

5713--B

2015-2016 Regular Sessions

I N S E N A T E

May 29, 2015

Introduced by Sens. DeFRANCISCO, FUNKE -- (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 -- reported favorably from said committee and committed to the Committee on Rules -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the state finance law, in relation to allowing the state comptroller to excuse non-material deviations in a procurement; in relation to participation by state agencies in a system used by the comptroller to compile vendor responsibility information; in relation to defining information technology for procurement purposes; in relation to authorizing the commissioner of the office of general services and state agencies to develop alternative procurement methods not otherwise authorized by law under certain circumstances; in relation to authorizing competitive negotiation concluding with a best and final offer; in relation to clarifying the use of best and final offers for invitations for bids and requests for proposals for goods, services and technology; in relation to providing unsuccessful offerors a reasonable opportunity for debriefing; in relation to increasing the threshold for construction bonds; in relation to clarifying the use of contracts let by another governmental agency; in relation to reports on centralized contracts; and in relation to increasing the threshold for the state comptroller's approval of certain contracts and clarifying the valuation of non-cash contracts by the state comptroller

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

1 Section 1. Subdivision 12 of section 163 of the state finance law, as
2 added by chapter 83 of the laws of 1995, is amended to read as follows:

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

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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. IF THE CONTRACTING AGENCY HAS NOT COMPLIED WITH ONE OR MORE PROVISIONS OF THIS ARTICLE, THE STATE COMPTROLLER MAY APPROVE THE AWARDED CONTRACT IF:

A. THE CONTRACTING AGENCY DETERMINES AND CERTIFIES, BASED ON CLEAR AND CONVINCING EVIDENCE, 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 STATE COMPTROLLER SHALL BE DOCUMENTED IN THE PROCUREMENT RECORD; AND

B. THE STATE COMPTROLLER CONCURS IN SUCH DETERMINATION.

S 2. The state finance law is amended by adding a new section 163-c to read as follows:

S 163-C. VENDOR RESPONSIBILITY; ONLINE SYSTEM PARTICIPATION. 1. DEFINITIONS. AS USED IN THIS SECTION THE FOLLOWING TERMS SHALL HAVE THE FOLLOWING MEANINGS:

A. "ENROLLMENT" SHALL MEAN THE ESTABLISHMENT OF AN ONLINE SERVICES ACCOUNT WITH THE STATE COMPTROLLER, INCLUDING, BUT NOT LIMITED TO, THE CREATION OF A UNIQUE USER IDENTIFICATION AND PASSWORD. ENROLLMENT PROVIDES A USER ACCESS TO THE SYSTEM.

B. "ONLINE SERVICES" SHALL MEAN THE SERVICES PROVIDED ELECTRONICALLY AND SECURELY BY THE STATE COMPTROLLER FOR THE BENEFIT OF NEW YORK'S CUSTOMERS, CLIENTS AND BUSINESS PARTNERS. SUCH ONLINE SERVICES MAY BE EXPANDED AND ENHANCED AS TECHNOLOGY ALLOWS.

C. "STATE AGENCY" OR "STATE AGENCIES" SHALL MEAN ALL STATE DEPARTMENTS, BOARDS, COMMISSIONS, OFFICES OR INSTITUTIONS. SUCH TERM SHALL NOT INCLUDE THE LEGISLATURE OR THE JUDICIARY.

D. "STATE CONTRACT" OR "CONTRACT" SHALL MEAN AND INCLUDE ANY WRITTEN AGREEMENT FOR THE ACQUISITION OF GOODS, SERVICES OR CONSTRUCTION OF ANY KIND BETWEEN A VENDOR AND A STATE AGENCY, OR A WRITTEN AGREEMENT OR OTHER INSTRUMENT WHEREIN A STATE AGENCY AGREES TO GIVE CONSIDERATION OTHER THAN THE PAYMENT OF MONEY AS CONTEMPLATED IN SUBDIVISION THREE OF SECTION ONE HUNDRED TWELVE OF THIS CHAPTER.

E. "SUBCONTRACTOR" SHALL MEAN AN INDIVIDUAL, SOLE PROPRIETORSHIP, PARTNERSHIP, JOINT VENTURE OR CORPORATION, WHICH IS ENGAGED IN A SUBCONTRACT BY A VENDOR PURSUANT TO A STATE CONTRACT AND SUCH SUBCONTRACT IS VALUED AT ONE HUNDRED THOUSAND DOLLARS OR MORE AND IS KNOWN AT THE TIME OF THE AWARD OF THE STATE CONTRACT TO THE VENDOR.

F. "SYSTEM" SHALL MEAN THE ON-LINE SOFTWARE, DATA AND RELATED RESOURCES MAINTAINED BY THE COMPTROLLER TO COMPILE VENDOR RESPONSIBILITY INFORMATION.

G. "TERMS OF SERVICE" SHALL MEAN THE TERMS AND CONDITIONS DEVELOPED BY THE STATE COMPTROLLER AND AGREED TO BY EACH AUTHORIZED USER PRIOR TO GAINING ACCESS TO ONLINE SERVICES. TERMS OF SERVICE SHALL INCLUDE A DESCRIPTION OF THE SERVICES, OBLIGATIONS OF THE STATE COMPTROLLER AND THE AUTHORIZED USER, A DESCRIPTION OF THE STATE COMPTROLLER'S PRIVACY POLICY, AUTHORIZED USER CODE OF CONDUCT, AND INDEMNITY FOR THE STATE COMPTROLLER AND THE STATE OF NEW YORK. TERMS OF SERVICE ARE SUBJECT TO CHANGE AS PRESCRIBED BY THE STATE COMPTROLLER. AUTHORIZED USERS MAY VIEW CHANGES VIA THE STATE COMPTROLLER'S INTERNET SITE.

1 H. "VENDOR" SHALL INCLUDE ANY PERSON, PARTNERSHIP, CORPORATION OR
2 LIMITED LIABILITY COMPANY OR ANY BUSINESS ENTITY BIDDING ON A STATE
3 PROCUREMENT OR OTHERWISE AWARDED A STATE CONTRACT.

4 I. "VENDOR RESPONSIBILITY" SHALL MEAN THAT A VENDOR HAS THE CAPACITY
5 TO FULLY PERFORM THE TERMS OF A CONTRACT AND THE INTEGRITY AND BUSINESS
6 ETHICS TO JUSTIFY AN AWARD OF PUBLIC DOLLARS. A DETERMINATION OF VENDOR
7 RESPONSIBILITY SHALL INCLUDE CONSIDERATION OF FACTORS INCLUDING, BUT NOT
8 LIMITED TO, FINANCIAL AND ORGANIZATIONAL CAPACITY, LEGAL AUTHORITY,
9 INTEGRITY AND PAST PERFORMANCE ON GOVERNMENTAL CONTRACTS.

10 2. A. STATE AGENCIES SHALL ENROLL WITH THE STATE COMPTROLLER TO ACCESS
11 THE SYSTEM MAINTAINED BY THE COMPTROLLER TO COMPILE VENDOR RESPONSIBIL-
12 ITY INFORMATION. STATE AGENCIES SHALL AGREE TO AND ABIDE BY THE TERMS OF
13 SERVICE FOR SUCH SYSTEM AS THE STATE COMPTROLLER DEEMS NECESSARY.

14 B. FOR EACH CONTRACT OR SUBCONTRACT BETWEEN A VENDOR AND A SUBCONTRACTOR
15 WHERE, PURSUANT TO LAW OR BY DIRECTION OF THE STATE AGENCY, DISCLOSURE
16 FOR VENDOR RESPONSIBILITY IS REQUIRED, THE STATE AGENCY SHALL:

17 (I) PROVIDE NOTICE TO VENDORS BIDDING FOR PROCUREMENTS ADMINISTERED BY
18 THE STATE AGENCY THAT ANY VENDOR AND SUBCONTRACTOR, SUBMITTING A VENDOR
19 RESPONSIBILITY QUESTIONNAIRE SHALL DO SO VIA THE SYSTEM MAINTAINED TO
20 COMPILE VENDOR RESPONSIBILITY INFORMATION;

21 (II) PROVIDE VENDORS WITH INSTRUCTIONS ON HOW TO ELECTRONICALLY ACCESS
22 THE SYSTEM AND PROVIDE CONTACT INFORMATION FOR ASSISTANCE WITH ENROLL-
23 MENT. THIS INFORMATION SHALL BE MADE AVAILABLE PRIOR TO THE TIME WHEN
24 VENDORS ARE REQUIRED TO SUBMIT DISCLOSURE FOR VENDOR RESPONSIBILITY; AND

25 (III) ACCESS THE SYSTEM TO OBTAIN AND EVALUATE ANY DATA SUBMITTED BY A
26 VENDOR PROPOSED FOR CONTRACT AWARD. STATE AGENCIES SHALL ENSURE THE
27 SUBMISSION FILED BY THE VENDOR MEETS SUCH SYSTEM'S TIMELINESS STANDARDS.
28 SUCH PROVISIONS APPLY REGARDLESS OF WHETHER THE CONTRACT IS SUBJECT TO
29 PRE-REVIEW AND APPROVAL BY THE STATE COMPTROLLER.

30 C. FOR CONTRACTS WHERE VENDOR DISCLOSURE IS NOT OTHERWISE REQUIRED,
31 THE STATE AGENCY AT ITS DISCRETION, MAY REQUIRE VENDORS BIDDING ON
32 PROCUREMENTS, AND/OR SUBCONTRACTORS, TO SUBMIT A VENDOR RESPONSIBILITY
33 QUESTIONNAIRE VIA THE SYSTEM. NOTHING CONTAINED IN THIS PARAGRAPH SHALL
34 BE CONSTRUED TO ALTER THE EXISTING AUTHORITY OF THE STATE COMPTROLLER TO
35 REQUIRE THE SUBMISSION OF A VENDOR RESPONSIBILITY QUESTIONNAIRE IN
36 CONJUNCTION WITH HIS OR HER DUTY TO REVIEW AND APPROVE STATE CONTRACTS
37 PRIOR TO SUCH CONTRACTS BECOMING EFFECTIVE.

38 D. STATE AGENCIES SHALL PROVIDE ACCESS TO THE SYSTEM TO USERS WITHIN
39 THEIR ORGANIZATION, AS DEEMED APPROPRIATE BY THE HEAD OF THE STATE AGENCY
40 OR HIS OR HER DESIGNEE. STATE AGENCY USERS PROVIDED WITH SUCH ACCESS
41 SHALL BE THOSE INDIVIDUALS, WHO, AS PART OF THEIR OFFICIAL JOB DUTIES,
42 ARE REQUIRED TO ASSESS AND/OR REVIEW VENDOR RESPONSIBILITY FOR THE AGENCY'S
43 CONTRACTS.

44 S 3. Subdivisions 7 and 10 of section 160 of the state finance law,
45 subdivision 7 as amended by section 30 of part L of chapter 55 of the
46 laws of 2012 and subdivision 10 as added by chapter 83 of the laws of
47 1995, are amended to read as follows:

48 7. "Service" or "services" means the performance of a task or tasks
49 and may include a material good or a quantity of material goods, and
50 which is the subject of any purchase or other exchange. For the purposes
51 of this article, INFORMATION technology shall be deemed a service.
52 Services, as defined in this article, shall not apply to those contracts
53 for architectural, engineering or surveying services, or those contracts
54 approved in accordance with article eleven-B of this chapter.

55 10. "[Technology] INFORMATION TECHNOLOGY" means either a good or a
56 service or a combination thereof, [that results in a technical method of

1 achieving a practical purpose or in improvements in productivity] USED
2 IN THE APPLICATION OF ANY COMPUTER OR ELECTRONIC INFORMATION EQUIPMENT
3 OR INTERCONNECTED SYSTEM THAT IS USED IN THE ACQUISITION, STORAGE,
4 MANIPULATION, MANAGEMENT, MOVEMENT, CONTROL, DISPLAY, SWITCHING, INTER-
5 CHANGE, TRANSMISSION, OR RECEPTION OF DATA INCLUDING, BUT NOT LIMITED
6 TO, HARDWARE, SOFTWARE, FIRMWARE, PROGRAMS, SYSTEMS, NETWORKS, INFRAS-
7 TRUCTURE, MEDIA, AND RELATED MATERIAL USED TO AUTOMATICALLY AND ELEC-
8 TRONICALLY COLLECT, RECEIVE, ACCESS, TRANSMIT, DISPLAY, STORE, RECORD,
9 RETRIEVE, ANALYZE, EVALUATE, PROCESS, CLASSIFY, MANIPULATE, MANAGE,
10 ASSIMILATE, CONTROL, COMMUNICATE, EXCHANGE, CONVERT, CONVERGE, INTER-
11 FACE, SWITCH, OR DISSEMINATE DATA OF ANY KIND OR FORM. Goods may be
12 either new or used.

13 S 4. Paragraphs g and i of subdivision 2 of section 161 of the state
14 finance law, as added by chapter 83 of the laws of 1995, are amended to
15 read as follows:

16 g. Consult with and advise the commissioner on strategic INFORMATION
17 technology investments that will facilitate electronic access to the
18 terms and conditions of existing procurement contracts, promote elec-
19 tronic commerce including, but not limited to, payment to vendors,
20 promote and enhance the efficiency of the procurement of products and
21 services by or for state agencies and produce useful information that
22 supports state procurement operations, management, analysis and decision
23 making including, but not limited to, data concerning the status and use
24 of procurement contracts and the number and type of contracts and award
25 recipients;

26 i. Establish and, from time to time, amend guidelines for the procure-
27 ment of services and INFORMATION technology in accordance with the
28 provisions of this article. Such guidelines shall ensure the wise and
29 prudent use of public money in the best interest of the taxpayers of the
30 state; guard against favoritism, improvidence, extravagance, fraud and
31 corruption; and ensure that service contracts are awarded on the basis
32 of best value, including, but not limited to, the following criteria:
33 quality, cost, and efficiency;

34 S 5. Paragraph k of subdivision 1 and subdivisions 6 and 7 of section
35 163 of the state finance law, paragraph k of subdivision 1 as added by
36 section 36 of part L of chapter 55 of the laws of 2012, subdivision 6 as
37 amended by section 1 of part P of chapter 55 of the laws of 2013 and
38 subdivision 7 as amended by section 10 of part L of chapter 55 of the
39 laws of 2012, are amended to read as follows:

40 k. "Authorized user" or "non-state agency purchaser" means (i) any
41 officer, body or agency of the state or of a political subdivision or a
42 district therein, or fire company or volunteer ambulance service as such
43 are defined in section one hundred of the general municipal law, to make
44 purchases of commodities, services and INFORMATION technology through
45 the office of general services' centralized contracts, pursuant to the
46 provisions of section one hundred four of the general municipal law;
47 (ii) any county extension service association as authorized under subdi-
48 vision eight of section two hundred twenty-four of the county law; (iii)
49 any association or other entity as specified in and in accordance with
50 section one hundred nine-a of the general municipal law; (iv) any asso-
51 ciation, consortium or group of privately owned or municipal, federal or
52 state owned or operated hospitals, medical schools, other health related
53 facilities or voluntary ambulance services, which have entered into a
54 contract and made mutual arrangements for the joint purchase of commod-
55 ities, services and INFORMATION technology pursuant to section twenty-
56 eight hundred three-a of the public health law; (v) any institution for

1 the instruction of the deaf or of the blind listed in section forty-two
2 hundred one of the education law; (vi) any qualified non-profit-making
3 agency for the blind approved by the commissioner of the office of chil-
4 dren and family services or the office of temporary and disability
5 assistance; (vii) any qualified charitable non-profit-making agency for
6 the severely disabled approved by the commissioner of education; (viii)
7 any hospital or residential health care facility as defined in section
8 twenty-eight hundred one of the public health law; (ix) any private
9 not-for-profit mental hygiene facility as defined in section 1.03 of the
10 mental hygiene law; (x) any public authority or public benefit corpo-
11 ration of the state, including the port authority of New York and New
12 Jersey and the interstate environmental commission; (xi) any public
13 library, association library, library system, cooperative library
14 system, the New York Library Association, and the New York State Associ-
15 ation of Library Boards or any other library except those which are
16 operated by for profit entities; (xii) any other association or entity
17 as specified in state law, to make purchases of commodities, services
18 and INFORMATION technology through the office of general services'
19 centralized contracts. Such qualified non-profit-making agencies for the
20 blind and severely disabled may make purchases from the correctional
21 industries program of the department of corrections and community super-
22 vision subject to rules pursuant to the correction law.

23 6. Discretionary buying thresholds. Pursuant to guidelines established
24 by the state procurement council: the commissioner may purchase services
25 and commodities in an amount not exceeding eighty-five thousand dollars
26 without a formal competitive process; state agencies may purchase
27 services and commodities in an amount not exceeding fifty thousand
28 dollars without a formal competitive process; and state agencies may
29 purchase commodities or services from small business concerns or those
30 certified pursuant to article fifteen-A of the executive law, or commod-
31 ities or INFORMATION technology that are recycled or remanufactured, or
32 commodities that are food, including milk and milk products, grown,
33 produced or harvested in New York state in an amount not exceeding two
34 hundred thousand dollars without a formal competitive process.

35 7. Method of procurement. Consistent with the requirements of subdivi-
36 sions three and four of this section, state agencies shall select among
37 permissible methods of procurement including, but not limited to, an
38 invitation for bid, request for proposals or other means of solicitation
39 pursuant to guidelines issued by the state procurement council. State
40 agencies may accept bids electronically including submission of the
41 statement of non-collusion required by section one hundred thirty-nine-d
42 of this chapter and, starting April first, two thousand twelve, and
43 ending March thirty-first, two thousand fifteen, may, for commodity,
44 service and INFORMATION technology contracts require electronic
45 submission as the sole method for the submission of bids for the solici-
46 tation. State agencies shall undertake no more than eighty-five such
47 electronic bid solicitations, none of which shall be reverse auctions,
48 prior to April first, two thousand fifteen. In addition, state agencies
49 may conduct up to twenty reverse auctions through electronic means,
50 prior to April first, two thousand fifteen. Prior to requiring the elec-
51 tronic submission of bids, the agency shall make a determination, which
52 shall be documented in the procurement record, that electronic
53 submission affords a fair and equal opportunity for offerers to submit
54 responsive offers. Within thirty days of the completion of the eighty-
55 fifth electronic bid solicitation, or by April first, two thousand
56 fifteen, whichever is earlier, the commissioner shall prepare a report

1 assessing the use of electronic submissions and make recommendations
2 regarding future use of this procurement method. In addition, within
3 thirty days of the completion of the twentieth reverse auction through
4 electronic means, or by April first, two thousand fifteen, whichever is
5 earlier, the commissioner shall prepare a report assessing the use of
6 reverse auctions through electronic means and make recommendations
7 regarding future use of this procurement method. Such reports shall be
8 published on the website of the office of general services. Except where
9 otherwise provided by law, procurements shall be competitive, and state
10 agencies shall conduct formal competitive procurements to the maximum
11 extent practicable. State agencies shall document the determination of
12 the method of procurement and the basis of award in the procurement
13 record. Where the basis for award is the best value offer, the state
14 agency shall document, in the procurement record and in advance of the
15 initial receipt of offers, the determination of the evaluation criteria,
16 which whenever possible, shall be quantifiable, and the process to be
17 used in the determination of best value and the manner in which the
18 evaluation process and selection shall be conducted.

19 S 6. Paragraph (a) of subdivision 2 of section 112 of the state
20 finance law, as amended by section 18 of part L of chapter 55 of the
21 laws of 2012, is amended to read as follows:

22 (a) Before any contract made for or by any state agency, department,
23 board, officer, commission, or institution, except the office of general
24 services, shall be executed or become effective, whenever such contract
25 exceeds fifty thousand dollars in amount and before any contract made
26 for or by the office of general services shall be executed or become
27 effective, whenever such contract exceeds eighty-five thousand dollars
28 in amount, it shall first be approved by the comptroller and filed in
29 his or her office, with the exception of contracts established as a
30 centralized contract through the office of general services [and
31 purchase orders or other procurement transactions issued under such
32 centralized contracts] THAT WERE NOT AWARDED PURSUANT TO SUBDIVISION
33 SIXTEEN OF SECTION ONE HUNDRED SIXTY-THREE OF THIS CHAPTER. The comp-
34 troller shall make a final written determination with respect to
35 approval of such contract within ninety days of the submission of such
36 contract to his or her office unless the comptroller shall notify, in
37 writing, the state agency, department, board, officer, commission, or
38 institution, prior to the expiration of the ninety day period, and for
39 good cause, of the need for an extension of not more than fifteen days,
40 or a reasonable period of time agreed to by such state agency, depart-
41 ment, board, officer, commission, or institution and provided, further,
42 that such written determination or extension shall be made part of the
43 procurement record pursuant to paragraph f of subdivision one of section
44 one hundred sixty-three of this chapter.

45 S 7. Section 163 of the state finance law is amended by adding a new
46 subdivision 16 to read as follows:

47 16. ALTERNATIVE PROCUREMENT METHODS FOR THE ACQUISITION OF NON-CON-
48 STRUCTION RELATED COMMODITIES, SERVICES AND INFORMATION TECHNOLOGY. A.
49 WHEN THE COMMISSIONER OR A STATE AGENCY DETERMINES THAT IT IS IN THE
50 BEST INTEREST OF THE STATE TO DEVELOP A PROCUREMENT METHOD NOT AUTHOR-
51 IZED BY THIS SECTION FOR NON-CONSTRUCTION RELATED COMMODITIES, SERVICES
52 AND INFORMATION TECHNOLOGY, THE COMMISSIONER OR STATE AGENCY IS HEREBY
53 AUTHORIZED TO DEVELOP AND USE SUCH METHOD FOR A SPECIFIC CONTRACT AWARD.
54 SUCH DETERMINATION SHALL BE MADE IN WRITING AND SHALL INCLUDE DOCUMENTA-
55 TION FOR THE PROCUREMENT RECORD THAT SUCH ALTERNATIVE PROCUREMENT METH-
56 OD: (I) WOULD SERVE THE INTEREST OF THE STATE BETTER THAN OTHER METHODS

1 CURRENTLY AVAILABLE UNDER THIS SECTION; (II) CAN BE APPLIED ON A COMPET-
2 ITIVE, FAIR AND EQUITABLE BASIS; AND (III) CONTAINS AN APPROPRIATE EVAL-
3 UATION METHODOLOGY THAT CONSIDERS BOTH COST AND QUALITATIVE EVALUATION
4 FACTORS. SUCH ALTERNATIVE PROCUREMENT METHOD SHALL BE SUBJECT TO ALL
5 OTHER APPLICABLE PROVISIONS OF THIS SECTION. THE COMMISSIONER OR A STATE
6 AGENCY MAY NOT UNDERTAKE AN ALTERNATIVE PROCUREMENT METHOD UNTIL THE
7 COMPTROLLER HAS DETERMINED THAT THE PROPOSED ALTERNATIVE PROCUREMENT
8 METHOD IS IN THE BEST INTEREST OF THE STATE; CAN BE APPLIED ON A COMPET-
9 ITIVE, FAIR AND EQUITABLE BASIS; AND UTILIZES AN APPROPRIATE EVALUATION
10 METHODOLOGY THAT CONSIDERS BOTH COST AND QUALITATIVE EVALUATION FACTORS.

11 B. WHEN USING AN ALTERNATIVE PROCUREMENT METHOD AUTHORIZED BY THIS
12 SUBDIVISION, THE COMMISSIONER OR AGENCY SHALL INCLUDE IN ITS SOLICITA-
13 TION A DETAILED DESCRIPTION OF THE PROPOSED METHOD OF AWARD. IN ADVANCE
14 OF THE INITIAL RECEIPT OF OFFERS OR BIDS, THE COMMISSIONER OR STATE
15 AGENCY SHALL DETERMINE AND DOCUMENT IN THE PROCUREMENT RECORD THE EVALU-
16 ATION CRITERIA AND PROCESS TO BE USED IN THE DETERMINATION OF THE
17 SPECIFIC CONTRACT AWARD AND THE PROCESS BY WHICH THE EVALUATION AND
18 SELECTION SHALL BE CONDUCTED. IN ADDITION TO THE REQUIREMENTS SET FORTH
19 IN PARAGRAPH G OF SUBDIVISION NINE OF THIS SECTION, THE PROCUREMENT
20 RECORD SHALL DOCUMENT THE BASIS UPON WHICH THE AGENCY HAS DETERMINED
21 THAT POTENTIAL VENDORS WILL BE ABLE TO RESPOND WITH VIABLE BIDS TO SUCH
22 ALTERNATIVE PROCUREMENT.

23 C. NOTWITHSTANDING THE PROVISIONS OF SUBDIVISION FIVE OF SECTION THREE
24 HUNDRED FIFTY-FIVE OF THE EDUCATION LAW TO THE CONTRARY OR SECTION
25 SIXTY-TWO HUNDRED EIGHTEEN OF THE EDUCATION LAW, BEFORE ANY CONTRACT
26 AWARDED UNDER THIS SECTION WHICH EXCEEDS FIFTY THOUSAND DOLLARS IN
27 AMOUNT BECOMES EFFECTIVE IT MUST BE APPROVED BY THE COMPTROLLER AND
28 FILED IN HIS OR HER OFFICE.

29 D. FOR EACH PROCUREMENT AWARDED PURSUANT TO THIS SECTION, THE COMMIS-
30 SIONER OR STATE AGENCY SHALL SUBMIT TO THE GOVERNOR, THE COMPTROLLER AND
31 THE HEADS OF THE FISCAL COMMITTEES OF EACH HOUSE OF THE STATE LEGISLA-
32 TURE NO LATER THAN THE MID-POINT OF THE INITIAL TERM OF THE RESULTANT
33 CONTRACT A REPORT ASSESSING THE VALIDITY OF THE PROCUREMENT METHOD AND
34 COMPARING ITS RESULTS TO PROCUREMENT METHODS FOR COMMODITIES AND
35 SERVICES OR INFORMATION TECHNOLOGY.

36 S 8. Section 163 of the state finance law is amended by adding a new
37 subdivision 17 to read as follows:

38 17. COMPETITIVE NEGOTIATION. A. WHERE THE BASIS OF AWARD IS BEST VALUE
39 AND AFTER COMPLETING AN INITIAL EVALUATION AND SCORING, A STATE AGENCY
40 MAY CHOOSE TO EITHER MAKE AN AWARD TO THE BEST VALUE OFFERER PURSUANT TO
41 SUBDIVISION FOUR OF THIS SECTION OR UNDERTAKE COMPETITIVE NEGOTIATIONS
42 WITH ALL OFFERERS OF PROPOSALS SUSCEPTIBLE OF BEING SELECTED FOR
43 CONTRACT AWARD, SO LONG AS THE AGENCY RESERVES THE RIGHT TO CONDUCT SUCH
44 COMPETITIVE NEGOTIATIONS IN THE SOLICITATION. THE NEGOTIATIONS SHALL BE
45 CONDUCTED AS PROVIDED IN PARAGRAPH D OF THIS SUBDIVISION.

46 B. COMPETITIVE NEGOTIATION MAY ONLY BE USED WHERE:

47 (I) AT LEAST TWO OFFERERS ARE DEEMED SUSCEPTIBLE OF BEING SELECTED FOR
48 CONTRACT AWARD;

49 (II) IN THE EVENT THAT THE SOLICITATION INCLUDES OPTIONAL COMPONENTS,
50 THE SOLICITATION SHALL REQUIRE ALL OFFERERS TO PROVIDE A PROPOSAL FOR
51 ALL OPTIONS OR OTHERWISE BE DEEMED NONRESPONSIVE; AND

52 (III) THE AGENCY HAS DETERMINED THAT USE OF COMPETITIVE NEGOTIATION
53 WILL MAXIMIZE THE AGENCY'S ABILITY TO OBTAIN BEST VALUE, BASED ON THE
54 AGENCY'S NEED AND THE SPECIFICATIONS SET FORTH IN THE SOLICITATION.

55 C. THE AGENCY MUST DOCUMENT IN THE PROCUREMENT RECORD AND IN ADVANCE
56 OF THE INITIAL RECEIPT OF OFFERS:

(I) THE METHODOLOGY, WHICH SHALL BE QUANTIFIABLE AND BASED ON A COMPARISON OF THE PROPOSALS' PRICE AND TECHNICAL MERIT, THAT WILL BE EMPLOYED TO ARRIVE AT A COMPETITIVE RANGE THAT WILL DETERMINE WHICH PROPOSALS ARE TO BE CONSIDERED SUSCEPTIBLE TO AWARD; AND

(II) A FAIR AND IMPARTIAL NEGOTIATION PROCEDURE, FORMULATED WITH THE GOAL OF ENSURING SUSTAINED COMPETITION UNTIL AN AWARD IS RENDERED AND OBTAINING THE BEST VALUE FOR THE STATE.

D. THE AGENCY SHALL CONDUCT WRITTEN OR ORAL NEGOTIATIONS WITH ALL RESPONSIBLE OFFERERS WHO SUBMIT PROPOSALS IN THE COMPETITIVE RANGE. IN THE COURSE OF SUCH NEGOTIATIONS, THE AGENCY SHALL:

(I) ADVISE THE OFFERER OF WAYS IN WHICH ITS PROPOSAL MAY BE IMPROVED SO THAT THE OFFERER IS GIVEN AN OPPORTUNITY TO BETTER MEET THE AGENCY'S NEEDS;

(II) CLARIFY ANY UNCERTAINTIES, AMBIGUITIES OR NON-MATERIAL DEVIATIONS IN THE PROPOSAL;

(III) ADVISE THE OFFERER OF ANY TECHNICAL COMPONENTS IN ITS PROPOSAL THAT MAY NOT BE NECESSARY TO SATISFY THE AGENCY'S REQUIREMENTS AND REQUEST MODIFICATIONS AS APPROPRIATE;

(IV) PROVIDE THE OFFERER A REASONABLE OPPORTUNITY TO SUBMIT ANY COST, TECHNICAL OR OTHER REVISIONS TO ITS PROPOSAL IN RESPONSE TO ISSUES IDENTIFIED DURING NEGOTIATIONS; AND

(V) DOCUMENT ANY ORAL NEGOTIATIONS FOR THE PROCUREMENT RECORD.

E. NEGOTIATIONS MAY BE TAILORED TO EACH OFFERER'S PROPOSAL PROVIDED, HOWEVER, SUCH NEGOTIATIONS SHALL BE CONDUCTED WITH EACH OFFERER WITHIN THE COMPETITIVE RANGE WITHOUT DISCLOSING INFORMATION CONCERNING ANY OTHER OFFERERS' PROPOSALS OR THE EVALUATION PROCESS. NEGOTIATIONS SHALL CULMINATE IN A TECHNICAL SOLUTION FROM EACH OFFERER REMAINING WITHIN THE COMPETITIVE RANGE THAT IS DEEMED ACCEPTABLE TO MEET THE AGENCY'S NEED AS SET FORTH IN THE SOLICITATION. AFTER DISCUSSION OF THESE TECHNICAL SOLUTIONS IS COMPLETED, THE AGENCY SHALL SOLICIT A BEST AND FINAL PRICE PROPOSAL FROM ALL OFFERERS WITHIN THE COMPETITIVE RANGE. THE BEST AND FINAL PRICE SOLICITATION SHALL ENSURE THAT ALL OFFERERS ARE AFFORDED AN EQUAL OPPORTUNITY TO RESPOND WITHIN A SPECIFIED PERIOD OF TIME.

F. WHERE AN AGENCY CHOOSES TO UNDERTAKE COMPETITIVE NEGOTIATIONS INSTEAD OF MAKING A BEST VALUE AWARD AFTER AN INITIAL EVALUATION AND SCORING, THE FINAL AWARD SHALL BE MADE TO THE LOWEST RESPONSIBLE OFFERER AFTER RECEIVING A BEST AND FINAL PRICE ON A REVISED ACCEPTABLE PROPOSAL.

S 9. Subdivision 9 of section 163 of the state finance law is amended by adding a new paragraph c-1 to read as follows:

C-1. WHERE A STATE AGENCY DETERMINES THAT NON-MATERIAL CHANGES TO THE SPECIFICATIONS AS SET FORTH IN THE SOLICITATION WOULD BE IN THE BEST INTEREST OF THE STATE AND, WHEN PROVIDED FOR IN THE SOLICITATION, STATE AGENCIES MAY REQUEST BEST AND FINAL OFFERS, WHICH SHALL BE IN WRITING AND SOLICITED IN THE SAME MANNER FROM ALL OFFERERS DETERMINED TO BE SUSCEPTIBLE OF BEING SELECTED FOR CONTRACT AWARD, WITH THE INTENT OF ALLOWING AN OFFERER TO REVISE ITS COST; PROVIDED, HOWEVER, THAT A STATE AGENCY MAY NOT MAKE A MODIFICATION TO THE SOLICITATION IF SUCH MODIFICATION WOULD PREJUDICE ANY BIDDER OR POTENTIAL BIDDER AND, PROVIDED FURTHER, THAT NO BEST AND FINAL OFFER MAY BE ACCEPTED OR CONSIDERED BY A STATE AGENCY UNLESS SUCH BEST AND FINAL OFFER IS SUBMITTED IN RESPONSE TO A REQUEST BY THE STATE AGENCY.

S 9-a. Paragraph c of subdivision 9 of section 163 of the state finance law, as amended by chapter 137 of the laws of 2008, is amended to read as follows:

c. Where provided in the solicitation, state agencies may require clarification from offerers for purposes of assuring a full understand-

1 ing of responsiveness to the solicitation requirements. Where provided
2 for in the solicitation, revisions may be permitted from all offerers
3 determined to be susceptible of being selected for contract award, prior
4 to award. Offerers shall be accorded fair and equal treatment with
5 respect to their opportunity for discussion and revision of offers. [A
6 state agency shall, upon request, provide a debriefing to any unsuccessful
7 offerer that responded to a request for proposal or an invitation
8 for bids, regarding the reasons that the proposal or bid submitted by
9 the unsuccessful offerer was not selected for an award. The opportunity
10 for an unsuccessful offerer to seek a debriefing shall be stated in the
11 solicitation, which shall provide a reasonable time for requesting a
12 debriefing.]

13 S 9-b. Subdivision 9 of section 163 of the state finance law is
14 amended by adding a new paragraph h to read as follows:

15 H. (I) WITHIN FIFTEEN DAYS OF THE SELECTION OF A SUCCESSFUL OFFEROR BY
16 A STATE AGENCY AND PRIOR TO THE SUBMISSION FOR APPROVAL OF A CONTRACT TO
17 THE OFFICE OF THE STATE COMPTROLLER IF THAT CONTRACT IS SUBJECT TO THE
18 APPROVAL OF THE COMPTROLLER, ALL UNSUCCESSFUL OFFERORS SHALL BE ADVISED
19 IN WRITING OF THE COMPLETION OF THE SELECTION PROCESS AND THAT THEIR
20 OFFER WAS NOT SELECTED FOR THIS AWARD. THIS NOTICE SHALL DISCLOSE THE
21 IDENTITY OF THE SUCCESSFUL OFFEROR.

22 (II) FOR ANY CONTRACT ESTABLISHED AS A CENTRALIZED CONTRACT BY THE
23 OFFICE OF GENERAL SERVICES, WITHIN FIFTEEN DAYS OF SELECTION OF THE
24 SUCCESSFUL OFFEROR BY THE OFFICE OF GENERAL SERVICES, ALL UNSUCCESSFUL
25 OFFERORS SHALL BE ADVISED OF THE COMPLETION OF THE SELECTION PROCESS AND
26 THAT THEIR OFFER WAS NOT SELECTED FOR AWARD. THIS NOTICE SHALL DISCLOSE
27 THE IDENTITY OF THE SUCCESSFUL OFFEROR.

28 (III) THE OPPORTUNITY FOR AN UNSUCCESSFUL OFFEROR THAT RESPONDED TO A
29 REQUEST FOR PROPOSALS OR AN INVITATION FOR BIDS TO SEEK A DEBRIEFING
30 SHALL BE STATED IN THE REQUEST FOR PROPOSALS OR INVITATION FOR BIDS,
31 WHICH SHALL PROVIDE A REASONABLE TIME FOR REQUESTING A DEBRIEFING.

32 (IV) THE STATE AGENCY, UPON THE TIMELY REQUEST OF AN UNSUCCESSFUL
33 OFFEROR, SHALL PROVIDE A REASONABLE OPPORTUNITY FOR A DISCUSSION WITH
34 AGENCY PERSONNEL WHO WERE INVOLVED IN AND ARE KNOWLEDGEABLE ABOUT THE
35 PROCUREMENT EVALUATION PROCESS. SUCH DEBRIEFING, SHALL INCLUDE, BUT NEED
36 NOT BE LIMITED TO: (A) THE REASONS THAT THE PROPOSAL OR BID SUBMITTED BY
37 THE UNSUCCESSFUL OFFEROR WAS NOT SELECTED FOR AWARD; (B) THE QUALITATIVE
38 AND QUANTITATIVE ANALYSIS EMPLOYED BY THE AGENCY IN ASSESSING THE RELATIVE
39 MERITS OF THE OFFERS; (C) THE APPLICATION OF EACH OF THE SELECTION
40 CRITERIA TO THE UNSUCCESSFUL OFFEROR'S PROPOSAL OR BID; AND (D) THE
41 REASONS FOR THE SELECTION OF THE WINNING PROPOSAL OR BID. SUCH PERSONNEL
42 SHALL ALSO PROVIDE, TO THE EXTENT PRACTICABLE, ADVICE AND GUIDANCE TO
43 THE UNSUCCESSFUL OFFEROR CONCERNING METHODS OF IMPROVING PROPOSALS OR
44 BIDS BY SUCH OFFEROR.

45 S 10. Intentionally omitted.

46 S 11. Intentionally omitted.

47 S 12. Subdivisions 1 and 2 of section 137 of the state finance law,
48 subdivision 1 as separately amended by section 17 of part MM of chapter
49 57 and chapter 619 of the laws of 2008 and subdivision 2 as amended by
50 chapter 137 of the laws of 1985, are amended to read as follows:

51 1. (A) In addition to other bond or bonds, if any, required by law for
52 the completion of a work specified in a contract for the prosecution of
53 a public improvement for the state of New York a municipal corporation,
54 a public benefit corporation or a commission appointed pursuant to law,
55 or in the absence of any such requirement, the comptroller may or the
56 other appropriate official, respectively, shall nevertheless require

1 prior to the approval of any such contract a bond guaranteeing prompt
2 payment of moneys due to all persons furnishing labor or materials to
3 the contractor or any subcontractors in the prosecution of the work
4 provided for in such contract. Whenever a municipal corporation issues a
5 permit subject to compliance with section two hundred twenty of the
6 labor law, such permittee or its contractor or subcontractors furnishing
7 workers shall post a payment bond subject to this section. [Provided,
8 however, that]

9 (B) NOTWITHSTANDING THE PROVISIONS OF PARAGRAPH A OF THIS SUBDIVISION,
10 all performance bonds and payment bonds may, at the discretion of the
11 head of the state agency, public benefit corporation or commission, or
12 his or her designee, be dispensed with for the completion of a work
13 specified in a contract for the prosecution of a public improvement for
14 the state of New York for which bids are solicited where the aggregate
15 amount of the contract is under [one] TWO hundred thousand dollars
16 [and]; provided [further], that in a case where the contract is not
17 subject to the multiple contract award requirements of section one
18 hundred thirty-five of this article, such requirements may be dispensed
19 with where the head of the state agency, public benefit corporation or
20 commission finds it to be in the public interest and where the aggregate
21 amount of the contract awarded or to be awarded is less than two hundred
22 thousand dollars. Provided further, that in a case where a performance
23 or payment bond is dispensed with, twenty per centum may be retained
24 from each progress payment or estimate until the entire contract work
25 has been completed and accepted, at which time the head of the state
26 agency, public benefit corporation or commission shall, pending the
27 payment of the final estimate, pay not to exceed seventy-five per centum
28 of the amount of the retained percentage.

29 2. A copy of such payment bond shall be kept in the office of the head
30 of the department or bureau having charge of the public improvement in
31 connection with which the bond was given and a copy shall also be kept
32 in the office of the comptroller [or other appropriate official]; such
33 copies shall be open to public inspection.

34 S 13. Paragraph e of subdivision 10 of section 163 of the state
35 finance law, as amended by chapter 137 of the laws of 2008, is amended
36 to read as follows:

37 e. The commissioner may authorize purchases required by state agencies
38 or other authorized purchasers by letting a contract pursuant to a writ-
39 ten agreement, or by approving the use of a contract let by any depart-
40 ment, agency or instrumentality of the United States government and/or
41 any department, agency, office, political subdivision or instrumentality
42 of any state or states. A state agency purchaser shall document in the
43 procurement record its rationale for the use of a contract let by any
44 department, agency or instrumentality of the United States government or
45 any department, agency, office, political subdivision or instrumentality
46 of any other state or states. Such rationale shall include, but need not
47 be limited to, a determination of need, a consideration of the procure-
48 ment method by which the contract was awarded, an analysis of alterna-
49 tive procurement sources including an explanation why a competitive
50 procurement or the use of a centralized contract let by the commissioner
51 is not in the best interest of the state, and the reasonableness of
52 cost. THE AUTHORITY TO USE A CONTRACT LET BY ANOTHER GOVERNMENTAL ENTITY
53 PURSUANT TO THIS PARAGRAPH IS INTENDED TO BENEFIT THE STATE BY USING
54 CONTRACTS IN PLACE THAT PROVIDE FOR THE SAME SERVICE OR COMMODITY SOUGHT
55 BY A STATE AGENCY AT A PRICE DETERMINED TO BE REASONABLE BY THE STATE
56 AGENCY. SUCH CONTRACTS ARE NOT INTENDED TO BE USED PRIMARILY TO AVOID

1 COMPETITIVE BIDDING. USE OF MULTIPLE AWARD CONTRACTS PURSUANT TO THIS
2 PARAGRAPH SHALL FOLLOW THE SAME BASIS OF SELECTION AMONG THE MULTIPLE
3 AWARDEES AS WAS PRESCRIBED BY THE ORIGINAL CONTRACTING GOVERNMENTAL
4 ENTITY.

5 S 14. Subdivision 15 of section 163 of the state finance law is
6 amended by adding a new paragraph d to read as follows:

7 D. IN ADDITION TO OTHER REPORTS REQUIRED BY THIS SUBDIVISION, THE
8 COMMISSIONER OF GENERAL SERVICES SHALL PREPARE A REPORT ON THE SAVINGS
9 ACHIEVED FROM ALL CONTRACTS ESTABLISHED AS A CENTRALIZED CONTRACT
10 THROUGH THE OFFICE OF GENERAL SERVICES PURSUANT TO THIS SECTION, THE
11 IMPACT OF SUCH CONTRACTS ON SMALL, MINORITY AND WOMEN-OWNED AND
12 SERVICE-DISABLED VETERAN-OWNED BUSINESS ENTERPRISES, AND THE EFFECTIVE-
13 NESS OF SUCH CONTRACTS IN FULFILLING THE PURCHASING NEEDS OF ALL AUTHOR-
14 IZED USERS OF SUCH CONTRACTS. SUCH REPORT SHALL BE SUBMITTED BY SUCH
15 COMMISSIONER TO THE GOVERNOR, THE STATE COMPTROLLER, AND THE HEADS OF
16 THE FISCAL COMMITTEES OF EACH HOUSE OF THE STATE LEGISLATURE NO LATER
17 THAN JANUARY FIFTEENTH, TWO THOUSAND SIXTEEN, AND THEREAFTER ANNUALLY ON
18 OR BEFORE SUCH DATE.

19 S 15. Subdivision 3 of section 112 of the state finance law, as
20 amended by chapter 319 of the laws of 1992, is amended to read as
21 follows:

22 3. A contract or other instrument wherein the state or any of its
23 officers, agencies, boards or commissions agrees to give a consideration
24 other than the payment of money, when the value or reasonably estimated
25 value of such consideration exceeds [ten] TWENTY-FIVE thousand dollars,
26 shall not become a valid enforceable contract unless such contract or
27 other instrument shall first be approved by the comptroller and filed in
28 his office. FOR PURPOSES OF THIS SUBDIVISION, WHERE CONSIDERATION CANNOT
29 BE DETERMINED IN TERMS OF MONETARY VALUE, IT SHALL BE VALUED IN TERMS OF
30 INTRINSIC VALUE.

31 S 16. This act shall take effect immediately; provided, however,
32 section two of this act shall take effect on the one hundred eightieth
33 day after it shall have become a law; provided, further, however, that
34 the provisions of sections one, five, seven, eight, nine, nine-a,
35 nine-b, thirteen and fourteen of this act shall apply to any procurement
36 initiated on or after such date; provided, further however, that the
37 amendments to section 163 of the state finance law made by sections one,
38 five, seven, eight, nine, nine-a, nine-b, thirteen and fourteen of this
39 act shall not affect the repeal of such section as provided in subdivi-
40 sion 5 of section 362 of chapter 83 of the laws of 1995, as amended, and
41 shall be deemed repealed therewith.