

S. 6293, A. 9293

Part E

Purpose:

Part E amends Chapter 83 of the Laws of 1995, the State Finance Law, the General Municipal Law, and the Economic Development Law to repeal the sunset for certain sections of the Procurement Stewardship Act, and to provide for certain technical and substantive improvements in the current statutory requirements for the procurement of commodities and services.

Summary of Provisions:

Section 1 repeals the sunset provision applicable to §162 (Preferred Sources) and §163 (Purchasing Services and Commodities) of Article 11 of the State Finance Law.

Economic Development Law, §142. Section 2 raises the existing statutory threshold for advance notice in the NYS Contract Reporter for discretionary purchases from \$5,000 to \$15,000, and from \$5,000 to \$30,000 for other purchases from small business concerns, businesses certified pursuant to article 15-A of the Executive Law, and purchases of recycled or remanufactured products. This exemption will apply if agencies run quarterly NYS Contract Reporter notices of all intended categories of procurements and afford interested vendors ongoing opportunities to be placed on bidder lists maintained by agencies.

State Finance Law, §112. Section 3 raises the threshold for the NYS Office of the State Comptroller pre-approval of contracts from \$10,000 to \$15,000.

State Finance Law, §163(4)(e). Section 4 establishes parallelism between commodity and service contracts by extending authority to certain not-for-profit organizations to participate in the Office of General Services centralized services contracts. Minor technical corrections are also made.

General Municipal Law, §109-a. Section 5 extends authority to purchase from centralized OGS contracts to public libraries, association libraries, other libraries, library systems, cooperative library systems, the New York Library Association and the New York State Association of Library Boards except those affiliated with for profit entities, and conforms certain terminology to actual practice.

State Finance Law, §163(4), addition of a new subparagraph (g). Section 6 amends §163 (4) by adding a new, parallel authority for services as currently exists for commodities for State agencies to participate in consortiums for services.

State Finance Law, §163(6). Section 7 makes a technical amendment to the

competitive bidding exemptions by changing the word “technology” to “service”.

State Finance Law, §163(9)(c). Section 8 deletes the statutory requirement that the right to seek clarifications and revisions must be set forth in the bid solicitation and permits agencies to seek clarifications and revisions as a matter of law.

State Finance Law, §163(9)(e). Section 9 amends the current statutory language to allow agencies to specify a period shorter than 60 days for firm offers, or permits agencies to revert to the current statutory period of 60 days or a period longer than 60 days where specified in the solicitation, and ensures that State solicitations are consistent with the Uniform Commercial Code.

State Finance Law, §163(10)(a). Section 10 amends the existing statutory language regarding tie bids to differentiate between ‘best value’ and ‘low price’ awards, and to permit the Commissioner or State agency to break a best value tie using either technical or cost criteria, as determined by the Commissioner in the best interest of the State.

State Finance Law, §163(12). Section 11 amends §163 (12) which allows the State to award and approve a contract where there is a minor technical or procedural error in the contracting process. This authority may only be exercised where the Commissioner or State agency and the Comptroller independently determine that: (i) the procurement otherwise substantially complies with the requirements of Article 11; (ii) the procurement was otherwise fundamentally fair and the error did not advantage or disadvantage any offerer or prospective offerer; and (iii) no benefit to the State would be realized from re-bidding as a result of correcting the error.

Existing Law:

State Finance Law, §162 and 163. §162 (Preferred Sources) and §163 (Purchasing Services and Commodities), enacted in 1995 as part of the Procurement Stewardship Act, enhance the goals of promoting responsible, fair and efficient public procurements by establishing certain preferences in buying from the handicapped and disabled (§162), and by prescribing the minimum requirements for public procurements (§163). Sections 162 and 163 are due to sunset and expire on June 30, 2000.

Economic Development Law, §142. The current threshold requiring advance notice in the NYS Contract Reporter is \$5,000 for discretionary purchases and for other purchases from small business concerns, businesses certified pursuant to article 15-A of the Executive Law, and for purchases of recycled or remanufactured products.

State Finance Law, §112. The current threshold for pre-audit by the Comptroller is \$10,000 for all contracts.

State Finance Law, §163(4)(e) and General Municipal Law, §109-a. None. While

parallel purchasing authority for these groups exists for commodities, there is no such authorization for the procurement of services. Only some libraries are currently authorized to purchase from centralized contracts.

State Finance Law, §163(4), addition of a new subparagraph (g). None. While State agencies are authorized by law to buy commodities through consortiums or other similar entities when justified by price, there is no such parallel authority for services.

State Finance Law, §163(6). Up to \$30,000 in commodities or “technology” may be acquired without competitive bidding from small businesses, businesses certified pursuant to article 15-A of the Executive Law, and of recycled and remanufactured products.

State Finance Law, §163(9)(c). Clarifications and revisions may only be sought by the State where provided, in advance, in the solicitation.

State Finance Law, §163(9)(e). Offers must be held firm for 60 days or other longer period of time set forth in the solicitation, unless withdrawn in writing by the bidder.

State Finance Law, §163(10)(a). If two or more offers are substantially equivalent, price is the basis for determining the award, or if price and other factors are found substantially equivalent, the Commissioner may select the awardee. The present law does not address best value procurements.

State Finance Law, §163(12). Reference is made to the State Comptroller’s review under Section 112 of the State Finance Law.

Prior Legislative History:

Repeal of the sunset and extension of centralized contract participation to not-for-profits are carryovers from last year (Bill Number S.3840). The remainder of the proposal is new.

Statement in Support:

State Finance Law, §162, Repeal of sunset. In order to advance special social and economic goals, the Legislature established a preference and an exemption from competitive bidding for State purchases of commodities and services from selected providers, including the correctional industries program, charitable non-profit-making agencies for the blind and severely disabled; employment programs serving the mentally ill; and qualified veterans’ workshops. This preferred-source status for government procurements has provided opportunities for rehabilitation, job training and development which otherwise would not be available from the private marketplace. If section 162 is allowed to sunset, the preference for these businesses will be lost.

State Finance Law, §163, Repeal of sunset. This section is currently the main statutory backbone of public contracting, and provides a comprehensive delineation of the minimum requirements for public procurements. It was enacted to promote competition in the public procurement of services, as well as commodities, and to protect public funds by preventing favoritism, fraud, and corruption in the making of contract awards. Many of these critical safeguards will be lost if this section is allowed to sunset, including: i) competitive bidding requirement for services; ii) “best value” award criteria in the acquisition of services; and iii) the ability to streamline the public procurement process and cut administrative costs by allowing the use of contracts let by other governmental entities.

Economic Development Law, §142. Currently, different dollar thresholds exist for each of these three statutory requirements: (1) NYS Contract Reporter, (2) OSC Pre-Audit, and (3) exempt discretionary, small and minority/women owned business enterprise and recycled procurements. Since these procurements are otherwise exempt from the competitive bidding requirements, requirement for public notice and pre-audit increase the procurement timeframe without commensurate benefits to the State. In order to promote special social and economic goals for these exempt procurements, and in order to simplify the process for agencies as well as these special business concerns, a uniform threshold for all three requirements will promote more efficient and expedited purchasing. The proposal substitutes, in lieu of advance NYS Contract Reporter notice for each individual exempt acquisition, quarterly NYS Contract Reporter notices in order to promote continuing access and provide additional bidding opportunities for interested bidders.

State Finance Law, §112. This proposal will raise the current threshold for pre-audit by the Office of the State Comptroller from \$10,000 to \$15,000 in order to provide a uniform threshold for discretionary purchases which are otherwise exempt from competitive bidding.

State Finance Law, §163(4)(e) and General Municipal Law, §109-a. This proposal establishes uniformity in centralized contract participation for commodities and services. Under the current act, certain not-for-profit entities have been unable to access NYS centralized services contracts, even though previously authorized by the Legislature to access commodities contracts. Extension of authority with respect to service contracts to these not-for-profit entities enables cost reduction because they are enabled to purchase at the volume discount rates provided in State centralized contracts. The State can also save money on contracts which are volume driven because the increased volume on State contracts resulting from greater participation lowers unit costs for all users.

This proposal also extends purchasing authority to certain libraries. The history of libraries in New York has led to the anomalous result that a large percentage of libraries providing public services are not eligible to purchase from State centralized contracts. Only those libraries which are part of a political subdivision, such as school district or

municipal libraries, are eligible to purchase. Library systems and cooperative library systems are independently operated organizations, chartered by the Board of Regents, and funded largely by State funds. These organizations of libraries and library trustees are similar to organizations already authorized by law to use these centralized service contracts under General Municipal Law section 109-a.

State Finance Law, §163(4), addition of a new subparagraph (g). In order to realize economies of scale and greater marketplace efficiencies, consortiums and aggregate buying of services are emerging in the commercial marketplace. An example of this is the consortiums of health care providers and hospitals which aggregate their buying power in procurements. Currently, State agencies and others are statutorily authorized to participate in consortiums for commodities where justified by price. This bill would extend the same statutory authority for services.

State Finance Law, §163(6). The term “service” is defined under State Finance Law, section 160, to include technology. However, the term “services” also encompasses a wide range of additional offerings in addition to technology products which more accurately reflect the types of offerings available from the businesses being encouraged under this program. This language change would parallel the proposed amendment to Economic Development Law, §142.

State Finance Law, §163(9)(c). This deletion will have little or no substantive impact on the procurement process, since most agencies merely add the clarification/revision language to the bids.

State Finance Law, §163(9)(e). The current statutory language, which requires a minimum 60 day irrevocability, is not commercially reasonable for certain procurement markets where offers are normally held open only a matter of hours, i.e., natural gas and oil. This proposal permits an agency to set in the solicitation a timeframe for the offer to be irrevocable which is appropriate for the context and subject matter of the procurement.

State Finance Law, §163(10)(a). The current statutory language regarding the breaking of tie bids is unclear in its application to “best value” procurements. In “best value” procurements, i.e., computer consulting projects, technical and cost elements are assigned relative weights which may, or may not, prioritize cost as the principal factor. Where technical capability is weighted more heavily than cost due to the difficulty or special expertise of the services being acquired, the current statutory language would default to price, not technical ability, in the event of a tie. This proposal permits the Commissioner or State agency to break a best value tie using whatever criterion was deemed more appropriate for the particular acquisition in the best interest of the State.

State Finance Law, §163(12). This proposal allows the State to save a flawed procurement where there has been substantial compliance with the law, where no one is disadvantaged, and where no gain would be realized to the State as a result of

correcting the flaw.

Budget Implications:

Enactment of this bill is necessary to implement the 2000-01 Executive Budget because it continues the State's ability to promote the public procurement process, while producing significant savings intended under the Procurement Stewardship Act.

Effective Date:

This act shall take effect April 1, 2000.