

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:

1 Section 1. The state finance law is amended by adding a new section
2 163-c to read as follows:

3 § 163-c. Vendor responsibility; online system participation. 1. Definitions. As used in this section the following terms shall have the
4 following meanings:
5

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

10 b. "Online services" shall mean the services provided electronically
11 and securely by the state comptroller for the benefit of New York's
12 customers, clients and business partners. Such online services may be
13 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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1 c. "State agency" or "state agencies" shall mean all state depart-
2 ments, boards, commissions, offices or institutions. Such term shall not
3 include the legislature or the judiciary.

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

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

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

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

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

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

36 2. a. State agencies shall enroll with the state comptroller to access
37 the system maintained by the comptroller to compile vendor responsibil-
38 ity information. State agencies shall agree to and abide by the terms of
39 service for such system as the state comptroller deems necessary.

40 b. For each contract or subcontract between a vendor and a subcontrac-
41 tor where, pursuant to law or by direction of the state agency, disclo-
42 sure for vendor responsibility is required, the state agency shall:

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

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

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

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

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

15 § 2. Subdivisions 7 and 10 of section 160 of the state finance law,
16 subdivision 7 as amended by section 30 of part L of chapter 55 of the
17 laws of 2012 and subdivision 10 as added by chapter 83 of the laws of
18 1995, are amended to read as follows:

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

26 10. "~~Technology~~ Information technology" means either a good or a
27 service or a combination thereof, [~~that results in a technical method of~~
28 ~~achieving a practical purpose or in improvements in productivity~~] used
29 in the application of any computer or electronic information equipment
30 or interconnected system that is used in the acquisition, storage,
31 manipulation, management, movement, control, display, switching, inter-
32 change, transmission, or reception of data including, but not limited
33 to, hardware, software, firmware, programs, systems, networks, infras-
34 tructure, media, and related material used to automatically and elec-
35 tronically collect, receive, access, transmit, display, store, record,
36 retrieve, analyze, evaluate, process, classify, manipulate, manage,
37 assimilate, control, communicate, exchange, convert, converge, inter-
38 face, switch, or disseminate data of any kind or form. Goods may be
39 either new or used.

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

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

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

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

5 § 4. Paragraph k of subdivision 1 and subdivision 6 of section 163 of
6 the state finance law, paragraph k of subdivision 1 as added by section
7 36 of part L of chapter 55 of the laws of 2012, subdivision 6 as amended
8 by chapter 96 of the laws of 2019, are amended to read as follows:

9 k. "Authorized user" or "non-state agency purchaser" means (i) any
10 officer, body or agency of the state or of a political subdivision or a
11 district therein, or fire company or volunteer ambulance service as such
12 are defined in section one hundred of the general municipal law, to make
13 purchases of commodities, services and information technology through
14 the office of general services' centralized contracts, pursuant to the
15 provisions of section one hundred four of the general municipal law;
16 (ii) any county extension service association as authorized under subdivi-
17 sion eight of section two hundred twenty-four of the county law; (iii)
18 any association or other entity as specified in and in accordance with
19 section one hundred nine-a of the general municipal law; (iv) any asso-
20 ciation, consortium or group of privately owned or municipal, federal or
21 state owned or operated hospitals, medical schools, other health related
22 facilities or voluntary ambulance services, which have entered into a
23 contract and made mutual arrangements for the joint purchase of commod-
24 ities, services and information technology pursuant to section twenty-
25 eight hundred three-a of the public health law; (v) any institution for
26 the instruction of the deaf or of the blind listed in section forty-two
27 hundred one of the education law; (vi) any qualified non-profit-making
28 agency for the blind approved by the commissioner of the office of chil-
29 dren and family services or the office of temporary and disability
30 assistance; (vii) any qualified charitable non-profit-making agency for
31 the severely disabled approved by the commissioner of education; (viii)
32 any hospital or residential health care facility as defined in section
33 twenty-eight hundred one of the public health law; (ix) any private
34 not-for-profit mental hygiene facility as defined in section 1.03 of the
35 mental hygiene law; (x) any public authority or public benefit corpo-
36 ration of the state, including the port authority of New York and New
37 Jersey and the interstate environmental commission; (xi) any public
38 library, association library, library system, cooperative library
39 system, the New York Library Association, and the New York State Associ-
40 ation of Library Boards or any other library except those which are
41 operated by for profit entities; (xii) any other association or entity
42 as specified in state law, to make purchases of commodities, services
43 and information technology through the office of general services'
44 centralized contracts. Such qualified non-profit-making agencies for the
45 blind and severely disabled may make purchases from the correctional
46 industries program of the department of corrections and community super-
47 vision subject to rules pursuant to the correction law.

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

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

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

8 16. Alternative procurement methods for the acquisition of non-con-
9 struction related commodities, services and information technology. a.
10 When the commissioner or a state agency determines that it is in the
11 best interest of the state to develop a procurement method not author-
12 ized by this section for non-construction related commodities, services
13 and information technology, the commissioner or state agency is hereby
14 authorized to develop and use such method for a specific contract award.
15 Such determination shall be made in writing and shall include documenta-
16 tion for the procurement record that such alternative procurement meth-
17 od: (i) would serve the interest of the state better than other methods
18 currently available under this section; (ii) can be applied on a compet-
19 itive, fair and equitable basis; and (iii) contains an appropriate eval-
20 uation methodology that considers both cost and qualitative evaluation
21 factors. Such alternative procurement method shall be subject to all
22 other applicable provisions of this section. The commissioner or a state
23 agency may not undertake an alternative procurement method until the
24 comptroller has determined that the proposed alternative procurement
25 method is in the best interest of the state; can be applied on a compet-
26 itive, fair and equitable basis; and utilizes an appropriate evaluation
27 methodology that considers both cost and qualitative evaluation factors.

28 b. When using an alternative procurement method authorized by this
29 subdivision, the commissioner or agency shall include in its solicita-
30 tion a detailed description of the proposed method of award. In advance
31 of the initial receipt of offers or bids, the commissioner or state
32 agency shall determine and document in the procurement record the evalu-
33 ation criteria and process to be used in the determination of the
34 specific contract award and the process by which the evaluation and
35 selection shall be conducted. In addition to the requirements set forth
36 in paragraph g of subdivision nine of this section, the procurement
37 record shall document the basis upon which the agency has determined
38 that potential vendors will be able to respond with viable bids to such
39 alternative procurement.

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

46 d. For each procurement awarded pursuant to this section, the commis-
47 sioner or state agency shall submit to the governor, the comptroller and
48 the heads of the fiscal committees of each house of the state legisla-
49 ture no later than the mid-point of the initial term of the resultant
50 contract a report assessing the validity of the procurement method and
51 comparing its results to procurement methods for commodities and
52 services or information technology.

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

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

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

7 b. Competitive negotiation may only be used where:

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

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

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

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

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

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

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

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

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

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

36 (iv) provide the offerer a reasonable opportunity to submit any cost,
37 technical or other revisions to its proposal in response to issues iden-
38 tified during negotiations; and

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

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

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

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

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

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

16 e. The commissioner may authorize purchases required by state agencies
17 or other authorized purchasers by letting a contract pursuant to a writ-
18 ten agreement, or by approving the use of a contract let by any depart-
19 ment, agency or instrumentality of the United States government and/or
20 any department, agency, office, political subdivision or instrumentality
21 of any state or states. A state agency purchaser shall document in the
22 procurement record its rationale for the use of a contract let by any
23 department, agency or instrumentality of the United States government or
24 any department, agency, office, political subdivision or instrumentality
25 of any other state or states. Such rationale shall include, but need not
26 be limited to, a determination of need, a consideration of the procure-
27 ment method by which the contract was awarded, an analysis of alterna-
28 tive procurement sources including an explanation why a competitive
29 procurement or the use of a centralized contract let by the commissioner
30 is not in the best interest of the state, and the reasonableness of
31 cost. The authority to use a contract let by another governmental entity
32 pursuant to this paragraph is intended to benefit the state by using
33 contracts in place that provide for the same service or commodity sought
34 by a state agency at a price determined to be reasonable by the state
35 agency. Such contracts are not intended to be used primarily to avoid
36 competitive bidding. Use of multiple award contracts pursuant to this
37 paragraph shall follow the same basis of selection among the multiple
38 awardees as was prescribed by the original contracting governmental
39 entity.

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

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

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

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

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

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