

STATE OF NEW YORK

6832

2017-2018 Regular Sessions

IN ASSEMBLY

March 21, 2017

Introduced by M. of A. GUNTHER -- read once and referred to the Committee on Governmental Operations

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. Section 162 of the state finance law, as added by chapter
2 83 of the laws of 1995, subdivision 2 as amended by chapter 501 of the
3 laws of 2002, paragraph a of subdivision 2, paragraphs a and b of subdivision 3,
4 subparagraph (i) of paragraph a of subdivision 4, subdivision
5 5, and paragraphs a and d of subdivision 6 as amended by section 164 of
6 subpart B of part C of chapter 62 of the laws of 2011, paragraph b of
7 subdivision 2 as amended by chapter 519 of the laws of 2003, subparagraph
8 (iii) of paragraph b of subdivision 4, as amended by chapter 430
9 of the laws of 1997, paragraph e of subdivision 6 as amended by chapter
10 265 of the laws of 2013, subdivision 7 as amended by chapter 426 of the
11 laws of 2002, paragraph a of subdivision 8 as amended by chapter 95 of
12 the laws of 2000, is amended to read as follows:

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

14 (a) "Preferred source" shall mean:

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

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

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

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

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

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

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

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

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

23 c. "Prevailing market price" shall mean the predominate price at which
24 vendors of the same or similar product or service regularly engaged in
25 the business of selling such product or service offers to sell such
26 product or service under similar terms in the same market. "Under simi-
27 lar terms" shall mean, without limitation, procurements conducted with-
28 out competitive bidding.

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

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

41 ~~a. Commodities produced by the correctional industries program of the~~
42 ~~department of corrections and community supervision and provided to the~~
43 ~~state pursuant to subdivision two of section one hundred eighty-four of~~
44 ~~the correction law;~~

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

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

53 ~~d. Commodities and services produced by any qualified charitable non-~~
54 ~~profit-making agency for other severely disabled persons approved for~~
55 ~~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 commodities and services, delete at the request of a preferred source, commodities or services from, the list established by paragraph a of this subdivision. The council may make a non-binding recommendation to the relevant preferred source to delete a commodity or service from such list. Additions may be made only for new services or commodities, or for services or commodities that are substantially different from those reflected on said list for that provider. The decision to recommend the addition of services or commodities shall be based upon a review of relevant factors as determined by the council including the purpose of the preferred source program identified in subdivision two of this section, costs and benefits to be derived from such addition, and [~~shall include~~] an analysis by the office of general services conducted pursuant to subdivision six of this section. Unless the state procurement

1 council shall make a recommendation to the commissioner on any such
2 application within one hundred twenty days of receipt thereof, such
3 application shall be deemed recommended. In the event that the state
4 procurement council shall deny any such application, the commissioner,
5 or non-profit-making agency or designated facilitating entity which
6 submitted such application may, within thirty days of such denial,
7 appeal such denial to the commissioner of general services who shall
8 review all materials submitted to the state procurement council with
9 respect to such application and who may request such further information
10 or material as is deemed necessary. Within sixty days of receipt of all
11 information or materials deemed necessary, the commissioner shall render
12 a written final decision on the application which shall be binding upon
13 the applicant and upon the state procurement council. For those commod-
14 ities and services identified in sections C and E of the "preferred
15 source list of offerings" as of January first, two thousand seventeen,
16 any state agencies, political subdivisions, public benefit corporations
17 and other interested parties choosing to purchase from a preferred
18 source shall obtain price approved pursuant to subdivision six of this
19 section.

20 c. The list maintained by the office of general services pursuant to
21 paragraph a of this subdivision shall be revised as necessary to reflect
22 the additions and deletions of commodities and services approved by the
23 state procurement council.

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

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

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

38 (iii) When commodities are available, in the form, function and utili-
39 ty required by, a state agency or political subdivision or public bene-
40 fit corporation having their own purchasing agency, and such commodities
41 are not available pursuant to subparagraphs (i) and (ii) of this para-
42 graph, said commodities shall then be purchased from a qualified non-
43 profit-making agency for other severely disabled persons, a qualified
44 special employment program for mentally ill persons, or a qualified
45 veterans' workshop;

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

53 (i) state agencies or political subdivisions or public benefit corpo-
54 rations having their own purchasing agency shall make reasonable efforts
55 to provide a written notification describing their requirements to those
56 preferred sources, or to the facilitating entity identified in paragraph

1 e of subdivision six of this section, which provide the required
2 services as indicated on the official public list maintained by the
3 office of general services pursuant to subdivision three of this
4 section;

5 (ii) if, within ten days of the notification required by subparagraph
6 (i) of this paragraph, one or more preferred sources or facilitating
7 entities identified in paragraph e of subdivision six of this section
8 submit a notice of intent to provide the service in the form, function
9 and utility required, said service shall be purchased in accordance with
10 this section. If more than one preferred source or facilitating entity
11 identified in paragraph e of subdivision six of this section submits
12 notification of intent and meets the requirements, ~~costs~~ price shall
13 be the determining factor for purchase among the preferred sources;

14 (iii) if, within ten days of the notification required by subparagraph
15 (i) of this paragraph, no preferred source or facilitating entity iden-
16 tified in paragraph e of subdivision six of this section indicates
17 intent to provide the service, then the service shall be procured in
18 accordance with section one hundred sixty-three of this article. If,
19 after such period, a preferred source elects to bid on the service,
20 award shall be made in accordance with section one hundred sixty-three
21 of this article or as otherwise provided by law.

22 c. For the purposes of commodities and services produced by special
23 employment programs operated by facilities approved or operated by the
24 office of mental health, facilities within the office of mental health
25 shall be exempt from the requirements of subparagraph (i) of paragraph a
26 of this subdivision. When such requirements of the office of mental
27 health cannot be met pursuant to subparagraph (ii) or (iii) of paragraph
28 a of this subdivision, or paragraph b of this subdivision, the office of
29 mental health may purchase commodities and services which are compet-
30 itive in price and comparable in quality to those which could otherwise
31 be obtained in accordance with this article, from special employment
32 programs operated by facilities within the office of mental health or
33 other programs approved by the office of mental health.

34 5. Prices charged by the department of corrections and community
35 supervision. The prices to be charged for commodities produced by the
36 correctional industries program of the department of corrections and
37 community supervision shall be established by the commissioner of
38 corrections and community supervision in accordance with section one
39 hundred eighty-six of the correction law.

40 a. The prices established by the commissioner of corrections and
41 community supervision shall be based upon costs as determined pursuant
42 to this subdivision, but shall not exceed a reasonable fair market price
43 determined at or within ninety days before the time of sale. Fair market
44 price as used herein means the price at which a vendor of the same or
45 similar product or service who is regularly engaged in the business of
46 selling such product or service offers to sell such product or service
47 under similar terms in the same market. Costs shall be determined in
48 accordance with an agreement between the commissioner of corrections and
49 community supervision and the director of the budget.

50 b. A purchaser of any such product or service may, at any time prior
51 to or within thirty days of the time of sale, appeal the purchase price
52 in accordance with section one hundred eighty-six of the correction law,
53 on the basis that it unreasonably exceeds fair market price. Such an
54 appeal shall be decided by a majority vote of a three-member price
55 review board consisting of the director of the budget, the commissioner

1 of corrections and community supervision and the commissioner or their
2 representatives. The decision of the review board shall be final.

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

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

12 (ii) With respect to the purchase of services, it shall be the duty of
13 the commissioner to review and to approve the price of all services
14 offered that have a value over two hundred thousand dollars annually, to
15 be provided by the facilitating entity in response to the written scope
16 of services issued by the state agency, political subdivision or public
17 benefit corporation. The facilitating entities identified in paragraph e
18 of this subdivision shall provide to the commissioner, within a reason-
19 able time following the request, information to determine prevailing
20 market price. Such information shall include a price application and
21 either comparable pricing from private contracts, benchmarking provided
22 by an independent third party supplied by the facilitating entity, or
23 attestation by the state agency, political subdivision or public benefit
24 corporation of price reasonableness. Where appropriate, the provider of
25 such information may request that such information be exempted from
26 disclosure in accordance with the provisions of paragraph (a) of subdi-
27 vision five of section eighty-nine of the public officers law. State
28 agencies, political subdivisions, or public benefit corporations may
29 issue a request for the information to assist the commissioner in estab-
30 lishing prevailing market prices. This price review process shall be
31 concluded within ninety days of receipt thereof by the commissioner of a
32 price application. Otherwise, such application shall be deemed approved.

33 b. In determining and revising the prices of such commodities or
34 services, in instances where the prevailing market price cannot be
35 reasonably determined by comparable price information from private
36 contracts, third party benchmarking or attestation by the customer,
37 consideration shall be given to the reasonable costs of labor, materials
38 and overhead necessarily incurred by such preferred sources under effi-
39 cient methods of procurement, production, performance and adminis-
40 tration; however, the prices of such products and services shall be as
41 close to prevailing market price as practicable, but in no event greater
42 than fifteen percent above, the prevailing market prices among respon-
43 sive offerors for the same or equivalent commodities or services.

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

51 d. Such qualified charitable non-profit-making agencies for the blind
52 and other severely disabled may make purchases of materials, equipment
53 and supplies directly from the correctional industries program adminis-
54 tered by the commissioner of corrections and community supervision,
55 subject to such rules as may be established from time to time pursuant
56 to the correction law; provided that the qualified charitable non-pro-

1 fit-making agency for the blind or other severely disabled shall accept
2 sole responsibility for any payment due the department of corrections
3 and community supervision.

4 e. The commissioner of the office of children and family services
5 shall appoint the New York state commission for the blind, or other
6 non-profit-making agency, other than the agency representing the other
7 severely disabled, to facilitate the distribution of orders among quali-
8 fied non-profit-making charitable agencies for the blind. The state
9 commissioner of education shall appoint a non-profit-making agency,
10 other than the agency representing the blind, to facilitate the distrib-
11 ution of orders among qualified non-profit-making charitable agencies
12 for the other severely disabled and the veterans' workshops. The
13 ~~[state]~~ commissioner of mental health shall facilitate the distribution
14 of orders among qualified special employment programs operated or
15 approved by the office of mental health serving mentally ill persons.

16 f. The commissioner may request the state comptroller to conduct
17 audits and examinations to be made of all records, books and data of any
18 agency for the blind or the other severely disabled, any special employ-
19 ment program for mentally ill persons or any veterans' workshops quali-
20 fied under this section to determine the costs of manufacture or the
21 rendering of services and the manner and efficiency of production and
22 administration of such agency or special employment program or veterans'
23 workshop with relation to any product or services purchased by a state
24 agency or political subdivision or public benefit corporation and to
25 furnish the results of such audit and examination to the commissioner
26 for such action as he or she may deem appropriate under this section.

27 7. Partnering with preferred sources. The commissioner of the appro-
28 priate appointing agency as identified in paragraph e of subdivision six
29 of this section, shall ~~[conduct one or more pilot studies]~~ review and
30 approve applications provided by the facilitating entity whereby a
31 private vendor may be accorded preferred source status for purposes of
32 this section. ~~[The pilot studies shall seek to ascertain the benefits of~~
33 ~~partnerships between private industry and those entities accorded~~
34 ~~preferred source status as specified in this section.]~~ Preferred source
35 status under a partnering arrangement may only be accorded when a
36 proposal to a soliciting agency for commodities or services includes a
37 binding agreement with one or more of the non-profit-making entities
38 accorded preferred source status ~~[under]~~ identified in paragraph e of
39 subdivision six of this section. The binding agreement shall provide
40 that:

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

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

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

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

54 8. ~~[a. The commissioner of the appropriate appointing agency shall~~
55 ~~report by December thirty-first, two thousand four, to the governor, the~~
56 ~~chairperson of the senate finance committee, the chairperson of the~~

~~assembly ways and means committee and the director of the budget, the results and findings of each pilot study conducted, pursuant to subdivision seven of this section, and include recommendations for improving partnering with preferred sources.~~

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

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

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.