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To: Chief Fiscal Officers

Subject: New “Piggybacking” Law - Exception to Competitive Bidding

Please provide copies of this bulletin to others who may need this information.

Background

A new subdivision 16 has been added to General Municipal Law (GML) § 103 to authorize political subdivisions to purchase apparatus, materials, equipment and supplies, and to contract for services related to the installation, maintenance or repair of those items, through the use of contracts let by the United States or any agency thereof, any state or any other political subdivision or district therein. The contract must be let in a manner that constitutes competitive bidding “consistent with state law,” and made available for use by other governmental entities. Purchases made in accordance with this new law are not subject to the competitive bidding requirements of GML § 103. The amendment became effective on August 1, 2012 and is scheduled to expire five years from that date. The stated purpose of the new law is to reduce administrative and product cost, and increase efficiencies.¹

Many local governments have already been approached by vendors offering goods and services under other governmental contracts. In some cases, vendors may have asserted that the contract falls within the exception. It is the responsibility of local officials to review each proposed procurement to determine, on advice of the local government’s counsel as appropriate, whether the procurements falls within the exception. To assist local government officials in undertaking this review, we offer the following guidance.

Three Prerequisites

There are three prerequisites that must be met in order for a procurement of apparatus, materials, equipment and supplies, and related installation, repair and maintenance services, to fall within this exception:

- (1) The contract must have been let by the United States or any agency thereof, any state or any other political subdivision or district therein. Therefore, there must be an

- Public solicitation of bids. A public solicitation is consistent with the statutory advertising requirement in GML § 103,⁵ and serves to ensure that the purposes of GML § 103 are furthered.
- Submission of sealed bids or analogous procedures to secure and preserve the integrity of the process and confidentiality of the bids submitted. A secure bidding process is consistent with the sealed bidding requirement of GML § 103⁶ and helps foster honest competition and guard against collusion.
- Preparation of bid specifications, or a similar document that provides a common standard for bidders to compete fairly. Consistent with the purposes of GML § 103, the contracting entity, in advance of bidding, should convey the nature of the goods or services and other information necessary for prospective bidders to make an intelligent evaluation and bid, without being unduly restrictive.⁷
- Award to the lowest bidder who materially or substantially meets the bid specifications and is determined to be a responsible bidder.⁸ A contract awarded to other than the lowest responsible bidder meeting the specifications, or a contract awarded through a negotiation process, would not be consistent with the requirements and purposes of competitive bidding under GML § 103.⁹

Other Factors to Consider; Internal Controls.

- Contractual Relationship. By placing an order with the contract vendor, the purchasing local government generally will be entering into a contractual relationship with that vendor in accordance with the terms and conditions of the contract. Accordingly, local officials, in consultation with the attorney for the local government as necessary, should carefully review those terms and conditions before making the purchase. In some cases, the contract may have been let in a manner consistent with GML § 103, but the terms and conditions of the contract may conflict with other New York State laws or regulations.¹⁰ This could result in the local government being unable to use the contract.
- Audit of Claims. The payment to the contract vendor would be subject to standard procedures for claims processing, including audit of claims procedures.
- Cost Savings Justification. Unlike recent amendments to GML §§ 103 (3) and 104 pertaining to county and certain federal contracts (L 2003, ch 62; L 2011, ch 97), GML § 103 (16) does not expressly require local governments to consider whether the contract will result in cost savings. Nonetheless, local officials should perform a cost-benefit analysis before utilizing this exception. This will help ensure that the local government is furthering the underlying purposes of the new law, and that the procurement is consistent with the purposes of GML § 103. The analysis should be used to demonstrate whether “piggybacking” is cost effective and should consider all pertinent cost factors, including any potential savings on the administrative expense

contracts (see e.g. Callanan v White, 118 AD2d 167 lv denied 123 AD2d 462 and 69 NY2d 601). There is only limited authority in New York to debar bidders from future contracts (e.g. Labor Law § 220-b, 235). There is, however, authority for bidders on contracts for public work to be “pre-qualified” under certain circumstances (GML § 103 [15]).

⁹ See e.g. AAA Carting v Town of Southeast, 17 NY3d 136; Sinram-Marnis Oil v New York City, 74 NY2d 13; compare Fischbach & Moore v NYCTA, 79 AD2d 14, lv denied 53 NY2d 604. The “lowest responsible bidder” requirement dictates that the contract award be made to the low price bidder who is determined to be a responsible bidder (see e.g. AAA Carting v Town of Southeast, id.). As an alternative to lowest responsible bidder awards, GML § 103 allows political subdivisions, by local enactment, to make awards of certain purchase contracts to “responsive and responsible” vendors on the basis of “best value,” as defined in State Finance Law § 163. “Best value” is a basis for awarding a contract to the offerer which optimizes quality, cost and efficiency among responsive and responsible offerers, reflecting, whenever possible, objective and quantifiable analysis. The amendments to GML § 103 which added the “best value” option (L 2011, ch 608 as amended by L 2012, ch 2) distinguished the “best value” process from competitive bidding, referring to the “best value” process as “competitive offering” (GML § 103 [1-a], [4], [6], [7]; see also GML § 103, section heading). Therefore, it appears that “best value” awards, or contracts awarded on a similar basis, would not constitute “competitive bidding” consistent with GML § 103, as required to fall within the exception under GML § 103 (16).

¹⁰ For example, an out-of-State contract may require advance payment to the vendor. With limited exceptions, local governments may not pay a claim for goods or services prior to audit and approval by the claims auditing body or official, or prior to the receipt of goods or services (see e.g. Town Law § 118; Village Law § 5-524 [4]; County Law § 369 [2]; Education Law § 1724; 8 [A-2] NYCRR § 170.2 [k]). Therefore, such a clause may conflict with New York State statutes.

¹¹ The monetary threshold is \$20,000 for purchase contracts, and \$35,000 for contracts for public work, calculated as prescribed in GML § 103 (1).

¹² See GML § 103 (4).

¹³ GML § 104-b generally requires that the procurement policies and procedures provide for obtaining alternative proposals or quotations when a procurement is not subject to bidding requirements (GML § 104-b [2] [b]). The procurement policies, however, may set forth circumstances when, or types of procurements for which, in the sole discretion of the governing body, the solicitation of alternative proposals or quotations will not be in the best interest of the local government (GML § 104-b [2] [g]). Local officials should undertake the same type of cost-benefit analysis and documentation as discussed above before permitting an exception to the local government’s procurement policies and procedures for these contracts. Local officials also should review and, as necessary, update the policies and procedures to ensure that use of the new exception for procurements above the bidding threshold is consistent with the relevant policies and procedures, and that provisions for cost savings justification and documentation to support the use of “piggybacking” as an exception to bidding are incorporated.