STATE OF NEW YORK

9527

IN ASSEMBLY

January 24, 2020

Introduced by M. of A. ZEBROWSKI -- (at request of the State Comptroller) -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the state finance law and the legislative law, in relation to participation by state agencies in a system used by the comptroller to compile vendor responsibility information; in relation to defining information technology for procurement purposes; in relation to authorizing the commissioner of the office of general services and state agencies to develop alternative procurement methods not otherwise authorized by law under certain circumstances; in relation to authorizing competitive negotiation concluding with a best and final offer; in relation to clarifying the use of best and final offers for invitations for bids and requests for proposals for goods, services and technology; in relation to clarifying the use of contracts let by another governmental agency; in relation to clarifying the valuation of non-cash contracts by the state comptroller; and in relation to conforming the definition of restricted period

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

Section 1. The state finance law is amended by adding a new section 163-c to read as follows:

§ 163-c. Vendor responsibility; online system participation. 1. Definitions. As used in this section the following terms shall have the following meanings:

a. "Enrollment" shall mean the establishment of an online services account with the state comptroller, including, but not limited to, the creation of a unique user identification and password. Enrollment provides a user access to the system.

b. "Online services" shall mean the services provided electronically and securely by the state comptroller for the benefit of New York's customers, clients and business partners. Such online services may be expanded and enhanced as technology allows.

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

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c. "State agency" or "state agencies" shall mean all state departments, boards, commissions, offices or institutions. Such term shall not include the legislature or the judiciary.

d. "State contract" or "contract" shall mean and include any written agreement for the acquisition of goods, services or construction of any kind between a vendor and a state agency, or a written agreement or other instrument wherein a state agency agrees to give consideration other than the payment of money as contemplated in subdivision three of section one hundred twelve of this chapter.

e. "Subcontractor" shall mean an individual, sole proprietorship, partnership, joint venture or corporation, which is engaged in a subcontract by a vendor pursuant to a state contract and such subcontract is valued at one hundred thousand dollars or more and is known at the time of the award of the state contract to the vendor.

f. "System" shall mean the on-line software, data and related resources maintained by the comptroller to compile vendor responsibility information.

g. "Terms of service" shall mean the terms and conditions developed by the state comptroller and agreed to by each authorized user prior to gaining access to online services. Terms of service shall include a description of the services, obligations of the state comptroller and the authorized user, a description of the state comptroller's privacy policy, authorized user code of conduct, and indemnity for the state comptroller and the state of New York. Terms of service are subject to change as prescribed by the state comptroller. Authorized users may view changes via the state comptroller's internet site.

h. "Vendor" shall include any person, partnership, corporation or limited liability company or any business entity bidding on a state procurement or otherwise awarded a state contract.

i. "Vendor responsibility" shall mean that a vendor has the capacity to fully perform the terms of a contract and the integrity and business ethics to justify an award of public dollars. A determination of vendor responsibility shall include consideration of factors including, but not limited to, financial and organizational capacity, legal authority, integrity and past performance on governmental contracts.

2. a. State agencies shall enroll with the state comptroller to access the system maintained by the comptroller to compile vendor responsibility information. State agencies shall agree to and abide by the terms of service for such system as the state comptroller deems necessary.

b. For each contract or subcontract between a vendor and a subcontractor where, pursuant to law or by direction of the state agency, disclosure for vendor responsibility is required, the state agency shall:

(i) provide notice to vendors bidding for procurements administered by the state agency that any vendor and subcontractor, submitting a vendor responsibility questionnaire shall do so via the system maintained to compile vendor responsibility information;

(ii) provide vendors with instructions on how to electronically access the system and provide contact information for assistance with enrollment. This information shall be made available prior to the time when vendors are required to submit disclosure for vendor responsibility; and

(iii) access the system to obtain and evaluate any data submitted by a vendor proposed for contract award. State agencies shall ensure the submission filed by the vendor meets such system's timeliness standards. Such provisions apply regardless of whether the contract is subject to pre-review and approval by the state comptroller.

c. For contracts where vendor disclosure is not otherwise required, the state agency at its discretion, may require vendors bidding on procurements, and/or subcontractors, to submit a vendor responsibility questionnaire via the system. Nothing contained in this paragraph shall be construed to alter the existing authority of the state comptroller to require the submission of a vendor responsibility questionnaire in conjunction with his or her duty to review and approve state contracts prior to such contracts becoming effective.

d. State agencies shall provide access to the system to users within their organization, as deemed appropriate by the head of the state agency or his or her designee. State agency users provided with such access shall be those individuals, who, as part of their official job duties, are required to assess and/or review vendor responsibility for the agency's contracts.

§ 2. Subdivisions 7 and 10 of section 160 of the state finance law, subdivision 7 as amended by section 30 of part L of chapter 55 of the laws of 2012 and subdivision 10 as added by chapter 83 of the laws of 1995, are amended to read as follows:

7. "Service" or "services" means the performance of a task or tasks and may include a material good or a quantity of material goods, and which is the subject of any purchase or other exchange. For the purposes of this article, information technology shall be deemed a service. Services, as defined in this article, shall not apply to those contracts for architectural, engineering or surveying services, or those contracts approved in accordance with article eleven-B of this chapter.

10. "[~~Technology~~] Information technology" means either a good or a service or a combination thereof, [~~that results in a technical method of achieving a practical purpose or in improvements in productivity~~] used in the application of any computer or electronic information equipment or interconnected system that is used in the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data including, but not limited to, hardware, software, firmware, programs, systems, networks, infrastructure, media, and related material used to automatically and electronically collect, receive, access, transmit, display, store, record, retrieve, analyze, evaluate, process, classify, manipulate, manage, assimilate, control, communicate, exchange, convert, converge, interface, switch, or disseminate data of any kind or form. Goods may be either new or used.

§ 3. Paragraphs g and i of subdivision 2 of section 161 of the state finance law, as added by chapter 83 of the laws of 1995, are amended to read as follows:

g. Consult with and advise the commissioner on strategic information technology investments that will facilitate electronic access to the terms and conditions of existing procurement contracts, promote electronic commerce including, but not limited to, payment to vendors, promote and enhance the efficiency of the procurement of products and services by or for state agencies and produce useful information that supports state procurement operations, management, analysis and decision making including, but not limited to, data concerning the status and use of procurement contracts and the number and type of contracts and award recipients;

i. Establish and, from time to time, amend guidelines for the procurement of services and information technology in accordance with the provisions of this article. Such guidelines shall ensure the wise and prudent use of public money in the best interest of the taxpayers of the

state; guard against favoritism, improvidence, extravagance, fraud and corruption; and ensure that service contracts are awarded on the basis of best value, including, but not limited to, the following criteria: quality, cost, and efficiency;

§ 4. Paragraph k of subdivision 1 and subdivision 6 of section 163 of the state finance law, paragraph k of subdivision 1 as added by section 36 of part L of chapter 55 of the laws of 2012, subdivision 6 as amended by chapter 96 of the laws of 2019, are amended to read as follows:

k. "Authorized user" or "non-state agency purchaser" means (i) any officer, body or agency of the state or of a political subdivision or a district therein, or fire company or volunteer ambulance service as such are defined in section one hundred of the general municipal law, to make purchases of commodities, services and **information** technology through the office of general services' centralized contracts, pursuant to the provisions of section one hundred four of the general municipal law; (ii) any county extension service association as authorized under subdivision eight of section two hundred twenty-four of the county law; (iii) any association or other entity as specified in and in accordance with section one hundred nine-a of the general municipal law; (iv) any association, consortium or group of privately owned or municipal, federal or state owned or operated hospitals, medical schools, other health related facilities or voluntary ambulance services, which have entered into a contract and made mutual arrangements for the joint purchase of commodities, services and **information** technology pursuant to section twenty-eight hundred three-a of the public health law; (v) any institution for the instruction of the deaf or of the blind listed in section forty-two hundred one of the education law; (vi) any qualified non-profit-making agency for the blind approved by the commissioner of the office of children and family services or the office of temporary and disability assistance; (vii) any qualified charitable non-profit-making agency for the severely disabled approved by the commissioner of education; (viii) any hospital or residential health care facility as defined in section twenty-eight hundred one of the public health law; (ix) any private not-for-profit mental hygiene facility as defined in section 1.03 of the mental hygiene law; (x) any public authority or public benefit corporation of the state, including the port authority of New York and New Jersey and the interstate environmental commission; (xi) any public library, association library, library system, cooperative library system, the New York Library Association, and the New York State Association of Library Boards or any other library except those which are operated by for profit entities; (xii) any other association or entity as specified in state law, to make purchases of commodities, services and **information** technology through the office of general services' centralized contracts. Such qualified non-profit-making agencies for the blind and severely disabled may make purchases from the correctional industries program of the department of corrections and community supervision subject to rules pursuant to the correction law.

6. Discretionary buying thresholds. Pursuant to guidelines established by the state procurement council: the commissioner may purchase services and commodities in an amount not exceeding eighty-five thousand dollars without a formal competitive process; state agencies may purchase services and commodities in an amount not exceeding fifty thousand dollars without a formal competitive process; and state agencies may purchase commodities or services from small business concerns or those certified pursuant to articles fifteen-A and seventeen-B of the executive law, or commodities or **information** technology that are recycled or

remanufactured in an amount not exceeding five hundred thousand dollars without a formal competitive process and for commodities that are food, including milk and milk products, grown, produced or harvested in New York state in an amount not to exceed two hundred thousand dollars, without a formal competitive process.

§ 5. Section 163 of the state finance law is amended by adding a new subdivision 16 to read as follows:

16. Alternative procurement methods for the acquisition of non-construction related commodities, services and information technology. a. When the commissioner or a state agency determines that it is in the best interest of the state to develop a procurement method not authorized by this section for non-construction related commodities, services and information technology, the commissioner or state agency is hereby authorized to develop and use such method for a specific contract award. Such determination shall be made in writing and shall include documentation for the procurement record that such alternative procurement method: (i) would serve the interest of the state better than other methods currently available under this section; (ii) can be applied on a competitive, fair and equitable basis; and (iii) contains an appropriate evaluation methodology that considers both cost and qualitative evaluation factors. Such alternative procurement method shall be subject to all other applicable provisions of this section. The commissioner or a state agency may not undertake an alternative procurement method until the comptroller has determined that the proposed alternative procurement method is in the best interest of the state; can be applied on a competitive, fair and equitable basis; and utilizes an appropriate evaluation methodology that considers both cost and qualitative evaluation factors.

b. When using an alternative procurement method authorized by this subdivision, the commissioner or agency shall include in its solicitation a detailed description of the proposed method of award. In advance of the initial receipt of offers or bids, the commissioner or state agency shall determine and document in the procurement record the evaluation criteria and process to be used in the determination of the specific contract award and the process by which the evaluation and selection shall be conducted. In addition to the requirements set forth in paragraph g of subdivision nine of this section, the procurement record shall document the basis upon which the agency has determined that potential vendors will be able to respond with viable bids to such alternative procurement.

c. Notwithstanding the provisions of subdivision five of section three hundred fifty-five of the education law to the contrary or section sixty-two hundred eighteen of the education law, before any contract awarded under this section which exceeds fifty thousand dollars in amount becomes effective it must be approved by the comptroller and filed in his or her office.

d. For each procurement awarded pursuant to this section, the commissioner or state agency shall submit to the governor, the comptroller and the heads of the fiscal committees of each house of the state legislature no later than the mid-point of the initial term of the resultant contract a report assessing the validity of the procurement method and comparing its results to procurement methods for commodities and services or information technology.

§ 6. Section 163 of the state finance law is amended by adding a new subdivision 17 to read as follows:

17. Competitive negotiation. a. Where the basis of award is best value and after completing an initial evaluation and scoring, a state agency

may choose to either make an award to the best value offerer pursuant to subdivision four of this section or undertake competitive negotiations with all offerers of proposals susceptible of being selected for contract award, so long as the agency reserves the right to conduct such competitive negotiations in the solicitation. The negotiations shall be conducted as provided in paragraph d of this subdivision.

b. Competitive negotiation may only be used where:

(i) at least two offerers are deemed susceptible of being selected for contract award;

(ii) in the event that the solicitation includes optional components, the solicitation shall require all offerers to provide a proposal for all options or otherwise be deemed nonresponsive; and

(iii) the agency has determined that use of competitive negotiation will maximize the agency's ability to obtain best value, based on the agency's need and the specifications set forth in the solicitation.

c. The agency must document in the procurement record and in advance of the initial receipt of offers:

(i) the methodology, which shall be quantifiable and based on a comparison of the proposals' price and technical merit, that will be employed to arrive at a competitive range that will determine which proposals are to be considered susceptible to award; and

(ii) a fair and impartial negotiation procedure, formulated with the goal of ensuring sustained competition until an award is rendered and obtaining the best value for the state.

d. The agency shall conduct written or oral negotiations with all responsible offerers who submit proposals in the competitive range. In the course of such negotiations, the agency shall:

(i) advise the offerer of ways in which its proposal may be improved so that the offerer is given an opportunity to better meet the agency's needs;

(ii) clarify any uncertainties, ambiguities or non-material deviations in the proposal;

(iii) advise the offerer of any technical components in its proposal that may not be necessary to satisfy the agency's requirements and request modifications as appropriate;

(iv) provide the offerer a reasonable opportunity to submit any cost, technical or other revisions to its proposal in response to issues identified during negotiations; and

(v) document any oral negotiations for the procurement record.

e. Negotiations may be tailored to each offerer's proposal provided, however, such negotiations shall be conducted with each offerer within the competitive range without disclosing information concerning any other offerers' proposals or the evaluation process. Negotiations shall culminate in a technical solution from each offerer remaining within the competitive range that is deemed acceptable to meet the agency's need as set forth in the solicitation. After discussion of these technical solutions is completed, the agency shall solicit a best and final price proposal from all offerers within the competitive range. The best and final price solicitation shall ensure that all offerers are afforded an equal opportunity to respond within a specified period of time.

f. Where an agency chooses to undertake competitive negotiations instead of making a best value award after an initial evaluation and scoring, the final award shall be made to the lowest responsible offerer after receiving a best and final price on a revised acceptable proposal.

§ 7. Subdivision 9 of section 163 of the state finance law is amended by adding a new paragraph c-1 to read as follows:

c-1. Where a state agency determines that non-material changes to the specifications as set forth in the solicitation would be in the best interest of the state and, when provided for in the solicitation, state agencies may request best and final offers, which shall be in writing and solicited in the same manner from all offerers determined to be susceptible of being selected for contract award, with the intent of allowing an offerer to revise its cost; provided, however, that a state agency may not make a modification to the solicitation if such modification would prejudice any bidder or potential bidder and, provided further, that no best and final offer may be accepted or considered by a state agency unless such best and final offer is submitted in response to a request by the state agency.

§ 8. Paragraph e of subdivision 10 of section 163 of the state finance law, as amended by chapter 137 of the laws of 2008, is amended to read as follows:

e. The commissioner may authorize purchases required by state agencies or other authorized purchasers by letting a contract pursuant to a written agreement, or by approving the use of a contract let by any department, agency or instrumentality of the United States government and/or any department, agency, office, political subdivision or instrumentality of any state or states. A state agency purchaser shall document in the procurement record its rationale for the use of a contract let by any department, agency or instrumentality of the United States government or any department, agency, office, political subdivision or instrumentality of any other state or states. Such rationale shall include, but need not be limited to, a determination of need, a consideration of the procurement method by which the contract was awarded, an analysis of alternative procurement sources including an explanation why a competitive procurement or the use of a centralized contract let by the commissioner is not in the best interest of the state, and the reasonableness of cost. **The authority to use a contract let by another governmental entity pursuant to this paragraph is intended to benefit the state by using contracts in place that provide for the same service or commodity sought by a state agency at a price determined to be reasonable by the state agency. Such contracts are not intended to be used primarily to avoid competitive bidding. Use of multiple award contracts pursuant to this paragraph shall follow the same basis of selection among the multiple awardees as was prescribed by the original contracting governmental entity.**

§ 9. Subdivision 3 of section 112 of the state finance law, as amended by section 2-c of part F of chapter 57 of the laws of 2016, is amended to read as follows:

3. A contract or other instrument wherein the state or any of its officers, agencies, boards or commissions agrees to give a consideration other than the payment of money, when the value or reasonably estimated value of such consideration exceeds twenty-five thousand dollars, shall not become a valid enforceable contract unless such contract or other instrument shall first be approved by the comptroller and filed in his office. **For purposes of this subdivision, where consideration cannot be determined in terms of monetary value, it shall be valued in terms of intrinsic value.**

§ 10. Subdivision (m) of section 1-c of the legislative law, as added by chapter 1 of the laws of 2005, is amended to read as follows:

(m) The term "restricted period" shall mean the period of time commencing with the earliest **posting, on a governmental entity's website, in a newspaper of general circulation, or in the procurement**

opportunities newsletter in accordance with article four-C of the economic development law of written notice, advertisement or solicitation of a request for proposal, invitation for bids, or solicitation of proposals, or any other method **provided for by law or regulation** for soliciting a response from offerers intending to result in a procurement contract with a [~~state agency, either house of the state legislature, the unified court system, or a municipal agency, as that term is defined by paragraph (ii) of subdivision (s) of this section, and ending with the final contract award and approval by the state agency, either house of the state legislature, the unified court system, or a municipal agency, as that term is defined by paragraph (ii) of subdivision (s) of this section,~~] **governmental entity and ending with the final contract award and approval by the governmental entity** and, where applicable, the state comptroller. **For the purposes of this subdivision, "governmental entity" shall have the same meaning as paragraph a of subdivision one of section one hundred thirty-nine-j of the state finance law.**

§ 11. This act shall take effect immediately; provided, however, section one of this act shall take effect on the one hundred eightieth day after it shall have become a law; provided, further, however, that the provisions of sections four, five, six, seven, eight and nine of this act shall apply to any procurement initiated on or after such date; provided, further however, that the amendments to section 163 of the state finance law made by sections four, five, six, seven and eight of this act shall not affect the repeal of such section as provided in subdivision 5 of section 362 of chapter 83 of the laws of 1995, as amended, and shall be deemed repealed therewith.