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PROCUREMENT GUIDELINES

SECTION ONE: PURPOSE, SCOPE AND DEFINITIONS

PURPOSE. The purpose of State procurement is to facilitate each State agency's mission while protecting the interests of the State and its taxpayers and promoting fairness in contracting with the business community. The following Procurement Guidelines (Guidelines) are intended to advance these goals and to encourage State agency adoption of practices which foster them.

The purpose of these Guidelines is to assist agencies when procuring Commodities, Services and Technology. This is accomplished by:

- consolidating in one place the multiple points of view and approaches to procurement;
- identifying an essential set of ingredients that go into successful procurements;
- providing valuable technical guidance on different approaches for structuring a procurement; and,
- providing examples of good procurement practices.

In drafting these Guidelines, a deliberate effort has been made to balance the need to preserve open and fair competition, with the goal of preserving each agency's flexibility to procure in a manner which contributes to the fulfillment of its mission.

In addition, these Guidelines were crafted to recognize, clarify and elaborate upon the distinctive nature of Service and Technology procurements as Services and Technology cannot always be procured in the same manner as Commodities: they may be difficult to describe and not easily reduced to a series of technical specifications; often agencies need to evaluate the vendor, as well as, its proposed solution; and when comparing various proposals, an extensive evaluation may need to be conducted in which the price of the Service/Technology is only one of many considerations.

One goal of these Guidelines is to make the process of procuring Services and Technology more manageable for State agencies.

SCOPE AND DEFINITIONS. These Guidelines are designed to apply to a wide range of procurements, from the very routine to the very complex. In applying these Guidelines, the following definitions and distinctions apply:

- **Application.** The Guidelines apply to **all** Commodity, Service and Technology contracts procured by State agencies. The Guidelines do not, however, apply to printing contracts, contracts with not-for-profit organizations covered by Article 11-B of the State Finance Law, or architectural, surveying or engineering services covered under Section 136-a of the State Finance Law. Additionally, construction contracts are not covered by these Guidelines.
- **Best Value.** “Best Value” is the basis for awarding **all** Service and Technology contracts to that offerer which optimizes quality, cost and efficiency, among responsive and responsible offerers. Such basis shall be, wherever possible, quantifiable. State Finance Law § 163(1)(j).
- **Commodities.** “Commodities” are defined as standard articles of commerce in the form of material goods, supplies, products or similar items. Commodities do **not** include Technology. State Finance Law § 160(3).
- **Costs and Price.** “Costs” in the case of “Best Value” are distinguished from “Price.” Costs include conversion costs, life-cycle costs, etc., and *embody* price, which is the amount charged by the vendor for the given Commodity or Service or Technology. State Finance Law § 160(5), (6).
- **Lowest Price.** “Lowest Price” is the basis for awarding **all** Commodity contracts among responsive and responsible offerers. State Finance Law § 163(1)(i).

- **Procurement Record.** The procurement law includes a requirement that a Procurement Record (Record) be kept for each acquisition. The Record formalizes the practice of agencies maintaining documentation concerning the procurement process and the decisions made during that process. The Record should contain all the materials necessary to be conveyed to the Office of the State Comptroller for contract review and approval purposes and for post audit, as well as any other material the agency determines is essential. The Record is designed to both serve and protect agencies and the business community during and after the procurement. State Finance Law §§ 163(1)(f) and 163(9)(g).
- **Services.** “Services” are defined as the performance of a task or tasks, which may include the use of a material good or a quantity of material goods. This definition includes Technology which can be either a good or a Service or a combination thereof (frequently referred to as “bundled procurements”). State Finance Law § 160(7).
- **Technology.** “Technology” is defined as a good or a Service or a combination thereof, that results in a technical method of achieving a practical purpose or in improvements in productivity. Goods may be new or used. State Finance Law § 160 (10).
- **Using an Invitation for Bid (IFB) or a Request for Proposal (RFP).** The decision as to which procurement method or model to use is at the discretion of the procuring agency. Generally speaking, less complex procurements for Commodities, Services and/or Technology should use an IFB, and more complex procurements should use an RFP.

PROCUREMENT GUIDELINES

SECTION TWO: GENERAL POLICY

The goal of the State's procurement process is to procure Commodities, Services and Technology that enable State agencies to fulfill their respective missions while ensuring fair and open competition. The State's procurement process is designed to: (a) guard against favoritism, improvidence, extravagance, fraud and corruption; (b) ensure that the results meet agency needs; and, (c) protect the interests of the State and its taxpayers. To ensure these goals are met, State statute provides for checks and balances to regulate and oversee agency procurement activities. Nevertheless, the primary responsibility for procurement rests with State agencies which, in addition to statutory requirements, should conform with the following general principles.

COMPETITION. Competition in the procurement process serves both State agencies and potential offerers by:

- √ ensuring the procurement process produces an optimal solution at a reasonable price;
- √ guarding against favoritism, fraud and collusion; and,
- √ allowing qualified vendors an opportunity to obtain State business.

When competition exists, State agencies should make every effort to administer a process which provides maximum opportunities for offerers to compete. The breadth of the competitive field may be defined by an agency through the establishment of minimum eligibility qualifications for offerers and the identification of programmatic requirements describing the Commodities, Services and Technology to be provided, so long as the rationale is sound and the process itself is documented. Alternatively, when competition does not exist or is not utilized, State agencies should endeavor to negotiate a reasonable price and terms and conditions which can be justified and documented.

RESPONSIBILITY. State agencies should only award contracts to vendors who are responsible. Agencies must administer a process in which offerers are required to provide assurances that they conform with responsibility requirements. Such requirements may include, but are not limited to, the offerer's qualifications, financial stability, legal authority, integrity and performance (State Finance Law section 163(9)(f)). **Responsibility differs from responsiveness** in that it generally applies to the offerer and the constructs are established in case law. Responsive applies to the extent to which the offerer has complied with the specifications or requirements of the solicitation document.

EVALUATION AND AWARD. Information provided to offerers must be clearly written such that all offerers understand: (i) the requirements of a responsive bid or proposal; (ii) how their bid or proposal will be evaluated; and (iii) the general method the agency will use to select a successful offerer. To ensure equitable treatment among competing offerers, each must be provided consistent information throughout the procurement process. Additionally, all offers must be considered and awards must be made in accordance with a rational, pre-determined process. The process may use price as the sole determinant or may consider a variety of factors such as quality, cost and the efficiency of the proposed solution. Where appropriate, consideration of cost does not have to be limited to the price of the goods and Services being procured but may apply to the total cost or cost/benefit of procuring and using the goods and services. Wherever possible, the evaluation should be quantifiable.

FAIR AND OPEN PROCESS. State agencies must make every reasonable effort to ensure that vendors are aware of opportunities to compete for State business. In addition, State agencies must:

- √ define the process by which the procurement is being conducted;
- √ disclose the general process to potential offerers;
- √ adhere to the process while conducting the procurement; and
- √ document the process.

Additionally, State agencies must provide offerers with an opportunity to learn why *their* offer was not selected.

PROCUREMENT GUIDELINES

SECTION THREE: SELECTING A PROCUREMENT TECHNIQUE

State agencies make purchases for a whole host of reasons. Normally, Commodities, Services and Technology are procured in response to a need or a problem situation that exists. These needs or problem situations vary with respect to how well they can be defined. Some are highly standardized or common to several agencies, and Commodities and Services may be available through a statewide contract offered by the Office of General Services. Other issues are unique to a given agency and range from relatively simple, routine concerns to complicated problems requiring complex solutions. Routine concerns are generally easier to describe and solutions may be articulated as a series of specifications. As problems become more complicated, the requirements for resolving them become more difficult to describe.

To address this array of conditions, there is a continuum of procurement techniques available to State agencies. Options include Preferred Sources; OGS Centralized Contracts; Discretionary Buying Thresholds; Competitive Procurements by State Agencies Using Invitations for Bid (IFBs) and Requests for Proposals (RFPs); Sole or Single Source procurements; and Emergency procurements. Irrespective of the technique used, acquiring Commodities, Services and Technology is a time-consuming undertaking that requires a fair degree of thought and planning.

It is the State agency's responsibility to determine that a need exists for a particular Service, Technology or Commodity and to select and document the appropriate procurement technique for meeting that need. These decisions form the first steps of the procurement process and the "initial entries" into the Procurement Record. This Record should fully document the steps taken in the procurement process, serving as an historical record as well as the basis for OSC's review.

When selecting the most effective technique, an agency may consider **any or all** of the following:

- What is the nature of the problem being addressed?
 - √ Is it a routine problem or one that is highly unique? Is it a recurring need or a one-time occurrence?
 - √ Has your agency or another State agency recently faced a similar problem or need? What approach was used?
 - √ To what extent is the problem within your agency's control?
 - √ Does your agency have a particular solution in mind? How firm is it? Could the market of existing providers generate more or better ideas?
 - √ What level of specialized skills or knowledge (e.g., scientific, academic, technical, practical) are required to provide the Commodities or Service?

- How well can the agency's need be described?
 - √ How easily can the Service or solution be translated into specifications or requirements?
 - √ Is there a single means for meeting the need (e.g., having a floor carpeted) or are there multiple solutions, known and unknown to the agency, for resolving the given problem area (e.g., a project for redesigning the work flow of a given unit)?
 - √ In describing the need, would the focus be on describing the problem to be resolved or the solution for resolving it? Also, would the focus be on how the requirements should be provided (i.e., the process) or the results (i.e, the outcomes) or both? How predictable are the results?
 - √ In order to describe the need, would your agency benefit from the input of external providers?

- √ How easily can the agency's requirements be translated into evaluation criteria?
- What practical considerations are there?
 - √ How complicated does the procurement need to be? How simple can it be and still meet the objective?
 - √ What is the proposed timetable? Is it realistic and, if not, can it be modified?
 - √ How time-sensitive is it? Are there other time-sensitive events that depend on its outcome?
 - √ Is there sufficient time to, for example, develop a proposal or bid specification or place notice in the Contract Reporter? To review proposals and award the contract? If not, how can the timetable be modified?
 - √ Does the agency have the necessary expertise to develop a proposal or bid specification and make the award?
 - √ Is there competition (i.e., are there multiple firms that provide the Commodity or Service?)
 - √ What other logistical considerations need to be taken into account? (e.g., does the acquisition also require moving staff? Is there adequate space available? Will the providers need access to telephones? Is necessary data available in the quality/form that it can be used?)
- How well does the proposed Commodity or Service fit into available resources?
 - √ Can the Service be provided by agency staff? Or, by another State agency? What is the preferred approach?
 - √ How much in-house support will the Commodity acquisition or Service require and is this support available? Is there management support?

- √ Are there experienced technical and managerial staff available to manage the acquisition process and oversee the contract once it's awarded? If not, how does the agency plan to address this requirement?
- √ Are there sufficient resources to pay for the Commodity or Service? Are there revenue sources outside State resources that could be used for financing? If federal funds are being used, what special requirements or conditions apply? Given available resources, are special financing or payment mechanisms required?
- How much risk is involved?
 - √ How compatible are the likely solutions or Services with existing program operations?
 - √ What types of measures of success will be applied? How realistic is it to meet these measures?
 - √ Could the approach itself, due to time or some other factors, cause some risk for the agency?
 - √ What are the contingencies and associated costs?
 - √ What risks are there to prospective contractors?
 - √ Is the expected solution sufficiently flexible to adapt to changing needs within the agency over time?

In order to answer these questions and select the most effective procurement technique, an agency may engage in a variety of activities. These may include analyzing and, where appropriate, quantifying agency needs and capabilities; researching “best practices” from other agencies or outside organizations; reviewing independent industry publications; and/or issuing a Request For Information (RFI) to assess the availability, types, options and state of the art of potential services and to help identify potential suppliers.

Finally, in many procurements, another consideration in selecting the most appropriate procurement technique is cost effectiveness. When it is necessary to examine costs and benefits, a broad context should be employed. Such an analysis may include: the life cycle costs of the product; overhead and handling costs; the investment of staff time; the cost of getting a service-provider “up to speed;” the cost of adapting existing equipment; and other financial considerations such as total financing charges net of any trade-in, credit, royalty and residual values. “Benefits” also are used in the broadest sense. Factors such as the impact of the acquisition on long-term agency operations, the extent to which it enhances the agency's capacity to achieve its mission, and the value of warranties or a vendor-managed inventory should be considered. In each case, the law requires that whenever possible, costs and benefits *should be quantified*.

Once the appropriate questions have been addressed, an agency is then equipped to match its situation with the features of the various techniques available and decide which procurement technique will best suit the situation.

PROCUREMENT GUIDELINES

SECTION FOUR: PROCUREMENT TECHNIQUES

The State's procurement law prioritizes how agencies must go about purchasing. Generally:

- When the desired Commodity or Service is available in the form, function and utility required by the State agency from a Preferred Source and the price as determined by OGS does not exceed fifteen (15) percent above the prevailing market rate (or, in the case of Correctional Industries, for Commodities, the price does not exceed a reasonable fair market rate as determined by DOCS), the agency must purchase from a Preferred Source (See generally State Finance Law § 162);
- In the case of **Commodities**, if the Commodity is not available from a Preferred Source in the form, function and utility required by the State agency, the State agency must apply the following sequence:
 - (i) determine if the Commodity is available in the form, function and utility required from an OGS centralized Commodity contract and if so, make the procurement;
 - (ii) when not so available, request that OGS establish a centralized contract, or
 - (iii) when not so available, procure the Commodity independently or in conjunction with other State agencies.

State Finance Law § 163(3).

- In the case of **Services**, if the Service is not available from a Preferred Source in the form, function and utility required by the State agency, the State agency may:
 - (i) use an OGS centralized Services and Technology contract; or
 - (ii) request that OGS establish such a centralized contract; or

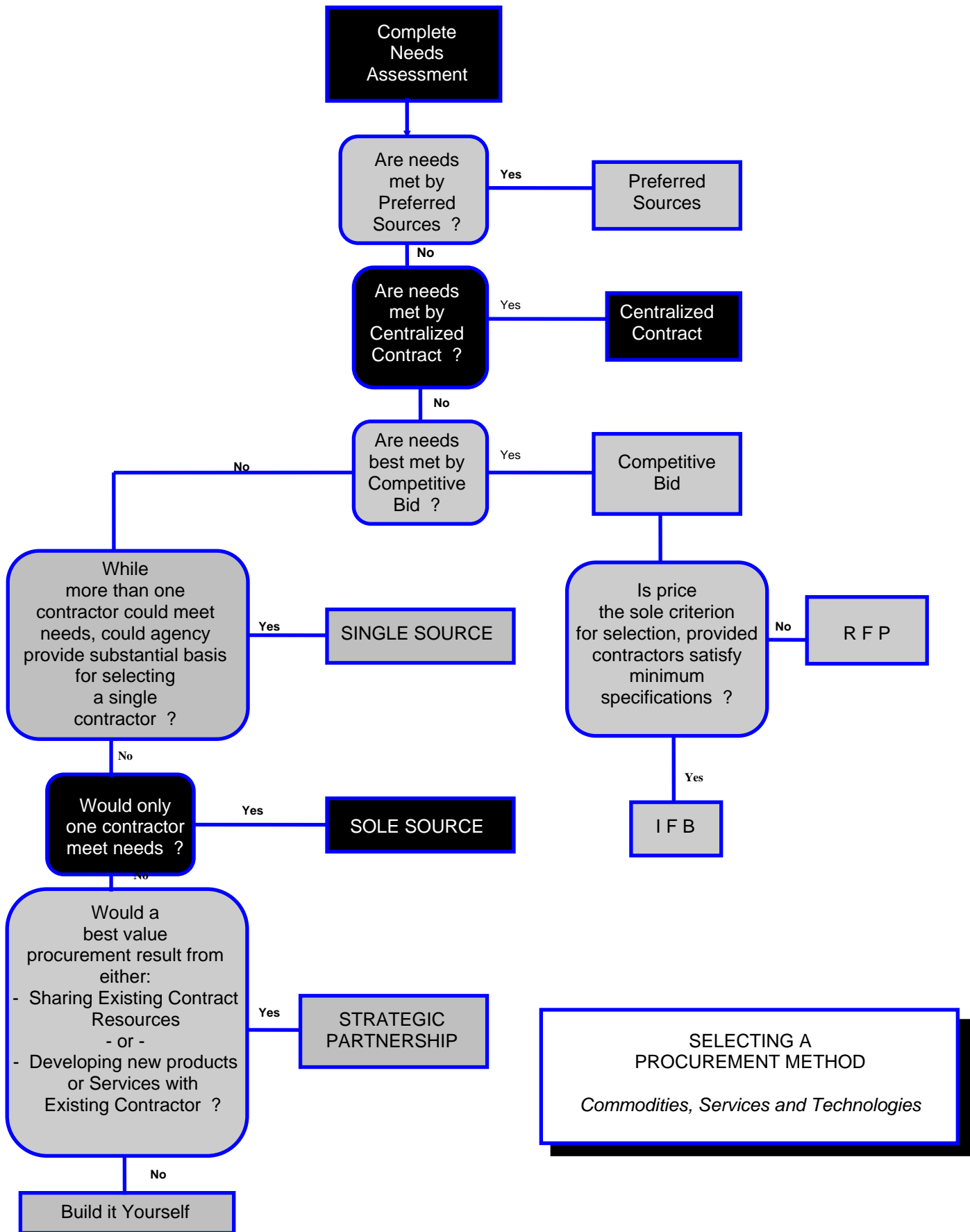
- (iii) procure the Service independently or in conjunction with other State agencies.

State Finance Law § 163(4).

This section outlines the different procurement techniques available for obtaining Commodities, Services and Technology as defined in this document. Future bulletins will cover new techniques such as strategic partnerships. The attached chart provides a general overview of how the various techniques are applied. Techniques include:

- A Preferred Sources
- B. OGS Centralized Commodity Contracts
- C. OGS Centralized Services and Technology Contracts
- D. Discretionary Buying Thresholds
- E. Competitive Procurements by State Agencies Including Invitations for Bid (IFBs) and Requests for Proposal (RFPs)
- F. Single/Sole Source
- G. Emergency Situations.

CHART Complete Needs Assessment



SELECTING A PROCUREMENT METHOD
Commodities, Services and Technologies

A. Preferred Sources

To advance special social and economic goals, certain providers have “Preferred Source” status under the law. See State Finance Law § 162. Procurements from these providers are **not** subject to competitive procurement requirements.

The special status of a “Preferred Source” **for Commodities** is accorded to the Department of Correctional Services (DOCS) Industries Program (Corcraft). The special status of “Preferred Source” for **Services and Commodities** is accorded to qualified charitable non-profit making agencies for the blind, qualified charitable non-profit making agencies for other severely disabled persons, qualified special employment programs for mentally ill persons and certain veterans' workshops.

The law prioritizes among Preferred Sources when making a purchase. For **Commodities**, Corcraft has first priority, qualified charitable agencies for the blind have second priority and all others are accorded equal priority. In other words, when purchasing a Commodity from a Preferred Source, agencies must begin with DOCS and proceed to qualified charitable agencies for the blind, and then all other Preferred Sources, in locating the desired Commodity.

For **Services**, equal priority is accorded qualified charitable agencies for the blind, qualified charitable agencies for other severely disabled, special employment programs for the mentally ill and veterans' workshops.

State agencies must purchase from a Preferred Source when the Commodities or Services required are:

- (i) on the List of Preferred Source Offerings published by OGS;
- (ii) approved by OGS as not exceeding fifteen (15) percent above the prevailing market price for the same or similar Commodities or Services, or in the case of Corcraft products, are approved by DOCS as not exceeding a reasonable fair market price for the same or similar Commodities; and

- (iii) in the form, function, and utility required by the State agency.

In addition for Services, State agencies must make reasonable efforts to determine whether the Preferred Source is interested in performing the Service **before** they go out to bid. This “right of first refusal” approach avoids having private businesses invest in a competitive procurement process when a Preferred Source is the likely recipient of the contract.

To accomplish this, once Service requirements have been specified, agencies must notify those preferred sources which provide the Service (as indicated on the List of Preferred Source Offerings), of their Service requirements.

If, within ten (10) days, the Preferred Source expresses an interest in performing the Service as specified and OGS approves the price of the Service, the agency must purchase said Service from the Preferred Source. If, within ten (10) days of the notification, the Preferred Source does not respond or expresses no interest in providing the Service, the State agency may conduct a competitive procurement. During the competitive procurement, if the Preferred Source elects to then “bid” on the contract, the State agency shall award the contract to the offerer having the best value, **irrespective** of the Preferred Source's special status. In other words, under such circumstances, the Preferred Source will be treated as any other offerer.

In addition to Preferred Sources, other statutes, while not mandating purchases from a specific source, establish a policy to promote small businesses and businesses which perform Services substantially within New York State. Similarly, there is a State policy to promote the participation of minority and women owned businesses which is applicable to Commodity and Service contracts.

B. OGS Centralized Commodity Contracts

The OGS Procurement Services Group (PSG) establishes centralized Commodity contracts in the form, function and utility required by State agencies, for a wide range of items commonly procured by agencies. If a Commodity is available from a centralized contract in the form, function and utility consistent with an agency's need, such item must be purchased from the centralized contract. Exceptions to the use of PSG contracts include:

√ "OGS or Less" - agencies may competitively procure items otherwise available on a centralized contract when the resultant price is less, in accordance with "OGS or Less" Guidelines.

√ Consortia procurements - when justified by price, State agencies may purchase from consortia, in lieu of using a centralized contract, in accordance with Consortia Guidelines.

Agencies may also request that OGS establish a Commodity contract to meet a unique agency need.

Users of the centralized Commodity contracts benefit from the buying power of the State as a single customer and through the reduction of administrative costs, taking advantage of bulk discounts and marketplace economies. Contracts are established both on statewide and on a regional basis, and may be made with multiple vendors to allow purchasing flexibility while optimally meeting user needs.

C. OGS Centralized Contracts for Services and Technology

The OGS Procurement Services Group establishes centralized Service and Technology contracts for State Agency use. The use of most centralized Service and Technology contracts is at the option of State agencies. The State Procurement Council may, however, mandate the use of certain Service and Technology contracts where warranted. A wide and diverse range of Services from routine maintenance to complex Technology-based procurements are available through these contracts for agencies to use without an independent contracting process.

OGS maintains contracts for Services based upon demonstrated multi-agency needs and potential savings. Users of the centralized Services contracting program benefit from the buying power of the State as a single customer and through the reduction of administrative costs, taking advantage of bulk discounts and market place economies. If a specific centralized contract is not available, agencies may request that OGS establish a Service contract. Procurements may be made on a statewide, regional or other basis and frequently will be made with multiple vendors to allow purchasing flexibility while optimally meeting user needs.

D. Discretionary Buying Thresholds

Purchases under the Discretionary Buying Threshold do not require a formal competitive procurement process. See State Finance Law § 163(6). For State agencies, the Discretionary Buying Threshold is \$50,000. However, for purchases from small business concerns or from firms certified under Article 15-A of the Executive Law, or for purchases of recycled or remanufactured materials, the Discretionary Buying Threshold for State agencies is \$100,000. Agencies are still required to publicize purchases \$15,000 or more in the Contract Reporter. For procurements valued at over \$5,000 but less than \$15,000 see NYS Procurement Bulletin - Contract Reporter Quarterly Listings. For procurements of \$15,000 or greater see OSC Bulletin No. G-107B - Procurement Opportunities Newsletter (Contract Reporter).

Any procurement by an agency not exceeding the Discretionary Buying Threshold of \$50,000 (or \$100,000 as the case may be) may be done without a formal competitive procurement. OGS may procure a Commodity or a Service without a formal competitive process up to a dollar limit of \$85,000. In determining whether a procurement is within the Discretionary Buying Threshold, agencies are expected to consider, when practical and appropriate, the anticipated annual expenditures for a Commodity or Service. The agency is required to select a reliable source and to obtain written quotation(s) from offerers which would include the terms and conditions of the procurement. For the Office of the State Comptroller's approval requirements, see the NYS Procurement Bulletin - Discretionary Purchasing Guidelines. When procuring under the Discretionary Buying Threshold, the agency has the responsibility to obtain the Commodities or Services at a reasonable cost.

E. Competitive Procurements by State Agencies

For competitive procurements conducted by State agencies, there is a continuum of procurement techniques ranging from a very simple **Invitation for Bid (IFB)** to a very complex **Request for Proposals (RFP)**. When selecting among these various approaches, the two determining factors are: 1) the importance of costs as a component in the review of incoming bids or proposals; and 2) the agency's ability to define specifications for the Commodity, Service or Technology being procured.

As depicted on the attached chart, when costs and, in particular, price, are important **and** the agency can translate the Commodity, Service or Technology into exact specifications, an IFB is likely to be the most appropriate procurement method. As costs become less important vis-a-vis other factors, the RFP becomes a more appropriate tool. It should be noted, however, that the ultimate decision of which procurement technique to use is a judgement call, based on the professional expertise of the agency.

Irrespective of the specific method used, i.e. an IFB or an RFP, Commodities are to be awarded on the basis of “lowest price” and Services/Technology are to be awarded on the basis of “best value,” among responsive and responsible offerers. There will be many cases in which an IFB is used to purchase services and awarded on the basis of best value. In rarer instances, Commodities will be purchased using an RFP and awarded on the basis of lowest price.

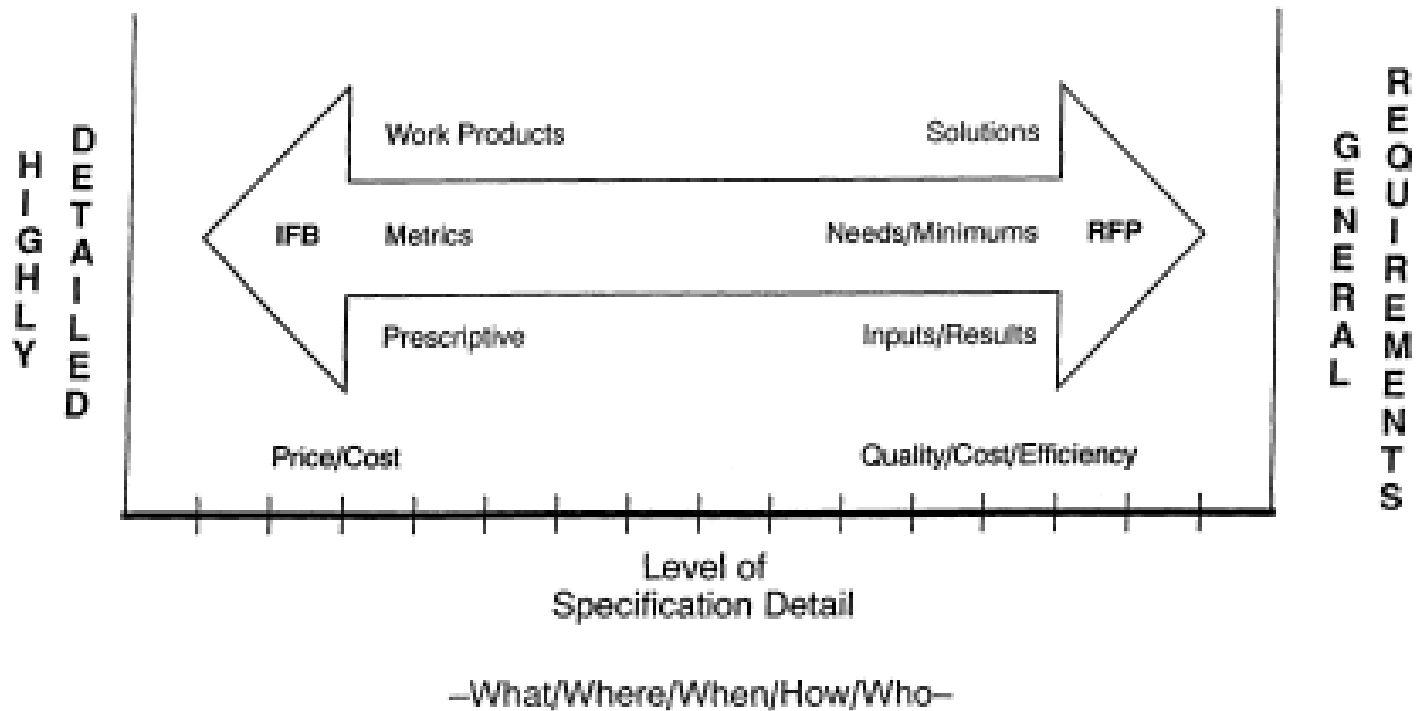
Similarly, it is expected that there will be occasions when it makes sense to boil down a best value award for services to a lowest price determination. **Specifically, best value can be equated to lowest price in those cases when:**

- √ **price is the only criterion for making the decision among responsive and responsible competing offers;**
- √ **“quality” and “efficiency” requirements have been fully defined in the specifications; and**
- √ **price equals cost.**

In these cases, while the award will still technically be made on the basis of best value, best value will be interpreted to mean the offer having the lowest price that meets specifications among responsible offerers.

CHART: PROCUREMENT METHODS

Procurement Methods



F. Sole Source/Single Source Procurement

In certain circumstances, a Sole Source or Single Source procurement may be necessary. In either case, the procuring agency should begin by developing a statement of work/scope which defines the Commodities, Technology or Services it is seeking to procure.

A Sole Source procurement is one in which only one vendor can supply the Commodities, Technology and/or perform the Services required by an agency. State Finance Law § 163(1)(g). Procurement by this method must be documented in the Procurement Record by an explanation of: (i) the unique nature of the requirement; (ii) the basis upon which it was determined that there is only one known vendor able to meet the need, i.e., the steps taken to identify potential competitors; and (iii) the basis upon which the agency determined the cost to be reasonable, i.e., a “fair market price” that could be anticipated had normal competitive conditions existed, and how that conclusion was reached. (Examples of such a determination may include a comparison to product catalogs, published price lists, retail market surveys, records of previous similar purchases, consulting other purchasing officials, or using professional experience.) All such documentation is required by OSC in order to review the proposed contract.

A Single Source procurement is one in which two or more vendors can supply the Commodity, Technology and/or perform the Services required by an agency, but the State agency selects one vendor over the others for reasons such as expertise or previous experience with similar contracts. State Finance Law § 163(1)(h). Circumstances leading an agency to select this method of procurement may include, for example, an agency's need for a specific consultant firm where a number of firms are available to perform the work. In such a case, the agency can demonstrate a rational basis for selecting a single vendor because of specific factors such as past experience with a particular issue, familiarity with specific agency operations, experience with similar projects at other agencies or at other levels of government, demonstrated expertise, or capacity and willingness to respond to the situation.

In a Single Source procurement, the agency must document in the Procurement Record: (i) the circumstances leading to the selection of the vendor, including the alternatives considered; (ii) its rationale for selecting the specific vendor; and (iii) the basis upon which it determined the cost was reasonable, as in the case of a Sole Source procurement, and how that conclusion was reached. All such documentation is required by OSC in order to review the proposed contract.

Unless the Commodity, Technology or Services are being procured as a result of an emergency, publication in the Contract Reporter is necessary. For additional guidance see the bulletin concerning the Contract Reporter.

G. Emergency Situations

An Emergency is considered an urgent and unexpected requirement where health and public safety or the conservation of public resources is at risk. State Finance Law § 163 (1)(b). **An agency's failure to properly plan in advance which then results in a situation in which normal practices cannot be followed does not constitute an emergency.**

Where an emergency exists, an agency may let procurement contracts without complying with formal competitive bidding requirements. Under such conditions, a waiver of the competitive bidding requirements must be approved by the agency head or a designee.

Under such conditions, the agency shall document in the Procurement Record each transaction entered into as a result of the emergency situation, setting forth the nature of the emergency situation; the potential effect on the health, public safety, or the conservation of public resources; and a detailed description of the Commodities, Services and Technology to be provided. The agency shall make all reasonable attempts to solicit at least three oral competitive bids and written confirmation of each solicitation shall be furnished within a reasonable time and maintained as an official record. Contracts entered into as a result of the emergency situation shall be for only the Commodities, Technology and/or Services necessary to remedy or ameliorate the situation.

Publishing requirements for the New York State Contract Reporter will be in compliance with appropriate bulletins. For additional guidance, see the bulletin concerning the Contract Reporter.

PROCUREMENT GUIDELINES

SECTION FIVE: USING OGS CENTRALIZED CONTRACTS

This section provides an overview of the OGS Procurement Services Group's (PSG) contracting functions, and describes the basic procedures for accessing their contracts.

A. Procurement Objectives -- Centralized Contracts

Procurements of Commodities, Services and Technology may often be made through the use of centralized contracts established by the Office of General Services' Procurement Services Group. Agencies may be able to meet their needs on a timely and cost effective basis through existing centralized contracts, or PSG may be able to more expeditiously meet their specialized requirements through the establishment of a new contract which may also benefit other agencies. The savings potential associated with centralized contracts is further enhanced with the inclusion of public authorities, political subdivisions, municipalities and not-for-profit organizations as eligible users.

The establishment of contracts for a particular Commodity, Service or Technology is dependent on the needs of customer agencies and other contract users. It is expressed in the law as "Form, Function and Utility." Categories of products and services and contractual terms and conditions are developed by the Procurement Services Group in cooperation with agency representatives. See generally State Finance Law § 163.

The objectives of PSG's contract programs include:

1. Leveraging the State's buying power in the procurement of Commodities, Services and Technology.
2. Assisting agencies in accessing a wide and diverse range of centralized contracts from routine goods and maintenance to complex technology-based procurements on a timely basis. In doing so, PSG provides flexibility for customer agencies to determine the most appropriate centralized contract to utilize based on the needs of the agency.

3. Reducing administrative burdens and costs in the creation of contracts by allowing for one centralized contract rather than individual contracts by multiple agencies.
4. Establishing central points of contact for vendors in Commodities, Services and Technologies to ensure opportunities for vendors to participate in the State procurement process.
5. Developing procurement approaches that reflect market changes and allow the State to benefit from new market advances and technological advances and achieve the most cost effective solutions.
6. Providing for procurement of a single Commodity, Service or Technology or bundled components of Services and related equipment to formulate effective solutions to agency needs. Bundling may include such aspects as consultant training, maintenance services and computer hardware and software.

B. Contract Types and Award Methodology

OGS may use various contracting methods including Invitation for Bids, Requests for Proposals, cooperative contracting arrangements, and Single/Sole Source. OGS, in cooperation with the Office of the State Comptroller, Division of the Budget, State Procurement Council and other agencies, may also develop new approaches to procurement to be made available and recommended to user agencies. The focus is on methodologies which provide more flexibility, improve the Service or product being offered or provide additional savings.

Various factors may be used in the contract selection process and several methods of award may be employed, as circumstances dictate, to provide the best approach for the scope of the particular acquisition. These include:

1. Statewide or Regional Single Vendor Contract. The agency directly purchases from the contractor.
2. Statewide or Regional Multiple Vendor Contracts with Agency Selection Among Contractors. The agency may select from Commodities, Technology or Services offered by any of the vendors and then directly purchase from the selected contractor. In some instances the agency may need to select based upon the lowest cost offered by the vendors or justify why the lowest cost vendor is not selected.
3. Backdrop Contracts With Agency Selection Based Upon a Mini-Bid Approach. State agencies and the Office of General Services' Procurement Services Group (PSG) may establish backdrop contracts with multiple vendors which require a subsequent bid process and award among the contracted vendors based upon specific agency requirements. The methods used to establish contracts with multiple vendors, and the process required to make purchases are described below.

Backdrop contracts are based on continuous recruitment and require bidders to provide not-to-exceed pricing that will establish the ceiling pricing for the term of the contract. Purchases from these contracts (e.g., computer consulting, systems integration and training contracts, PBX contracts, elevator maintenance, etc.), require the using agency to conduct a mini-bid process among the pre-qualified backdrop contractors. Agencies must prepare a project definition describing the agency's specific requirements, and identify the evaluation criteria which will be used in determining award. Mini-bid awards with a value exceeding \$50,000 require approval by the Office of the State Comptroller before work can begin.

For guidelines on how to conduct a mini-bid under backdrop contracts let by PSG, agencies should refer to Mini-Bid Guidelines issued by the Office of General Services.

4. Centralized Contract With One or More Contractors Allowing Subcontracts with Agency Specific Modifications. The centralized contracts contain general terms and conditions for the services and/or technology with discounted pricing. An agency may obtain service directly from the vendor utilizing the centralized contract or may execute and obtain approval of a subcontract with agency specific modifications to terms and conditions.
5. Discretionary Purchases. In certain situations where a commodity, service or technology is not under a centralized contract, PSG may provide for a procurement under the discretionary limit established for the Office of General Services (\$85,000). See State Finance Law § 163(6).

C. Utilization of Centralized Contracts

The following outlines the general procedures and agency responsibilities for using centralized contracts.

1. OGS will disseminate information about centralized contract offerings to agencies through bulletins, contract award notices, electronic access and user groups. A listing of agency representatives has been established to receive such information and will be updated periodically. Purchases under the centralized services contracts will be generally processed through a purchase order which should be identified by "PT" or "PS" contract numbers. Centralized commodity contract purchases are identified by "P" contract numbers. Alternatively, when the contract has a "CMS" designation, it must be accessed by a contract encumbrance. The "PT" contract identifier provides for purchases of technologies. The "PS" contract identifier provides for purchases of services. The "CMS" contract identifier primarily provides for purchases of services and technology which utilize payment schedules which qualify for the automatic payment process and contracts requiring a mini-bid.

2. OGS may provide more than one contract that could be used to address the needs of an agency. The agency determines the most appropriate centralized contract that addresses their needs and provides the most cost effective solution. A large volume purchase requirement may enable an agency to solicit best and final offers from potential vendors under the centralized contract pricing. Such purchases will still be made under the centralized contract, but at the special pricing offered by the vendor.
3. Agencies are to purchase from centralized **commodity** contracts if the item is available in the form, function and utility consistent with an agency's need. Agencies have the option of using centralized **services** contracts, unless otherwise specified by the State Procurement Council, or establishing their own contracts. A filed requirement approach may also be used by PSG. With such an approach, agencies will be asked to define their need and commit to use of the centralized contract. This information may be utilized in the bid solicitation to assist in ensuring the most cost effective contract.
4. OGS will, as necessary, establish contracts through a sole source or single source procurement. To support these procurement methods, agencies may need to provide documentation which details the special circumstances and factors that justify a sole or single source procurement.
5. The benefits associated with centralized contracts generally exist from the merging of multiple agency needs; however, OGS may undertake a contract for a single agency for a pilot project or a prototype acquisition. On a limited basis, PSG will also establish a contract for a specific agency, upon request.
6. Vendor lists established by PSG are also available to State agencies when undertaking independent competitive procurements.

PROCUREMENT GUIDELINES

SECTION SIX: USING AN INVITATION FOR BID (IFB)

The IFB methodology is appropriate for those situations where the needed commodities, services and/or technology can be translated into exact specifications **and** the award can be made on the **basis of lowest price, or best value**, when the best value determination can be made on price alone, among responsive and responsible offerers.

In the case of commodities, procurement using an IFB is relatively straightforward -- awards are made on the basis of lowest price among responsible and responsive offers. State Finance Law § 163(3)(a)(ii). **In the case of services**, an IFB may be used to acquire services and technology when the agency determines that price is the principal award criteria. In these cases, the acquisition process must adhere to the following:

(i) Quality and Efficiency. The minimum specifications set forth in the IFB must serve as the criteria to assess the quality and efficiency of the bids. The agency must satisfy itself that the successful proposal complies with minimum quality and efficiency requirements; and

(ii) Cost. The procurement must define "cost" as the bid price. In some cases, non-price factors (e.g., life cycle costs, supply costs, etc.) that can be quantified may be considered in the comparison of bids and the selection of the successful bid.

When an IFB is used to purchase services and technology, it is still awarded on the basis of best value (State Finance Law § 163(4)(d)); however, "best value" in this case is interpreted to mean the offer having the lowest price that meets specifications among responsible offerers.

The following section details the procedures for developing an IFB including those for more complex procurements. Mandatory requirements are designated with an **(M)**.

I. PROCUREMENT OBJECTIVES AND POLICIES GOVERNING THE PROCESS

A. STATE'S MINIMUM ESSENTIAL OBLIGATIONS TO OFFERERS

(M) State acquisitions of commodities, services and technology to fulfill programmatic needs and to provide the State with the best solution at the lowest practicable cost, must ensure open and fair competition in which offerers of goods and services are accorded the following:

(M) 1. The State shall make every reasonable effort to apprise offerers of solicitation opportunities. Such efforts may include, but are not limited to:

- √ Notifications in the State's Contract Reporter (State Finance Law § 163(8) and §163(2)(b));
- √ Mailings to industry associations;
- √ Notifications to known offerers;
- √ Mailing lists maintained by OGS and other State agencies;
- √ Contact with the Department of Economic Development to determine known M/WBE offerers;

(M) 2. The IFB shall set forth clear and descriptive specifications or requirements that define the commodities, technology, or services and promote fairness in contracting with the business community (State Finance Law § 163(9)(a));

(M) 3. The IFB shall specify the required qualifications of offerers and the mandatory contract terms and conditions (State Finance Law § 163(9)(a));

- (M) 4. All information concerning the solicitation shall be conveyed in writing to all potential offerers participating in the process including, but not limited to:
- √ Answers to offerers' substantive inquiries,
 - √ IFB clarifications and amendments,
 - √ Process rules,
 - √ Methods of Award (State Finance Law § 163(9)(b));
- (M) 5. Any changes to the IFB and/or the rules of the procurement shall be communicated, in writing, to each offerer participating in the process;
- (M) 6. The Method of Award shall be completed and secured prior to opening bids (State Finance Law § 163(2)(b) and (7));
- (M) 7. The Method of Award shall not be altered after opening the bids, with the exception of minor changes and only if the modifications are justified and evidence presented to ensure that the changes would not materially benefit or disadvantage an offerer;
- (M) 8. The award shall be made on the basis of lowest price (State Finance Law § 163(3)(a)(ii)) or best value (State Finance Law § 163(4)(d)) to a responsible and responsive offerer or, in the case of multiple awards, to the lowest price or best value offerers meeting all terms and conditions (State Finance Law § 163(10)(c));
- (M) 9. The Method of Award shall be applied equally and uniformly in the evaluation of bids;
- (M) 10. All offerers shall be notified as to whether they are successful or unsuccessful. Upon request, an unsuccessful offerer should be provided a debriefing as soon as possible after selection of the successful bidder, as to why its bid was unsuccessful.

B. STATE'S RESERVED RIGHTS

To enable the State to acquire commodities, technology and services at the lowest price or best value from responsible and responsive offerers, the State reserves rights to:

- (M) 1. Define requirements to meet agency needs and to modify, correct and clarify requirements at any time during the process provided the changes are justified and maintain fairness in contracting with the business community
- 2. Accept and/or reject any or all bids, and waive technicalities or portions of the bids in the best interest of the State (State Finance Law § 163(9)(d));
- 3. Establish terms and conditions which must be met by all offerers and/or, where permitted by the solicitation, eliminate mandatory requirements that are not met by any offerer (State Finance Law § 163(2)(b) and § 163(9)(b));
- 4. Establish, where permitted by the solicitation, conditions under which the scope of the contract can be expanded and criteria for price increases or decreases during the contract period;
- 5. Award contracts for any or all parts of the IFB in accordance with the Method of Award (State Finance Law § 163(9)(d));
- 6. Consider every offer as firm and not revocable for a period of up to sixty days from the bid opening or such other period of time specified in the solicitation. Subsequent to such sixty day or other specified period, an offer may be withdrawn in writing (State Finance Law § 163(9)(e));
- 7. Have the option to require a bond or other guarantee of performance, and to approve the amount, form and sufficiency thereof (State Finance Law § 163(10)(d).

II. ADMINISTRATION OF THE PROCUREMENT PROCESS

Procurements should be conducted in accordance with a defined process. While agencies retain some discretion in defining such processes, certain mandatory **(M)** actions are required by the agency. This section outlines the general process for administering an IFB, identifying both the applicable mandatory and optional activities.

- (M) A. All solicitations \$15,000 or above must be published in the **Contract Reporter** in conformance with applicable statutes and guidelines. Economic Development Law § 142. For procurements valued over \$5,000 but less than \$15,000 see NYS Contract Reporter Bulletin. For procurements of \$15,000 or greater see OSC Bulletin No. G-107B - Procurement Opportunities Newsletter (Contract Reporter).
- (M) B. The agency must make every reasonable effort to **identify potential offerers** in addition to those identified through the Contract Reporter. Sources can be found by consulting with the OGS Procurement Services Group, talking with other agencies who may have similar requirements, reviewing reference directories (such as the Thomas Register, Data Pro, and Data Sources) and checking with the Department of Economic Development for potential M/WBE sources.
- (M) C. **The agency issues the IFB**, including a mailing or other distribution to all known offerers identified through the process defined in item (B) above.
- (M) D. **IFB clarifications** to modify, eliminate or add requirements must be issued in writing and disseminated to all offerers, maintaining fairness in contracting with the business community (State Finance Law § 163(2)(b)).
- E. The agency should seek to establish **communication strategies with offerers**, as needed, to ensure the requirements, specifications and expectations contained in the IFB are sufficient to communicate the agency's needs to prospective offerers.

For example, the agency may require or recommend a **site visit** to permit potential offerers to familiarize themselves with agency facilities. When it is necessary to obtain additional information from offerers or provide additional information to offerers, the following techniques may be used:

1. The agency may arrange a **Pre-Bid Conference** to determine if the bid document accurately reflects the current marketplace. Notification of the Pre-Bid Conference shall be given to all prospective offerers. This conference, held prior to the release of the IFB, provides an opportunity to receive input from potential offerers. A draft IFB may be provided to attendees to foster discussion.

In lieu of a formal Pre-Bid Conference, an agency may want to circulate a draft bid document to potential bidders on a more informal basis to invite input before finalizing the IFB.

2. The agency may conduct a **Bidders' Conference** following the release of the IFB. Attendance may be voluntary or mandatory as outlined in the IFB.

(M) If a Bidders' Conference is convened, the agency must maintain a record of the proceedings and provide either a transcript or summary of questions and answers to all attendees. If the Bidders' Conference is optional, such documentation must be provided to all bidders who were sent the original IFB.

3. The agency may conduct a **Pre-Award Survey** after the lowest price or best value offer has been tentatively selected to determine if a bidder meets all requirements of the IFB. Such a survey is typically reserved for large scale or critical projects and is conducted when the information available to the agency is not sufficient to make a determination of the firm's qualifications. Through a Pre-Award Survey the agency seeks to verify information provided by the bidder relative to the firm's technical qualifications, current workload, financial capacity

and related factors, in order to determine whether the prospective contractor can perform in accordance with the terms of the proposed contract. A Pre-Award Survey should be limited to verifying information required by the IFB.

(M) If a Pre-Award Survey is required, the IFB must include the mandatory procedures and requirements.

4. In the case of certain commodities and technology, an agency may also require a **benchmark or acceptance test** after the lowest price or best value offer has been tentatively selected to determine if the offer meets its program needs.

(M) If a benchmark or acceptance test is required, the IFB must include the mandatory procedures and requirements.

(M) F. The agency must publish in the IFB the **bid due date and time** and the location to which the bid must be delivered, as well as the mandatory bid form.

(M) G. The agency must **award the contract or contracts on the basis of lowest price or best value to a responsive and responsible offerer(s)** (State Finance Law § 163(10)) **in accordance with the Method of Award** set forth in the IFB. Award can be made by item, by lot, by grand total bid for all items, by district or zone if an agency is bidding for multi-location delivery, or by a combination of these.

H. **The agency may award all items bid, or award some and not others, provided that the Method of Award allows for award by item or lot.** The agency may elect to not award a contract. The agency may award a contract to an offerer even if only one bid is submitted (State Finance Law § 163(9)(d)).

- (M) I. The agency must **monitor the contractor's performance** in the context of pre-determined standards and administer applicable sanctions for failure to conform to standards. Agencies must publish both the predetermined standards and applicable sanctions in the IFB

- (M) J. It is the agency's responsibility to **immediately inspect products** delivered to insure full performance in accordance with contract requirements and specifications as set forth in the IFB. To ensure software acceptability, the agency is responsible for specifying an acceptance period in the IFB, either upon receipt or upon installation.

III. DEVELOPING AN INVITATION FOR BIDS

The Invitation for Bids should provide prospective offerers with all the information necessary to develop a responsive bid. The IFB should inform the offerers of the specific steps in the process, the scope of commodities, services, hardware or software to be provided, the method of award and the terms and conditions of the contract. A copy of the IFB should be included in the Procurement Record.

Most IFBs follow a common format. To ensure the completeness of the final product, an agency should first focus on those core elements which comprise the IFB document:

- √ the statement of work/detailed specifications;
- √ the bidder qualifications;
- √ the method of award;
- √ the contract terms and conditions; and
- √ administrative considerations.

A. STATEMENT OF WORK/DETAILED SPECIFICATIONS

This section of the IFB describes the specifications of the product to be acquired or the work or service to be performed. Clear specifications are the key to producing a contract satisfactory to both parties and ensuring that all bidders are on an equal footing. Specifications should be sufficiently detailed so as to enable responsiveness and yet broad enough to encourage competition.

The elements of the statement of work will vary with the size and nature of the procurement. In describing the work to be accomplished, the statement of work should begin with a broad non-technical description summarizing the nature of the service to be provided or product to be acquired, the work to be done by the contractor, and the results expected. When applicable, the various types or categories of work should be listed, indicating, if necessary, that the list is not all inclusive. Special care should be accorded to the drafting of this summary statement such that all further or amplifying descriptions of work contained in the IFB are covered by this initial statement.

The broad statement of work should be followed by a more detailed description of the service to be provided or product to be acquired. In the case of **services**, this detailed description should include a description of each task including, but not limited to:

- √ Directions, specifications and requirements pertaining to the manner (e.g., cleaning consistent with industry standards) of performing the work;
- √ Deliverables or other desired outputs of the work;
- √ Personnel requirements, and where necessary, the specific duties and the total necessary person-hours estimated;
- √ Timing requirements that are realistic and clearly stated, including when and where the service will be provided, milestones and a completion date if applicable and other time-related factors;
- √ Instructive materials including a list, by full title, of all manuals, guidelines or regulations which apply to the execution of the service being acquired and where these materials can be located;
- √ Work phasing considerations if any, including the extent to which the agency itself will participate in the project and/or oversee contract execution, and the desired frequency of staff briefings or status reports; and
- √ Basis for award of the contract including the anticipated bases for reviewing and ranking bids, and subsequently making the awards (see Method of Award).

In the case of **commodities and technology**, the detailed specifications will in most cases fall into one of the following types:

- √ Make and Model or Equal. When an agency is not limiting its procurement to a specific brand, it may use a make and model specification. This will reference a specific manufacturer's product in order to describe such factors as functionality, style, or capacity. However, the agency may acquire any product having equivalent characteristics.
- (M) √ Qualified Products List. If an agency has determined and can provide justification why only one product or only certain products can meet their needs, the detailed specification may take the form of a Qualified Products List. A statement must be made in the IFB that bids will be accepted on the specified item(s) only and that no substitutes will be considered.
- √ Technical Specification. A technical specification describes the product required in detail, usually outlining physical components.
- √ Performance Specification. A performance specification describes the specific performance expected from a product. The bidder assumes responsibility for ensuring that the product offered performs as required.

For more complex acquisitions where an agency contemplates the purchase of bundled commodities, technologies and services, detailed specifications will reflect both those that apply to the services and those that apply to the technology or commodity being acquired.

Agencies may request specifications or information regarding a product or service provided by a vendor while exercising care to ensure that the final product or service specification is generic and does not benefit or disadvantage an offerer.

- For procurements of technology, if a vendor prepares and furnishes specifications for a technology proposal which is to be competitively bid, that vendor is prohibited from subsequently bidding on the procurement either as a prime vendor or as a subcontractor. Similarly, a vendor may not be awarded a contract to evaluate offers for products or services which would include evaluation of the vendor's own products or services. These prohibitions should be discussed with potential vendors as early as possible in the procurement process and prior to issuing an IFB (State Finance Law § 163-a)).

The above prohibitions shall not apply if:

- the vendor is the sole source or single source of the product or service;
- more than one vendor has been involved in preparing the specifications for a procurement proposal;
- the vendor has furnished specifications or information regarding a product or service it provides at the request of the agency but the vendor has not been directly requested to write specifications for the product or service or for the agency technology proposal; or
- the agency, together with the Office for Technology, determines that the restriction is not in the best interest of the State.

Agencies need to consider these prohibitions and exceptions well in advance of developing the IFB.

B. BIDDERS' QUALIFICATIONS

This section defines the minimum acceptable qualifications for a bidder to be considered acceptable for an award. In addition to a determination of the bidder's responsibility when drafting this section, agencies should consider which qualifications should be specified to ensure the bidder:

- √ Is technically qualified to perform the proposed work;
- √ Has, or can secure, adequate financial resources to perform the proposed work;
- √ Is able to comply with the delivery or performance schedule taking into consideration all existing business commitments;
- √ Has a satisfactory record of past performance;
- √ If selected, would not result in a conflict of interest, with regard to either other work performed by the firm, or individual staff conflicts.

Qualifications may include the length of time a firm has been in business, the expertise and experience of staff and the bidder's experience with projects of similar scope and size. Appropriate business references should also be required.

In the case of commodities, technology and certain services, this section should specify whether bids will be accepted from manufacturers only, or from authorized dealers.

C. METHOD OF AWARD

- (M) The award of an IFB is made on the basis of lowest price or best value to a responsible and responsive offerer(s). The method of award must be: determined in advance of releasing the IFB; specified in the IFB; followed in awarding the contract; and documented in the Procurement Record.

The method of award section of an IFB identifies the process for determining the lowest price or best value offer, and the responsiveness of the offerer. Additionally, the IFB should specify that the responsibility of the bidder will be considered.

- (M) In those situations when cost factors other than base bid price are to be considered as part of the award process, a description and the applicability of such factors **must** be outlined in the IFB (State Finance Law §§ 163(9)(a) and (b)).

An agency should be able to defend its method of award particularly if it results in reduced competition (i.e., award is to be made based on Statewide capability thereby excluding firms which can perform only within a specific region).

For commodities, services and technology acquisitions, depending on how many items are required, award can be made by item, by lot, by grand total bid for all items, by district or zone if an agency is bidding for multi-location delivery or by a combination of these, so long as these requirements are specified in the IFB. When customizing the method of award, items should be grouped to maximize competition to the extent practicable, taking into consideration all necessary compatibilities. An agency should award by item or by grand total bid -- whichever is in the State's best interest. This section should indicate whether multiple awards are contemplated and, if so, on what basis.

D. CONTRACT TERMS AND CONDITIONS

In addition to required contract terms and conditions mandated by law (see Appendix A), there are many important contract-related terms and conditions that need to be addressed when issuing an IFB. Important considerations include:

- Contract Period defines the beginning and the end of the contract and any possible extensions.
- Price should reflect all applicable freight, delivery and insurance charges. This should also outline whether the agency wants unloading, assembling, or installation. (Note: Agency may have to include prevailing wage rates in the IFB if installation is required.) The price clause should outline whether instruction of personnel is required, and if so, the number of people who must be instructed and the depth of instruction required.
- Delivery should require the bidder to express delivery in terms of the number of calendar days required to make delivery after receipt of a purchase order (ARO). In cases where immediate or rush delivery is necessary, the IFB should state that guaranteed delivery may be considered in making the award. In cases where delivery is being made to more than one destination and/or the agency requires staggered deliveries, a delivery schedule should be included.
- Contract Monitoring covers issues such as the performance expectations of the contractor or product and the actions the agency will take in the event a minimum level of performance is not achieved or maintained. The factors considered in, and frequency of, agency monitoring of contractor compliance should be specified in the IFB. The fact that contract compliance represents an agency responsibility and that non-compliance will be documented in writing along with a possible process for settling disputes may also be outlined in the IFB.

- Contract Termination concerns the conditions under which the contract can be terminated. Generally a contract may be terminated for cause or without cause, or for non-appropriation of funds.

E. BID FORM

- (M) To ensure uniformity, all IFBs must include a **Bid Form** on which bidders insert bid prices in a uniform format. This form should reflect the Method of Award and give bidders the ability to record all relevant costs in an organized manner. For commodities and technology, the bid form may also include a section where the bidder is asked to fill in the name and address of the manufacturer of the item or items being bid, the guaranteed delivery, the manufacturer's warranty period, and whether pricing offered is the lowest offered to commercial, government or education customers for similar quantities under similar conditions. The IFB bid form may also include a section which requires bidders to acknowledge whether any documentation required to be submitted with the bid has indeed been included. Questions can also be included to determine whether the bidder complies with certain boilerplate or other IFB requirements.

F. ADMINISTRATIVE CONSIDERATIONS

Prior to releasing an IFB, the agency should establish and include in the IFB (Economic Development Law § 142(2)(c)):

- √ A bid opening date and time;
- √ A bid acceptance period;
- √ Conditions under which bids may be modified or withdrawn;
- √ Policy on submission of facsimile bids; and
- √ Bid deposit and/or bond requirements.

To protect both the bidder and the agency, the IFB should specify that the bids should be **sealed**, or where **facsimile** or electronic technology is used, conveyed in a manner that guarantees the security of the bid.

In addition, the IFB should specify the **method of payment**. This is especially relevant to the case of service contracts. Methods include:

- √ Periodic variable payments (monthly, quarterly, etc.) based on the level of services rendered (units, hours, visits);
- √ Periodic lump sum payments (monthly, etc.) at the completion of a specified service (predetermined amounts); or
- √ One lump sum at the completion of services rendered.

For service contracts for consultants, the type of contract determines the method of payment. Two of the more common contract types are the **cost reimbursement type** and the **fixed price type**. Under a cost reimbursement type of contract, the consultant promises, in effect, to meet the performance requirements or goals of the contract. In return, the consultant is entitled to the reimbursement of allowable, allocable, and reasonable costs of performance and receives a fee, as appropriate, which is set by the terms of the contract. Deviations from estimated costs or cost range have no effect on the consultant's fee.

Under a fixed price type of contract, the contractor guarantees performance. In exchange for this guarantee, the State is obligated to pay a certain price. The provisions of the contract itself determine the ceiling of this price. The consultant's expected profit could be higher or lower depending on the actual cost incurred.

- (M) Other administrative considerations include the design of what is known as a “**front sheet.**” The front sheet briefly outlines what the IFB is for (i.e., computer maintenance, microcomputers, security services, etc.). It includes the issuing office, the point of contact (name and telephone number) for any questions about the IFB, the date and time of the bid opening and where the bid opening will be held, as well as where the completed bids should be mailed or faxed. The front sheet also includes a place for the bidder to sign the bid and to fill in the company's name, address, Employer's Federal ID number, telephone and fax numbers, and indicate whether the bidder is offering a cash discount for prompt payment.

Finally, all IFBs must clearly enumerate what documentation, if any, over and above the completed IFB must be submitted by the offerer. Required information such as literature on equipment, manufacturer's certifications, current list prices and related documentation should be specified. The agency should also reserve the right to request any additional information deemed necessary to properly review the bids.

IV. THE BID OPENING, EVALUATION AND AWARD PROCESS

(M) A. SECURING THE BIDS

As bids are received, they are recorded and placed in a secure location until the date and time of the bid opening.

(M) B. THE BID OPENING

At the announced bid opening time, an authorized agency representative opens all timely bids in the presence of at least one agency witness. The person opening bids is required to sign a Bid Affidavit certifying that the person opened bids for the specific IFB at the appointed time. No alteration or correction of bids should be allowed at the time of bid opening.

(M) C. THE SELECTION PROCESS

The objective of the bid selection process is to determine the lowest price or best value offer among responsive and responsible offerers in accordance with the Method of Award. Bids are to be reviewed on the basis of requirements set forth in the IFB such as inspection, testing, quality, delivery and suitability for the purpose as specified. No criteria may be used in the bid evaluations that are not set forth in the IFB. The Selection Process and outcomes should be reflected in the Procurement Record (State Finance Law § 163(2)(b), § 163(2)(c), § 163(3)(a)(ii) and § 163(9)(g)).

After the bid opening, a tabulation of all timely bids is created. The bids are ranked from the lowest to the highest based on the stated method of award. The selection process begins with the lowest bid and continues upwards until a bidder (or bidders) in total conformance with all specifications is (are) determined. If the award is not being made to the lowest price or best value offer among responsive and responsible offerers, the agency must document in the Procurement Record the reason(s) for rejection of each bid. In all cases, the award must be made in accordance with the method of award outlined in the IFB. In the event of tie bids, the commissioner or agency head or designee shall make the final determination.

In more complex and technical procurements, a two-step sealed bidding process can be used. The procedure calls for bidders to submit a separately sealed technical proposal that responds to the performance specification of the IFB. The bidder also simultaneously submits a separately sealed bid. The sealed bids remain unopened until the technical proposals have been evaluated. The technical proposals must not allude to price, and failure to adhere to this restriction is grounds for disqualification.

After technical proposals are found to be responsive and acceptable, only the sealed bids of those bidders are opened. The award is then made to the low price or best value offer.

D. NEGOTIATION PROCESS

On very rare occasions (i.e., if only one bid is received), it may be necessary to negotiate certain terms and conditions in a more complicated IFB. For example, for a more complicated service IFB, it may be necessary to negotiate the terms and conditions on how to provide the required service. In addition, an offerer may occasionally take exception to one or more of the IFB's terms and conditions. Under certain circumstances, it may be appropriate to negotiate rather than reject the bid as non-responsive. In all cases, however, purchasing staff should consult with the agency's legal counsel to ensure that the resulting modifications to the terms and conditions are acceptable and appropriate. All such negotiations should be documented in the Procurement Record.

E. NOTIFICATION AND AWARD

Pending approval by OSC of the agency's selection of the successful bidder, statistical information on the bid opening should be available to all bidders. For example, the names of all bidders, and the tabulation of all timely bids which is created after the bid opening, should normally be available to all bidders. If such information is not available, successful bidder(s) may be informally notified that they have been successful, contingent on the approval of OSC and unsuccessful bidders should be notified as soon as possible after approval of the successful bidder. Debriefings for unsuccessful bidders should also be provided upon request and must be restricted to discussion of the unsuccessful offerer's bids (State Finance Law §163(9)(c)).

PROCUREMENT GUIDELINES

SECTION SEVEN: USING A REQUEST FOR PROPOSALS (RFP)

I. INTRODUCTION

Request For Proposals (RFP) solicitations may range from relatively uncomplicated procurements to highly complex, long-term efforts involving a significant commitment of both agency and offerer resources. Services and technology procurements, and to a lesser extent commodities, are frequently procured using RFPs.

A. MANDATORY RFP REQUIREMENTS

To accommodate the range of RFP procurement approaches, the following Guidelines set forth essential policies and procedures to which agencies must adhere in undertaking an RFP procurement. Mandatory requirements are designated with an **(M)**.

B. OPTIONAL RFP METHODS

Additionally, the Guidelines provide for a variety of **optional** RFP procedures and methods, typically applied in more complex procurements. While these procedures remain discretionary, if applied by an agency, certain associated activities must be employed to ensure fair competition. These necessary activities, required because the agency has elected to invoke an optional procedure are coded **(OM)** in the text of the Guidelines. For example, while bidders' conferences may be discretionary, agencies electing to arrange such meetings **(OM)** must notify all potential offerers, in advance, of the date, time and location of the conferences.

II. PROCUREMENT OBJECTIVES AND POLICIES GOVERNING THE PROCESS

Procurements of goods and services are not ends in themselves. Instead, the State's acquisition process aims to acquire commodities, services and technology to enable State agencies to fulfill their respective programmatic missions.

A. STATE'S MINIMUM ESSENTIAL OBLIGATIONS TO OFFERERS

(M) State acquisitions of services and technology to fulfill programmatic needs and to provide the State with the "best value" must ensure open and fair competition in which offerers of goods and services are accorded the following (State Finance Law § 163(4)(d) and §163(2)):

(M) 1. The State shall make every reasonable effort to apprise offerers of solicitation opportunities which could include, but not be limited to:

√ Notifications in the State's Contract Reporter (Economic Development Law Article 4-C and State Finance Law § 163(8) and §163(2)(b));

√ Mailings to industry associations;

√ Notifications to known offerers;

√ Mailing lists maintained by OGS and other State agencies;

√ Contact with the Department of Economic Development to determine known M/WBE offerers;

(M) 2. Requests For Proposals (RFPs) shall set forth generic specifications or requirements that define the services or technologies needed but may not, knowingly, favor a particular offerer, product or service offering (State Finance Law § 163(9)(a));

(M) 3. The RFP shall specify the required qualifications of offerers and the mandatory contract terms and conditions (State Finance Law § 163(9)(a));

- (M) 4. All information concerning the solicitation shall be conveyed in writing to all offerers participating in the process including, but not limited to (State Finance Law §§ 163(9)(a) and (b):
- √ Answers to offerer inquiries;
 - √ RFP clarifications and amendments;
 - √ Process rules;
 - √ Evaluation criteria;
- (M) 5. Any changes to the RFP and/or the rules of the procurement shall be communicated, in writing, to each offerer participating in the process;
- (M) 6. The agency shall maintain a Procurement Record which documents all decisions regarding the procurement process, particularly the quantification of the application of criteria to determine an award based on best value; or where not quantifiable, the justification which demonstrates that best value will be achieved (State Finance Law § 163(9)(g));
- (M) 7. Evaluation criteria and methodology shall be completed and secured prior to initial receipt of proposals (State Finance Law § 163(7));
- (M) 8. The overall evaluation criteria shall not be altered after opening the proposals, with the exception of minor changes and only if the modifications are justified and evidence presented to ensure that the changes would not materially benefit or disadvantage an offerer;
- (M) 9. Offerers shall be apprised of the relative importance or weight of the cost criterion compared with the overall non-cost criterion (State Finance Law § 163(9)(b));
- (M) 10. The evaluation criteria shall be applied equally and uniformly in the evaluation of proposals (State Finance Law §§ 163(2)(b) and 163(9)(a));

- (M) 11. All offerers shall be notified as to whether they are successful or unsuccessful. Upon request, an unsuccessful offerer should be provided a debriefing as soon as possible after selection of the successful offerer, as to why its proposal was unsuccessful.

B. STATE'S RESERVED RIGHTS

To enable the State to acquire goods and services that represent the "best value," the State reserves rights to:

- (M) 1. Define requirements to meet agency needs and to modify, correct and clarify requirements at any time during the process provided the changes are justified and that modifications would not materially benefit or disadvantage an offerer;
- (M) 2. Disqualify proposed solutions that fail to meet mandatory requirements, provided that the RFP discloses to the offerers the agency's right to make such decisions;
- (M) 3. Eliminate mandatory requirements unmet by all offerers, provided that the RFP discloses to the offerers the agency's right to make such deletions;
- (M) 4. Establish evaluation criteria relating to quality, quantity, performance and cost; establish the relative importance of each criterion; and evaluate proposals as well as award contracts on the basis of these criteria. As a result, service and technology procurements administered through an RFP process would not necessarily be awarded to the responsible offerer submitting the lowest priced proposal (State Finance Law §§ 163(4)(d), (7) and (9)(b));

The agency reserves the right to include an assessment of total life cycle costs and benefits in addition to the offerers' prices in selecting the proposal most advantageous to the State;

- (M)** 5. Consider every offer as firm and not revocable for a period of sixty days from the bid opening or such other period of time specified in the solicitation. Subsequent to such sixty day or other specified period, an offer may be withdrawn in writing (State Finance Law § 163(9)(e));
- (M)** 6. Award a contract for any or all parts of a proposal and negotiate contract terms and conditions to meet agency program requirements consistent with the solicitation (State Finance Law § 163(9)(d));
- (M)** 7. Establish that in the event two offers are found to be substantially equivalent, price shall be the basis for determining the award recipient or, when price and other factors are found to be substantially equivalent, the determination of the agency head or designee to award a contract to one or more of such offerers shall be final. The basis for determining the award shall be documented in the Procurement Record (State Finance Law § 163(10)(a));
- (OM)** 8. Elect to award a contract to one or more responsive and responsible offerers, provided that the basis for the election among multiple contracts at the time of purchase shall be the most practical and economical alternative and shall be in the best interests of the State (State Finance Law § 163(10)(c));
- 9. Require, at the discretion of the agency and where not otherwise mandated by law, a bond or other guarantee of performance, and to approve the amount, form and sufficiency thereof (State Finance Law § 163(10)(d)).

III. ADMINISTRATION OF THE PROCUREMENT PROCESS

Procurements should be administered in accordance with a defined process which is published as part of the RFP. While agencies retain the discretion of defining such processes, certain Mandatory (M) actions are required by the agency and must be documented as part of the Procurement Record.

- (M) A. All solicitations \$15,000 or above must be published in the **Contract Reporter** in conformance with applicable statutes and guidelines (Economic Development Law § 142). For procurements valued over \$5,000 but less than \$15,000 see NYS Contract Reporter Bulletin. For procurements of \$15,000 or greater see OSC Bulletin No. G-107B - Procurement Opportunities Newsletter (Contract Reporter).
- (M) B. The agency must make reasonable efforts to **identify potential offerers and to maintain and update listings**. Sources could include, but not be limited to:
- √ Pre-existing offerer lists;
 - √ Industry and trade associations;
 - √ Feedback from Request For Information (RFI) procedures and interest expressed by offerers from Contract Reporter notifications and other sources;
 - √ Mailing lists maintained by OGS and other State agencies;
 - √ Certified M/WBE lists (State Finance Law § 163(2)(c)).
- C. The agency may mail a **notice to prospective offerers** concerning the planned release of the RFP. To the extent practicable, agencies should solicit sufficient bids to ensure effective competition.
- (M) D. **The agency issues the RFP**, including a mailing to all known offerers identified through the process defined in item (B) above.
- E. The agency may permit offerers to submit **written questions** concerning all aspects of the procurement.

(OM) If questions are permitted, **the agency must respond to the questions within a pre-defined period** (subject to modification) and provide written answers to all questions to all offerers. The sources of the questions would not necessarily need to be disclosed. If the sources of the questions are to be disclosed, the offerers must be apprised of such procedures prior to the submission of questions.

F. The agency may arrange a **Bidders' Conference**.

(OM) If a Bidders' Conference is provided in which participation of the offerers is discretionary, the agency must maintain a record of the proceedings and provide either a transcript or summary of questions and answers to all attendees and to all offerers mailed a copy of the RFP.

(OM) If participation in the Bidders' Conference is mandatory, the RFP must apprise offerers, in writing, of the requirement to participate and the agency must provide all participants with either a transcript or summary of questions and answers.

G. The agency may issue a **"Notice of Intent to Bid"** in which offerers would be required to file the Notice by a scheduled date. Offerers electing to not file the Notice would be ineligible to participate in the process. Offerers timely filing the Notice would continue in the process, although no obligation would be placed on the offerer (e.g., the offerer would not be required to submit a proposal). If the Notice is required, it should follow the Bidders' Conference.

(OM) H. The agency may develop **communication strategies with offerers** with the aim of balancing the need to refine requirements, specifications and expectations of the agency with the need to disseminate information to offerers concerning the agency's needs. Strategies must be described in the RFP and usually scheduled after the issuance of the RFP, but prior to the submission of proposals. These strategies may include:

1. Plan **meetings with each offerer** to discuss feasibility of the program, the offerer's capabilities and limitations with respect to the requirements;
 2. Plan **on-site walk-throughs** of existing State operations/ facilities to clarify the current program;
 3. Issue **RFP clarifications** to modify, eliminate or add requirements reflecting the availability of products and services or the lack thereof provided, however, that no offerer benefits or is disadvantaged by any such modifications. If modifications are issued by the agency, offerers must include acknowledgment of receipt of the modifications as part of the offerer's proposal submission;
 4. Offer the opportunity for **technical conferences** that would enable agencies to respond to offerer questions regarding the preparation of Technical and Financial Proposals. The purpose of these sessions would be limited to assisting offerers as to **how** to prepare proposals (e.g., formatting responses) rather than any discussion of the substance of the offerer's proposal.
- (M) I. The agency must publish in the RFP the **proposal due date and time** and accept only proposals submitted on or before same. Proposals received after the filing date must be returned to the offerers unopened.
- (M) J. The agency shall prepare a **certification listing** of the offerers which have submitted timely proposals.
- (M) K. The agency must **complete the development of the evaluation instrument prior to the initial receipt of proposals** (State Finance Law §§ 163(7) and (9)(b)).

- (M) L. The Agency must **evaluate proposals in accordance with the evaluation criteria** set forth in the Procurement Record. The evaluation criteria and methodology must be documented in the Procurement Record prior to receipt of proposals (State Finance Law § 163(7) and (9)(b)).
- (OM) M. **The agency may award all or parts of the proposed scope of services** provided that such agency discretion is set forth in the RFP. The agency may elect to not award a contract. The agency may award a contract to an offerer if only one proposal is submitted (State Finance Law § 163(9)(d)).
- N. The agency should **monitor the contractor's performance** in the context of pre-determined standards and assert applicable penalties for failure to conform to standards. Agencies monitoring performance in accordance with pre-determined standards should **publish both the standards and applicable penalties in the RFP.**

IV. DEVELOPING A REQUEST FOR PROPOSALS

A. OVERALL RFP CONTENTS

Overall, the Request For Proposals aims to convey to prospective offerers all the information needed to enable offerers to determine the desirability of participating in the procurement process and to develop a competitive proposal.

B. MINIMUM ESSENTIAL RFP CONTENTS

RFP documents vary widely and are uniquely drafted to meet specific agency program objectives. Regardless of the degree of complexity of the procurement, however, certain Mandatory **(M)** requirements must be included in all RFP documents as follows:

- (M)** 1. Description of the Administration Process
The RFP must adhere to the mandatory **(M)** process steps described in Subsection III, "Administration of the Procurement Process," which are applicable to the planned procurement;
- (M)** 2. Requirements Describing the Services Needed
If the agency deems specific requirements as essential, the agency must so indicate the mandatory nature of such requirements. Refer to Subsection IV-C-3, "Detailed Requirements or Specifications" (State Finance Law § 163(9)(a) and (b));
- (M)** 3. Requirements Describing Offerer Responsibility
Refer to Section Two of the Procurement Guidelines, for a discussion of offerer responsibility requirements (State Finance Law § 163(9)(f));

- (M) 4. Evaluation Criteria
The agency must describe the overall evaluation criteria. The agency must disclose to offerers the relative importance or weight of the cost criterion compared with the overall non-cost criterion. Refer to Subsection V, "Developing the Evaluation Process" (State Finance Law § 163(9)(b));
- (M) 5. Mandatory Contract Terms and Conditions
Refer to Subsection IV-C-8 for a listing of the mandatory contract terms and conditions which must be set forth in the RFP.

C. RFP DEVELOPMENT GUIDELINES

The following aims to describe the considerations used in developing a Request For Proposals. The material provides for the development of an RFP for a complex and/or large procurement effort. Agencies need not include all of the aspects set forth herein. Instead, agencies should be guided by illustrative examples of RFPs included in the Guidelines.

To the extent agencies elect to incorporate the optional approaches described below, however, the agency must adhere to the applicable mandatory **(M)** processes set forth in these Guidelines.

If the agency elects to employ a consultant to participate in the development of the RFP, the consultant would be prohibited from competing in the procurement unless the agency provides acceptable justification warranting the consultant's inclusion in the competition (State Finance Law § 163-a)).

1. Description of Program Objectives and Background

Offerers require a description of the program objectives and an overview of the program to

assist in assessing the desirability of competing for the business and developing a strategic plan. Typically, RFPs are reviewed by senior management who need to assess the risk of proceeding with the development of a proposal which is typically a costly proposition. This section should be drafted with the aim of communicating with the offerers' senior management.

2. Scope of Services to be Provided

The agency should provide the offerer with a “top down” view of the scope of services to be provided, including the programmatic context for the services and any strategic and tactical plans of the agency which would be affected by the services to be provided, as well as strategic direction for the services to be provided, if known.

For example, if the agency desires a consultant to undertake statistical research, it would be essential for the agency to provide a description of the areas of research.

Similar to the Description of Programmatic Objectives and Background, the Scope of Services section should be aimed at communicating with the offerers' senior management. This section should assist offerer management to complete a risk assessment as to the desirability of investing in the development of a proposal and participating in the process.

(M) 3. Detailed Requirements or Specifications

This section is critical in communicating to the offerer the services needed. Generally, agencies should aim to provide as much specificity as possible insofar as detailed requirements provide offerers with a better understanding of their role and responsibilities, thereby reducing their risk and providing an opportunity for the proposal of the best solution at the least cost.

(M) a. Developing the Program Requirements

Agencies must develop generic requirements which ensure that the specifications do not conform to known offerer product or service specifications and, thus, neither benefit nor disadvantage a particular offerer.

Agencies may solicit proposals from suppliers of a specific product brand, provided, however, that the agency justifies the basis for limiting the selection to a particular brand.

Nevertheless, the requirements ought not be developed without some knowledge of the products and services available in the marketplace.

To develop generic requirements which also provide reasonable assurances that product and/or services conforming to the required specifications would be available in the marketplace, agencies should adhere to the following process:

(i) Define initial program needs based on statute, rules and regulations, policies, procedures, etc.;

(ii) Identify offerer product and services availability utilizing processes that would not benefit or disadvantage individual offerers. Approaches could include:

√ Request For Information (RFI). The agency prepares a document which provides a preliminary description of the program objectives and specifications and solicits input from offerers as to the availability of products and services to meet the agency's needs.

- (M)** Notification of the RFI must be published in the Contract Reporter.
- (M)** The RFI is mailed to all potential offerers known by the agency at the time of mailing.
- (OM)** The agency may follow-up the receipt of written comments from offerers with an open meeting to solicit additional information from offerers, **(M)** provided all offerers responding to the RFI are notified in writing of the conference schedule;
- √ Preliminary Issuance of Draft RFP. The agency may issue a preliminary draft of the RFP to solicit input from offerers as to the availability of products and services to meet the agency's needs.
- (M)** The draft RFP is mailed to all potential offerers known by the agency at the time of mailing. The draft RFP differs from the RFI insofar as the agency provides more specificity as to program requirements and also reveals both the evaluation criteria and contract terms and conditions. Typically, the agency would seek comments from offerers concerning all aspects of the draft RFP.
- √ Literature Search. Extensive data regarding product and service availability could be developed by accessing experts within the subject agency, other State or Federal agencies, not-for-profit organizations, trade associations, and industry literature.

A benefit of the Literature Search is avoiding contacts with offerers prior to the issuance of the RFP, thereby mitigating concerns that the agency structured the RFP requirements to benefit or disadvantage an offerer.

√ Offerer Presentations. Offerer presentations may include the demonstration of products, on-site visits to operations of the offerer and/or marketing/sales presentations of products and services.

Agencies need to take great care in assessing the appropriateness of such presentations to ensure that offerers are neither advantaged nor disadvantaged.

General guidelines for soliciting offerer presentations are as follows:

-- Agencies may arrange presentations from incumbent contractors already providing products and/or services to the subject agency,

(OM) -- Agencies may solicit presentations from offerers which represent industries with a limited group of potential service providers. For example, there are a limited number of telecommunications companies and mainframe computer companies. It would be appropriate for an agency to arrange presentations with such companies provided that the agency justifies the basis for excluding any companies offering such products or services and not invited to make a presentation,

(OM) -- Agencies may limit offerer presentations to only a small number of firms representing an industry provided the **(M)** agency justifies the limited number of presentations (e.g., the agency canvassed a large number of firms, but only a limited group of offerers expressed interest in preparing a presentation).

√ Vendor Specifications. Agencies may request specifications or information regarding a product or service provided by a vendor while exercising care to ensure that the final product or service specification is generic and does not benefit or disadvantage an offerer.

- For procurements of technology, if a vendor prepares and furnishes specifications for a technology proposal which is to be competitively bid, that vendor is prohibited from subsequently bidding on the procurement either as a prime vendor or as a subcontractor. Similarly, a vendor may not be awarded a contract to evaluate offers for products or services which would include evaluation of the vendor's own products or services. These prohibitions should be discussed with potential vendors as early as possible in the procurement process and prior to issuing an RFP.

The above prohibitions shall not apply if:

- the vendor is the sole source or single source of the product or service;
- more than one vendor has been involved in preparing the specifications for a procurement proposal;
- the vendor has furnished specifications or information regarding a product or service it provides at the request of the agency but the vendor has not been directly requested to write specifications for the product or service or for the agency technology proposal; or
- the agency, together with the Office for Technology, determines that the restriction is not in the best interest of the State.

Agencies need to consider these prohibitions and exceptions well in advance of developing the RFP.

(iii) Develop the generic requirements reflecting both definable agency needs and information gleaned from research concerning product and service availability. It is essential, however, that the requirements are generic rather than conforming with known offerer product or service specifications;

(iv) Prioritize requirements to provide offerers with information concerning which aspects of the products and/or services are critically important to the agency. Generally, requirements are prioritized as follows:

√ Mandatory: Based on absolute need and relative certainty that the product and/or service is available. Mandatory requirement designations are critically important. Offerers assume that failure to respond to a mandatory requirement could result in disqualification of the proposal or a low evaluation score. Agencies, therefore, should consider the following in defining **mandatory** requirements:

- Absolute certainty as to whether the mandatory requirement is truly essential to the program;

-- Relative certainty that the mandatory requirement could be met by products and/or services known to be available;

√ Desirable: Based on need and the expectation that the product and/or service may be available;

√ Optional: The need is not well-defined and the availability of the product and/or service is unknown. Optional requirements aim to solicit from offerers solutions or alternative approaches that are unknown to the agency.

b. Other Characteristics of Program Requirements

(i) Requirements may be grouped into modules which may also be defined in Mandatory, Desirable or Optional categories;

(ii) Requirements should distinguish between “what” is needed and “how” services should be provided. The agency needs to take care to define the extent to which the offerer is permitted to propose an approach. For example, if the agency has settled on a specific approach and is seeking proposals that would propose only implementation methods, the agency needs to specify the limitations (e.g., how to implement) and define for the offerer “what” is to be implemented;

(iii) The agency needs to define the anticipated roles and responsibilities of the agency and the offerer, respectively, particularly in situations where the successful implementation of the products and/or services requires interdependencies between the agency and the offerer.

c. Modifying Program Requirements

The agency may elect to modify the requirements at any time during the process in accordance with the following:

(M) (i) Modifying requirements prior to submission of proposals

(M) √ The agency must communicate the modifications in writing to all offerers participating in the process and obtain written acknowledgement from each offerer that the modifications have been received;

(M) √ The modifications shall not benefit or disadvantage any offerer participating in the process (State Finance Law § 163(2)(b) and (9)(a));

(ii) Deleting requirements after proposal submission

(OM) √ The agency may eliminate requirements provided that the agency justifies the basis for the change and sets forth in the RFP the discretionary authority to make such changes. For example, if the evaluation of proposals identifies that none of the offerers proposed a solution to meet particular requirements, such requirements may be eliminated.

The RFP need not be reissued, although offerers submitting proposals must be notified, in writing, of the requirement deletions;

(iii) Modifying or adding requirements after proposal submission

√ The agency may elect to either modify or add requirements, although the agency would need to reissue the RFP, with the changes, to all known offerers including those which elected to not submit a proposal:

(M) -- If the RFP is reissued after 45 days from the original date of RFP issuance, a notice must be published in the Contract Reporter (Economic Development Law § 144(1)(b));

(M) -- The agency must establish a new proposal submission date and modify the evaluation criteria and instrument to reflect the requirement modifications or additions;

(M) -- The agency must request written acknowledgments from the offerers that the reissued RFP has been received;

(M) -- The agency must ensure that the requirement modifications neither benefits nor disadvantages an offerer.

(M) 4. Offerer Responsibility

Refer to Section Two of the Procurement Guidelines for a discussion of the offerer responsibility requirements. See also State Finance Law § 163(9)(f).

5. Financial Proposal Requirements

The agency should provide offerers with instructions for developing the Financial Proposal. The objective of this component of the offerer's proposal is to ensure that both the agency and the offerer understand the financial terms and conditions associated with the services that would be provided.

The agency should structure the requirements to ensure that financial terms and conditions are defined for purposes of both Cost Proposal evaluation and the terms and conditions of the contract, if awarded.

With respect to the latter, the agency should require that fees be defined for services over the life of the contract term. For example, to the extent that the agency elects to cap fee increases over time, the basis for the cap should be defined in the financial requirements (e.g., annual inflation capped by the Consumer Price Index).

In defining the financial requirements, agencies should consider the following:

a. Define Financial Proposal Approach

- Distinguish one-time fees (e.g., development) from ongoing fees (e.g., operations) and specify appropriate assumptions (e.g., annual volumes);
- Define reimbursement approach, for example:
 - √ Fixed fee for deliverables,
 - √ Daily rates for defined categories of staff services,
 - √ Price per unit, possible sliding scale based on volume increments,

- √ Cost plus profit margin,
- √ Maximum upset price;

- Pricing strategy for future services (development, goods and operations);
- Fee increases: adjustments for inflation, etc. over life of contract (CPIU, or cost based justification);
- Strategy to encourage savings while protecting integrity of program;
- Financial Proposal should be inclusive of all fees.

b. Means of Compensation

- Define billing structure and frequency;
- Define reimbursement mechanism (direct fee).

6. Standards and Penalties

The agency should give consideration to the approaches to be utilized during the life of the contract to monitor performance. To the extent that the agency plans to monitor performance against standards, it is advisable to include the standards in the RFP together with any plans for enforcing the standards (e.g., financial penalties).

Generally, it is desirable to structure standards that could be quantified and objectively measurable. For example:

- a. Standards for timeliness, quality and performance;

b. Sanctions may include:

- √ Reduction in fees
- √ Flat penalties
- √ Cost recovery (e.g., interest).

7. Evaluation Criteria

The agency should develop the detailed evaluation criteria simultaneously with the development of the program requirements, the offerer response requirements and applicable performance standards associated with the requirements.

(M) While the detailed evaluation criteria may be published in the RFP together with a description of the relative importance or weight associated with the criteria, at a minimum, the agency must publish the relative importance or weight of the Financial Proposal compared with the relative importance or weight of the technical solution (e.g., program requirements, offerer requirements) (State Finance Law § 163(9)(b)).

Refer to Subsection V, “Developing the Evaluation Process”, for a discussion of the Evaluation of Financial and Technical Proposals.

(M) 8. Contract Terms and Conditions

The agency must publish in the RFP invariable and mandatory contract terms and conditions which assist the offerers to assess the risk associated with the required contract terms and the extent to which the contract terms are compatible with the offerers' policies (e.g., human resource policies governing affirmative action programs) (State Finance Law §§ 163(9)(a) and (b)).

(M) a. Mandatory Provisions (i.e, terms and conditions which must be included in the contract) such as:

- Appendix A
- MacBride Fair Employment Principles Stipulation (State Finance Law §165(5)(b))
- Non-Collusive Bidding Certification (State Finance Law §139-d(1)(a))
- Employment Opportunities for Minorities and Women (Executive Law Article 15-A)
- Procurement Lobbying Affirmation, Certification and Termination Clause (State Finance Law §139-j(6)(b) and §139-k(5))
- Sales Tax Certification (NYS Tax Law §5-a)
- Standard Vendor Responsibility Questionnaire or Equivalent (State Finance Law §163(9)(f))

Other Statutory Provisions to Consider Depending on the Nature or Value of the Contract, such as:

- Consultant Disclosure Reporting (State Finance Law §163(4)(g))
- Omnibus Procurement Act of 1992 Certification for total bid amounts over \$1 million (Executive Law §313 and State Finance Law §139-i)
- Statement on Purchase of Apparel (State Finance Law §162(4-a))
- New York State Information Security Breach and Notification Act (General Business Law §899-aa and State Technology Law §208)
- Mercury Law (Chapter 145 of the Laws of 2004)

b. Examples of Required Topics Defined by the Agency and Negotiable

- √ Dispute resolution process
- √ Change management process
- √ Liability and indemnification
- √ Prime and subcontractor responsibilities
- √ Contract duration and extensions
- √ Termination process for failure to perform
- √ Ownership of program products (e.g., proprietary software and documentation)
- √ Supporting transition of the contract to new service provider at expiration of contract

V. DEVELOPING THE EVALUATION PROCESS

The objective of the evaluation process is to develop and apply evaluation criteria to ensure that:

- Offerer proposals are evaluated objectively; and
- The agency selects the offerer(s) proposing the “best value” solution.

A. MINIMUM ESSENTIAL PROPOSAL EVALUATION ELEMENTS

The nature, scope and complexity of evaluation methods vary widely yet Minimum Essential Elements must be included as follows (see State Finance Law § 163(9)(a) and (b)):

- (M) 1. The evaluation criteria and methodology must be completed and secured prior to the initial receipt of proposals;
- (M) 2. The overall evaluation criteria must not be altered after opening the proposals, with the exception of minor changes and only if the modifications are justified and evidence presented to ensure that the changes would not materially benefit or disadvantage an offerer;
- (M) 3. The evaluation criteria must be applied equally and uniformly in the evaluation of proposals.

B. PROPOSAL EVALUATION PROCESS AND METHODOLOGY ALTERNATIVES

Given the unique character of proposal evaluation processes and methods, the Procurement Guidelines do not aim to set forth strict evaluation procedures or all-inclusive processes and methods. Instead, the following describes alternative evaluation processes and methods with an emphasis on approaches that would be applied to large and/or complex procurements. Smaller and/or less complex procurements would likely apply similar

approaches, pared down to meet the unique needs of particular situations.

Typically, evaluations comprise a comparative analysis of the Technical Proposals, a separate comparative analysis of the Financial Proposals and a method for combining the results of the Technical and Financial Proposal evaluations to arrive at the selection of the proposal judged most advantageous to the State.

1. Organization of the Evaluation Team

Depending on the scope and breadth of the procurement, agencies may organize the evaluation team to meet the unique nature of each procurement. Generally, however, agencies should ensure that:

(i) All executive or senior managers retain the authority to review and approve the evaluation team recommendations. Even limited scope procurements have the potential to become controversial and, therefore, the final selection should be reviewed by a manager with a broad perspective of both the agency's operations and any strategic considerations related to the sensitivity of the procurement.

It is essential that agencies are cognizant that a procurement utilizing an RFP is dependent on judgements and the consideration of many criteria in addition to cost. Unsuccessful offerers whose experience is limited to "lowest responsible bidder" procurements may require debriefings by senior or executive managers who are sensitized to both the agency's needs and the offerers' expectations;

(ii) The Technical and Financial Proposals are often evaluated by separate teams.

√ Separate Team Approach: The Technical Evaluation Team should not have access to any aspects of the Financial Proposal. It may be necessary, however, for the Financial Evaluation Team to obtain data from either the Technical Proposal and/or the Technical Evaluation Team's evaluation. For example, to clarify the association between costs and services and/or to normalize costs, the Financial Evaluation Team may need to meet with members of the Technical Evaluation Team and obtain clarifications with respect to the scope and/or definition of services;

√ Single Team Approach: Financial Proposals must remain sealed until completion of the technical evaluation.

The following summarizes an approach which may be used to organize the evaluation process:

a. Management/Steering Committee

(i) Depending on the breadth and scope of the procurement, the agency needs to identify a procurement officer, accountable directly to senior or executive management;

(ii) Typically, the evaluation organization is structured to include a Management/ Steering Committee to provide policy, guidance and direction, as well as a review of the Technical and

Financial Evaluation Teams' analyses and a submission of recommendations to top management;

(iii) The Technical Evaluation and Financial Evaluation Team managers would be members of the Management/Steering Committee;

b. Technical Proposal Evaluation Committee

(i) The committee is typically comprised of program and technical experts under the direction of a technical evaluation manager;

(ii) The committee would be responsible for all aspects of the evaluation of the Technical Proposal (e.g., benchmarks, site checks, reference checks, site markings), including the firm (e.g., financial stability) and its proposed resources (e.g., staff);

(iii) Committee members would not have access to the Financial Proposal;

c. Financial Proposal Evaluation Committee

Typically under the direction of a senior manager, the committee would be responsible for evaluating the offerers' Financial Proposals.

2. Technical Proposal Evaluation Process

a. Elements of a successful evaluation process include the following:

(i) Apply both a top-down management perspective and a bottom-up technical analysis which should be integrated through communications between the Management/Steering Committee and the technical evaluation manager, who would be a sitting member of the Management/Steering Committee;

(ii) Develop an evaluation methodology to reflect the overall evaluation criteria set forth in the Procurement Record. The evaluation criteria and methodology must be documented in the Procurement Record prior to the initial receipt of proposals;

(iii) Develop an **evaluation methodology** that could **measure** the relative quality of the Technical Proposals:

√ The relative importance or weight of evaluation criteria

Technical Proposals are evaluated by measuring the extent to which the proposal and the offerer could attain the objectives of the solicitation as set forth in the RFP and fulfill the requirements described in the RFP.

Criteria, therefore, need to be developed against which the proposal and the offerer are measured. Criteria could include:

- Workplan and methodology
- Experience of the offerer in providing services and/or technology
- Management capability of the offerer
- Offerers' overall past performance
- Extent to which the proposal is responsive to the RFP requirements
- Qualifications and experience of the offerer's proposed staff
- Conformance with the schedule of work set forth in the RFP

The agency must then develop a methodology for ranking the relative importance or weight of the criteria. Methods may include:

- Numerically based quantitative approaches (e.g., Criterion A is four times more important than Criterion B, which is two times more important than Criterion C)

- Qualitative approaches (e.g., Criterion A is more important than Criterion B, which is more important than Criterion C)

Overall, the approach selected should provide a method for differentiating the relative importance of each criterion;

√ Rating the proposal and the offerer against the evaluation criteria

The agency must establish a scale of measures to evaluate the effectiveness of the proposal and the offerer against each evaluation criterion. Measures may be:

- Quantitative (e.g., a numerical scale in which a superior proposal response would be rated "5" and an unacceptable proposal response would be rated "0")
- Qualitative (e.g., a narrative description of the quality of the proposal response)

Regardless of the methods employed, the agency must document the basis for the rating,

using narrative to explain the scoring (e.g., the quality of the offerer's proposed project director was rated superior insofar as the individual successfully managed a similarly complex project and, based on reference checks, he/she was critically important to the success of the project);

(iv) Apply the evaluation methodology uniformly to all proposals. For example, subject matter teams would review all aspects of **each proposal** relating to the specific subject matter instead of organizing separate teams to evaluate individual proposals;

(v) The evaluation methodology should be comprehensive and multi-faceted. Effective evaluation methods typically examine proposals utilizing a variety of measures. The overall process would function as follows:

- √ The Technical Proposal is evaluated for completeness. Materially incomplete proposals may be disqualified;
- √ The Technical Proposal is initially evaluated and **preliminarily** rated. Strengths, weaknesses, gaps and omissions are identified;
- √ Following this initial review, a variety of measures are applied

to validate the preliminary findings, including but not limited to the following:

- Benchmarking equipment performance
- Product/service demonstrations and presentations
- Personnel reference checks
- Site inspections
- Offerer presentations
- Interviews of key proposed managers and technical experts
- Written proposal clarifications, on request
- Reference checks
- Rating services

√ Following completion of each of these processes, the preliminary Technical Proposal evaluation scores are adjusted and finalized to conform with the evidence gathered from the detailed follow-up processes as listed above;

√ Conclusions, particularly of an extreme nature, should be documented, including the sources of the conclusion (e.g., reference check);

(vi) Evaluation methods should be overlapping. For example, to evaluate the technical qualifications of a proposed management consultant, the evaluation team would:

- √ Review the proposal submitted by the team;
 - √ Identify the team managers responsible for various elements of the proposal;
 - √ Examine deliverables previously prepared by the team managers;
 - √ Interview the proposed team managers;
 - √ Match those results with reference checks associated with each individual proposed team member.
- b. Technical Evaluation Policies include the following:

(i) Evaluation Criteria

The following summarizes the rules for balancing the agency's obligation to offerers to undertake an open and equitable competitive procurement with the need to evaluate and select service providers on the basis of "best value:"

- (M)** √ The agency must disclose to offerers the relative importance or weight of the cost criterion compared with the overall non-cost criterion (State Finance Law § 163(9)(b)).

Agencies which need to evaluate proposals based on criteria which do not differentiate between cost and technical considerations may be excluded from this requirement provided the agency justifies the approach;

- √ The agency is not required to disclose to offerers either the detailed evaluation criteria or the relative importance or weight of the various individual Technical Evaluation measures.

For large and/or complex procurements, however, it may be advisable to review the criteria and the relative importance or weighting of the criteria with State control agencies (e.g., Office of the State Comptroller);

(ii) Offerer Pre-Qualification Criteria

The agency may develop and apply “offerer pre-qualification criteria” which are defined as criteria setting forth minimally acceptable standards concerning the responsiveness and responsibility of the offerer (e.g., adequacy of resources, experience, past performance).

- √ The agency may apply the criteria prior to evaluating the offerer's proposal and disqualify the proposal from further consideration if the offerer fails to meet the minimum standards;

- (OM)** √ If the agency elects to apply a pre-qualification screen, the agency must disclose to offerers, in the RFP, both the pre-qualification criteria and the intent to apply the criteria as a pre-qualification screen;

(OM) (iii) Changing Evaluation Criteria

Agencies possess the authority to delete, add or change specific evaluation criteria (but not the overall evaluation criteria) during the evaluation process provided the agency demonstrates and justifies the basis for the changes and also affirmatively demonstrates that the changes would not materially benefit or disadvantage an offerer;

(iv) Mandatory Requirements

(OM) √ The agency has the discretion to disqualify a proposal for failure to satisfy one or more mandatory requirements provided the agency sets forth the policy in the RFP;

(OM) √ The agency has the authority to delete mandatory requirements unmet by **all** offerers provided, however, that the RFP discloses to the offerers the agency's discretionary authority.

3. Financial Proposal Evaluation Process

a. The Financial Proposal Evaluation Manager coordinates with the Technical Evaluation Proposal Team Manager as a member of the Management/Steering Committee.

b. Methods for evaluating cost vary depending on a mix of factors concerning the nature and extent of the services, the costs associated with utilizing the services and the impact of the services on agency programs and operations (State Finance Law §§ 160(5) and (6)).

The following summarizes approaches for evaluating Financial Proposals:

(i) Comparison of service delivery fees

The most basic cost evaluation provides for a comparison of proposed contractor fees (i.e., price) for the term of the contract. This approach is most applicable when the provision of services and/or the installation of technology do not result in significant additional non-contractual agency costs, savings or new revenue.

Methods for comparing the offerer price proposals include the following:

- √ Conversion of price (in dollars) to a weighted point score. This approach is particularly useful if the overall evaluation apportions weight between Technical and Financial Proposals (e.g., Technical is weighted at 70 percent and Financial at 30 percent of a 100 point evaluation system).

The following formula may be applied to convert dollars to points:

$$\text{Points} = \frac{\text{Category Points} \times (1.0 - \text{Bid Difference}/\text{Highest Bid})}{1}$$

$$\text{Category Points} = \frac{\text{Maximum points allocated to price}}{1}$$

“Bid” Difference = Difference between the lowest offer and the offer being evaluated

√ Competitive Range. The agency may compare the Financial Proposals and make a determination on the basis of predetermined criteria as to a competitive range and the identification of proposals falling both within and outside the competitive range. Presumably, proposals falling outside the competitive range would not receive further consideration.

For example, competitive range may be applied as follows:

Proposal A ----- \$ 5 million
Proposal B ----- \$ 3 million
Proposal C ----- \$ 2 million

The agency establishes a competitive range of \$1 million to \$3 million. Proposal A is outside the competitive range and receives no further consideration while the agency has the discretion to select either Proposal B or C, without any further consideration of cost.

√ Banding applies a similar approach in which evaluation bands based on cost ranges are established (e.g., \$1 million to \$3 million; \$3 million to \$6 million). Bids are slotted into appropriate bands and all bids within a particular band are considered to be weighted equally from a cost perspective relative to bids falling within other bands.

(ii) Comparison of Life Cycle Costs

Procurements which entail the expenditure of funds for both the fees associated with the services to be procured (i.e., price) and costs associated with the introduction of the services into the environment (i.e., indirect costs) could be evaluated by analyzing total Life Cycle Costs, defined as the sum of the fees and indirect costs.

An example of the application of the Life Cycle Cost evaluation would be the sum cost of the acquisition of a new computer environment (offer price) and the cost of a systems conversion necessitated by the installation of a new computer environment (indirect costs).

(iii) Comparison of Cost Benefit

Procurements which entail significant Life Cycle Costs and/or significantly impact the expenditures and/or revenues associated with the program(s) affected by the introduction of the services and/or technology could be evaluated by analyzing the total costs and benefits of the services and the affected programs.

While this type of financial evaluation is the most desirable in that it would measure program outcomes, it may not be feasible in all cases to quantify program cost benefit.

As an example of cost benefit financial evaluations, an agency acquiring new technology to replace outdated technology could

Compare the costs:

- √ Fees for implementing the new technology
- √ Costs to convert the environment to the new technology

With the benefits:

- √ Reduced maintenance costs associated with the old environment
- √ Reduced personnel costs associated with manual processes formerly needed to augment the old technology
- √ Space savings and reduced utility costs associated with the more compact and less environmentally sensitive equipment (e.g., reduced air conditioning and cooling requirements)
- √ Improved productivity and increased revenue derived from the new technology

c. Other Factors Affecting the Evaluation of Financial Proposals Include Normalization:

Service procurements which are not predicated on detailed requirements and specifications may result in proposed solutions which are not necessarily comparable.

Additionally or alternatively, service procurements which provide for optional requirements may result in proposals which are not comparable insofar as some proposals may exclude the optional service delivery.

Normalization is the process by which the agency makes adjustments or compensates to account for fee variations which result from differences in the scope of services proposed or the type of services provided.

For example, a procurement may consist of modules as follows:

<u>Module</u>	<u>Modules "Bid"</u>	
	<u>Offerer A</u>	<u>Offerer B</u>
1-Offerer Must Bid	Bid	Bid
2-Offerer Must Bid	Bid	Bid
3-Offerer May Bid	Bid	No Bid

In comparing the service delivery fees between Offerer A and B, the agency may add to the Offerer B fees for Modules 1 and 2, the cost to the agency to provide Module 3 services and compare these total costs with Offerer A fees for all three modules.

- (M)** Normalization procedures must be published in the RFP if it is a planned component of the evaluation methodology (State Finance Law § 163(9)(b)).

4. Approaches for Combining Technical and Financial Evaluation Results

The following sets forth suggested methods, which are not intended to be all inclusive. The method(s) selected should provide the agency with the “best value” selection.

a. Quantitative Approaches

(i) Weigh the Technical and Financial evaluation results as two components which total 100 percent of the evaluation (e.g., Technical Evaluation weighs 70 percent and the Financial Evaluation weighs 30 percent). This approach can only be employed when the agency quantifies both the criteria and the rating scales;

(ii) A variation of this approach would provide for “banding” criteria. Evaluation bands based on weighted Technical and Financial Evaluation results are established (e.g., 90 to 100 percent). Proposals are slotted into appropriate bands and all proposals within a particular band are considered to be weighted equally relative to proposals falling within other bands;

(iii) Where the amount of difference between Cost Proposals is not considered a significant factor, the Technical and Financial evaluations may be combined by rank ordering the results of each evaluation, applying the relative weights that had been assigned and using the resulting combined score as the basis for the selection decision;

b. Lowest Responsible Offer Fulfilling the Mandatory Technical Requirements

The agency may rank the offerer's Financial Proposal on the basis of cost and select the lowest responsible offerer from the proposals which fulfilled the mandatory technical requirements;

c. Pairwise Comparisons

Where there are multiple conflicting criteria with significant trade offs related to desirable results, competing priorities, relative value and cost, pairwise comparisons of the evaluation criteria may be useful. This technique involves taking each evaluation criterion and comparing it against each other criterion. For each pair of criteria compared, the reviewer weights which is more important and on a predefined scale, how much more important. The results of all the possible pair comparisons are then analyzed mathematically to determine the overall weights of each criterion;

d. Cost Effectiveness

Proposals are ranked by price or cost depending on the method utilized to determine the ranking of the Financial Proposals (e.g., ranking offerer price proposals, considering total life cycle costs).

Presuming each of the proposals fulfills the mandatory technical requirements, the agency “quantifies” (in terms of cost) the additional value of technical features of the offerers' proposals and adjusts the **rankings** of the offerers' financial proposals (not the financial proposal documents) to reflect the quantified additional value of the technical solutions. Agencies may further adjust the rankings for “qualitative” measures of added value relating to the Technical Proposals provided the agency justifies the basis for the additional value. Lastly, the agency selects the highest ranking proposal which provides the State with the most cost-effective solution.

5. Control Agency Review of Evaluation Instrument

It may be advisable (although not required) to submit the evaluation instrument to the Office of the State Comptroller's Contract Unit for review prior to the receipt of proposals.

VI. AWARDING AND NEGOTIATING A CONTRACT

A. AWARDING A CONTRACT

- (M)** 1. Proposal award notification letters must indicate a conditional award subject to successful contract negotiations. Multiple awards may be appropriate provided the agency discloses such an option in the RFP (State Finance Law § 163(10)(c)).
- (M)** 2. Non-winning offerers must be notified of the conditional award and possibility that a failed negotiation could result in an alternative award. Debriefings should also be offered, although the discussion must be limited to only the evaluation results as they apply to the proposal of the offerer receiving the debriefing.
- (M)** 3. The terms and conditions of a contract that is entered into pursuant to an RFP, must be in accordance with the requirements and specifications of the RFP and with the offerer's proposal. Deviations may be considered if the changes are to the State's advantage and do not substantially alter the requirements and specifications of the RFP so as to prejudice the other competitors.
- (M)** 4. The term of the contract and any renewal or extension provisions must be specified in the RFP and contract. Contracts that do not allow for any renewals or extensions beyond the initial term cannot be extended (State Finance Law §§ 163(9)(a) and (b)).
- (M)** 5. Generally, an RFP process results in the award to a single offerer. The agency's discretion to award to multiple offerers must be specifically set forth in the RFP. The method as to how the multiple award is to be made must be clearly stated in the RFP.

- (M) 6. The RFP must require a minimum timeframe that would guarantee the Technical and Financial Proposals' terms and conditions.

B. NEGOTIATING A CONTRACT

1. Invariable required contract conditions should be set forth as such in the RFP (e.g., indemnification, liability) to facilitate negotiations.
2. Specific terms and conditions associated with the mandatory topics would be negotiable.
3. For a strategic advantage, it is desirable to clarify (i.e., negotiate) the controversial contract terms prior to the notice of award.
4. The agency may include the proposed contract in the RFP to enable offerers to react to the complete set of terms and conditions and to include in the evaluation an analysis of the offerer's reaction to the contract.

C. COMPLETING THE DOCUMENTATION REQUIREMENTS FOR CONTROL AGENCY REVIEW AND APPROVAL

- (M) 1. Since the Office of the State Comptroller's Contract Unit must review the competitive procurement process as well as the contract, specific documentation, including all items comprising the Procurement Record, must be submitted for review (State Finance Law § 112 and State Finance Law §163(9)(g)):

- √ RFP
- √ Evaluation instrument and process description
- √ For more complex procurements, a management summary of the evaluation results
- √ Pre-Bid Conference questions and answers

- √ Any additional documentation provided to offerers
- √ List of offerers solicited
- √ Contract
- √ Certified Bid Tab
- √ Successful proposals as well as unsuccessful proposals

See also the NYS Procurement Bulletin, the Procurement Record and Checklist set forth at <http://www.ogs.state.ny.us/procurecouncil/pdfdoc/Procureguideline.pdf>.

2. The Department of Law normally requires the contract document only.
3. The Division of the Budget requires a completed H-100A (available at <http://www.budget.state.ny.us/bprm/h/h100.html>).
4. Depending on the scope and complexity of the procurement, a management presentation for the Office of the State Comptroller and the Division of the Budget may be desirable.

PROCUREMENT GUIDELINES

SECTION EIGHT: OFFICE OF THE STATE COMPTROLLER (OSC) CONTRACT APPROVAL

The Office of the State Comptroller (OSC) is charged with the responsibility to approve contracts and purchase orders whenever such contracts or purchase orders exceed \$50,000 (for OGS the approval limit is \$85,000). See State Finance Law §§112 (2)(a) and 163(12). During the process OSC reviews the Procurement Record for documentation that supports the selection of the vendor, the reasonableness of the price, and that all statutory, regulatory and policy requirements have been met.

When performing a review of an agency's proposed contract award, it is the Comptroller's responsibility to confirm that the contract has been executed in due form and by proper authority; to determine that it is fair and reasonable; and to determine that sufficient appropriated funds are available for the payment requirements of the contract. Overall, the contract review ascertains whether contracts committing the State to a liability, and vouchers for payment, are reasonable. It also serves as an independent examination of transactions having a financial impact, which enables errors and unreasonable transactions to be corrected before a financial obligation has been incurred or an expenditure has been made.

In performing the contract review, OSC looks toward maximizing competition as the means of obtaining the best possible solution at the best possible price for the State. OSC seeks to ensure that the entire procurement process has placed all prospective offerers on an "even playing field" and that vendors have been given an opportunity to compete for State contracts. As a general rule, the review of contracts is directed to a determination that formal competition has been sought where the law requires competition, and that the contract has been awarded properly -- on the basis of lowest price or best value, as the case may be, to a responsive and responsible offerer.

When transactions lacking competition are presented to OSC, OSC reviews the Invitation for Bid (IFB) or Request for Proposal (RFP) for restrictive specifications, and examines the bidders list and makes inquiries to the State agency about the lack of competition. If

irregularities are not identified and the agency can justify its actions, the contract is approved. When irregularities in the awarding of contracts are identified or alleged, OSC closely reviews the contract and contacts the State agency with its concerns. If necessary, OSC assists the agency in deciding on corrective action. When an agency awards a contract on a sole or single source basis, OSC requires that the agency justify why the contract cannot be bid, document and justify how the vendor was selected, and demonstrate the reasonableness of the price.

There are a number of triggers that will lead OSC to question a particular transaction. The following represents some of the major triggers, but can in no way be considered an all-inclusive listing:

- The award was not made in accordance with the method of award as stated in the RFP/IFB.
- Significant changes have been made to the scope of the original RFP/IFB prior to the bid opening.
- A contract was negotiated that significantly differs from the major requirements of the original RFP/IFB.
- A vendor protest is received regarding the award of the contract.
- The specifications appear to be written to restrict competition.
- The evaluation criteria has been altered or not followed in determining the successful vendor.
- Insufficient competition (two bids or less) was received making it difficult to justify the reasonableness of the price.
- Documentation of the actual bid process was not included, i.e., no Contract Reporter notice; missing signatures or acknowledgments; no certified bid tabulation, etc.

- Many of the solicited vendors did not bid and no follow-up was done; or the no-bids responses indicate problems with the specifications.
- Articles in the press call attention to certain transactions which may require additional explanation.
- The method of award or evaluation criteria does not appear to fit the type of goods or Services being bid.