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 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; and in relation to authorizing competitive negotiation concluding with a best and final offer

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

Section 1. Section 163 of the state finance law is amended by adding two new subdivisions 16 and 17 to read as follows:

16. ALTERNATIVE PROCUREMENT METHODS FOR THE ACQUISITION OF NON-CONSTRUCTION RELATED COMMODITIES, SERVICES AND INFORMATION TECHNOLOGY. A. WHEN THE COMMISSIONER OR A STATE AGENCY DETERMINES THAT IT IS IN THE BEST INTEREST OF THE STATE TO DEVELOP A PROCUREMENT METHOD NOT AUTHORIZED BY THIS SECTION FOR NON-CONSTRUCTION RELATED COMMODITIES, SERVICES AND INFORMATION TECHNOLOGY, THE COMMISSIONER OR STATE AGENCY IS HEREBY AUTHORIZED TO DEVELOP AND USE SUCH METHOD FOR A SPECIFIC CONTRACT AWARD. SUCH DETERMINATION SHALL BE MADE IN WRITING AND SHALL INCLUDE DOCUMENTATION FOR THE PROCUREMENT RECORD THAT SUCH ALTERNATIVE PROCUREMENT METHOD: (I) WOULD SERVE THE INTEREST OF THE STATE BETTER THAN OTHER METHODS CURRENTLY AVAILABLE UNDER THIS SECTION; (II) CAN BE APPLIED ON A COMPETITIVE, FAIR AND EQUITABLE BASIS; AND (III) CONTAINS AN APPROPRIATE EVALUATION METHODOLOGY THAT CONSIDERS BOTH COST AND QUALITATIVE EVALUATION FACTORS. SUCH ALTERNATIVE PROCUREMENT METHOD SHALL BE SUBJECT TO ALL OTHER APPLICABLE PROVISIONS OF THIS SECTION. THE COMMISSIONER OR A STATE AGENCY MAY NOT UNDERTAKE AN ALTERNATIVE PROCUREMENT METHOD UNTIL THE COMPTROLLER HAS DETERMINED THAT THE PROPOSED ALTERNATIVE PROCUREMENT METHOD IS IN THE BEST INTEREST OF THE STATE; CAN BE APPLIED ON A COMPETITIVE, FAIR AND EQUITABLE BASIS; AND UTILIZES AN APPROPRIATE EVALUATION METHODOLOGY THAT CONSIDERS BOTH COST AND QUALITATIVE EVALUATION FACTORS.

B. WHEN USING AN ALTERNATIVE PROCUREMENT METHOD AUTHORIZED BY THIS SUBDIVISION, THE COMMISSIONER OR AGENCY SHALL INCLUDE IN ITS SOLICITA-

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

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TION A DETAILED DESCRIPTION OF THE PROPOSED METHOD OF AWARD. IN ADVANCE OF THE INITIAL RECEIPT OF OFFERS OR BIDS, THE COMMISSIONER OR STATE AGENCY SHALL DETERMINE AND DOCUMENT IN THE PROCUREMENT RECORD THE EVALUATION CRITERIA AND PROCESS TO BE USED IN THE DETERMINATION OF THE SPECIFIC CONTRACT AWARD AND THE PROCESS BY WHICH THE EVALUATION AND SELECTION SHALL BE CONDUCTED. IN ADDITION TO THE REQUIREMENTS SET FORTH IN PARAGRAPH G OF SUBDIVISION NINE OF THIS SECTION, THE PROCUREMENT RECORD SHALL DOCUMENT THE BASIS UPON WHICH THE AGENCY HAS DETERMINED THAT POTENTIAL VENDORS WILL BE ABLE TO RESPOND WITH VIABLE BIDS TO SUCH ALTERNATIVE PROCUREMENT.

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

D. FOR EACH PROCUREMENT AWARDED PURSUANT TO THIS SECTION, THE COMMISSIONER OR STATE AGENCY SHALL SUBMIT TO THE GOVERNOR, THE COMPTROLLER AND THE HEADS OF THE FISCAL COMMITTEES OF EACH HOUSE OF THE STATE LEGISLATURE NO LATER THAN THE MID-POINT OF THE INITIAL TERM OF THE RESULTANT CONTRACT A REPORT ASSESSING THE VALIDITY OF THE PROCUREMENT METHOD AND COMPARING ITS RESULTS TO PROCUREMENT METHODS FOR COMMODITIES AND SERVICES OR INFORMATION TECHNOLOGY.

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

B. COMPETITIVE NEGOTIATION MAY ONLY BE USED WHERE:

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

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

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

C. THE AGENCY MUST DOCUMENT IN THE PROCUREMENT RECORD AND IN ADVANCE 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 2. This act shall take effect immediately; provided, however, that the provisions of section one of this act shall apply to any procurement initiated on or after such date; provided, further however, that the amendments to section 163 of the state finance law made by section one 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.