

# STATE OF NEW YORK

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165

2017-2018 Regular Sessions

## IN SENATE

(Prefiled)

January 4, 2017

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Introduced by Sen. RIVERA -- read twice and ordered printed, and when printed to be committed to the Committee on Local Government

AN ACT to amend the general municipal law and the state finance law, in relation to ensuring compliance with the competitive bidding law

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

1 Section 1. Short title. This act shall be known and may be cited as  
2 the "municipal competitive bidding enforcement act".

3 § 2. The general municipal law is amended by adding a new section  
4 103-h to read as follows:

5 § 103-h. Enforcement of competitive bidding law. 1. Definitions. (a)  
6 "Procurement action" means any transaction which is claimed to consti-  
7 tute a contract for public work involving an expenditure of more than  
8 twenty thousand dollars or a purchase contract involving the expenditure  
9 of more than ten thousand dollars which should be awarded to the lowest  
10 responsible bidder, as provided by section one hundred three of this  
11 article.

12 (b) "Good faith bidder" means any person who has submitted a bid in  
13 response to an advertisement for sealed bids, or who could submit a good  
14 faith bid on a procurement action.

15 2. Comptroller's opinions. Upon a complaint filed by a taxpayer of the  
16 political subdivision or by a good faith bidder, the state comptroller  
17 shall issue an opinion on whether a proposed procurement action by a  
18 political subdivision complies with the competitive bidding requirements  
19 of section one hundred three of this article. The complaint shall speci-  
20 fy the procurement action that is claimed to violate section one hundred  
21 three of this article. The taxpayer or good faith bidder shall serve a  
22 copy of the complaint on the political subdivision prior to serving the  
23 complaint on the comptroller. Upon the filing of a prima facie valid  
24 complaint with the comptroller, the comptroller shall notify the poli-

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

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1 tical subdivision. Upon receipt of such notice from the comptroller, the  
2 political subdivision may not proceed with the complaint of procurement  
3 action for a period of thirty days. In rendering his or her opinion, the  
4 comptroller may consult with the office of general services as to the  
5 reasonableness and validity of any bid specifications. The comptroller  
6 shall issue a written opinion pursuant to this subdivision within thirty  
7 days of such notice to the political subdivision and shall promptly  
8 serve copies of the opinion on the political subdivision and on the  
9 complaining party.

10 3. Attorney general. If the comptroller's opinion is that the procure-  
11 ment action would violate section one hundred three of this article, the  
12 comptroller shall transmit a copy of the opinion to the attorney gener-  
13 al. Notwithstanding any other provision of law, the attorney general is  
14 authorized to bring a special proceeding in the supreme court to have a  
15 procurement action enjoined or declared null and void on the ground that  
16 it is in violation of section one hundred three of this article.

17 4. Damages to good faith bidder. A good faith bidder may bring an  
18 action in the supreme court to recover damages and attorney's fees from  
19 a political subdivision, which engages in a violation of section one  
20 hundred three of this article. The court shall award damages and attor-  
21 ney's fees if the court finds that the good faith bidder would have been  
22 the lowest responsible bidder, but for the political subdivision's  
23 violation of section one hundred three of this article. The court is  
24 authorized in any such action to declare an illegally awarded contract  
25 to be null and void.

26 (a) If the comptroller has issued an opinion that the procurement  
27 action would be in violation of section one hundred three of this arti-  
28 cle and the political subdivision has thereafter proceeded with the  
29 procurement action, the measure of damages shall be three times the good  
30 faith bidder's lost profits.

31 (b) If the comptroller has not issued an opinion that the procurement  
32 action would be in violation of section one hundred three of this arti-  
33 cle, the measure of damages shall be the lesser of (i) the good faith  
34 bidder's lost profits and (ii) the difference between the price of the  
35 nullified contract and any amount that the court awards to the person  
36 who performed on the nullified contract.

37 5. Civil penalty. Any person who shall wilfully and intentionally  
38 violate the competitive bidding requirements of section one hundred  
39 three of this article shall be personally liable for a civil penalty of  
40 not more than one thousand dollars. In a proceeding brought pursuant to  
41 this section, the comptroller's opinions and audits may be admitted into  
42 evidence on the issue of the respondent's state of mind, provided that  
43 (a) the opinion or audit was issued prior to the alleged violation, (b)  
44 the opinion or audit was issued no more than ten years prior to the  
45 alleged violation, and (c) the opinion or audit concerned the same kind  
46 of item or same kind of practice as the alleged violation.

47 6. Complaint fee. Whenever the comptroller accepts a complaint for  
48 filing pursuant to this section, the comptroller shall require and  
49 collect a fee of one hundred dollars, which shall be paid into the state  
50 treasury and which shall, so far as is necessary, be appropriated annu-  
51 ally by the legislature to the comptroller to be used in implementing  
52 this article.

53 § 3. Section 103 of the general municipal law is amended by adding a  
54 new subdivision 14 to read as follows:

55 14. Except as otherwise expressly authorized by this article, a poli-  
56 tical subdivision shall not require that bids conform to unduly restric-

tive specifications. All specifications shall be drafted so as to promote overall economy for the purposes intended and to encourage competition in satisfying the needs of the political subdivision. A brand name may be used as a specification only if the specification clearly states that the brand name or equivalent is acceptable. Where a brand name or equivalent specification is used in a bid solicitation, the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance and characteristics desired and is not intended to limit or restrict competition. In any opinion, proceeding or action brought pursuant to section one hundred three-h of this article, a bid specification developed and provided by the office of general services shall be deemed valid.

§ 4. Subdivision 2 of section 103 of the general municipal law, as amended by section 1 of chapter 367 of the laws of 2014, is amended to read as follows:

2. Advertisement for bids and offers shall be published in the official newspaper or newspapers, if any, or otherwise in a newspaper or newspapers designated for such purpose and may be published in the procurement opportunities newsletter pursuant to article four-C of the economic development law. Such advertisement shall contain a statement of the time when and place where all bids received pursuant to such notice will be publicly opened and read and where the identity of all offerers will be publicly disclosed, and the designation of the receiving device if the political subdivision or district has authorized the receipt of bids and offers in an electronic format. Such board or agency may by resolution designate any officer or employee to open the bids and offers at the time and place specified in the notice. Such designee shall make a record of such bids and offers in such form and detail as the board or agency shall prescribe and present the same at the next regular or special meeting of such board or agency. All bids received shall be publicly opened and read at the time and place so specified and the identity of all offerers shall be publicly disclosed at the time and place so specified. All bids received and opened shall be public records and shall be available for public inspection and copying. At least five days shall elapse between the first publication of such advertisement and the date so specified for the opening and reading of bids and offers.

§ 5. Subdivision 2 of section 103 of the general municipal law, as amended by section 2 of chapter 367 of the laws of 2014, is amended to read as follows:

2. Advertisement for bids and offers shall be published in the official newspaper or newspapers, if any, or otherwise in a newspaper or newspapers designated for such purpose and may be published in the procurement opportunities newsletter pursuant to article four-C of the economic development law. Such advertisement shall contain a statement of the time when and place where all bids received pursuant to such notice will be publicly opened and read and where the identity of all offerers will be publicly disclosed. Such board or agency may by resolution designate any officer or employee to open the bids and offers at the time and place specified in the notice. Such designee shall make a record of such bids and offers in such form and detail as the board or agency shall prescribe and present the same at the next regular or special meeting of such board or agency. All bids received shall be publicly opened and read at the time and place so specified and the identity of all offerers shall be publicly disclosed at the time and

place so specified. All bids received and opened shall be public records and shall be available for public inspection and copying. At least five days shall elapse between the first publication of such advertisement and the date so specified for the opening and reading of bids and offers.

§ 6. Subparagraph 1 of paragraph (b) of subdivision 4 of section 35 of the general municipal law, as amended by chapter 692 of the laws of 1989, is amended to read as follows:

(1) Not later than ninety days after presentation to the governing board of a report of examination performed by the office of the state comptroller, or receipt by the governing board of any report of an external audit performed by an independent public accountant or any management letter in conjunction with such an audit, the governing board may, in its discretion, provide to the comptroller, and file in the office of the clerk, or with the secretary if there is no clerk, of the municipal corporation, industrial development agency, district, agency or activity, a written response to the findings and recommendations, if any, in the report or letter. Provided, however, that if such report or letter contains a finding that the competitive bidding requirements of section one hundred three of this chapter were violated, the governing board must file a written response. In the case of municipal corporations, industrial development agency, districts, agencies or activities subject to examination by the commissioner of education, any written response shall also be provided to such commissioner.

§ 7. The state finance law is amended by adding a new section 164-a to read as follows:

§ 164-a. Providing bid specifications to political subdivisions. The commissioner of general services shall provide to any political subdivision, at no charge, any specification that the commissioner has developed for items to be let for bids in purchase contracts. The commissioner may develop additional specifications at the request of any political subdivision and may provide such specifications to the political subdivision and may charge the political subdivision for the cost of developing such specifications.

§ 8. If any clause, sentence, paragraph, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 9. This act shall take effect on the first of January next succeeding the date on which it shall have become a law; provided, however, the amendments to subdivision 2 of section 103 of the general municipal law made by section four of this act shall not affect the expiration and reversion of such subdivision pursuant to subdivision (a) of section 41 of part X of chapter 62 of the laws of 2003, as amended, when upon such date the provisions of section five of this act shall take effect.