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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

OSC No. 34 R-1

MEMORANDUM
RE
AN ACT

to amend the state finance law, in relation to allowing the state comptroller to excuse non-material deviations in a procurement; 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 requiring competition and increased oversight for private vendor preferred source opportunities; in relation to increasing the threshold for construction bonds and requiring performance bonds for certain installation projects; in relation to clarifying the use of contracts let by another governmental agency; in relation to reports on centralized contracts; in relation to increasing the threshold for the state comptroller's approval of certain contracts and clarifying the valuation of non-cash contracts by the state comptroller; and to amend the education law to define construction related services

PURPOSE: The purpose of this proposed legislation is to increase the transparency, accountability, efficiency and flexibility of the procurement process and to make technical corrections and clarifications relating to certain procurements.

SUMMARY OF PROVISIONS: Section 1 of this proposal amends Subdivision 12 of Section 163 of the State Finance Law authorizing the State Comptroller to excuse non-material deviations in a procurement.

Section 2 of this proposal amends the State Finance Law by adding a new Section 163-c requiring use by state agencies of a system maintained by the State Comptroller to compile vendor responsibility information.

Section 3 of this proposal amends Subdivisions 7 and 10 of Section 160 of the State Finance Law in relation to defining information technology for procurement purposes.

Sections 4 and 5 of this proposal make conforming changes to Paragraphs g and i of Subdivision 2 of Section 161 of the State Finance Law with respect to the definition of information technology.

Section 6 of this proposal amends Paragraph (a) of Subdivision 2 of Section 112 of the State Finance Law relating to centralized contracts not awarded under an alternative procurement method.

Section 7 of this proposal adds a new Subdivision 16 to Section 163 of the State Finance Law authorizing alternative procurement methods for the acquisition of non-construction related commodities and services, or information technology.

Section 8 of this proposal amends Section 163 of the State Finance Law by adding a new Subdivision 17 relating to competitive negotiation.

Section 9 of this proposal amends Subdivision 9 of Section 163 of the State Finance Law by adding a new Paragraph c-1 relating to best and final offer.

Section 10 of this proposal amends Subdivision 7 of Section 162 of the State Finance Law relating to private vendor opportunities for preferred source.

Section 11 of this proposal amends Paragraph b of Subdivision 3 of Section 162 of the State Finance Law to require that applications for new preferred source services or commodities only be recommended by the procurement council when at least 50 percent of all labor involved in delivering such service or commodity to the state is being provided directly by the individuals of the class of preferred source.

Section 12 of this proposal amends Subdivisions 1 and 2 of Section 137 of the State Finance Law increasing the threshold for the requirement for construction bonds.

Section 13 of this proposal amends Subdivision 1 of Section 163 of the State Finance Law by adding a new Paragraph l defining "major installation."

Section 14 of this proposal amends Paragraph d of Subdivision 10 of Section 163 of the State Finance Law requiring a performance bond for major installations valued at one million dollars or more and requiring a payment bond for such major installations at the agency's discretion.

Section 15 of this proposal amends Paragraph e of Subdivision 10 of Section 163 of the State Finance Law clarifying the use of a contract let by another governmental entity.

Section 16 of this proposal amends Subdivision 15 of Section 163 of the State Finance Law by adding a new Paragraph d requiring a report on the savings achieved from all contracts established as a centralized contract through the office of general services.

Section 17 of this proposal amends Subdivision 3 of Section 112 of the State Finance Law to increase the threshold from \$10,000 to \$25,000 for revenue contracts requiring pre-review by the State Comptroller and provide that for contracts where consideration cannot be determined in terms of monetary value, it shall be valued in terms of intrinsic value.

Section 18. Section 350 of the Education Law is amended by adding a new Subdivision 14 to define "construction related services."

Section 19 provides for an immediate effective date and provides that the provisions of sections 1, 5, 7, 8, 9, 13, 14, 15 and 16 of the proposal shall apply to any procurement initiated on or after such date. Additionally, this Section provides that section two of the proposal shall take effect on the 180th day after it shall have become a law and finally, provides that the amendments to section 163 of the State Finance Law shall not affect the repeal of Section 163 and shall be deemed repealed therewith.

PRIOR LEGISLATIVE HISTORY: New bill.

JUSTIFICATION:

Non-Material Deviations: To allow for award of contracts where noncompliance with this article was not material and did not substantially affect the fairness of the competitive procurement process.

Vendor Responsibility: To fully standardize the vendor responsibility review and streamline the contract process, and enable a 24-7, online access for vendors to update information easily as information changes. Pursuant to the State Comptroller's responsibility under Section 112 of the State Finance Law to review and approve State contracts, which may include a vendor responsibility review performed by the state agency and the State Comptroller, the State Comptroller finds that mandatory use of the on-line system for filing necessary vendor responsibility information will facilitate an efficient review of a vendor's responsibility thereby streamlining the procurement process for vendors and contracting agencies.

Agencies not on the system require vendors to update in paper with *every* procurement.

59 agencies use the system now, with more than 11,600 vendors already in the system.

Change references to “technology” in article 11 to “information technology”: To clarify the definition of technology, to ensure the definition meets current practice, and ensure future developments in information technology are anticipated. This amendment would also clarify that incidental technology content is not intended to drive a major procurement that is not directly information technology related.

Alternative Procurements: When a State agency develops a procurement method that does not fit within the requirements of the Procurement Stewardship Act (the Act), the agency should be able to use such an alternative method for a specific contract award if certain conditions are met. The bill authorizes the State Comptroller to approve a contract awarded on the basis of an alternative procurement method as long as (i) the contracting agency makes a determination, documented in the procurement record, that such alternative procurement method better serves the interest of the State than other procurement methods available under the Act and can be applied on a fair and equitable basis; and (ii) the State Comptroller approves the alternative procurement method prior to the procurement. In order to effectively monitor the success or failure of the alternative procurement method the procuring State agency must file a report with the Governor, State Comptroller and heads of the Legislative Fiscal Committees by the mid-term of the resulting contract concerning the benefits of the alternative method and comparing results to other procurement methods

Competitive Negotiation with Best and Final Offer: This amendment expands available procurement options to include competitive negotiation with multiple vendors to obtain the best result for taxpayers. The State Comptroller anticipates this change would be useful in highly complex procurements where approaches to meeting the requirements are not pre- defined, to encourage innovative solutions amidst changing industry capabilities, or where there may be opportunities for the state to mitigate risk or expense through non-material tradeoffs.

Where the basis of award is best value and after completing an initial evaluation and scoring, a state agency may choose to make an award at that time based on best value. Or, if the agency believes a better price or outcome can be achieved, competitive negotiations can be conducted with vendors that fall in a competitive range and could potentially be selected based on the final outcome.

Clarifying use of Best and Final Offer: There is a lack of clarity among agencies as to when Best and Final Offers can be utilized to achieve best value for the state; this is intended to help clarify the requirements for use of best and final offers.

Preferred Source: This amendment is intended to promote employment of disabled individuals by *private vendors* that partner with designated preferred source entities. This amendment provides that 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 entities accorded preferred source status and where at least 50 percent of all labor involved in delivering services or

commodities to the state by the private vendor is being provided directly by the individuals of the class of preferred source including, but not limited to, inmates, the disabled, veterans and the blind. Additionally, it requires that private vendor opportunities for preferred sources be competitively awarded and the procurement summary, vendor responsibility summary and contract agreement brought before the procurement council for review. Finally, the amendment requires that the State shall not access the services of such private vendor unless a majority of the procurement council approves.

Adding Bonds to Installation Projects and Raising threshold for construction bonding to \$500,000: This amendment is intended to help small businesses qualify for construction contracts by not requiring contractors to post construction bonds for contracts under \$500,000 (the current threshold is \$100,000) and to protect state agencies that “purchase and install” large equipment (e.g. MRI), by adding a performance bond requirement for projects of \$1 million or greater.

Clarifying Use of “Piggyback” Contracts: This amendment is intended to ensure that agencies using the contracts of other entities (local, state, or federal) comply with the intent of the original contract as well as the mechanism for vendor selection in the case of contracts with multiple award options.

Office of General Services Reporting Requirement: This amendment requires the Commissioner of General Services to prepare a report on the savings achieved from all contracts established as a centralized contract through the Office of General Services pursuant to Section 163 of the State Finance Law, the impact of such contracts on small, minority and women-owned business enterprises, service-disabled veteran owned enterprises and the effectiveness of such contracts in fulfilling the purchasing needs of all authorized users of such contracts. Such report shall be submitted by such Commissioner to the Governor, the State Comptroller, and the heads of the fiscal committees of each house of the state legislature no later than January 15, 2016, and thereafter annually on or before such date.

Change Revenue Threshold and Clarify Consideration Non-Cash Contracts: This amendment increases from \$10,000 to \$25,000 the threshold for revenue contracts needing State Comptroller approval. For contracts with little or no cash actual cash consideration, the intrinsic value of the contract will be used to determine the threshold.

Construction Related Services: Provides a definition of construction-related services for SUNY and CUNY which are exempt from State Comptroller review.

The State Comptroller urges the passage of this proposed legislation.

FISCAL IMPLICATIONS FOR STATE: None. However, these proposals will help streamline procurements and facilitate the use of new methods that will result in more effective and efficient procurements at reduced costs.

EFFECTIVE DATE: Provides for an immediate effective date and states that certain provisions shall only apply to any procurement initiated on or after such date; and further provides that the amendments to Section 163 of the state finance law shall not affect the repeal of such Section and shall be deemed repealed therewith.