# 2014

# Purchasing Forum & Trade Show

## *Planting Seeds Today for Tomorrow's Success*

Andrew M. Cuomo
Governor
State of New York

RoAnn M. Destito
Commissioner
Office of General Services

*In cooperation with the Office of the State Comptroller:*

Thomas P. DiNapoli
New York State Comptroller

2014
Purchasing Forum
& Trade Show
*May 14 & 15*

# *Discretionary Spending: How it Works*

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# What is the Discretionary Spending Authority?

- State Finance Law § 163(6)
- Purchase services and commodities **without a formal competitive process**
- Under **$50,000:** All agencies
  - OGS ($85k); SUNY ($125k/$250k)
- **$50,000-$200,000:**
  - M/WBEs, SBEs, Recycled, NYS Food

http://www.ogs.ny.gov/BU/PC/docs/PnpDiscretionaryThresholds.pdf

# STEP 1: Identify Your Need

Consider **order of priority** and determine whether any of the following meet your need in the form, function and utility required:

1. Preferred Source Offerings
2. OGS Centralized Contracts
3. Agency's own contracts

# “Form, Function and Utility”

These are the minimum essential requirements that will meet the agency’s needs. These requirements are defined by the agency. Requirements may include quality, quantity, delivery terms, packaging, performance standards, and compatibility, among others.

# First

**Can the need be met by using Preferred Sources?**

# Preferred Sources

## Preferred Source status is granted to

- Dept. of Corrections & Community Supervision –
  Corcraft: www.CORCRAFT.org
- NYS Preferred Source Program for People who are Blind
  www.NYSPSP.org
- NYS Industries for the Disabled: www.NYSID.org
- Office of Mental Health:www.omh.ny.gov/omhweb/buyomh/

***http://www.ogs.ny.gov/BU/PC/Preferred.asp***

# Second

**Can the need be met by using**

**Office of General Services (OGS) Centralized Contracts*?**

**Statewide contracts that are generally competitively bid or negotiated*

# Types of OGS Centralized Contracts

- ***Commodities***

  ***http://www.ogs.ny.gov/purchase/spg/lists/commodty.asp***

- ***Services***

  ***http://www.ogs.ny.gov/purchase/snt/lists/services.asp***

- ***Technology***

  ***http://www.ogs.ny.gov/purchase/snt/lists/infotech.asp***

# Third

**Can the need be met through Agency-Established Contracts?**

If no Preferred Source, OGS Centralized Contract, or existing Agency-Established contract meets your need (form, function, and utility)

↓

# Fourth

Agency conducts its **own** procurement

# STEP 2: Determine Cost

## Ask Yourself

- What is the estimated cost?
- Is your estimated cost under the **Discretionary Purchasing Threshold** -
  - under $50,000 ?
  - $50,000 - $200,000 ?
- One Year Rule

# One Year Rule

## Determination of Threshold Amount

State Finance Law § 163(6-b):

- State agencies must consider the total amount of expected purchases for the same commodity or service to be made within the twelve-month period from the date of purchase
- expressly prohibits split ordering
- Can not change or a renew a discretionary purchase if the change or renewal would bring the aggregate amount for the twelve-month period over the discretionary threshold

# STEP 3: Determine Vendor Pool

- Estimated Annual Cost
  - under $50,000 – General Purchases
  - $50,000 - $200,000
    - **Small Businesses:** Commodities or Services
    - **M/WBEs:** Commodities or Services
    - **Recycled or Remanufactured:** Commodities or Technology
    - **Food "grown, produced or harvested" in NYS:** Commodities

# New York State Small Businesses

**A New York State Small Business is defined in SFL §135-a as**

- Resident to New York State
- Independently owned and operated
- 100 or fewer employees
- Not dominant in its field

*There is no certification process for "New York State Small Business"*

# Minority/Women- Owned Business Enterprises

**A Minority/Woman-Owned Business Enterprise (M/WBE)**
*must be certified by NYS Empire State Development in accordance with NYS Executive Law Article 15-A.*

*For information on the **certification** process, contact **Empire State Development** at mwbecertification@esd.ny.gov or visit the website:*
***http://esd.ny.gov/MWBE/Certification.html***

# Recycled/Remanufactured & NYS Food

- **Recycled or Remanufactured Products:** **"commodities or technology that are recycled or remanufactured" (SFL §163(6))**
- **Food Grown, Produced or Harvested in New York:** **"commodities that are food, including milk and milk products, grown, produced or harvested in New York State" (SFL §163(6))**

# Public Policy: M/WBEs

- Economic Development Law Art 15-A:
  - The Minority and Women-Owned Business Enterprise Certification Program was adopted in 1988 to address the underrepresentation of M/WBEs in state contracts – sets a goal
  - Over the years, ESD has commissioned disparity studies to look at the use of M/WBEs as state contractors. In 2010, the results of one such study were published, concluding that M/WBEs were not being used in state contracting as their availability would indicate they should be.
  - Art. 15-A is a remedial measure to address past discrimination against M/WBEs.

# Public Policy: M/WBEs

- **State Finance Law § 163(6) -** Inclusion of M/WBEs in the discretionary spending authority is also a remedial measure.

# STEP 4: Advertise

- Economic Development Law Art. 4C
  - Contract Reporter Ad required for $50,000 or more, unless an exemption applies
- Procurement Council approved scripts
  - SFL § 163(6) states that agencies can use the discretionary spending "Pursuant to guidelines established by the state procurement council"
    - IMPORTANT FOR OSC APPROVAL
- Agencies must submit ad at least 15 business days prior to bid/proposal due date

# ADVERTISING
## Approved Scripts

- NYS Procurement Council Guidelines
  - http://ogs.ny.gov/procurecounc/pdfdoc/DiscretionaryPurchasingGuidelines.pdf

- Common Elements
  - Contracting Agency name
  - A description of the goods/services sought
  - The statutory authority for discretionary purchase

# ADVERTISING
# Approved Scripts

- Best Practices Language #1
  - Agency X intends to purchase (insert project description, i.e., 1,000 widgets) pursuant to its discretionary purchasing authority under State Finance Law §163(6), which authorizes purchases without a formal competitive process in certain circumstances, including purchases from New York State small businesses, from businesses certified pursuant to Article 15-A of the New York State Executive Law, if applicable, from businesses selling commodities or technology that are recycled or remanufactured or commodities that are food, including milk and milk products, grown, produced or harvested in New York State. Interested parties should contact (agency designated contact/purchasing officer) to discuss this opportunity.

# ADVERTISING
# Approved Scripts

- Best Practices Language #2
  - Agency X intends to purchase (insert project description, i.e., 1,000 widgets), pursuant to its discretionary purchasing authority under State Finance Law §163(6). Interested parties should contact (agency designated contact/purchasing officer) for more details about this opportunity.

# ADVERTISING
# Approved Scripts

- Best Practices Language #3
  - Agency X intends to procure (insert project description, i.e., 1,000 widgets) pursuant to its discretionary purchasing authority under State Finance Law §163(6). This procurement opportunity is limited to New York State small businesses, businesses certified pursuant to Article 15-A of the New York State Executive Law, if applicable, businesses selling commodities or technology that are recycled or remanufactured or commodities that are food, including milk and milk products, grown, produced or harvested in New York State.

# Additional Advertising Requirement for NYS Food Purchases

- **NYS Food Purchases** – In addition to the contract reporter, SFL § 163(6-c) requires you to advertise on your agency website for "a reasonable period of time" and make the discretionary purchase based on the lowest price that meets the agency's form, function and utility.

# STEP 5: Make An Award

- Remember: NOT a formal competitive process
  - No IFB or RFP
- Prior to making an award:
  - Agencies use a **Request for Quotes**
  - Vendors provide quotes
  - Agencies can share price info, ask for better quotes **(i.e., negotiate!)**

# Negotiate the Price

- This is an informal competitive process
- When negotiating price, keep in mind:

  Award need not go to the lowest quote, but the price must be **reasonable**

  - Exception: NYS produced food (SFL § 163[6-c])

# Reasonableness of Price

- What is reasonable? "Fair Market Price" - Always depends on the particular circumstances
  - Ex. 1: You pick the 2nd lowest quote and they are the only other quote w/in X% of the lowest – still need to justify not going to the low quote
  - Ex. 2: All others are within X% and you pick a higher-end quote, you need more to show the reasonableness of price (e.g. the proposed awardee is the only M/WBE and you want to meet agency goal under Exec. Law Art. 15-A)
- If not the lowest quote - why it is in the best interest of the State? What are you getting that makes sense for NY that you are willing to pay more?

# Reasonableness of Price

- Methods for determining reasonableness of price:

  1. Informal quotes (3 or more)
  2. Cost to other governmental entities
  3. Historic cost or price comparisons
     - Warning: may be outdated in some instances due to market changes

# STEP 6: OSC Approval

- Sufficiency of Advertisement
  - Use one of 3 approved scripts
- Justification of Vendor
  - Why is this vendor the right choice
- Reasonableness of Price
  - Depends on particular circumstances
- Vendor Responsibility
  - Over 100k – complete questionnaire at OSC's **Vendor Responsibility** website: http://www.osc.state.ny.us/vendrep/
  - Under 100k – verify responsibility otherwise (i.e., agency should represent they've done a review)

# Recap

For purchases up to the Discretionary Buying Threshold, each agency must:

1. Ensure that the commodities and services acquired meet its form, function and utility needs;

2. Document and justify the selection of the vendor;

3. Document and justify the reasonableness of price; and

4. Ensure that the State buys from responsible vendors.

# Resources

- NYS Procurement Council Guidelines
  - http://ogs.ny.gov/procurecounc/default.asp
  - http://ogs.ny.gov/procurecounc/pdfdoc/DiscretionaryPurchasingGuidelines.pdf
  - http://ogs.ny.gov/procurecounc/pdfdoc/psguide.pdf
- OSC's Vendor Responsibility website:
  - http://www.osc.state.ny.us/vendrep/
- OSC Bureau of Contracts: (518) 474-4622
- NYS Department of Ag & Markets
  - http://www.agriculture.ny.gov/

* If accessing the electronic version of this presentation, please copy and paste links into your browser.

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