STATE OF NEW YORK

5096--B

2017-2018 Regular Sessions

IN SENATE

March 7, 2017

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:

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

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

§ 2. Section 162 of the state finance law, as added by chapter 83 of the laws of 1995, subdivision 2 as amended by chapter 501 of the laws of 2002, paragraph a of subdivision 2, paragraphs a and b of subdivision 3, subparagraph (i) of paragraph a of subdivision 4, subdivision 5, and paragraphs a and d of subdivision 6 as amended by section 164 of subpart B of part C of chapter 62 of the laws of 2011, paragraph b of subdivision 2 as amended by chapter 519 of the laws of 2003, subparagraph (iii) of paragraph b of subdivision 4 as amended by chapter 430 of the laws of 1997, paragraph e of subdivision 6 as amended by chapter 265 of the laws 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

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

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

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

a. (i) When commodities are available, in the form, function and utility required by a state agency, public authority, commission, public benefit corporation or political subdivision, said commodities must be purchased first from the correctional industries program of the department of corrections and community supervision;

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

(iii) When commodities are available, in the form, function and utility required by, a state agency or political subdivision or public benefit corporation having their own purchasing agency, and such commodities are not available pursuant to subparagraphs (i) and (ii) of this paragraph, said commodities shall then be purchased from a qualified non-profit-making agency for other severely disabled persons, a qualified

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

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

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

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

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

c. For the purposes of commodities and services produced by special employment programs operated by facilities approved or operated by the office of mental health, facilities within the office of mental health shall be exempt from the requirements of subparagraph (i) of paragraph a of this subdivision. When such requirements of the office of mental health cannot be met pursuant to subparagraph (ii) or (iii) of paragraph a of this subdivision, or paragraph b of this subdivision, the office of mental health may purchase commodities and services which are competitive in price and comparable in quality to those which could otherwise be obtained in accordance with this article, from special employment programs operated by facilities within the office of mental health or other programs approved by the office of mental health.

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

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

price as used herein means the price at which a vendor of the same or similar product or service who is 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. Costs shall be determined in accordance with an agreement between the commissioner of corrections and community supervision and the director of the budget.

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

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

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

(ii) With respect to the purchase of services, it shall be the duty of the commissioner to review and to approve the price of all services offered that have a value over two hundred thousand dollars annually, to be provided by the facilitating entity in response to the written scope of services issued by the state agency, political subdivision or public benefit corporation. The facilitating entities identified in paragraph e of this subdivision shall provide to the commissioner, within a reasonable time following the request, information to determine prevailing market price. Such information shall include a price application and either comparable pricing from private contracts, benchmarking provided by an independent third party supplied by the facilitating entity, or attestation by the state agency, political subdivision or public benefit corporation of price reasonableness. Where appropriate, the provider of such information may request that such information be exempted from disclosure in accordance with the provisions of paragraph (a) of subdivision five of section eighty-nine of the public officers law. State agencies, political subdivisions, or public benefit corporations may issue a request for the information to assist the commissioner in establishing prevailing market prices. Subcontracting a portion of the work under the preferred source program shall be authorized provided that: the annual value of the subcontract does not exceed authorized thresholds for discretionary purchase levels; and the service provided through a subcontract is integral to the service being delivered by the providing preferred source agency or partnership. When the subcontracted work is not a preferred source service, it must be sourced from a centralized contract when available, unless a better value can be achieved from another source. If the subcontract is sourced outside a centralized contract the subcontracting shall be sourced competitively by the facilitating agency or the performing preferred source provider or partner. All direct labor hours performed by a subcontractor shall be included in the required value added labor ratio requirements. This price review process shall be concluded within ninety days of receipt thereof by the

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

b. In determining and revising the prices of such commodities or services, **in instances where the prevailing market price cannot be reasonably determined by comparable price information from private contracts, third party benchmarking or attestation by the customer,** consideration shall be given to the reasonable costs of labor, materials and overhead necessarily incurred by such preferred sources under efficient methods of procurement, production, performance and administration; however, the prices of such products and services shall be as close to prevailing market price as practicable, but in no event greater than fifteen percent above, the prevailing market prices among responsive offerors for the same or equivalent commodities or services.

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

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

e. The commissioner of the office of children and family services shall appoint the New York state commission for the blind, or other non-profit-making agency, other than the agency representing the other severely disabled, to facilitate the distribution of orders among qualified non-profit-making charitable agencies for the blind. The state commissioner of education shall appoint a non-profit-making agency, other than the agency representing the blind, to facilitate the distribution of orders among qualified non-profit-making charitable agencies for the other severely disabled and the veterans' workshops. The [~~state~~] commissioner of mental health shall facilitate the distribution of orders among qualified special employment programs operated or approved by the office of mental health serving mentally ill persons.

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

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

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

(i) The preferred source shall perform the majority of the work necessary to such offering, and

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

(iii) The partnering proposal offers the solicited services or commodities at a price less than the price that otherwise would be charged by [~~a~~] **the** preferred source **that is a party to the partnership application, or**

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

8. [~~a. The commissioner of the appropriate appointing agency shall report by December thirty-first, two thousand four, to the governor, the 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)~~] **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.

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