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**AN EXAMINATION OF THE  
PROCUREMENT STEWARDSHIP ACT AND  
PROCUREMENT ISSUES**

*Testimony before the Assembly Standing Committee on Governmental Operations;  
Assembly Standing Committee on Local Governments; Assembly Standing Committee on Small  
Business; Assembly Standing Committee on Environmental Conservation; Assembly Standing  
Committee on Oversight, Analysis and Investigation; Assembly Standing Committee on  
Government Administration; and the Subcommittee on Oversight of the Department of  
Environmental Conservation*

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**SEPTEMBER 27, 2005**

**Patricia E. Salkin, Esq.  
Associate Dean and Director**

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Written Testimony of Patricia E. Salkin  
Associate Dean and Director  
Government Law Center of Albany Law School  
September 27, 2005

Before the: Assembly Standing Committee on Governmental Operations; Assembly Standing Committee on Local Governments; Assembly Standing Committee on Small Business; Assembly Standing Committee on Environmental Conservation; Assembly Standing Committee on Oversight, Analysis and Investigation; Assembly Standing Committee on Government Administration; and the Subcommittee on Oversight of the Department of Environmental Conservation

Regarding the Examination of the Procurement Stewardship Act and Procurement Issues

Members of Assembly Destito, Sweeney, Weprin, DiNapoli, Brennan, Millam and Bradley, thank you for the opportunity to share our research regarding the impending sunset of the Procurement Stewardship Act.

The Government Law Center of Albany Law School is a non-partisan law-school based research center that focuses on legal aspects of public policy reform. Established in 1978 with a threefold mission to assist governments in meeting legal challenges, to introduce law students to methods of policy analysis and to public service, and to serve as a resource to governments at all levels, the Government Law Center is a unique source for law and policy research as well as for public sector workforce training.

Recognizing that the Procurement Stewardship Act was initially set to sunset in June 2005, the Government Law Center dedicated significant staff resources during the 2004-2005 academic year to the study of the procurement law in New York. In addition to our research efforts, working with the Office of the State Comptroller, the Office of General Services, the NYS Forum for Information Management, the New York State Bar Association's Committee on Attorneys in Public Service and the State Academy for Public Administration, we developed and hosted a one-day symposium on procurement law in New York in the Spring

of 2005. This symposium brought together close to 200 people from across New York State to discuss and debate many issues related to the Procurement Stewardship Act. My testimony today is intended to share with you some highlights of our research and issues discussed at the symposium. We will provide each of you with a copy of our forthcoming report as well as the published proceedings of the symposium.

As you know, The Procurement Stewardship Act of 1995 brought reform and consistency to the procurement process in New York State but was enacted with a five-year sunset clause, presumably to ensure that the new law would be evaluated. In 2000, however, the Act was simply amended to extend the sunset provision to June 30, 2005. In April 2005, the Act was again extended for one year and is due to sunset on June 30, 2006.

Prior to the enactment of the Procurement Stewardship Act, laws dealing with procurement for the State were scattered throughout State law. Amid scandal, the State set out to review and reform its laws. In the late 1970's the Legislative Commission on Economy and Efficiency in Government enlisted the assistance of the American Bar Association (ABA). In 1979, after four years of drafting, the ABA adopted the Model Procurement Code for State and Local Governments (the Model Code).

The American Bar Association Model Procurement Code Project issued the first in a series of three reports for the State in 1983. The report was essentially a comprehensive comparison of the Model Code and existing New York Statutes. Comparisons were made between the Model Code and State procurement laws which were found in the Commerce Law, Corrections Law, Court of Claims Law, Finance Law, Education Law, Labor Law, Judiciary Law, General Municipal Law, Highway Law, Labor Law, Public Buildings Law, Printing and Public Documents Law, Public Authorities Law, and Transportation Law. Major findings and recommendations centered on nine of the Model Procurement

Code's twelve articles. The summary of findings included: 1) need for a universal application of the procurement statutes to all branches of State government and consideration of application to local governments, 2) creation of an independent policy office to implement regulations, 3) development of a cohesive purchasing system for various types of source selection, 4) provisions for uniform procurement of construction and selection of architect-engineer and land surveying services, 5) provide only an overall system of supply management and disposal in the law that is to be followed by all agencies, 6) provide for bid protests and contract disputes at the administrative level, 7) provide for cooperative purchasing at all levels of government, 8) provide assistance to small and disadvantaged businesses, and 9) revise and expand ethical considerations. In addition, the report concluded that adopting procurement legislation based on the Model Procurement Code would serve to codify existing statutes, facilitate use of the laws, and enable the purging of antiquated and inconsistent laws.

Three years later, the New York State Legislative Commission on Public Management Systems, formerly known as the Legislative Commission on Economy and Efficiency in Government, issued a second report. The report advocated procurement reform in New York. It was published on the heels of a conference on procurement reform sponsored by the Commission and identified problems with existing procurement laws. The report included a review of survey responses asking the vendor community to evaluate various State procurement practices. Comparisons of procurement laws from other states were examined, and procurement for construction and public benefit corporations was also considered in depth. Ultimately, the report included proposed comprehensive legislation that was introduced but never adopted.

The third report was prepared by the Legislative Commission on Public Management Systems in December 1989. As a result of new leadership in the Assembly and the Commission, procurement had become the Commission's top priority in 1987. New research focused on reactions to the proposed legislation

that was introduced in 1986. In the spring of 1988, public hearings were held on a revised consolidated procurement bill and reactions to that bill and further research led to this third report. Again, the Commission's work involved a broad range of professionals from the former ABA Model Code Committee, State agencies, legislative staff, public interest groups, academia, and other government entities. Based on the Commission's research, the report compared New York's procurement laws to the ABA Model Code as well as other states' procurement laws and set forth alternatives for change.

In 2000, legislation was adopted to extend the sunset provisions of Section 163. In addition to the extender, many clarifications and technical amendments were made to the Act along with amendments to other statutes related to procurement. In many instances, bid limits were increased. Additionally, it required OGS to maintain centralized lists of small businesses and minority and women-owned businesses and also provided training regarding the purchasing from such business. Section 162 of the State Finance Law, regarding preferred sources, was also extended in 2000 and in 2002 the sunset provision was removed making that section permanent. This law was recognized as advancing special social and economic goals and providing opportunities for rehabilitation, job training and development which otherwise would not be available from the private marketplace.

In an effort to increase public confidence in the State's procurement process, Governor Pataki issued 2003 Executive Order Number 127, *Providing for Additional State Procurement Disclosure*, increasing the disclosure requirements regarding persons and organizations contacting State government about procurement and real estate transactions, and making that information available to the public. In June of 2005, the New York State Legislature passed the Omnibus Lobbying Law Reform Act of 2005 with the purpose of reforming the Lobby Law and State Finance Law. The bill, signed by the Governor in August

2005, has a January 1, 2006 effective date and will significantly impact procurement lobbying activities.

New York now faces another sunset on June 30, 2006 of State Finance Law Section 163. Many options are available. The law could expire, leaving no legislation to follow or enforce. The sunset provision could simply be removed with no amendments to the law making Section 163 permanent until and unless amended in the future. The sunset provision could be removed along with amendments to the law, and amendments to the Act may be made with another sunset provision enacted to require a review at a later date. Various state entities as well as trade organization have now developed a history of experience with the Act and with current procurement processes, and many of these entities continue to make recommendations to enhance the overall efficiency of the procurement process in New York. While not all proposals are the same and the details may not be agreed upon, many have common themes such as raising bid thresholds, addressing procurement lobbying, and advancing e-commerce.

At our Spring 2005 symposium, the following issues were among those discussed (in no particular order and with no judgment on the part of the Government Law Center as to whether these are worthwhile and needed reforms). The following list is by no means comprehensive. Please refer to the attached transcript of the proceedings for more specific details:

- Increase discretionary buying thresholds for small and minority and women-owned businesses.
- Improve the vendor responsibility questionnaire and create a centralized vendor database.
- Employ technology in the procurement process, e.g., transition the state to a paperless procurement system.

- Clarify debriefing rules so that vendors who have lost competitive procurements have better access to information on how the procurement took place and why they were not chosen.
- Set forth clearer rules governing piggybacking between agencies.
- Create stricter guidelines concerning review/approval of contracts.
- Examine opportunities set forth in the recently revised Model Procurement Code.
- Provide better and ongoing training devoted to both drafting and evaluating an RFP.
- Revise the review process after bidding is complete.
- Eliminate contractual conditions imposing “limitless liability.”
- Ensure that the contract process is completed in a timely manner.
- Raise bid thresholds.
- Increase discretionary thresholds--\$25,000 for commodities and \$50,000 for public works.
- Allow NY municipalities to buy off of contracts from other states.

One thing was evident to us by the conclusion of the symposium – this public, day long focus on the procurement law did not provide enough time to explore in depth the dozens of issues related to a reauthorization. The overwhelming response as demonstrated by those who attended, was simply the tip of the iceberg in terms of the stakeholder interests desiring to participate in the discussion.

The Government Law Center is pleased to report that we are working with the Office of General Services and with the State Comptroller on a series of three statewide focus groups scheduled for October 2005 to engage various stakeholders in more in-depth conversation about many procurement law and policy reform issues. We expect that the findings from these sessions will provide valuable insights regarding the effectiveness and usefulness of the

current Procurement Stewardship Act for vendors and for state and local governments.

The Government Law Center welcomes the opportunity to provide additional information and research resources to Assembly Members and staff as you continue to sort through options for reform with response to the Procurement Stewardship Act.

Thank you.