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

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I N S E N A T E

May 23, 2016

Introduced by Sen. DeFRANCISCO -- (at request of the State Comptroller) -- read twice and ordered printed, and when printed to be committed to the Committee on Finance

AN ACT to amend the state finance law, in relation to participation by state agencies in a system used by the comptroller to compile vendor responsibility information; defining information technology for procurement purposes; clarifying the use of best and final offers for invitations for bids and requests for proposals for goods, services and technology; clarifying the use of contracts let by another governmental agency; 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:

Section 1. 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" MEANS 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" MEANS 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 CONTRACT" OR "CONTRACT" MEANS AND INCLUDES 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.

D. "SUBCONTRACTOR" MEANS AN INDIVIDUAL, SOLE PROPRIETORSHIP, PARTNERSHIP, JOINT VENTURE OR CORPORATION, WHICH IS ENGAGED IN A SUBCONTRACT BY

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

LBD15317-02-6

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.

E. "SYSTEM" MEANS THE ONLINE SOFTWARE, DATA AND RELATED RESOURCES MAINTAINED BY THE COMPTROLLER TO COMPILE VENDOR RESPONSIBILITY INFORMATION.

F. "TERM OF SERVICE" MEANS 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.

G. "VENDOR" MEANS ANY PERSON, PARTNERSHIP, CORPORATION OR LIMITED LIABILITY COMPANY OR ANY BUSINESS ENTITY BIDDING ON A STATE PROCUREMENT OR OTHERWISE AWARDED A STATE CONTRACT.

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

2. A. STATE AGENCIES SHALL ENROLL WITH THE STATE COMPTROLLER TO ACCESS THE SYSTEM MAINTAINED BY THE COMPTROLLER TO COMPILE VENDOR RESPONSIBILITY INFORMATION. STATE AGENCIES SHALL AGREE TO AND ABIDE BY THE TERMS OF SERVICE FOR SUCH SYSTEM AS THE STATE COMPTROLLER DEEMS NECESSARY.

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

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

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

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

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

D. STATE AGENCIES SHALL PROVIDE ACCESS TO THE SYSTEM TO USERS WITHIN THEIR ORGANIZATION, AS DEEMED APPROPRIATE BY THE HEAD OF THE STATE AGENCY OR HIS OR HER DESIGNEE. STATE AGENCY USERS PROVIDED WITH SUCH ACCESS SHALL BE THOSE INDIVIDUALS, WHO, AS PART OF THEIR OFFICIAL JOB DUTIES,

ARE REQUIRED TO ASSESS AND/OR REVIEW VENDOR RESPONSIBILITY FOR THE AGENCY'S CONTRACTS.

S 2. Subdivisions 7 and 10 of section 160 of the state finance law, subdivision 7 as amended by section 30 of part L of chapter 55 of the laws of 2012 and subdivision 10 as added by chapter 83 of the laws of 1995, are amended to read as follows:

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

10. ["Technology"] "INFORMATION TECHNOLOGY" means either a good or a service or a combination thereof, [that results in a technical method of achieving a practical purpose or in improvements in productivity] USED IN THE APPLICATION OF ANY COMPUTER OR ELECTRONIC INFORMATION EQUIPMENT OR INTERCONNECTED SYSTEM THAT IS USED IN THE ACQUISITION, STORAGE, MANIPULATION, MANAGEMENT, MOVEMENT, CONTROL, DISPLAY, SWITCHING, INTERCHANGE, TRANSMISSION, OR RECEPTION OF DATA INCLUDING, BUT NOT LIMITED TO, HARDWARE, SOFTWARE, FIRMWARE, PROGRAMS, SYSTEMS, NETWORKS, INFRASTRUCTURE, MEDIA, AND RELATED MATERIAL USED TO AUTOMATICALLY AND ELECTRONICALLY COLLECT, RECEIVE, ACCESS, TRANSMIT, DISPLAY, STORE, RECORD, RETRIEVE, ANALYZE, EVALUATE, PROCESS, CLASSIFY, MANIPULATE, MANAGE, ASSIMILATE, CONTROL, COMMUNICATE, EXCHANGE, CONVERT, CONVERGE, INTERFACE, SWITCH, OR DISSEMINATE DATA OF ANY KIND OR FORM. Goods may be either new or used.

S 3. Paragraphs g and i of subdivision 2 of section 161 of the state finance law, as added by chapter 83 of the laws of 1995, are amended to read as follows:

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

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

S 4. Paragraph k of subdivision 1 and subdivisions 6 and 7 of section 163 of the state finance law, paragraph k of subdivision 1 as added by section 36 of part L of chapter 55 of the laws of 2012, subdivision 6 as amended by chapter 569 of the laws of 2015 and subdivision 7 as amended by section 10 of part L of chapter 55 of the laws of 2012, are amended to read as follows:

k. "Authorized user" or "non-state agency purchaser" means (i) any officer, body or agency of the state or of a political subdivision or a

district therein, or fire company or volunteer ambulance service as such are defined in section one hundred of the general municipal law, to make purchases of commodities, services and INFORMATION technology through the office of general services' centralized contracts, pursuant to the provisions of section one hundred four of the general municipal law; (ii) any county extension service association as authorized under subdivision eight of section two hundred twenty-four of the county law; (iii) any association or other entity as specified in and in accordance with section one hundred nine-a of the general municipal law; (iv) any association, consortium or group of privately owned or municipal, federal or state owned or operated hospitals, medical schools, other health related facilities or voluntary ambulance services, which have entered into a contract and made mutual arrangements for the joint purchase of commodities, services and INFORMATION technology pursuant to section twenty-eight hundred three-a of the public health law; (v) any institution for the instruction of the deaf or of the blind listed in section forty-two hundred one of the education law; (vi) any qualified non-profit-making agency for the blind approved by the commissioner of the office of children and family services or the office of temporary and disability assistance; (vii) any qualified charitable non-profit-making agency for the severely disabled approved by the commissioner of education; (viii) any hospital or residential health care facility as defined in section twenty-eight hundred one of the public health law; (ix) any private not-for-profit mental hygiene facility as defined in section 1.03 of the mental hygiene law; (x) any public authority or public benefit corporation of the state, including the port authority of New York and New Jersey and the interstate environmental commission; (xi) any public library, association library, library system, cooperative library system, the New York Library Association, and the New York State Association of Library Boards or any other library except those which are operated by for profit entities; (xii) any other association or entity as specified in state law, to make purchases of commodities, services and INFORMATION technology through the office of general services' centralized contracts. Such qualified non-profit-making agencies for the blind and severely disabled may make purchases from the correctional industries program of the department of corrections and community supervision subject to rules pursuant to the correction law.

6. Discretionary buying thresholds. Pursuant to guidelines established by the state procurement council: the commissioner may purchase services and commodities in an amount not exceeding eighty-five thousand dollars without a formal competitive process; state agencies may purchase services and commodities in an amount not exceeding fifty thousand dollars without a formal competitive process; and state agencies may purchase commodities or services from small business concerns or those certified pursuant to articles fifteen-A and seventeen-B of the executive law, or commodities or INFORMATION technology that are recycled or remanufactured, or commodities that are food, including milk and milk products, grown, produced or harvested in New York state in an amount not exceeding two hundred thousand dollars without a formal competitive process.

7. Method of procurement. Consistent with the requirements of subdivisions three and four of this section, state agencies shall select among permissible methods of procurement including, but not limited to, an invitation for bid, request for proposals or other means of solicitation pursuant to guidelines issued by the state procurement council. State agencies may accept bids electronically including submission of the

statement of non-collusion required by section one hundred thirty-nine-d of this chapter and, starting April first, two thousand twelve, and ending March thirty-first, two thousand fifteen, may, for commodity, service and INFORMATION technology contracts require electronic submission as the sole method for the submission of bids for the solicitation. State agencies shall undertake no more than eighty-five such electronic bid solicitations, none of which shall be reverse auctions, prior to April first, two thousand fifteen. In addition, state agencies may conduct up to twenty reverse auctions through electronic means, prior to April first, two thousand fifteen. Prior to requiring the electronic submission of bids, the agency shall make a determination, which shall be documented in the procurement record, that electronic submission affords a fair and equal opportunity for offerers to submit responsive offers. Within thirty days of the completion of the eighty-fifth electronic bid solicitation, or by April first, two thousand fifteen, whichever is earlier, the commissioner shall prepare a report assessing the use of electronic submissions and make recommendations regarding future use of this procurement method. In addition, within thirty days of the completion of the twentieth reverse auction through electronic means, or by April first, two thousand fifteen, whichever is earlier, the commissioner shall prepare a report assessing the use of reverse auctions through electronic means and make recommendations regarding future use of this procurement method. Such reports shall be published on the website of the office of general services. Except where otherwise provided by law, procurements shall be competitive, and state agencies shall conduct formal competitive procurements to the maximum extent practicable. State agencies shall document the determination of the method of procurement and the basis of award in the procurement record. Where the basis for award is the best value offer, the state agency shall document, in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable, and the process to be used in the determination of best value and the manner in which the evaluation process and selection shall be conducted.

S 5. 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 6. Paragraph e of subdivision 10 of section 163 of the state finance law, as amended by chapter 137 of the laws of 2008, is amended to read as follows:

e. The commissioner may authorize purchases required by state agencies or other authorized purchasers by letting a contract pursuant to a written agreement, or by approving the use of a contract let by any department, agency or instrumentality of the United States government and/or any department, agency, office, political subdivision or instrumentality

of any state or states. A state agency purchaser shall document in the procurement record its rationale for the use of a contract let by any department, agency or instrumentality of the United States government or any department, agency, office, political subdivision or instrumentality of any other state or states. Such rationale shall include, but need not be limited to, a determination of need, a consideration of the procurement method by which the contract was awarded, an analysis of alternative procurement sources including an explanation why a competitive procurement or the use of a centralized contract let by the commissioner is not in the best interest of the state, and the reasonableness of cost. THE AUTHORITY TO USE A CONTRACT LET BY ANOTHER GOVERNMENTAL ENTITY PURSUANT TO THIS PARAGRAPH IS INTENDED TO BENEFIT THE STATE BY USING CONTRACTS IN PLACE THAT PROVIDE FOR THE SAME SERVICE OR COMMODITY SOUGHT BY A STATE AGENCY AT A PRICE DETERMINED TO BE REASONABLE BY THE STATE AGENCY. SUCH CONTRACTS ARE NOT INTENDED TO BE USED PRIMARILY TO AVOID COMPETITIVE BIDDING. USE OF MULTIPLE AWARD CONTRACTS PURSUANT TO THIS PARAGRAPH SHALL FOLLOW THE SAME BASIS OF SELECTION AMONG THE MULTIPLE AWARDEES AS WAS PRESCRIBED BY THE ORIGINAL CONTRACTING GOVERNMENTAL ENTITY.

S 7. Subdivision 3 of section 112 of the state finance law, as amended by section 2-c of part F of chapter 57 of the laws of 2016, is amended to read as follows:

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

S 8. This act shall take effect immediately; provided, however, section one of this act shall take effect on the one hundred eightieth day after it shall have become a law; provided, further however, that the provisions of sections four, five and six of this act shall apply to any procurement initiated on or after such sections shall have become a law; provided, further, however, that the amendments to section 163 of the state finance law made by sections four, five, and six of this act shall not affect the repeal of such section as provided in subdivision 5 of section 362 of chapter 83 of the laws of 1995, as amended, and shall be deemed repealed therewith.