



STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER  
110 STATE STREET  
ALBANY, NEW YORK 12236

November 2012

**To: Chief Fiscal Officers**

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

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

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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.<sup>1</sup>

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

underlying contract let by one of the listed governmental entities. Contracts developed for use by local governments that are let by private parties (e.g., a private company, association or not-for-profit corporation is the party awarding the contract to the vendor), and not by the United States or any agency thereof, any state or any other political subdivision or district therein, would not fall within the exception.<sup>2</sup>

The phrase “any state or other political subdivision or district therein” clearly includes other states, and political subdivisions in other states. In our view, it also includes New York State political subdivisions. Therefore, in addition to the current competitive bidding exception for certain purchases through contracts of New York State counties (County Law § 408-a; GML § 103 [3]), local governments also may purchase through qualifying contracts let by other New York State political subdivisions under this exception.

(2) The contract must have been made available for use by other governmental entities. This means that the other governmental entity has taken steps to make its contract available for New York local governments. In general, this would occur by inclusion in the contract let by the other entity of a clause extending the terms and conditions of the contract to other governmental entities. Unilateral offers by vendors to extend contract pricing and other terms and conditions would not fall within the exception.

(3) The contract must have been let in a manner that constitutes competitive bidding “consistent with state law.” We believe the term “state law” refers to New York State's bidding law applicable to its political subdivisions (GML § 103 and related case law). The purchasing local government would need to obtain background information on the procedures used to let the contract and, as necessary, consult with its counsel, to determine whether this prerequisite is met. Additional guidance on complying with this prerequisite follows.

### Determining Consistency with GML § 103

In order for a non-New York contract to have been let in a manner “consistent” with New York State bidding law, the procedures used by that government need not be exactly the same as those under GML § 103. Rather, the procedures for letting the non-New York contract must be in harmony or general agreement with, and further the same principles as; the bidding requirements of GML § 103.<sup>3</sup> In this regard, the courts in this state have stated that the underlying purposes of GML § 103 are to guard against favoritism, improvidence, extravagance, fraud and corruption, and to foster honest competition in order that the local government may obtain the best goods and services at the lowest possible price to protect the public fisc.<sup>4</sup>

Based on the provisions of GML § 103 as construed by the courts in this state, and the underlying purposes of GML § 103, we believe there are four fundamental elements that should be present in the procedures used by the non-New York entity in letting its contract in order for the process to constitute competitive bidding consistent with GML § 103. These elements are:

- Public solicitation of bids. A public solicitation is consistent with the statutory advertising requirement in GML § 103,<sup>5</sup> 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 § 103<sup>6</sup> 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.<sup>7</sup>
- Award to the lowest bidder who materially or substantially meets the bid specifications and is determined to be a responsible bidder.<sup>8</sup> 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.<sup>9</sup>

#### 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.<sup>10</sup> 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

that would be incurred if the local government initiated its own competitive bidding process.

- Documentation. Local governments should maintain appropriate documentation to allow for a thorough review of the decision to use this exception to competitive bidding by local government officials, external auditors and taxpayers. This documentation may include such items as copies of the contract, analysis of the contract to ensure it meets the three prerequisites stated above, and cost savings analysis including consideration of other procurement methods.

### Procurements Below the Bidding Monetary Threshold; Policies and Procedures

As noted, GML § 103 (16) provides an exception to the competitive bidding requirements of that section. However, procurements that are below the bidding monetary thresholds set forth in Section 103 (1)<sup>11</sup> (or otherwise fall within another exception to bidding, such as emergency purchases)<sup>12</sup> already are exempt from bidding requirements. Those procurements, instead, are subject to the local government's own procurement policies and procedures adopted pursuant to GML § 104-b. Therefore, whether a local government may make purchases that are below the bidding thresholds by "piggybacking" on contracts let by governmental entities listed in GML § 103 (16) will be governed by the local government's own procurement policies.<sup>13</sup>

Please feel free to contact Mark Stevens in our Division of Legal Services (518-402-4437) with legal questions, and the State Comptroller's regional office that serves your local government with internal control and documentation questions.

### End Notes

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<sup>1</sup> NY Senate and Assembly Memos in Support of S. 5525-C/A. 8034-C, 2012. The amendment also states that the authority provided in GML § 103 (16) does not relieve any obligation of the local government to comply with any applicable M/WBE business enterprise mandates and the preferred source requirements of State Finance Law § 162.

<sup>2</sup> In 2011, the GML was amended to permit political subdivisions to participate in two specific federal contract extension programs ("Supply Schedule 70" and "Section 1122") as exceptions to the bidding requirements of GML § 103 (GML §§ 103 [1-b], 104, scheduled to sunset on June 24, 2014). These exceptions are separate from, and not subject to the prerequisites of, GML § 103 (16). Other federal contracts are subject to the prerequisites of GML § 103 (16).

<sup>3</sup> See e.g. Stocker v Sheehan, 13 AD3d 1.

<sup>4</sup> See e.g. AAA Carting v Town of Southeast, 17 NY3d 136; Associated General Contractors v New York State Thruway Authority, 88 NY2d 56; Jered v NYCTA, 22 NY2d 187; see also GML § 100-a.

<sup>5</sup> See GML § 103 (2).

<sup>6</sup> See GML § 103 (1).

<sup>7</sup> See e.g. AAA Carting v Town of Southeast, 17 NY3d 136; Browning-Ferris v City of Lackawanna, 204 AD2d 1047; Progressive Dietary v Wyoming County, 90 AD2d 214; Matter of L & M Bus Corp. v New York City Dept. of Educ., 17 NY3d 149; Gerzof v Sweeney, 16 NY2d 206.

<sup>8</sup> Whether a bidder is "responsible" involves a factual, case by case examination into a bidder's background, assessing factors such as a bidder's capacity and financial ability to complete the contract, accountability, reliability and integrity (see e.g. DeFoe v New York City, 87 NY2d 754; Abco Bus v Macchiorola, 75 AD2d 831 revd on dissent 52 NY2d 938). The New York Court of Appeals has held that, as a matter of due process, a bidder is entitled to reasonable notice and a timely and adequate opportunity to be heard before a determination of non-responsibility is made (LaCorte v County of Rensselaer, 80 NY2d 232). In addition, the New York courts have distinguished between the case by case determination of responsibility and the authority to debar or suspend bidders from future

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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]).

<sup>9</sup> 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).

<sup>10</sup> 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.

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

<sup>12</sup> See GML § 103 (4).

<sup>13</sup> 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.