

STATE OF NEW YORK

5096--B

2017-2018 Regular Sessions

IN SENATE

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Introduced by Sens. YOUNG, GRIFFO, MARCHIONE, ORTT, SEWARD -- read twice and ordered printed, and when printed to be committed to the Committee on Finance -- recommitted to the Committee on Finance in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the state finance law, in relation to preferred sources for state contracts for goods and services

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Paragraph m of subdivision 2 of section 161 of the state
2 finance law, as amended by section 13 of part L of chapter 55 of the
3 laws of 2012, is amended to read as follows:

4 m. Establish and, from time to time, amend guidelines with respect to
5 publishing by state agencies of quarterly listings of projected procure-
6 ments having a value greater than five thousand dollars but less than
7 [~~fifty~~] two hundred thousand dollars in the procurement opportunities
8 newsletter established by article four-C of the economic development
9 law.

10 § 2. Section 162 of the state finance law, as added by chapter 83 of
11 the laws of 1995, subdivision 2 as amended by chapter 501 of the laws of
12 2002, paragraph a of subdivision 2, paragraphs a and b of subdivision 3,
13 subparagraph (i) of paragraph a of subdivision 4, subdivision 5, and
14 paragraphs a and d of subdivision 6 as amended by section 164 of subpart
15 B of part C of chapter 62 of the laws of 2011, paragraph b of subdivi-
16 sion 2 as amended by chapter 519 of the laws of 2003, subparagraph (iii)
17 of paragraph b of subdivision 4 as amended by chapter 430 of the laws of
18 1997, paragraph e of subdivision 6 as amended by chapter 265 of the laws
19 of 2013, subdivision 7 as amended by chapter 426 of the laws of 2002 and

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

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paragraph a of subdivision 8 as amended by chapter 95 of the laws of 2000, is amended to read as follows:

§ 162. Preferred sources. 1. Definitions. As used in this section:

(a) "Preferred source" shall mean:

(i) commodities produced by the correctional industries program of the department of corrections and community supervision;

(ii) commodities and services produced by any qualified charitable non-profit-making agency for the blind approved for such purposes by the commissioner of children and family services;

(iii) commodities and services produced by any special employment program serving mentally ill persons, which shall not be required to be incorporated and which is operated by facilities within the office of mental health and is approved for such purposes by the commissioner of mental health;

(iv) commodities and services produced by any qualified charitable non-profit-making agency for other significantly disabled persons approved for such purposes by the commissioner of education, or incorporated under the laws of this state and approved for such purposes by the commissioner of education;

(v) commodities and services produced a qualified veterans' workshop providing job and employment-skills training to veterans where such a workshop is operated by the United States department of veterans affairs and is manufacturing products or performing services within this state and where such workshop is approved for such purposes by the commissioner of education;

(vi) commodities and services produced by any qualified charitable non-profit-making workshop for veterans approved for such purposes by the commissioner of education, or incorporated under the laws of this state and approved for such purposes by the commissioner of education;
or

(vii) commodities and services produced by a private vendor accorded preferred source status pursuant to subdivision seven of this section.

b. "Facilitating entity" shall refer to those non-profit-making entities identified pursuant to paragraph e of subdivision six of this section by the commissioner of children and family services or the commissioner of education; and the commissioner of mental health.

c. "Prevailing market price" shall mean the predominate price at which vendors of the same or similar product or service regularly engaged in the business of selling such product or service offers to sell such product or service under similar terms in the same market. "Under similar terms" shall mean, without limitation, procurements conducted without competitive bidding.

2. Purpose. To advance special social and economic goals, selected providers shall have preferred source status for the purposes of procurement in accordance with the provisions of this section. Procurement from these providers shall be exempted from the competitive procurement provisions of section one hundred sixty-three of this article and other competitive procurement statutes. Such exemption shall apply to commodities produced, manufactured or assembled, including those repackaged to meet the form, function and utility required by state agencies, in New York state and, where so designated, services provided by those sources in accordance with this section.

~~[2. Preferred status. Preferred status as prescribed in this section shall be accorded to:~~

~~a. Commodities produced by the correctional industries program of the department of corrections and community supervision and provided to the~~

~~state pursuant to subdivision two of section one hundred eighty-four of the correction law;~~

~~b. Commodities and services produced by any qualified charitable non-profit-making agency for the blind approved for such purposes by the commissioner of the office of children and family services;~~

~~c. Commodities and services produced by any special employment program serving mentally ill persons, which shall not be required to be incorporated and which is operated by facilities within the office of mental health and is approved for such purposes by the commissioner of mental health;~~

~~d. Commodities and services produced by any qualified charitable non-profit-making agency for other severely disabled persons approved for such purposes by the commissioner of education, or incorporated under the laws of this state and approved for such purposes by the commissioner of education;~~

~~e. Commodities and services produced by a qualified veterans' workshop providing job and employment skills training to veterans where such a workshop is operated by the United States department of veterans affairs and is manufacturing products or performing services within this state and where such workshop is approved for such purposes by the commissioner of education; or~~

~~f. Commodities and services produced by any qualified charitable non-profit-making workshop for veterans approved for such purposes by the commissioner of education, or incorporated under the laws of this state and approved for such purposes by the commissioner of education.]~~

3. Public list of services and commodities provided by preferred sources.

a. By December thirty-first, nineteen hundred ninety-five, the commissioner, in consultation with the commissioners of corrections and community supervision, ~~[the office of]~~ children and family services, ~~[the office of]~~ temporary and disability assistance, mental health and education, shall prepare a list (the "preferred source list of offerings") of all commodities and services that are available and are being provided as of said date, for purchase by state agencies, public benefit corporations or political subdivisions from those entities accorded preference or priority status under this section. Such list may include references to catalogs and other descriptive literature which are available directly from any provider accorded preferred status or the designated facilitating entity under this section. The commissioner shall make this list available to prospective vendors, state agencies, public benefit corporations, political subdivisions and other interested parties. Thereafter, new or substantially different commodities or services may only be made available ~~[by preferred sources for purchase by more than one state agency, public benefit corporation or political subdivision]~~ for purchases pursuant to the exemption established pursuant to this section after addition to said list.

b. After January first, nineteen hundred ninety-six, upon the application of the commissioner of corrections and community supervision, the commissioner of ~~[the office of]~~ children and family services, the ~~[office]~~ commissioner of temporary and disability assistance, the commissioner of mental health or the commissioner of education, or a non-profit-making facilitating ~~[agency]~~ entity designated by one of the said commissioners pursuant to paragraph e of subdivision six of this section, the state procurement council may recommend that the commissioner: (i) add commodities or services to, or (ii) in order to insure that such list reflects current production and/or availability of

1 commodities and services, delete at the request of a preferred source,
2 commodities or services from, the list established by paragraph a of
3 this subdivision. The council may make a non-binding recommendation to
4 the relevant preferred source to delete a commodity or service from such
5 list. Additions may be made only for new services or commodities, or for
6 services or commodities that are substantially different from those
7 reflected on said list for that provider. The decision to recommend the
8 addition of services or commodities shall be based upon a review of
9 relevant factors as determined by the council including the purpose of
10 the preferred source program identified in subdivision two of this
11 section, costs and benefits to be derived from such addition, and [~~shall~~
12 ~~include~~] an analysis by the office of general services conducted pursu-
13 ant to subdivision six of this section. Unless the state procurement
14 council shall make a recommendation to the commissioner on any such
15 application within one hundred twenty days of receipt thereof, such
16 application shall be deemed recommended. In the event that the state
17 procurement council shall deny any such application, the commissioner,
18 or non-profit-making agency or designated facilitating entity which
19 submitted such application may, within thirty days of such denial,
20 appeal such denial to the commissioner of general services who shall
21 review all materials submitted to the state procurement council with
22 respect to such application and who may request such further information
23 or material as is deemed necessary. Within sixty days of receipt of all
24 information or materials deemed necessary, the commissioner shall render
25 a written final decision on the application which shall be binding upon
26 the applicant and upon the state procurement council. For those commod-
27 ities and services identified in sections C and E of the "preferred
28 source list of offerings" as of January first, two thousand eighteen,
29 any state agencies, political subdivisions, public benefit corporations
30 and other interested parties choosing to purchase from a preferred
31 source shall obtain price approved pursuant to subdivision six of this
32 section.

33 c. The list maintained by the office of general services pursuant to
34 paragraph a of this subdivision shall be revised as necessary to reflect
35 the additions and deletions of commodities and services approved by the
36 state procurement council.

37 4. Priority accorded preferred sources. Except as provided in the New
38 York state printing and public documents law, priority among preferred
39 sources shall be accorded as follows:

40 a. (i) When commodities are available, in the form, function and util-
41 ity required by a state agency, public authority, commission, public
42 benefit corporation or political subdivision, said commodities must be
43 purchased first from the correctional industries program of the depart-
44 ment of corrections and community supervision;

45 (ii) When commodities are available, in the form, function and utility
46 required by, a state agency or political subdivision or public benefit
47 corporation having their own purchasing agency, and such commodities are
48 not available pursuant to subparagraph (i) of this paragraph, said
49 commodities shall then be purchased from approved charitable non-pro-
50 fit-making agencies for the blind;

51 (iii) When commodities are available, in the form, function and utili-
52 ty required by, a state agency or political subdivision or public bene-
53 fit corporation having their own purchasing agency, and such commodities
54 are not available pursuant to subparagraphs (i) and (ii) of this para-
55 graph, said commodities shall then be purchased from a qualified non-
56 profit-making agency for other severely disabled persons, a qualified

1 special employment program for mentally ill persons, or a qualified
2 veterans' workshop;

3 b. When services are available, in the form, function and utility
4 required by, a state agency or political subdivision or public benefit
5 corporation having their own purchasing agency, equal priority shall be
6 accorded the services rendered and offered for sale by qualified non-
7 profit-making agencies for the blind and those for the other severely
8 disabled, by qualified special employment programs for mentally ill
9 persons and by qualified veterans' workshops. In the case of services:

10 (i) state agencies or political subdivisions or public benefit corpo-
11 rations having their own purchasing agency shall make reasonable efforts
12 to provide a **written** notification describing their requirements to those
13 preferred sources, or to the facilitating entity identified in paragraph
14 e of subdivision six of this section, which provide the required
15 services as indicated on the official public list maintained by the
16 office of general services pursuant to subdivision three of this
17 section;

18 (ii) if, within ten days of the notification required by subparagraph
19 (i) of this paragraph, one or more preferred sources or facilitating
20 entities identified in paragraph e of subdivision six of this section
21 submit a notice of intent to provide the service in the form, function
22 and utility required, said service shall be purchased in accordance with
23 this section. If more than one preferred source or facilitating entity
24 identified in paragraph e of subdivision six of this section submits
25 notification of intent and meets the requirements, [~~costs~~] **price** shall
26 be the determining factor for purchase among the preferred sources;

27 (iii) if, within ten days of the notification required by subparagraph
28 (i) of this paragraph, no preferred source or facilitating entity iden-
29 tified in paragraph e of subdivision six of this section indicates
30 intent to provide the service, then the service shall be procured in
31 accordance with section one hundred sixty-three of this article. If,
32 after such period, a preferred source elects to bid on the service,
33 award shall be made in accordance with section one hundred sixty-three
34 of this article or as otherwise provided by law.

35 c. For the purposes of commodities and services produced by special
36 employment programs operated by facilities approved or operated by the
37 office of mental health, facilities within the office of mental health
38 shall be exempt from the requirements of subparagraph (i) of paragraph a
39 of this subdivision. When such requirements of the office of mental
40 health cannot be met pursuant to subparagraph (ii) or (iii) of paragraph
41 a of this subdivision, or paragraph b of this subdivision, the office of
42 mental health may purchase commodities and services which are compet-
43 itive in price and comparable in quality to those which could otherwise
44 be obtained in accordance with this article, from special employment
45 programs operated by facilities within the office of mental health or
46 other programs approved by the office of mental health.

47 5. Prices charged by the department of corrections and community
48 supervision. The prices to be charged for commodities produced by the
49 correctional industries program of the department of corrections and
50 community supervision shall be established by the commissioner of
51 corrections and community supervision in accordance with section one
52 hundred eighty-six of the correction law.

53 a. The prices established by the commissioner of corrections and
54 community supervision shall be based upon costs as determined pursuant
55 to this subdivision, but shall not exceed a reasonable fair market price
56 determined at or within ninety days before the time of sale. Fair market

1 price as used herein means the price at which a vendor of the same or
2 similar product or service who is regularly engaged in the business of
3 selling such product or service offers to sell such product or service
4 under similar terms in the same market. Costs shall be determined in
5 accordance with an agreement between the commissioner of corrections and
6 community supervision and the director of the budget.

7 b. A purchaser of any such product or service may, at any time prior
8 to or within thirty days of the time of sale, appeal the purchase price
9 in accordance with section one hundred eighty-six of the correction law,
10 on the basis that it unreasonably exceeds fair market price. Such an
11 appeal shall be decided by a majority vote of a three-member price
12 review board consisting of the director of the budget, the commissioner
13 of corrections and community supervision and the commissioner or their
14 representatives. The decision of the review board shall be final.

15 6. Prices charged by agencies for the blind, other severely disabled
16 and veterans' workshops.

17 a. (i) Except with respect to the correctional industries program of
18 the department of corrections and community supervision, it shall be the
19 duty of the commissioner to determine, and from time to time review, the
20 prices of all commodities [~~and to approve the price of all services~~]
21 provided by preferred sources as specified in this section offered to
22 state agencies, political subdivisions or public benefit corporations
23 having their own purchasing office.

24 (ii) With respect to the purchase of services, it shall be the duty of
25 the commissioner to review and to approve the price of all services
26 offered that have a value over two hundred thousand dollars annually, to
27 be provided by the facilitating entity in response to the written scope
28 of services issued by the state agency, political subdivision or public
29 benefit corporation. The facilitating entities identified in paragraph e
30 of this subdivision shall provide to the commissioner, within a reason-
31 able time following the request, information to determine prevailing
32 market price. Such information shall include a price application and
33 either comparable pricing from private contracts, benchmarking provided
34 by an independent third party supplied by the facilitating entity, or
35 attestation by the state agency, political subdivision or public benefit
36 corporation of price reasonableness. Where appropriate, the provider of
37 such information may request that such information be exempted from
38 disclosure in accordance with the provisions of paragraph (a) of subdi-
39 vision five of section eighty-nine of the public officers law. State
40 agencies, political subdivisions, or public benefit corporations may
41 issue a request for the information to assist the commissioner in estab-
42 lishing prevailing market prices. Subcontracting a portion of the work
43 under the preferred source program shall be authorized provided that:
44 the annual value of the subcontract does not exceed authorized thresh-
45 olds for discretionary purchase levels; and the service provided through
46 a subcontract is integral to the service being delivered by the provid-
47 ing preferred source agency or partnership. When the subcontracted work
48 is not a preferred source service, it must be sourced from a centralized
49 contract when available, unless a better value can be achieved from
50 another source. If the subcontract is sourced outside a centralized
51 contract the subcontracting shall be sourced competitively by the facil-
52 itating agency or the performing preferred source provider or partner.
53 All direct labor hours performed by a subcontractor shall be included in
54 the required value added labor ratio requirements. This price review
55 process shall be concluded within ninety days of receipt thereof by the

1 commissioner of a price application. Otherwise, such application shall
2 be deemed approved.

3 b. In determining and revising the prices of such commodities or
4 services, in instances where the prevailing market price cannot be
5 reasonably determined by comparable price information from private
6 contracts, third party benchmarking or attestation by the customer,
7 consideration shall be given to the reasonable costs of labor, materials
8 and overhead necessarily incurred by such preferred sources under effi-
9 cient methods of procurement, production, performance and adminis-
10 tration; however, the prices of such products and services shall be as
11 close to prevailing market price as practicable, but in no event greater
12 than fifteen percent above, the prevailing market prices among respon-
13 sive offerors for the same or equivalent commodities or services.

14 c. Such qualified charitable non-profit-making agencies for the blind
15 and other severely disabled may make purchases of materials, equipment
16 or supplies, except printed material, from centralized contracts for
17 commodities in accordance with the conditions set by the office of
18 general services; provided that the qualified charitable non-profit-mak-
19 ing agency for the blind or other severely disabled shall accept sole
20 responsibility for any payment due the vendor.

21 d. Such qualified charitable non-profit-making agencies for the blind
22 and other severely disabled may make purchases of materials, equipment
23 and supplies directly from the correctional industries program adminis-
24 tered by the commissioner of corrections and community supervision,
25 subject to such rules as may be established from time to time pursuant
26 to the correction law; provided that the qualified charitable non-pro-
27 fit-making agency for the blind or other severely disabled shall accept
28 sole responsibility for any payment due the department of corrections
29 and community supervision.

30 e. The commissioner of the office of children and family services
31 shall appoint the New York state commission for the blind, or other
32 non-profit-making agency, other than the agency representing the other
33 severely disabled, to facilitate the distribution of orders among quali-
34 fied non-profit-making charitable agencies for the blind. The state
35 commissioner of education shall appoint a non-profit-making agency,
36 other than the agency representing the blind, to facilitate the distrib-
37 ution of orders among qualified non-profit-making charitable agencies
38 for the other severely disabled and the veterans' workshops. The
39 ~~[state]~~ commissioner of mental health shall facilitate the distribution
40 of orders among qualified special employment programs operated or
41 approved by the office of mental health serving mentally ill persons.

42 f. The commissioner may request the state comptroller to conduct
43 audits and examinations to be made of all records, books and data of any
44 agency for the blind or the other severely disabled, any special employ-
45 ment program for mentally ill persons or any veterans' workshops quali-
46 fied under this section to determine the costs of manufacture or the
47 rendering of services and the manner and efficiency of production and
48 administration of such agency or special employment program or veterans'
49 workshop with relation to any product or services purchased by a state
50 agency or political subdivision or public benefit corporation and to
51 furnish the results of such audit and examination to the commissioner
52 for such action as he or she may deem appropriate under this section.

53 7. Partnering with preferred sources. The commissioner of the appro-
54 priate appointing agency as identified in paragraph e of subdivision six
55 of this section, shall ~~[conduct one or more pilot studies]~~ review and
56 approve applications provided by the facilitating entity whereby a

1 private vendor may be accorded preferred source status for purposes of
2 this section. ~~[The pilot studies shall seek to ascertain the benefits of~~
3 ~~partnerships between private industry and those entities accorded~~
4 ~~preferred source status as specified in this section.]~~ Preferred source
5 status under a partnering arrangement may only be accorded when a
6 proposal to a soliciting agency for commodities or services includes a
7 binding agreement with one or more of the non-profit-making entities
8 accorded preferred source status ~~[under]~~ identified in paragraph e of
9 subdivision six of this section. The binding agreement shall provide
10 that:

11 (i) The preferred source shall perform the majority of the work neces-
12 sary to such offering, and

13 (ii) The partnering proposal includes bona fide long term employment
14 opportunities for ~~[persons who could otherwise be new]~~ clients of an
15 entity previously accorded preferred source status ~~[herein]~~ pursuant to
16 this section, and

17 (iii) The partnering proposal offers the solicited services or commod-
18 ities at a price less than the price that otherwise would be charged by
19 ~~[a]~~ the preferred source that is a party to the partnership application,
20 or

21 (iv) The partnering proposal allows the preferred source to engage in
22 an approved offering that would allow for employment opportunities that
23 would not otherwise be able to provide on its own.

24 8. ~~[a. The commissioner of the appropriate appointing agency shall~~
25 ~~report by December thirty-first, two thousand four, to the governor, the~~
26 ~~chairperson of the senate finance committee, the chairperson of the~~
27 ~~assembly ways and means committee and the director of the budget, the~~
28 ~~results and findings of each pilot study conducted, pursuant to subdivi-~~
29 ~~sion seven of this section, and include recommendations for improving~~
30 ~~partnering with preferred sources.~~

31 ~~b.]~~ The council shall report to the governor, legislative fiscal
32 committees and the director of the budget by December thirty-first,
33 ~~[nineteen hundred ninety-five and thereafter]~~ annually, a separate list
34 concerning the denial of any application made pursuant to paragraph
35 ~~[(b)]~~ b of subdivision three of this section, the reasons for such
36 denial, whether such denial was appealed to the commissioner, and the
37 final decision by the commissioner on such application.

38 9. The provisions of this section shall supersede inconsistent
39 provisions of any general, special or local law, or the provisions of
40 any charter.

41 § 3. This act shall take effect on the first of January next succeed-
42 ing the date on which it shall have become a law.