

10688

I N A S S E M B L Y

June 13, 2016

Introduced by COMMITTEE ON RULES -- (at request of M. of A. Peoples-Stokes) -- (at request of the State Comptroller) -- read once and referred to the Committee on Governmental Operations

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:

- 1 Section 1. The state finance law is amended by adding a new section
2 163-c to read as follows:
3 S 163-C. VENDOR RESPONSIBILITY; ONLINE SYSTEM PARTICIPATION. 1. DEFINI-
4 TIONS. AS USED IN THIS SECTION, THE FOLLOWING TERMS SHALL HAVE THE
5 FOLLOWING MEANINGS:
6 A. "ENROLLMENT" MEANS THE ESTABLISHMENT OF AN ONLINE SERVICES ACCOUNT
7 WITH THE STATE COMPTROLLER, INCLUDING, BUT NOT LIMITED TO, THE CREATION
8 OF A UNIQUE USER IDENTIFICATION AND PASSWORD. ENROLLMENT PROVIDES A USER
9 ACCESS TO THE SYSTEM.
10 B. "ONLINE SERVICES" MEANS THE SERVICES PROVIDED ELECTRONICALLY AND
11 SECURELY BY THE STATE COMPTROLLER FOR THE BENEFIT OF NEW YORK'S CUSTOM-
12 ERS, CLIENTS AND BUSINESS PARTNERS. SUCH ONLINE SERVICES MAY BE EXPANDED
13 AND ENHANCED AS TECHNOLOGY ALLOWS.
14 C. "STATE CONTRACT" OR "CONTRACT" MEANS AND INCLUDES ANY WRITTEN
15 AGREEMENT FOR THE ACQUISITION OF GOODS, SERVICES OR CONSTRUCTION OF ANY
16 KIND BETWEEN A VENDOR AND A STATE AGENCY, OR A WRITTEN AGREEMENT OR
17 OTHER INSTRUMENT WHEREIN A STATE AGENCY AGREES TO GIVE CONSIDERATION
18 OTHER THAN THE PAYMENT OF MONEY AS CONTEMPLATED IN SUBDIVISION THREE OF
19 SECTION ONE HUNDRED TWELVE OF THIS CHAPTER.
20 D. "SUBCONTRACTOR" MEANS AN INDIVIDUAL, SOLE PROPRIETORSHIP, PARTNER-
21 SHIP, 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.

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1 A VENDOR PURSUANT TO A STATE CONTRACT AND SUCH SUBCONTRACT IS VALUED AT
2 ONE HUNDRED THOUSAND DOLLARS OR MORE AND IS KNOWN AT THE TIME OF THE
3 AWARD OF THE STATE CONTRACT TO THE VENDOR.

4 E. "SYSTEM" MEANS THE ONLINE SOFTWARE, DATA AND RELATED RESOURCES
5 MAINTAINED BY THE COMPTROLLER TO COMPILE VENDOR RESPONSIBILITY INFORMA-
6 TION.

7 F. "TERM OF SERVICE" MEANS THE TERMS AND CONDITIONS DEVELOPED BY THE
8 STATE COMPTROLLER AND AGREED TO BY EACH AUTHORIZED USER PRIOR TO GAINING
9 ACCESS TO ONLINE SERVICES. TERMS OF SERVICE SHALL INCLUDE A DESCRIPTION
10 OF THE SERVICES, OBLIGATIONS OF THE STATE COMPTROLLER AND THE AUTHORIZED
11 USER, A DESCRIPTION OF THE STATE COMPTROLLER'S PRIVACY POLICY, AUTHOR-
12 IZED USER CODE OF CONDUCT, AND INDEMNITY FOR THE STATE COMPTROLLER AND
13 THE STATE OF NEW YORK. TERMS OF SERVICE ARE SUBJECT TO CHANGE AS
14 PRESCRIBED BY THE STATE COMPTROLLER. AUTHORIZED USERS MAY VIEW CHANGES
15 VIA THE STATE COMPTROLLER'S INTERNET SITE.

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

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

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

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

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

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

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

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

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

1 ARE REQUIRED TO ASSESS AND/OR REVIEW VENDOR RESPONSIBILITY FOR THE AGEN-
2 CY'S CONTRACTS.

3 S 2. Subdivisions 7 and 10 of section 160 of the state finance law,
4 subdivision 7 as amended by section 30 of part L of chapter 55 of the
5 laws of 2012 and subdivision 10 as added by chapter 83 of the laws of
6 1995, are amended to read as follows:

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

14 10. ["Technology"] "INFORMATION TECHNOLOGY" means either a good or a
15 service or a combination thereof, [that results in a technical method of
16 achieving a practical purpose or in improvements in productivity] USED
17 IN THE APPLICATION OF ANY COMPUTER OR ELECTRONIC INFORMATION EQUIPMENT
18 OR INTERCONNECTED SYSTEM THAT IS USED IN THE ACQUISITION, STORAGE,
19 MANIPULATION, MANAGEMENT, MOVEMENT, CONTROL, DISPLAY, SWITCHING, INTER-
20 CHANGE, TRANSMISSION, OR RECEPTION OF DATA INCLUDING, BUT NOT LIMITED
21 TO, HARDWARE, SOFTWARE, FIRMWARE, PROGRAMS, SYSTEMS, NETWORKS, INFRAS-
22 TRUCTURE, MEDIA, AND RELATED MATERIAL USED TO AUTOMATICALLY AND ELEC-
23 TRONICALLY COLLECT, RECEIVE, ACCESS, TRANSMIT, DISPLAY, STORE, RECORD,
24 RETRIEVE, ANALYZE, EVALUATE, PROCESS, CLASSIFY, MANIPULATE, MANAGE,
25 ASSIMILATE, CONTROL, COMMUNICATE, EXCHANGE, CONVERT, CONVERGE, INTER-
26 FACE, SWITCH, OR DISSEMINATE DATA OF ANY KIND OR FORM. Goods may be
27 either new or used.

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

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

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

49 S 4. Paragraph k of subdivision 1 and subdivisions 6 and 7 of section
50 163 of the state finance law, paragraph k of subdivision 1 as added by
51 section 36 of part L of chapter 55 of the laws of 2012, subdivision 6 as
52 amended by chapter 569 of the laws of 2015 and subdivision 7 as amended
53 by section 10 of part L of chapter 55 of the laws of 2012, are amended
54 to read as follows:

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

1 district therein, or fire company or volunteer ambulance service as such
2 are defined in section one hundred of the general municipal law, to make
3 purchases of commodities, services and INFORMATION technology through
4 the office of general services' centralized contracts, pursuant to the
5 provisions of section one hundred four of the general municipal law;
6 (ii) any county extension service association as authorized under subdi-
7 vision eight of section two hundred twenty-four of the county law; (iii)
8 any association or other entity as specified in and in accordance with
9 section one hundred nine-a of the general municipal law; (iv) any asso-
10 ciation, consortium or group of privately owned or municipal, federal or
11 state owned or operated hospitals, medical schools, other health related
12 facilities or voluntary ambulance services, which have entered into a
13 contract and made mutual arrangements for the joint purchase of commod-
14 ities, services and INFORMATION technology pursuant to section twenty-
15 eight hundred three-a of the public health law; (v) any institution for
16 the instruction of the deaf or of the blind listed in section forty-two
17 hundred one of the education law; (vi) any qualified non-profit-making
18 agency for the blind approved by the commissioner of the office of chil-
19 dren and family services or the office of temporary and disability
20 assistance; (vii) any qualified charitable non-profit-making agency for
21 the severely disabled approved by the commissioner of education; (viii)
22 any hospital or residential health care facility as defined in section
23 twenty-eight hundred one of the public health law; (ix) any private
24 not-for-profit mental hygiene facility as defined in section 1.03 of the
25 mental hygiene law; (x) any public authority or public benefit corpo-
26 ration of the state, including the port authority of New York and New
27 Jersey and the interstate environmental commission; (xi) any public
28 library, association library, library system, cooperative library
29 system, the New York Library Association, and the New York State Associ-
30 ation of Library Boards or any other library except those which are
31 operated by for profit entities; (xii) any other association or entity
32 as specified in state law, to make purchases of commodities, services
33 and INFORMATION technology through the office of general services'
34 centralized contracts. Such qualified non-profit-making agencies for the
35 blind and severely disabled may make purchases from the correctional
36 industries program of the department of corrections and community super-
37 vision subject to rules pursuant to the correction law.

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

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

1 statement of non-collusion required by section one hundred thirty-nine-d
2 of this chapter and, starting April first, two thousand twelve, and
3 ending March thirty-first, two thousand fifteen, may, for commodity,
4 service and INFORMATION technology contracts require electronic
5 submission as the sole method for the submission of bids for the solic-
6 itation. State agencies shall undertake no more than eighty-five such
7 electronic bid solicitations, none of which shall be reverse auctions,
8 prior to April first, two thousand fifteen. In addition, state agencies
9 may conduct up to twenty reverse auctions through electronic means,
10 prior to April first, two thousand fifteen. Prior to requiring the elec-
11 tronic submission of bids, the agency shall make a determination, which
12 shall be documented in the procurement record, that electronic
13 submission affords a fair and equal opportunity for offerers to submit
14 responsive offers. Within thirty days of the completion of the eighty-
15 fifth electronic bid solicitation, or by April first, two thousand
16 fifteen, whichever is earlier, the commissioner shall prepare a report
17 assessing the use of electronic submissions and make recommendations
18 regarding future use of this procurement method. In addition, within
19 thirty days of the completion of the twentieth reverse auction through
20 electronic means, or by April first, two thousand fifteen, whichever is
21 earlier, the commissioner shall prepare a report assessing the use of
22 reverse auctions through electronic means and make recommendations
23 regarding future use of this procurement method. Such reports shall be
24 published on the website of the office of general services. Except where
25 otherwise provided by law, procurements shall be competitive, and state
26 agencies shall conduct formal competitive procurements to the maximum
27 extent practicable. State agencies shall document the determination of
28 the method of procurement and the basis of award in the procurement
29 record. Where the basis for award is the best value offer, the state
30 agency shall document, in the procurement record and in advance of the
31 initial receipt of offers, the determination of the evaluation criteria,
32 which whenever possible, shall be quantifiable, and the process to be
33 used in the determination of best value and the manner in which the
34 evaluation process and selection shall be conducted.

35 S 5. Subdivision 9 of section 163 of the state finance law is amended
36 by adding a new paragraph c-1 to read as follows:

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

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

52 e. The commissioner may authorize purchases required by state agencies
53 or other authorized purchasers by letting a contract pursuant to a writ-
54 ten agreement, or by approving the use of a contract let by any depart-
55 ment, agency or instrumentality of the United States government and/or
56 any department, agency, office, political subdivision or instrumentality

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

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

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

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