

Part 22 of 2 NYCRR is repealed and replaced as follow:

TITLE 2. DEPARTMENT OF AUDIT AND CONTROL  
CHAPTER I. AUDIT OF REVENUES AND ACCOUNTS PAYABLE FROM  
STATE FUNDS AND FUNDS UNDER ITS CONTROL

PART 22. PROMPT CONTRACTING AND INTEREST PAYMENTS FOR NOT-  
FOR-PROFIT ORGANIZATIONS

Section 22.1 Purpose

The purpose of this Part is to implement the provisions of Article XI-B of the State Finance Law as added by Chapter 166 of the Laws of 1991 and as amended by chapter 648 of the Laws of 1992 and chapter 292 of the Laws of 2007.

Section 22.2 Definitions

All terms shall have the meaning prescribed to them pursuant to section 179-q of the State Finance Law unless otherwise provided for in this Part.

Section 22.3 Agency notification with respect to renewal contracts

A State agency administering a contract subject to this Part, shall, as required by section 179-t of the State Finance Law, provide written notice by mail to the not-for-profit organization of its preliminary determination whether or not to renew the contract. Such notification must be provided no later than ninety days prior to the end of the contract or thirty days after an appropriation providing funding for continued payments shall become law, whichever is later. Where a State agency fails to provide such notice by the required date, the existing contract shall be deemed to be extended until ninety days after the date the State agency provides the not-for-profit organization with the required notice. The not-for-profit organization shall be entitled to payment consistent with the terms of the existing contract and may submit invoices or vouchers to the State agency on billing cycles consistent with those applicable to the existing contract. The State agency shall then submit the necessary documentation to the Comptroller in order for payment to be processed. The not-for-profit organization shall be entitled to interest under Article IX-A of the State Finance Law to the extent that payment is not timely made as provided in such Article IX-A, which relates to the prompt payment of contracts.

Section 22.4 Comptroller's determination whether unusual circumstances warrant denial of interest

1. If a State agency believes that it is unable to comply with the timeframes established by section 179-t of the State Finance Law due to unusual circumstances beyond its control, and that such unusual circumstances warrant

the denial of interest, in whole or in part, to the not-for-profit organization, the State agency shall so advise the Comptroller, the Division of the Budget and the not-for-profit organization and shall provide the basis for such assertion in writing on or before ninety days prior to the end of the contract or thirty days after an appropriation providing funding for continued payments shall become law, whichever is later.

(2) "Unusual circumstances" does not mean a State agency's (a) failure to plan for implementation of a program; (b) failure to assign sufficient staff resources to implement a program; (c) failure to establish a schedule for the implementation of a program; or (d) failure to anticipate any other reasonably foreseeable circumstance.

(3) Not more than twenty days after receipt of the State agency's written notice, the Comptroller shall determine whether unusual circumstances exist and whether such circumstances warrant the denial of interest in whole or in part; and inform the State agency. If the Comptroller determines that the denial of interest is not warranted, in whole or in part, the Comptroller shall notify the State agency, the Division of the Budget, and the not-for-profit organization of such determination. Thereafter, the State agency shall, if the contract is then fully executed, immediately submit for the Comptroller's approval a voucher requesting payment of the interest, if any, due under section 22.7. If the contract is not then fully executed, the State agency shall immediately submit a voucher for the Comptroller's approval requesting payment of interest, if any, due under section 22.7 once the contract is fully executed.

#### Section 22.5 Written directives

(a) Upon receipt of a written directive a not-for-profit organization may begin to provide the services required by a State agency on the date provided for by such written directive. A "written directive" means a written request by a State agency to a not-for-profit organization authorizing such organization either to begin providing services during the negotiation of a contract or to continue providing services during the negotiation of a renewal contract. For purposes of this section, a State agency shall be deemed to have issued a written directive where: (i) with respect to a renewal contract it has provided notice to the not-for-profit organization of its intent to renew the contract; or (ii) with respect to new contracts, it has provided the not-for-profit organization with a proposed contract containing a start date, in which case such start date shall be deemed the date of the written directive.

(b) Any not-for-profit organization receiving a written directive to perform services under a new contract between such not-for-profit organization and a State agency that has not been fully executed by the contract start date shall be eligible for interest payments to the extent authorized by section 22.7 of this Part.

(c) In order for a State agency to exercise an option in an existing contract to provide for an additional quarter of financing or any advance payment to such not-for-profit organization in accordance with section 22.6 of this Part, the State agency shall provide a written directive to such organization.

(d) Any not-for-profit organization in receipt of a written directive from a State agency with an existing contract which does not contain an optional financing quarter may be eligible for an advance payment in accordance with section 22.6 of this Part.

(e) A written directive shall only be executed by State agency personnel duly authorized to sign contracts on behalf of such State agency.

#### Section 22.6 Advance payments for renewal contracts

(a) Where a State agency administering a contract has advised a not-for-profit organization of the State agency's intention to renew the contract, the State agency may authorize an advance payment to the not-for-profit organization pursuant to this section pending execution of the renewal contract, if such contract is not fully executed by the commencement date of the renewal contract.

(b) Existing or renewal contracts that do not contain an optional financing or fifth quarter financing provision shall be eligible for an advance payment providing such organization receives a written directive from a State agency.

(c) An advance payment under this section shall not exceed one quarter of the amount paid or to be paid to the not-for-profit organization pursuant to the existing contract.

(d) Any advance payment shall offset the amount of money due to the organization for services provided during the period for which payment was made.

(e) Any State agency that wishes to provide an advance payment pursuant to this section shall submit to the Comptroller a written directive, a voucher and such other documents as may be required by the Comptroller. The Comptroller shall review such written directive and either approve or disapprove such written directive. Such written directive shall include language indicating that if the agency subsequently determines pursuant to section 179-w of the State Finance Law that substantive and significant differences exist between the State agency and the not-for-profit organization in the negotiation of the contract or that the not-for-profit organization is not negotiating the renewal contract in good faith, the written directive shall be deemed suspended and the not-for-profit organization shall not be eligible for subsequent advance payments thereunder.

#### Section 22.7 Interest payments

(a) (1) A not-for-profit organization that provides services to a State agency pursuant to a written directive prior to the date that the contract for such services has been fully executed, shall, once such contract has been approved and become fully executed, be entitled to interest in accordance with, and to the extent authorized by, this section on those moneys that would be due under the terms of a contract or a renewal contract prior to the date on which the contract became fully executed.

(2) For purposes of this section, a State agency shall be deemed to have issued a written directive where: (i) with respect to a renewal contract it has provided notice to the not-for-profit organization of its intent to renew the contract; or (ii) with respect to new contracts, it has provided the not-for-profit organization with a proposed contract containing a start date, in which case such start date shall be deemed the date of the written directive.

(b) A not-for-profit organization that has borrowed funds to provide services pursuant to a written directive may receive interest under this section where the not-for-profit organization has: (i) been denied an advance payment pursuant to section 22.6 of this Part; and (ii) did not obtain a loan from the Not-For-Profit Short Term Revolving Loan Fund.

(c) A not-for-profit organization may not receive interest payments pursuant to this section where the not-for-profit organization received an advance payment pursuant to section 22.6 of this Part, provided however that if the contract has not been fully executed at the end of the period covered by such advance payment, the not-for-profit organization shall be eligible for interest payments pursuant to this section in respect to services performed after such period; or

(d) (1) Except as provided in paragraph (2) in this subsection, any not-for-profit organization eligible to receive an interest payment pursuant to subdivision (a) or (b) of this section shall receive such interest payments at a rate equal to the rate set by the Commissioner of Taxation and Finance for corporation taxes pursuant to paragraph I of subsection (e) of section 1096 of the Tax Law.

(2) A not-for-profit organization eligible to receive interest pursuant to subdivision (b) of this section shall submit to the State agency the interest rate at which it borrowed funds and such other documentation as prescribed under subdivision 2 of 179-v of the State Finance Law. Such not-for-profit organization shall receive interest pursuant to this section at a rate of interest equal to the rate it is paying on such borrowed funds, provided the State agency has approved of such rate and the Comptroller determines such rate is reasonable.

(e)(1) Interest shall be due a not-for-profit organization for each payment that would have been due if the contract had been fully executed before the scheduled commencement date. Interest shall be calculated for the period

commencing thirty days after the end of each billing period as specified in the contract and ending on the date payment is actually made, except where under the terms of the contract the not-for-profit organization is entitled to a payment or payments on specified dates without the submission of an invoice or voucher, in which case interest shall run from each such specified date or dates. Interest shall be calculated separately with respect to each payment due under the contract. For purposes of this section, if a contract does not specify billing periods or a payment schedule, it shall be presumed that the not-for-profit is authorized to submit invoices or vouchers at the end of each month for a pro rata portion of the total contract amount. The State agency is responsible for calculating interest due and preparing a separate voucher to pay such interest consistent with this section. A State agency may not deny interest to a not-for-profit organization on the basis that it failed to submit invoices or vouchers during the period prior to final execution of the contract. However, where the not-for-profit fails to submit an invoice or voucher for such payment by the thirtieth day after the date the contract became fully executed, no additional interest shall accrue after such thirtieth day.

(2) Once a late contract is fully executed, interest on any late payments due subsequent to the date the contract is fully executed shall be made in accordance with the requirements of the Article XI-A of the State Finance Law which relates to the prompt payment of contracts.

(f) Any interest payments made pursuant to subdivision (a) or (b) of this section shall be made from appropriations for State operations that are available for the administrative programs for the State agency which contracted with the not-for-profit organization. Interest payments shall not be made from amounts appropriated for program purposes. Any interest payments made to a not-for-profit organization shall not reduce the amount of money that otherwise would be payable to the not-for-profit organization under the terms of the contract.

(g) No interest shall be payable pursuant to the provisions of this section with respect to any contract or renewal contract where such contract is required to be approved by the Attorney General and the Comptroller, but is never approved.

(h) No interest shall be payable under this section where a State agency and a not-for-profit organization have entered into an agreement under section 179-v subdivision (7) waiving interest, and the Comptroller has determined that the waiver of interest is warranted. If the Comptroller determines the waiver of interest is unwarranted the State agency shall immediately submit for the Comptroller's approval a voucher requesting payment of interest to such not-for-profit organization. If such voucher is not received within 30 days after the date of the Comptroller's written determination, the Comptroller will calculate the amount of unpaid interest due to the not-for-profit organization pursuant to section 179-v of the State Finance Law and this Part, and pay such amount to the not-for-profit organization as a charge against the agency's appropriations.

(i)(1) Interest payable pursuant to the provisions of this section shall be suspended where the State agency has, in accordance with section 179-w of the State Finance Law, determined that significant and substantive differences exist between the State agency and the not-for-profit organization in the negotiation of a contract or renewal contract or that the not-for-profit organization is not negotiating in good faith; and the State agency has provided written notice of such determination to the not-for-profit organization and the Comptroller, as required by section 179-w.

(2) Interest shall be suspended only for the period during which the State agency has determined that the significant and substantive differences existed or the not-for-profit was not negotiating in good faith. Any State agency that has made a determination under paragraph (1) of this subdivision shall, when it submits the contract to the Comptroller for approval, provide notice to the Comptroller and the not-for-profit organization of the date on which the conditions that justified the suspension of interest, ceased to exist.

(j) A determination that extenuating circumstances exist pursuant to section 179-w shall not suspend the accrual of interest unless the State agency also determines, and such determination is approved by the Comptroller, that the circumstances are unusual which warrant the denial of interest as prescribed by section 22.4 of this Part.

(k) No State agency shall be liable for interest payments under this section on contracts executed pursuant to appropriations made in whole or in part for liabilities incurred in a prior fiscal year that were awarded without the use of competitive process.

#### Section 22.9 Reports

(a) On or before March thirty-first, each State agency shall, for each annual period beginning January second and ending the following January first prepare and transmit a report to the Office of the State Comptroller in relation to such State agency's contracting activities with not-for-profit organizations. The Office of the State Comptroller shall make such report available to the public.

(b) Such report shall include, but not be limited to:

(i) information regarding the number of programs affected by Article XI-B of the State Finance Law;

(ii) the ability of the State agency to meet the time frames described within Article XI-B of the State Finance Law and the regulations;

(iii) the number of programs, contracts, renewal contracts both complying and failing to comply with the time frames set forth in Article XI-B of the State Finance Law;

(iv) the number of contracts on which interest was paid;

(v) the amount of interest paid by each State agency; and  
(vi) any other information deemed relevant in relation to the implementation of prompt contracting and payments affecting not-for-profit organizations.

(c) On or before May thirty-first of each year, the Comptroller shall prepare an annual report examining the effectiveness and implementation of prompt contracting; and make any recommendations deemed necessary to improve existing contracting and payment methods between State agencies and not-for-profit organizations. Such report shall be transmitted to the temporary president and minority leader of the Senate, the speaker and minority leader of the Assembly, the director of the Division of the Budget, the chairman of the Senate Finance Committee and the Chairman of the Assembly Ways and Means Committee.