

STATE OF NEW YORK

6626--A

2021-2022 Regular Sessions

IN SENATE

May 10, 2021

Introduced by Sen. KRUEGER -- (at request of the State Comptroller) -- read twice and ordered printed, and when printed to be committed to the Committee on Procurement and Contracts -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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 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. Defi-
4 nitions. As used in this section the following terms shall have the
5 following meanings:

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

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

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1 customers, clients and business partners. Such online services may be
2 expanded and enhanced as technology allows.

3 c. "State agency" or "state agencies" shall mean all state depart-
4 ments, boards, commissions, offices or institutions. Such term shall not
5 include the legislature or the judiciary.

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

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

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

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

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

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

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

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

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

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

53 (iii) access the system to obtain and evaluate any data submitted by a
54 vendor proposed for contract award. State agencies shall ensure the
55 submission filed by the vendor meets such system's timeliness standards.

1 Such provisions apply regardless of whether the contract is subject to
2 pre-review and approval by the state comptroller.

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

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

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

19 16. Alternative procurement methods for the acquisition of non-con-
20 struction related commodities, services and technology. a. When the
21 commissioner or a state agency determines that it is in the best inter-
22 est of the state to develop a procurement method not authorized by this
23 section for non-construction related commodities, services and technolo-
24 gy, the commissioner or state agency is hereby authorized to develop and
25 use such method for a specific contract award. Such determination shall
26 be made in writing and shall include documentation for the procurement
27 record that such alternative procurement method: (i) would serve the
28 interest of the state better than other methods currently available
29 under this section; (ii) can be applied on a competitive, fair and equi-
30 table basis; and (iii) contains an appropriate evaluation methodology
31 that considers both cost and qualitative evaluation factors. Such
32 alternative procurement method shall be subject to all other applicable
33 provisions of this section. The commissioner or a state agency may not
34 undertake an alternative procurement method until the comptroller has
35 determined that the proposed alternative procurement method is in the
36 best interest of the state; can be applied on a competitive, fair and
37 equitable basis; and utilizes an appropriate evaluation methodology that
38 considers both cost and qualitative evaluation factors.

39 b. When using an alternative procurement method authorized by this
40 subdivision, the commissioner or agency shall include in its sollicita-
41 tion a detailed description of the proposed method of award. In advance
42 of the initial receipt of offers or bids, the commissioner or state
43 agency shall determine and document in the procurement record the evalu-
44 ation criteria and process to be used in the determination of the
45 specific contract award and the process by which the evaluation and
46 selection shall be conducted. In addition to the requirements set forth
47 in paragraph g of subdivision nine of this section, the procurement
48 record shall document the basis upon which the agency has determined
49 that potential vendors will be able to respond with viable bids to such
50 alternative procurement.

51 c. Notwithstanding the provisions of subdivision five of section three
52 hundred fifty-five of the education law to the contrary or section
53 sixty-two hundred eighteen of the education law, before any contract
54 awarded under this section which exceeds fifty thousand dollars in
55 amount becomes effective it must be approved by the comptroller and
56 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 technology.

§ 3. 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.

§ 4. 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.

§ 5. 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. 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.

§ 6. 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

1 instrument shall first be approved by the comptroller and filed in his
2 office. For purposes of this subdivision, where consideration cannot be
3 determined in terms of monetary value, it shall be valued in terms of
4 intrinsic value.

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

7 (m) The term "restricted period" shall mean the period of time
8 commencing with the earliest posting, on a governmental entity's
9 website, in a newspaper of general circulation, or in the procurement
10 opportunities newsletter in accordance with article four-C of the
11 economic development law of written notice, advertisement or sollicita-
12 tion of a request for proposal, invitation for bids, or solicitation of
13 proposals, or any other method provided for by law or regulation for
14 soliciting a response from offerers intending to result in a procurement
15 contract with a [~~state agency, either house of the state legislature,~~
16 ~~the unified court system, or a municipal agency, as that term is defined~~
17 ~~by paragraph (ii) of subdivision (s) of this section, and ending with~~
18 ~~the final contract award and approval by the state agency, either house~~
19 ~~of the state legislature, the unified court system, or a municipal agen-~~
20 ~~cy, as that term is defined by paragraph (ii) of subdivision (s) of this~~
21 ~~section,~~] governmental entity and ending with the final contract award
22 and approval by the governmental entity and, where applicable, the state
23 comptroller. For the purposes of this subdivision, "governmental entity"
24 shall have the same meaning as paragraph a of subdivision one of section
25 one hundred thirty-nine-j of the state finance law.

26 § 8. This act shall take effect immediately; provided, however,
27 section one of this act shall take effect on the one hundred eightieth
28 day after it shall have become a law; provided, further, however, that
29 the provisions of sections two, three, four, five and six of this act
30 shall apply to any procurement initiated on or after such date;
31 provided, further however, that the amendments to section 163 of the
32 state finance law made by sections two, three, four and five of this act
33 shall not affect the repeal of such section as provided in subdivision 5
34 of section 362 of chapter 83 of the laws of 1995, as amended, and shall
35 be deemed repealed therewith.