

Part 206 is added to Title 2 of NYCRR as follows:

PART 206

Comptroller Approval of Contracts Made by State Authorities.

(Statutory Authority: N.Y. Const. Art. X, § 5; State Finance Law § 8 (14); and Public Authorities Law § 2879-a)

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§ 206.7 Filing requirements for exempt contracts, exempt contract amendments, certain eligible contracts and certain eligible contract amendments.

§ 206.1 Purpose. (a) The purpose of this Part is to set forth: (1) the standards for the Comptroller's determination of state authority contracts and contract amendments subject to the Comptroller's approval; (2) the criteria for the Comptroller's approval of such contracts and contract amendments; (3) the responsibilities of state authorities with respect to the filing of exempt contracts and exempt contract amendments, certain eligible contracts and certain eligible contract amendments as defined in this Part; and (4) the procedural requirements for overall compliance with section two thousand eight hundred seventy nine-a of the Public Authorities Law.

(b) Nothing contained in this Part shall diminish, or in any way adversely affect, the Comptroller's existing authority to approve state authority contracts where such approval is otherwise required, or provided for, by law or by resolution of a state authority, including, but not limited to, contracts made "for" the State by a

state authority. A contract is made “for” the State by a state authority where the state authority is entering into a contract with a third party, but the primary role of the state authority is to act on behalf of the State or a state agency. Such third-party contracts are contracts for the State and are subject to the Comptroller’s approval under section one hundred twelve of the State Finance Law notwithstanding any of the thresholds or criteria contained in this Part.

§ 206.2 Definitions. For purposes of this Part:

- (a) Competitive procurement shall mean a procurement where a state authority has:
 - (1) (i) published notice of the contract opportunity consistent with any statutory publication requirement including, but not limited to, article four-c of the Economic Development Law, or, where there is no express statutory requirement for published notice, in the procurement opportunities newsletter or another newspaper, journal or periodical which is reasonably designed to give notice of the contract opportunity to all offerers capable of providing the requisite product, service or work to be performed; and further that such notice, wherever published, is reasonably designed to solicit bids, proposals or offers from all qualified offerers in response thereto; or
 - (ii) provided notice of the contract opportunity by soliciting bids, proposals or offers through some other method expressly authorized by statute, where such statute has deemed such other method to be competitive; and
 - (iii) awarded on the basis of a balanced and fair evaluation and selection method developed before the receipt of offers or bids; that is rational, objective and

utilized a quantified scoring system, which evaluated all relevant factors such as cost (revenue), technical merits, or qualifications, and was applied equally to all qualified offerers.

(b) Contract shall mean any written agreement including, but not limited to: any agreement for the acquisition or sale of goods or services of any kind; public work, construction, alterations, or improvements to public facilities; grant contracts; employment contracts; revenue or concession contracts; the exchange of personal or real property; the exchange of services; or any combination thereof. For purposes of this Part, a purchase order shall be deemed to be a contract unless the purchase order is issued pursuant to:

(1) an existing state authority contract; or

(2) an Office of General Services centralized contract where neither the contract nor the relevant procurement guidelines require a mini-bid or similar competitive process.

(c) Eligible contract shall mean any contract executed by a state authority on or after March 1, 2010, other than an exempt contract, where the aggregate consideration proposed for exchange (including all reasonably anticipated renewals and amendments) may reasonably be valued in excess of one million dollars and such contract either: (1) shall be paid in whole or in part with monies appropriated by the State, either directly to a state authority or to a state agency which pays the money to a state authority; or (2) was or shall be awarded on a single source basis, a sole source basis or pursuant to any other method of procurement that is not a competitive procurement. For purposes of

determining the value of a contract that has no term or is perpetual in nature, the contract shall be deemed to have a term of five years.

(d) Eligible contract amendment shall mean:

(1) any modification to an eligible contract; or

(2) any modification other than an exempt contract amendment to a contract executed by a state authority where such modification was executed on or after March 1, 2010, and where the aggregate consideration under the contract as amended may reasonably be valued in excess of one million dollars and:

(i) the contract as amended will be paid in whole or in part with monies appropriated by the State, either directly to a state authority or to a state agency which pays the money to a state authority; or

(ii) the contract was originally awarded on a noncompetitive basis; or

(iii) the contract was originally awarded on the basis of a competitive procurement, but the modification was neither contemplated nor provided for in the solicitation for such competitive procurement.

(e) Executed or execution shall mean that the contract or contract amendment has been signed as required by the contractor and the state authority.

(f) Exempt contract shall mean any contract or contract amendment, executed by a state authority on or after March 1, 2010, that would otherwise be an eligible contract or eligible contract amendment, but is exempt pursuant to subdivision three of section two thousand eight hundred seventy nine-a of the Public Authorities Law because it is:

(1) for the issuance of commercial paper or bonded indebtedness including, but not limited to: bond purchase agreements, standby bond purchase agreements, letters of credit, firm remarketing agreements, forward purchase agreements, revolving credit agreements and other similar liquidity facility agreements, broker-dealer agreements, remarketing agent agreements, auction agent agreements, interest rate swaps and other similar hedging agreements; provided, however, that this category of exempt contracts shall not include:

(i) contracts with the state providing for the payment of debt service subject to an appropriation;

(ii) professional or banking services agreements such as bond counsel agreements, financial advisor agreements and trustee agreements, and

(iii) custodial service agreements;

(2) entered into by an entity established under article ten-c of the Public Authorities Law and is for:

(i) projects approved by the Department of Health or the Public Health Council in accordance with article twenty-eight, thirty-six or forty of the Public Health Law or article seven of the Social Services Law;

(ii) projects approved by the Office of Mental Health, the Office for People with Disabilities, or the Office of Alcoholism and Substance Abuse Services in accordance with article sixteen, thirty-one or thirty-two of the Mental Hygiene Law;

(iii) services, affiliations or joint ventures for the provision or administration of health care services or scientific research;

- (iv) payment for direct health care services or goods used in the provision of health care services; or
- (v) participation in group purchasing arrangements;
- (3) for the procurement of goods, services or both goods and services to meet emergencies arising from unforeseen causes or to effect repairs to critical infrastructure that are necessary to avoid a delay in the delivery of critical services that could compromise the public welfare;
- (4) for the purchase or sale of energy, electricity or ancillary services made by an authority on a recognized market for the goods, services or commodities in question in accordance with standard terms and conditions of purchase or sale at a market price;
- (5) for the purchase, sale or delivery of power or energy, fuel, costs and services ancillary thereto, or financial products related thereto, with a term of less than five years; or
- (6) for the sale or delivery of power or energy and costs and services ancillary thereto for economic development purposes pursuant to title one of article five of the Public Authorities Law or article six of the Economic Development Law.
- (g) Exempt Contract Amendment shall mean a modification to any contract where such modification would otherwise be an eligible contract amendment, but is for an exempt purpose as defined in subparagraphs (1) through (6) of paragraph (f) of this section.
- (h) Monies appropriated by the state shall mean:

(1) monies from the state treasury or any of its funds, or any of the funds under its management pursuant to law; or

(2) the proceeds of bonds, where such bonds shall be paid in whole or in part with monies from the state treasury or any of its funds, or any of the funds under its management pursuant to law.

(i) Procurement record shall mean documentation of the decisions made and the approach taken by the state authority in the procurement process.

(j) Single source shall mean a procurement in which although two or more offerers can supply the required goods or services, the state authority, upon written findings setting forth the material and substantial reasons therefore, may award a contract or amendment to a contract to one offerer over the other.

(k) Sole source shall mean a procurement in which only one offerer is capable of supplying the required goods or services.

(l) State authority shall mean a public authority or public benefit corporation created by or existing under any law of the state of New York, other than an interstate or international authority or public benefit corporation, including subsidiaries of such public authority or public benefit corporation, where one or more members serve by virtue of holding a civil office of the state, or where one or more members are appointed by the governor except where all such appointments by the governor occur specifically upon the recommendation of a local government official.

(m) Subsidiary shall mean a corporate body or company:

(1) having more than half of its voting shares owned or held by a state authority;
or

(2) having a majority of its directors, trustees or members in common with the directors, trustees or members of a state authority or as designees of a state authority.

(n) Written determination shall mean notification provided in writing either in paper or electronic format of the Comptroller's approval or disapproval of any contract submitted for approval by a state authority.

(o) Written notice shall mean notification provided in writing either in paper or electronic format.

§ 206.3 Annual Reporting Requirement for Eligible Contracts and Eligible Contract Amendments.

(a) No later than 30 days before the end of the state authority's fiscal year, every state authority shall submit to the Office of the State Comptroller a report, in such form as prescribed by the Comptroller, which includes a description of every eligible contract and eligible contract amendment which the state authority reasonably anticipates entering into in the following fiscal year; provided, however, that the following eligible contract amendments shall not be included in such reports: (1) construction contract change orders that do not exceed \$100,000; and (2) agreements to extend the duration of a contract for which there is no change in contract amount.

(b) The description for each anticipated eligible contract or eligible contract amendment specified in the report shall include, but not be limited to, the

following elements: (1) the purpose of the eligible contract or eligible contract amendment; (2) the anticipated value of the eligible contract or eligible contract amendment; (3) whether it is anticipated that the contract will be awarded on a competitive basis, and, if not, the basis upon which the contract will be awarded; (4) the anticipated date for the release of the solicitation, if applicable, or execution of the eligible contract or eligible contract amendment; and (5) the source of funding for the eligible contract or eligible contract amendment.

(c) (1) The state authority shall provide written notice to the Office of the State Comptroller of:

(i) any eligible contract or eligible contract amendment not previously reported, together with all information required by paragraph (b) of this section;

(ii) any deletions from the list of eligible contracts or eligible contract amendments previously reported; or

(iii) any significant change in the information provided in the reports submitted by the state authority pursuant to this section. For purposes of this paragraph, a change shall be deemed significant if it affects the method of award of a contract or increases the anticipated value of a contract or contract amendment by more than 25 percent.

(2) Such written notice shall be submitted no later than thirty days after the state authority has identified the need for such addition or significant change.

However, such notice must be given at least ten days prior to the release of a solicitation related to such addition or significant change in the event of a

competitive procurement, or to the execution of a contract related to such addition or significant change in the event of a noncompetitive award.

(d) The Comptroller may waive the requirements of this section for any state authority that submits eligible contracts to the Comptroller for approval pursuant to an existing law or resolution.

§ 206.4 Determination of eligible contracts and eligible contract amendments subject to the Comptroller's approval.

(a) (1) The Comptroller shall periodically determine which eligible contracts and eligible contract amendments shall be subject to the Comptroller's approval.

(2) Once the Comptroller has determined that any eligible contract, eligible contract amendment, category of eligible contracts or category of eligible contract amendments shall be subject to approval by the Comptroller, the Comptroller shall provide written notice of such determination to the affected state authorities as soon as practicable.

(3) Such written notice shall include instructions for submitting any such contracts or contract amendments and the period of time during which the state authority is required to submit the contracts and/or contract amendments.

(4) Where a state authority that is subject to the publication requirements contained in article four-c of the Economic Development Law believes that an eligible contract, described in a written notice provided by the Comptroller pursuant to this section, is exempt from such requirements under paragraph (a) of subdivision one of section one hundred forty-four of the Economic

Development Law, the state authority must obtain the Comptroller's approval for such exemption.

(b) The Comptroller's determination of which eligible contracts or eligible contract amendments shall be subject to his or her approval may include, but shall not be limited to, consideration of one or more the following criteria:

(1) number and dollar value of contracts entered into, or anticipated to be entered into, by the state authority;

(2) past practices of the state authority with respect to its contracting or procurement process as identified by audits performed by regulating bodies including, but not limited to, the Office of the State Comptroller;

(3) the types of contracts entered into by the state authority;

(4) the presence or absence of competition in the procurement process;

(5) the level of financial risk posed by the state authority's contracts;

(6) any potential liability for the State posed by the state authority's contracts;

(7) the content and adequacy of the state authority's existing procurement guidelines; and

(8) the state authority's compliance with the provisions in section 206.7 regarding the filing of exempt contracts, exempt contract amendments, certain eligible contracts and certain eligible contract amendments.

§ 206.5 Submission of eligible contracts or eligible contract amendments subject to the Comptroller's approval.

(a) Every state authority shall, upon execution of any eligible contract or eligible contract amendment described in a written notice issued pursuant to paragraph

(a) of section 206.4, promptly submit to the Comptroller for approval each such eligible contract or eligible contract amendment for the duration stated in the notice, including all attachments and documents incorporated by reference therein, except where the Comptroller has determined that a complete copy is unnecessary and has so notified the state authority, along with the complete procurement record. A copy of all such eligible contracts and eligible contract amendments shall be retained on file with the Office of the State Comptroller. Such submission should be made in such form and manner as may be prescribed by the Comptroller. The Comptroller also reserves the right to request submission of additional materials that are relevant to the Comptroller's review and approval.

(b) For each eligible contract or eligible contract amendment described in a written notice issued pursuant to paragraph (a) of section 206.4 of this Part, the state authority shall include a certification in the procurement record that it has undertaken an affirmative review of the responsibility of the contractor and significant subcontractors known at the time of the contract award. Such review shall be designed to provide reasonable assurances that the contractor and significant subcontractors are responsible and shall be documented in the procurement record. For purposes of this paragraph, a subcontractor shall be deemed to be significant if: (1) the subcontractor's qualifications are a material factor in the award; or (2) the value of the subcontract will equal or exceed an amount as the Comptroller may from time-to-time determine, to be reasonable.

(c) Where the Comptroller has provided written notice pursuant to paragraph (a) of section 206.4, the state authority shall include in each eligible contract or eligible contract amendment described in such notice a clause providing that the contract or contract amendment is subject to the Comptroller's approval before such contract or contract amendment may become valid and enforceable.

(d) The Comptroller shall have ninety days to issue a written determination with respect to the approval or disapproval of each eligible contract or eligible contract amendment submitted for approval. Such ninety day period shall begin upon receipt of the eligible contract or eligible contract amendment, including all required documentation, by the Office of the State Comptroller. No eligible contract or eligible contract amendment submitted to the Comptroller shall become valid and enforceable until such eligible contract or eligible contract amendment has been approved by the Comptroller; provided, however, that if the Comptroller has not issued a written determination within the ninety day period, such eligible contract or eligible contract amendment shall become valid and enforceable without approval by the Comptroller. In the event that the state authority resubmits an eligible contract or eligible contract amendment previously disapproved by the Comptroller, the Comptroller shall have ninety days from the receipt of such resubmitted eligible contract or eligible contract amendment to issue a written determination.

(e) The Comptroller reserves the right to require state authorities to transmit all or part of the procurement record electronically according to standards developed by the Comptroller.

§ 206.6 Criteria for approval of an eligible contract or eligible contract amendment.

The Comptroller's determination as to whether to approve an eligible contract or eligible contract amendment submitted for approval shall include, but not be limited to, consideration of the following criteria:

(a) for all eligible contracts and eligible contract amendments: (1) compliance with all applicable laws; (2) the responsibility of the proposed contractor; (3) the reasonableness of the state authority's procurement procedures and, if applicable, compliance with such procedures; (4) the reasonableness of the result; (5) whether the contract contains a description of the scope of services, a specified term with a commencement and end date (except in the case of properly executed purchase orders) and is otherwise reasonable and acceptable as to form; and (6) whether the terms of the agreement are reasonable and in the best interests of the authority;

(b) for single source and sole source contracts, or any eligible contract or eligible contract amendment awarded pursuant to any other method of procurement that is not a competitive procurement: (1) the justification for not utilizing a competitive procurement; and (2) the reasonableness of the selection of the contractor, the cost and the terms of the eligible contract or eligible contract amendment. The procurement record for such eligible contracts or eligible contract amendments shall include: the justification for not using a competitive procurement; the basis for selecting the contractor, including the

alternatives considered; and the basis upon which the state authority determined the cost was reasonable; and

(c) for competitive procurements: (1) the adequacy of the efforts made to provide notice of the contract opportunity; (2) the reasonableness of the product specifications, requirements or work to be performed; (3) the reasonableness of the methodology for evaluating bids, proposals or other offers; and (4) the state authority's fair application of the established methodology for evaluating bids, proposals or other offers. The procurement record for competitive contracts shall demonstrate a competitive field by providing, at a minimum, a clear statement of the required specifications or work to be performed, a fair and equal opportunity for offerers to submit responsive offers and a balanced and fair method of evaluation and selection.

§ 206.7 Filing requirements for exempt contracts, exempt contract amendments, certain eligible contracts and certain eligible contract amendments.

(a)(1) A state authority shall file with the Office of the State Comptroller: (i) a copy of any exempt contract; (ii) a copy of any exempt contract amendment; and (iii) an explanation of why such contract or contract amendment is exempt from the Comptroller's approval.

(2) When an exempt contract or an exempt contract amendment is executed in order to meet an emergency, the state authority shall document in the explanation the nature of the emergency giving rise to the procurement.

(3) Copies of such exempt contracts, exempt contract amendments and the related explanation shall be filed within sixty day after the execution of such exempt contract or exempt contract amendment.

(b)(1) A state authority shall also file with the Office of the State Comptroller a copy of any eligible contract or eligible contract amendment entered into by the state authority for which the Comptroller has not provided notice pursuant to paragraph (a) of section 206.4.

(2) Copies of such eligible contracts or eligible contract amendments executed on or after the date of the adoption of this Part shall be filed within sixty days after such execution.

(c) The filing of any contracts or contract amendments pursuant to this section shall be made in such form and manner as may be prescribed by the Comptroller. In addition, where an eligible contract amendment or an exempt contract amendment filed pursuant to this section modifies a contract that was not previously filed with the Office of the State Comptroller, the state authority shall, at the Comptroller's request, provide a copy of the original contract and any prior amendments thereto. A state authority should file a complete copy of any contract or contract amendment pursuant to this section, including all attachments and documents incorporated by reference therein, except where the Comptroller has determined that a complete copy is unnecessary, is not legally required, and has so notified the state authority.