

State & Local Government Procurement

A PRACTICAL GUIDE

THIRD EDITION

NASPO 

National Association of
State Procurement Officials

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STATE AND LOCAL GOVERNMENT PROCUREMENT: A Practical Guide

Third Edition

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FOREWORD

The National Association of State Procurement Officials is proud to make the *State and Local Government Procurement: A Practical Guide, 3rd Edition*, available to government professionals, students, suppliers, educators, and others interested in learning about public procurement. Whether you are a seasoned procurement professional or new to the field, this guide should provide you a valuable reference tool in your efforts. This edition of NASPO's flagship guide features many changes, improvements, and additional content.

On behalf of the NASPO Board of Directors and members, I would like to thank the Practical Guide Steering Committee, the Professional Development Committee, and their chair, Deb Damore, for enthusiastically taking on the extensive task of updating this important resource. In addition, NASPO truly appreciates the work of all the members and other professionals who thoroughly reviewed this guide and made recommendations to the Work Group. Finally, I would like to thank all of the NASPO staff for working together with us to see the project through.

Lisa Eason

Deputy Commissioner of the State Purchasing Division, State of Georgia
2019 President, National Association of State Procurement Officials

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A Steering Committee was developed to provide leadership and guidance throughout the development process. This group was involved in reviewing the previous edition of the text and offering recommendations on improvements. Their knowledge and expertise helped shape the focus of the text. Many of them also served as contributors and leads on chapter revisions. I would like to thank each of you for your commitment to this effort. The list of Steering Committee Members is included below:

John Adler, NASPO Life Member
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Sincerely,

Dianne Lancaster, MBA, JD, CPPO
Chief Learning Officer, National Association of State Procurement Officials

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CHAPTER 1: INTRODUCTION

This 3rd Edition of *State & Local Government: A Practical Guide* (hereafter referred to as this *Practical Guide*) identifies the current and rapidly changing forces that are encountered by state or local government procurement officers and suggests ways in which they may be addressed. The text also describes the principles and practices that are at the heart of a procurement system that must remain both flexible and accountable.

A combination of the factors that are discussed in the pages of this *Practical Guide* indicates that the challenges that public procurement officers are facing are rapidly evolving. State and local central procurement offices are obliged to find creative and innovative ways to adapt to new situations while still upholding traditional legal and ethical standards. Because of this, it is essential to recognize that a central procurement office cannot provide the effective leadership that is required in order to meet today's complex procurement needs if it is located several tiers below the public entity's highest executive level.

EDITION HIGHLIGHTS

There are several differences between this edition and the 2015 edition. They include:

- Issues such as the procurement of information technology (IT), sustainability principles in procurement, and the use of eProcurement systems have been updated. Additionally, the narratives relating to the *bones* of the state and local government procurement process—such as procurement planning, source selection methods, evaluation of bids and proposals, quality assurance, and contract

management—have been significantly expanded upon.

- Each chapter of this *Practical Guide*, except for this one, includes a comprehensive list of recommended best practices that are pertinent to that chapter's topic. Lists of recommended topics for statutory and regulatory coverage have been eliminated in favor of the more practical *best practices* lists.
- A comprehensive list of the resources that were used in the text of this *Practical Guide* is noted for each chapter through endnotes citing those resources.
- There is a significant increase in cross-referencing within each chapter to demonstrate the interrelationships among all of the subject matters that they address.
- Many of the changes in this edition are aimed at providing foundational definitions and explanatory overviews to benefit those readers who have no knowledge of state and local government procurement.

Terminology has been made consistent throughout this *Practical Guide*, and a guide to that terminology is provided at the end of this chapter.

HISTORY AND ORGANIZATION OF THIS TEXT

Although the National Association of State Procurement Officials (NASPO) was founded in the 1940s, it did not achieve its long-held goal of publishing a text on the public procurement profession at the state and local government level until the 1970s, when the Law Enforcement Assistance Administration of the United States Department of Justice provided funding for a study of state and local procurement. As a

result, NASPO, through its then-parent organization the Council of State Governments, published *State and Local Government Purchasing* in 1975.

The book became a companion to NASPO's survey of state purchasing practices, which the organization began conducting in 1949. The second survey was entitled *Purchasing by the States II* and was published in 1954–55. The third version came ten years later. Subsequent broader surveys became part of each edition of the original book. NASPO separated the text and the survey in 1997. NASPO now provides the most recent survey results to everyone through the website.¹

NASPO published a completely updated and restructured edition of this *Practical Guide* called the *First Edition* in 2008. This 3rd Edition is the second update since then.

When studying this text, the reader should keep in mind that state and local governments are not carbon copies of each other. Every procurement program has its own strengths and weaknesses that are attributable to governing law, operating rules/regulations, quality of management, political tradition, and availability of resources. This *Practical Guide* is a roadmap with effective procurement as the destination rather than a detailed blueprint that limits ingenuity and innovation.

Scope of the Text

The word *procurement* as used in this text means the *cradle to grave* of purchasing—from when the need to buy a certain commodity, construction, or service is first identified to the time for a commodity to be disposed of at the end of its useful life or when a service or construction project is concluded. Each chapter of this *Practical Guide* covers the role that the public procurement officer should play at each point of that process.

Given the increasing reliance on IT, Chapter 19 (*eProcurement*) and Chapter 20 (*Procurement of Information Technology*) have gained in importance in this edition.

New challenges and increasing complexity in procurement mean that public procurement officers need specialized training and education. The availability of college courses and majors, in-house training and online programs, and the creation of certifications and other credentials for public procurement officers reinforces the view that persons who possess such education and credentials are truly members of a specific profession. Chapter 21 (*Professional Development*) addresses this very current topic.

Organization of this Text

This *Practical Guide* is divided into 22 chapters—each addressing a component of, or issues pertaining to, the state and local government procurement process.

Guiding Principles of Procurement

This *Practical Guide* seeks to paint a clear picture of the principles of public procurement: competition, impartiality, openness, effective use of public funds, and innovation and flexibility. Those fundamentals call for a public procurement program in which: public business is open to competition; suppliers are treated fairly; contracts are administered impartially; value, quality, and economy are basic and equally important aims; public procurement officers are innovative to meet needs; and the process is open to public scrutiny.

Successful outcomes depend on the effective implementation of those principles. An ideal procurement program derives from a comprehensive law that is accompanied by an easy-to-use set of rules/regulations and guidelines. Effective implementation requires sufficient resources—an adequate budget, competent personnel, and

resourceful management—situated at a high level within the public entity’s organizational structure, along with positive executive and legislative government support.

Some fundamental guiding principles of a good public procurement program are:

- Assurance of consistency of procedures and decision making
- Assurance of consistency of goals, objectives, and policies
- Measurement of the performance of the procurement system in light of its goals and objectives
- Recognition of procurement as a profession
- Recognition that procurement is a strategic function in government
- Centralized leadership of all aspects of the procurement process
- Recognition that procurement begins with coordinated planning with contracting user agencies
- Assurance of the day-to-day adherence to the principles of public procurement, including a balance between accountability, innovation, and flexibility
- Timing to meet user agency requirements and to benefit from advantageous markets and technologies
- Maintenance of an environment of openness and fairness
- Balance between the need for fiscal accountability, the needs of user agencies, and opportunities for suppliers
- Effective leadership through close working relationships and effective communication with users and user agencies

CHANGES IN STATE AND LOCAL PUBLIC PROCUREMENT

Although there have been a number of changes in the role of the state and local public procurement officers over the last decades, it is also

noteworthy that some of the same issues that existed in the past still exist today.

A Look Back

As the procurement process became more complex, the role of the public procurement officer began to evolve into a more strategic one. The procurement officer moved to the center of the web of relationships among key contractors, government administration, and user agencies. He or she was expected to provide expertise to user agencies as they determined their needs, to conduct a process to select a contractor in a manner that generally satisfied both the user agency and competing suppliers, and to manage the resulting contract strictly, but congenially.

As the technology developed that made it possible to automate the procurement system, expectations were raised that faster service was achievable. The public procurement officer was expected to be a leader in the charge to streamline the procurement process. Demands for change occurred at the same time that government’s reliance on purchased services and commodities increased, the services and commodities sought were less routine, and the role that public procurement played within the executive branch became more strategic to the success of essential government programs.

A Look Ahead

The public procurement officer is still responsible for the accountability of the procurement process, while the competing and complex demands of user agencies dictate that the officer be a flexible and creative problem solver, exercising whatever latitude the procurement laws permit. Caution and the temptation to implement all possible safeguards must be balanced with a more user-friendly process that is flexible and cuts through red tape.

The push to exercise that latitude more freely is complicated by the fact that state and local government procurements often receive intensive scrutiny. The public procurement officer and the process become lightning rods for criticism when the media, the legislature, and even the user agency assume that something went awry.

That criticism often demonstrates a lack of understanding of the procurement process. For instance, the media may denounce a failure to award to the low bidder, even though it may be that the public procurement officer used the competitive sealed proposal process authorized by law, permitting award based on multiple factors rather than price alone.

The failure of some executive government officials to recognize that sound public procurement requires strong leadership is an impediment to the future development and maintenance of a sound, modern procurement system, which in turn, mandates placement of a central procurement authority at an executive level within the governmental structure. Public procurement officers cannot be key players in the planning, acquisition, and management of strategic services, construction, and commodities if executive government officials view procurement as a clerical function with commensurately low pay and minimal authorization and training.

NASPO and its members are eager to be agents of change. They urge all those who participate in the state and local procurement process, particularly government executives, to ensure that public procurement officers are provided with the support and resources that are necessary to make those changes.

SOME CRITICAL ISSUES

Some of the most critical issues that challenge procurement professionals now (and most likely in the future, also) are addressed in the various chapters of this *Practical Guide*. A brief scan of the chapter titles and subheadings will offer the

reader a summary of these issues. The following topics are especially challenging.

Procurement Leadership

A central procurement officer cannot offer expertise at the critical decision-making point without being a part of executive-level decisions. The reader will find the case for this primarily in Chapter 2 (*Procurement Leadership, Organization, and Value*), but it is also a theme in many other chapters, such as Chapter 4 (*Strategies and Plans*).

Procurement as a Profession

NASPO continues to work directly with colleges and universities to develop a public procurement curriculum at those institutions. NASPO also continues to be a partner with the National Institute of Governmental Purchasing (NIGP): The Institute for Public Procurement on the Universal Public Procurement Certification Council to advocate for the certification of all public procurement officers at the state and local government level. Chapter 21 (*Professional Development*) provides a narrative on this important issue.

Technology

Technology projects and their procurement are a major focus of resources, and will be so in the future, and eProcurement will continue to grow in importance going forward. Chapter 19 (*eProcurement*) and Chapter 20 (*Procurement of Information Technology*) discuss in more detail the latest thinking on those issues.

Value of Procurement

Today, procurement has become a critical function within the public entity with the potential of contributing as much as, or more than, other governmental functions to the efficient and effective operation of that public entity. For instance, the genesis of eProcurement systems regarding the significant savings in time

and money that they have achieved is an effort that is being led by central procurement offices throughout the country.

Without the oversight of central procurement offices, the integrity of the procurement process can break down with potentially embarrassing or even legal consequences for public leaders.

THE MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS

It is important to address a noteworthy event in the history of state and local public procurement—the publication in 1979 of the American Bar Association Model Procurement Code for State and Local Governments (hereafter referred to as the Model Procurement Code).²

The American Bar Association revised the Model Procurement Code and its regulations for implementation in 2000. It separately published a Model Code for Public Infrastructure Procurement in 2007, which extracted those portions of the 2000 Model Procurement Code that relate to the procurement of construction. The Model Procurement Code is widely considered to be a model for best practice in public procurement. The American Bar Association designated the Model Procurement Code as a model code and not as a uniform code, so that states might recast parts of its provisions to fit their needs.

The development of the Model Procurement Code, along with its implementing model regulations and the Model Procurement Ordinance for Local Governments and the Model Code for Public Infrastructure, remains a major event that affects both the present and future conduct of state and local government procurement.

Terminologies may have changed over the years since the Model Procurement Code was first issued in 1979. For instance, the term *best*

value, relating to the evaluation of bids and proposals, took hold in some sectors in the 1990s and is discussed in this edition. Additionally, the term *sourcing strategies* is often used in public procurement circles to describe the development of nonstandard approaches to purchasing commodities, services, or construction, particularly of IT.

The key benchmark for any law such as the Model Procurement Code is whether, despite its age, its language is flexible enough to permit the approaches that are reflected in those new terminologies. So far, the Model Procurement Code's language holds up well. It continues to be a starting point—a model law and not one seeking uniformity—for finding good language from which a public entity may draft a solid procurement law or ordinance.

NEW TO THIS EDITION OF THE PRACTICAL GUIDE

Terminology Used

One improvement that this *Practical Guide* strives to make is to ensure that certain terms are used uniformly throughout the text, avoiding the confusion that arises when different terms are used to mean the same thing. The following is a directory of those terms:

- *Chief Procurement Officer* means the person who heads the central procurement office of a state or local government
- *Central procurement office* means the procurement office within a state or local government that is responsible for conducting all or most of the procurements for that government
- *Public entity and state and local government* are used interchangeably, although in fact, the term *public entity* is broader since it encompasses entities such as public universities that are not generally deemed to be governments

- *User agency* means the agency, board, or department within a state or local government that is one of the following, depending on the context:
 - ◊ The agency for which the central procurement office conducts a procurement
 - ◊ The agency that has authority to conduct its own procurements outside of the central procurement office
 - ◊ The agency requesting that the Chief Procurement Officer approve its request to engage in a limited or no-competition procurement such as a sole source or emergency procurement
- *User* means the public agency employee
- *Commodities* means all tangible things such as products, equipment, software, and hardware—in contrast to services and construction
- *Supplier* means any entity that sells commodities, services, or construction

The chapters of this *Practical Guide* also use the following shorthand terms:

- *NASPO* means the National Association of State Procurement Officials
- *NIGP* means National Institute of Governmental Purchasing: The Institute for Public Procurement
- *NIGP Dictionary* means the NIGP Online Dictionary of Procurement Terms³
- The *Model Procurement Code* means the American Bar Association Model Procurement Code for State and Local Governments

Negotiation Callouts Used

A final element that is new to this edition of the *Practical Guide* is the use of callouts to highlight important concepts related to contract negotiations. Effective negotiations have become a critical part of the modern public procurement process. In lieu of a new chapter on negotiations, callout boxes were used to discuss negotiations within existing chapters to emphasize how

negotiation planning and execution touches multiple areas of the procurement process. Callouts discussing negotiations can be found in Chapters 4, 9, 20, and 21.

CONCLUSION

Throughout this *Practical Guide*, the kinds of decisions faced by public procurement officers and Chief Procurement Officers illustrate the importance of developing knowledgeable and skilled procurement professionals. NASPO and other organizations, as well as some colleges and universities, have launched initiatives aimed at creating sustained training programs to support state and local government procurement offices. The fact that this *Practical Guide* has been revised only four years after publication of the last edition further highlights the importance of the knowledge and training challenges that are facing procurement offices today.

Preserving the integrity of the procurement system and making it fair and equitable is an objective that is unique to public procurement. Public procurement officers have responsibilities that sometimes cause friction between user agency satisfaction and compliance requirements. The speed of change has refocused the profession on the need for continual growth of knowledge and skills. This *Practical Guide* is intended to help practitioners focus their own learning on the topics of most importance to the profession.

ENDNOTES

1. <https://www.naspo.org/Publications/PID/8806/CategoryID/207/CategoryName/Survey-of-State-Procurement-Practices>
2. A copy of the Model Procurement Code, along with various versions of it including the Model Procurement Ordinance is available at: <http://apps.americanbar.org/dch/committee.cfm?com=PC500500>
3. <https://www.nigp.org/home/find-procurement-resources/dictionary-of-terms>

CHAPTER 2: PROCUREMENT LEADERSHIP, ORGANIZATION, AND VALUE

RECOMMENDED BEST PRACTICES

- The central procurement office and the Chief Procurement Officer should define the internal purposes, goals, and objectives of the office; orienting them toward service, leadership, and management while addressing the full spectrum of procurement activities—including planning, procurement, quality assurance, contract administration, dispute resolution, property management and disposal, supplier relations, procurement consulting and training, and procurement data and technology management.
- The central procurement office and the Chief Procurement Officer should establish measurements for assessing the performance of the procurement process, such as processing times, supplier performance data, and client survey responses.
- The central procurement office should publish and maintain appropriate manuals for procurement personnel that set forth public entity-wide procurement goals and objectives and establish day-to-day procurement procedures in simple, concise language.
- The central procurement office should create programs and written *how-to* guides for non-procurement personnel at all levels of government and also for suppliers, instructing them in the procurement process.
- The Chief Procurement Officer should delegate, but closely monitor, procurement functions that can be logically, effectively, and efficiently performed by others. The delegation should be in writing and the scope of the delegation should be commensurate with the expertise and resources of the agency, department, or person to whom the delegation is to be made.
- The central procurement office should establish mechanisms such as focus or advisory groups and cross-functional procurement teams to encourage coordination and cooperation in order to unite the technical expertise of procurement and program staff and suppliers in carrying out its procurement mission.
- The central procurement office should encourage the use of internal teams as an effective technique for providing specialization, experienced back-up assistance, and group decision making.
- The central procurement office should ensure that consistent and uniform legal advice on public procurement and contract law issues is readily available—to everyone in their own office as well as to all procurement personnel within the public entity.
- The central procurement office should publish and maintain an internal procedures manual, a policy manual for agency personnel, and a supplier manual. These may be in hard-copy or electronic form, whichever most effectively meets the reader's needs. Composition control should reside with the Chief Procurement Officer.

This chapter promotes the strategic leadership of the state and local public procurement process. To implement that vision, this chapter advocates that procurement authority must be placed in a single leader—an experienced Chief Procurement Officer—whose position is at a high executive level within government.

This chapter will demonstrate that a strong central leader is essential to a public entity's procurement system. State and local governments cannot leave it to chance that their procurement processes, through which billions of dollars are spent, will achieve the following: ensuring the best use of public resources; allowing innovation, flexibility, and discretion; promoting professionalism; and providing a uniform and consistent way of offering contracting opportunities to encourage competition.

The *Harvard Business Review* describes strategic leaders as persons who “. . . are constantly vigilant, honing their ability to anticipate by scanning the environment for signals of change.”¹ Unless a Chief Procurement Officer sits at the table alongside the public entity's highest executives to gain the best knowledge of the future plans of the public entity, he or she cannot, in turn, anticipate and be vigilant in finding ways for the procurement process to support such plans.

Investing authority in a single, strategic leader does not mean that user agencies lose their authority to conduct procurements. Instead, central leadership and structure provide the best means of ensuring that the procurement process works seamlessly to meet the public entity's needs through collaborative development and interpretation of laws, rules/regulations, and policies. It also allows for professionalism in the process through, for instance, establishing criteria for delegating procurement authority, creating training programs, providing electronic tools for procurement officers and suppliers, and fostering cooperation among user agencies' procurement officers.

THE CASE FOR A SINGLE PROCUREMENT ADMINISTRATOR AT AN EXECUTIVE LEVEL

The National Association of State Procurement Officials (NASPO) has long professed that its members—the Chief Procurement Officer for each state—should be elevated to cabinet-level status. In fact, NASPO members ranked that issue highest in its recent annual Top Ten Priorities for State Procurement.²

That ranking is not a self-serving act. It reflects the benefits of investing a single leader with the authority to guide the movement of the ship in the same direction. The private sector has also recognized this as a best practice for decades, aiming to achieve many of the same objectives that this chapter sets forth as justification for creating a similar procurement structure within public entities.³

The argument that a public entity must designate a single strategic procurement leader who sits at an executive level within that entity is not new. The American Bar Association Model Procurement Code for State and Local Governments (hereafter referred to as Model Procurement Code), approved by the organization's House of Delegates in 1979 and revised with that body's approval in 2000, champions a state or local public procurement structure managed by one single experienced Chief Procurement Officer at a high level, with tenure and authority over all of the public entity's procurements.⁴ NASPO has published several papers analyzing and promoting the benefits of this type of structure.⁵ The National Institute of Governmental Purchasing (NIGP) issued a position paper on procurement authority that enumerates the benefits of central procurement leadership.⁶

Leadership means going beyond merely purchasing items. It involves developing a partnership with user agencies without sacrificing the

responsibility to keep the procurement system accountable. Leadership starts with a cooperative and professional attitude. It means that instead of saying *no* to a *may we* question, the answer must be *let's figure it out*.

The treatment of the public procurement function as merely an awkward, hide-bound, and risk-averse process that is a necessary evil significantly reduces its chance of success. Public procurement officers should be viewed by user agencies as essential facilitators. However, to achieve this, procurement officers must be given appropriate access to in-depth program knowledge, well-trained personnel, and appropriate authority for decision making, along with adequate time to plan and implement a procurement solution. Recognition at the highest level of a public entity that procurement is a strategic function, with leadership at the top level where critical policy decisions are made, signals to user agencies that the procurement process should play a crucial role in its planning and program development. It also signals to procurement professionals that they are expected to provide superior service.

NASPO's members recognize that strategic leadership is a significant obligation for them. They and the public procurement officers that they manage must have a solution-focused attitude if they are to be considered of strategic value. When a government chief executive or user agency asks for solutions, the answer cannot be: "the rules won't let us do that," "we can't take that risk," "we would need a lot more time" or "we have never done it that way." The complex problems facing public entities today and a chronic lack of resources mean that chief executives are seeking creative solutions to accomplish their tasks.

Some key tasks of a central procurement office led by a strategic leader—the Chief Procurement Officer—are:

- Establish a program of professional excellence and make this competence known

to executive and legislative management, using agencies and the public

- Clearly state the procurement system's obligation to provide service and value to its customers—taxpayers, user agencies, and suppliers
- Define the management role of the Chief Procurement Officer and the central procurement office in decision making, in policy making and implementation, and in oversight of the full spectrum of procurement activities
- Strive to improve employee motivation, professionalism, and productivity
- Encourage innovation and ingenuity by a commitment to training and research for the professional procurement staff and to program management within the user agencies
- Commit the central procurement office to working with user agencies and suppliers to achieve value for the funds spent in the acquisition of construction, commodities, and services
- Commit the central procurement office to communicating needed revisions in the procurement law to executive and legislative leadership
- Support the use of technology to provide faster services and current, accurate procurement information
- Encourage continuing education and professional certification for the procurement staff
- Establish programs to measure the performance of the procurement system, in terms of both quality and quantity, and require communication of those measures to customers
- Establish and maintain open communication with the public, including the news media

The vision of one strategic procurement leader with responsibility over all of a public entity's procurement may seem naïve. Public entities are often headed by executive and legislative politicians who regularly change after elections.

Long-term continuity of vision and policy direction is an aspiration that is not often met. Large and politically powerful user agencies, along with the suppliers that contract with them, can also wield influence to prevent central oversight by a single, strategic procurement leader.

Those barriers do not mean that the concept of a single leader and the data that supports it are flawed. This chapter provides a discussion of some tools for providing a solid, broadly unified procurement structure in which the Chief Procurement Officer may delegate procurement authority to others within a public entity based on objective criteria. It also includes a discussion of exemptions from a single leader's oversight and the best way in those cases to achieve collaboration, consistency, and policy development.

STAFFING FOR STRATEGIC PROCUREMENT SERVICES

The leadership tasks and strategic thinking that are described in this 3rd Edition of *State & Local Government: A Practical Guide* (hereafter referred to as this *Practical Guide*) require skilled professionals in order to carry them out. As the economy plummeted in the early 2000s, many procurement offices suffered serious staff reductions. Even though the economy has improved, some of those offices have not returned to their previous staff numbers.

Staff cuts—or maintaining those cuts after they are no longer necessary—may be done for political reasons to show a reduction in government. There should be communication with a public entity's senior leadership—governors and mayors, for instance—so that the unintended consequences of staff reduction will be clearly understood. A major consequence is the delay of contract awards, which impacts private

sector business cash flow, the local economy, and tax revenue.

This is not merely a cry for more bodies. The activities that a well-run central procurement office is responsible for—for example, complex procurement, planning, market research, contract development and management, tracking procurement office performance, training, and user and supplier training—cannot be done with a skeleton staff.

One approach for calculating the number of public procurement officers that are required in order to conduct only a central procurement office's procurements—but not the rest of that office's responsibility—is described in the following steps. This is based on the hours calculated for procurements that are being conducted by public procurement officers who are not new to their jobs.

Step 1

- Study the labor hours needed to administer one invitation for bids (IFBs), two requests for proposals (RFPs), and three spot purchases⁷
- Identify the required steps for each of these methods of procurement—both pre-award and postaward
- Assign a labor-hour value to each step depending on whether the procurement was low, medium, or high complexity
- Project all procurements over a year—current and projected IFBs and RFPs, for instance—and categorize them as low, medium, or high complexity
- Total all of the labor hours, which will be the total office labor hours for the existing and projected workload

Step 2

Calculate a public procurement officer's productive work hours in a year. There is unproductive time taken up by meetings, interruptions, and other events.

Here is an example of a calculation of this number:

	<u>Hours</u>
365 days in a year × 8 hours a day	2,920
Less weekends	(832)
Less 11 holidays	(88)
Less annual leave	(80)
Less sick leave	(40)
Less 10% unproductive time	<u>(188)</u>
Total Productive Time, One Staff	1,692

Step 3

Take the total hours calculated in Step 1 and divide them by the number resulting from Step 2. Assuming that a workload of 37,000 labor hours is required as a result of Step 1, and then dividing it by the 1,692 productive hours determined in Step 2, the result will be the required number of procurement officers: 21.87, in this case. Essentially, 22 officers are needed to accomplish this workload, which is adjustable up or down for any error in calculation or increased productivity goal.

Central procurement and other public procurement offices have a strategic impact by saving governments money. The savings are much higher than any savings that are realized from not filling procurement jobs. As Chapter 4 (*Strategies and Plans*) explains, officers must track what they do and then report their successes. Those reports, along with staffing analyses like the one previously shown, will help provide the justification that is needed for any request for more staff.

DRAFTING A COMPREHENSIVE PROCUREMENT LAW

The structure and authority of an effective procurement program is rooted in the law that grants the authority of the procurement official to act. The procurement law does not need to—and indeed should not—specify every procurement activity in order to authorize it. The

best procurement laws are those that offer a clear statement of legislative intent, a high-level description of the procurement structure and processes, and broad authority to the Chief Procurement Officer.

The nature of public procurement changes because the nature of what the public entity needs shifts regularly. Therefore, a procurement system must be adaptable, responsive, and flexible. This means that the law should outline the public entity's public procurement policies and procedures, while also leaving room for procurement professionals to exercise discretion.

The Model Procurement Code and Model Procurement Ordinance offer excellent starting points for statutory/ordinance language for adoption or adaptation. The general philosophical approach taken in those model laws is that the law should consist of clear, simple, broad legal parameters and authorities, leaving operational details to be filled in through separate implementing rules/regulations and guidelines.

The law should be written in such a way that it does not require legislative action to amend it when change occurs. For instance, the Model Procurement Code, in its 1979 version, did not codify anything requiring a paper process or require that notices should be published in newspapers. Thus, it was not necessary to update its provisions in 2000 to embrace an electronic process.

Appendix B offers a checklist that specifies organizational structure, leadership responsibilities, and activities that a good procurement law should authorize. Especially critical is the creation of the position of the Chief Procurement Officer and the central procurement office that he or she directs. The law, in whatever form is appropriate, should:

- Place the Chief Procurement Officer and the central procurement office at an executive level, reporting directly to the public entity's chief executive

- Authorize the Chief Procurement Officer to institute and maintain an effective program for all procurement of commodities, services, and construction within the public entity, and make that official responsible for the program
- Assign the Chief Procurement Officer and the central procurement office the responsibility for policymaking as well as for the implementation and oversight of the full spectrum of procurement functions
- Designate the Chief Procurement Officer as the sole authority to delegate procurement authority and to determine the conditions for doing so
- Authorize the Chief Procurement Officer to promulgate rules/regulations and policies to implement the procurement law
- Define the applicability of the law to include all of the public entity's procurements
- Exclude blanket exemption for the purchases of an entire user agency or department; if exclusions are considered necessary, define them narrowly by types of commodities, construction, or services sought and not so broadly as to exclude all the procurements of certain user agencies

One critical feature that the procurement law should include is a set of procurement definitions. Defining terms and using them in the law ensures that the law does not use different words to mean the same thing.

For instance, the Model Procurement Code defines the full range of things that may be purchased by using three terms and broadly defining them: *supplies* (including any interest in real property), *services*, and *construction*.⁸ It then defines *procurement* as the *buying, purchasing, renting, leasing, or otherwise acquiring*⁹ [of] *supplies, services, or construction*. The existence of three terms to represent the universe of things to be purchased simplifies the task of writing a solicitation and interpreting the law, among other things.

Additionally, definitions themselves can exclude an item from a procurement law's coverage. For example, the State of Arizona, in adopting its version of the Model Procurement Code, changed the term *supplies* to *materials* and specifically excluded from that definition any interest in real property, thus exempting something from the Arizona law that was covered by the Model Procurement Code.¹⁰

Exemptions from Procurement Law

Generally speaking, procurement laws often exempt some agencies or departments or particular types of procurements from that law's coverage or from centralized procurement management. For instance, states historically have excluded construction from their main procurement laws, particularly highway construction, and have created separate procurement laws for those types of procurements. The argument offered for exempting highway construction procurements is that they are heavily regulated through the federal highway funding authorities.

The real reason for many exemptions is that user agencies have enjoyed the exercise of procurement authority prior to the creation of a central procurement law with no central management oversight. The user agencies fear that they will be required either to cede authority to a central procurement leader who is not housed with the user agency or will have to follow standard procurement procedures. They perceive a loss of authority and power were they to have their procurements regulated through the central procurement office or subject to standard procedures.

However, legislative exemptions from a procurement law may result in negative procurement results, including:

- Losing the benefit of reducing the total public entity spend from economies of scale

- Inadvertently reducing competition as suppliers are required to meet multiple and differing sets of competition requirements among user agencies
- Diminishing adherence to procurement laws and best practices when underqualified or unqualified personnel are procuring commodities, services, and construction
- Minimizing the cultivation of strong supplier relationships that focus on performance and output due to varied processes and procedures across the public entity

An Approach to Reducing Exemptions

In the face of sometimes formidable opposition to centralized oversight, one compromise is for the law to cover all user agencies and make them subject to the law's requirements, but eliminate the Chief Procurement Officer's oversight of those procurements. The State of Utah, in adopting its version of the Model Procurement Code, took this approach when embracing one of the Model Procurement Code's proposed structures. It created a procurement policy board that develops procurement regulations and policies under the Utah Procurement Code, which is generally applicable to all user agencies. The policy board is composed of the Chief Procurement Officer as well as the leaders of the exempted user agencies, along with representatives of cities, counties, and school districts.¹¹

Delegation of Procurement Authority

Rather than excluding some user agencies from the procurement law, a better approach is to make all user agencies subject to the Chief Procurement Officer's authority along with that official's agreement to delegate procurement authority. This approach recognizes a user agency's historical procurement authority while still achieving the goal of retaining central procurement leadership and management

public entity-wide. The American Bar Association suggests—in its Commentary Notes to Section 2-301 (Centralization of Procurement Authority) of the Model Procurement Code,¹²—the following factors for the Chief Procurement Officer to consider in delegating procurement authority:

- The expertise of the potential delegate in terms of procurement knowledge and any specialized knowledge pertinent to the authority to be delegated
- The past experience of the potential delegate in exercising similar authority
- The degree of economy and efficiency to be achieved in meeting the state's requirements if authority is delegated
- The resources available to the office of the Chief Procurement Officer to exercise the authority if it is not delegated, and the consistency of delegation under similar circumstances

There are certain authorities, though, that a Chief Procurement Officer should never delegate. The most important of those is the approval of exemptions from competition, such as sole source or emergency procurement. Chapter 8 (*Noncompetitive and Limited Competition Procurements*) discusses these types of procurements in more detail.

PROCUREMENT RULES/REGULATIONS

The same philosophy previously discussed for the adoption of a procurement law applies as well to the adoption of rules/regulations that implement the statute. The terms *rules* and *regulations* mean the same thing but states will vary as to which term they use. Rules/regulations are generally limited to state governmental entities. A statute must authorize their creation and establish the means by which they are adopted within a state government.

Their scope is limited to what statutes explicitly direct and to matters that are reasonably inferable from the explicit statutory language. They must undergo a rigorous administrative review before adoption. Local public entities such as school boards, public universities, cities, and towns generally do not have the legal authority to adopt rules/regulations.

Rules/regulations should provide the requisite amount of detail needed to interpret the statutes authorizing them. They should direct the development of guidelines and procedures manuals without addressing every discrete step in a process. For instance, a rule/regulation may define the criteria for sole source procurements without establishing the exact format through which a user agency should make a request for one.

The Chief Procurement Officer should have the authority to institute rules/regulations under the procurement law. The Model Procurement Code offers statutory language for that approach as well as an alternative one that separates policymaking from day-to-day operations. The latter approach proposes the creation of a policy board, either of high-level outside persons with business experience or of cabinet-level employees of the public entity. Either configuration anticipates support staff.

The policy board that the State of Utah adopted (and which was discussed earlier) is responsible under the Utah Procurement Code for adopting rules/regulations.

The American Bar Association offers a list as examples of possible topics to cover in procurement rules or regulations for states adopting versions of the Model Procurement Code. Some of the topics mentioned are:¹³

- Conditions and procedures for delegations of procurement authority
- Prequalification, suspension, debarment, and reinstatement of prospective bidders, offerors, and contractors
- Small purchase procedures

- Conditions and procedures for the procurement of perishables and items for resale
- Conditions and procedures for the use of source selection methods including emergency procedures
- The opening or rejection of bids, proposals, and offers, and waiver of informalities in bids and offers
- Confidentiality of technical data and trade secrets submitted by actual or prospective bidders or offerors
- Partial, progressive, and multiple awards
- Supervision of storerooms and inventories, including determination of appropriate stock levels and the management, transfer, sale, or other disposal of publicly owned supplies
- Conducting price analysis
- Use of payment and performance bonds in connection with contracts for supplies and services
- Guidelines for use of cost principles in negotiations, adjustments, and settlements

CREATING TOOLS FOR PUBLIC EMPLOYEES AND SUPPLIERS

One of the critical components of the public procurement process is maintaining a system that is open, so that all of those who have an interest in it can see how public funds are being spent. Toward that end, it is important for the central procurement office to publish manuals that describe that process to user agencies, users, suppliers, legislative bodies, and the public. These tools should be developed in a manner that permits the greatest amount of input by those who will be using them.

Generally, these tools take the form of an operations manual as well as a supplier manual entitled, for example: *How to do Business with the [state, city, university, school district]*. Today, any public procurement office with a website

has probably placed those manuals on that site in electronic form, making them widely available and in a format that is easy to revise.

As a rule, the manuals, particularly the *how to* manual for suppliers, should not discuss the specifics of the procurement law—primarily because the manuals need to be in plain, easily understood English and the language of laws is not known for simplicity. Electronic versions of those laws, at least at the state level, are readily available online and links to them may be provided in the manuals. NASPO maintains profiles for all states that include a link to each state's laws and procurement website. These can be accessed on the NASPO website.¹⁴

Operations or Procedures Manual

An operations manual establishes and describes the internal procedures of the procurement office. This manual should be a practical guide for public procurement officers. There is no need to repeat the law or rules/regulations in an operations manual.

In the case of a local public entity, there may be a need for more detail in an operations manual because there may be a procurement ordinance but no implementing rules/regulations if that entity is not bound by the state's procurement laws.

The subjects addressed in an operations manual will vary, depending on the language of the applicable procurement law and the authority that it grants to a procurement officer.

Chapter 4 (*Strategies and Plans*) outlines the critical role that the public procurement officer must play strategically in assisting a user agency toward meeting its future needs. It also notes that a procurement office must identify the role that it should play along with the procedures that are necessary to be prepared for emergencies. The operations manual should address matters relating to these issues.

The following list addresses some of the *how to* topics that it may be useful for an operations manual to discuss, but it is not exclusive:

- Establishing and maintaining supplier lists
- Locating new sources
- Monitoring and evaluation of supplier performance
- Determining bidder or offeror responsibility
- Notifying suppliers of contracting opportunities
- Receipt, opening, and tabulation of bids and proposals
- Determining responsiveness in bids and proposals
- Handling of supplier mistakes
- Handling of proprietary information and trade secrets
- Defining circumstances under which any or all bids or proposals may be or are rejected, including collusive bidding and resolution of identical bids
- Handling and return of samples
- Handling of and need for bid security
- Notifying successful and unsuccessful bidders and offerors
- Outlining small purchase procedures
- Specifying roles and responsibilities relating to contract administration and management—for example, verifying contractor compliance with metrics including service levels and milestones; enforcing provisions for price reduction; handling requests for price increases; monitoring contractor adherence to contract terms and conditions; and implementing quality assurance
- Handling protests of bidders and claims of contractors
- Handling complaints from user agencies or the public about suppliers, contractor performance, or procurement office services
- Transferring or other disposition of excess and surplus property
- Key steps and procedures for conducting different kinds of procurements

- Maintaining complete procurement/contract file documentation, retaining records, and making records available to user agencies and the public
- Reporting anticompetitive practices and suspected collusion to appropriate legal authorities
- Tracking and measuring procurement office performance and maintaining user agency communication through means such as surveys and focus groups
- The methods of conducting competitions for contracts including the receipt of solicitations
- The nature of basic statutory provisions, and of rules/regulations and policies, but not necessarily quotations or citations of statute or ordinance
- The manners in which procurements are conducted, for example, by competitive quotations, sealed bids, sealed proposals, multistep bidding, and under emergency and sole source conditions
- Clear statements prohibiting supplier gifts to public employees, and other ethical matters such as back-door selling or collusive bidding
- Any socioeconomic procurement programs, such as minority supplier programs or environmental procurement mandates

Supplier Manual

The manual should be brief, concise, and free of jargon. The introduction should be phrased in a friendly, informal way, setting the tone for the material to follow, which also should be written in an easily readable, nonbureaucratic style. It should offer some general information about the background, organization, and overall philosophy of the public entity's procurement program. The introduction should also include an invitation to visit or call the central procurement office for further details or a more complete understanding of topics discussed in the manual.

Here is a list—by no means exhaustive—of some of the topics that the procurement office may wish to address in the supplier manual:

- The kinds of construction, commodities, and services purchased
- A list of the public procurement officers in the offices, and a description of their responsibilities
- The location and address of the central procurement office and of procurement offices of user agencies with delegated procurement authority
- The way in which suppliers may register for inclusion on supplier lists and access any special requirements or communications

The NASPO website provides access to a variety of state *how to* supplier manuals.¹⁵

While it is a great benefit to offer a supplier manual online, it is important to provide something that a procurement officer can distribute at supplier fairs and other outreach opportunities. That may be as simple as a business card with the web address where the supplier may access the manual.

RESPONSIBILITIES OF THE CENTRAL PROCUREMENT OFFICE

The mandate to lead and to manage the public entity's procurement system is the foundation for organizing the central procurement office and assigning staff responsibilities. Even if the central procurement office and the officer in charge of it are not placed at the recommended executive level, the responsibility for leading the procurement system must still be the objective that defines the work of that office.

Policy Generation, Implementation, and Communication

While the central procurement office must be the undisputed leader of a public entity's procurement system, it should not operate in a vacuum, particularly when establishing rules/regulations or policies that will affect the work of others. The development of policies, procedures, and guidelines does not need to be consensus-driven, but the act of leading requires that the voices of those touched by the procurement system have an opportunity to be heard.

One best practice is for the Chief Procurement Officer to establish regular forums with user agencies and users, including user agency procurement officials. Doing so goes a long way toward assuring that issues are addressed in a timely and open fashion.

Training and Staff Development

Training for procurement staff and user agencies is critical to maintaining a high level of professionalism. As will be discussed in Chapter 21 (*Professional Development*), the central procurement office should devote resources toward developing training and education programs for user agency staff, in addition to assuring the professional development and certification of procurement staff. The central procurement office should also maintain a relationship with the public entity's personnel division in order to ensure that the job classifications and employee recruitment for procurement positions keep pace with changes in procurement and reflect the appropriate level of professionalism.

Technology

As Chapter 7 (*Competition: Solicitations and Methods*), Chapter 9 (*Bid and Proposal Evaluation and Award*), and Chapter 19 (*eProcurement*) discuss, the growth of eProcurement systems continues.

A FEW WORDS ON PERFORMANCE METRICS

The whole of this topic is too broad to address in this *Practical Guide*, but procurement office performance measurement is critical. As the saying goes, "What gets measured gets done." It is also important to show that procurement offices are actually providing the value that they promise. Measures must be both quantitative and qualitative.

A NASPO document entitled *Critical Success Areas and Key Performance Indicators for State Central Procurement Offices* is a resource for identifying what should be measured. It indicates key procurement performance indicators, many of which should be universal for all public procurement offices.¹⁶

THE VALUE OF PROCUREMENT

Today, procurement has a much greater role in a state or local government than the traditional mission of simply obtaining high-quality commodities, construction, and services for the lowest possible cost or best value. Instead, it has become a critical function within the public entity—with the potential of contributing as much as, or more than, other governmental functions toward the efficient and effective operation of public entities.

Traditional Value of Procurement

Perhaps the primary traditional value of public procurement is in its ability to reduce costs and generate savings. Procurement professionals do this by leveraging volume in the public entity's contracts, competing and negotiating contracts, and effectively using eProcurement solutions. The following paragraphs depict two examples.

Through Leveraged State Contracts

Procurement professionals strive to award long-term, high-volume contracts that leverage a public entity's buying power to obtain the best prices for commodities, construction, and services, and to reduce administrative costs. Other public entities, including institutions of higher education, use these contracts, thereby lowering the cost to taxpayers.

When a public entity does not leverage its buying power through a strong central procurement organization, user agencies must expend resources to purchase for their own individual needs and because the volume purchased is less than it would be if all user agencies' needs were combined, those purchases are often at higher prices.

Through eProcurement Solutions

Public entities that have made the investment in and then implemented robust, fully functional procurement solutions have achieved substantial savings by automating the procurement process. These eProcurement solutions have made a public entity's business opportunities more accessible to suppliers, reduced paperwork, increased competition, and made the procurement process more efficient and effective—all resulting in savings.

Creating and Sustaining Private Sector Jobs

Chapter 3 (*The Importance of Competition*) describes the economic impact that public procurement plays in the nation's economy. Many private sector businesses depend on public contracts to generate cash flow and to create or sustain jobs.

One often overlooked resource that helps directly improve competitiveness and sustain jobs is a state's Procurement Technical Assistance Center (PTAC). These centers, funded partially by the United States Defense Logistics

Agency, provide free counseling to businesses in all aspects of federal, state, and local government procurement. Many state central procurement offices are involved in the strategic direction of PTACs, including educating suppliers about doing business with state governments. There are more than 300 local PTAC offices across the country.¹⁷

Ensuring a Fair, Open, Honest Process

Central procurement offices headed by a Chief Procurement Officer ensure that the procurement process is fair, open, and honest, with equal access for suppliers to a public entity's business opportunities. Absent their oversight, the integrity of the procurement process can break down, with potentially embarrassing or even legal consequences for public leaders.

Transparency and Accountability

Public procurement involves billions of dollars of public funds. Taxpayers believe procurement should be public and transparent. Central procurement offices ensure through oversight and use of technology (such as eProcurement systems) that the procurement process remains fair, open, and honest, and that its process and outcomes are transparent to the public. Without a strong central procurement office, the procurement process can degenerate and thus, transparency and accountability can be compromised.

Importance of Consistent Laws and Regulations

Businesses suffer when there is inconsistency in the rules/regulations that pertain to procurement laws. As an example, the introduction to the Model Procurement Code states:

The proliferation of "local content" procurement regulations has created a multitude of arcane differences among the thousands of public entities buying commodities and services on an annual basis.

. . . complex, arcane procurement rules of numerous public entities discourage competition by raising the costs to businesses in order to understand and comply with these different rules. Higher costs are recovered through the prices offered by a smaller pool of competitors, resulting in unnecessarily inflated costs to state and local governments.

When public entities are removed from a state's procurement law and establish their own rules, businesses are forced to track a myriad of practices and procedures. Competitions initiated by those exempted public entities can vary significantly.

CONCLUSION

The key ingredient in an effective public procurement system is leadership through the Chief Procurement Officer and a central office, placed at a high executive level. To achieve this, executives and legislators must recognize the importance of the central procurement office. Leadership also requires that the person serving as the Chief Procurement Officer, along with those who work under that officer, adopt an attitude of professionalism, openness, cooperation, and creativity. Finally, leadership means going beyond simply acquiring things; training, outreach, planning, and contractor management are just a few of the other activities that are of equal importance.

ENDNOTES

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2. For the 2017 and 2018 lists, go to: <http://www.naspo.org/Publications/PID/8806/CategoryID/215/CategoryName/Yearly-Top-Ten-Priorities>
3. L. Younger & B. Umbenhauer. (March 27, 2018). The Deloitte Global Chief Procurement Officer Survey 2018. Retrieved October 1, 2018, from <https://www2.deloitte.com/content/dam/Deloitte/at/Documents/strategy-operations/deloitte-global-cpo-survey-2018.pdf>. The survey contains data from 500 business chief procurement officers in 39 countries.
4. See Article 2—Procurement Organization—of the Model Procurement Code. A copy of the Model Procurement Code, along with various versions of it including the Model Procurement Ordinance is available at: <http://apps.americanbar.org/dch/committee.cfm?com=PC500500>
5. <https://www.naspo.org/Publications/ArtMID/8806/ArticleID/2208>
6. See the white paper entitled *Procurement Authority in Public Entities* at: <http://www.nigp.org/home/find-procurement-resources/guidance/position-papers>
7. The NIGP Dictionary defines a spot purchase as “a one-time purchase occasioned by a small requirement, an unusual or emergency circumstance, or a favorable market condition.”
8. See Sections 1-301(4), (21), and (24) of the Model Procurement Code.
9. See Section 1-301(16) of the Model Procurement Code.
10. Arizona Revised Statutes §41-2503-27. See: <https://www.azleg.gov/viewdocument/?docName=https://www.azleg.gov/ars/41/02503.htm>
11. <https://purchasing.utah.gov/boards-and-commissions/procurement-policy-board/>
12. See Section 2-205 of the Model Procurement Code.
13. See Commentary to Section 2-102 of the Model Procurement Code.
14. www.naspo.org
15. www.naspo.org
16. <https://www.naspo.org/Publications/ArtMID/8806/ArticleID/3324>
17. www.aptac-us.org

CHAPTER 3: THE IMPORTANCE OF COMPETITION

RECOMMENDED BEST PRACTICES

Every public procurement officer should:

- Be informed about competition law, that is, federal and state laws that prohibit commercial arrangements or certain behaviors that reduce economic competition.
- Understand market conditions for every procurement.
- Avoid specifications, scopes of work, or contractual relations that reduce competition.
- Be aware of anticompetitive patterns, responses, and communications.
- Develop a good working relationship with antitrust enforcers.
- Remain at arm's length from every supplier.
- Practice procurement ethics.
- Report concerns to prosecutors.
- Document everything.

Much of what this book addresses is competition and how it applies—or does not apply—when state and local governments make purchases. Most public procurement officials would probably agree that a critical, if not *the most critical*, aspect of what they do is to be good stewards of public funds—making sure that government users obtain good quality commodities, services, and construction that are appropriately priced through a process that is transparent and uncorrupted. But state and local laws establishing competitive procurement systems have other purposes as well. Among those noted in the American Bar Association Model Procurement Code for State and Local Governments¹ (hereafter referred to as the Model Procurement Code) are the following:

- To ensure the fair and equitable treatment of all persons who deal with the procurement system
- To foster effective broad-based competition within the free enterprise system²

Look at the facts. State and local governments spend hundreds of billions of dollars annually through their procurement processes. That hefty dollar amount means that state and local government contracts have significant clout within the economy of the United States. That clout, as recognized in the section of the Model Procurement Code for State and Local Governments noted previously, means that each public procurement official must keep an eye on that bigger picture.

This chapter provides a basic description of how competition drives the free marketplace. It also defines the types of conduct that restrain free trade and offers guidance to the procurement professional on how to prevent and detect anticompetitive behavior. This chapter includes a discussion of key federal and state laws relating to anticompetitive supplier behavior that is known as antitrust or restraint of trade laws.

For those who are not lawyers, it is important to define the two legal terms—*antitrust* and

restraint of trade—and put them in context. Merriam-Webster defines *antitrust* as “of, relating to, or being legislation against or opposition to trusts or combinations; specifically: consisting of laws to protect trade and commerce from unlawful restraints and monopolies or unfair business practices.”³

In the same vein, *restraint of trade* means:

1. *An act, fact, or means of curbing the free flow of commerce or trade . . .*
2. *An attempt or intent to eliminate or stifle competition, to effect a monopoly, to maintain prices artificially, or otherwise to hamper or obstruct the course of trade and commerce as it would be if left to the control of natural and economic forces . . . also: the means (as a contract or combination) employed in such an endeavor.*⁴

While this chapter contains practical advice for public procurement officers about how they can avoid and detect anticompetitive behavior, any discussion of competition requires some analyses of the laws that preclude price fixing and other types of restrictions on competition. Since those analyses are best provided by an attorney, the reader should understand that this chapter was written by an antitrust attorney who views competition through that lens.

WHY COMPETITION MATTERS

The United States was founded as a free market country. An essential premise of that type of economy is that unfettered markets will produce the highest quality commodities, services, and construction at the best possible prices to meet demand. Governments are large consumers in virtually every market. But governments, like any consumer, do not have unlimited funds. Additionally, governments, unlike private industry, cannot routinely pass costs on to the taxpayer. A price acceptable to

a private firm may be unduly burdensome for a government.

Thus, effective competition in state and local public procurement plays a key economic role. Effective competition widely benefits the economy of a community. In turn, benefits return to the government in the form of vigorous competition for that government's contracts. Suppliers competing in a truly competitive market should be more reluctant to unreasonably elevate prices and reduce quality because of the risk of suffering a loss of customers. The ready availability of other market alternatives—created through customer demand and effective competition—isolates the unreasonably priced, poor quality goods and services.

Effective competition can also promote open access to the marketplace, induce new suppliers to enter it, promote better market performance, encourage new technology and higher productivity, and result in conservation of scarce and irreplaceable resources. Public procurement officers who promote competition provide an important public service.

While there are situations in which competition must and should be limited,⁵ competition is the central premise in public procurement. Every public procurement practice should therefore have two co-equal objectives: using the power of free markets to generate the best commodities, services, and construction, along with the best prices; and ensuring the fairness and impartiality of the procurement process.

The methods by which public procurement officials have conducted competition have changed dramatically in recent years and will continue to do so in the future. More often than not, lowest price is no longer the key factor in selecting a contractor. That fact, along with the billions of dollars that state and local public entities spend, makes the role of public procurement officials even more important when it comes to preventing and detecting supplier anticompetitive practices.

DEFINING ADEQUATE COMPETITION

Adequate competition cannot be quantified in exact terms or prescribed by a particular procedure. As a rule, it generally means the level of competition that an unrestrained market produces.

A simple example can show how adequate competition varies based on the circumstances. If a government needs a modest quantity of paper clips and there are dozens of retailers actively competing on the price at which they sell these clips, then the public entity is well served to simply purchase them without a formal solicitation process from the supplier with the lowest price. This approach is efficient and takes advantage of a competitive market. Many public entities have rules that allow smaller dollar purchases for this very reason.

When the volume of commodities or the dollar amount the government is going to spend rises, however, adequate competition often requires a more formal process. Regarding the paper clip example, if the government is going to buy over a million paper clips and is willing to offer a contract to supply them for a term such as a year, a formal invitation for bids makes more competitive sense. That is because there may be another level of price competition created by the large purchase. Suppliers price their commodities based in part on volume sold. A retailer may sell 100 paper clips for a dollar, but would sell a million at fifty cents per 100 clips.

PROCUREMENT PRACTICES THAT ENCOURAGE COMPETITION

While procedural requirements may be helpful to achieve adequate competition, it is not necessarily ensured by blindly following a process. Fostering and maintaining competition requires the efforts of each public procurement official. The following paragraphs contain examples

of how a procurement official's actions may encourage competition.

Preparing to Compete

Market Research and Supplier Outreach

- Performing market research to understand the scope of the marketplace
- Estimating prices and costs based on thorough market price and cost research
- If prequalification of suppliers is used, prequalifying as many suppliers as exist in the current market; and if there are too few suppliers, broadening the geographic area of qualification

Specifications and Scope of Work

- Clearly identifying in the solicitation the need to be filled with a view toward qualifying the broadest range of commodities, services, construction, and suppliers
- Avoiding the bundling of multiple unrelated commodities, construction, or services unless it is impossible to obtain the needed product without bundling
- Carefully weighing the advantages and disadvantages of partnering in long-term contracts, even if permitted by law, since markets can change rapidly
- Drafting specifications independent of any prospective supplier or brand name commodity
- Drafting specifications and scopes of work to be performed and other terms of the procurement to avoid brand or sole supplier limitations

Competing in an Open Fashion

Competitive Strategy and Sole Source

- Reopening a commodity or service if markets change significantly
- Reopening rather than extending contracts in response to new demands, changed needs, or changed markets

- Restricting sole source procurements to a limited, well-defined, and published set of criteria, and documenting the need for a sole source decision

Bidding Systems

- Publicly announcing invitations for bids or requests for proposals using different forms of publications (such as websites and e-mails to supplier professional groups and industry organizations) aimed at reaching the broadest possible number of potential suppliers
- Widely publishing the results of each formal competition
- Assuring that the public procurement office's website is easy to locate on the government's website so that suppliers may easily learn about contracting opportunities

Supplier Selection, Evaluation, Award, Negotiations, and Protest

- Selecting qualified bidders or suppliers inclusively and avoiding a set of limitations such as considering only three bids or proposals
- Always requiring suppliers to sign non-collusion affidavits since, even if false, they can be the basis for enforcement and debarment of colluding suppliers without the high cost of an antitrust enforcement lawsuit
- Conducting fair contract negotiations that treat all suppliers who reach this stage equally
- Handling bid protests, contract claims, and disputes fairly

Effectively Managing Contracts

Contract Administration and Monitoring

- Engaging in post-award contract changes only if unforeseen circumstances require them, and if the changes either could have

been foreseen or are significant in relation to the entire contract, competing that changed work, particularly if it adds to and does not simply change the original work

- Building into enterprise procurement and financial systems the capability of keeping records of competing supplier information (including pricing) and of analyzing that data to support detection of anticompetitive activities.

Documenting and Keeping Accurate Records

Public Records

- Documenting each stage of the process in a single procurement file or series of files
- Keeping nonproprietary procurement records open for review so that unsuccessful suppliers may become better equipped to compete in the future

Maintaining a System of Integrity

Professional Ethics

- Staffing the procurement process with truly independent, well-trained public procurement professionals and making sure that they are free to exercise their professional judgment without political pressure
- Avoiding conflicts of interest and establishing and adhering to a set of ethical principles, which are discussed in more detail in Chapter 15 (*Procurement Program Integrity and Credibility*)
- Avoiding special advantages for a supplier that are not available to others

PRACTICES AND LAWS THAT RESTRAIN COMPETITION

Overview

As a practical matter, a government restrains competition at times through its laws. Public

procurement and other public officials may also do so through their own actions.

The most common government restraint of competition is regulation. Laws of the state of California, for instance, have for some time required that most vehicles sold in the state have emissions equipment that is different from and stricter than those mandated by the federal government. That kind of restraint is generally immune from antitrust and restraint-of-trade laws.

Other examples of laws that restrain competition and are familiar to procurement officials are bidding preference laws such as those aimed at local, small, or disadvantaged businesses.⁶ Although these have been in use at federal, state, and local levels for decades, many of these types of laws have been and will continue to be subject to close legal scrutiny.

Other government-caused anticompetitive practices result from poor judgment, misunderstandings of markets, lack of resources to do necessary market research, blind obedience to past practices, and cronyism that is not recognized as such. In some cases, competition is compromised unintentionally through the mistaken belief that the public interest is being served by the action taken or by a misguided albeit sincere effort to be helpful to suppliers.

There are also political pressures. Some elected officials are notorious, at least according to the media, for implementing costly government programs that involve lucrative contracts between the government and campaign contributors. It is often difficult for appointed public officials to resist pressure from elected public officials.

Procurement Practices that Hinder Competition

Here are some procurement activities that may diminish competition:

- **Accepting a late bid because it is low.** By accepting a late bid, the public procurement

officer is changing the rules of the game. This practice can also appear to be unfair since the late bid is received after the bids of the other bidders have been publicly announced, and the bidder submitting that late bid has possible knowledge of the other bids before providing its bid.

- **Using evaluation criteria not stated in the solicitation as the basis of award.** This is a practice that stands competition on its head. True competition cannot occur where the suppliers do not know the real specifications, the scopes of work, or the evaluation criteria.
- **Unnecessary sole source purchases.** In today's global economy, it is rare that only one supplier can supply whatever the government needs. Sole source procurement, which is viewed skeptically by auditors and by the public, may occur due to a lack of market research. Sole source procurement may also reflect an improper relationship, such as in the case of a pilot program managed by a supplier that leads to a set of specifications authored by that supplier or favoring that firm. The sole source procurement could also be the result of political pressure and cronyism.
- **Improper communication with suppliers.** Public procurement officers need to communicate with suppliers to understand relevant markets. However, communications should always be open to all possible suppliers. A good rule is that if the public procurement officer calls one supplier, that officer must call all of the suppliers known to him or her. Calling one supplier, particularly for help in writing specifications, leads to leaking of inside information and gives that supplier an unfair advantage. All communications should avoid the appearance of favoritism.
- **Restrictions on supplier qualifications.** While experience may be useful, requiring too much experience eliminates all new suppliers from competition. Requiring too much stock on-hand generally favors big suppliers and eliminates small suppliers

who may, given the chance to bid, be able to provide the product needed. Another example of restrictive requirements is a solicitation calling for delivery within 24 hours, which may be unnecessary and frequently favors larger suppliers.

- **Bundling and other specification or scope of work restrictions.** Bundling has several anticompetitive outcomes. First, it facilitates collusion among bidders. Deals may be cut as to who will bid as the prime contractor and who will be subcontractors. Second, the practice eliminates head-to-head competition among those who supply the prime contractor. Third, smaller suppliers, who may be able to bid on 30% of a bundled solicitation but cannot bid on the other 70% are cut out of the process. Finally, the user agency loses oversight of the subcontractors. There are times when bundling is essential or even mandated, such as in design-build contracts.⁷ But every time it occurs, competition is diminished.
- **Barriers to prequalification.** The fact that large suppliers have historically been the only ones to qualify does not mean that small suppliers have not come into the market who can, through legitimate joint ventures, qualify to supply what is needed. Effective, procompetitive procurement is one that is open to every supplier who can possibly qualify in every commodity, construction, or service likely to be procured.
- **Brand names and other unnecessary restraints in specifications.** It may be that a public procurement officer believes he or she knows that Brand X copiers are better than Brand Y, but that officer may be wrong. Specifications should ask for the best possible copiers capable of producing what is needed—such as 50 copies a minute, if that is a legitimate need. If a brand has failed to perform in the past, it may be that the retailer supplying the copier serviced it poorly. Procurement officials should ask for what they need by

description, and almost never by a single brand name.⁸

- **Post-bid specification changes.** If specifications must be changed materially and promptly after a solicitation is issued, it is often because of a failure to conduct appropriate market research before issuing that solicitation. The changed specifications are a new competitive opportunity, and all qualified suppliers should be allowed to participate. To do otherwise is tantamount to a sole source award to the initial successful supplier. This unquestionably eliminates competition.
- **Letters of intent.** There is no competitive justification for pre-award letters of intent where the evaluation process is not complete. Where the law prohibits price as a factor in the award of a contract, such as contracts for architects or engineers, completion of the qualifications-selection process is necessary before it is appropriate for the public entity to express its intention to award a contract to a particular supplier. After the qualifications competition and a clean selection process, a letter of intent to negotiate may be appropriate, so long as this letter does not contain an intention to procure anything not in the original specifications.
- **Post-award contract changes.** Immediate post-award contract changes are often anticompetitive and unjustified. Change orders can be rife with abuse and only warranted where the change is within the original scope of work. A post-award design change that must be made to move a wall ten inches to avoid a power line is within a design scope of work. Adding a new facility to the original design contract is sole source purchasing without justification. Another contract change that is problematic is inappropriately extending the duration of contracts where the original solicitation did not specify that there would be the possibility of extensions or renewals.
- **Most favored customer pricing.** Most favored customer pricing results from a contractual provision, also known as a *most-favored-customer clause* or *non-discrimination clause* in which the seller promises the buyer that it will not offer another buyer better terms before offering those terms, or better terms, to the first buyer. This mechanism, while appearing to limit price increases, actually sets artificial floors on prices.
- **Slow pay.** When a public entity fails to pay invoices on time, the cost of borrowing to the contractor discourages competition and may preclude participation by small businesses.
- **Preferences.** These laws—for example local supplier/commodity preferences, small/disadvantaged/minority/women-owned preferences—have already been noted earlier in this chapter.
- **Rotation of suppliers or lists.** Rotation of lists of suppliers who may bid is an artificial device that impedes market forces. It may be competitively acceptable to solicit for a multi-vendor contract and to rotate work among those two or three selected in a clean, competitive process. However, these types of awards should not result in long-term contracts and they should be competed annually since better suppliers may come into the market.
- **Long-term contracts.** Long-term contracts lock the user agency into the market at the time of contract award. Some long-term contracts may be justified in order to lock in rising prices at current levels, but the public procurement office will want to be able to avoid being locked in should prices fall. If long-term contracts are used, they should include a price escalation/de-escalation clause establishing criteria for price adjustments.
- **Disclosing the budget.** A practice that denies the taxpayers the benefit of competition is disclosing the budget for a particular procurement when soliciting bids or proposals. Once suppliers know how much the government is going to spend, they will tend to price their responses

so as to earn the whole amount. Public records laws may allow clever suppliers access to the information, but it should not be announced. An even worse practice is to disclose the budget to only some suppliers and not others.

- **Confidentiality problems.** Leaks of inside information are a hallmark of bid rigging involving government personnel. If information is not public, no supplier should have it. If it is public, all should have it.
- **Proprietary information.** Companies are entitled to protect their proprietary information, but what is proprietary is limited to specialized processes that genuinely are not the business of competitors. However, prices should not be considered confidential after award since this is the taxpayer's business. The finances of a competing company, if it is publicly traded (that is, offers stock on a stock market), may be subject to public records law requests—and public procurement officers should not promise confidentiality for those types of records. But, one competitor learning about another's approach (particularly that of the winning supplier) after a completed competition is procompetitive since the losers may be better equipped to compete the next time.

COMBATING ANTICOMPETITIVE PRACTICES

Awareness is the first step toward combating bid rigging and other anticompetitive practices. For public procurement officers, it means knowing how the market works so that they may discover whether the lack of bids, unreasonably rising prices, or other suspicious behavior is a problem that requires a lawyer's attention.

To obtain that knowledge, public procurement officers should have training in how unfettered markets work according to the economic laws of supply and demand. They should also learn

how to conduct market research so that they are aware of what an appropriate, non-collusive market response to a solicitation should look like. A rudimentary knowledge of antitrust law and competition policy is also essential. Finally, public procurement officers should receive training on how to spot aberrant and collusive market responses, how to report these, and how to obtain assistance when suspicions arise.

Next, well-informed public procurement officers should understand the scope of their own discretion. Procurement laws often provide public procurement officers with considerable flexibility to make awards on any reasonable basis consistent with competition.

This level of discretion can be used effectively to cancel and recompete any procurement where the response is suspicious. Cancellation of the procurement is a relatively easy way to prevent an antitrust law violation and to remedy a non-competitive market response. In cancelling a solicitation after receipt of responses, the public procurement officer can communicate the user agency's intention to examine the market or to seek enforcement assistance due to concerns about the manner of bidding. Such a communication before recompeting the procurement is a wake-up call to suppliers. A cancellation and rebid, without any other action from, for instance, the attorney general, will further place the power back where it belongs—in the procurement office.

Another weapon against antitrust and anticompetitive activities is to manage public procurement offices so as to discourage favoritism in any form. A strong Chief Procurement Officer, together with enforced ethical policies, will aid the public procurement officer in withstanding political pressure to sole source, to bundle, to hurry the contract competition, or to compromise the fairness of the selection process.

Finally, public procurement officers should consider the best practices to enhance and promote competition recommended in this chapter

and elsewhere in this practical guide. Some best practices for combating antitrust violations include:

- **Identical bids.** Report identical bids to management and to the state attorney general or the county or district attorney's office. On bids using federal funds, ask that the report be passed on to the Antitrust Division of the United States Department of Justice (DOJ). On reopening competitive bidding, announce that all identical bids will be rejected and reported or, at the discretion of the procurement office, that an award will be made to the first qualified nonidentical bidder.
- **Suspicious bidding patterns.** Audit bid histories from time to time and publish reports to qualified suppliers. If patterns suggesting rotating bids appear, report these to appropriate enforcement authorities.
- **Simultaneous price increases.** Conduct market research to determine if price increases appear market driven. Reject all bids, and then rebid if there is no obvious market reason for the increases.
- **Cronyism.** Practice procurement ethics at all times, with all suppliers, in all situations. The inability of a supplier to improperly buy into a contract forces it to compete on a level playing field. Where information suggests that a fellow procurement officer has become too close to suppliers, report that information. When the offending public official is a superior, the report should go to the state attorney general, any state or local government office of inspector general, a state auditor general, or an outside auditor. Many states have whistleblower protection statutes that protect those who report such illegal behavior. In some circumstances, public employee organizations have resources to protect public procurement officers caught in this situation.
- **Post-bid and contract changes and extensions.** If a public procurement officer

observes unwarranted post-bid or post-award changes, including unsupported contract extensions and claims of cost overruns, these should be reported as these practices are rarely competitively justifiable.

- **Market aberrations.** Know markets well enough to recognize if a strange-looking response to a solicitation is market driven. There are times when markets, for reasons outside the suppliers' control, change rapidly. One needs only to look at historic real estate bubbles that burst to know that sometimes markets rise beyond all economic reality, and that sometimes they collapse. For public procurement officers, a burst bubble is a tremendous purchasing opportunity of which the government may take advantage, but only if its contracts contain language that allow it to do so. Where market prices are rising unrealistically, the user agency does well to avoid locking in to rising prices.
- **Anticompetitive remarks and admissions.** Write down the date, time, identity of the speaker, witnesses to the anticompetitive or suspicious remarks, and a best recollection of what was said, as soon as possible. Report these to the appropriate authorities at once.

Public procurement officers should be mindful of the fact that user agencies are consumers. The essential purpose of antitrust laws and their enforcement is to protect consumers. An example of the consumer power that state and local government procurement represents is a case involving four national drug distributors who wished to merge into two. The United States Federal Trade Commission (FTC) had jurisdiction to investigate the mergers and their effects on competition.

Federal agencies such as the military branches are huge consumers of pharmaceuticals and these were among the potential victims of the reduction in competition—both in price and distribution—that the mergers represented. But

states, counties, cities, and towns along with some special quasi-government entities also purchased mass quantities of certain drugs for facilities such as state mental hospitals and prison infirmaries.

Because the FTC sought to coordinate with the states, thirty-two states as well as local governments compiled their drug purchase costs and combined their stories into a *friend-of-the-court* brief that the FTC credited with successfully defeating the mergers in 2000. The cost to state and local governments of even a 1% price increase would be so staggering that it was clear to the federal court that government consumers and ultimately their client citizens would be irreparably harmed.

Successful enforcement requires evidence. The public procurement officer is the front-line defense against antitrust violations in this regard. By thoroughly documenting procurement decisions, keeping abreast of local markets, understanding the effect on the taxpayer of a reduction in competition, and listening closely to suppliers' discussions about changes in markets, the public procurement officer is in a unique position to gather the sort of evidence that makes an enforcement action more likely.

DETECTING ANTITRUST VIOLATIONS IN PROCUREMENTS

The first part of this chapter provided tools for avoiding and detecting anticompetitive practices. The remainder of this chapter provides information about how public procurement officers can assist law enforcement officials in enforcing antitrust laws aimed at supplier behavior that violates those laws.

Public procurement officers are in a unique position to detect suspicious pricing patterns and other supplier behaviors indicating anticompetitive practices. On detecting any of those

types of activities, public procurement officers should immediately alert their superiors and the antitrust lawyers in the state attorney general's office. The attorney general's office can investigate and take appropriate action to prevent threatened illegality or to remedy anticompetitive conduct that has already taken place.

The following are suspicious practices that may suggest collusion or aberrations in markets:

- **Identical bids.** No one bidder or proposer is in an identical financial situation to any other. It costs one supplier more to produce commodities, services, or construction than another. One supplier will have more efficient systems than another. Suppliers do not have identical processes, supply costs, or overheads. It is economically impossible for competition to produce identical bids. Unless there has been a leak of a desired price by the user agency, market conditions will generate different prices.
- **Alternating bid patterns.** A rotation pattern in which one of the same group of suppliers is the low bidder strongly suggests collusion. In such a case, the record might show that, although the bids appeared to be competitive for each single procurement, the awards fell into a suspicious pattern. For example, the price range top to bottom over time is B-C-A, A-B-C, or C-B-A. Since every contract is different, at least in time, from every other, consistent rotations do not reflect real market conditions.
- **Rotating territorial or product bidding patterns.** Analyzing bids and awards can show that A only bids in Zone 1, B only bids in Zone 2, and C only bids in Zone 3. A map can be used to portray such patterns. Where A only bids on Product 1, B only bids on Product 2, and C only bids on Product 3, the pattern suggests a market allocation scheme.
- **No-bid responses from expected bidders.** Occasionally a supplier decides it

does not wish to sell to the government. A *no-bid* response from a single expected bidder may reflect one company's circumstances. Two or more *no-bids* are suspicious. Knowing who is likely to bid, who bid on the last solicitation, and who is absent from the current bid can also reveal a bid rotation scheme where the suppliers agree to rotate chances at winning contracts, reducing price competition.

- **Simultaneous price increases.** If every bidder's price goes up in a uniform way, that uniform increase is one indicator of price collusion. If the bids go up by the same amount as a percentage or amount over the last bids, the increase is very strongly suggestive of price collusion. There are times when the price of global products used by suppliers in their processes increases. An obvious example is gasoline price increases. Public procurement officers may expect some increase in prices, if gasoline is likely a large part of marginal costs. Under a truly competitive process without collusion, however, Company A's bid price in the face of rising gas prices will not reflect an identical increase to Company B's bid price, due to differences in efficiencies and other costs within the suppliers' enterprises. And, if the pool of competitors is large enough, there should be suppliers who will find efficiencies elsewhere, and not increase price at all.
- **Comments about price, territory, or product.** Public procurement officers talk to suppliers frequently since many also serve as contract managers. Supplier comments such as "the industry's prices are going up" or, "we are not allowed to bid on that product" or, "we no longer sell in this territory" are not to be taken lightly. Such comments show broad understandings among and between competitors that affect price or restrict output.
- **Manufacturer's retail prices.** If it appears from comments made or through bid analyses that multiple manufacturers are

engaged in controlling resale prices at similar levels or are imposing simultaneous restrictions on discounts, this suggests a horizontal agreement among manufacturers. Since the government as the ultimate buyer is victimized by such conduct, these patterns are worth watching carefully.

- **Other suspicious patterns.** There are antitrust violations that can also be detected just by being alert. For example, public procurement officers should watch for sudden changes in the conditions of the bidding. If suppliers or contractors suddenly eliminate or cut back the period of warranty or the discount on the items installed or sold, a conspiracy may have prompted the action.

COOPERATION WITH ENFORCEMENT AUTHORITIES

Every public procurement office should have a relationship with an antitrust enforcement office. For state agencies, this is the state attorney general, who may have a designated antitrust unit or an assistant attorney general assigned to the procurement office.

Some state agencies have internal audit or investigative departments, such as an office of inspector general, that are charged with ferreting out waste, fraud, and abuse. Antitrust violations always result in waste, fraud, or abuse on some level. States also have auditor general departments that are in charge of looking for government waste and inefficiency.

Counties have district or county attorneys who may be charged with enforcing state antitrust laws since many of these are criminal laws. Counties may also have internal auditors. Municipalities have city attorneys who enforce local laws and ordinances. These officials may have the ability to prosecute fraud in procurement.

Public procurement officers are key witnesses in antitrust enforcement actions. Not only have they witnessed and documented anticompetitive conduct, but they have also seen the harm to their government and the taxpayers from a lack of competition.

One of the strongest deterrents against collusive bidding continues to be active cooperation between alert public procurement officers and a prosecutor's office. When prosecutors become involved in antitrust suits, they will need, as evidence, records of past bidding patterns and practices. Well-documented procurement files, including historical information, are essential. The prosecutors will expect to find the following in the procurement files and data:

- The pre-notice solicitation and specification documentation
- The specifications or scopes of work
- The public notice of the proposed procurement
- Lists of suppliers in the market, including prequalified suppliers
- Names, addresses, and the principal contact person of each bidder, along with commodities, services, or construction sold by suppliers who competed
- The actual bids or proposals, specifically including all prices, rates, and qualifications
- Names, addresses, principal contact person, prices, and qualifications of any subcontractors
- The selection process documentation, including who served on selection panels, when they met, evaluation sheets, and communications among and between them
- All correspondence and communication to and from the user agency and to and between bidders or proposers and subcontractors, especially including e-mails
- Any notes taken by the public procurement officer or memoranda reflecting concerns about an inadequate or unexpected

response to the solicitation, or about suspicious bids or patterns

- Files concerning historical bid patterns and prior bids by the same suppliers
- Non-collusion affidavits—signed and notarized

The enforcement authority should have a voice in determining the number of years that procurement records are kept in order to provide the adequate historical data needed as evidence of collusion.

Communication with enforcement offices should be broader than simply reporting competition concerns. These officials should be included in periodic training sessions, where informal conversations can occur about competition issues. A casual conversation with a state assistant attorney general who is responsible for antitrust matters provides much needed guidance to public procurement officers, and can often allay fears by explaining that certain conduct has been determined to be procompetitive, either by the courts or by the United States DOJ or FTC guidelines.⁹

The National Association of Attorneys General publishes an antitrust report that summarizes each state antitrust case, its current status, and the final outcome.¹⁰ The Antitrust Division of the United States DOJ also publishes statistical reports.¹¹ Enforcement offices may publish excerpts of successful cases, and they also often publish remarks by chief enforcement officials as to anticompetitive trends in the marketplace. Much of this material can be found online, as noted later in this text.

FEDERAL AND STATE ANTITRUST LAWS

This portion of the chapter contains an overview of federal and state laws that address anticompetitive economic behavior as well as the civil remedies and criminal penalties in place to

enforce them. The discussion in the final paragraphs of this chapter provides context for the chapter's main theme, which is that public procurement officers play a critical role in the economy of the United States because of the volume that state and local governments consume.

Summary of Federal Antitrust Laws

There are three main federal laws that prosecutors use to protect customers. The FTC describes those laws as follows:

Congress passed the first antitrust law, the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act (FTC Act), which created the FTC, and the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today.

The antitrust laws proscribe unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case. Courts have applied the antitrust laws to changing markets from a time of horse and buggies to the present digital age. Yet for over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.¹²

Each is discussed in the remainder of this chapter. Table 3.1 is a snapshot of the laws' provisions.¹³

There is an abundance of information available online about these three key federal laws. Additionally, states have adopted their own versions of these laws, popularly called *mini* or little versions.¹⁴

The Sherman Act

The Sherman Antitrust Act has been the linchpin of antitrust law in the United States since Congress enacted it in 1890. The Sherman Act is enforced by the Antitrust Division of the United States DOJ. Criminal Sherman Act investigations are conducted by the Federal Bureau of Investigation. The Antitrust Division has jurisdiction whenever an antitrust crime affects interstate commerce. In today's markets, almost every transaction affects interstate trade.

Section One of the Sherman Act, 15 U.S.C. §1, states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

The felony provisions of Section One were enacted in 1974.

Section Two of the Sherman Act, 15 U.S.C. §2, makes interstate monopolies felonies:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . .

Conduct that offends Section One of the Sherman Act involves conspiracies. This type of

Table 3.1 Federal Antitrust Laws Snapshot

<p>The Sherman Act 15 United States Code (U.S.C.) §§1–7</p>	<ul style="list-style-type: none"> • The Act: <ul style="list-style-type: none"> ◊ Outlaws “every contract, combination, or conspiracy in restraint of trade,” and ◊ Outlaws any “monopolization, attempted monopolization, or conspiracy or combination to monopolize.” • As interpreted by the United States Supreme Court, it only prohibits unreasonable restraints of trade. • Some acts are considered so harmful to competition that they are always illegal, such as arrangements between individuals or business to fix prices, divide markets, or rig bids. These acts are per se violations of the Act, that is, there is no defense or justification allowed for them. • Penalties are both civil and criminal. <ul style="list-style-type: none"> ◊ Criminal penalties are generally reserved to intentional and clear violations such as fixed prices or rigged bids. ◊ Criminal penalties may go as high as \$100 million for a corporation and \$1 million for an individual, along with 10 years in prison. ◊ The Act allows for fines to be increased under certain circumstances. • The United States Department of Justice enforces violations of this Act.
<p>The Federal Trade Commission Act 15 U.S.C. §§41–58, as amended</p>	<ul style="list-style-type: none"> • The Act <ul style="list-style-type: none"> ◊ Bans “unfair methods of competition,” and ◊ Bans “unfair or deceptive acts or practices.” • The United States Supreme Court has ruled that all violations of the Sherman Act also violate this Act. Thus, the United States Federal Trade Commission may institute cases under this Act against the same kinds of activities that violate the Sherman Act. • The Act also covers other practices that harm competition that do not specifically align with those in the Sherman Act. • Only the Federal Trade Commission brings cases under this Act.
<p>The Clayton Act as amended by the Robins-Patman Act of 1936 and the Hart-Scott-Rodino Antitrust Improvements Act of 1976 15 U.S.C. §§12–27, 29 U.S.C. §§52–53</p>	<ul style="list-style-type: none"> • The Act covers specific practices that the Sherman Act does not clearly prohibit. An example is the same person making business decisions for competing companies. • It prohibits mergers and acquisitions where the effect “may be substantially to lessen competition, or to tend to create a monopoly.” • It also bans certain discriminatory prices, services, and other practices in dealings between merchants. • It requires companies planning larger mergers or acquisitions to notify the government of their plans in advance. • The United States Department of Justice enforces violations of this Act. • It authorizes state attorneys general, state and local governments, and private parties to sue for civil triple damages when they have been harmed by conduct that violates either the Sherman Act or the Clayton Act, and to obtain a court order prohibiting the anticompetitive practice in the future.

conduct is typically referred to as Section One conduct. Generally speaking, the Antitrust Division brings criminal Section One charges against private suppliers engaged in price fixing, territorial market allocations, or bid rigging.

No person or firm is beyond the reach of the literal language of the Sherman Act; and this includes procurement personnel. However, certain constitutional immunities have been implied by federal courts to limit the reach of the Sherman Act. (See the discussion under the *Immunities, Exemptions, Exceptions, and Defenses to Antitrust Laws* heading of this chapter.)

In interpreting the Sherman Act, the United States Supreme Court ruled in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) that although the statute's literal language prohibits every restraint of trade, only unreasonable restraints of trade may be prosecuted. This is because, while every exclusive contract excludes the unsuccessful competing suppliers from the contract through the selection process, every exclusive contract does not restrain trade.

Unreasonable restraints of trade under Section One have been held to include contracts, combinations, and conspiracies that, in fact, harm the whole of trade in a particular product and geographic market. Certain types of practices between horizontal competitors—that is, those suppliers who compete at the same level of trade, such as retail-to-retail or manufacturer-to-manufacturer—have been held to be so likely to cause harm to the relevant market that they are per se illegal.

If an agreement is per se illegal, then competitors who do nothing more than to enter into the conspiracy have violated Section One. Per se restraints are those that are illegal simply because they are shown to exist without any need for proof of any actual harm to competition.

Generally, only the following have been held to be per se unlawful:

- Price fixing
- Territorial market allocation
- Output restriction agreements
- Bid rigging
- Tying arrangements¹⁵

These per se offenses nearly always involve horizontal competitors only. Federal courts interpreting the Sherman Act held for many years that even vertical price fixing, where a manufacturer dictates to a wholesaler or retailer the price at which the latter must sell the commodities, was per se unlawful. However, in recent years the Supreme Court has reversed that holding.

In today's federal Section One law, only truly horizontal conspiracies with known pernicious market effects are held to be per se illegal. Thus, the type of government contract bid rigging deemed so pernicious as to be per se illegal is generally between and among bidders and would-be bidders. Only per se violations, and those solely in which there is criminal intent, warrant criminal prosecution.

The Clayton Act

Section 4 of the Clayton Act, 15 U.S.C. §15, is the central civil antitrust enforcement statute. The Clayton Act gives the United States Attorney General the right to bring a civil suit in federal court to enjoin antitrust violations, to break up unlawful monopolies, and to recover damages for the government. The Clayton Act gives state attorneys general the right to sue as *parens patriae*, that is, to sue in the name of the state, on behalf of its citizens harmed by anti-competitive activities.

The Clayton Act is used by the Antitrust Division of the United States DOJ to remedy violations of Sections One and Two of the Sherman Act. The Antitrust Division may seek to enjoin or stop a merger of two giant suppliers under Section Two on the grounds that the merger will create a monopoly. It may also seek to break up an existing monopoly that is deemed to be

abusing its power. Historic cases against AT&T and Microsoft were brought via Section Two of the Sherman Act and the Clayton Act.

The Clayton Act gives state attorneys general, state and local governments, individuals, and private suppliers the right to sue antitrust violators and recover triple damages plus attorneys' fees. Such parties are considered private attorneys general, in that a private action enforces the Sherman Act as much as does a government prosecution.

However, federal courts have imposed many burdens and threshold requirements on private antitrust plaintiffs. Such parties must prove that they were, in fact, harmed by conduct that injures competition, meaning that the conduct caused harm to a relevant market. It is not enough that a party is excluded from some aspect of trade. State and local public entities have, on occasion, sued private parties for damages and attorneys' fees under the Clayton Act.

Most civil antitrust cases brought under the Clayton Act by the Antitrust Division, by state or local governments, or by private parties are per se, Section One-type cases. A government damaged by a bid-rigging conspiracy among construction contractors, for example, has a remedy in federal court under the Clayton Act.

Under Section 4 of the Clayton Act, the Antitrust Division, state attorneys general, state and local governments, and private parties may also prosecute noncriminal, non-per se cases where consumers are actually harmed under a doctrine developed by the United States Supreme Court called the rule of reason. Rule of reason cases require proof that a defined market is actually hurt by the practice challenged.

To define a market requires defining the product and the territory in which it is sold. A product market includes all of those commodities or services which consumers will generally buy, if another similar commodity or service is

unavailable. A geographic market is the entire territory where the product market trades. Rule of reason cases require extensive evidence and are frequently difficult to prosecute.

State attorneys general often combine with other states to bring civil actions against antitrust violators that affect many states. State attorneys general combined to sue Microsoft, for example, after the Antitrust Division of the United States DOJ brought its civil case.

This practice, known as *multi-state* enforcement, has often been successfully used where the federal government wants one remedy, but the states want another. These cases are also often brought with claims under state antitrust laws appended to the Sherman Act claims. In national cases, private parties or consumer classes also may sue, leading to complex litigation.

Such multi-state claims are especially important where states are direct purchasers of nationally sold commodities. One example was *In re Refined Petroleum Products*, 906 F.2d 432 (9th Cir. 1990). Four states combined to sue major oil companies for retail gasoline price fixing on behalf of their government gasoline consumers. In that case, the state attorneys general sued on behalf of the individual citizen gasoline consumers as well.

The United States Supreme Court imposed an important barrier to cases brought by ultimate consumers claiming injury from price fixing in *Illinois Brick Co. et al. v. Illinois et al.*, 431 U.S. 720 (1977). The Supreme Court held that only the direct buyer from the price-fixer could claim damages. Thus, if manufacturers conspired to fix retail prices, the retail buyers could not sue the manufacturer unless they sued all suppliers in the line of distribution and proved that the illegal or fixed part of the price was in fact passed on to them.

After the *Illinois Brick* decision, the National Association of State Procurement Officials and

The Institute for Public Procurement (NIGP)¹⁶ petitioned Congress to amend the law, but without success. Since then, many states have passed their own statutes granting indirect purchasers the right to claim antitrust damages from price-fixers.

These laws were upheld by the United States Supreme Court in *California et al. v. ARC America Corp. et al.*, 490 U.S. 93 (1989). At least one state has held that indirect purchasers may sue manufacturers for price fixing under state law, expressly rejecting the federal *Illinois Brick* doctrine. See *Bunker's Glass Co. v. Pilkington, PLC*, 75 P.3d 99 (Ariz. 2003).

For states that have not enacted such laws, state and local governments should include a standard clause in their general contract terms and conditions similar to the following:

The parties recognize that, in actual economic practice, overcharges resulting from antitrust violations are, in fact, borne by the ultimate purchaser. Therefore, the bidder/offeror hereby assigns to the [government] any and all claims for such overcharges.

The Clayton Act also prohibits certain mergers and acquisitions and interlocking directorates between competing companies. Exclusive dealings and refusals to deal, the effect of which is to substantially lessen competition or to tend to create a monopoly, are also made illegal by the Clayton Act.

The Federal Trade Commission Act

Section 5 of the FTC Act, 15 U.S.C. §45, prohibits unfair methods of competition affecting commerce and unfair or deceptive practices affecting commerce. The FTC Act creates an administrative enforcement scheme under the jurisdiction of the United States FTC. Only the FTC can enforce the FTC Act by means of cease-and-desist orders and federal court

injunctions. Private persons and state and local governments cannot sue under the FTC Act.

The FTC uses the law to stop mergers that may create monopolies, and has co-equal jurisdiction with the Antitrust Division of the United States DOJ in merger enforcement. The FTC also uses the act to stop practices that may not create actual economic monopolies and that do not involve Sherman Act conduct, but are nevertheless likely to injure competition and consumers in other ways.

Practices such as false advertising and marketing or contracting practices that abuse consumers fall under the FTC's jurisdiction, so long as the practice affects interstate commerce. The FTC's remedy is to enjoin or stop the practice and to recover government costs of enforcement only. The FTC Act does not authorize the FTC to seek damages.

The FTC often enlists the help of the state attorneys general in its enforcement actions. In an action under the FTC Act, states appear as *friends of the court*, urging federal courts to consider the harm suffered by the procurement offices of state and local governments as a result of unfair trade practices.

The Robinson-Patman Price Discrimination Act

The federal Robinson-Patman Anti-Price Discrimination Act, 15 U.S.C. §13 (Robinson-Patman Act), was enacted as part of the Clayton Act. The Robinson-Patman Act makes discrimination in price as between buyers at the same levels of trade and so-called tying arrangements unlawful. The Robinson-Patman Act affects transactions in interstate commerce. As part of the Clayton Act package, the Robinson-Patman Act can be enforced by the Antitrust Division of the United States DOJ, state attorneys general, and private parties.

The Robinson-Patman Act has had a convoluted history in federal courts. Its chief utility has been as a tool against so-called tying arrangements by defining this type of trade restraint. A tying arrangement occurs when a supplier having market power (equivalent to monopoly power) over one product forces buyers of the monopolized product to purchase another, less desirable product. One of the key allegations of the state attorneys general's case against Microsoft in the 1990s was that Microsoft forced buyers of its personal computer-market-dominating operating system to buy its Internet Explorer browser at a time when that product was less desirable than Netscape.

Federal Antitrust Guidelines

The United States DOJ and the FTC have issued a number of sets of guidelines to assist those concerned to understand the effect of antitrust law on proposed business relationships. These can be very helpful if a situation is covered by a guideline. Areas that the guidelines cover include cyber security, health care, intellectual property, and joint ventures.

The guidelines are sometimes heavy on economics, but in certain industries, such as health care, they have become the standard by which risk of antitrust prosecution can be both assessed and avoided. Additionally, the FTC website contains helpful information about the laws discussed in this chapter, along with other tools to assist in detecting anticompetitive activities.¹⁷

BUSINESS PRACTICES THAT UNREASONABLY RESTRAIN TRADE

The next few paragraphs discuss how courts apply the federal antitrust laws to business practices. They provide a window into how the laws are applied to the suppliers with which public procurement officers work.

Horizontal Restraints Affecting Price and Output

Clearly, any conduct that constitutes a Section One per se antitrust offense under the Sherman Act restrains trade, and there is little debate that horizontal agreements among competitors that affect price and output restrain trade. Even though federal cases have severely narrowed the reach of the per se antitrust doctrine, the following conduct is likely to be deemed to restrain trade without much evidence beyond the agreement itself:

- **Price fixing conspiracies**—horizontal agreements among competing suppliers affecting any aspect of price. These are per se unlawful. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). Price fixing includes, but is not limited to, agreements to set common prices, discounts, trade-in allowances, and price floors or ceilings. Even agreements to set cap prices for the express purpose of benefiting consumers, if they are between horizontal competitors, are per se illegal. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982).
- **Bid rigging**—horizontal agreements among competing suppliers to submit rigged bids. These are a species of price fixing, because the purpose of the conspiracy is to prevent the price competition that bidding usually involves. *United States v. Gosselin World Wide Moving N.V.*, 411 F. 3d 502 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1464 (2006). Less frequent are horizontal agreements to rig procurements based on quality or experience, not price. These often involve certain competitors agreeing not to propose on the procurement. Such agreements are no less per se illegal, since they are a form of sham competition. *United States v. Reicher*, 983 F. 2d 168 (10th Cir. 1992).
- **Group boycotts**—horizontal agreements among competing suppliers to refuse to deal with another horizontal competitor.

FTC v. Superior Ct. Trial Lawyers Association, 493 U.S. 411 (1990).

- **Territorial or customer market allocation conspiracies**—horizontal agreements among competing suppliers to not trade in each other's territories, nor sell to competitors' customers.
- **Output restriction conspiracies**—horizontal agreements among competing suppliers to restrict supply of a product to a market, or not to compete in a market. *General Leaseways v. National Truck Leasing Association*, 744 F.2d 588 (7th Cir. 1984). This type of conspiracy can be a form of bid rigging, where the agreement is that certain competitors, but not others, will propose on a procurement.
- **Customer allocation conspiracies**—horizontal agreements among competing suppliers not to sell to the other's customer, or to limit what products are sold to whom. These are a form of output restriction conspiracy. *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995).

Other Horizontal Restraints

Any combination of horizontal competitors raises antitrust risk, unless it is necessary to deliver a product to a market, such as a joint venture. Horizontal arrangements among conspirators should be viewed as presenting high antitrust risk.¹⁸

Vertical Restraints

Vertical, or buy-sell relationships, are nearly universally allowed unless they actually harm markets under a *rule of reason* economic analysis. The exception is where horizontal competitors conspire to induce a seller or a buyer in a market to refuse to deal with a competitor. When the supplier or buyer refuses to deal with the victim of such a conspiracy, the vertical nature of his relationship to the horizontal conspirators may not provide much of a defense. *United States v. General Motors Corp.*, 384 U.S. 127 (1966).

STATE ANTITRUST LAWS

State Constitutions

The first level of law for states is their constitutions; for home-rule municipalities and counties, it is their enabling charter. Some states have language that protects competition built into their constitutions.

For example, a state constitution might provide that “monopolies and trusts shall never be allowed.” It may also state that “no persons shall directly or indirectly combine or make any contract, . . . to fix the prices, limit the production, or regulate the transportation of any product or commodity.”

Legislation creating governments—for example, counties or municipalities—may have pro-competition or procurement ethics provisions built into the enabling legislation. Such legislation or charters operate as the constitution of that government. Statutes granting powers to cities, counties, and agencies may proscribe anticompetitive conduct. Even city charters may have language prohibiting the expenditure of public funds other than via a competitive process.

State Little-Sherman and Mini-Clayton Acts

Most states have adopted their own antitrust statutes that apply to trade within that state. In practice, these statutes are typically called little-Sherman Acts because the language of the state statute parrots the federal Sherman Act's Sections One and Two. Typical language of a state little-Sherman Act forbids “contracts, combinations, and conspiracies in restraint of trade or commerce, any part of which is within the state” along with “the establishment or use of monopolies and attempts to monopolize.”

Most little-Sherman acts contain a mini-Clayton Act, which gives both the state attorneys general, and often district or county attorneys as

well, the authority to prosecute antitrust violations in the name of the state and on behalf of consumers within the state. These public prosecutors are often empowered to seek injunctions and damages where state and local public entities have been economically harmed. These Mini-Clayton Acts also give private parties and governments the right to sue for antitrust damages and attorneys' fees.

State statutes are not always identical to the Sherman and Clayton Acts, however. Not all state little-Sherman Acts make antitrust violations criminal. Some states have enacted special statutes that make only certain types of antitrust violations criminal. Only the state attorneys general or county prosecutors may enforce these criminal provisions.

Some state statutes provide for automatic triple damages, while others require special proof, such as proof of specific intent or knowledge or proof that the trade restraint is extreme, egregious, or flagrant. These latter conditions have been construed by some state courts to mean that only conduct that is per se illegal under the federal Sherman Act is serious enough to justify the penalty of triple damages.

While some little-Sherman Act statutory schemes contain provisions that require state courts to apply federal antitrust case law in interpreting the state's antitrust statutes, other state schemes leave this decision up to the discretion of state judges. In some states, the courts may apply federal precedent, but are not required to do so. This has led to sharp departures from federal antitrust precedent. An example is the Arizona Supreme Court's decision not to apply the *Illinois Brick* indirect purchaser bar on consumer antitrust cases based on price-fixing claims, which was mentioned earlier in this text.

Most state antitrust statutes also empower prosecutors to conduct civil investigations of possible antitrust violations. Attorneys general and sometimes county prosecutors are often authorized to issue civil investigative demands

or subpoenas seeking testimony and documents from suppliers.

In some states, the attorney general may investigate (or has investigated) agencies of the state or local governments when they suspect government officials are personally involved in unlawful trade restraints. This practice is fairly rare. But at least one state Supreme Court has held that even though a state attorney general represents that state's agencies and departments, he or she may investigate and even prosecute that agency or department recognizing that, although such action is a conflict of interest, the special role of attorney general as the chief law enforcement officer for the people of the state allows this sort of investigation.

For state and local government, the most important aspect of state antitrust statutes may be that their agencies have rights as victims of an antitrust offense. When procurement professionals suspect antitrust violations resulting in higher prices, fewer bidders, or lower quality commodities, they should have procedures in place to communicate these suspicions so that the attorney general may take rapid remedial action.

If the state or local government has been damaged, state antitrust laws provide remedies to recover the funds the agency has overpaid as a consequence. The attorney general can also recover his or her in-house or outsourced attorneys' fees in such a case, all of which inures to the benefit of the taxpayers. In the event of a criminal conspiracy of suppliers, an attorney general's criminal investigation and prosecution can open up rigged markets and liberate agencies from the loss of competition.

State and Local Procurement Codes

Procurement codes are a type of competition law, along with the actual antitrust laws described previously. Chapter 2 (*Procurement Leadership, Organization, and Value*) describes those types of statutes.

Conflict of Interest Statutes

Ethics laws, particularly those defining conflicts of interest and penalties, are another type of competition law. Chapter 15 (*Procurement Program Integrity and Credibility*) discusses these in detail.

Other State Competition Statutes

Many states have criminal laws that specifically prohibit bid rigging. Other special statutes often prohibit any contract, combination, or conspiracy to restrain trade in connection with a government contract, most often a government construction contract. These statutes exist because bid rigging is, unfortunately, common in government construction procurement. Sadly, at any given time somewhere in the United States, there is likely a bid-rigging conspiracy taking place in connection with public works construction.

The sordid history of public construction bid rigging also involves many cases in which organized crime enterprises have been involved. For this reason, the United States Code and many state Racketeer Influenced and Corrupt Organization statutes make bid rigging a foundational offense to a racketeering crime. This is because a bid-rigging conspiracy can be an enterprise, with separate companies acting together to rig the bid.

Most states have a number of other criminal statutes that apply to competition offenses. Bid rigging is often prosecuted by means of fraudulent scheme criminal statutes, which make it a felony to utilize an artifice or scheme to defraud any person, including a government. Fraudulent scheme enforcement does not require proof of all of the elements of an antitrust offense and applies to unilateral action where there is no conspiracy.

There are often state statutes outside the anti-trust and procurement laws that affect competition in public procurement. For instance, an

exemption of a type of commodity from a procurement law requiring competition may not be in the *exemptions* section of that law, but instead is buried elsewhere in a government's law.

Public procurement officers cannot assume that there is only one law or set of laws that applies to public procurement. Nor can they assume that state legislatures or city councils will be careful to enact laws that do not conflict with one another. Therefore, it is essential that public procurement personnel be trained in the statutes that apply to them and that there be an open door to appropriate lawyers in the user agency or in the state's attorney general's office to have their questions answered.

PROCUREMENT CASE LAW

Typical procurement professionals have little time to peruse the procurement decisions of their state or federal courts. Yet there are many situations in which the rules of the game are found nowhere else. Case law that is announced through decisions of judges is just as much a part of the law regulating a public official's behavior as is an actual statute, ordinance, or rule/regulation.

For example, a 2005 federal Court of Appeals decision declared statutes granting preferences based on race, sex, or national origin are unconstitutional. *Western States Paving Co., Inc. v. Washington State Department of Transportation et al.*, 407 F. 3d 983 (9th Cir. 2005). The Ninth Circuit Court ruled that unless a state agency can prove that it has, in the past, actually discriminated against the specific ethnic minority or gender being granted the preference, the preference amounts to unequal protection of the law. This case has been followed elsewhere and has caused consternation among public entities accustomed to granting preferences to businesses owned by minorities and women.

Federal court cases interpreting federal laws and regulations are often adopted by state

courts enunciating new (for that state) principles governing public procurement and contract law. Cases that involve similar facts are often highly persuasive to a court or administrative law judge.

Getting Help

Public procurement officers should be deeply versed in the procurement law that applies to their government and should also be generally familiar with the other competition laws that apply to their procurement transactions. Not even experienced antitrust and competition lawyers know it all, so the best course of action for public procurement officers is to keep it firmly in mind that all competition law and policy has as its sole purpose to obtain, promote, enhance, and use the power of strong competition in government procurement.

Where there is no specific statute or rule to answer the question, research and access to legal advisors is the next step. In today's Internet world, it is relatively easy to research procurement codes and rules being used with success by other similar governments. There are also trade associations who publish government contracting developments online, such as builders' associations and professional societies. In every case, the effort made to understand competition law and policy will serve procurement professionals well.

IMMUNITIES, EXEMPTIONS, EXCEPTIONS, AND DEFENSES TO ANTITRUST LAWS

There are legal defenses and immunities that affect the scope of antitrust laws. They are described briefly here to offer some perspective to the public procurement officer about the scope of liability, both to suppliers doing business with the government and to the officers themselves.

Unilateral Action

Offenses subject to Section One of the Sherman Act require a conspiracy. Thus, a supplier or government acting alone does not violate Section One. Section Two offenses require a single actor, but that actor must have market power or monopoly power.

Antitrust scholars and economists recognize that a large buyer can exert market power, which is defined as the ability to control price outside the laws of supply and demand. A buyer monopoly is called a monopsony. Some argue that social programs (for example, Medicaid) are government monopsonies that unfairly control price. Government programs that meet the United States Supreme Court's tests for state action immunity, however, cannot be successfully sued. See the discussion under the heading *State Action Antitrust Immunity* later in this chapter. Thus, unilateral action by the government, despite its strong effect on markets, is almost never prosecuted.

Vertical Buy-Sell Transactions

Buyer-seller transactions are considered vertical relationships. Even if the nature of the government-supplier contract relationship restrains trade—for example, in that it forecloses new competitors from a large segment of a market—this relationship is considered a vertical restraint and generally will be evaluated under the rule of reason, as explained previously.

Such vertical relationships are very rarely challenged due to the cost and difficulty of proving market harm. Some states have special statutes, however, that make certain vertical arrangements, such as buyer-seller conspiracies to rig public construction bids, per se unlawful. Even so, prosecution and civil litigation against government buy-sell arrangements is extremely rare, and even an overt conspiracy between a supplier and a public official to rig bids may be entitled to immunity. See the discussion under

the heading *First Amendment Antitrust Immunity* later in this chapter.

Lack of Knowledge or Intent

The fact that the person accused had no knowledge of the scheme may be used as a defense to a Section One claim under the Sherman Act. To prove the existence of a conspiracy, each person must have a unity of purpose with at least one of the other conspirators.

A procurement official who participates unknowingly in some aspect of a rigged bid is not liable. However, whether the public procurement officer knew or did not know can be subject to conflicting evidence. Practicing good procurement ethics and integrity—as set forth previously in this chapter and in Chapter 15 (*Procurement Program Integrity and Credibility*)—protects procurement personnel from the appearance of collusion.

Statutory Protections

Some state statutes expressly grant immunity to public employees who are just doing their required jobs. These statutes are reassuring, but usually only cover official action. Thus, if a public procurement officer socializes publicly with suppliers, and in the course of an off-site party cuts a deal, that conduct may not be considered official action. Again, public procurement officers do well to practice complete independence from suppliers who compete for the taxpayers' dollars.

State Action Antitrust Immunity

In 1943 the United States Supreme Court recognized that the actions of a sovereign state are not subject to liability under the Sherman Act and other federal antitrust laws. In *Parker v. Brown*, 317 U.S. 341 (1943), the high court reasoned that principles of federalism prohibit the federal government from holding states and their agents who act in their official capacities liable for antitrust violations. See also *City of*

Columbia v. Omni Outdoor Advertising, 499 U.S. 365 (1991).

In a now-famous case, the Supreme Court set forth a two-part test to be used by federal courts faced with state claims of sovereign immunity. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (*Midcal*) held that the state is immune if:

1. The enabling state statutes clearly articulate a legislative intent to displace competition; and
2. The legislative scheme results in active supervision of the conduct being challenged.

This so-called *two-pronged test* has been black-letter federal antitrust law since the case was decided.

The first prong of the state action test is met where the statute declares that the state, and only the state, can trade in a market. An example is a pricing board established to set prices for agricultural commodities, where the clear legislative policy is that the government, not competition, will set prices.

Proving clear legislative policy is not sufficient. In addition to the policy to displace competition, the statutory scheme must provide for active supervision of the trade. In the agricultural commodity example, the legislature must create a state entity or oversight panel whose job it is to oversee the setting of prices.

If a statutory scheme leaves the actual price setting to a panel of private traders, it will not qualify for state action. Closer cases involve oversight panels that are staffed partly by public employees and partly by industry representatives. Such hybrid oversight has, in the past, bred litigation by those who wish to price their products in the open market.

State action immunity applies only to actions of the state and at least historically has not been

deemed by federal courts to immunize anticompetitive conduct by counties, cities, towns, or other public and semipublic entities. *Community Communications, Co. v. City of Boulder*, 455 U.S. 40 (1982); *Lafayette v. Louisiana Power & Light*, 435 U.S. 389 (1978).

Because of the threat of triple damage awards against local treasuries, Congress enacted the Local Government Antitrust Act of 1984, 15 United States Code §§34–36, which immunizes local governments, special districts, and school districts from antitrust damage awards. These entities can still be subjected to suits seeking injunctions.

Immunities Related to Partnering

The common practice of partnering can raise antitrust issues. Partnering is a popular term and generally means that the government joins with industry representatives to conduct some aspect of trade. Assuming there is no true collusion or bid rigging, partnering can be an efficient and cost-effective method of providing needed commodities and services. The procurement professional is wise, however, to become educated about whether the program displaces competition; and if so, whether it meets the *Midcal* two-pronged test for state action immunity.

Partnering with a single supplier would be a vertical relationship, adjudged under the rule of reason, and only unlawful if trade is, in fact, restrained—that is, if consumers are harmed because price or output competition is diminished. Partnering that involves the government and associations of suppliers who otherwise compete directly with each other poses a larger risk.

Partnering with suppliers who collectively urge the public procurement officer to refuse to deal with another competitor of theirs raises considerable risk, because it involves collusion among horizontal competitors and can be a group boycott.¹⁹

Outsourcing is not necessarily anticompetitive, but any time the government selects a single supplier to supply all the commodities or services in a market, the practice can restrain trade. Whether such conduct would be immune depends on many facts and, without proper legislative authority, can lead to antitrust challenges.

First Amendment Antitrust Immunity—Noerr-Pennington

In the case of *Eastern Railroad Presidents' Conference v. Noerr Motor Freight Co.*, 365 U.S. 127 (1961), the United States Supreme Court held that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade a legislature or the governmental executive to take a particular action with respect to a law that would produce a restraint or monopoly. There are First Amendment overtones to the decision and the court indicated that it would be a stretch to think that Congress, in passing the Sherman Act, intended to circumscribe those constitutional rights.

This type of immunity, called Noerr-Pennington immunity, has been successfully used to defend private parties accused of egregious conduct—even bribery of public officials. Because of this doctrine, prosecutors rarely use the Sherman Act to criminally charge public officials who have entered into an illegal *quid pro quo* with a supplier. See *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991).

There are exceptions to Noerr-Pennington immunity. One is the sham exception, where individuals in a government process are used by a supplier as competitive weapons against a horizontal competitor. Another exception is where the competitor supplies false information to the government.

Improper influence of a public procurement officer can be, and usually is, still criminal under criminal statutes covering bribery of a public

official or a fraudulent scheme. The Noerr-Pennington doctrine provides little help in a bribery prosecution.

State conflict of interest statutes often exist, and in many states these statutes expressly give private parties the right to sue a public official or employee for damages. These statutes apply where a public procurement officer acts in his or her own economic self-interest and not in the interest of the government or the taxpayer.

Statutory Exemptions and Exceptions

The United States Code and most state statute books are full of special situations that are exempt from competition laws, particularly the Sherman, Clayton, and Robinson-Patman Acts. Among the exemptions are agricultural cooperatives and the labor of a human being, in part because these are often wholly regulated by the federal or state government.

A dramatic exemption from the operation of the Sherman Act is called the McCarran-Ferguson Act. (15 U.S.C. §§1011–15.) This act allows insurance companies to share risk and to price their products jointly. Because this act is a federal statute on par with the Sherman Act, Congress has the power to make this broad exemption. What looks like permission for anticompetitive conduct has been of concern to many government insurance buyers as they watch insurance prices rise and coverage diminish.

The government is not without a remedy if the insurance industry goes too far, however. In the 1990s, state attorneys general and the FTC successfully challenged the insurance industry's collusive withdrawal of pollution insurance products from the market. The McCarran-Ferguson Act does not immunize a restriction conspiracy among insurance providers.

Regulated Industries

Generally, industries that are regulated by the government are not subject to antitrust and

competition laws. These typically include communications, common carriers, electric power, and certain financial networks. Where not specifically exempted, the extent of a state's regulation usually must be at least enough to qualify for the state action immunity defense.

Questions can arise when regulation is incomplete. For example, competing ambulance providers may be immune from setting identical prices where a state department of health regulates those prices. But they may not be immune if they conspire not to compete in fixed territories, if the state does not regulate that aspect of their business.

Of course, improper conduct by regulating public officials can still be subject to criminal prosecution and conflict of interest claims.

CONCLUSION

Public procurement officers are the first line of defense against antitrust violations and anti-competitive conduct. Their invaluable role is often more important than that of the user agency executive or prosecutor. The public procurement officer can best serve the state and national policy of maximizing competition in public procurement by:

- Becoming informed about competition law
- Understanding market conditions for every procurement
- Avoiding specifications that reduce competition
- Being aware of anticompetitive patterns, responses, and communications
- Developing a good working relationship with antitrust enforcers
- Remaining an arm's length from every supplier
- Practicing procurement ethics
- Reporting concerns to prosecutors
- Documenting everything

ENDNOTES

1. A copy of the Model Procurement Code is available at: <http://apps.americanbar.org/dch/committee.cfm?com=PC500500>
2. See the Model Procurement Code Section 1-101(2) (e) and (g).
3. <https://www.merriam-webster.com/dictionary/antitrust>
4. <https://www.merriam-webster.com/legal/restraint%20of%20trade>
5. See Chapter 8 (*Noncompetitive and Limited Competition Procurements*).
6. Chapter 4 (*Strategies and Plans*) addresses bidder preference laws.
7. For information about design-build contracting, see Chapter 11 (*Procurement of Construction and Related Services*).
8. See Chapter 5 (*Non-construction Specifications and Scopes of Work*).
9. <https://www.justice.gov/atr/guidelines-and-policy-statements-0> and <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws>
10. http://www.naag.org/naag/committees/naag_standing_committees/antitrust-committee.php
11. See Endnote 9.
12. See Endnote 9.
13. See Endnote 9.
14. See *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, Carolyn L. Carter, National Consumer Law Center, Inc. (February 2009), http://www.nclc.org/images/pdf/udap/report_50_states.pdf
15. A tying arrangement is an agreement between a seller and a buyer under which the seller agrees to sell a product or service (the tying product) to the buyer only on the condition that the buyer also purchases a different (or tied) product from the seller or the buyer agrees not to purchase the tied product from any other seller. Tying arrangements can be used to tie together not only different products but also services, leases, franchises, licenses to intellectual property, or combinations of any of those things.
16. The Institute was formerly called the National Institute for Governmental Purchasing.
17. The web addresses for this information are noted in Endnote 9.
18. See the United States DOJ and the FTC documents referenced at Endnote 9.
19. See the documents noted in Endnote 9.

CHAPTER 4: STRATEGIES AND PLANS

RECOMMENDED BEST PRACTICES

- The procurement office must foster a relationship with user agencies that ensures that those agencies will elect to have procurement professionals involved with them early in the procurement planning process. This requires, in part, that the procurement office adopt a policy of keeping an eye on the *big picture* rather than solely on daily business. It also requires that the public procurement officer engage in continual outreach to those agencies and devise effective means for collecting user agency needs information and expenditure data.
- The procurement office must plan for its workload in a manner that permits regular prioritizing and reprioritizing of work; that assigns work based on the needs of the procurement, as well as on the training and experience of the public procurement officer; and that benchmarks performance through measurements, such as processing times and customer satisfaction.
- The procurement office should have an emergency preparedness plan that permits access to its contract information even when its staff does not have access to the office.
- The procurement office should budget for supporting staff access to current market information, such as subscriptions to online market research tools and attendance at trade shows.
- Public procurement officers must be encouraged to think strategically about each procurement and ensure that they have the right tools and data to make strategic decisions.

Government is confronted with the challenge of meeting the needs of a changing social and economic environment. Planning and strategic thinking allow for the introduction of improved practices necessary to meet these challenges. Chapter 2 (*Procurement Leadership, Organization, and Value*) demonstrates the importance of placing procurement leadership at the executive level to meet those needs.

At the public procurement officer level, planning and strategizing better ensures that the procurement process is seamless in implementing critical short-term and long-term government program goals. A public procurement officer should not work without a *map* or in isolation. This chapter discusses some of the activities that should be routine in a high-performing public procurement office.

Plans for emergency preparedness are not covered in this chapter. Chapter 18 (*Emergency Preparedness*) addresses that topic.

PLANNING WITH USERS AND USER AGENCIES

Many decisions that state and local governments make touch in some way on the procurement process. As previously noted, Chapter 2 of this *Practical Guide* advocates that the best procurement structure is one in which there is a strategic leader—a Chief Procurement Officer—who, among other things, participates in the executive planning process.

Similarly, it is essential that the public procurement officer be invited into the early stages of a user agency's specific program planning where that program will require the support of a contract. In turn, the public procurement officer, as part of his or her plan for a specific procurement, must initiate a collaborative and team-focused approach with user agencies and users. A public procurement officer should not be passive.

A well-informed public procurement officer can play a vital role in the planning for a complex new technology, for example. That officer must think in terms of the long view, be a problem solver, and innovate, perhaps formulating a new way of conducting a competitive procurement. His or her professional knowledge of the process provides critical information to the user agency about the source selection methods available and how flexible they may be, market conditions, and a range of other considerations.

In the example of the new technology mentioned earlier, the public procurement officer may be able to offer a modular procurement approach. NASPO's website contains a paper on modular procurement along with a description of the steps used in this process.¹ It defines the method as follows:

The term "modular procurement" encompasses several different specific strategies for the practice of breaking up large and complex procurements into small, "tightly-scoped projects to implement technology systems in successive, interoperable increments." [Footnote omitted.] Modular procurement methods certainly do segment risks and increase transparency, but can go even further to also result in better solutions, faster delivery, and happier customers.

On the other hand, the public procurement officer is not in a position to know precisely how the user agency will utilize the commodity or service. Because the officer is not sitting in the user's seat, he or she will not understand in detail the user agency program that the commodity or service will support. The knowledge that the user agency and the users provide about the program is a key ingredient for success. Public procurement officers must reach out regularly to user agencies and users in order to develop a solid working relationship and a good means of exchanging expertise and knowledge.

The principle of collaboration early in the process applies to more than major purchases. Cooperation improves the effectiveness of any procurement, regardless of size, by providing valuable information and insights. It helps the procurement office plan its operations around the users' needs.

Forging a good relationship with users and user agencies is a key role a public procurement professional must play. A NASPO webinar entitled *Best Practices in Agency Relations and Communications* offers some suggestions for establishing such interactions.² Because of the important aspect of these relationships to a public procurement officer's job, a public procurement office should provide training as part of its orientation for new staff on relationship building. Additionally, employee's success in this area should be measured as part of that employee's performance evaluation.

PROCUREMENT OFFICE PLANNING

It is perhaps stating the obvious to assert that a well-run public procurement office should have a plan that sets both operational and strategic goals and objectives. If any organization does not have a *map* to direct it to its ultimate goal, there is a good chance that it will not reach that goal.

The plan must be set forth in a document that demonstrates how the procurement office will accomplish its short- and long-term goals and objectives. These must be tied to its vision and mission. It must include activities that impel both the office and its public procurement officers to be more effective. Finally, the plan must describe the methods that will be used to measure whether the plan is effective and whether employees in the procurement office are following it.

A procurement office does not have complete control over its workload. The policy directions of

a state or local government, particularly after an election, will change. In turn, the procurement office's priorities may change as well, since that office serves users and user agencies affected by the policy change. Thus, the plan must be flexible and should be reviewed regularly.

Note that every public procurement office must have an emergency preparedness plan in place to define the actions to be taken during sudden crises and to assign the appropriate staff to carry them out. The best practice is for the public procurement office to craft an emergency preparedness plan separate from their overall plan. Chapter 18 (*Emergency Preparedness*) addresses the important issue of the role that a public procurement office plays in crisis situations and in planning for them.

Developing a plan requires information and data. A NASPO document entitled *Critical Success Areas and Key Performance Indicators for State Central Procurement Offices* is a useful resource for the types of data and information that should be collected. It identifies key procurement performance indicators, many of which should be universal for all public procurement offices.³

Once the procurement office identifies the information and data that it needs, it will need to track them. With the increasing use of eProcurement systems, tracking some types of data has become much easier than it would have been a decade ago. Chapter 19 (*eProcurement*) discusses eProcurement systems in more detail.

Tracking should also include feedback from a broad array of public personnel outside of the procurement office at all levels of employment, as well as suppliers. They can provide critical perceptions of or experience with the procurement office. It is recommended that these surveys be anonymous, to encourage forthright answers.

Data which shows that a certain procurement is taking too long may indicate that the workload

of the public procurement officer assigned to that purchase is too heavy, or that the officer is struggling with the purchase and may not have the necessary expertise. Long turnaround times for procurements among several public procurement officers may mean that the office itself is struggling under the workload.

Data showing an increase in user complaints may indicate that there are personnel issues or that the office is lacking expertise in an area that a user agency requires.

Compliments from user agencies are just as important and should be tracked. Such kudos provide valuable information to the procurement office managers about the effectiveness of their procedures. Good performance should be reported, marketed, and publicly available to demonstrate the effectiveness of the public procurement office.

The development of a plan for a procurement office is critical in order to ensure that those in the public procurement office—managers, public procurement officers, and support staff—are all working toward common goals and objectives. Plans are the foundation of high-quality procurement and assure that a procurement office is offering superior service to the user agencies and users.

RESEARCH AND OTHER PRE-SOLICITATION GROUNDWORK

A key aspect of planning is research. A public procurement officer, if acting professionally, should not be a passive recipient of the information that a user agency provides to him or her for a particular procurement. That officer has an obligation to arm himself or herself with all available data relating to the needs of a user agency.

As discussed earlier, some relevant data should be available through an eProcurement system. Other data is available outside of the public

entity, such as descriptions of new models of a piece of equipment on the market. Many procurements will require numerous sources of data.

Public procurement officers must be problem solvers and investigate data sources on their own initiative. Examples of some of the types of data that are critical to know are user agency buying patterns, current and future market conditions for the commodity or service, past performance information about contractors under prior contracts, and past performance of the same or similar commodities or services.

Methods of Collecting Internal Data

There are two broad categories of purchases for which a public procurement officer must plan: those that are somewhat predictable because they recur, and those that respond to a user agency's new or changing needs.

For recurring types of procurements, access to comprehensive expenditure data is essential in planning. A single set of dollar figures for a public entity's purchases, broken down by commodity and service type, with further details available such as makes and models, could lead to a consolidation of user agencies' purchases. That, in turn, would allow the public procurement officer to achieve pricing on larger quantities of a commodity or service, perhaps lowering costs.

The availability of that data is key to the successful implementation of a sustainable procurement program because it allows for the identification of commodities and services to target for that program. Chapter 6 (*Sustainable Procurement Considerations and Strategies*) discusses these types of programs in more detail.

There have been great strides made in recent years toward reaching this goal, but it is a work in progress. Without this data, the public procurement officer must be creative and find alternative sources of information.

For non-recurring types of purchases, a public procurement officer must use ingenuity to try to predict the future requirements of user agencies and users. One approach is for the public procurement officer to survey key contacts in user agencies regularly, asking them to identify what they will need, the quantities they expect to order, and the times they will need them.

Another approach is to engage a panel of users from a broad array of user agencies to meet regularly in order to discuss problems, solutions, and forecasts. The panel may consist of user advisors that a public procurement officer brings together to provide input for procurements of specific types of commodities or services. A public procurement officer may also convene a contract oversight group to assist with the management of large and important contracts, such as health insurance or office supplies. This type of collaboration allows a public procurement officer, based on user ideas and knowledge, to be innovative and to discover new or different ways to conduct future procurements well in advance of the time that the user agencies need them.

Budget data is another source of internal information that may be helpful. However, most state or local government purchases are funded out of their regular budgets, and the budget that the legislative funding body—a state legislature or a city council—approves for a user agency will not generally identify specific items to be purchased.

The exceptions to this are capital (or high-dollar) procurements such as large construction projects or complex technology systems. Legislative funding bodies specifically appropriate funds for those. Such appropriations are based on the estimated cost of the procurement. That means that a significant amount of planning for the procurement must occur before the user agency requests the funds. The public procurement officer should be part of the team that develops the plan well before a budget item

goes to the appropriating body, such as the legislature or city council.

Legislative and gubernatorial-announced programs are also a source of information for a public procurement officer. A legislative appropriation and authorization to buy drones or body cameras is one example. An explicit statement by an executive government official about implementing a new initiative or technology should spur the public procurement officer to begin evaluating the market and preparing for the future.

There is no single best way for public procurement officers to ensure that they obtain the best information. In fact, the collection of internal data for planning purposes should be part of a broader outreach effort by a procurement office to its user agencies and users. If there is good communication between that office and the user before, during, and after the procurement, obtaining data about the user's needs should evolve as part of that communication.

Methods of Collecting External Data

It is easier than it has ever been for a public procurement officer to locate useful sources of external data and carry out market research through the Internet and its search engines. The time saved by having that information at the officer's fingertips means that there is no excuse for not conducting a thorough review of available resources.

Among the resources available are studies, papers, and publications of organizations of public officials. For instance, the website for the National Association of State Chief Information Officers offers a wealth of research, studies, and position papers, some developed with NASPO, about the procurement of information technology.⁴

Subscriptions to online and print publications are also critical to ensure that a public procurement officer remains current. A best practice

is to set aside a dollar amount in the procurement office budget that permits its public procurement officers to have access to information about industry innovations and future products and services.

Industry trade shows are another excellent source of information, particularly concerning technology. While budgets are often scarce for travel, trade shows allow a public procurement officer to obtain information on a wide range of suppliers' commodities in a neutral setting, that is, without becoming *too close* to suppliers.

The public procurement officer should also seek information directly from suppliers. Online survey tools can provide a simple and effective method of obtaining that information in a way in which suppliers may remain anonymous.

Even more data can be obtained through the issuance of a request for information to suppliers. This is a solicitation used solely to seek supplier information and ideas. There is no contract awarded. The drawback with this approach is that, unless the open records/freedom of information laws within a state allow the public procurement officer to keep that supplier-provided information confidential, this tool may have only limited utility. Suppliers will not provide their best information in this setting if they believe that their competitors may be able to gain access to it.

There are many other external sources of information, and some require membership or other fees. It is important for there to be a commitment by the managers of a public procurement office to obtain the best external data that the budget will bear.

DEVISING PROCUREMENT STRATEGIES

As soon as the user agency requests the public procurement officer's assistance—ideally, early

in the procurement planning process—that officer must think strategically and innovatively.

Public procurement officers should consider issues such as the information that they will require in order to write the solicitation, the procurement method that will be used to conduct the competition, the most appropriate method to evaluate the bids or proposals, the type of contract to be used, and negotiation strategies.

The public procurement officer must consider not only the commodity or service being purchased, but also contract terms, payment and performance measures, and risk management. In short, they must consider the entire process. The next paragraphs discuss a few of the strategies that a public procurement officer should contemplate implementing.

Cost Savings

One of the most obvious roles of public procurement professionals is to determine how best to save their state or local government money, either through obtaining the best value/price of a commodity or service or through cost avoidance.

A poorly devised procurement raises the costs to a public entity because user agencies end up with commodities or services that do not meet their needs, wasting precious dollars. A well-run procurement is based on a full understanding of the user agencies' needs. This calls for teamwork, a well-written specification/scope of work, relevant evaluation criteria, and appropriate contract terms, all of which greatly increase the chances that the public entity will receive the best value for its money.

Additionally, while state and local governments no longer purchase most commodities, services, and construction based solely on lowest price, the public procurement officer should aim to use his or her expertise, through market research and other available data, to investigate ways in which the public entity and the specific

user agency may save money. That may be through locating a better performing and less costly version of a commodity than the one the user agency regularly purchases, finding a way to increase competition among service suppliers, or looking for opportunities to combine user agency purchases in order to obtain volume discounts from suppliers.

For certain types of commodity procurements, it may be appropriate to request information from competing suppliers about either their costs or the costs to the public entity of owning and operating suppliers' commodities. The best known of these costs are life cycle cost and total cost of ownership. The NIGP Dictionary defines life cycle cost as:

*The total cost of ownership over the life-span of the asset. An analysis technique that takes into account operating, maintenance, the time value of money, disposal, and other associated costs of ownership as well as the residual value of the item.*⁵

Burt, Dobler, and Starling (2003) define total cost of ownership as:

*A measure of all of the cost components associated with the procurement of a product or service. The sum of all fixed and variable costs attributed to a product or service. A philosophy for understanding all supply-chain-related costs of doing business with a particular supplier for a particular good or service*⁶ (as cited in The NIGP Dictionary).

Chapter 6 (*Sustainable Procurement Considerations and Strategies*) and Chapter 9 (*Bid and Proposal Evaluation and Award*) discuss these two approaches to analyzing costs in more detail.

The analyses that the public procurement officer conducts using the information that the supplier submits during a competition permits that

officer to evaluate suppliers' bids or proposals in order to determine which commodity offers the best value. Those analyses may be used to determine the actual lowest price submitted in situations where that is the basis for contract award as stated in the solicitation, or to calculate which offered price should be given the highest number of points, for instance, where price is one factor for contract award as stated in the solicitation.

One of the critical tools that may assist with cost-savings strategy is the availability of comprehensive expenditure data, as discussed earlier. The public procurement officer should not be daunted by the lack of that type of data, but instead use his or her ingenuity to find other ways to achieve cost savings.

Strategic Sourcing

Strategic sourcing began as a tool used in private-sector procurement. Its use in the federal public procurement system took hold in the early 2000s. From 2003 through 2012, the United States Office of Management and Budget issued five directives relating to strategic sourcing.⁷

The United States General Services Administration maintains a website entitled *Federal Strategic Sourcing Initiative (FSSI)*.⁸ It offers a description of strategic sourcing:

Strategic sourcing is the structured and collaborative process of critically analyzing an organization's spending patterns to better leverage its purchasing power, reduce costs, and improve overall performance. The primary goals of FSSI are to:

- *Strategically source across federal agencies*
- *Establish mechanisms to increase total cost savings, value, and socioeconomic participation*
- *Collaborate with industry to develop optimal solutions*

- *Share best practices*
- *Create a strategic sourcing community of practice*

Since most definitions of the term *strategic sourcing* tend to be vague and broad, the FSSI website provides the best idea of how that approach is used within a public procurement system. For instance, the website identifies the current commodities and services that the federal government has strategically sourced and describes the features of the contracts, including the availability of environmentally friendly items and the use of small and disadvantaged businesses.

As may be seen by the federal description of strategic sourcing, its use relies heavily on the availability of comprehensive spending information, an issue for state and local governments that this chapter has already discussed. In situations where that kind of information is available, a public procurement officer should consider launching a strategic sourcing initiative with user agencies, users, and suppliers if that spending information suggests that a long-term and different solution in purchasing particular types of commodities or services will be beneficial.

Source Selection Methods

One of the important things that a public procurement officer must determine in preparing to conduct a procurement is the method that will be used to select a supplier—the source selection method. Chapter 7 (*Competition: Solicitations and Methods*) discusses this topic in detail.

Length of Contracts

A decision about the length of a contract requires that public procurement officers weigh several objectives. They must consider the nature of the user agency or agencies' needs, the nature of the item being procured, the ongoing or long-term need for it, and the principle of

competition, which creates a presumption that a purchase ought to be competed regularly.

There are good reasons, however, in certain situations, to put in place a long-term contract, the duration of which may be as long as ten years. In contracts of that length, it is critical for the contract to include special terms that will support the issues that may arise in any long-term relationship, such as: opportunities for price/cost reductions; contractor requests for price increases and the required documentation; and procedures for handling going-out-of-business or bankruptcy problems. Simply using a public entity's standard contract terms is not sufficient.

There is a barrier to longer-term contracts. Laws reserve the authority to appropriate funds only to a state or local government's legislative body—for a state, its legislature; and for a city, its city council. While some state legislatures meet every two years and thus appropriate funds for a two-year period, most appropriate funds for only one year at a time.

As a practical matter, many state and local government contracts that support that government qualify as multi-year. That is because the duration of those contracts is at least a year and the start dates of contracts vary based on when the public procurement officer awards the particular contract. All public entities have a fiscal year for budgeting purposes. If that fiscal year begins on July 1, a public procurement officer does not award all contracts of one-year duration on July 1.

The solution that governments use to resolve the appropriations issue is to insert into each contract language such as the following, which is taken from the Federal Acquisition Regulation—the body of regulations that implements the federal government's procurement laws:⁹

Funds are not presently available for performance under this contract beyond _____. The Government's obligation for performance of this contract beyond

that date is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise for performance under this contract beyond _____, until funds are made available to the Contracting Officer for performance and until the Contractor receives notice of availability, to be confirmed in writing by the Contracting Officer.

Some version of this language should be included in every public contract and in a public entity's purchase order terms. These contract clauses are called *funding out* or *non-appropriations* clauses.

There are instances in which the legislative body of the state or local government appropriates funds for specific high-dollar projects that will take longer than a year or more to complete, such as highway or stadium construction or the procurement of an enterprise system. In those cases, a *funding out* clause does not have as important a role to play as it does in other types of contracts. However, those contracts should still include it.

This recognition of the power of the legislative body to appropriate public funds becomes an issue in contracts under which the contractor is financing something that the government will purchase by making payments to the contractor over time. Examples of these types of contracts are the lease/purchase of equipment or contracts for a construction of a public facility that the contractor will build at its cost and the public entity will occupy. While contractors that are in the business of lease/financing to governments acknowledge that governments must include *funding out* clauses in contracts, those contractors generally will want to negotiate some specific contractual protections relating to situations in which the government may need to terminate the contract using that clause.

Any strategy of a public procurement officer to compete for and enter into contracts for long terms should be supported by a law that authorizes those types of contracts. The issue of legal authorization is a separate one from that relating to the appropriation previously discussed. Contractors who are asked to enter into long-term contracts will feel more comfortable competing for them where the law sanctions them.

Here is a sample of language that may be used in a statute or ordinance for that authorization. It is taken from the American Bar Association Model Procurement Code for State and Local Governments (Model Procurement Code).¹⁰

§3-503 Multi-Year Contracts

(1) Specified Period. *Unless otherwise provided by law, a contract for supplies or services may be entered into for any period of time deemed to be in the best interests of the [State] provided the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefore.*

(2) Use. *A multi-year contract is authorized where:*

(a) estimated requirements cover the period of the contract and are reasonably firm and continuing; and

(b) such a contract will serve the best interests of the [State] by encouraging effective competition or otherwise promoting economies in [State] procurement.

(3) Cancellation Due to Unavailability of Funds in Succeeding Fiscal Periods. *When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled and the contractor shall be reimbursed for*

the reasonable value of any non-recurring costs incurred but not amortized in the price of the supplies or services delivered under the contract. The cost of cancellation may be paid from any appropriations available for such purposes.

Selection of Contract Type

One of the most important decisions that a public procurement officer makes is the type of contract that he or she will award as a result of a procurement. There are many types of contracts. Selecting the right one depends in large part on an analysis of the risks that the procurement and resulting contract pose. A later portion of this chapter describes some structured ways of analyzing risks.

A good starting point in determining the contract types that may be available to the public procurement officer is to become familiar with what is authorized by the state or local government's procurement law. An example of such legal language can be found in the Model Procurement Code:

§3-501 Types of Contracts.

Subject to the limitations of this Section, any type of contract which will promote the best interests of the [State] may be used; provided that the use of a cost-plus-a-percentage-of-cost contract is prohibited. A cost-reimbursement contract may be used only when a determination is made in writing that such contract is likely to be less costly to the [State] than any other type or that it is impracticable to obtain the supplies, services, or construction required except under such a contract.

Cost-plus-a-percentage-of-cost contracts are universally prohibited in public procurement, including at the federal government level.¹¹ A cost-plus-a-percentage-of-cost contract is one in which, before completion of the work, the contractor and the public entity agree that the

contractor will be entitled to a fee amounting to a predetermined percentage of the total cost of the work. Thus, the more the contractor spends, the greater its fee. It incentivizes the contractor to incur cost at the expense of the public entity.

Note that determining what is and what is not a cost-plus-a-percentage-of-cost contract is not simple. There is a good discussion of this topic on the NASPO ValuePoint website.¹²

Contract Types

The Recommended Regulations of the Model Procurement Code offer the following list of some of the types of contracts available for commodities or services contracts: fixed-price contracts (with contract-specified adjustments); firm fixed-price contracts; fixed-price contracts with price adjustment; cost-reimbursement contracts; allowable cost contracts; cost-plus-fixed fee contracts; cost incentive contracts; fixed-price cost incentive contracts; cost-reimbursement contracts with cost incentive fee; performance incentive contracts; time and materials contracts; labor hours contracts; definite quantity contracts; indefinite quantity contracts; requirements contracts; leases; lease with purchase option.¹³

If a public procurement officer finds the preceding list of contract types daunting, it is understandable. He or she is not expected to be an expert in this area. The aim of this chapter is to provide resources to that officer as he or she strategizes about the type of contract to be used in a particular procurement.

Many contracts awarded by state and local governments are some version of a firm-fixed-price contract under procurements conducted either via competitive sealed bidding or via competitive sealed proposals. Chapter 7 (*Competition: Solicitations and Methods*) describes those procurement methods in more detail.

At the federal government level, firm-fixed-price contracts or fixed-price contracts with economic price adjustment are the only contract types that

may be used when a procurement is conducted by competitive sealed bidding.¹⁴ Nash, Schooner, and O'Brien (1998) define a firm-fixed-price contract as:¹⁵

A type of contract providing for a price that is not subject to adjustment on the basis of the contractor's cost experience in performing the contract. [Firm-fixed-price] contracts place maximum risk and full responsibility on the contractor for all costs and resulting profit or loss. They provide maximum incentive for the contractor to control costs, perform effectively, and impose a minimum administrative burden upon the contracting parties unless changes are issued or unforeseen events occur during performance (as cited in The NIGP Dictionary).

The Federal Acquisition Regulation describes fixed-price contracts with economic price adjustment as follows:¹⁶

16.203 Fixed-price contracts with economic price adjustment.

16.203-1 Description.

(a) A fixed-price contract with economic price adjustment provides for upward and downward revision of the stated contract price upon the occurrence of specified contingencies. Economic price adjustments are of three general types:

(1) Adjustments based on established prices. These price adjustments are based on increases or decreases from an agreed-upon level in published or otherwise established prices of specific items or the contract end items.

(2) Adjustments based on actual costs of labor or material. These price adjustments are based on increases or decreases in specified costs of labor or material that the contractor actually experiences during contract performance.

(3) Adjustments based on cost indexes of labor or material. These price adjustments are based on increases or decreases in labor or material cost standards or indexes that are specifically identified in the contract.

Federal Acquisition Regulation Subpart 16.1, entitled *Selecting Contract Types*, provides valuable information that any state or local government public procurement officer may use as a guide. There is more in those regulations than a state or local government procurement officer needs, but they are a useful starting point. A theme that runs through these regulations is the importance of the risk posed by particular contract types. Because of that reality, federal regulations mandate that the decision to use a particular contract type be documented.¹⁷

At the outset of a procurement, a public procurement officer must understand that contract types fall into two broad categories—fixed-price contracts and cost-reimbursement contracts, with incentive contracts somewhere in between—and that they vary according to:¹⁸

- The degree and timing of the responsibility assumed by the contractor for the costs of performance
- The amount and nature of the profit incentive offered to the contractor for achieving or exceeding specified standards or goals

As seen from the titles of the various contract types mentioned, there is a close relationship between the type of contract and the determination of the price under a contract. Even though there are contract designations such as *definite quantity* or *indefinite quantity*, those, in reality, are a combination of contract types, in many cases a form of fixed-price contracts.

Factors in Selecting a Contract Type

The factors that Subpart 16.1, and specifically Federal Acquisition Regulation Subpart 16.104,

offers to assist with the selection of a contract type include:

(a) **Price competition.** Normally, effective price competition results in realistic pricing, and a fixed-price contract is ordinarily in the Government's interest.

(b) **Price analysis.** Price analysis, with or without competition, may provide a basis for selecting the contract type. The degree to which price analysis can provide a realistic pricing standard should be carefully considered. [Citation omitted.]

(c) **Cost analysis.** In the absence of effective price competition and if price analysis is not sufficient, the cost estimates of the offeror and the Government provide the basis for negotiating contract pricing arrangements. It is essential that the uncertainties involved in performance and their possible impact upon costs be identified and evaluated, so that a contract type that places a reasonable degree of cost responsibility upon the contractor can be negotiated.

(d) **Type and complexity of the requirement.** Complex requirements, particularly those unique to the Government, usually result in greater risk assumption by the Government. This is especially true for complex research and development contracts, when performance uncertainties or the likelihood of changes makes it difficult to estimate performance costs in advance. As a requirement recurs or as quantity production begins, the cost risk should shift to the contractor, and a fixed-price contract should be considered.

(e) **Combining contract types.** If the entire contract cannot be firm-fixed-price, the contracting officer shall consider whether or not a portion of the contract can be established on a firm-fixed-price basis.

(f) **Urgency of the requirement.** If urgency is a primary factor, the Government may choose to assume a greater proportion of risk or it may offer incentives tailored to

performance outcomes to ensure timely contract performance.

(g) **Period of performance or length of production run.** In times of economic uncertainty, contracts extending over a relatively long period may require economic price adjustment or price redetermination clauses.

(h) **Contractor's technical capability and financial responsibility.**

(i) **Adequacy of the contractor's accounting system.** Before agreeing on a contract type other than firm-fixed-price, the contracting officer shall ensure that the contractor's accounting system will permit timely development of all necessary cost data in the form required by the proposed contract type. This factor may be critical:

(1) when the contract type requires price revision while performance is in progress; or

(2) when a cost-reimbursement contract is being considered and all current or past experience with the contractor has been on a fixed-price basis.

[Citation omitted.]

(j) **Concurrent contracts.** If performance under the proposed contract involves concurrent operations under other contracts, the impact of those contracts, including their pricing arrangements, should be considered.

(k) **Extent and nature of proposed subcontracting.** If the contractor proposes extensive subcontracting, a contract type reflecting the actual risks to the prime contractor should be selected.

(l) **Acquisition history.** Contractor risk usually decreases as the requirement is repetitively acquired. Also, product descriptions or descriptions of services to be performed can be defined more clearly.

Analysis of Risks Posed by Contract Types
Finally, Federal Acquisition Regulation Subpart 16.1, specifically 16.103(d), describes the documentation that those regulations require to

support the selection of a contract type for a procurement. While it may be unlikely that a state or local government procurement officer will detail the procurement file to this extent, a review of the following items provides the factors, including risks, that need to be considered and weighed in order to make the best decision:

(d)(1) Each contract file shall include documentation to show why the particular contract type was selected. This shall be documented in the acquisition plan, or in the contract file if a written acquisition plan is not required by agency procedures.

(i) Explain why the contract type selected must be used to meet the agency need.

(ii) Discuss the Government's additional risks and the burden to manage the contract type selected (e.g., when a cost-reimbursement contract is selected, the Government incurs additional cost risks, and the Government has the additional burden of managing the contractor's costs). For such instances, acquisition personnel shall discuss:

(A) how the Government identified the additional risks (e.g., pre-award survey or past performance information);

(B) the nature of the additional risks (e.g., inadequate contractor's accounting system, weaknesses in contractor's internal control, noncompliance with Cost Accounting Standards, or lack of or inadequate earned value management system); and

(C) how the Government will manage and mitigate the risks.

(iii) Discuss the Government resources necessary to properly plan for, award, and administer the contract type selected (e.g., resources needed and the additional risks to the Government if adequate resources are not provided).

(iv) For other than a firm-fixed-price contract, at a minimum the documentation should include:

(A) an analysis of why the use of other than a firm-fixed-price contract (e.g., cost reimbursement, time and materials, labor hour) is appropriate;

(B) rationale that details the particular facts and circumstances (e.g., complexity of the requirements, uncertain duration of the work, contractor's technical capability and financial responsibility, or adequacy of the contractor's accounting system), and associated reasoning essential to support the contract type selection;

(C) an assessment regarding the adequacy of Government resources that are necessary to properly plan for, award, and administer other than firm-fixed-price contracts; and

(D) a discussion of the actions planned to minimize the use of other than firm-fixed-price contracts on future acquisitions for the same requirement and to transition to firm-fixed-price contracts to the maximum extent practicable.

(v) A discussion of why a level-of-effort, price redetermination, or fee provision was included.

Contract Types Requiring Substantiation of Costs or Prices

As noted before, some contracts call for the contractor to substantiate the quoted cost or prices. The reasons may be related to the type of contract, such as cost-reimbursement contracts. In that category are contracts under which price is negotiated, those that reimburse any contractor costs (such as travel), cost-plus-fixed-fee contracts, and cost incentive contracts. In other cases, the need for substantiation arises because of the lack of full competition in awarding the contract. Chapter 8 (*Noncompetitive and Limited Competition Procurements*) and Chapter 9 (*Bid and Proposal Evaluation and Award*) address those situations.

The Model Procurement Code's recommended statutory language is simple and to the point in

authorizing a public procurement officer to ask a supplier for cost or pricing information:¹⁹

§3-403 Substantiation of Offered Prices

The Procurement Officer may request factual information reasonably available to the bidder or offeror to substantiate that the price or cost offered, or some portion of it, is reasonable, if:

- (1) *the price is not:*
 - (a) *based on adequate price competition;*
 - (b) *based on established catalogue or market prices; or*
 - (c) *set by law or regulation; and*
- (2) *the price or cost exceeds an amount established in the regulations.*

Thus, it is important for a public procurement officer to decide in advance of a procurement whether he or she may need to insert language advising suppliers that they may be asked to provide cost or pricing data during the procurement or the contract. The Recommended Regulations of the Model Procurement Code describe the types of information that the public procurement officer may seek from a supplier or contractor as follows:²⁰

R3-101.01.2 Cost Analysis is the evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.

R3-101.01.3 Cost Data are information concerning the actual or estimated cost of labor, material, overhead, and other cost elements which have been actually incurred or which are expected to be incurred by the contractor in performing the contract.

R3-101.01.6 Price Analysis is the evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

R3-101.01.7 Price Data are factual information concerning prices, including profit, for supplies, services, or construction substantially similar to those being procured. In this definition, "prices" refer to offered or proposed selling prices, historical selling prices, and current selling prices of such items. This definition refers to data relevant to both prime and subcontract prices.

Contract Pricing, Important Contract Terms

Overview

Among the things that a contract accomplishes, there are three that are very important, namely: (1) establish what the contractor and, in some cases, the public entity must do; (2) detail how the contractor will be paid; and (3) allocate the other risks that may possibly arise during contract performance between the contractor and the public entity. Good contract terms are those that cover those three items in a clear and unambiguous way.

For the purposes of this discussion, the term *contract terms* excludes specifications, scopes of work, and instructions for bidders or offerors in a solicitation. In fact, it is important for a solicitation not to mix contract terms—which will apply once the contract is awarded—with instructions to bidders/offerors or specifications/scopes of work. All of these parts of a solicitation address distinct matters and should be separated under distinct headings to avoid confusing suppliers.

Contract terms appear in a variety of documents for which a public procurement office is responsible. Every formal solicitation for a procurement must include them because they are an important part of the matters that suppliers take into consideration when preparing bids or proposals. Additionally, contract terms should be included in a public entity's purchase orders, which are the documents that the public entity sends to a contractor to confirm that funds are

available to pay the contractor; they authorize the contractor to begin work under the contract.

Standard Contract Terms

Most public procurement offices maintain a set of standard contract terms that are used routinely in solicitations and purchase orders. These must include a wide range of remedies that the public entity may initiate if the contractor fails to perform according to the contract's terms. Just a few examples of types of contract clauses that offer a range of remedies are:

- Modification of the terms of the Uniform Commercial Code as discussed in Chapter 13 (*Quality Assurance*)
- Reservation of all legal and equitable remedies in addition to those set forth in the contract
- Explicit warranties that are additional to those provided by law
- Termination of the contract for default or breach
- The right to offset from amounts owed to the contractor any expenses that the public entity incurs due to poor performance
- Non-waiver language, providing that the failure to invoke a remedy or enforce a right on occasion during the contract does not waive that right or remedy
- Indemnification by the contractor of the public from liability associated with claims, damages, and actions
- Termination of the contract for convenience, paying the contractor for costs along with a reasonable profit for the work to that point of termination; to be used, for instance, when circumstances change, necessitating that the public entity end the contract before completion

Nonstandard Contract Terms

With the complexity of the commodities, services, and construction that a public entity purchases today, it is unreasonable for a public procurement officer to rely only on those standard terms in the procurements that he or she

conducts. He or she needs to examine those terms in light of the three issues—what the contractor is supposed to do, how it is supposed to be paid, and who accepts what risk.

Many contract terms must be founded on a prior risk analysis conducted during solicitation drafting, during evaluations of bids or proposals, during negotiation with the selected supplier, or even during contract performance. Performing risk analyses is discussed later in this chapter.

An analysis of the three main issues in each procurement will consistently result in the need to draft additional contract terms that address the unique risks and requirements posed by that particular competition. Thus, as part of a public procurement officer's first thoughts about the best way to proceed with a particular procurement, he or she must develop a strategy to collect reliable information concerning the three main issues, prepare the precise contract terms to address them, and obtain any additional expertise through the public entity's attorneys or finance staff.

The attorney general's office of the State of North Dakota has prepared a manual to instruct public procurement officers in drafting contract terms.²¹ Resources such as that one are excellent guides for developing contract terms.

Contract Administration Plan

For some contracts, it is critical to have a contract administration plan in place. Chapter 14 (*Contract Management and Contract Administration*) provides a discussion regarding this type of plan.

Plans for Complex Information Technology Procurements

A significant amount of planning is part of a sound procurement for complex information technologies. Chapter 20 (*Procurement of Information Technology*) covers this topic in detail.

Network Security and Cyber Risks

Any entity—whether it be private or public—must put policies and procedures in place to protect the confidential information it holds about people. Federal and state laws specify what kinds of information must be protected.

As state and local governments gravitate toward systems solutions that include strategies such as cloud services or software as a service, or use consultants who have access to their systems, it is necessary to establish strategies to reduce the risk of unauthorized disclosure of private information. A public procurement officer along with a larger team of public entity employees (such as information technology specialists and those responsible for obtaining that entity's insurance) must strategize about how to identify, weigh, and reduce those risks in procurements where those issues are a genuine concern. Chapter 20 (*Procurement of Information Technology*) discusses this in more detail.

Negotiation

In many instances, a public procurement officer will negotiate with a supplier during a procurement. Negotiation may occur under a procurement conducted through competitive sealed proposals. It may be with those suppliers selected from the pool of suppliers competing to be finalists for a contract award or it may be with the supplier selected for contract award. A public procurement officer will also be required to negotiate contract terms where there has been little or no price competition, such as when awarding a sole source contract. Whatever the condition is that creates the need to negotiate, a public procurement officer should not initiate negotiations without a strategy and plan in place.

Construction Project Delivery Methods

There are strategies that a public procurement officer must formulate with the user agency about how best to deliver a project to construct

or renovate public infrastructure. Some of those involve financing options, such as public-private partnerships. Chapter 11 (*Procurement of Construction and Related Services*) describes those possible strategies in more detail.

Strategies—Socioeconomic Programs

Overview

The fundamental purpose of state and local government procurement is to buy the commodities, construction, and services needed for the operation of that government. The objective is to acquire these items at the best value for the public entity.

It is inevitable, however, that other state and local government policies influence the procurement function. The buying power of state and local governments is frequently used to achieve socioeconomic objectives that do not directly pertain to the procurement of commodities, construction, and services. Such objectives find their way into a law or executive order, which will generally direct a public procurement office to implement those goals.

There is a wide range of possible socioeconomic objectives. Examples are procurement preferences for local businesses, for sustainable commodities, and for small and diverse businesses—often called disadvantaged businesses, which is the term used in this chapter.

The terms *disadvantaged business* or *diverse business* are often used to encompass the most common supplier diversity categories of minority business enterprise (MBE) and women's business enterprise (WBE). Some jurisdictions, such as the Commonwealth of Massachusetts, have expanded definitions of supplier diversity to add veteran business enterprise (VBE); service-disabled veteran-owned business enterprise (SDVOBE); disability-owned business enterprise (DOBE); and lesbian-, gay-, bisexual-, transgender-owned business enterprise (LGBTBE).²²

PLANNING FOR NEGOTIATIONS

Negotiation is a common part of everyday life and plays an important role in the procurement process. When used properly, negotiations can help achieve best value contracts for the government entity. Effective negotiations can improve quality, delivery, cost, and provide deeper clarity for all parties around contract expectations. This guide features callout boxes (like this one) on the topic of negotiation within several chapters to reinforce the need for public procurement professionals to embrace negotiation when appropriate, seek it as a skill, refine it in staff, and realize that it is often essential to achieving best value. When negotiation is practiced in public procurement environments, it must be done with the tenants of fairness and integrity in mind—in other words, it must include principled bargaining, because that is the standard owed to the public. However, negotiation also requires diligence and thought; procurement officers cannot start throwing positions and *requests* at suppliers and hope to achieve best value.

This chapter identifies the importance of establishing strategies and plans in the management of a procurement office, such as contract coverage planning, strategic sourcing, risk management, and planning the approaches to various markets. Planning for negotiations early on is also a critical aspect of procurement office planning. When planning for a negotiation with a supplier, many of the same best practices of strategic planning are involved but use different tools and resources. For example, in the book *Getting to Yes: Negotiating Agreement Without Giving Up* by Roger Fisher and William Ury,¹ the importance of planning is emphasized primarily through techniques such as identification of alternatives, promoting a focus on interests versus positions, and creating options for mutual gain. All of these techniques require time, and more important, time spent with a team of the right people.

Engaging a cross-functional team to craft a strategy for successful implementation and monitoring of contracts is critical to minimizing risk and costs when dealing with suppliers. At each major milestone of procurement—from brainstorming on requirements during an RFP, to whiteboarding possible options available to implement a new contract, to discussing the impacts of a performance issue and the corrective action to take—a consistent team and a commitment to a structured plan will increase the chance of success.

¹ R. Fisher, W. Ury, & B. Patton. (2011). *Getting to Yes: Negotiating Agreement without Giving Up* (3rd ed.). New York, New York: Penguin Group.

The reference to disadvantaged businesses in this chapter should not be confused with the federal government's disadvantaged business enterprise (DBE) program. That federal program flows down to state and local governments when they are issuing contracts using federal funds for things such as highways, public transportation (such as airports and light rail), concessions in airports, and equipment related to those items.

As part of the mandate that accompanies the use of those federal funds, the state or local government is required to have a certification process in place to assure that a business claiming to meet the federal definition actually does so. The upcoming discussion does not focus on federal requirements, but instead provides an overview of socioeconomic programs at the state and local government level that are unrelated to spending federal funds.

The State of Maryland is an example of a state government that has instituted a socio-economic program for non-federally funded procurements. In 1978, the state's General Assembly enacted legislation to create an MBE program to encourage minority-owned firms to participate in the state's procurement process. The state's current law requires user agencies to make every effort to achieve an overall minimum goal of 29% of the total dollar value of their procurement contracts directly or indirectly from certified MBE firms.²³

The State of Maryland uses the federal government criteria for determining which businesses qualify and which do not. Since the state already has the staffing and process in place within its department of transportation for certifying businesses as disadvantaged for federally funded procurements, it uses the same staff and process to certify businesses applying for the benefits of non-federally funded state contracts. Each user agency in state government reviews and assesses its procurements for commodities, services, maintenance, construction, and architectural/engineering contracts to determine an MBE participation goal appropriate for each contract.

The definition of an MBE business used by the state of Maryland is:

[A] Business must be at least 51% owned and controlled by one or more socially and economically disadvantaged individuals. Under current State law, an individual is presumed to be socially and economically disadvantaged if that individual belongs to one of the following groups: African Americans, Hispanic Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Native Americans, and Women. Persons who own and control their business, but are not members of one of the above groups, also may be eligible for MBE certification if they establish their social and economic disadvantage. Disabled individuals may also

apply for MBE certification. A determination of whether an individual meets MBE eligibility criteria is made on a case-by-case basis.

Socioeconomic Program Risks

Socioeconomic procurement programs that give some preference to small and disadvantaged businesses have risks. For example, a law establishing a preference for local businesses in state A may trigger a reciprocal preference law in state B, disadvantaging a business headquartered in state A when it competes for contracts under a procurement solicited by state B. Additionally, programs giving preferences based on race or gender raise legal issues under the United States Constitution. Legal challenges will be successful unless the programs are based on documented disparities and are narrowly tailored to address the documented discrimination. There is substantial case law that addresses this topic, but it is not covered in this *Practical Guide*.

Strategies for Obtaining Supplier Diversity in Procurements

The stated reason for small and disadvantaged business programs is that those businesses are often at a disadvantage when they compete with large businesses for procurements. To address this situation, strategies are sometimes applied to level the playing field. The following are some of these strategies:

- **Set-asides.** A set-aside is a preference, which may be total or partial, in which a procurement is reserved solely for participation by small or disadvantaged businesses.
- **Unbundling contracts.** Unbundling involves changing a previous single award, large-volume contract either by breaking out commodities or services into smaller groups and making multiple contract awards or breaking the contract up into geographical regions. By unbundling contracts, disadvantaged businesses that may

not have the capacity to compete for the entire award may be able to compete for part of the award or for a particular region of a state.

- **Evaluation points for small or disadvantaged businesses.** In negotiated procurements that use evaluation factors to identify the supplier that submits the best proposal, one approach may be to specify in the solicitation that points will be given to a supplier that is small or disadvantaged.
- **Disadvantaged business subcontracting plan.** Another strategy to promote small or disadvantaged businesses is to require suppliers competing for the contract to show their efforts to involve small or disadvantaged businesses by submitting a plan with their bid or proposal.
- **Percentage preferences.** A percentage preference allows a small or disadvantaged business to bid a higher price than the bid of a larger, non-disadvantaged business but still be considered the lowest bid if the bid of the small or disadvantaged business is no more than a certain percentage higher (such as 5% or 10%) than the actual low bid.

Arguments Made Against These Preference Programs

There are those who are opposed to small and disadvantaged business programs.

One argument is that these programs run counter to the basic tenet of public procurement, which is full and open competition. Additionally, claims are made, correct or not, that the quality of commodities and services offered by these businesses or their ability to meet requested quantities and schedules are inferior.

Another argument proffered is that many small and disadvantaged businesses conduct transactions with the private sector without any favored treatment. Preferential strategies, as the argument goes, weaken the businesses' ability

to compete in the open market by making them increasingly dependent on the public sector.

Finally, concerns are raised that, unless the process for certifying a business as disadvantaged is robust and involves in-depth investigation of the information that a business submits to qualify, disadvantaged business programs are fraught with opportunities for abuse.

Documenting Program Benefits

A public procurement office is rarely given additional resources to support implementation of preference programs. All too often there is insufficient consideration of the real cost involved when public procurement is mobilized for some ancillary purpose. Those promoting these programs as good public policy must be responsible for documenting both the costs of such programs and the tangible, measurable benefits. One measure, for example, is how many disadvantaged businesses *graduate* annually from the program and are competing along with non-disadvantaged businesses for the same contracts. That cost/reward information should be detailed and made transparent.

Increasing Small and Disadvantaged Business Participation Without Sacrificing Competition and Effectiveness

There are ways in which public procurement officers and other public officials may help small and disadvantaged businesses participate without sacrificing competition, affecting quality, or making the procurement process less effective. For example:

- Make special efforts to identify small and disadvantaged businesses and to encourage them to seek public business through methods such as advertisement of opportunities in trade journals or small or disadvantaged business audience newspapers, as well as being in contact with local chamber of commerce offices
- Coordinate with state small and disadvantaged business assistance offices and

- federally funded procurement technical centers
- Use technology to increase visibility of business opportunities, including mobile technology such as business opportunity apps and e-mail campaigns
- Provide special training or introductory seminars and workshops and on-demand web-based training for businesses, including those without previous procurement experience
- Provide one-on-one counseling sessions by state or local government procurement officers
- Provide forums and expositions where small and disadvantaged businesses can present their products and network with public entity procurement professionals

MANAGING RISKS

A public procurement officer is at the center of a process that requires a consistent and in-depth look at the risks posed by a procurement and contract. While the point of a contract is to obtain needed commodities, services, and construction, there are milestones all along the decision-making continuum—starting with the user agency’s decision that it needs something through contract completion to fulfill that need—at which the risks of the particular activity proposed must be reviewed. As an example, the public procurement officer’s selection of a contract type involves the consideration of risks, which has already been discussed in this chapter.

Effective risk analysis and management requires strategies and plans. These should be developed in a structured manner to ensure that nothing in the analysis is missed.

There are outside professionals who specialize in the use of sophisticated risk-assessment tools, including tools used for making complex financing decisions. Projects with long performance periods, complex cash flow models, significant

environmental or regulatory considerations, and large capital expenditures may require quantitative risk-management modeling to assist in decision making. Moreover, some of those projects may require stand-alone risk management plans.

In most cases, a public procurement officer, user agency personnel, or an evaluation committee reviewing and evaluating supplier proposals will not have the benefit of an outside professional to assist with risk analysis. The following text includes some suggestions about how to conduct an analysis.

Steps in a Risk Analysis

For the purposes of providing an outline of the basic steps in risk analysis, this discussion offers a formal structure for conducting that analysis. It also contemplates that those involved in the risk analysis will include a public entity’s personnel who are subject matter experts in the possible risks on which the activity or issue touches. However, any individual sitting at his or her desk may use the process described here for risks/benefits decisions.

It may not always be possible to include the appropriate subject matter experts at the table. If an issue that requires a risk analysis is identified by an evaluation committee during an evaluation of proposals, the confidentiality of the committee’s deliberations may not provide any opportunity to include others in its risk assessment.

The basic steps in a risk analysis are:

- **Identification of the risks involved.** To complete this step successfully, there must be a clear written statement of the activity or issue to be evaluated so that there is a common understanding of the source of the possible risks. That keeps the analysis discussion on point. In some cases, it may be useful to list the benefits of the activity or issue so that they may

be compared to the risks once those are identified. In some cases, there may not be any benefit, such as when a critical supplier of cloud services, for instance, does not maintain cyber insurance for its operations. Additionally, as discussed later, it is a good practice to ask the suppliers who are competing for a contract themselves to identify the risks associated with the particular service, commodity, or construction that the procurement is seeking.

- Assessment of the risks.** Once risks are identified and a list is made, each risk is assigned a score, such as 1 through 5; or a ranking, such as low, medium, or high. The risk is given a separate score or ranking for two different factors: the probability of the risk occurring and the impact if the risk occurs. Once that is done, the overall risk, based on the two scores, is determined and may be plotted on a chart such as the one following this paragraph. Those that hover high in Quadrant 2, or perhaps medium to high in Quadrant 1 and are located near the dividing line between the two top quadrants present the highest risk.²⁴

IMPACT ↑	High or 5	Quadrant 1	Quadrant 2
	Low or 1	Quadrant 3	Quadrant 4
		Low or 1	High or 5
		PROBABILITY →	

- Determine the risk response, including actions to reduce risks.** After the risk assessment, handling the risks requires the public entity to determine whether the

benefits of the activity outweigh the risks—its tolerance for risk. Using the example stated earlier of a critical supplier for cloud services who does not maintain cyber insurance, the public entity must determine its tolerance for taking that risk and how it might reduce the risk. For instance, if the supplier agrees to reimburse the public entity for some of the standard costs of a data breach, such as the cost of forensic experts, notification of the victims, call center services, and credit monitoring, will that suffice? Cloud service suppliers uniformly demand that the contract place a dollar cap on their responsibility for those costs, which requires the public entity to perform another risk analysis.

- Monitor and control risky activities.** Monitoring and controlling risks during contract performance can include requirements for approvals, authorizations, reviews, reconciliations, and contract exception reporting. Mandatory security training for certain types of contractors and administrative permissions/controls relating to technology systems are other examples. Monitoring and control for risk management purposes should also be linked with other project management activities, such as weekly or monthly reviews. Effective contract administration may be the most important element of risk monitoring and control in procurements. Chapter 14 (*Contract Management and Contract Administration*) describes good contract management/contract administration in more detail. Post-award kickoff meetings, careful monitoring of project schedule and status, and aggressive resolution of contract issues as they arise become central to monitoring the risks of a procurement project and assessing the need for any adjustments.

Requiring Suppliers to Identify Risks

It is unlikely that a group of public entity employees and a public procurement officer will be able to identify all of the key risks that a procurement

of a particular service, commodity, or construction poses, particularly in the case of more complicated ones. A best practice for a solicitation is to ask competing suppliers not only to address specific risks that public entity employees have identified in their risk analysis but to identify in a detailed way, from their viewpoint, the potential significant risks posed by the contract to be awarded under the solicitation. Suppliers should also be required to provide a plan to reduce and otherwise manage risks.

The solicitation should include criteria for evaluating suppliers' responses relating to risk since they may demonstrate whether or not a supplier understands the project context. It may be prudent in particular cases to require a bidder or offeror to include a risk mitigation plan enumerating the risks that the potential contract may pose from the supplier's point of view and providing steps to mitigate them.

Suppliers' responses allow the public procurement officer and the evaluation committee the opportunity to assess the risk in each supplier's proposed approach, including whether it requires excessive contract administration to maintain the schedule and to achieve a successful outcome within the proposed cost.

Risk management is an enterprise-wide concept that covers strategies and planning in all aspects of a public entity's activities, including procurement. Risk management is a tool for identifying threats to successful procurements and managing them. The process of identifying, assessing, responding to, and monitoring/controlling risk are key ingredients in procurement planning.

CONCLUSION

Participation in the overall government planning process enables a public procurement officer to provide strategic services to user agencies. As that officer and the procurement office provide those types of services on their own initiative,

user agencies will recognize the importance of involving procurement professionals early in the procurement planning process.

ENDNOTES

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4. <https://www.nascio.org/#>
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7. https://obamawhitehouse.archives.gov/omb/procurement_strategic
8. <https://www.gsa.gov/acquisition/purchasing-programs/federal-strategic-sourcing-initiative-fssi>
9. See Federal Acquisition Regulation 52.233.19, *Availability of Funds for the Next Fiscal Year*, at: https://www.acquisition.gov/far/html/52_232.html#wp1152919
10. A copy of the Model Procurement Code, along with various versions of it including the Model Procurement Ordinance is available at: <http://apps.americanbar.org/dch/committee.cfm?com=PC500500>
11. See Federal Acquisition Regulation 16.102(c) at: https://www.acquisition.gov/far/html/Subpart%2016_1.html#wp1085495
12. <https://www.naspovaluepoint.org/revisiting-an-old-nemesis-cost-plus-a-percentage-of-cost-contracts/>
13. See R3-501.01. A copy of the Model Procurement Code, along with various versions of it including the Recommended Regulations,

- is available at: <http://apps.americanbar.org/dch/committee.cfm?com=PC500500>
14. See Federal Acquisition Regulation 16.102(a) at: https://www.acquisition.gov/far/html/Subpart%2016_1.html#wp1085495
 15. Nash, R.C., O'Brien, K.R., Schooner, S.L., *The Government Contracts Reference Book: a Comprehensive Guide to the Language of Procurement*. 2nd ed., George Washington Univ Government, (1998) as cited in The NIGP Dictionary at: <http://www.nigp.org/home/find-procurement-resources/dictionary-of-terms>
 16. For the web address, see Endnote 10.
 17. Subpart 16.1 is at the website noted in Endnote 10.
 18. See Federal Acquisition Regulation 16.102(a) at the web address in Endnote 10.
 19. See Endnote 11.
 20. See Endnote 11.
 21. <https://attorneygeneral.nd.gov/attorney-generals-office/manuals-state-and-local-government-agencies>
 22. <https://www.mass.gov/supplier-diversity-office>
 23. <http://www.mdot.maryland.gov/newMDOT/MBE/FAQs.html#1>
 24. Risk tools similar to the chart provided here are available on line by simply Googling "risk assessment tools."

CHAPTER 5: NON-CONSTRUCTION SPECIFICATIONS AND SCOPES OF WORK

RECOMMENDED BEST PRACTICES

- In preparing a specification, a public procurement officer's key duty is to provide service to the user agency; and that officer has a responsibility to be creative in finding resources to assist that agency in obtaining the right commodities and services.
- The central procurement office should develop guidelines allowing for instances in which supplier input into the solicitation process or in the preparation of initial specifications or scopes of work is useful, so that the user agencies and the central procurement office may obtain the benefits of supplier expertise without creating unfair bias or a conflict of interest. The use of supplier focus groups and pre-solicitation conferences should be encouraged.
- Specifications should be closely tailored to the appropriate level of use and quality to meet the user agency's needs, should emphasize performance rather than design, and should not recite features or quality levels that the user agency does not need.
- A specification should identify the essential characteristics of the item to be purchased.
- For commonly used commodities that are available *off the shelf*, the specification should recite the desired features of the commercial commodity being sought and not attempt to create an entire new specification. The best practice is for a procurement policy to prefer the purchase of commercial commodities over specifications that require that items be specially made. It should also stress functional and performance characteristics above design requirements in the preparation of specifications.
- Standardization of specifications is appropriate where user agencies frequently and repetitively purchase the same commodities and uniform performance and quality levels can be identified.
- To avoid favoritism to a particular supplier and increase competition, the use of a brand-name specification must include the words: *or equivalent*. To ensure that suppliers submitting an alternative to the brand-name commodity know the exact features of the brand-name commodity that make it the benchmark, it is a best practice for the specification to identify those critically necessary features significant to the specified brand.
- As a general rule, the specifications portion of a solicitation should be distinct from the other sections. Suppliers need to be able to easily identify what the state or local government seeks to buy. Mixing instructions or terms and conditions into the specifications hinders suppliers' clear understanding of what it is that the public entity is seeking.
- Specification writing is not strictly an exercise in finding the cheapest commodity or service on the market. It is a careful balance between factors related to suitability, performance and price, and overall cost effectiveness.
- Performance specifications are useful tools because they essentially ask the supplier to show that its commodity or services can meet benchmarks.

- In the absence of a law, the central procurement office should have a written policy stating that, when an agent or representative of a manufacturer or prospective bidder or offeror unofficially and significantly participates in the preparation of a specification, the procurement office will not consider bids or proposals submitted on that manufacturer's commodity.
- Procurement policies and procedures should provide for uniform formats of specification documents; that is, standard presentation of the elements, consistent types of item identifiers, and adequate reference to the kind and source of the commodity or service requirements.

The heart of the competitive source selection process is the specifications—the description in the solicitation that identifies for suppliers the characteristics of the commodity or service that the public entity wishes to buy. It is the critical statement of what the government seeks in order to meet its needs. This chapter discusses the general principles applicable to preparing those specifications.

For purposes of this discussion, the term *specification* is used in its broadest sense to include the terms *purchase description*, *purchase specification*, *purchase requirement*, *commercial item description*, *scope of work*, and *statement of work*. In practice, these terms may refer to different types of descriptions. For instance, The NIGP Dictionary uses the term *specification* to mean a description used within an invitation for bids, and the term *scope of work* to refer to a description contained within a request for proposals.¹

Whichever term is used, the principles used to draft specifications are the same, and authority needs to reside in the Chief Procurement Officer, either to produce them or oversee their production. This chapter focuses on those principles for commodities. Chapter 10 (*Contracting for Services*) provides specific guidance on the drafting of those descriptions for the purchase of services. Additionally, Chapter 11 (*Procurement of Construction and Related Services*) addresses the preparation of designs for seeking contractors to construct public infrastructure.

As a general rule, the specifications portion of a solicitation should be distinct from the other sections. Suppliers need to be able to identify easily what the state or local government seeks to buy. Mixing instructions or terms and conditions into the specifications hinders suppliers' clear understanding of what it is that the public entity is seeking.

OBJECTIVES OF THE PROCUREMENT AND THE SPECIFICATIONS

The development of specifications demands good communication between the public procurement officer and the user agency. For commonly used commercial commodities such as pens, paper towels, and copy paper, the procurement office can prepare specifications without significant input from the user agencies in developing the actual language of the specification.

However, it is important to obtain continuous feedback from users about how those commodities are working and whether user agencies or users are actually buying them once a contract is in place. Usage information is critical so that the public procurement officer has a *heads up* if specifications need to be adjusted for the next procurement. For instance, it is important to make sure that the paper towels described in the specification fit the various towel dispensers throughout the public entity's buildings.

For more complicated procurements, the first step in the process of developing specifications requires that the public procurement officer and representatives of the user agency work closely to determine the objective of the procurement. Issues that they might address are what the user agency's needs are, whether they are short term or long term, and whether the commodity is one related strictly to an internal need, or one that the public will be using as well.

In some instances, the user agency may not have considered the public procurement officer as a strategic partner in its initial planning process. Those procurements start off on the wrong foot and can result in the public procurement officer playing catch-up on what may have been months, or even years, of prior planning. It is critical to ensure that the public procurement officer is brought in early in the planning

process. Chapter 2 (*Procurement Leadership, Organization, and Value*) discusses this need for teamwork in more detail. Additionally, Chapter 20 (*Procurement of Information Technology*) outlines a team approach between public procurement officers and public information technology staff in the procurement of complex information technologies.

Some of the steps that the public procurement officer may take with user agencies to determine the objective of the procurement are:

- An analysis of the market, the competitive climate, and resources or research available on commodities and their performance, such as specifications from other public entities or associations like ASTM International²
- Identification of unique or atypical elements of the user agency's request
- Data gathering, including an understanding of the user agency's intended use for the item, how often it will use the item, and the quantity of the item needed
- An analysis to identify the acceptable level of performance; such as equipment speed, service performance standards, error levels, or quality of deliverables³
- An analysis of any outside requirements, such as federal Occupational Safety and Health Administration requirements, that may affect the user agency's request⁴
- An analysis of the tasks required to complete the specifications drafting process, including whether outside technical assistance is needed

Whether the drafting involves a commonly used commodity or service or something more complicated, specification writing is not strictly an exercise in finding the cheapest commodity or service on the market. It is a careful balance among factors related to suitability, performance and price, and overall cost effectiveness.

Specifications may eliminate some suppliers from a competitive procurement. The objective

of a sound specifications-drafting process is to find a balance between what the user believes that it needs and a fair expression of those needs that is not too restrictive for the marketplace.

MANAGEMENT OF SPECIFICATIONS

In order to find that balance, it is imperative that the drafting of specifications have a central manager. That central manager is the Chief Procurement Officer, whom the law should authorize to have overall management responsibility for specification development and oversight. Users often have a valid but different perspective since their day-to-day jobs involve implementing state and local government objectives that are unrelated to the procurement process. As the person who is tasked with ensuring that the goals of the procurement law are met, the Chief Procurement Officer must have ultimate responsibility for the soundness, openness, competitiveness, and suitability of specifications.

Exercising that authority requires a delicate balance between the primary service role that a public procurement officer plays to assist his or her user agency and users, and the responsibility that the officer has to ensure, for instance, that the user agency is not buying something simply because a supplier suggested it or that it is not buying something that patently exceeds the user agency's requirements. For the most part, the debate centers not on the statement of the type of commodity or service needed, but on the manner in which it is described; that is, the text of the specifications.

This is true even where the Chief Procurement Officer delegates procurement authority to a user agency procurement office. That office has the same duties as the Chief Procurement Officer in managing specifications. But the Chief Procurement Officer must retain oversight authority as part of the terms of the delegation. In doing that, he or she is a sounding board and

ultimate arbiter for user agency procurement officers who may find themselves at odds with their users.

The Recommended Regulations of the American Bar Association Model Procurement Code for State and Local Governments,⁵ Section R3-103.01, supports the need for this oversight authority, stating that the Chief Procurement Officer shall have authority to return a purchase requisition to a user agency when “the request exceeds agency needs” or “the quality requested is inconsistent with the [State’s] standards and usage.” In order that everyone within state or local government understands their appropriate roles in the drafting of specifications, the Chief Procurement Officer must establish and communicate—through policies and manuals—clear guidelines for that task.

TYPES OF SPECIFICATIONS

There are several types of specifications from which a public procurement officer may choose when drafting a specification for a competitive procurement. Some common examples are brand name specifications, brand-name-or-equal specifications, detailed design-type specifications, functional or performance specifications, and qualified commodity lists. These types of specifications are generally used to describe a commodity rather than a service.

It is common, however, to write performance specifications for services contracts. Additionally, services specifications can describe the type of equipment that the services contractor must have available. An example is a solicitation seeking printing services in which a particular type of printing equipment is identified through a brand-name-or-equal specification to show the functionality requested.⁶

A specification may include things other than a description of the commodity or service that the government wishes to buy. It may require the submission and testing of samples or

prototypes, the inspection of the supplier’s production site, custom or environmentally friendly packaging, or warranties that go beyond those that the manufacturer may normally give.

The range of items that state and local governments purchase necessitates the use of all types of specifications. In solicitations covering hundreds of items of laboratory supplies or automotive parts, a brand-name-or-equal specification may be the most appropriate. For a proprietary mechanical part where no other will fit, a brand name specification is necessary, with price competition solicited from as many dealers as possible. For gasoline, a performance specification may be necessary. For an x-ray machine or an air compressor, a combination design-performance specification may work well.

These are the tools of the trade for a public procurement officer. It is critical to the success of a public procurement program that the public procurement officer have the training, knowledge, and confidence to choose the most advantageous type of specifications necessary to meet user agency’s needs. The most commonly used specifications are described in the following paragraphs.

Brand Name Specification

The NIGP Dictionary of Procurement Terms defines a *brand name* specification as “a name, term, symbol, design, or any combination . . . used in specifications to describe a product by a unique identifier specific to a particular seller or manufacturer that distinguishes it from its competition.”⁷ There are legitimate circumstances when using this type of specification is appropriate. For instance, the original equipment manufacturer may be the only producer of a part, but it may not be the only supplier that carries the original manufacturer equipment item for sale, and thus may not be the only supplier from which a public agency can solicit a bid.

Since the use of this specification limits competition to a single commodity, it is the most restrictive.⁸ A public procurement officer should use this type of specification when it is clear that it is the only way to meet a user's need. To ensure that its use is appropriate, a law or rule/regulation should require that the Chief Procurement Officer determine in writing, in advance, the propriety of its use. Even where the use of a brand name specification is warranted, competition among multiple suppliers is often possible.

Brand-Name-or-Equal Specification

A brand-name-or-equal specification consists of one or more brand names, model numbers, or other commodity designations that identify, by way of example, the specific commodity of a particular manufacturer that has the characteristics of the item that the public entity is seeking. A solicitation using a brand-name-or-equal specification invites other brands or models substantially equivalent to those named to be considered for awards, with the public procurement officer reserving the right to determine equivalency.

To ensure that suppliers submitting an alternative to a brand name commodity know the exact features of the brand name commodity that make it the benchmark, it is a best practice that the specification identify those critically necessary features significant to the specified brand. For instance, it is not likely that the color of a brand of lawnmower is going to be critical to a user agency. However, there are other key features of a brand that could make it the standard, such as deck size, engine horsepower, or available warranty.

One practical tip about writing this type of specification is to include a statement that the designated brands are for reference purposes only, and not a statement of preference. Here is some sample language:

Any manufacturers' names, trade names, brand names, or catalog numbers used in the specification are for the purpose of establishing and describing general performance and quality levels. The references are not intended to be restrictive, and bids are invited on these and comparable brands or commodities of any manufacturer.

A good way to express to suppliers that they have the opportunity to submit an equivalent may be the use of a phrase in the specification such as *or equal*, or *approved equal*, or *similar in design, construction, and performance*. Some public entities refer to this type of specification as brand name or equivalent, instead of brand name or equal to better clarify that commodities of equivalent performance and quality levels will be considered. Brand-name-or-equal specifications invite commodity and price competition across the marketplace. They have a legitimate place in public procurement, but should be used only where the brand name describes an industry standard for which there are competitors. In fact, it is best, where practical, to specify three or more brand references.

Qualified Products List

The NIGP Dictionary defines a qualified products list (QPL) as follows:⁹

A list of products identified by manufacturers' names and model numbers that are the only items that meet the minimum specifications as determined by the using entity. These products are used when quality is such a critical factor and testing so lengthy or expensive that the entity wants to stay with proven products. The list is prepared by testing products, either in the lab or in daily use. Items may be added to the list by the supplier demonstrating their quality by meeting specifications that have been defined by the using entity.

During the competitive procurement in which it is used, the list that is generated restricts suppliers to offering only commodities on that list.

The criteria and the methods for establishing and maintaining a QPL vary widely for different types of commodities. Some items require more detailed benchmarking or testing than others and dictate that the public procurement officer have access to testing facilities.

Various commodities might be tested in different ways. For musical instruments, the procurement office may establish a committee of musicians to test different brands of an instrument according to certain procedures. In another circumstance, for an item of heavy construction equipment, that office may establish the performance level desired, and then conduct field tests of similar models from different manufacturers to determine which of them meets those performance requirements. In the case of padlocks, the procurement office may test a number of brands under controlled conditions and assess their performance. For ready-mixed paints, the office may use laboratory tests to accept or reject a brand.

The Chief Procurement Officer should establish policies and procedures specifying how the qualification process works. This includes ensuring that the procurement office announces that it is establishing a QPL and the procedures for suppliers to submit their commodities. The announcement must also advise suppliers of the qualifications of the commodities sought and the means used to evaluate the commodities submitted. It should also advise suppliers that, if they do not participate by submitting commodities to qualify, they will not have the opportunity to do so until the procurement office establishes a new QPL in the future.

Using a QPL eliminates the need for samples or testing under a solicitation issued to purchase the types of commodities that have prequalified. Instead, the public procurement officer

may make an award promptly since the acceptability or comparative rating of commodities is done before the solicitation is issued. Subpart 9.2 of the Federal Acquisition Regulation—the body of regulations that implement the United States government's procurement system—spells out how the QPL process works within that system.¹⁰

To avoid a QPL process that leads to marginal levels of quality, a best practice is for the qualifications procedures to include, where appropriate for the commodity, qualitative ratings or test scores that are tied to prices. For example, a QPL may require a truck tire to pass a use test of a minimum average of 25,000 miles to be qualified. If tests on the six brands of tires submitted pass the tests and average 25,000; 26,000; 29,000; 30,000; 32,000; and 36,000 miles, the public procurement officer may determine the lowest average cost per mile.

This qualitative or numerical test score comparison to price is critical for assuring the best use of a QPL. Since QPLs focus on commodities already on the market, they do not encourage or take advantage of innovation unless they use those performance ratings as criteria for qualification and contract award.

The actual samples and testing results have a life beyond the establishment of the QPL, and the public procurement officer should retain them. That official may use them as a contract standard so that he or she may enforce quality if a contractor subsequently delivers questionable commodities. The need for enforceability results not only from a concern over receiving substandard commodities. At times, manufacturers modify the quality of a commodity without changing its model number or other designation. The commodity may still be listed as acceptable, though it may no longer meet the specification. The public procurement officer with the sample in hand has a formidable tool in enforcing the quality level that the contract specifies.

Design Specification

Design specifications describe dimensional and other physical requirements of the item to be purchased. *Design* indicates that the specification concentrates on how a commodity is to be fabricated or constructed. It is the most traditional kind of specification, having been used historically in public contracting for buildings, highways, and other public construction. It represents the kind of thinking in which architects and engineers have been trained. It is used when a structure or commodity has to be specifically made to meet the specific need.

Additionally, large-scale technology systems require a unique set of specifications since those systems do not exist in a commercial, off-the-shelf form to meet the specific needs of a state or local government. Because of the high cost of a major construction or enterprise technology system project, it is generally the case that a public entity must ask its legislative body—a state legislature or city council, for instance—to appropriate funds for that specific project.

Consequently, the public entity must estimate that project's cost in order to request the funds. A project design provides the basis for calculating the estimate. For large technology systems, this becomes a problem. The rapid pace of changing technology creates a dilemma since the slow nature of the legislative funding process can make a design obsolete before the procurement gets off of the ground.

Detailed design specifications frequently have precise characteristics that unnecessarily limit competition. Unless the specification seeks a custom-produced item, it can be extremely difficult to draft design specifications without being unduly restrictive. Design specifications may also reflect the status quo and lag behind the state of the art, preventing consideration of the latest improvements in commodities.

Since design specifications for commodities do not accommodate rapidly changing technology and are poorly suited for the purchase of many commercial commodities, a public procurement officer should use them sparingly. In most cases, it is far better to use a performance specification alone or combined with a design specification so that suppliers select their best commodity for the functionality required.

Performance Specification

Performance specifications state the function that a user agency wishes to achieve. They do not commit the public purchaser to a set design or commodity that will presumably meet the required functionality. Instead, the specification states what the user agency needs the commodity to do and asks the supplier to demonstrate that its commodity qualifies.

A performance or functional specification is less concerned about how a commodity is made and more concerned about how well it performs, and at what cost. In contrast to the design approach, performance specifications afford the manufacturer or supplier sizable latitude in how to accomplish the end purpose.

The use of performance specifications is not limited to the purchase of commodities. They are also critical in services contracts. The best practice for a public procurement officer writing a specification for services is to establish critical minimum levels of service to which a supplier must commit in the proposal it submits. Those minimum levels become a key part of the contract for services and provide the most valuable tool for the public procurement officer in measuring contract performance. Chapter 10 (*Contracting for Services*) discusses this in more detail.

The examples that follow illustrate the use of performance specifications for services. A solicitation seeking services to administer a public agency's employee health insurance program

may require that the supplier agree to respond to all telephone calls from employees within 24 hours, and to generate no more than three employee complaints per quarter. A solicitation requesting janitorial services may mandate that the supplier commit to vacuuming offices three times per week, and generate no more than one complaint monthly about breakage. For more information about contracting for services contracts management, see Chapter 10 (*Contracting for Services*), Chapter 13 (*Quality Assurance*), and Chapter 14 (*Contract Management and Contract Administration*).

Performance specifications are not new. Dated December 23, 1907, Signal Corps Specification No. 486: *Advertisement and Specification for a Heavier-Than-Air Flying Machine* was almost entirely a performance description.¹¹ Materials and design were left largely to the bidders, while performance requirements listed such things as takeoff and landing in a specified distance and on specified surfaces. The Wright Brothers, Dayton, Ohio, was the successful bidder at a contract price of \$25,000.00 for delivery within 200 days to Fort Meyer, Virginia, with the package to be marked Order 3619.

Writing competitive performance specifications and evaluating bids or proposals submitted in response requires a different approach than one geared more toward design. For design specifications, the goal is to look for similarities and equivalencies in commodities in order to establish common denominators, and largely to ignore commodity differences. Performance specifications, on the other hand, accept the similarities, but seek to identify differences that provide equal or better performance at lower costs.

Another element of a performance specification focuses on ownership costs as a more accurate basis than initial price for achieving economy. Chapter 6 (*Sustainable Procurement Considerations and Strategies*) and Chapter 9 (*Bid and Proposal Evaluation and Award*) discuss these types of cost analyses.

Performance specifications are useful tools because they essentially ask the supplier to show that its commodity or services can meet benchmarks. Those benchmarks make contract management easier. The central procurement office's policies and guidelines should encourage public procurement officers to start their analysis of what type of specification to use by focusing on performance specifications first.

Minimal Specifications Under the Best Value Procurement Approach

There is a source selection approach that generally is conducted as a type of competitive sealed proposals called best value procurement or performance information procurement system. Chapter 7 (*Competition: Solicitations and Methods*) and Chapter 20 (*Procurement of Information Technology*) provide descriptions of this approach. Under this approach, the specifications are very minimal. The offerors are expected to provide proposals that the solicitation often limits to fewer than ten pages.

SAMPLES AND TECHNICAL DATA

Samples and commodity data questionnaires are valuable aids in the specification process. For many commodities, the comparison and testing of samples can effectively supplement a brief commodity description that is the basis for a specification.

This is how the process generally works. The public procurement officer requesting samples under a solicitation subjects them to comparisons such as visual inspection, taste testing, or chemical and physical laboratory tests. The comparison may be conducted blindly, without identification of the particular brands being tested, to ensure objectivity. Data and relative performance results are documented. Then the public procurement officer, along with a team of users, examines that documentation and

determines the best commodity on a price/performance, cost-effective basis.

Examples of commodities for which this approach is useful are waxes and floor finishes, paints, disinfectants and germicides, file cabinets, surgical dressings, tires, cleaning agents, classroom furniture, and art materials, to name a few. As mentioned earlier, it is important to keep samples that are tested or reviewed to compare them to what the contractor actually supplies.

A solicitation may require suppliers to submit product questionnaires and call for technical data to be furnished to enhance the public entity's understanding of its own solicitation's specifications. In many cases, the product questionnaires and requested data may substitute for the submission of samples.

Prototypes may also be of value in assuring compliance and ultimate satisfaction with a commodity. The NIGP Dictionary describes a prototype as "an initial version or working model of a new commodity or invention. Usually constructed and tested to evaluate the feasibility of a design and to identify problems that need to be corrected." Where a solicitation requires the production and submission of a prototype, it stipulates that the successful supplier awarded the contract will be required to submit that prototype before the government orders any of the commodity.

In the purchase of truck chassis or band uniforms, for example, final award of a contract may be contingent upon the successful supplier producing a model that demonstrates compliance with the specification's requirements. The process allows problems to be resolved before the successful supplier manufactures and delivers the units. If the public procurement officer and the successful supplier do not agree on the preproduction sample, the solicitation and contract should provide that the public procurement officer may cancel the contract, perhaps paying

an amount for the prototype, and then contract with another supplier that competed for the same contract. Chapter 13 (*Quality Assurance*) discusses testing in more detail.

STANDARDIZATION OF SPECIFICATIONS

Prior versions of the NIGP Dictionary defined a *standard specification* as one "that is to be used for all or most purchases of an item. . . ." Today, that dictionary no longer offers any definition of that term but provides instead definitions of two related terms:

- **Standardization of Specifications**—*The process of establishing a single specification for an item, or range of items.*
- **Standards (Standardization) Committee**—*Generally, an internal committee consisting of cross-functional representation including procurement, end users, and other internal stakeholders impacted by the decisions of the committee. Examples of key functions and activities may include: Developing [sic] standards through a simplification process for products and services, establish specifications, review items to determine which items should be incorporated into a standards program, approve products for the Qualified Products List.*

Standardization of specifications is appropriate where user agencies frequently and repetitively purchase the same commodities, and where uniform performance and quality levels can be identified. It reduces the varieties of items bought, simplifies inventories, facilitates the consolidation of requirements into large volume bids and contracts, and eliminates duplicative specification writing.

Law should assign the responsibility for developing a standardization program to the Chief Procurement Officer in order to ensure that

all appropriate users and relevant parties are involved. The ability of a standardization program to meet its fundamental objectives, which is to achieve uniformity and keep current, depends upon flexibility—both in how it operates and in how quickly the program can develop the specifications. To reduce rigidity and obsolescence, standard specifications should incorporate performance standards wherever practical. Standardization boards and standing specification committees should avoid becoming institutionalized, too comfortable with the status quo, and inflexible. Ad hoc committees and supplier input and participation can bring fresh approaches to the process.

A central procurement office that standardizes specifications should regularly reexamine its program to ensure that it accommodates and is readily responsive to new concepts, improved commodities, and advanced applications. This calls for a focus on at least five aspects of the program:

- Identifying items for which standards currently are relatively stable, such as meats, canned fruits and vegetables, and various building materials
- Discontinuing standard specifications for items where such specifications are no longer needed or it has become impractical to update and maintain them
- Substituting, wherever possible, performance requirements for dimensional and other design-type details, especially in the case of items for which manufacturing standards tend to be unstable
- Providing a highly expeditious means of reviewing and modifying a standard specification for a current procurement
- Expanding the advisory role and ad hoc participation of user agency personnel throughout the standards process

PROCEDURES FOR DEVELOPING SPECIFICATIONS

The ability to develop specifications is a critical skill for any public procurement officer, but can be difficult and time consuming. This section will present suggestions for drafting certain types of specifications.

Identifying the User Agency's Needs

This chapter has discussed the importance of investing the overall authority in the Chief Procurement Officer to determine specifications for a competition. That principle ensures that the decision is made by someone whose duties under the procurement law are to ensure that there is an appropriate level of competition in light of the user's needs. However, it is just as critical that the public procurement officer, whether from the central office or from a user agency, maintains through his or her own initiative good communication with the user agencies. The public procurement officer's responsibility is to serve the state or local government customer within the framework that the procurement law establishes.

Chapter 14 (*Contract Management and Contract Administration*) discusses the importance of using steering or user committees in the administration of some contracts. Good contract management also requires that there be mechanisms in place for users to report supplier deficiencies to a public procurement officer. Chapter 13 (*Quality Assurance*) offers some guidance about identifying deficiencies early and resolving them. Another means of tracking whether a contract is working is through data showing purchasing patterns, that is, that the contract is being used.

These contract management tools and the information that they generate become critical to drafting specifications for the next competition for the repurchase of those or similar

items. For complicated items, such as technology integration or health insurance coverage, another important factor in preparing reliable specifications is ensuring that the public procurement officer is part of the strategic planning for the purchase. Procurement planning with users is discussed further in Chapter 4 (*Strategies and Plans*).

For a procurement that aims at a specific user's need, it is important for the public procurement officer to request that the user express its requirements in terms of functional or performance requirements. The public procurement officer should also design questionnaires for the user agencies to complete detailing their use of those items. The thrust of the questionnaires should be on how the requested commodity or service is to be used, and the results expected.

This planning helps to accomplish two important objectives: diverting the attention of user agency program personnel from a particular brand preference by directing it to describe a purpose for which the item is required; and providing the central procurement office with the kind of information needed to invite broader competition from prospective bidders and offerors and establish valid criteria for evaluating responses.

Aids in Preparing Specifications

As noted earlier, it is not the purpose or role of the central procurement office to write all specifications on its own. The central procurement office, public procurement officers in user agencies, and in some cases the user agencies themselves must assist in preparing specifications.

Here are some examples of resources that are available to the public procurement officer:

- Commodity information from industry
- Standards and test information from national professional societies
- Example specification information from other federal, state, and local governments,

whether from the entity itself or through online database services that aggregate this type of data across multiple entities

- Knowledge and expertise from personnel of the user agencies
- Specification assistance for complex items through services contracts to assist in drafting specifications (and possible assessment and recommendations in the award process)

A procurement office staff must establish and maintain open communications with these resources in a manner that systematically gathers, culls, classifies, and makes use of the information available.

In using any resources or evaluating information, the public procurement officer is obligated to exercise his or her professional judgment, and not be a passive recipient of the data provided. As emphasized in Chapter 2 (*Procurement Leadership, Organization, and Value*) a key duty of the public procurement officer is to provide service to the user agency; and that officer has a responsibility to be creative in finding resources to assist that agency in locating commodities and services.

Once the public procurement officer has an initial understanding of the user's needs, he or she should make a plan (such as conducting market research) to investigate the resources available. The public procurement officer should only begin writing the specification once the information gathered has been thoroughly weighed, analyzed, discussed, and vetted with the user agency or agencies.

Specification advisory committees or focus groups involving various commodity areas and consisting primarily of knowledgeable program people from various user agencies are a necessary and invaluable part of a successful specification development process. For some critical contracts, these committees should stay intact beyond the contract award process to assist the public procurement officer in monitoring

contract compliance and in making decisions (for instance, on renewal price increases).

The expertise and testing capabilities of colleges and universities, especially technical institutions, are particularly useful as a resource for specifications. Outside the state and local government community there are many industrial trade associations and independent research and testing organizations that can supply up-to-date technical information on a regular basis across a full range of commodity areas.

Direct Supplier Marketing

The marketing programs of many suppliers are geared to sales efforts made directly to user agencies rather than to or through the central procurement office. In addition to creating demand for needs that may not exist and stimulating unwarranted preferences for particular brands or suppliers, the practice frequently may result in a supplier improperly drafting or writing a specification.

In the absence of a law, the central procurement office should have a written policy stating that, where an agent or representative of a manufacturer or prospective bidder or offeror unofficially and significantly participates in the preparation of a specification, a procurement office will not consider bids or proposals submitted on that manufacturer's commodity. It should further state that a bid or proposal will not be accepted or considered from that supplier under a solicitation based on those specifications.

While information and advice are needed from industry and suppliers, a supplier who drafts specifications unofficially for the user agencies prejudices the rights of other prospective competitors and the public. Acceptance of bids or proposals from suppliers that have had significant input into specifications raises the risk of protests and litigation in which the supplier's *unofficial role* in specification development is rightfully revealed. That, in turn, reduces

confidence in the procurement process by the public and legislative bodies.

There can be situations where the public procurement officer seeks out supplier input or where a supplier is under contract to provide a needs assessment or a design. In those cases, the issue concerning whether the supplier may participate in a competitive procurement that may follow is not clear cut. There needs to be balance to ensure fairness.

If the public entity issues a solicitation seeking a contractor for the first phase of a project that involves preparing data or specifications to be used in a follow-on competitive procurement, the solicitation should advise prospective bidders and offerors that they may be barred from competing on future phases of the project. Note that the Common Rule relating to procurement using federal funds, which is discussed more thoroughly at the end of this chapter, precludes any outside party assisting with drafting specifications from competing for the procurement using those specifications.

It is important to note that public chiefs of information technology believe, with valid reasoning, that a complete arms' length from suppliers makes it very difficult to quickly identify new technologies on the market. Chapter 20 (*Procurement of Information Technology*) provides further insights into this issue.

Commercial Product Preference

The best practice is for a procurement policy to prefer the purchase of commercial commodities over specifications that require items to be specially made. It should also stress functional and performance characteristics above design requirements in the preparation of specifications. Procurement policies and procedures should provide for uniform formats of specification documents; that is, standard presentation of the elements, consistent types of item identifiers, and adequate reference to the kind and source of the commodity or service requirements.

Alternatives and Optional Items

Alternatives and optional items in a solicitation describe commodities or services that are not the main object of the solicitation. Specifically, they describe items that the user agency may buy in addition to the item that it definitely intends to buy.

Occasionally, suppliers offer their own alternatives or optional items in their bids or proposals, even though the solicitation has not requested them. These are problematic. One of the foundations of the public competitive process is that competing suppliers have a level playing field. When suppliers unilaterally try to sweeten the pot by offering different terms than those requested, the user agency's consideration of those items gives an advantage to the offering supplier that competing suppliers do not have. The best practice is for the public procurement officer not to evaluate those items. Any alternatives or options that the user agency may wish to consider should be clearly requested in the solicitation.

Alternate specifications are sometimes needed in the public interest to compare costs or to keep an award within the funds available. They can be used to obtain wider competition (alternative commodities), quicker deliveries (alternative delivery requirements), and other advantages.

Optional items will have the same effect. Optional items are features that may be adapted to a piece of basic equipment such as an automobile or communication product in order to enhance performance or capacity. They may be needed under certain circumstances or may represent only luxury accessories. Optional items can significantly affect the total price of the commodity.

To ensure that the use of alternatives and options is not abused, a public procurement officer should not permit a user to make decisions

concerning how alternatives or optional items will be evaluated until bids or proposals are open or are being evaluated for award. Careful planning and proper structuring of specifications and solicitations are critical to the successful inclusion of alternates and the purchase of optional items.

A WORD ABOUT SPECIFICATION REQUIREMENTS WHEN USING FEDERAL FUNDS

In 2013, the federal government issued the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 Code of Federal Regulations Part 200 (Common Rule). Any non-federal public entity whose procurements are funded with federal monies must comply with the Common Rule.

The Common Rule requires the precise, accurate, and open process for developing specifications that this chapter discusses. For instance, the Common Rule states:¹²

(c) The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations:

(1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product, or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is

impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equivalent" description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and (2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(d) The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

The Common Rule also states that outside parties assisting with procurements, including drafting specifications, "must be excluded from competing for such procurements."¹³

The Common Rule reflects the best practices for all procurements relating to drafting specifications, whether or not federal funds are paying for the purchase.

CONCLUSION

Specifications are the lifeblood of the procurement process. They must be broad enough to allow for fair competition, yet be precise enough for the public entity to acquire the quality commodities and services it needs for its essential programs. Balanced specifications require thorough planning and communication between the public procurement officer and all stakeholders involved, and function best when they are the result of a partnership between the public

procurement officer and the user, formed from the moment that the user identifies its need.

ENDNOTES

1. Access to The Institute for Public Procurement: NIGP Dictionary is available at: <http://www.nigp.org/home/find-procurement-resources/dictionary-of-terms>
2. The ASTM was formerly known as the American Society for Testing and Materials. See: <https://www.astm.org/>
3. The NIGP Dictionary defines *deliverables* as: "1. Expected work product as defined in a contract . . . 3. The completion of a milestone or the accomplishment of a task that can be measured and verified, and may be a unit by which a contractor or consultant may be paid."
4. <https://www.osha.gov/>
5. A copy of the Model Procurement Code along with the Recommended Regulations is available at: <http://apps.americanbar.org/dch/committee.cfm?com=PC500500>
6. Designs for construction projects may also include brand name or brand-name-or-equal specifications in them relating to equipment that the project design requires to be installed, such as heating/air conditioning/ventilation systems or windows. The same cautions that this chapter discusses about using them for commodity procurements applies to their use in construction procurements as well.
7. See Endnote 1.
8. The Common Rule, the set of regulations establishing procurement and accounting requirements for the expenditure of federal funds by non-federal entities, explicitly states that a brand name specification restricts competition. See 2 Code of Federal Regulations §200.319(2)(6). The Common Rule is discussed at the end of this chapter.

9. See Endnote 1.
10. https://www.acquisition.gov/far/html/Subpart%209_2.html
11. The Wright Story. (n.d.). Retrieved September 1, 2018, from http://www.wright-brothers.org/History_Wing/Wright_Story/Showing_the_World/Back_in_Air/Signal_Corps_Spec.htm
12. See 2 Code of Federal Regulations §200.319, *Competition*, at: <https://www.gpo.gov/fdsys/pkg/CFR-2017-title2-vol1/pdf/CFR-2017-title2-vol1-part200.pdf>
13. 2 CFR §200.319(a). The regulation may be found at: <https://www.gpo.gov/fdsys/pkg/CFR-2017-title2-vol1/pdf/CFR-2017-title2-vol1-part200.pdf>

CHAPTER 6: SUSTAINABLE PROCUREMENT CONSIDERATIONS AND STRATEGIES

RECOMMENDED BEST PRACTICES

- Sustainable procurement programs should be developed with the cooperation and input from persons representing a wide range of users, using agencies, organizations that certify commodities and services as sustainable, and suppliers—all of which have ideas to contribute.
- That broad input in the development of the program will help provide support from both inside and outside the public entity.
- Foundational to a program is a policy that clearly outlines the program's purpose, legal authority establishing that policy, the commodities and services covered, and the external certifications and other verification tools used to make it credible. The policy should also identify the roles and responsibilities of the staff responsible for implementing it and the conditions under which waivers from the program will be granted.
- The benefits and effectiveness of the program must be tracked and measured, including the use of techniques such as total cost of ownership and life cycle costing. Available online calculators should be utilized to assist with demonstrating benefits.
- Reporting on the public entity's usage of sustainable commodities and services is critical, either through expenditure information if available or, if not, through reports that contractors provide.

This chapter offers insights and provides guidance regarding the role of public procurement in implementing state and local government sustainability programs. This chapter also provides tools and resources to assist public procurement officers in carrying out sustainability mandates. The NASPO website contains several helpful resources; including an interactive map of sustainable purchasing programs across the country.¹ NASPO's 2018 Survey of State Practices identifies states that have implemented green purchasing programs or initiatives, as seen in Figure 6.1.

The focus of this chapter is on commodities and services. Sustainability programs for construction projects are discussed in Chapter 11 (*Procurement of Construction and Related Services*).

OVERVIEW OF SUSTAINABLE PROCUREMENT

Definitions of Key Terms

To begin this chapter's discussion, it is important to define key terms. Over recent decades, environmental procurement has evolved to become part of what is known as sustainable procurement. As may be seen in the following definitions, the term *sustainable procurement* is broader than the term *environmental procurement*. Sustainable procurement includes environmentally friendly procurement along with social and economic factors. For clarity, both of these terms are defined below.

The NIGP Dictionary defines *sustainable procurement* as:

- *Procurement and investment process that takes into account the economic,*

FIGURE 6.1 | GREEN PURCHASING POLICIES, CONTRACTS, AND PROGRAMS

Has your state implemented any of the following green purchasing programs or initiatives?
Please select all that apply.



Total of respondents: 48 Statistics based number of response: 32 Filtered: 0 Skipped: 16

*environmental, and social impacts of an entity's spending.*²

In comparison, Martin and Miller (2006) define *environmentally preferable procurement* as: *an attempt to address environmental challenges by taking advantage of the government's vast procurement power to create strong markets for environmentally friendly products and services. Procurement of commodities and services in a way that does not harm the environment; also known as green procurement*³ (as cited in the NIGP dictionary).

For the purposes of this chapter, the broader term *sustainable procurement* will be used.

The language of the law or other state or local government mandate, such as an executive order that creates a program, will determine whether the program is strictly an environmentally friendly one or instead is one of sustainability.

Sustainable Commodities and Services

State and local governments that mandate the purchase of sustainable commodities and services have determined that doing so provides environmental, social, and economic benefits. That determination also recognizes that sustainability programs protect human health and the environment over the course of the commodity or service life cycle, ranging from extraction of raw materials to end-of-life disposal of a commodity. A sustainable service or commodity has a lesser or reduced negative effect on human health and the environment when compared with competing commodities or services. Examples include commodities that:

- Conserve energy or water
- Contain recycled or reused materials
- Minimize waste
- Consist of fewer toxic substances

- Reduce the amount of toxic substances disposed of or consumed
- Lessen the impact on public health
- Protect open space
- Are socially responsible

Sustainability Criteria Focused on Social Considerations

Institutional—public and private—purchasers are increasingly interested in procuring commodities that are not only environmentally preferable but have also been produced in a socially responsible manner. In a global supply chain, sourcing decisions that the public procurement officer must make can affect individual lives and communities far from the point of purchase.

Transparency throughout supply chains is still an aspiration and not a reality. Pressure is being applied to supply chains by stakeholders such as investors, customers, employees, and citizens who are increasingly expecting that public and private entities take steps to ensure that their procurement decisions do not enable or promote human rights abuses.

It is a challenge to learn what questions to ask suppliers regarding how they address negative labor and human rights impacts and to determine what constitutes credible supporting documentation from a supplier. Though additional work is still required in this area, new resources and case studies are available to state and local governments interested in learning more about how to address these issues. An example is the Green Electronics Council's *Purchaser Guide for Addressing Labor and Human Rights Impacts in IT Procurement*.⁴ Several other resources that highlight the application of socially responsible procurement tools are available on the websites of the Sustainable Purchasing Leadership Council,⁵ the International Labour Organization,⁶ and the Responsible Business Alliance.⁷

PUBLIC POLICY REASONS FOR THE PROCUREMENT OF SUSTAINABLE COMMODITIES AND SERVICES

Laws and executive orders may mandate sustainable procurement. In many cases, procurement of sustainable services and commodities is simply a good practice. Purchasing sustainable commodities and services frequently saves money or reduces costs, promotes the more efficient use of government resources, and protects the health and well-being of vulnerable populations who work in or visit government or government contractor facilities. Sustainable procurement programs may also strengthen relationships between a state or local government and members of the community and create new opportunities for partnerships with suppliers. Finally, the buying power of governments can convince manufacturers and service providers to produce or offer reasonably priced sustainable commodities or services that do less harm to public health and the environment.

Some critics of sustainable procurement assert that sustainable commodities are more expensive than their non-sustainable counterparts. While this is true in some instances, many sustainable commodities are either cost neutral or save money when considering the total cost of using or owning them. They often have a short payback period, after which they provide a significant ongoing cost savings in the form of reduced maintenance, operation, and disposal expenses. A simple example is a ball point pen that may be more expensive, but which lasts significantly longer than a lower-priced pen.

Sustainable commodities are becoming increasingly cost competitive in high-volume markets such as information technology, janitorial supplies, personal care products, paints, lighting, and appliances. Beyond the initial purchase cost, savings can be realized through reductions in the purchase of protective equipment used with hazardous materials, in energy use

and in non-recyclable waste. Sustainable commodities also offer the added value of reducing toxins introduced into the environment through manufacturing, use, or both.

Some examples of direct and indirect cost-saving opportunities that the purchase of sustainable commodities offers include reductions in:

- Material and energy consumption
- Operational costs through energy savings from more efficient equipment
- Disposal costs of hazardous and solid waste
- Repair and replacement costs when using more durable and repairable equipment
- Employee safety and health concerns
- Hazardous materials management costs through the use of less toxic commodities

CREATING A SUSTAINABLE PROCUREMENT PROGRAM

When developing a sustainable procurement program, success is predicated upon the public entity's commitment to involve key people and to create benchmarks and reporting that make user agencies and suppliers accountable for sustainable procurement goals. This section outlines core questions, considerations, and steps that state and local governments may take when laying the foundation for a procurement program focused on sustainability.

Participation of Key Stakeholders

Like all purchases, procuring sustainable commodities and services relies upon cooperation and input from a host of both internal and external stakeholders. Key participants to consider are:

- **Public procurement officers**—They play a prominent role in the development of a sustainable procurement program. They may coordinate procurements among various user agencies within a state or

local government to optimize supply chain performance and cost efficiency. Public procurement officers frequently work with user agency personnel to build sustainable specifications. Finally, they can encourage current suppliers or new ones to improve the sustainable performance of their operations and of their commodities or services.

- **Public entity program managers and other user agency personnel**—They play a large role in determining the specifications for commodities and services they need, and frequently own the budget that will pay for those commodities and services. These individuals look to the public procurement officer to obtain critical information and education regarding sustainable commodities and services.
- **Manufacturers, suppliers, and contractors**—This group can be encouraged to change the design, manufacturing processes, and supply chain of current commodities or services to minimize environmental impacts. Suppliers may provide feedback regarding new and innovative approaches to sustainable commodities and services. Contractors that provide required reporting on the types of sustainable commodities and services purchased by a public entity, the volumes purchased, and the dollars spent offer significant data for measuring the success of the program and for future planning.
- **Environmental or sustainable subject matter experts**—These persons within state and local governments are subject matter experts on priorities and strategies, and may advise on environmental laws that must be met through the procurement process. They may assist user agencies in identifying and assessing more sustainable alternatives to currently used commodities and services.
- **External organization certifiers and standard setters**—These outside organizations play a role in the process since they provide standards, certifications, and

government labeling programs (called *eco labeling* or *ecolabels*) to show that the commodity is manufactured according to recognized environmental standards.

It is also essential that there be a person designated as the sustainable procurement program advocate to lead the effort, most likely from the stakeholder group. The law establishing the program may specify the user agency tapped to lead the program, which will narrow the search for the right person to be that advocate. Whether the law provides that guidance or not, the person designated as the advocate must have significant leadership skills as well as the backing of the state or local government's executives.

Building Stakeholder and Executive Buy-In

When enlisting the support of the stakeholders, the program advocate must recognize that sustainability is one of a multitude of topics vying for stakeholders' attention. As part of the effort to launch the program successfully, he or she will need to educate and advocate to the stakeholders about why they should invest their time and energy into establishing and maintaining a sustainable procurement program.

Some tips for preparing to engage with sustainable procurement stakeholders include:

- Consider how sustainability requirements for a commodity or service might overlap with existing laws, rules/regulations, policies, and strategic goals of the public entity's internal programs and users. If none exist, create a plan that details the need for the resources needed to implement the program.
- Quantify benefits whenever possible. Use benefit calculation tools that highlight program effects such as reduced or eliminated environmental impact, enhanced benefits to human health, and realization of cost savings. Benefit calculation tools are discussed later in this chapter.

- Emphasize the value that a sustainable procurement program can add to the public entity's brand and reputation in the community.

Educating Versus Mandating

Sustainable procurement programs effect change through a combination of laws and efforts that encourage state and local government personnel to implement sustainability directives.

While legislation mandating the procurement of a specific sustainable service or commodity may be the most effective way of jumpstarting or growing sustainable procurement programs, enacting a law can be a long process and difficult to achieve. At the state and local government level, the issuance of executive orders by governors, mayors, and others is likely to be a more rapid method and is easier to keep current. Executive orders do not have the same legal weight that a law does but they do provide high-level directives, guidance, and support that serve as a foundation for initiating action.

The success of a sustainable procurement program can be attributed in part to comprehensive education and outreach to public procurement officers within the state or local government. That effort should include information about the sustainability issues associated with specific commodities and services, detailing both economic and sustainability benefits that can be achieved, and providing easily available tools. While this process of educating and reaching out may take more time than imposing a mandate, the program tends to do a better job of engaging both the user agencies within the state or local government and the suppliers into the process by providing them with a sense of ownership. Once the benefits are clearly understood and the performance of the sustainable commodity or service demonstrated, sustainable procurement becomes the preferable choice.

DRAFTING A POLICY FOR A SUSTAINABLE PROCUREMENT PROGRAM

Any sustainable procurement program should be codified in a single document. Many state and local governments maintain sustainable procurement policies and they are often available online.

Environmental Factors and Other Sustainable Considerations

A key step in establishing a sustainable procurement program policy is to identify the environmental or societal *ill* that the program seeks to ameliorate in preparing and using specifications for sustainable commodities and services. Though public entities may choose to emphasize or focus upon specific sustainability impacts, policies often address some or all of the following sustainable considerations:

- Pollutant releases
- Toxicity, especially the use of or release of persistent bio-accumulative toxic chemicals, carcinogens, and reproductive and developmental toxins
- Waste generation and waste minimization
- Disposal considerations such as reusability, recyclability, or compostability
- Greenhouse gas emissions
- Energy consumption, energy efficiency, and the use of renewable energy
- Water consumption
- Depletion of natural resources
- Impacts on biodiversity
- Environmental practices that manufacturers and suppliers have incorporated into their production processes or operations
- Minimized packaging
- Social responsibility, including efforts to address labor rights, human rights, and community engagement across the life cycle of the commodity

Writing a Sustainable Procurement Policy

The following points identify and describe important elements that should be included in most policies:

- **Clear statement of purpose**—Most policies begin with a statement setting out the reasons that the state or local government is developing a sustainable procurement policy, a brief statement establishing the principles of the program, and identification of the internal stakeholders that the policy will involve and affect. This statement should always address environmental and sustainability considerations as previously described, which may include social factors such as sweatshop labor or local sourcing options.
- **Legal authority and relevant laws, regulations, and policies**—A policy will have added weight and authority if it is supported by existing laws, executive orders, rules/regulations, and mandates already in effect in a state and local government. References in the policy to relevant laws and rules/regulations will provide an important context and also stimulate the user agencies' efforts to comply with the policy's directives.
- **External standards, certifications, and ecolabels for commodities and services**—External standards, certifications, and ecolabels are a key element of any sustainable procurement policy. They are discussed later in this chapter. Use of these tools allows a state and local government to easily identify the important sustainable attributes of a commodity or service, then substantiate and verify them. Additional information about the importance of external sustainability standards appears later in this chapter in the section entitled *Understanding External Sustainability Standards*. Policies should include references to any specific external

standards or certifications that a state or local government recognizes.

Due to the wide range of the use of ecolabels and the ongoing proliferation of "green" marketing claims, policies should also include general guidelines and common criteria that standards, certifications, and ecolabels must meet to be deemed credible. The United States Federal Trade Commission publishes *Green Guides* to provide guidance on "green" claims.⁸ Similarly, many policies require that credible standards, certifications, and ecolabels be developed in accordance with resources such as the International Organization for Standards (ISO) Standard 14020:2000, *Environment Labels and Declarations—General Principles*,⁹ United States Office of Management and Budget Circular A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*,¹⁰ or the ISEAL Alliance, *Credible Sustainability Standards*:¹¹

- **Identifying the types of commodities and services to target**—Although the goal should be a policy that establishes sustainable criteria for almost every type of commodity or service, prioritizing those routinely used or representing large expenditures is important at the outset of the program. Examples of common high-volume commodity categories might include: appliances, automobiles, cleaning products, computers, copier/multifunctional devices, food, furniture, industrial supplies, landscaping, lighting, mobile phones, office supplies, paper, playground equipment, printing services, transportation products, and servers.
- **A description of roles and responsibilities**—The policy should define the roles and responsibilities of all program stakeholders. This facilitates implementation of the policy and avoids confusion as the policy is implemented. Depending on how a procurement office is structured and its

relationship to the sustainability program stakeholders, it is important to spell out the process by which sustainable specifications are developed and enforced, the scope of the application of sustainable specifications, available training and other tools, and the means by which implementation and benchmarking, including cost savings, will be tracked.

- **Price preferences and waivers**—A state or local government may wish to use price preferences and waivers in its sustainable procurement program. The conditions for the use of those should be spelled out in the policy.

Price Preferences

Public entities may employ the use of a price preference to give sustainable commodities and services leeway to cost more to purchase than their non-sustainable competitors, but still be the commodity or service selected to be bought. Preferences most often apply in *low bid* situations and generally require that the law authorize them if that law requires that a contract be awarded based on low price. A standard preference allows the bid submitted by a supplier offering a sustainable commodity or service to be the winning low bidder if it is no higher than five to ten percent of the low bid of the supplier offering a non-sustainable commodity or service. Due to the disparate nature of commodities and services, not every commodity or service to be purchased based on low price requires the application of a price preference. Therefore, in instances where the law authorizes preferences, policies should provide a procurement office with the flexibility to apply preferences on a commodity or service category-specific basis.

A request for proposals process where price is not the only or most important contract award factor permits the public procurement officer to establish evaluation criteria that favor sustainable commodities or services. In those situations, the solicitation establishes a minimum specification favoring sustainable commodities

or services along with evaluation criteria offering the greatest number of points for sustainable commodities or services, corporate practices, and solutions proposed by the supplier.

Waivers

Due to the dynamic nature of the sustainable commodity and service marketplace and the unique needs of user agencies, sustainable procurement program policies should outline scenarios in which the purchase of a sustainable commodity or service is not necessary.¹² Waivers should be documented and incorporated into purchase expenditure reports and future programmatic decisions.

Examples include:

- The sustainable commodity does not meet the required form, functionality, or utility
- The sustainable commodity is prohibitively expensive or cannot be competitively priced
- An emergency or compelling public health or safety reason exists that requires the purchase of a specific non-sustainable commodity

IMPLEMENTING A SUSTAINABLE PROCUREMENT PROGRAM

Specification Development and Use

As discussed earlier in this chapter, it is important to create an inclusive and thoughtful process for creating a sustainable procurement program, including the development of specifications. Successful sustainable procurement programs start with a core group of commodities and services to develop specifications using broad input.

The following are suggestions to consider when developing and using sustainable specifications.

- Look at what the public entity is already buying. Often, sustainable commodities or

services are already being purchased but the data has not been centrally collected and reported. Take credit for good work that is already being done.

- Look at what other state and local governments are doing, particularly the sustainable specifications being used.
- Solicit input from the supplier community, but do not show a preference. Create an open and neutral mechanism to gather information about available sustainable commodities and services on the market. Hold *sustainable product fairs* or focused public meetings on sustainability.
- Trust and value input. Be prepared to waive use of specifications for sustainable commodities or services if following investigation, a sustainable commodity or service will not perform adequately or will cost too much.

Selecting Targeted Commodities and Services

When building a sustainable procurement program, it is important to be strategic about the commodities or services that the program stakeholders choose to concentrate on first. Procuring commodities that are easily found in the marketplace, credibly address environmental issues, and save money at the point of purchase are cost neutral. These commodities and services represent the greatest opportunities for early success.

Some commodities that are ideal as the focus of a sustainability program are:

- **Energy efficient commodities and appliances**—Two United States government entities, the Environmental Protection Agency (EPA) and the Department of Energy, sponsor the Energy Star program.¹³ It is a universal and credible means of verifying a commodity's energy efficiency. The Energy Star program covers numerous commodity categories including: copiers, faxes, other office equipment,

mail machines, computers, lighting (including traffic), appliances, air conditioners, heating, ventilation equipment, and more. In their solicitations, public procurement officers commonly include requirements in solicitations that commodities meet the most recent Energy Star standard available in order to reduce electricity consumption and decrease the volume of pollution related to their use.

- **Computers and office equipment**—Procuring products that are energy efficient, less toxic, pollute less, and can be disposed of responsibly creates a unique opportunity to drastically reduce the environmental impact of an organization's day-to-day activities. Public procurement officers frequently use the EPEAT—Electronic Product Environmental Assessment Tool,¹⁴ ecolabel of the Green Electronics Council, to ensure they are obtaining sustainable commodities. The EPEAT registry offers a list of thousands of commonly purchased information technology items and office equipment from many manufacturers. EPEAT-rated commodities meet full life cycle environmental criteria, including Energy Star, and may also meet social impact criteria.
- **Environmentally preferable paper**—Paper commodities are particularly important in a sustainability program because of their frequent use and because paper production has a substantial impact on forests, water, and energy consumption. The EPA has established Comprehensive Procurement Guidelines for recycled content for various types of paper, and those are good starting points.¹⁵ Many state and local governments seek paper with even higher levels of recycled content. Third-party commodity certifications are available to assist in creating specifications for these commodities, such as those offered through the Forest Stewardship Council.¹⁶ Depending on the volume of paper purchased and the region of the country, many public procurement officers are

able to procure environmentally preferable paper without increasing costs. Other public entities implement paper reduction strategies to offset differences in price by, for instance, encouraging the setting of office equipment to default to two-sided printing, reducing margin widths, and instituting paperless practices. Another sustainable procurement best practice is to require that suppliers for contracts to print publications and other items use chlorine-free paper to the maximum extent possible.

- **Green cleaning commodities**—As many as one in three cleaning chemicals may be hazardous due to their flammable, corrosive, or toxic properties. There also may be safety, health, and cost concerns in the handling, storage, and disposal of these chemicals. Some of the chemicals may not cause immediate injury, but rather are associated with cancer, reproductive disorders, respiratory problems, skin damage, and other health conditions. As a result, many public entities including schools require the use of less toxic but equally performing cleaning products. Some tools for locating these types of commodities are available through third-party organizations such as Green Seal¹⁷ and UL's ECOLOGO Product Certification.¹⁸
- **Post-consumer recycled content commodities**—Requiring post-consumer recycled content in specifications for commodities strengthens markets for recyclable materials, reduces the waste stream going to landfills and incinerators, and works to create economic development opportunities within emerging industries. Usable post-consumer content includes paper, plastics, metals, and petroleum-based products. Commodities using that content include office papers and envelopes, packaging, plastic lumber, traffic cones, re-refined motor oil, antifreeze, and toner cartridges.
- **Services suppliers**—Public procurement officers may establish sustainability

requirements in service contracts by specifying that materials that the contractors use in performing the contract meet established sustainability standards. The contracts may also mandate the use of particular processes or methods that are less harmful to the environment. Some examples of services that can use sustainable practices include landscaping, custodial, pest control, and printing. To illustrate, printing contracts may require the use of water- or vegetable-based lithographic ink to the maximum extent practicable, which will reduce the amount of volatile organic compounds released into the environment.

Using the Power of the Procurement Process and the Contract

Sustainability considerations should be an essential part of the early stages of a procurement process. State or local governments can use that process to encourage or require competing suppliers to offer sustainable commodities or services, or to follow sustainability practices.

Below are some recommendations on utilizing the power of the procurement process and the contract in support of a sustainable procurement program.

- **Incorporate sustainable specifications and utilize ecolabels**—In addition to mandating minimum sustainable specifications for commodities or services, as already discussed, explore other options such as specifying in the solicitation that suppliers must provide a sustainable alternative along with a conventional commodity or service. Consider stating a scoring preference in the evaluation criteria under a request for proposals to discourage suppliers from providing conventional items, which may increase the number of sustainable options available to the public entity.
- **Require reporting on sustainable purchases and practices**—Require suppliers

seeking contract awards to offer reporting on the volumes and types purchased and dollars spent by the public entity for sustainable commodities or services. Provide additional points in the evaluation of suppliers' proposals if they have the ability to supply those types of reports.

- **Allow suppliers to recommend alternative solutions**—Encourage suppliers to submit information identifying all environmental attributes of the requested commodity or service, even when such attributes have not been required. Public entities may use this information to develop specifications in the future that incorporate sustainability criteria. Ask suppliers to provide a sustainable alternative (or replacement) for their conventional commodity wherever possible. Such requests serve to reveal new sustainable commodities in the marketplace.
- **Evaluate suppliers' sustainability programs**—Include a supplier sustainability questionnaire in every formal solicitation, giving suppliers the opportunity to describe their sustainable operations. Provide additional evaluation points for the proposals of suppliers that can prove they have programs in place. Doing this sends a clear message to the suppliers that the public entity takes sustainability into consideration when awarding contracts.
- **Write contract language to allow the substitution or addition of sustainable commodities in an existing contract**—Include language in solicitations that permits the public entities to negotiate with the contractor during the contract term to substitute and add sustainable commodities when such commodities become available at a competitive price, are readily available, and satisfy the buying entity's performance needs.
- **Green the market basket**—As a way of obtaining discounts for sustainable commodities, make sure they are among

commodities listed in the market basket on the pricing sheet that suppliers must submit during a formal competition for a contract. A *market basket* is a representative sample of routinely purchased, generally high-volume commodities for which the formal solicitation asks competing suppliers to provide discounted pricing. This market-basket pricing is used to evaluate the pricing that suppliers provide in their bids or proposals.

- **Write the contract to permit sustainable planning**—Incorporate language that requires potential contractors competing under a formal solicitation to agree to work with the public entity to explore the feasibility of implementing a sustainability plan. The objective of this requirement is to encourage suppliers to incorporate sustainable practices in their business operations, and then market those practices. It also allows the public entity to encourage contractors to expand their sustainability initiatives or add new initiatives during the contract term, depending on the interests of the public entity.

Selecting Contractors Using Total Cost of Ownership or Life Cycle Cost Factors

In the evaluation of suppliers' submissions to a solicitation, public procurement officers are increasingly using methods that are focused on selecting commodities and services through source selection methods that allow for the consideration of factors other than the low purchase price. Chapter 9 (*Bid and Proposal Evaluation and Award*) discusses these methods, including the idea of *best value*. There are some non-price factors that are often taken into consideration when evaluating the sustainability of a commodity or service; including quality, risk, performance, durability, local production, and environmental impacts. The analysis of these factors is often called *total cost of ownership* or *life cycle cost*.

The NIGP Dictionary defines life cycle cost as:

*The total cost of ownership over the life-span of the asset. An analysis technique that takes into account operating, maintenance, the time value of money, disposal, and other associated costs of ownership as well as the residual value of the item.*¹⁹

Burt, Dobler, and Starling (2003) define total cost of ownership as:

*A measure of all of the cost components associated with the procurement of a product or service. The sum of all fixed and variable costs attributed to a product or service. A philosophy for understanding all supply-chain-related costs of doing business with a particular supplier for a particular good or service*²⁰ (as cited in The NIGP Dictionary).

With the rising costs of fuel and electricity, maintenance and operation, handling of toxic substances, pollution remediation, and insurance claims, some state and local governments require contractors to take responsibility for the safe operation and end-of-life management of their commodities. Therefore, a slightly higher purchase price may easily represent the best value when it provides an opportunity for significant cost avoidance throughout the entire life of the commodity.

Even if a public entity's laws require a contract award to a low bidder, sustainable requirements within the specifications that are founded on a TCO means that the responsive bidder submitting the lowest price will meet those requirements. Depending on the language of the public entity's law, an invitation for bids seeking a lowest price commodity may include factors such as a suppliers' healthy work environment and resource conservation. Public entities should consider using the TCO of sustainable commodities over the life of the commodity to determine their true cost.

Purchasing Sustainable Commodities and Services Through Cooperative Agreements

Cooperative agreements and cooperative purchasing are essential and valuable tools for public procurement officers. Chapter 12 (*Cooperative Purchasing*) discusses this topic in more detail. Use of cooperatives encourages competitive pricing on a wide range of commodities and services due to the promise of large volumes of business for suppliers that are awarded contracts.

To encourage the procurement of sustainable commodities and services, public procurement officers should ask cooperatives to make information easily available about the sustainable commodities and services offered through their contracts.

USING CREDIBLE STANDARDS, THIRD-PARTY CERTIFICATIONS, AND ECOLABELS

Understanding External Sustainability Standards

As noted in this chapter under the heading *Writing a Sustainable Procurement Policy—External standards, certifications, and ecolabels for commodities and services*, the use of external standards, ecolabels and certifications can assist public procurement officers in locating commodities and services that have met rigid testing requirements as well as the specifications for those commodities.

The most credible, respected standards and certifications are those that have been developed in a balanced, open, transparent process by organizations that do not have a vested interest in the outcome. They usually focus on a balance of multiple sustainability attributes or considerations throughout a commodity's or service's life cycle.

Some standards and certifications require comprehensive third-party audits, while others may simply permit manufacturers to determine or self-certify whether they comply with a standard. Both can be valuable and effective, but public entities need to recognize the distinction. The following resources for research on this topic, already mentioned in this chapter, are: International Organization for Standards (ISO) Standard 14020:2000, *Environment Labels and Declarations—General Principles*,²¹ United States Office of Management and Budget Circular A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*,²² or the ISEAL Alliance, *Credible Sustainability Standards*.²³

Avoid Greenwashing

Sustainable commodities are a rapidly growing market and suppliers have responded with *green* marketing, touting the environmental benefits of what they are selling. But sometimes what companies think their sustainable claims mean and what consumers really understand are two different things. This practice is commonly referred to as *greenwashing*.

Characteristics of modern greenwashing are:

- **Fibbing**—false claims that a commodity meets a specific standard.
 - **Unsubstantiated claims**—commonly known as *just trust us*, occur when manufacturers are unable to prove their environmental claims.
 - **Irrelevance**—making factually correct environmental statements that are no longer current.
 - **Hidden trade-off**—making claims about a single environmental attribute, leading consumers to think that this single attribute is the only environmental one of concern associated with the use of the commodity or service.
- **Vagueness**—broad environmental claims such as *100% natural*, *earth smart*, and *ozone safe*, for instance.
 - **Relativism**—a commodity, as compared to other commodities of the same type, may be environmentally friendly, but still a poor choice.

Incorporating requirements such as the following into solicitations and contracts can clarify how suppliers label commodities, which in turn, can assist in the consistency of and benefits from the sustainability reports that contractors must supply:

- Environmental benefit claims concerning commodities or services must be consistent with the United States Federal Trade Commission's *Green Guides*.
- Contractors providing sustainable commodities or services must explicitly identify the industry standard, certification, or ecolabel that those commodities or services meet in both the paper and online catalog descriptions available to public entity agencies and departments purchasing from those catalogs. For example, all Energy Star commodities should be labeled with the Energy Star logo and the words *Energy Star*.
- The solicitation and contract should include language that authorizes public entities to remove *green* labels and claims that constitute *greenwashing* or are determined to be weaker than the standard, such as vague claims that something is recyclable or biodegradable.
- Solicitations and contracts should require that the suppliers provide copies of the certifications they claim upon request if the public procurement officer cannot otherwise verify the certifications.

EPA Recommendations for Standards and Ecolabels

The EPA maintains guidance to assist federal government purchasers in sorting through

hundreds of ecolabels and identifying credible and effective standards and ecolabels that best fit their needs. That guidance is titled *Recommendations of Standards and Ecolabels for Use in Federal Procurement*²⁴ and it covers six broad categories of commodities with many subcategories. The EPA assesses ecolabels against the guidelines.

MEASURING AND MARKETING EFFECTIVENESS

It is often difficult to measure the effectiveness of a program or even of individual contracts. However, it may be the single most important factor in establishing and maintaining a strong and robust sustainable procurement program. Measuring success highlights both the environmental and cost-saving benefits of sustainable procurement efforts. Credible data creates opportunities to recognize and reward outstanding achievers, identify problem areas that may need correcting, and meet reporting and record-keeping requirements.

State and local governments should consider sharing and documenting achievements and challenges through the issuance of annual reports and share them with other public entities. This also offers the opportunity to discuss progress and potential barriers relating to specific commodities and services.

When drafting an annual report or an assessment of a program, there are four elements for measuring and tracking results:

1. **Identify key metrics, and then establish goals to meet those metrics**—Metrics may include an annual increase in purchase volumes or in dollars spent involving sustainable commodities or services, the number of contracts and items involving them, costs and savings, energy reduction, and other environmental benefits. Goals for the future can be defined based on the desired metric, the number of new sustainable commodities and services available, or sustainable expenditure targets. Performance measures for contractor services (such as timely delivery or response time for complaints) will also enable public procurement officers to track high- and low-performing contractors.
2. **Establish a current baseline on which to measure future progress**—The information to be used in calculating the baselines will depend to some degree upon the goals established for the sustainable procurement program. The baseline generally will include such data as: the type and number of commodities or services currently purchased, the cost of those commodities or services, and environmental data and impacts associated with those purchases. Environmental data used in a baseline may include the percentage of recycled content, the current process and cost to dispose of or recycle a commodity, and the commodity's energy and water requirements. Baselines can also include contractor performance.
3. **Determine the means of recordkeeping used to document measurements**—State and local governments that maintain a central single accounting system through which all transactions are processed offer a reliable means of collecting expenditure data. In those cases, the central procurement office should identify within that system the sustainable commodities or services so that the information can be broken out for reporting purposes. Many state and local governments have e-procurement solutions that may include the means of tracking expenditures on sustainable commodities and services.

If this reporting is not available, many state and local governments rely upon supplier reports. However, as not all contractors are as timely in submitting their reports as others, it is helpful to have assistance in following up with the contractors.

In an effort to ensure that contractors provide complete and comprehensive information in a user-friendly format for analysis, states may want to provide a template for contractors to use when submitting this data.

4. **Publicize and reward achievers**—When data is available and shows good results, reward internal participants and publicize success. Recognition can be as simple as a thank you letter, credit toward an employee's performance review, or more publicly via a special awards program. Piggy-backing on the annual meetings of various organizations (such as school business managers and public procurement officials) and offering a *sustainable procurement award* at annual events can be one way to increase visibility. In addition, featuring the success story of an agency or department in a case study can be an excellent peer-to-peer example of how to implement sustainable procurement.

- EPA Waste Reduction Model (WARM)²⁶—tracks greenhouse gas (GHG) emission reductions from several waste management practices, and calculates and totals GHG emissions from baseline and alternative waste management practices, including source reduction, recycling, anaerobic digestion, combustion, composting, and landfilling
- Energy Star website²⁷—contains a number of calculators created to estimate potential savings and payback of energy efficient commodities
- EPA Electronics Environmental Benefits Calculator²⁸—estimates the environmental benefits of improving the purchasing, use, and disposal of computer products; specifically computer desktops, liquid crystal display and cathode ray tube monitors, and computer notebooks/laptops

A more complete list of links to useful calculators is available on NASPO's webpage.²⁹

BENEFITS CALCULATORS

Benefits calculation tools may be used to build the case for pursuing sustainable commodities and demonstrating project success to management, co-workers, and stakeholders outside of the public entity. Benefits calculators are most useful when they are credible and easy to use. Some calculators offer the ability to convert hard-to-understand metrics such as kilowatt hours or greenhouse gas emissions into vivid equivalents, such as numbers of cars removed from the road, or energy consumption for a given number of households.

Some examples include:

- COOL Climate Calculator, University of California at Berkeley²⁵—an online decision-making tool that helps public entities estimate greenhouse gas emissions or carbon footprints from purchases of home or business commodities

MAINTAINING YOUR SUSTAINABLE PROCUREMENT PROGRAM

Sustainable procurement programs are successful in the long term when proper resources are dedicated to them and steps are taken to promote and highlight their successes. The most successful approaches result from the work of dedicated staff.

Some specific examples of steps that individual states can take to maximize the success of a sustainable procurement program include the following:

- Create a dedicated sustainable procurement website that: features statutory language, publicizes sustainable specifications, demonstrates the benefits of purchasing sustainable commodities and

services, and provides other appropriate guidance.

- Make sure that procurement training tools and curricula include core competencies relating to the sustainable procurement program and sustainable commodities and services, such as lessons in how to draft specifications for those sustainable items.
- Highlight the achievements of public entity individuals, agencies, departments, or divisions who embrace sustainable procurement efforts through newsletters, press releases, and other forms of recognition. Whenever possible, utilize benefits calculators that can convert sustainable procurement activities into understandable environmental or human health impacts and then share the results publicly.
- Tie sustainable procurement efforts to individual and organizational performance metrics and key performance indicators.

CONCLUSION

Taking steps to ensure that sustainable purchasing considerations are a part of the procurement process is an increasing priority among procurement divisions across the states. Understanding sustainable procurement concepts and utilizing the tactics and tools described in this chapter can increase a procurement office's ability to be a responsible member of the local and global community through buying high-performing, cost-effective, and competitive commodities and services that support sustainability.

ENDNOTES

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8. <https://www.ftc.gov/news-events/media-resources/truth-advertising/green-guides>
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12. See the State of New York, Executive Order 4 (2008), *Establishing a State Green Procurement and Agency Sustainability Program*, regarding waivers at: <https://www.dec.ny.gov/energy/71389.html>
13. <https://www.energystar.gov/>
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CHAPTER 7: COMPETITION: SOLICITATIONS AND METHODS

RECOMMENDED BEST PRACTICES

- Public procurement officers must have at hand a wide range of source selection methods in order to be able to meet user agencies' and users' needs.
- For a public procurement officer, acting professionally means, in part, exercising the full discretion and flexibility that a procurement law permits.
- Use of eProcurement systems does not change the steps or standards for using various source selection methods, but instead frees the public procurement officer to concentrate on substantive matters rather than paperwork.
- The standard for contract award under competitive sealed bidding should not merely be lowest price but also lowest cost to the state or local government.
- A procurement law should describe the competitive bids and proposals methods broadly enough to allow for best value as a standard for contract award as well as to authorize best value procurements.

While technology is revolutionizing the way in which the public procurement officer conducts competition for a contract, the principles governing the process remain the same. This chapter supplies a basic overview of the competitive source selection methods—that is, the methods that a state or local government uses to select a supplier for a contract—that are currently in use. It describes the tools that a public procurement officer uses to announce, solicit, and receive responses for a competitive procurement.

Procurement of construction services and what are called *alternative delivery methods* for building public infrastructure differ from the source selection methods described in this chapter. Chapter 11 (*Procurement of Construction and Related Services*) discusses those variations.

Note that this chapter provides an overview of the traditional methods of procuring commodities, services, and construction. It also offers a look at some different methods that may be used to purchase highly complex items. To understand those methods *in action*, Chapter 20 (*Procurement of Information Technology*) offers a useful discussion.

Also, be aware that the issuance of a solicitation and the decision about which source selection method to use are only part of the planning for the procurement. That planning requires the public procurement officer to think ahead about what happens after the contract is awarded. The solicitation must contain the essential tools for managing the contract that results from it. In fact, the time before issuing a solicitation is the point at which contract management needs to be considered and, where appropriate, the drafting of a contract plan begins. Chapter 4 (*Strategies and Plans*) and Chapter 14 (*Contract Management and Contract Administration*) offer insights on this issue.

TERMINOLOGY AND OVERVIEW

Informal and Formal Competition

It is important to start with the basics. Source selection methods are divided into two categories based on the level of competition that a public entity conducts.

The first is *formal competition*. It means that all suppliers who are able to supply the commodity, service, or construction that the procurement seeks must be invited to participate in the competitive procurement. Most often, the law applicable to the public entity sets a maximum expected dollar amount below which a contract may be exempt from formal competition. If the expected contract price or cost of the procurement meets or exceeds that dollar amount specified in the law, full—or formal—competition is required.

As discussed later in this chapter, announcing a *public invitation* does not mean that the public procurement officer must, for instance, take out an advertisement in the *Wall Street Journal*. Instead, the invitation to participate—called the solicitation—must be readily available, for instance, on the public entity's website.

The source selection methods that are used for procurements that are expected to cost below the dollar amount set for formal competition are in the category called *informal competition*. Those methods are often called *small purchase procedures*.

Definitions of Key Terms

Understanding a public procurement system requires comprehension of its terminology. The following definitions are of key terms that the chapters of this 3rd Edition of *State and Local Government: A Practical Guide (Practical Guide)* use relating to source selection methods. Apart from *competitive sealed proposals*, these definitions are provided by The NIGP Dictionary.¹ The definition provided for competitive

sealed proposals was developed based off of language from the American Bar Association Model Procurement Code for State and Local Governments (Model Procurement Code).²

The first set of definitions is made up of the terms that designate the primary source selection methods used for formal competition.

Competitive sealed bidding—*Method for acquiring goods, services, and construction for public use in which award is made to the lowest responsive bid and responsible bidder, based solely on the response to the criteria set forth in the invitation for bids; does not include discussions or negotiations with bidders.*

Competitive sealed proposals—*The process of inviting and obtaining proposals during which discussion and negotiations may be conducted with responsible offerors who submit proposals. The process concludes with the award of a contract to the offeror whose proposal is determined to best meet the criteria or factors specified in the solicitation for contract award. Price is generally one criterion or factor, but is not the only one. Thus, low price or cost is not the basis for contract award unless the proposal also demonstrates that it best meets the other evaluation criteria above all of the other proposals submitted. The solicitation used for this source selection method is a request for proposals.*

The following terms are the *supporting cast* for those defined previously.

Invitation for bids (IFB)—*A procurement method used to solicit competitive sealed bid responses, sometimes called a formal bid, when price is the basis for award.*

Request for proposals (RFP)—*The document used to solicit proposals from potential providers (proposers) for goods and services. Price is usually not a primary evaluation factor. Provides for the negotiation of all terms, including price, prior to contract*

award. May include a provision for the negotiation of best and final offers. May be a single-step or multi-step process.

Offeror—*A person or entity who submits an offer in response to a solicitation.*

Bidder—*A person or entity who submits a bid in response to an invitation for bids*

Some public entities may use different terms; however, the terms defined here are fairly standard.

ePROCUREMENT SYSTEMS

Many states and some local governments have eProcurement systems in place that support many of the steps outlined in this chapter. Chapter 19 (*eProcurement*) discusses these systems in more detail.

As Chapter 19 demonstrates, eProcurement systems have allowed the public procurement officer to concentrate on the substance of what needs to be done, rather than on paperwork and hand-created documentation. On a grander scale, the state and local governments that have instituted such systems have saved great sums of money. For a deeper understanding of how a particular source selection method works, state central procurement office procurement manuals are available. NASPO maintains profiles for all states; and each profile includes a link to that state's laws and procurement website where manuals are posted. They can be accessed on the NASPO website.³

OVERVIEW OF FORMAL COMPETITION SOURCE SELECTION METHODS

There is still a perception among the media, state legislators, the public, and even the supplier community that the lowest price should always be the sole basis for the award of a contract by a public entity. That simply is not the

case. Because of the complexity of commodities, services, and construction that public entities buy today, price or cost is most often only one of several factors in determining which supplier is awarded a contract. It is not even the most important one in many cases.

At the time that the American Bar Association issued its first version of the Model Procurement Code in 1979, state and local governments almost exclusively used only competitive sealed bidding to conduct procurements, focusing on low price or cost. As those governments' requirements grew more complicated, trying to satisfy all of those needs based only on the consideration of low price or cost was not an effective approach.

The Model Procurement Code offered—and still offers—a range of source selection methods in addition to competitive sealed bidding. The most important contribution of the Model Procurement Code is that it provides sample language for a state legislature or city council to adopt to authorize the use of the competitive sealed proposals method. In addition to providing that price or cost need not be the sole basis for contract award, the Model Procurement Code's language also authorizes negotiations with suppliers (offerors) submitting proposals under the competitive sealed proposal method.

The Model Procurement Code provides a starting point for understanding the conditions for using the competitive sealed bidding and competitive sealed proposals methods.⁴ Note that the following discussion analyzes the conditions for use based on the specific language in the Model Procurement Code's provisions. Different language in a law might result in a different analysis:

Under competitive sealed bidding, judgmental factors may be used only to determine if the supply, service, or construction item bid meets the purchase description. Under competitive sealed proposals, judgmental factors may be used to determine

not only if the items being offered meet the purchase description, but may also be used to evaluate the relative merits of competing proposals. The effect of this different use of judgmental evaluation factors is that under competitive sealed bidding, once the judgmental evaluation is completed, award is made on a purely objective basis to the lowest responsive and responsible bidder. Under competitive sealed proposals, the quality of competing products or services may be compared and trade-offs made between price and quality of the products or services offered (all as set forth in the solicitation). Award under competitive sealed proposals is then made to the responsible offeror whose proposal is most advantageous to the [State].

Competitive sealed bidding and competitive sealed proposals also differ in that, under competitive sealed bidding, no change in bids is allowed once they have been opened, except for correction of errors in limited circumstances. The competitive sealed proposal method, on the other hand, permits discussions after proposals have been opened to allow clarification and changes in proposals provided that adequate precautions are taken to treat each offeror fairly and to ensure that information gleaned from competing proposals is not disclosed to other offerors.

COMPETITIVE SEALED BIDDING

The following are definitions provided by The NIGP Dictionary⁵ of key terms related to the competitive sealed bidding method:

Responsive bid—*A bid that fully conforms in all material respects to the Invitation for Bids (IFB) and all of its requirements, including all form and substance.*

Responsiveness can be a difficult concept to understand at first. The determination rests on whether a bid demonstrates an absolute

commitment to the material requirements of the IFB. What is *material* and what is not is discussed in the upcoming paragraphs.

Responsible bidder or offeror—A business entity or individual who has the financial and technical capacity to perform the requirements of the solicitation and subsequent contract.

Note the difference between the two terms: responsiveness and responsibility. *Responsiveness* applies to the bid submitted and whether it complies with all of the important items set forth in the IFB, including the specifications and the contract terms. *Responsibility*, on the other hand, applies to the bidder (or offeror under competitive sealed proposals) and requires a determination that the bidder is, for instance, financially solid and has not been convicted of fraud.

The essential elements for award of a contract under the competitive sealed bidding method are the responsibility of the bidder, the responsiveness of the bid, and the lowest price.

In some cases, it may be lowest cost that is the basis for contract award. Through factors such as the cost to the public entity of owning a commodity, using life cycle costing or total-cost-of-ownership calculations, a higher-priced commodity may be, overall, the best value for the public entity. Where that is the case, it is deemed to be the lowest priced. Chapter 9 (*Bid and Proposal Evaluation and Award*) and Chapter 6 (*Sustainable Procurement Considerations and Strategies*) address the use of those calculation tools in more detail.

Content of the Invitation for Bids

An effective IFB should generally contain:

- General and special instructions to bidders, including the date and time when bids are due, the location where they are due if bids are not submitted electronically,

the process for handling information in a bid that the bidder marks as proprietary and confidential, and the date/time/location for any pre-bid conference

- A general description of the commodity, service, or construction to be purchased
- Specifications, design, or scopes of work identifying the features of the commodity, service, or construction needed—prepared using the suggestions offered in Chapter 5 (*Non-construction Specifications and Scopes of Work*), Chapter 10 (*Contracting for Services*), or Chapter 11 (*Procurement of Construction and Related Services*)
- The criteria for evaluating bids
- A statement of the basis on which award will be made, which generally must be consistent with the language of the public entity's law or procedures that announce the standard for award, discussed later in this chapter
- The standard and special contract terms and conditions including the type of contract to be awarded as described in Chapter 4 (*Strategies and Plans*)
- Price sheets on which the bidders can submit prices for the items requested along with any price increases for renewal years
- A non-collusion affidavit as described in Chapter 3 (*The Importance of Competition*)
- A sheet on which the bidders sign their bid

It is important for there to be sufficient time between the date when the public procurement officer publicizes the IFB and the due date. Factors that will affect the amount of time between publication of the solicitation and the bid due date include the complexity of the commodity, service, or construction being purchased and whether the public procurement officer schedules a pre-bid conference, which is discussed later in this chapter.

Basis or Standard for Contract Award

If the public entity's law or policies contain language specifying the basis or standard that the

public procurement officer must use in determining who is awarded the contract, that officer may not deviate from it. Doing so is an invitation for bidders who were not awarded the contract to file bid protests. Chapter 17 (*Protests, Disputes, and Claims*) discusses bid protests and provides tips for avoiding them.

Examples of the language of such laws or policies help illustrate this. For instance, the Model Procurement Code's award basis or standard under its competitive sealed bidding provision is:

*The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids.*⁶

The Model Procurement Code's language is broad enough to allow for the use of life cycle costing or total-cost-of-ownership calculations in determining the lowest bid. It is also broad enough to permit the use of other evaluation criteria in selecting the winning bidder.

Other laws or policies may state a standard that is slightly different. If the law or policies state that award must be based on the responsible bidder submitting the lowest price—without the mention of the language in the Model Procurement Code related to *criteria*—it may be that the law or policies do not allow the consideration of anything but price.

The term *best value* as a standard for award arose in the 1990s, primarily to change the manner in which some public entities were evaluating proposals under the competitive sealed proposals method. The term developed in opposition to the practice of some public entities of awarding a contract based on the lowest-priced, technically acceptable proposal. A best value award standard as used in the competitive sealed proposals method is discussed later in this chapter.

The term also took hold in some laws as a standard for award of a contract using the competitive sealed bidding method to counter the practice of strict *low-bid* awards.⁷ Generally speaking, *best value* as used in the competitive sealed bidding method allows for factors other than lowest price or cost to be considered so long as those factors are objectively measurable. Chapter 9 (*Bid and Proposal Evaluation and Award*) discusses these evaluations in more detail. Without using the term *best value*, the Model Procurement Code permits that type of evaluation.

Today, the term *best value* is often used, even in this *Practical Guide*, to refer to awards both under the competitive sealed bidding method and the competitive sealed proposal method, although the evaluations of bids and proposals using *best value* are different. Evaluation criteria for bids must generally be objectively measurable; those for proposals are both objectively measurable and subjective.

Essentially, the winning bid must be responsive, as defined earlier in this chapter. The bid may not—as of the date that the bidder submits it, which must be before the due date and time—deviate from the critical requirements of the IFBs.

If the deviation is only minor—or immaterial—the bid is still responsive. The NIGP Dictionary provides some guidance on what is immaterial:

Immaterial defect—A tangential flaw having no material body or form that may be corrected without prejudice to other bidders. Example: Submission of two copies of a catalog when three copies were requested.

The concept of responsiveness and the basis or standard for award are also discussed in Chapter 9 (*Bid and Proposal Evaluation and Award*).

Receipt and Control of Bids

As a part of making sure that a public procurement process is fair, the time and date

established when bids are due are hard deadlines. That is because, among other things, it is inappropriate to give bidders who did not plan well the same consideration as those that did.

Additionally, most public entities—either because it is required by law or simply due to practice—open bids publicly and announce or provide access to bidders' prices immediately after the date and time that bids are due. It would be highly unfair to allow a bidder to submit a bid after seeing or hearing the other bids.

If the bidding process is a paper one, it is critical for the envelopes in which the bids are submitted to be date and time stamped. The public procurement officer must keep them in a secure place to prevent them from being misplaced, lost, or tampered with until the date and time of bid opening.

Since formal bids must remain sealed until the bid opening, proper identification on the outside of the bid envelope is important. The IFB should require the bid envelope to show the solicitation number, opening date, and bidder's name or supplier number.

eProcurement systems, discussed in Chapter 19 (*eProcurement*), allow for the electronic submission of bids, including date/time stamping, sealed bid folders, and electronic opening of bids.

Bidder Request to Modify or Withdraw Bid

There are occasions when bidders ask that they be permitted to modify or withdraw their bids after they have submitted them to the public procurement office but before bids are due. As a general rule, it is appropriate to accommodate the request if an authorized representative of the bidder submits a request in writing before the date and time that bids are due. Any modified bid must be submitted by the due date and time.

After bids are opened, the general rule is much harsher, as discussed later in this chapter.

Public Opening and Confidentiality

The requirement for public opening of bids has long been a practice—if not a requirement in law—in state and local government procurement. It is aimed at reducing the potential for collusion and favoritism and to foster public confidence in the procurement system.

The best practice is for the opening to take place immediately after the date and time when bids are due. The prices submitted in the bids and the names of the bidders should be announced and available publicly at that time. Additionally, the public procurement officer should make a written record—often called an abstract—of the bidders and the bid prices, or any *no bid* that a supplier may have submitted, and place it in the procurement file. If the competition was performed electronically, the eProcurement systems will likely make that record automatically.

Bidders will ask questions about and request to examine competitors' bids. The bids themselves—along with all of the documentation about the evaluation of bids and bidders—should be confidential until after contract award. A state's open records/freedom of information law, though, may require that bids be public at that time, except perhaps for proprietary information or trade secrets that a bidder has marked as such in its bid. The best process for handling these bidder requests for confidentiality of proprietary information or trade secrets is discussed in more detail in the section of this chapter entitled *Competitive Sealed Proposals*.

After contract award, the documents in the procurement file—the bids, their evaluation, and any other information that played a role in the public procurement officer's selection of the winning bid—should be made public, except for proprietary information.

Late Bids

When a bidder submits its bid late, that is, after the deadline, the best practice is for the public

procurement officer to refuse to accept it. There is one narrow exception to that hard approach. That exception arises from instances where the tardiness is due solely to the public entity's fault or inaction.

An example of a rule/regulation that specifies this treatment of late bids is in the Recommended Regulations of the Model Procurement Code, which provides:⁸

No late bid . . . will be considered unless received before contract award, and [unless] the bid . . . would have been timely but for the action or inaction of [State] personnel directly serving the procurement activity.

The rule/regulation or policy on exceptions must also be clear on three additional points: the bid must have been out of the hands of the bidder or its agent before the time/date set for bid opening; the delay occurred out of the bidder's hands and is not the bidder's fault; and evidence of these facts is available and is documented as a public record. For instance, the failure of a delivery service to deliver as promised would not fall into the exception. However, the closure of the public entity's mail room might.

Mistakes in Bids

Claims by bidders that they made mistakes in their bids are common. The following paragraphs describe a common approach.

Before the deadline for receipt of bids, a bidder may correct a mistake or withdraw its bid in writing. After the bids are opened, but before award, a public procurement officer may waive a mistake, or permit a bidder to correct it, only if it is minor and the true intent of the bid is obvious from the information in the bid itself. The bidder may not provide any outside documents or other evidence to show the error.

An example is an arithmetic error in totaling up a column of numbers to arrive at the bid price

on the bid sheet submitted with the bid. If the mistake is clear by looking at the bid alone and the bid is otherwise responsive as defined earlier, the public procurement officer may permit the correction so long as doing so does not improve the bidder's competitive position in view of the other bids, such as changing its bid from third-lowest price to lowest price.

On the other hand, a bidder that claims, for instance, that it mistakenly failed to agree to the insurance requirements in the invitation to bid has made a material mistake that may not be corrected. Its bid is nonresponsive since insurance coverage relates to price because it is an added cost for the bidder. It does not matter whether insurance cost was part of the bidder's pricing in this particular instance. Responsiveness is determined based on the theoretical effect of a bid defect on price, quantity, quality, or delivery.

All mistakes other than the minor ones previously cited that surface after bid opening and before contract award are not correctable. Any remedy for a mistake becomes more difficult after award of a contract. The universal legal view is that a mistake in a bid that comes to light after award does not relieve the bidder/contractor from contract performance in accordance with the contract award.

COMPETITIVE SEALED PROPOSALS

Similarities and Differences Compared to Competitive Sealed Bidding

Generally

The essential difference between the competitive sealed bidding method and the competitive sealed proposal method is that the latter permits negotiations with offerors and revisions of their proposals, with contract award based on a variety of factors, which may include price.

Many of the steps that are part of the competitive sealed bidding method apply also to the competitive sealed proposals method. For example, there should be public notice of the contracting opportunity. Additionally, the receipt of proposals within the procurement office should be subject to the same tracking and security procedures that are applicable to bids.

As with competitive sealed bidding, a public procurement officer opens proposals publicly. However, he or she only reads or provides access to the names of the offerors. Neither prices nor other information contained in the proposals is public until after a notice of intent to award a contract is announced or, depending on the public entity, actual contract award has occurred. This is seen as preserving the soundness of the process by avoiding situations in which offerors change their proposals in their best and final offers, which are discussed later, based on other offerors' proposals.

The law of the State of Montana takes a different approach. It requires open access to proposals shortly after their submission except for proprietary information or trade secrets. That law says:

Section 18-4-304. Competitive sealed proposals.

(4) After the proposals have been opened at the time and place designated in the request for proposals and reviewed by the procurement officer for release, proposal documents may be inspected by the public, subject to the limitations of:

- (a) the Uniform Trade Secrets Act, Title 30, chapter 14, part 4;*
- (b) matters involving individual safety as determined by the department; and*
- (c) other constitutional protections.*

Additionally, the deliberations of evaluation committees reviewing the bids and negotiations with offerors are open and not confidential in that state.

Offerors often designate large portions of their proposals as proprietary and confidential. The law or policy of some public entities protects offerors' true proprietary information and trade secrets from public disclosure.

Because so much of a proposal may be designated as proprietary and confidential, it becomes a problem once a public procurement officer has made a contract award or has issued an intent to award a contract. It is at that point that the offerors who did not receive the award will ask to see the winning offeror's proposal.

If the public procurement officer disagrees with an offeror's claim of confidentiality, the best approach is for him or her to advise the offeror and give it the opportunity to explain the reasons it believes the information to be proprietary. That officer should make the final determination with the assistance of legal counsel.

Responsiveness of Proposals

In describing the legal standard for the award of a contract under the competitive sealed proposal method, the laws of some public entities have added a requirement that the proposal be *responsive* to the request for proposals. The laws of the State of Utah and the Commonwealth of Pennsylvania are two of those. Since the concept of responsiveness mandates compliance in all material respects to the solicitation, it is somewhat difficult to apply to proposals, where procurement laws allow for discussions with offerors and the submission of best and final offers in which offerors are allowed to make some changes to the proposals.⁹

Drafting the Request for Proposals

Overview of the Request for Proposals

The basic contents of the RFP, the solicitation document used for the competitive sealed proposals method, are similar to those of an IFB. The solicitation should include general and special instructions to offerors; the time and date for any pre-proposal conference; the

deadline—date and time—for submission of proposals, and the place to submit them if submission is in paper form; the format in which offerors should submit their proposals; pricing or costing requirements, including price or cost increases for renewal periods; the specifications; the non-collusions affidavit; and the general and special contract terms and conditions.

Other chapters of this *Practical Guide* provide guidance on aspects of the planning process and the development of specifications or scopes of work that are key to a well-written RFP. Those chapters are: Chapter 4 (*Strategies and Plans*); Chapter 5 (*Non-construction Specifications and Scopes of Work*); Chapter 6 (*Sustainable Procurement Considerations and Strategies*); Chapter 10 (*Contracting for Services*); and Chapter 20 (*Procurement of Information Technology*).

Developing Evaluation Criteria

One critical difference between the content of an IFB and an RFP is that the latter must state the criteria on which the evaluation of each proposal will be measured. Since contract awards made using the competitive sealed proposals method are not generally made based on low price, the listing of the evaluation criteria informs the offerors about the methods used by the public procurement officer for organizing the evaluation of the proposals and keeping it on track.

The NIGP Dictionary offers the following definition of the term *evaluation criteria*:

Generally used in the Request for Proposals (RFP) method. Qualitative factors that an evaluation committee will use to evaluate/score a proposal and select the most qualified proposer(s). May include such factors as past performance, references, management and technical capability, price, quality, and performance requirements. (Harney, 1992)

Depending on the law or policy of the public entity, the RFP must list the criteria in order of

importance or provide some indication of the weight that they will be given during the evaluation. The Model Procurement Code requires that the RFP list evaluation criteria and any sub-criteria in order of their importance. It does not require that a solicitation offer further information, such as ascribing to each criterion a percentage (for instance 35%) or a description (such as *critical*).

It is imperative that the evaluation factors be set and not changed once proposals have been submitted. Making changes to them after the proposal submission deadline opens the process to an accusation that changes favored a particular offeror, since they occurred once the names of the offerors and their proposals were available to the public procurement officer and the evaluation committee.

Evaluation and evaluation committees are discussed in Chapter 9 (*Bid and Proposal Evaluation and Award*).

Discussion and Negotiation

Another key difference between an IFB and an RFP is that, under the latter, the public procurement officer may engage in discussions or negotiations with offerors whose proposals, after a first review, are generally deemed to be eligible for contract award. The RFP should advise offerors of this in language such as the following:

The procurement officer may enter into discussions or negotiations with offerors whose proposals that officer determines, after an initial review and based on the offeror's initial proposal, to be acceptable or potentially acceptable based on the requirements of the solicitation.

Chapter 9 (*Bid and Proposal Evaluation and Award*) offers additional information about discussions and negotiations. Additionally, Chapter 4 (*Strategies and Plans*) advocates that there be a negotiation plan in place. Finally, the *call outs* in some of the chapters of this *Practical Guide* offer negotiating tips.

Basis or Standard for Contract Award

As in the case of an IFB, the RFP must inform offerors of the basis on which a contract award will be made. If that basis or standard is embedded in the public entity's law or policy, the statement of that basis or standard must be the same in the RFP.

The basis or standard for award under the Model Procurement Code is:

*Award shall be made to the responsible offeror whose proposal conforms to the solicitation and is determined in writing to be the most advantageous to the [state], taking into consideration price and the evaluation factors set forth in the Request for Proposals.*¹⁰

The standards or basis for award are also discussed in Chapter 9 (*Bid and Proposal Evaluation and Award*).

A term that appears regularly in this *Practical Guide* and in some laws as a standard for award is *best value*. The NIGP Dictionary defines the term as:

Best value—1. A procurement method that emphasizes value over price. The best value might not be the lowest cost. Generally achieved through the Request for Proposals (RFP) method. 2. An assessment of the return that can be achieved based on the total life cycle cost of the item; may include an analysis of the functionality of the item; can use cost-benefit analysis to define the best combinations of quality, services, time, and cost considerations over the useful life of the acquired item.

Use of the term several decades ago signaled a movement against a type of competitive sealed proposals process that required the contract to be awarded to the lowest-priced, technically acceptable proposal. Since the Model Procurement Code version in 1979, its language, cited

earlier, has always permitted best-value contract awards.

Given the complexity of many state and local government procurements today, a public procurement officer must take advantage of all of the discretion that a procurement law offers, and not always rely on the way that competitive sealed proposals have been conducted in the past. As Chapter 2 (*Procurement Leadership, Organization, and Value*) demonstrates, being a strategic leader means envisioning future needs and trends and finding ways to address them.

Development of Evaluation Criteria

Development of the criteria that will be the framework within which proposals are evaluated requires that the public procurement officer work closely with the user agencies for which he or she is conducting the procurement. That officer should also work with the evaluation committee, if one is used, to refine those criteria. This ensures that the committee will have a full and common understanding of the details to consider in relationship to each of those criteria.

In many cases, the criteria will fall into three broad categories: technical capability and the approach for meeting the specifications or scope of work; competitiveness and reasonableness of price or cost; and managerial and staffing capability, including experience and past performance. Some public entities have a *stock* set of criteria, stated in broad terms, that they use in nearly every RFP. That is not a recommended professional approach. Evaluation criteria should be tailored to meet the requirements of each specific procurement.

The task of identifying evaluation criteria for the procurement of complex information technologies is part of an entire project structure in which the public procurement officer and a representative of the public entity's chief information officer are co-equal managers of the procurement process. Chapter 20 (*Procurement*

of *Information Technology*) provides insights on this topic.

Using and Selecting Evaluation Committees

It is a standard practice to use an evaluation committee, comprised of subject matter experts, usually from the user agency, to assist the public procurement officer in evaluating proposals. Additionally, in some complex procurements, such as the selection of a health insurance plan, the procurement office may employ an outside consultant to assist in the evaluation.

The independence of the evaluation committee is essential to its fairness. To ensure that it is independent, the public procurement officer should make the final decision about who sits on the committee. It is also a best practice for the public procurement officer to chair the committee.

In the real world, the governor's or mayor's office or a large user agency may demand that they select the persons to sit on an evaluation committee for a highly visible and important procurement. If a public procurement officer cannot dissuade them from their position, that officer should insist upon naming at least some members of the committee.

Another problem occurs when a supervisor and his or her subordinate sit on the same committee and are from the user agency requesting the procurement. To avoid any possibility of intimidation, these situations should be avoided.

Before offerors submit their proposals, the committee must have an opportunity to discuss the evaluation criteria, identify any sub-criteria, and come to an understanding of how those will be applied. It must also decide how the committee will operate. Finally, the public procurement officer and, if appropriate, the committee must determine whether to use a scoring or ranking process, a consensus approach, or a combination to evaluate proposals.

As noted before regarding the preparation of evaluation criteria, this preparation must occur before the names of the offerors and their proposals are available to the public procurement officer and the evaluation committee. In fact, evaluation committee members and other technical advisors who will assist in the evaluation of proposals should be asked to sign a conflict of interest/confidentiality statement before receiving copies of or gaining electronic access to proposals.

Clearly, the unbiased deliberations of the evaluation committee are critical. Since the evaluation process using the competitive sealed proposals method frequently involves subjective judgments, the flexibility it affords requires that those participating in contractor selection bring open minds to the process.

Some of the standard rules previously noted may be problematic for procuring complicated information technologies. While the procurement process for such technologies needs to be unbiased, that complexity requires more persons to be a part of the entire project preparing for the actual procurement. Chapter 20 (*Procurement of Information Technology*) provides insights on this topic.

Conducting Discussions

After an initial evaluation of the proposals, the procurement officer and the evaluation committee may determine that discussions and negotiations with offerors are warranted. As noted earlier in this chapter, the solicitation must advise offerors of the possibility for discussions and negotiations.

As far as the offerors who should be afforded this opportunity are concerned, the Model Procurement Code offers some guidance. It states that a procurement officer must present the opportunity to all offerors whose proposals are found to have a reasonable possibility of being selected for award under the terms of the RFP. This is a useful standard.

Chapter 9 (*Bid and Proposal Evaluation and Award*) focuses on discussions in more detail.

Best Value Procurements

One approach for conducting procurement is called a performance information procurement system, more recently also known as best value procurements. In the early 1990s, Dean Kashiwagi at Arizona State University started to develop what is now known as the best value procurement/performance information procurement system (BVP/PIPS). This approach focused initially on procurements of construction but it has expanded since then. Chapter 20 (*Procurement of Information Technology*) provides a case study from the State of Alaska in which its central purchasing office used this approach to purchase information technology.

The best value procurements described here are different from the *best value* used to describe the standard for contract award, which this chapter has already discussed. Depending on the language of procurement law of the specific public entity, this approach may easily be used through a competitive sealed proposal process. It would be authorized under the Model Procurement Code's language.

On the *Governing* magazine website, in a 2017 article entitled *Most Government Procurement Has Got It All Wrong, These Advocates Say*,¹¹ the approach is broadly described as follows:

Kashiwagi's approach, which he calls Best Value Performance Information Procurement Systems (PIPS), essentially reorders the traditional process of putting out requests for proposals, accepting bids, and then awarding a contract. Instead, PIPS begins with buyers or purchasing agents identifying what they think they want, and then vendors compete to provide services to meet the buyer's intent. It's up to the vendors to explain the process of what good or service they will deliver, as well as the risks. Vendors are

ranked on a series of metrics; after one is chosen, it delivers regular reports on how it's meeting agreed-upon goals. The process is more collaborative between buyer and vendor, and it better utilizes the established knowledge of the experts (the vendors) rather than relying on the non-experts (the buyers), says Jacob Kashiwagi, Dean's son and business partner.

An overview of the steps in this procurement process with a flow chart appears in an article published in *Government Procurement* magazine in June/July 2013.¹² Here is a summary:

- The selection phase:
 - ◊ In response to a solicitation that provides a minimal description of what the state or local government is seeking—the objective of the work under the contract—offerors submit one-page surveys completed by their past clients, a cost submission, a milestone schedule, and a six-page project capability submission without any marketing information or information that would identify the offeror.
 - ◊ Evaluation team members complete an evaluation of the project capability submissions without knowing who the suppliers are.
 - ◊ Evaluation team members interview offerors' personnel who will be responsible for delivery of the commodity or service that the public entity is requesting.
 - ◊ Scores for the offerors' submissions are tabulated and a best value offeror is identified.
- The clarification phase:
 - ◊ Offeror submits a detailed plan to accomplish the objective stated in the solicitation:
 - Since the selected offeror was chosen based in large part upon its expertise in accomplishing the public entity's objective, the offeror must identify risks, defined as anything outside of its control. Risks outside

- of the offeror's control will be the public entity's responsibility.
- Offeror prepares a risk mitigation plan that describes potential risks and how they will be mitigated.
- Offeror must clearly identify what is within the scope of the proposed contract and what is not.
- ◊ The clarification phase is complete and contract award made when: past performance is verified; offeror provides a detailed delivery plan and a risk mitigation; management and reporting metrics are in place; and the public entity has reviewed all of these documents and has had its concerns addressed.
- Management by risk mitigation:
 - ◊ Contractor submits weekly risk reports.
 - ◊ Those reports track risks and impacts on the project, and make both contractor and public entity personnel accountable.

MULTI-STEP BIDDING

Another source selection method offers the best of two worlds—adherence to the lowest bid principles of competitive sealed bidding while offering an opportunity for some of the discretion and negotiation associated with competitive sealed proposals. This is called multi-step bidding.

The NIGP Dictionary defines *multi-step bidding* as follows:

Multi-step bidding—A method of source selection involving two competitive steps, combining the elements of both Invitation for Bids and Request for Proposals. The first step may require the submission of technical and price proposals with only the technical proposals being evaluated and scored. The second step involves the opening of price proposals of those firms who have achieved the highest technical scores.

This method is used most often for formal competitions, but may be used as well for a small-dollar purchase or informal competition. The solicitation used is an IFB to which bidders will submit two things in response: a technical proposal offering the bidders' response to the specification—often a performance specification seeking a solution to a problem—and a price proposal.

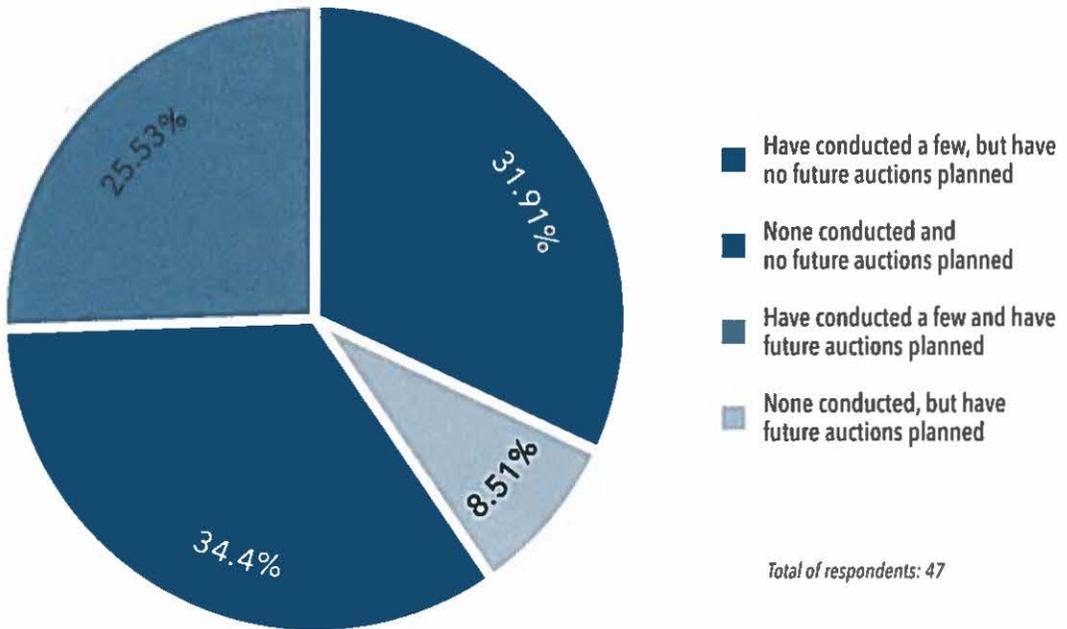
There are two basic approaches to conducting a multi-step bidding procurement:

- **Approach one**—The first approach asks in the IFB that bidders submit technical proposals and bid prices separately on the date that the IFB establishes as the deadline. Once the public procurement officer evaluates the technical proposals, he or she opens only the price responses for those bidders whose technical proposals are found to be responsive. From the pool of those responsive proposals, the public procurement officer makes an award on price alone.
- **Approach two**—The second approach offers an opportunity to add elements of negotiation into the process. The public procurement officer requests only technical proposals in the solicitation that he or she issues. Once they have been received, he or she evaluates them. In accordance with the language of the IFB, the public procurement officer may then enter into discussions with all the bidders or only with those whose technical proposals are considered to have merit after evaluation. The public procurement officer sends another IFB to those bidders with whom discussions have been held. The lowest price offered by the bidder submitting an acceptable technical proposal becomes the basis for contract award.

The flexibility that the second approach provides makes it preferable. Whether a public entity may adopt that approach may depend on what its procurement law provides. Figure 7.1 highlights

FIGURE 7.2 | EXPERIENCE WITH REVERSE AUCTIONS

If the State Central Procurement Office has authority to conduct reverse auctions, what is your state's experience using reverse auctions? Choose the option that best applies.



The majority of states have authority to conduct reverse auctions. There is a more detailed discussion of this method in Chapter 19 (*eProcurement*). Figure 7.2 shows state's experience in using reverse auctions.

SMALL PURCHASES

Rules/regulations or policies should describe minimum levels of competition for procurements at dollar levels below the dollar amount required for formal competition, but leave the means of competition to the discretion of the public procurement officer. They should also warn that a user agency's requirements may not be split up into small-dollar purchases to avoid the requirements for formal competition.

Reasonable and adequate competition should be the norm, while some purchases are too small to justify the time and expense of soliciting any competition. The introduction of purchase cards¹³ provides for control of both the procurement and accounting functions while giving users more flexibility.

Higher-dollar small purchases should not require formal competition; but they should preserve the openness of the procurement system so that any supplier that has requested to quote on a particular type of purchase is invited to do so. Additionally, there should be some competition consistent with the dollar level of the purchase contemplated.

The solicitation document most closely associated with small purchases is a request for quotation. The NIGP Dictionary defines it as follows:

Request for quotation (RFQ)—*Purchasing method generally used for small orders under a certain dollar threshold, such as \$1000.00. A request is sent to suppliers along with a description of the commodity or services needed and the supplier is asked to respond with price and other information by a predetermined date. Evaluation and recommendation for award should be based on the quotation that best meets price, quality, delivery, service, past performance, and reliability.*

The principles governing evaluation of quotations and award of contracts for small purchases should follow those for fully competed procurements. For instance, the purchase description that the public procurement officer provides to suppliers must avoid favoring a particular product. Records should be maintained confirming the manner in which each procurement was made and the basis for contract award.

BIDDER AND OFFEROR CONFERENCES

Conferences with prospective bidders or offerors—either before or after a solicitation is issued—help any formal competition. Often operating as a type of focus group of suppliers, they provide an excellent source of information for the public procurement officer. Additionally, they allow suppliers to obtain a better understanding of the needs of the user agency, increasing the quality of responses to the solicitation.

As the use of technology expands, some public entities are using webcasting, and other electronic means to broadcast these supplier conferences. The use of these technologies in the procurement process increases the real-time exchange of information between public procurement officers and suppliers. They enhance the chances for a positive outcome for procurements in which they are used.

Pre-solicitation Conferences

A pre-solicitation conference is often convened through a document called a request for information. This tool may be useful to gather information before preparing a solicitation for a formal competition. The NIGP Dictionary defines “request for information” as follows:

Request for information (RFI)—*A non-binding method whereby a jurisdiction publishes via newspaper, Internet, or direct mail its need for input from interested parties for an upcoming solicitation. A procurement practice used to obtain comments, feedback, or reactions from potential responders (suppliers, contractors) prior to the issuing of a solicitation. Generally, price or cost is not required. Feedback may include best practices, industry standards, technology issues, etc.*

There are some built-in limitations to the utility of a pre-solicitation conference. Suppliers generally do not like to share information that they believe is proprietary with their competitors. Even where they provide information in writing, they understand that the public procurement officer may not have the authority to keep that information confidential under open records/freedom of information laws.

Pre-Award Conferences

A public procurement officer convenes a pre-award conference after the solicitation has been issued but before bids or proposals are due. Its purpose is to provide an opportunity for suppliers to ask questions about specific parts of the solicitation and to ensure that the suppliers understand its requirements.

It also serves to alert the public procurement officer to parts of the solicitation that may not be clear—requiring the issuance of a solicitation amendment correcting or clarifying the solicitation text.

The solicitation should contain the date, time, location, and information about web access for the pre-award conference. In terms of the conference agenda, the best approach is for the public procurement officer to review the solicitation paragraph by paragraph, permitting questions limited to the paragraph at hand. That prevents *shotgun* questioning that may confuse the attendees. After the conference, the public procurement officer, by way of a solicitation amendment, should disseminate the questions and answers generated during the conference, along with any solicitation modifications made as a result.

Written Questions and Answers

Some public entities allow prospective bidders or offerors to submit questions relating to a solicitation. Both the questions and the

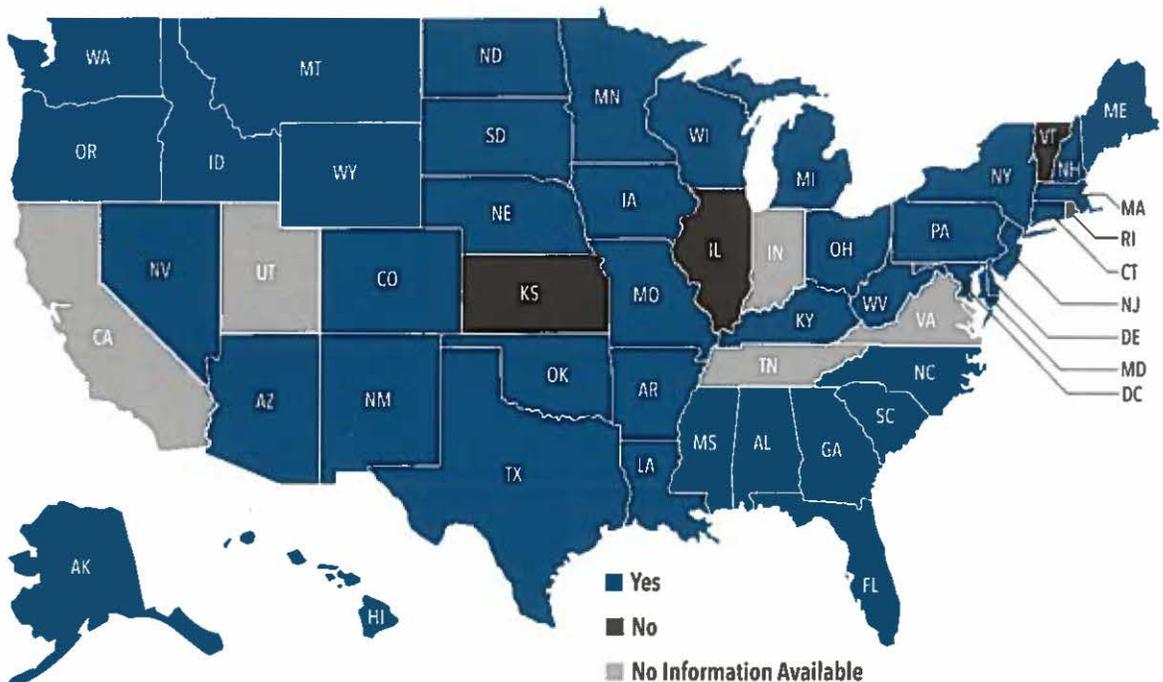
answers are made available to all interested bidders. The solicitation should clearly explain this process, including a deadline for submitting questions and an estimated time frame for responses to be publicly posted. The public procurement officer must take pains to assure that this process is complete and made public a sufficient time before the bid or proposal is due, so that interested bidders or offerors may consider this when preparing their bid or proposal.

NOTIFYING SUPPLIERS

Notifying suppliers of a pending procurement is an important step in encouraging open competition. With eProcurement systems in use today, the suppliers who have registered in those systems to supply specific commodities, services,

FIGURE 7.3 | SUPPLIER REGISTRATION LISTS

State Central Procurement Offices with Supplier Registration List



AFFIRMATIVE RESPONSIBILITY CRITERIA

This chapter has already described the obligation of a public procurement officer to determine the responsibility of a supplier that is about to be awarded a contract. In many cases, that determination turns out to be perfunctory and based, in large part, on the reputation of the supplier and perhaps a financial statement that it submits. This is not the appropriate approach.

Establishing what are called *affirmative responsibility criteria* in a solicitation is a powerful tool for a public procurement officer. In essence, it allows him or her a means for requesting documentation that will assist in an evaluation of a supplier's past performance, where lowest price is the basis for contract award such as under the competitive sealed bidding methods. It permits the public procurement officer to reject the bid of a bidder whose past performance simply does not provide an adequate level of confidence that it will provide the needs identified in the solicitation.

Affirmative responsibility criteria are not as useful in procurements conducted using competitive sealed proposals since past performance and other responsibility measures may be among the evaluation criteria noted in the solicitation. However, the items listed in the following regulations as supplier capabilities for an affirmative responsibility criteria analysis are useful starting points for preparing evaluation criteria in this area.

The Recommended Regulations of the Model Procurement Code describe the breadth of the factors that a procurement officer may consider in examining responsibility as follows:

R3-401.02 Standards of Responsibility.

R3-401.01.1 Standards. *Factors to be considered in determining whether the standard of responsibility has been met include whether a prospective contractor has:*

- (a) available the appropriate financial, material, equipment, facility, and per-*

sonnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;

(b) a satisfactory record of performance;

(c) a satisfactory record of integrity;

(d) qualified legally to contract with the [State]; and

(e) supplied all necessary information in connection with the inquiry concerning responsibility.

R3-401.03 Ability to Meet Standards. *The prospective contractor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:*

(a) evidence that such contractor possesses such necessary items;

(b) acceptable plans to subcontract for such necessary items; or a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.

The solicitation must describe the affirmative responsibility criteria and require the bidder or offeror in line for contract award to supply documentation showing that it can meet those criteria. The language in the solicitation should also allow the discretion of the public procurement officer to use other data in making an affirmative responsibility determination, including his or her own experience with the bidder or offeror.

OTHER TYPES OF SOURCE SELECTION METHODS

Pilot Projects

Finally, a reading of Chapter 20 (*Procurement of Information Technology*) shows the challenges posed in purchasing information technology. One of the methods it promotes as helpful to performing the critical market research is the use of pilot projects. Those projects are ones

in which the public entity uses a particular commodity or service at no cost and without any financial obligation to the supplier for the sole purposes of evaluating the commodity or service.

As Chapter 8 (*Noncompetitive and Limited Competition Procurements*) explains, these types of projects often pose some ethical issues for public procurement officers. Additionally, a procurement law, if the public entity is under one, must specifically authorize them.

One state whose law permits pilot or demonstration projects is Arizona. The Arizona Revised Statutes state:

41-2556. Demonstration projects¹⁴

A. A demonstration project may be undertaken if the director determines in writing that the project is innovative and unique. This state shall not be obligated to pay the contractor, or to procure or lease the services or materials supplied by the contractor. However, on the written request and justification by the agency and written determination by the director that it is in the best interest of this state, this state may pay the contractor for the demonstration project. The contract term shall not exceed two years. A request and written determination of the basis for the contract award shall be included in the contract file.

B. A contract to procure or lease services or materials previously supplied during a demonstration project shall be conducted under this article.

C. Except as otherwise provided by law, a contractor for a demonstration project shall not be precluded from participating as a bidder or offeror in a procurement for the services or materials supplied during a demonstration project.

Chapter 20 makes a case for the use of this type of market research tool.

Special Procurement Methods

Finally, the Model Procurement Code provides language that a state or local government may adopt to permit a procurement officer to devise new source selection methods when circumstances dictate a need to do so. It provides:

§3-207 Special Procurements.

Notwithstanding any other provision of this Code, the Chief Procurement Officer or the head of a Purchasing Agency may with prior public notice initiate a procurement above the small purchase amount specified in Section 3-204 where the officer determines that an unusual or unique situation exists that makes the application of all requirements of competitive sealed bidding or competitive sealed proposals contrary to the public interest. Any special procurement under this Section shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the procurement and for the selection of the particular contractor shall be included by the Chief Procurement Officer or the head of a Purchasing Agency in the contract file, and a report shall be made publicly available at least annually describing all such determinations made subsequent to the prior report.

The American Bar Association inserted this language into the 2000 version of the Model Procurement Code. It is based on a statute that is in the version of the Model Procurement Code that the State of Alaska adopted which states:¹⁵

AS 36.30.308. Innovative Procurements.

(a) A contract may be awarded for supplies, services, professional services, or construction using an innovative procurement process, with or without competitive sealed bidding or competitive sealed proposals, in accordance with regulations adopted by the commissioner. A contract may be awarded under this section only

when the chief procurement officer, or, for construction contracts or procurements of the state equipment fleet, the commissioner of transportation and public facilities, determines in writing that it is advantageous to the state to use an innovative competitive procurement process in the procurement of new or unique requirements of the state, new technologies, or to achieve best value.

(b) The procurement officer shall submit a procurement plan to the Department of Law for review and approval as to form before issuing the notice required by (c) of this section.

(c) A procurement under this section is subject to the requirements of AS 36.30.130.

(d) Nothing in this section precludes the adoption of regulations providing for the use of bonuses instead of preferences in a procurement of construction.

CONCLUSION

The Recommended Best Practices and this chapter identify the concepts and methods that the public procurement officer applies when procuring commodities, services, and construction, and emphasizes the discretion and flexibility that he or she must exercise. These concepts and methods have been used for decades and will likely be practiced for decades more. It will be the responsibility of the public procurement officer to use them in a creative way to meet the needs of a public entity, its user agencies and its users.

ENDNOTES

1. <https://www.nigp.org/home/find-procurement-resources/dictionary-of-terms>
2. A copy of the Model Procurement Code, along with various versions of it including the Model Procurement Ordinance is

- available at: <http://apps.americanbar.org/dch/committee.cfm?com=PC500500>
3. www.naspo.org
 4. See the commentary to Section 3-203(1) of the Model Procurement Code.
 5. <https://www.nigp.org/home/find-procurement-resources/dictionary-of-terms>
 6. See Section 3-202(7) of the Model Procurement Code.
 7. See Kentucky Revised Statutes 45A.070 at: <http://www.lrc.ky.gov/statutes/statute.aspx?id=22340>
 8. See Section R3-202.11.2 of the Model Procurement Code.
 9. Pennington, R. (February 1, 2011). Problems in applying concepts of responsiveness in RFPs—Go Pro article. Retrieved October 9, 2018, from: <http://www.americancityandcounty.com/2011/02/01/responsive-or-not/>
 10. See Section 3-203(7) of the Model Procurement Code.
 11. Wyllie, J. (December 4, 2017). *Most Government Procurement Has Got It All Wrong, These Advocates Say*. Retrieved August 15, 2018, from: <http://www.governing.com/cityaccelerator/blog/lc-pips-procurement.html>
 12. Hagar, S., (June/July 2013) *A Case for Achieving Best Value Through PIPS, Government Procurement*. Retrieved from: https://www.nigp.org/docs/default-source/New-Site/govpro/govprojunejuly2013.pdf?sfvrsn=809cca46_0
 13. A purchase card “is a type of Commercial Card that allows organizations to take advantage of the existing credit card infrastructure to make electronic payments for a variety of business expenses (e.g., goods and services). In the simplest terms, a P-Card is a charge card, similar to a consumer credit card.” <https://www.napcp.org/page/WhatArePCardsc>
 14. See: <https://www.azleg.gov/viewdocument/?docName=https://www.azleg.gov/ars/41/02556.htm>
 15. <http://www.akleg.gov/basis/statutes.asp#36.30.308>

CHAPTER 8: NONCOMPETITIVE AND LIMITED COMPETITION PROCUREMENTS

RECOMMENDED BEST PRACTICES

- Balancing the flexibility provided by exceptions to full competition with the need for proper administration requires central oversight, including the authority to establish strict conditions for the use of exceptions. That authority and oversight must reside solely with the Chief Procurement Officer.
- Central decision making by the Chief Procurement Officer means that there is a central repository for the documentation supporting the decision on the exception to competition. This, in turn, offers one place for auditors and others to find data about these types of procurements, including the justification for limiting or eliminating competition.
- A request for an exception to competition should be in writing and meet the conditions that are spelled out in the laws, rules/regulations, or policies establishing the conditions and procedures for these types of procurements.
- The Chief Procurement Officer should provide some public notice of sole source procurements, as notice can provide an excellent method for testing the user agency's request for a sole source against the supplier community-at-large, who may have a different view.
- When conditions necessitating an emergency procurement arise and the Chief Procurement Office is unavailable to provide approval, procedures should permit user agencies to conduct those procurements and require them to report the circumstances to the Chief Procurement Officer within a short period of time to obtain approval after the fact.
- The Chief Procurement Officer should review and approve his or her public entity's purchase of another government's property, including the advisability of the purchase and its price, along with the terms and conditions in any written agreement.

Circumstances can sometimes make it difficult or impossible to conduct a formal competitive procurement. There are source selection methods for conducting noncompetitive and limited competition procurements when conditions are appropriate. In order to provide a public procurement officer with a full range of tools, a public entity's procurement law should authorize the use of these methods where that law otherwise requires competition.

This chapter discusses the conditions and methods for awarding procurement contracts where there is limited or no competition.

AUTHORITY AND CENTRAL OVERSIGHT

A very small dollar purchase is one example of a type of procurement that a public procurement officer conducts with limited or no competition. Chapter 7 (*Competition: Solicitations and Methods*) addresses those types of procurements.

High dollar noncompetitive or limited competition procurements can be controversial and may become fodder for newspaper headlines. But these can also be legitimate procurements that offer a public entity a means of buying what it needs in situations where full and open competition does not make sense. The authority to conduct these types of procurements rests in a public entity's law establishing its procurement processes. In some cases, there may not be a law mandating competition or the law may simply give full discretion to a state or local governmental official to establish procurement processes. However, that is not the best practice.

A public entity's law should require full competition above a certain dollar level or authorize that dollar level to be established in rules/regulations. Once the law has established the mandate for competition, it must then define the specific authority of a public procurement office to make exceptions. Balancing the flexibility

provided by exceptions to full competition with the need for proper administration requires central oversight, including the authority to establish strict conditions for the use of exceptions. That authority and oversight must reside solely with the Chief Procurement Officer.

That is the case even if the Chief Procurement Officer delegates authority to a user agency to conduct procurements. Chapter 2 (*Procurement Leadership, Organization, and Value*) discusses delegations in more detail.

Central oversight achieves several important public policy goals. For instance, it takes the decision to limit or eliminate competition away from the user agency requesting an exception. Public procurement officers within that user agency will often feel political pressure, real or imagined, to accommodate the request. Removing the decision from within the user agency provides a more objective and neutral process for evaluating that request.

Additionally, central decision making means that there is a central repository for the documentation supporting the procurement decision. In turn, that offers one place for auditors and others to find data about these types of procurements, including the justification for limiting or eliminating competition.

The following paragraphs address the types of procurements that fall into the limited competition or no competition categories. They also examine the kind of due diligence that is necessary to verify the reasonableness of price and the record keeping required to support the decisions being made.

A WORD ABOUT COMPETITIVE REQUIREMENTS WHEN USING FEDERAL FUNDS

In 2013, the federal government issued the Uniform Administrative Requirements, Cost

Principles, and Audit Requirements for Federal Awards, 2 Code of Federal Regulations Part 200 (Common Rule). Any non-federal public entity whose procurements are funded with federal monies must comply with the Common Rule.

The Common Rule states:¹

§200.319 Competition.

(a) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section.

The Common Rule does not address or authorize the use of exemptions from full competition for procurements funded with federal monies.

INVESTIGATION AND PRESERVATION OF RECORDS

For some limited competition or noncompetitive procurements, the central procurement office itself initiates the process. More often than not, however, such a procurement begins when a user agency makes a request to the Chief Procurement Officer. That request should be in writing and must meet the conditions that are spelled out in the laws, rules/regulation, or policies establishing the conditions and procedures for these types of procurements. The written request for this type of procurement is inadequate if it merely cites a need for waiver of competition without supporting information and justification.

In many cases, the Chief Procurement Officer will not have any real means to examine independently the user agency's determination of its need for these types of procurements. In other instances, the basis for exempting the procurement from full competition is clear, such as in emergencies, in instances where formal competition has previously failed, for commodities that are needed for over-the-counter sale, or

when a commodity is available from correctional industries.

Whether the basis of the user agency need is obvious or not, the procurement file must demonstrate that the Chief Procurement Officer's decision to approve the purchase was based on all of the information available. For instance, the file should show that the Chief Procurement Officer independently studied the market to determine whether the commodity was, in fact, the only commodity available. It should also demonstrate that the Chief Procurement Officer took steps to substantiate that the price offered was reasonable. This is discussed later in this chapter, as well as in Chapter 4 (*Strategies and Plans*).

What is obvious to those within the executive branch of a state or local government is not always readily evident to those outside of it, such as journalists, legislators, and other suppliers. The key point is that the file should leave a satisfactory audit trail demonstrating that the Chief Procurement Officer conducted an appropriate independent analysis of a user agency's request and that he or she documented those efforts.

TYPES OF NONCOMPETITIVE OR LIMITED COMPETITION PROCUREMENTS

There are many circumstances where the opportunity for competition is limited or not practical. Some of these are discussed in the following text.

This does not suggest that the law must use the exact wording employed in this chapter for a public procurement officer to have the authority to limit or eliminate competition. The Chief Procurement Officer should interpret the law with reasonable flexibility while also considering the advice of the public entity's attorneys. However, the ultimate decision as to whether the law

permits an action or not must rest with the Chief Procurement Officer.

Sole Source Procurements

Sole source procurement is a commonly referenced designation. However, there is not one single universally accepted definition. A good one is found in The Institute for Public Procurement: NIGP Dictionary:²

Sole source procurement—*A situation created due to the inability to obtain competition. A procurement method where only one supplier possesses the unique ability or capability to meet the particular requirements of the solicitation. The purchasing authority may require a justification from the requesting department within the agency explaining why this is the only source for the requirement.*

Competition is not available in a sole source procurement situation simply because there is only a single source for the procurement or no reasonable alternative source exists.

The American Bar Association Model Procurement Code (Model Procurement Code) for State and Local Governments addresses the issue in its model statutory language and the commentary to it as follows:³

§3-205 Sole Source Procurement.

A contract may be awarded for a supply, service, or construction item without competition when, under regulations, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer above the level of the Public Procurement Officer determines in writing that there is only one source for the required supply, service, or construction item.

COMMENTARY:

(1) This method of procurement involves no competition and should be utilized only

when justified and necessary to serve [State] needs. This Code contemplates that the [Policy Office] [Chief Procurement Officer] will promulgate regulations which establish standards applicable to procurement needs that may warrant award on a sole source basis.

(2) The power to authorize a sole source award is limited to the Chief Procurement Officer and the head of an agency with purchasing authority, or their designees above the level of Public Procurement Officer. The purpose in specifying these officials is to reflect an intent that such determinations will be made at a high level. The permission for these officials to authorize a designee to act for them should be subject to regulations.

The term *sole source* refers to the source, not the commodity or service. The ability of a supplier to meet a necessary condition dictated by circumstances such as immediate delivery date or repairs at a particular location can create a sole source situation in which there is a single available supplier. Some examples of sole source procurements are:

- Equipment for which there is no comparable competitive commodity, for example, a one-of-a-kind oscilloscope that is available from only one supplier
- Public utility services from regulated monopolies
- A component or replacement part for which there is no commercially available substitute and which may be obtained only directly from the manufacturer
- An item where compatibility is the overriding consideration, such as computer operating software enhancements for an existing system
- A used item, for example, a television transmitter tower that becomes immediately available

Best practice is for the law authorizing the use of sole source procurement to require that the

Chief Procurement Officer provide some public notice that he or she is embarking on this type of procurement. Even if the law does not require it, notice can provide an excellent method of testing the user agency's request for a sole source against the supplier community-at-large, which may have a different view.

NASPO has published sole source procurement information on its website.⁴ That information provides a more thorough look at what constitutes a sole source, how to reduce the use of unnecessary sole source procurements, and how to maximize competition. It also offers sample justification forms and templates for sole source requests.

Emergency Procurements

Another circumstance in which competition may be limited or not practical is in an emergency. The focus here is not on the rarity of the item or service sought, but on expediency instead. As noted for sole source procurements, there should be some authority in a state or local government's law to permit this type of procurement when that law otherwise requires procurements to be conducted through full competition.

An *emergency* for procurement purposes is an unexpected and pressing situation requiring swift procurement action outside of normal procedures. The NIGP defines the term as follows:

Emergency purchase—*A purchase made due to an unexpected and urgent request where health and safety or the conservation of public resources is at risk. Usually formal competitive bidding procedures are waived.*

In addition to threats to life and property, an emergency may include circumstances such as an unexpected delay in delivery or an unanticipated volume of work. It never includes a situation created by poor planning on the part of user agencies.

The Model Procurement Code addresses the issue in its model statutory language and the commentary to it:⁵

§3-206 Emergency Procurements.

Notwithstanding any other provision of this Code, the Chief Procurement Officer, the head of a Purchasing Agency, or a designee of either officer may make or authorize others to make emergency procurements when there exists a threat to public health, welfare, or safety under emergency conditions as defined in regulations; provided that such emergency procurements shall be made with such competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

COMMENTARY:

(1) *This Section authorizes the procurement of supplies, services, or construction where the urgency of the need does not permit the delay involved in utilizing more formal competitive methods. This Code contemplates that the [Policy Office] [Chief Procurement Officer] will promulgate regulations establishing standards for making emergency procurements and controlling delegations of authority by the Chief Procurement Officer or the head of a Purchasing Agency. Such regulations may limit the authority of such officials to delegate the authority to make procurements above designated dollar amounts.*

(2) *While in a particular emergency an award may be made without any competition, the intent of this Code is to require as much competition as practicable in a given situation. When the amount of the emergency procurement is within that adopted for Section 3-204 (Small Purchases), the competitive procedures prescribed under that Section should be used when feasible.*

(3) Use of this Section may be justified because all bids submitted under the competitive sealed bid method are unreasonable, and there is no time to re-solicit bids without endangering the public health, welfare, or safety. As with other emergency conditions, regulations will further define these circumstances, and any procurements conducted pursuant to this authority must be done so as to treat all bidders fairly and to promote such competition as is practicable under the circumstances.

It is a best practice for rules/regulations and procedures to address situations where prior approval of the Chief Procurement Officer is not feasible, such as when emergencies occur on weekends. In those cases, the rules/regulations and procedures should permit user agencies to conduct emergency procurements but require them to report the circumstances to the Chief Procurement Officer within a short period of time to obtain approval after the fact.

In an emergency procurement, the quantity to be purchased should only be that necessary to meet the circumstance. If time, the nature of the requirements, and other circumstances permit, verbal price quotations should be sought from more than one potential source.

For certain commodity or service needs, the Chief Procurement Officer may consider putting in place indefinite quantity contracts⁶ for a period of time (such as a year) through a formal competition in anticipation of certain emergency situations, with the understanding that the user agencies will purchase from the contract only if an emergency need exists. For example, one emergency might be for helicopter services for forest firefighting work. Major disasters require prompt action and these types of contracts allow the procurement process to meet an urgent need in a competitive yet timely manner.

Procurement of Government-Produced Services or Commodities

Many state laws mandate that state user agencies use commodities or services produced by correctional industries and sheltered suppliers, such as industries for the blind. In some cases, the Chief Procurement Officer may have the authority to establish the prices that user agencies will pay for those commodities and services.

In most cases, however, the public procurement officer will not have that authority. Under those circumstances, the public entity's law must provide a mechanism for the Chief Procurement Officer to determine whether the price charged is reasonable; and if it is not, to seek to purchase the services or commodities through normal competitive processes or existing contracts.

Procurements of Other Governments' Property

Some purchases may take place between two different governments. For instance, a state highway department may rent out a road grader to a county government, or a small town may ask a larger city to provide hosting services for its website and e-mail services. A state university may wish to buy a piece of research equipment from a university in another state.

The best practice is for the Chief Procurement Officer to review and approve the transaction, including the advisability of the purchase and its price, along with the terms and conditions in any written agreement.

Procurements with or from Other Governments' Contracts

Chapter 12 (*Cooperative Purchasing*) discusses cooperative procurement in detail. When a public entity purchases services, commodities, or construction from the contract competed and awarded by a second public entity—a cooperative contract—the first public entity's purchase

from the cooperative contract is an exception to any requirement in its law to compete that procurement opportunity. Therefore, it is important for the public entity to have the authority in its law to purchase from another public entity's cooperative contract.

In most cases, the public entity awarding the cooperative contract fully competes it. Typically, there are requirements in the law that have to be satisfied for a public entity to be able to purchase from a cooperative contract. For instance, there may be a requirement that the public entities—the one purchasing and the one competing and awarding the contract—have a written agreement for cooperative purchasing.

There is one issue related to cooperative purchasing that may be problematic for some public entities. In some cases, a public entity's law may authorize that entity to make purchases from a cooperative contract only if the solicitation for that cooperative contract explicitly names that entity as a potential purchaser. If a public entity who wishes to purchase from the cooperative contract is not named as a potential purchaser, it cannot purchase from, or piggyback onto, a cooperative contract.

Many governments below the state level freely purchase commodities and services from other public entities' cooperative contracts whether or not the solicitations that resulted in those contracts specifically named them or not. While the naming of every participating public entity in the solicitation at the procurement's initiation is ideal, particularly if the competing suppliers are trying to project potential volume in their pricing strategies, suppliers awarded contracts generally do not object to the additional business. It is convenient for the cooperative contract to allow the contractor the option of providing commodities or services under that contract to public entities that were not originally named in it.

Laws authorizing cooperative purchasing vary widely. As Chapter 12 explains, the specific legal authority in a particular public entity must

be understood before it attempts to purchase through cooperative contracts.

Unsolicited Offers

If a supplier submits an unsolicited offer to a state or local government, acceptance of the offer constitutes a waiver of competition. It is best for a law to authorize acceptance of such offers while directing that rules/regulations and procedures be put in place to govern the conditions for considering, accepting, or rejecting them.

Generally, the rules/regulations and procedures should require that the offer be made entirely upon the initiative of the offeror; that it be submitted in sufficient detail to evaluate its need and usefulness; that it be proprietary or unique to the extent that competitive solicitations are not practicable; and that its evaluation be subject to comparisons and tests as determined by the public entity receiving the offer. In addition, procedures should require that an unsolicited offer not be evaluated, nor any commitment be made by a user agency with respect to such an offer, without written approval of the Chief Procurement Officer.

The Recommended Regulations of the Model Procurement Code address the issue in the following way:⁷

R3-104.01 Unsolicited Offers.

R3-104.01.1 Defined. *An unsolicited offer is any offer other than one submitted in response to a solicitation.*

R3-104.01.2 Processing of Unsolicited Offers. *The Chief Procurement Officer or the head of the Purchasing Agency shall consider the offer as provided in this Section. If an agency that receives an unsolicited offer is not authorized to enter into a contract for the supplies or services offered, the head of such agency shall forward the offer to the Chief Procurement Officer who shall have final authority with*

respect to evaluation, acceptance, and rejection of such unsolicited offers.

R3-104.01.3 Conditions for Consideration. *To be considered for evaluation, an unsolicited offer:*

- (a) must be in writing;*
- (b) must be sufficiently detailed to allow a judgment to be made concerning the potential utility of the offer to the [State];*
- (c) must be unique or innovative to [State] use;*
- (d) must demonstrate that the proprietary character of the offering warrants consideration of the use of sole source procurement; and*
- (e) may be subject to testing under terms and conditions specified by the [State].*

R3-104.01.4 Evaluation. *The unsolicited offer shall be evaluated to determine its utility to the [State] and whether it would be to the [State's] advantage to enter into a contract based on such offer. If an award is to be made on the basis of such offer, the sole source procedures in Regulation 3-205 (Sole Source Procurement) shall be followed.*

R3-104.01.5 Confidentiality. *Any written request for confidentiality of data contained in an unsolicited offer that is made in writing shall be honored. If an award is made, confidentiality of data shall be agreed upon by the parties and governed by the provisions of the contract. If agreement cannot be reached on confidentiality, the [State] may reject the unsolicited offer.*

Pilot or Demonstration Projects

Public procurement professionals are often asked by a user agency to permit it to put a commodity or service through a practical test to see if that type of commodity or service might

meet the user agency's critical needs. Pilot or demonstration projects are exceptions to competition, although some might argue that if the supplier provides the commodity or service without charge, the transaction does not qualify as a procurement. Given the effect on future possible competition of allowing one supplier access to test its commodity or service, this type of arrangement should be reviewed thoroughly and require the approval of the Chief Procurement Officer.

Additionally, the public entity's law should specifically authorize that entity to engage in this type of arrangement. One state whose law permits pilot or demonstration projects is Arizona. The Arizona Revised Statutes state:

41-2556. Demonstration projects⁸

A. *A demonstration project may be undertaken if the director determines in writing that the project is innovative and unique. This state shall not be obligated to pay the contractor, or to procure or lease the services or materials supplied by the contractor. However, on the written request and justification by the agency and written determination by the director that it is in the best interest of this state, this state may pay the contractor for the demonstration project. The contract term shall not exceed two years. A request and written determination of the basis for the contract award shall be included in the contract file.*

B. *A contract to procure or lease services or materials previously supplied during a demonstration project shall be conducted under this article.*

C. *Except as otherwise provided by law, a contractor for a demonstration project shall not be precluded from participating as a bidder or offeror in a procurement for the services or materials supplied during a demonstration project.*

Supplier arrangements such as this one pose a dilemma for a Chief Procurement Officer. On the one hand, a pilot or demonstration project allows the public entity to *kick the tires* of something that may solve a serious public problem without committing the public entity to a costly contract in situations where the contractor may try to resolve the problem but not be able to perform if the solution does not work. On the other hand, the pilot project supplier will clearly have *inside information* for any formal competition that may be conducted based on the outcome of the project. Among other things, competitors of the pilot supplier will tend to be discouraged from competing based on that fact, to the detriment of the public entity.

CONCLUSION

The public procurement function must be flexible enough to allow for exceptions to the requirement for full competition. Approval of these exceptions must be within the sole authority of the Chief Procurement Officer. The key is that the special circumstances justifying the exception must be described in the public entity's law. Additionally, all steps in the process of conducting a noncompetitive or limited competition procurement must be documented.

ENDNOTES

1. See 2 Code of Federal Regulations §200.319, *Competition*, at: <https://www.gpo.gov/fdsys/pkg/CFR-2017-title2-vol1/pdf/CFR-2017-title2-vol1-part200.pdf>
2. Access to the NIGP Dictionary is available at: <http://www.nigp.org/home/find-procurement-resources/dictionary-of-terms>
3. A copy of the Model Procurement Code, along with various versions of it including the Model Procurement Ordinance and Recommended Regulations is available at: <http://apps.americanbar.org/dch/committee.cfm?com=PC500500>
4. <http://www.naspo.org/solesourceprocurement/index.html>
5. See Endnote 3.
6. The NIGP Dictionary defines an indefinite quantity contract as follows: A type of a contract that provides for the delivery of indefinite quantities, within stated limits, of supplies or services. These supplies or services are to be furnished during a fixed period, with deliveries or performance to be scheduled by placing orders with the contractor.
7. See Endnote 3.
8. See: <https://www.azleg.gov/viewdocument/?docName=https://www.azleg.gov/ars/41/02556.htm>

CHAPTER 9: BID AND PROPOSAL EVALUATION AND AWARD

RECOMMENDED BEST PRACTICES

- The evaluation of bids and proposals must conform to the procurement law.
- The evaluation must also be consistent with the criteria and requirements specified in the solicitation.
- There should be a plan in place for how the evaluation is to be conducted before the due date for bids or proposals.
- The public procurement officer should conduct the cost or price evaluation with any needed assistance from a public entity's fiscal personnel, leaving the technical evaluation to the evaluation committee, where one has been appointed.
- The analysis of the bids or proposals must be documented in writing. Documentation is important, not only to show that the evaluation conformed to the law and the solicitation, but also to show that the process was fair and unbiased.
- The solicitation should specify a time (such as three months) during which a bidder or offeror must keep their bids and proposals open—that is, keep their pricing firm.
- It is imperative that those involved in the evaluation of bids or proposals be completely unbiased in whatever role they play in the evaluation.
- There should be a rigorous determination of a bidder's or offeror's responsibility as part of the evaluation process. Responsibility should not be presumed because the bidder or offeror has previously been a contractor for the public entity.
- The documentation of the selection of the winning bidder or offeror must demonstrate compliance with contract award standards stated in the law and the solicitation. It should also be consistent with the procurement procedures and guidelines, such as internal procurement manuals, that exist to assist the public entity's public procurement officers.

The evaluation of bids and proposals is a key point in the procurement process. It is where the needs of the user agency, as reflected in the solicitation, are compared side-by-side with the response of suppliers heeding the call to meet those needs. This chapter discusses the process of making that comparison—the evaluation of bids or proposals—and awarding a contract.

At the outset, it is important to say a word about who should make the award decision. A procurement law should confer that authority solely on the public procurement officer. In many state and local governments (primarily cities, counties, and districts), applicable laws grant that authority to an elected official or bodies of elected officials.

The awarding of a contract and the maintenance of a truly professional procurement system do not fit well within a political, often legislative-type process. Lobbying and other normal characteristics of the deliberations of a political body such as an elected city council or board of supervisors run counter to the promise that suppliers' responses to a solicitation will be judged fairly by those most knowledgeable about the procurement process and the subject matter of the procurement.

Thus, where the public political body has the authority to give away or delegate its authority to award contracts, it should do so to the Chief Public Procurement Officer in the interest of sound management. This also allows public officials to devote their time to the important policy and budgetary issues for which they were elected.

EVALUATIONS AND AWARDS

At the outset of this chapter, it is appropriate to set forth some overarching principles that should drive any evaluation of a bid or proposal and subsequent contract award. Important principles are:

- **Alignment of the evaluation to the law**—The evaluation must conform to the procurement law. If that law, for instance, does not explicitly permit the public entity to take into consideration evaluation criteria in considering bids but requires that the contract award be made to the lowest responsible bidder, then it is doubtful that evaluation criteria may be used. If the law allows criteria other than low price to be used in evaluating bids but limits them to those that are objectively measurable, then it is critical to limit criteria to factors that fit that requirement. Similarly, if the law says that price or cost must be one of the criteria in evaluating proposals, then the solicitation must list price or cost as an evaluation factor. Chapter 7 (*Competition: Solicitations and Methods*) discusses these legal standards in more detail.
- **Alignment of the evaluation to the solicitation**—The evaluation must also be consistent with the evaluation criteria and requirements specified in the solicitation. If the evaluation is based in part on whether a bid or proposal meets certain minimum requirements, then those requirements must be clearly identified as such in the solicitation. Additionally, the evaluation criteria must be those that will allow whoever is weighing bids or proposals—a public procurement officer or an evaluation committee—to measure how well a particular bid or proposal fares against the criteria. Finally, a mismatch between the solicitation requirements and the evaluation criteria is unfair to suppliers who may be misled about what is required or important.
- **Evaluation plan**—The plan for how the evaluation is to be conducted must be in writing and in place before the due date for bids or proposals. That precludes any criticism that the plan was crafted after bids or proposals were in the public procurement officer's hands and that it was skewed in a particular supplier's direction.

- **Evaluation of price or cost**—The public procurement officer should evaluate cost or price with any needed assistance from a public entity's fiscal personnel, leaving the technical evaluation to the evaluation committee where one has been appointed.
- **Written documentation**—The analysis of the bids or proposals must be documented in writing. The formal procurement process, and even the informal one at some dollar levels, is a written one, with a written solicitation asking for written responses. Documentation is important, not only to show that the evaluation conformed to the law and the solicitation, but also to show that the process was fair and unbiased. The importance of thorough documentation is outlined in Chapter 17 (*Protests, Disputes, and Claims*).
- **Timelines**—The solicitation should specify a time (such as three months) during which a bidder or offeror must keep their bids and proposals open—that is, keep their pricing firm. Therefore, before the solicitation is issued, it is necessary for the public procurement officer to have in mind a good estimate of the time that evaluation of bids or proposals will take. The evaluation sometimes takes longer than anticipated and stated in the solicitation. In those situations, the public procurement officer should ask each bidder or offeror to extend its bid or proposal for another specific amount of time.
- **Impartial evaluators**—It is imperative that those involved in the evaluation of bids or proposals be completely unbiased in whatever role they play in the evaluation. Chapter 7 (*Competition: Solicitations and Methods*) emphasizes this point.
- **Determinations of responsibility**—There should be a rigorous determination of a bidder's or offeror's responsibility as part of the evaluation process. Responsibility should not be presumed because the bidder or offeror has previously been a contractor for the public entity.
- **Alignment of the contract award with the law and the solicitation**—The documentation of the selection of the winning bidder or offeror must demonstrate compliance with contract award standards stated in the law and the solicitation. It should also be consistent with the public entity's procurement procedures and guidelines, such as internal procurement manuals, that exist to assist public procurement officers.

EVALUATION OF BIDS AND PROPOSALS GENERALLY

The following discussion focuses on some steps in the formal procurement process that apply to the evaluation of both the bids and the proposals.

Initial Review for Compliance

After opening bids or proposals, a public procurement officer must verify that they contain all the required documents and information and that they are properly signed. The point of that exercise is to determine whether there is any omission or defect in a bid or proposal that requires rejection before formal evaluation even begins. A public procurement officer should not waste time on an incomplete or defective submission.

Bids

For bids, the determination is whether they are responsive, that is, whether they demonstrate an unequivocal commitment to the material requirements of the solicitation. Chapter 7 (*Competition: Solicitations and Methods*) discusses this concept in more detail. Nonresponsive bids should be set aside and not evaluated.

Proposals

For proposals, the determination is more complicated. Problems may be obvious, for instance, only to technical persons assisting with the procurement or sitting on the evaluation committee.

It may be the case in reviewing proposals for initial compliance that the public procurement officer reviews them for the most obvious non-compliance problems and that an evaluation committee composed of users with technical knowledge assists with what is often called determining technical acceptability. Proposals that are technically acceptable or may become so during clarifications or discussions, if any, with the evaluation committee are kept in the pool, and those that are too flawed to be within reasonable parameters are eliminated. No matter how that sorting is carried out, it must be reasonable, based on any requirements in the law and the solicitation, and documented.

Sending Bids or Proposals to Users for Evaluation

At the start of the formal evaluation process, some procurement offices refer bids or proposals to the user agency for its review and recommendation. That process is generally informal and unstructured.

While input from the user agency may be helpful, the informality of that approach results in at least part of the evaluation being placed outside of the hands of the public procurement officer. That means that there may not be a complete record of how the award decision was made, exposing the process to accusations that it was suspect.

The better approach is for the public procurement officer to conduct and maintain control over the evaluation of bids and proposals. There is room in that approach for user agency input without the public procurement officer losing oversight of the process. Use of an evaluation committee is one method, and it is an approach that is structured, formal, and a matter of record. The public procurement officer exercises control of the process so that the evaluation effort does not go astray or gravitate toward consideration of factors not announced in the solicitation.

Evaluation of Price or Cost

One matter that a public procurement officer needs to resolve before assigning evaluation responsibilities to a committee is whether that group will evaluate price or cost. It is the best practice for the public procurement officer to make that decision with appropriate fiscal personnel assistance, if necessary. In many instances today, price or cost requires some calculation, such as life cycle costing or total-cost-of-ownership analysis. While the public procurement officer may need help in performing the cost or price analysis, this analysis should not be within the purview of any committee evaluating bids or proposals.

The laws of some public entities specifically require that price or cost be evaluated only by the public procurement officer. The law of the State of Utah is an example.¹

Documentation

Because the evaluation process focuses on subjects such as responsiveness in the case of bids and subjective evaluation criteria in the case of proposals, suppliers and the public may understandably think that the evaluation process is a mystery. It is common to see bid protests that challenge, for instance, the application of the evaluation criteria, an evaluation committee's interpretation of a proposal, or the determination that a bid is materially defective. It is critical, therefore, that the written record of each key step in the procurement be sufficient to demonstrate how that decision was made.

The amount of documentation will depend on the type of evaluation conducted and the complexity of the commodity, construction, or service being purchased. The public procurement officer must look at the documentation in the procurement file from the view of competing bidders or offerors, the public, the press, and auditors. The question that the review must answer is whether the procurement file tells a reasonable story about the process—particularly about the basis for award. In preparing documentation,

the public procurement officer must be aware of one of the laws of contrariety: if something can be misinterpreted, it likely will be.

EVALUATION OF BIDS

Most public entities utilize a spectrum of criteria for evaluating bids and awarding contracts under competitive sealed bidding. Price is always a criterion in that spectrum, either as a principal determinant or as an element of overall cost.

Price/Performance Evaluation

For a procurement in which a price/performance evaluation will be carried out, the invitation for bids must notify suppliers that price/performance factors will be used and require them to submit technical performance and other data with their bids to allow for this evaluation. Today, price/performance analysis relies on strategies such as life cycle costing or total-cost-of-ownership calculations, which are discussed in detail in Chapter 6 (*Sustainable Procurement Considerations and Strategies*).

Whether or not the public entity has a sustainable procurement program, it is important for the public procurement officer to consider price/performance in determining which bid offers the lowest price or cost.

If the public procurement officer needs outside expert assistance to make the necessary technical assessments, that expertise should be made available. Additionally, as Chapter 6 notes, there is an abundance of information available online about energy use, maintenance, and other costs related to owning many brand-name commodities.

Types of Non-Price Evaluation Criteria

Non-price evaluation factors used in selecting the winning bid under competitive sealed bids are generally limited to those that are objectively

measurable. The State of Utah's Administrative Code defines *objective criteria* as follows:²

(19)(a) "Objective Criteria" means the quantifiable requirements, standards, and specifications set forth in a solicitation by which solicitation responses from vendors will be evaluated and scored by evaluators based on the measurable and verifiable facts, evidence, and documentation provided in each vendor's solicitation response.

(b) Objective criteria [are] not evaluated and scored based on the personal judgment, interpretation, or opinion of evaluators. Objective criteria [are] evaluated and scored strictly on the observable, verifiable and measurable facts, evidence, and documentation provided in each vendor's solicitation response.

(c) Examples of objective criteria that may be included in a solicitation:

(i) Vendors must document that they have a minimum of five years of experience on similar projects;

(ii) Vendors must have three licensed technicians on the project; and

(iii) Vendors must certify that they have an "A" rating from an accredited rating agency.

Table 9.1 lists some examples of objectively measurable criteria offered by the State of Utah and the Commonwealth of Kentucky for the evaluation of bids. The Utah Administrative Code also lists those same criteria as well as others when addressing competitive sealed proposals. The difference is that what is measured in evaluating a bid must be objectively measurable in contrast with criteria used in evaluating proposals under the competitive sealed proposals method, which may require measuring subjective criteria as well. The State of Utah's definition of *subjective criteria* is discussed under the heading *Evaluation of Proposals* in this chapter.

Objectively measurable criteria rely heavily on whether a number can be used to define baseline compliance for each criterion, such as the

Table 9.1 Examples of Objectively Measurable Criteria

State of Utah ¹	Commonwealth of Kentucky ²
<p>(1) A procurement unit that conducts a procurement using a bidding process shall evaluate each bid using the objective criteria described in the invitation for bids, which may include:</p> <ul style="list-style-type: none"> a) experience; b) performance ratings; c) inspection; d) testing; e) quality; f) workmanship; g) time and manner of delivery; h) references; i) financial stability; j) cost; k) suitability for a particular purpose; l) the contractor's work site safety program, including any requirement that the contractor imposes on subcontractors for a work site safety program; or m) other objective criteria specified in the invitation for bids. 	<p>Suggested evaluation criteria for commodities, establishing minimums and maximums for scoring purposes</p> <ul style="list-style-type: none"> • Delivery: time, number of delivery equipment • Price: lowest price • Product(s): these are general measurable and quantifiable criteria. The agency is responsible for developing measurable criteria that best suit the agency's business need. Remember, use only relevant, objective, and measurable criteria. If product best value criteria are not important to your agency's business needs, use the ranking approach and other appropriate criteria • Product training • Supplier responsibility: years in business, amount of inventory, personnel (number of dedicated employees required for the contract); experience—years of combined experience; qualifications such as a minimum of one (1) year in an (applicable) accredited educational institution is required. • Service: response time • Warranty: period of warranty

1. See Utah Code 63G-6a-606-(1) at: <https://codes.findlaw.com/ut/title-63g-general-government/#!tid=NFD2F9190A04B11E1A5BEF191D2B004BD>

2. [https://finance.ky.gov/services/eprocurement/Documents/FAQ's and Presentations/BestValueOverview.doc](https://finance.ky.gov/services/eprocurement/Documents/FAQ's%20and%20Presentations/BestValueOverview.doc)

number of years of experience for each bidder personnel assigned to the contract, commodity performance ratings provided by a specified outside certifying organization, or expected delivery times in hours or days.

Evaluation of Price Discounts

It is a good practice to ask bidders to offer discounts, particularly under indefinite quantity/indefinite delivery contracts. Three common types of discounts are: a percentage off of the price deductible from an established catalog list price; a percentage off of an invoice amount deductible for payment of an invoice within a specified time; or a percentage off of the price based on volume purchased.

If the solicitation asks bidders to supply discounts, it must specify if and how the public procurement officer will evaluate them. By doing that, the procurement office prevents the bidders that do not offer discounts from claiming that they did not know that the public procurement officer would accept them.

A discount from an established list price is the only one that can be considered in evaluating bid prices. A discount based on future volume purchases will not occur until the contract is in place and thus is too speculative to consider during the procurement process. The same may be said of the discount offered for prompt payment of an invoice.

Determining Responsibility

As noted in Chapter 7 (*Competition: Solicitations and Awards*), a universal requirement for the award of a contract through a public procurement process is that it be made to a responsible supplier.

In many instances, the determination of a supplier's responsibility is given short shrift where the supplier has been a contractor for the state or local government for many years, or is well known within the community. In other cases, some of the criteria related to a supplier's responsibility, such as past performance of contracts, are made a part of the evaluation of a bid or proposal, requiring the supplier to demonstrate compliance in its bid or proposal with that criteria.

Neither of those situations, however, excuses the public procurement officer from making a specific determination that a supplier is responsible separate from the evaluation of its bid or proposal.

An example of a comprehensive responsibility determination process is that of the State of New York. The Office of the New York State Comptroller has established a precise and detailed process for examining a supplier's integrity and capability to perform a contract. The following information is part of a description from that office's website:³

Category	Factors to be considered include, but are not limited to:
<i>Financial and Organizational Capacity</i>	<i>Assets, liabilities, recent bankruptcies, equipment, facilities, personnel resources and expertise, and proper auditing and accounting controls.</i>
<i>Legal Authority</i>	<i>Authority to do business in New York State, licenses, and registrations.</i>
<i>Integrity</i>	<i>Criminal indictments or convictions, civil fines and injunctions imposed by other agencies, antitrust investigations, ethical violations, tax delinquencies, or debarment by federal, state, or local governments.</i>
<i>Previous Contract Performance</i>	<i>Reports of less than satisfactory performances, early contract termination for cause, contract abandonment, court determinations of breach of contract.</i>

In making a vendor responsibility determination, you must assess whether the vendor has:

- *appropriate financial, organization, and operational capacity and controls;*
- *appropriate legal authority to do business in New York;*
- *a satisfactory record of integrity; and*
- *an acceptable performance record on past contracts.*

You should consider any information that comes to your attention and work with the vendor to address any negative information.

Things to keep in mind:

- *Determinations must be made on a case-by-case basis.*
- *No specific response or piece of information from the vendor should automatically trigger a determination.*
- *A previous non-responsibility finding does not necessarily ban the vendor from future State contracts.*

Reviewing supplier information

When reviewing a vendor, you should rely on the scope of the contract to help guide you in determining what information is most relevant. However, your review must address the four categories listed here before you can make a determination:

[. . .]

Evaluating a supplier's past performance

It's good practice to require the vendor to provide references and identify other government contracts it has received, particularly those similar in scope to the contract at hand. You should contact these references and use the information obtained as part of the review process.

We encourage you to use quality control and consumer satisfaction measures, especially for human services contracts.

[. . .]

Addressing potentially negative information

Before you make a determination, you should contact the vendor to address any information that appears unfavorable. This provides an opportunity for the vendor to explain or even resolve the issue to your satisfaction.

However, there are valid causes that may warrant a finding of non-responsibility. These include, but are not limited to, the vendor having:

- *committed fraud, such as anti-trust violations, embezzlement, theft, forgery, bribery, or tax evasion;*
- *made false statements or similar offenses;*
- *breached contracts resulting in their termination; or*
- *failed to show its financial capacity to perform the work.*

If you become aware of information that calls into question a vendor's responsibility after you've awarded the contract, you may do one of two things:

- *review the issue and determine no action is warranted, or*
- *require the vendor to correct the problem or implement a corrective action plan.*

The information from the New York website reflects best practices. Since the information that a public procurement officer needs to make a responsibility determination is uniform regardless of the type of procurement involved, it should not be too difficult to establish templates and checklists for collecting the needed information from suppliers and analyzing it.

Contract Award

As noted earlier, the contract must be awarded to the responsible bidder whose bid is judged to meet the requirements that the law dictates. Additionally, there must be an in-depth scrutiny of a bidder's responsibility before awarding it a contract.

EVALUATION OF PROPOSALS

Under a request for proposals (RFP), non-price/cost evaluation factors generally play a much greater role in the selection of a winning proposal than they do in selecting a winning bid. Additionally, criteria used to evaluate proposals may include ones that rely on the evaluators' subjective judgments, and are not limited to criteria that are objectively measurable. Finally, unlike the competitive sealed bidding method, there are opportunities for offerors to modify their proposals within limits, and for discussions and negotiations to take place.

As noted earlier in this chapter, the Utah Administrative Code contains a definition of *subjective criteria*:⁴

(28)(a) "Subjective Criteria" means the open-ended requirements, standards, and specifications set forth in a solicitation by which solicitation responses from vendors will be evaluated and scored by evaluators based on the personal judgment, interpretations, and opinions of the evaluators after reviewing and analyzing the information presented in each vendor's solicitation response.

(b) Subjective criteria [are] not evaluated and scored strictly on the observable, verifiable and measurable facts, evidence, and documentation provided in each vendor's solicitation response. Subjective criteria [are] also evaluated and scored based on the personal judgement, interpretation, and opinion of the evaluators after reviewing and analyzing the information presented in each vendor's solicitation response.

(c) Examples of subjective criteria that may be included in a solicitation:

(i) Vendors must describe how they will manage the project to meet the deadline;

(ii) Vendors must demonstrate that they have the knowledge, skills, and ability to accomplish the scope of work; and

(iii) Vendors must explain how their product complies with the specifications.

The Evaluation

Instructions to the Evaluation Committee

At the outset of the evaluation, the evaluation committee members should be advised of their roles in the process and the requirement to exercise independent judgment. The State of Utah Administrative Code sets out a good process for doing this, requiring a meeting at which the public procurement officer does the following:⁵

- Explains the evaluation and scoring process;
- Discusses requirements and prohibitions pertaining to socialization with suppliers, financial conflicts of interest, personal relationships, favoritism or bias, disclosure of confidential information contained in proposals or the deliberations and scoring of the evaluation committee, and ethical standards for an employee of a user agency involved in the procurement process;
- Reviews the scoring sheet and evaluation criteria set forth in the RFP; and

- Provides a copy of procedures for scoring non-priced technical criteria to the evaluation committee, employees of the procurement unit involved in the procurement, and any other person that will have access to the proposals.

That administrative code also emphasizes that the evaluation committee must “exercise independent judgement in the evaluation and scoring of the non-priced technical criteria in each proposal.”⁶ The steps outlined here are all good approaches.

The separation of the analysis of price/cost and the analysis of the technical aspects of proposals is a best practice. The evaluation of price or cost should be a mathematical one based on the importance of price or cost as an evaluation factor. The public procurement officer may need to ask for assistance from financial personnel within the public entity because the application of accounting principles may come into play. Removing the evaluation of a price or cost from an evaluation committee frees it to concentrate on the more important non-price portions of the offeror's proposals and whether they suit the public entity's business needs as stated in the solicitation.

Once the public procurement officer completes his or her evaluation of price or cost, that officer combines it with the evaluations of the committee. Since the committee is likely to conduct more than one evaluation during a procurement, the timing of when the public procurement officer provides the total evaluation, including price or cost, to the committee depends on the public entity.

Methods of Evaluation

It is the general practice in state and local government procurement processes to use numerical scoring to evaluate proposals—either points or rankings. That practice is even embedded into the procurement laws and procurement handbooks of various governments. For instance,

the Utah Administrative Code directs each evaluation committee independently to assign a *preliminary draft score* to proposals, and states that evaluation will be based on a *one through five point scoring system*.⁷ The Commonwealth of Pennsylvania's *Procurement Handbook* also requires the evaluation committee to use the *scoring sheets* provided to it.⁸

Numerical scoring is often perceived as the most objective means of evaluating criteria, including those that are subjective, such as an offeror's references. In contrast, the federal government uses a variety of ways to evaluate proposals. Table 9.2 lists some, with their pluses and minuses.

The best practice is to allow flexibility in the manner in which the evaluation is conducted.

Sequence of Evaluations

After the initial review of proposals, the sequence of the evaluation will vary, depending on the evaluation plan. If there are oral presentations, site visits/demonstrations, discussions/negotiations,

and best and final offers, the evaluation committee will not make its final evaluation until these activities have occurred. It may make multiple evaluations before conducting a final one.

The Utah Administrative Code mandates the following best practice:⁹

(d) In order to score proposals fairly, an evaluation committee member must be present at all evaluation committee meetings and must review all proposals, including, if applicable, oral presentations. If an evaluation committee member fails to attend an evaluation committee meeting or leaves a meeting early or fails for any reason to fulfill the duties and obligations of a committee member, that committee member shall be removed from the committee. The remainder of the evaluation committee members may proceed with the evaluation, provided there are at least three evaluation committee members remaining.

Table 9.2

Type of Evaluation Method	Advantages	Disadvantages
Numerical scoring	<ul style="list-style-type: none"> Calculating a total score for each proposal is easy Evaluators often feel that they are being precise by using numbers 	<ul style="list-style-type: none"> Too easy to focus on the score without in-depth analysis of a proposal's strengths and weaknesses and potential impact of success under the contract Numbers do not automatically transform the evaluation into an objective or precise one
Color coding (assigning colors to designate evaluation decisions such as blue = exceptional, green = acceptable)	<ul style="list-style-type: none"> Allows the evaluators to focus on the strengths, weaknesses, and risks of each proposal 	<ul style="list-style-type: none"> Hard to identify the most technically superior proposal where each proposal evaluated has a mix of colors More difficult to consider the relative importance of evaluation factors and subfactors
Adjectives (such as exceptional, outstanding, acceptable, weak, unacceptable)	<ul style="list-style-type: none"> Same as color coding 	<ul style="list-style-type: none"> Same as color coding If many adjectives are used, distinction between those adjacent to each other becomes difficult

Discussions and Negotiations

Identifying proposals for discussions—If the evaluation committee engages in discussions with offerors about their proposals, it must use some reasonable basis to decide which offerors will be afforded that opportunity. The American Bar Association Model Procurement Code for State and Local Governments (Model Procurement Code) states that those offerors “who submit proposals determined to be reasonably susceptible of being selected for award” should be given that opportunity.¹⁰

Another commonly used standard employed to sift through proposals is to determine which of them is within a *competitive range*. The NIGP Dictionary defines that term as follows:¹¹

Competitive range—*That group of proposals, as determined during the evaluation process for competitive negotiation, that includes only those proposers considered to have a reasonable chance of being selected for award and who are, therefore, chosen for additional discussions and negotiations. Proposals not in the competitive range are given no further consideration.*

Clarifications versus discussions/negotiations—Evaluation committees talk to offerors for two purposes. One is to obtain clarifications of offeror’s proposals. The other is to enter into limited negotiations with offerors. The public entity’s law should authorize both.

Federal procurement law makes a clear distinction between clarifications on the one hand and discussions and negotiations on the other.¹² Meetings with offerors during an evaluation process for purposes of clarifying proposals are quite limited and occur where the contract award will be made without discussions/negotiations “to clarify certain aspects of proposals (e.g., the relevance of an offeror’s past performance information and adverse past performance

information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors.” They are limited to a narrow set of issues.

Under federal law, discussions and negotiations are the same and allow the agenda for the meetings between offerors and the evaluation committee to be more substantive. In fact, it is generally the best practice for the public procurement officer to seek revisions of proposals after discussions/negotiations have occurred so that the substantive issues raised in those meetings may be reflected in writing and evaluated.

The agenda for discussions/negotiations is described aptly in the federal procurement regulations:¹³

At a minimum, the contracting officer must . . . indicate to, or discuss with, each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. The contracting officer also is encouraged to discuss other aspects of the offeror’s proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal’s potential for award. However, the contracting officer is not required to discuss every area where the proposal could be improved. The scope and extent of discussions are a matter of contracting office judgment.

The federal government approach is a good one since it affords flexibility in the evaluation process.

It is critical that any meetings with offerors during the evaluation process not reveal information about the proposals of competing offerors. This is essential to ensuring that the process remains fair.

THE NEGOTIATION PROCESS

The need for negotiations will often begin to take shape during bid and proposal evaluations. For most states and government entities, the ability to negotiate and at what time that entity is allowed to negotiate will vary, and is almost always explicitly authorized in statute. The following paragraphs describe the seven major steps in the basic negotiation process.

Step 1—Receive and Evaluate Offers

The negotiation process begins with receipt and evaluation of bids and proposals. During evaluation, entities may need to confirm responsive and responsible proposals by verifying financial statements, contacting references, or conducting site visits. With offers that are evaluated and determined to be equal or almost equal, negotiation can help reduce the price or get additional features the government entity values.

Step 2—Determine Need for Formal Negotiation

The purpose of this step is to determine if formal negotiations will be needed, and if so, what approach will be taken. Statutes and policies will almost certainly influence this decision, along with the amount of time negotiations might take, the impact to resources, the amount of benefit expected from negotiating, and other factors that may be unique to the solicitation can all influence the decision to negotiate.

Step 3—Select Negotiation Team

The negotiation team will prepare for and execute the negotiations. It is therefore critical to select the right individuals to be on this team. Team members should be chosen and assigned roles based on their skill sets and personalities in relation to the specific needs of the negotiation. Especially for large contracts, it is important to have a cross-functional team representing all key stakeholders. Individuals representing central procurement, finance, using agency, legal, subject matter experts, management, and others should all be considered for the team where needed.

In the State of Wisconsin's *IT Procurement Best Practices Playbook*, Play #4 provides an acronym for those who should be involved—TEAM: T for technical staff; E for an expert in procurement or purchasing; A for attorney; M for management of the program.

Step 4—Research and Plan a Negotiation Strategy

Planning is the most important step in the negotiation process. This step involves gathering information and developing a plan to be followed during the actual negotiations. It begins by identifying the overall objectives of the negotiation and allowing those objectives to drive the resulting plan. Research and preparation should include market research and performing cost/price analysis, analyzing the negotiation positions of each party, identifying potential areas of compromise, and understanding the vendor's potential negotiating strategy, among many other things. Each negotiation is unique, therefore it is important to plan for the unexpected and remain flexible throughout the negotiation process to increase the likelihood of success.

Step 5—Strategy Meeting and Finalization of Negotiation Plan

A strategy meeting allows the team one final opportunity to prepare for the negotiations. While finalizing the negotiation plan, the team should look to review how the negotiation will be conducted, the roles of each member, and any guidelines, protocols, or policies everyone should be aware of. Team members may also engage in role playing and scenarios to further prepare for the negotiation.

Step 6—Negotiate

During the actual negotiation meeting, it is important that both sides work to identify areas of agreement, focus on interests of both parties, and identify alternatives to areas of disagreement. An agreement should be reached on all contract terms. Depending on the complexity of the project, negotiations may take additional meetings to come to a full agreement. Keep in mind that each negotiation meeting will be different.

Step 7—Document the Negotiation Process and Outcomes

Documentation of negotiations should be made and retained in accordance with laws and statutes. All required documentation should be included in the contract file, which will be a part of the official record. This step ensures transparency of the entire process.

Best and Final Offers

After discussions/negotiations, a best practice is for the public procurement officer to request that those offerors who engaged in discussions/negotiations submit revisions to their proposals—often called best and final offers. The submission of revised offers after discussions/negotiations is required under federal procurement law¹⁴ and under the Model Procurement Code.¹⁵

This gives the offerors the chance to modify their proposals to reflect the issues discussed in negotiations, including price. The request should be in writing and should instruct offerors that, in the event that they choose not to submit a revised offer, the public procurement officer and the evaluation committee will consider their initial proposal as their complete submission.

The principles that apply to the evaluation of initial proposals also apply to the revisions that offerors submit in their best and final offers. The

evaluation must stay within the criteria outlined in the solicitation and the plan that the public procurement officer and the evaluators put into place at the outset of the evaluation process.

Determining Responsibility

The responsibility determination process is the same for any supplier or suppliers in line for contract award, whether the procurement was conducted through competitive sealed bidding, or competitive sealed proposals, or for that matter, any other selection process. The section of this chapter entitled *Evaluation of Bids* discusses responsibility determinations in more detail.

Contract Award

As noted earlier, the contract must be awarded to the responsible offeror whose proposal is judged to best meet the requirements that the law dictates.¹⁶

PRICE AND COST ANALYSIS

The award of certain kinds of contracts requires scrutiny of a supplier's prices or costs. Those contracts include sole source contracts and contracts in which the public entity will reimburse any of the contractor's costs, such as contracts in which pricing is based on the contractor's costs plus a fixed fee. What is sometimes absent in the situations where a price or cost analysis is appropriate is head-to-head competition with other suppliers on what the public entity will be required to pay the contractor. The NIGP Dictionary defines the key terms as follows:

Price analysis—*Evaluation of readily available information in the marketplace. The process of examining and evaluating a prospective price without performing a cost analysis; that is, without evaluating the separate cost elements and profit of the offeror included in that price. The end result of price analysis is to ensure fair and reasonable pricing of a product or service. Price analysis may include a variety of techniques such as comparing proposed prices with prices of same or similar commodity or services obtained through market research. (Nash, Schooner, and O'Brien, 1998)*

Cost analysis—*The review and evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred. A cost analysis should be employed when price analysis is impractical or does not allow a purchaser to reach the conclusion that a price is fair and reasonable. Cost analysis is most useful when purchasing nonstandard items or services. (Burt, Dobler, and Starling, 2003)*

Conducting a price analysis is less complicated than conducting a cost analysis. Price analysis may be based on market research focused on pricing. Cost analysis, on the other hand,

involves applying government accounting standards. The regulations that implement federal procurement law are quite detailed regarding this subject.¹⁷ It is beyond the scope of this 3rd Edition of *State & Local Government: A Practical Guide* to provide an in-depth discussion of this topic, but here are some good practices relating to these types of analyses:

- The solicitation must reserve the right of the public procurement officer to conduct a price or cost analysis.
- The public procurement officer, in evaluating prices or costs, must go beyond the simple numbers that suppliers offer and, in appropriate circumstances, must scrutinize them to ensure that they are reasonable.

MULTIPLE SOURCE AWARDS

There are times when it is beneficial for a public procurement officer to award a contract to more than one supplier. In the case of definite quantity contracts, this is called a progressive or incremental award. For indefinite quantity contracts, it is called a multiple award.

Conditions are right for a progressive award when two or more suppliers are needed to supply the required definite quantity specified in the solicitation or to meet the delivery requirements. A multiple award is the award of a contract to two or more suppliers to furnish an indefinite quantity of a commodity or service.

To guard against carelessness and abuses in using multiple source awards, a public entity's law or rules/regulations should specify that: they must not be made when a single award can meet the contract requirements; the number of suppliers awarded a contract is limited to the minimum number necessary to reasonably satisfy the needs of the user agencies; and awards shall not be made for the purpose of dividing the business or providing a selection

of commodities, services, or suppliers to satisfy user agency preferences instead of actual needs.

EVALUATIONS USING ePROCUREMENT SYSTEMS

As eProcurement systems become more common among state and local governments, many are able to conduct a good portion of their procurement processes online, including the evaluation and award processes. Chapter 19 (*eProcurement*) discusses the state of these systems in more detail.

CONCLUSION

The bid and proposal evaluation process must be flexible, but must also stay within the boundaries of principles that ensure equitable treatment of all bidders and offerors. The public procurement officer and any evaluators who are assisting must ensure that the evaluation criteria are broad enough to permit a range of responses from competitors, but are also precise enough for those suppliers to submit their best ideas and products in response. Additionally, they must leave a clear and easy-to-follow written trail of how decisions have been made. Good management of this process should assure public confidence in the fairness of the procurement function.

ENDNOTES

1. See Utah Code 63G-6a-707-(6)(b) at: <https://codes.findlaw.com/ut/title-63g-general-government/#!tid=NFD2F9190A04B11E1A5BEF191D2B004BD>
2. R33-1-1. Definitions at: <https://rules.utah.gov/publicat/code/r033/r033-001.htm#T1>
3. https://www.osc.state.ny.us/vendrep/info_vresp_agency.htm
4. R33-1-1. Definitions at: <https://rules.utah.gov/publicat/code/r033/r033-001.htm#T1>
5. R33-7-703(2)(a). <https://rules.utah.gov/publicat/code/r033/r033-001.htm#T1>
6. R33-7-703(4)(b). <https://rules.utah.gov/publicat/code/r033/r033-001.htm#T1>
7. R33-7-703(5) and R33-7-704(1). <https://rules.utah.gov/publicat/code/r033/r033-001.htm#T1>
8. Part I Section 06-B-3-b. <https://www.dgs.pa.gov/Documents/Procurement%20Forms/Handbook/Pt1/Pt%201%20Ch%2006%20Methods%20of%20Awarding%20Contracts.pdf>
9. R33-7-703(5)(d) <https://rules.utah.gov/publicat/code/r033/r033-001.htm#T1>
10. Section 3-203(6). A copy of the Model Procurement Code is available at: <http://apps.americanbar.org/dch/committee.cfm?com=PC500500>
11. <http://www.nigp.org/home/find-procurement-resources/dictionary-of-terms>
12. Federal Acquisition Regulation 15-306 at: http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/far/15.htm#P286_46346
13. See Endnote 14.
14. Federal Acquisition Regulation 15-307 at: http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/far/15.htm#P286_46346
15. Section 3-203(6). <http://apps.americanbar.org/dch/committee.cfm?com=PC500500>
16. Chapter 7, *Competition: Solicitations and Methods*, describes problems associated with evaluations for public entities whose laws require them to award a contract based on a *responsive* proposal.
17. FAR Subpart 15.4. https://www.acquisition.gov/far/html/Subpart%2015_4.html

CHAPTER 10: CONTRACTING FOR SERVICES

RECOMMENDED BEST PRACTICES

- A services contract creates a human-to-human relationship between government employees and the contractor, with the aim of achieving a specific end. The words used to describe the services sought must be precise, since features that are found in specifications for commodities, such as equipment output minimums or life cycle standards, are not applicable.
- A well-written solicitation for the procurement of services includes a profile of the user agency and the specific program to which the services are directed.
- The procurement of services that are considered *professional services* dictates that the service provider supply professional liability insurance instead of the standard commercial general liability insurance that contractors are generally required to have.
- A service provider who is going to have access to the public entity's network must be asked to provide network security and cyber security insurance.
- A contract for services should include some means of measuring contractor performance such as milestones, performance measures, deliverables, and service levels.
- Unless payment is going to be made to the contractor only at the end of the contract after the public entity has received the contract deliverables and accepted those deliverables, periodic payments to the contractor during the contract term must be tied to service levels, performance measures, milestones, or sub-deliverables that the contract specifies.
- There should be ramifications in the contract for the failure of the contractor to meet one or more service levels. A contractor's service fees should be docked based on a formula that the solicitation and the contract set out.
- Contracts may offer an incentive to a contractor where it consistently exceeds the established service levels.
- Even in contracts for routine services, there should be more than one activity within the total services provided that the public entity considers important. Thus, every service contract should contain more than one service level.
- Service levels must be based on a careful examination of service data detailing a solid service baseline as well as an understanding of what service suppliers can provide.
- If the service is a complicated one and the contractor's performance depends in part on the public entity's actions, there should be service levels in the contract for that public entity to meet as well.
- A contract for services must explicitly establish services warranties.
- Outsourcing, or privatizing government services to outside contractors, is complicated and should be subject to a precise and in-depth analysis of critical information, such as the cost of providing the services through government employees; a detailed and specific set of contract requirements; and a detailed plan for implementation, including the establishment of performance measures and continuous assessment of contractor performance.

- The selection of a service contractor to provide a government service or manage a government facility is complicated. The best practice is for such procurements to be under the authority of the Chief Procurement Officer working closely with the user agency that will have oversight of the contractor.
- Contracting for human services providers is one example of the alternative delivery of government services. Funding for these services is different from most other state and local government procurements. It can consist of a complex mixture of federal and state government dollars along with, in some cases, charitable donor funds. The supplier community delivering these types of services is also atypical. A significant portion of them are nonprofit entities.
- The process for obtaining human services contractors must permit the user agency to maintain and grow a steady stream of good providers. In many cases, competing and awarding contracts every year or every five years does not work.

Contracting for services is often an exercise in subjectivity. Unlike buying tangible things with a defined outcome, such as office supplies or the construction of a new building, the procurement of services requires the public entity to think carefully about what it wants from the service provider and how best to describe it. It may sometimes seem easy, such as producing a description of courier services. In other cases, the service requested is more complicated, such as the delivery of services that public employees previously provided. Even in the case of simple services, there is no *brand name* or *brand-name-or-equal* specification or architect's design to use as a starting point. The words used in the solicitation's scope of work need to be precise, clear, and well written.

This chapter focuses on issues relating to contracting for services and the use of those contracts as alternative methods for delivering government services. It also focuses on the procurement of one unique type of service—delivery of human services. It does not address services related to construction. That topic is covered in Chapter 11 (*Procurement of Construction and Related Services*). This chapter also does not discuss the purchase of services that are closely linked with information technology (IT), such as software as a service or hosting services. Those are covered in Chapter 20 (*Procurement of Information Technology*).

A well-written solicitation for the procurement of services includes a profile of the user agency and the specific program to which the services are directed. It is also useful for the solicitation to feature a narrative answering the questions, "What is the user agency seeking to procure?" and "What problem is the user agency seeking to solve?" Other components of a well-thought-out solicitation for services are:

- The user agency's program philosophy and/or mission statement
- Major components of service sought and the desired outcome

- Service elements and service delivery, setting forth specific aspects of the services requested and those items that the agency wants the supplier to address
- Desired contract outcomes, including quantifiable objectives, which may be performance based
- Technology standards that identify the entity's data security, handling, and ownership guidelines
- A statement that payment will be tied to performance and deliverables, and based on documentation that the contract requirements have been met

DEFINITION OF TERMS

The American Bar Association Model Procurement Code for State and Local Governments¹ (Model Procurement Code) provides a definition of the term *services*, and distinguishes those from two other general types of items that a procurement officer purchases under the Code—supplies and construction. Section 1-301(21) of the Model Procurement Code states that *services* means:

. . . The furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term shall not include employment agreements or collective bargaining agreements.

At times, there is confusion between a contract for services and a grant of public funds. A grant, as defined in Section 1-301(12) of the Model Procurement Code is:

. . . The furnishing by the [State] of assistance, whether financial or otherwise, to any person to support a program authorized by law. It does not include an award whose primary purpose is to procure an end product, whether in the form of sup-

plies, services, or construction; a contract resulting from such an award is not a grant but a procurement contract.

The Model Procurement Code is written in language appropriate for a statute or ordinance. A practical working definition of *services* in plainer language is found in the NIGP Dictionary:²

Service/Services contract—1. An agreement calling for a contractor's time and effort. 2. The furnishing of labor, time, or effort by a contractor or supplier, which may involve to a lesser degree the delivery or supply of products. The Uniform Commercial Code (UCC)/state commercial codes only apply to a procurement of a product, while state common law would apply if it is considered a procurement of a service.

The key concept to draw from both the aforementioned definitions is that while a services procurement may require the delivery of something tangible like a report, the procurement is still one for services.

There is another observation about services procurements that is important. The procurement of services that are considered *professional services* demands that the service provider supply professional liability insurance instead of the standard commercial general liability insurance that contractors are generally required to have. The NIGP Dictionary defines "professional services" as:³

Professional services—Services rendered by members of a recognized profession or possessing a special skill. Such services are generally acquired to obtain information, advice, training, or direct assistance.

The two categories of services for which professional liability insurance is necessary are: services to be performed by a licensed professional such as an engineer, lawyer, or doctor; or services where the contractor will provide a

recommendation on which the public entity will rely in order to make a decision.

Finally, a service provider who will have access to the public entity's network must be asked to provide network security and cyber security insurance. There are other insurance products that a contractor should be required to provide if it will have routine access to offices where sensitive documents may reside. The services where that type of insurance may be appropriate can be as innocuous as heating/ventilation/air conditioning/electronic controls maintenance, temporary employment services, janitorial services, and document storage/shredding services. Contracts under which a contractor supplies temporary employees must ensure that the contractor not only has the appropriate data security insurance but is also responsible for the employees' acts that are not specifically directed by the public entity.

PREPARATION OF SERVICE DESCRIPTIONS AND STATEMENTS OF WORK

Both Chapter 5 (*Non-Construction Specifications and Scopes of Work*) and Chapter 7 (*Competition: Solicitations and Methods*) address in a general manner the preparation of specifications and statements of work. This portion of the chapter focuses on three areas relating to the preparation of services descriptions for a solicitation or for a statement of work issued under a contract:

- The appropriate level of specificity in the description of the service sought
- Measurement of performance
- Establishment of a general legal standard with which the contractor must comply

Preparing the Service Description

Drafting a description—a specification or scope of work—for a solicitation seeking a services

contractor requires a close collaboration between the user agency and the public procurement officer, particularly if the services are complex. Technical experts and lawyers may need to be part of the team.

While it may seem to be stating the obvious to point out the necessity for a close working relationship, it is important to keep in mind that a services contract creates a human-to-human relationship between government employees and the contractor, aimed at achieving a specific end. The words used to describe the services sought must be precise, since features that are found in specifications for commodities, such as equipment output minimums or life cycle standards, are not applicable.

The precision of the services description relies heavily on an understanding of the user agency's needs and wants, even if the services sought are seemingly simple. For instance, in a description for janitorial services, does the user wish to require that the contractor use eco-friendly products?

The service description will depend in part on whether:

- The service sought is complicated or routine
- There are a specific and limited number of deliverables (such as a report) that the contractor must provide during or at the end of the contract, or the contract calls instead for the contractor to provide the same services regularly during the term of the contract (such as landscaping services)
- The solicitation seeks a contractor or contractors to provide multiple types of related services from which a user agency may choose during the contract as the user's need arises

There is no magic set of principles that will ensure that a service description is a good one. Here are some basic tips:

- Make sure that the description is broad enough to cover all of the services sought. Use examples of types of services desired under the general service description to illustrate what is intended, making sure to state that the examples are not all-inclusive of the desired services.
- Concentrate in the description on the service output rather than itemizing individual tasks. Detailed itemizing of individual tasks may restrict the effectiveness of the contract.
- If the service description is for a consulting report, particularly where a recommendation is being requested that will be the basis of a public policy decision, include as an *output* requirement that the contractor must provide all of the underlying data or other information that served as the basis for the report or recommendation.
- Tie the service description to the measurements in the solicitation by which the contractor's performance will be evaluated. If the service description and the measurements do not fit well, something is awry and needs to be fixed. Measuring performance is discussed in the next part of this chapter.
- Read the service description as someone who knows nothing about the user agency's needs would read it. Ask whether the service description is clear and precise, allows flexibility, and paints a vivid picture of what the solicitation seeks.

Where state and local government procurements utilize federal funds, the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 Code of Federal Regulations Part 200, known as the Common Rule, provide that solicitations:⁴

- Must incorporate a clear and accurate description of the technical requirement for the service to be procured;
- Must not unduly restrict competition;
- May include a statement of the qualitative nature of the service to be procured; and

- Where necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use.

In complex procurements for services, a procurement office may contract with an outside party to assist in the development of the service description and other parts of the solicitation. The Common Rule states that those outside parties “must be excluded from competing for such procurements.”⁵ That reflects the best practices for all procurements on which outside assistance is used, whether or not federal funds are paying for the purchase.

Best Value Procurements

There is a source selection approach that generally is conducted as a type of competitive sealed proposals called best value procurement or performance information procurement system. Chapter 7 (*Competition: Solicitations and Methods*) and Chapter 20 (*Procurement of Information Technology*) provide descriptions of this approach. Under this approach, the specifications are very minimal. The offerors are expected to provide proposals that the solicitation often limits to fewer than ten pages.

MEASURING AND PAYING FOR PERFORMANCE

Overview

There is a variety of terms that are used to describe the ways in which a contractor’s performance may be measured.⁶ As defined by the NIGP Dictionary, four common terms are discussed in the ensuing paragraphs.

Deliverable

The NIGP Dictionary defines this term as follows:

1. Expected work product as defined in a contract . . . 3. The completion of a mile-

stone or the accomplishment of a task that can be measured and verified, and may be a unit by which a contractor or consultant may be paid.

Deliverables under a services contract are something that the contractor provides. For a services contract, a *deliverable* may be a desired report or recommendation, which may include *sub-deliverables* such as progress reports at specified intervals of the contract term. In other types of services contracts, for instance a contract for a call center, the deliverable may be the actual ongoing services themselves, with additional performance measures tied to that deliverable, such as maintaining the ability to handle a certain number of phone calls per day.

Milestones

The NIGP Dictionary defines this term as follows:

Designated steps of the planned acquisition that usually signify a completion of a requirement or delivery of materials. Payments may be targeted to the completion of milestones. (Harney, 1992)

Milestones are the points in time when the contractor needs to complete a portion of its contract work in order to be on schedule so that it can finish the contract’s tasks on time. A milestone is important and more likely to be used in a services contract where there is a specific deliverable such as a report to be provided.

Performance Measures

The NIGP Dictionary defines this term as follows:

Tools used to measure performance and quantitatively evaluate progress toward planned targets

Although this definition may suggest that a performance measure is strictly a quantitative one—that is, how much of the work was accomplished, it may also be a qualitative measure—that is, how well the work was performed.

Service Level Agreement (SLA)

The NIGP Dictionary defines this term as follows:

1. An agreement between the Application Service Provider (ASP) and the end user to determine the scope of work to be provided by the ASP. 2. An agreement between a customer and a service provider that details the level of service and the quality of the service to be provided. May be a legally binding agreement. (Business, 2002)

Service levels are a type of performance measure that developed originally as a means of measuring services—and assuring a certain level and quality of them—in the IT sector. Today, service levels are an essential part of services contracting, particularly where the contractor is providing services on an ongoing basis. Service level measurements are critically important in instances where the contractor is performing services that public employees used to perform.

Some benefits in using service levels in contracts are:

- They provide the contractor with a clear picture of what is considered good performance
- Problems with performance may be identified early and amicably and be solved before the contractor is considered to have breached the contract
- Agreed-upon penalties for failure to meet a service level eliminate the possibility of a contentious situation in which a contractor seeks damages
- Service levels avoid the need to quantify loss, which can often be difficult
- They assist in aligning requested services with their delivery
- They improve an understanding of the services requested and the interdependent relationships involved in their delivery
- They provide a framework for effective communication between parties

Service levels should be set forth as part of any solicitation for services. The public entity may need to change them as a result of additional information gathered from prospective bidders or offerors who wish to respond to the solicitation. However, defining service levels at the point of negotiating with a selected contractor leaves the public entity with less bargaining power.

Measurements Tied to Payments

Unless payment is going to be made to the contractor only at the end of the contract after the public entity has received the contract deliverables and accepted those deliverables, periodic payments to the contractor during the contract term must be tied to service levels, performance measures, milestones, or sub-deliverables that the contract specifies. For instance, payment under services contracts where there is a major deliverable to be presented at the end of the contract should always be tied to milestones that are established at the start of the services contract. If the contractor does not meet a milestone, the services contract should, at a minimum, authorize the public entity to withhold some or all of the payment due on that milestone date. Tying payment to performance is discussed further in the next section of this chapter.

The importance of tying payment to performance is reflected in part in the Common Rule. Those requirements define an *improper payment*, among other things, to include incorrect payments (including overpayments and underpayments), and any payment where insufficient or lack of documentation prevents a reviewer from discerning whether a payment was proper.⁷ The requirements also mandate that recipients of federal awards relate financial data to performance accomplishments, and that federal agencies awarding federal funds provide recipients with *clear performance goals, indicators, and milestones*.⁸

As noted earlier, these federal requirements reflect good practice. A public procurement officer,

as well as the user agencies assisting that officer, should keep them in mind as they work together to develop a solicitation for a services procurement.

Developing Service Levels

Service levels require the services contractor to perform specified outputs to a particular, measurable level to bring certainty to what it delivers. Examples are:

- The percentage of the time that the service is available
- How long it takes to contact someone on the phone
- The total number of complaints about a service for a period of time, often categorized by ranking or severity
- The average or total time to complete a particular activity related to the service, such as maintenance
- The reasonably determined, hoped-for increase in the use of the service over the period of the contract, particularly where the contractor is providing services to the public on the public entity's behalf

If the service is a complicated one and if the contractor's performance depends in part on the public entity's actions, there should be service levels in the contract for that public entity to meet as well.

As noted earlier, the service levels established for the contractor to meet must relate directly to the services description in the solicitation. Service levels may not be pulled out of the air. They must be based on a careful examination of service data detailing a solid service baseline as well as an understanding of what the service contractor can provide. Here are some basic rules for writing service levels:

- Focus on specific outputs rather than tasks.
- Make the outputs measurable. If the public entity will not have access during the contract to all of the data needed to determine

whether levels have been achieved, the contract must require the contractor to report its service level performance on a regular basis, reserving the right of the public entity to audit the contractor's records.

- Avoid making service levels complex, as those are more difficult to monitor.
- Allow for improvements in the service and provide a mechanism in the contract for revising the service levels to fit those improvements in the service.
- Review any historical data and entity-specific examples as well as current industry trends.

Even in contracts for routine services, there should be more than one activity within the service to be delivered that the public entity considers important. Thus, every service contract should contain more than one service level.

Finally, there should be ramifications in the contract for the failure of the contractor to meet one or more service levels. In this case, contractor's service fees should be docked based on a formula that the contract sets out. For instance, the formula might provide that a failure to comply with two of four service levels in one month results in a reduction in the fee for that month of \$XX. A specified number of months of failures to meet a set number of service levels might result in a greater reduction of fees, again by a dollar number detailed in the contract. The contract should further define that the failure to meet set numbers of service levels over a period of time results in the contractor defaulting on its contractual obligations. Keep in mind that there is a point at which contractor failures result in such degraded service that the contract may no longer meet the public entity's needs.

Contracts may also offer an incentive to a contractor that consistently exceeds the established service levels. The formula for both incentive and *disciplinary* measures related to service level achievement or failure must be part of the solicitation that the entity publicly distributes seeking a services contract.

A Word About Service Warranties

As a general rule, warranties are most often associated with the sale of goods. The Uniform Commercial Code (UCC), which is discussed in more detail in Chapter 13 (*Quality Assurance*), codifies the standard implied warranties—that is, warranties that are not expressly in a contract’s language—that arise under the law in the sale of goods. But the UCC does not apply to the sale of services.

Warranties for services contracts arise from the language of the contract itself. The contract must explicitly establish them, which is a key factor in drafting a professional solicitation or contract for services. Performance measures, milestones, deliverables, and service levels assist with contract performance by providing both the public entity and the contractor with a means of measuring, evaluating, and demanding the improvement of performance. Explicit services warranties, that is, those set forth in writing in the solicitation or contract, provide the public entity with another set of overarching standards with which the contractor must comply. They can be the critical validation for a public entity’s decision to terminate the contract for default if the contractor continuously fails to meet performance measures, milestones, deliverables, or service levels. The following are some examples of explicit service contract warranties:

- The contractor will provide the services within the highest standards of its profession
- The contractor will provide the services with reasonable skill and care according to best industry practices
- The contractor will provide the services in compliance with all applicable laws, rules, and regulations
- The contractor will provide the services in compliance with the code of conduct of (for instance, some industry, national, or international standard-setting organization)

ALTERNATIVE DELIVERY OF GOVERNMENTAL SERVICES

When the government finds an alternative means of delivering its services, some terms used for those alternative methods include contracting out, outsourcing, and privatization.

Privatization is different from the other two, which are basically synonymous. *Privatization*, as the NIGP Dictionary defines it, means:

The divestiture of both management and assets of a public function to the private sector in order to change the status of a function formerly performed by the public entity to one that is privately controlled and owned including the transfer of real and personal property.

The critical factor in privatization—the divestiture of both government assets and services—is not present in outsourcing or contracting out. The NIGP Dictionary defines *outsourcing* as occurring “when an organization makes an informed decision to contract out a product, service, or business process that was previously provided by internal (in-house) resources.”

An Overview of the Outsourcing Process

The process of either privatizing or outsourcing government services is complicated. In fact, there are a host of nonprofit organizations devoted to reducing the size of government that advocate for and track instances of government privatization and outsourcing.

It is beyond the scope of this book and chapter to describe in detail the precise reasons for a government to consider allowing the private sector to offer the public services that the government used to provide. Those reasons may vary greatly. Some can be purely political and others may be based on data suggesting that the private sector is able to provide the

service at a lower cost. As a matter of practice, a well-conducted procurement for privatizing or outsourcing a government service should be determinative. That is, it should be the point at which the public entity decides—based on the information in proposals received under the solicitation—that private industry can or cannot provide the services in a manner that fulfills the original objective for considering privatizing or outsourcing.

There is a good short set of recommendations by experts outlining the key steps in the outsourcing/privatization of state and local government services. They are contained in a report called *Government Outsourcing: A Practical Guide for State and Local Governments, The Report of an Expert Panel*, School of Public and Environmental Affairs, Indiana University, January 2014.⁹

Recommendations from the report are enumerated below. Where the recommendation provides guidance related to the procurement process, the text from the report is provided in full.

Recommendation #1. Determine initial motivations for outsourcing.

Recommendation #2. Thoroughly assess the feasibility, potential costs, and potential benefits of the outsourcing initiative.

Recommendation #3. Scope and plan the outsourcing project early on in the process.

The second and third recommendations are closely related, since an adequate assessment of costs requires full understanding of the scope of the project. The more decision makers are clear about the goals and expected outcomes, the better they can plan major processes, tasks, and milestones, as well as identify associated costs. Proper scoping and planning is also important to attracting the right suppliers and setting reasonable expectations. Importantly, ample time

must be allowed to accurately describe the service or function, especially when no precedent exists. The timing for scoping and planning is important. Planners should try to seek advice from potential providers (e.g., at a pre-solicitation public meeting where all interested vendors are welcome) and other technical experts before drafting the solicitation document. The earlier this occurs in the process, the better. Officials are encouraged to develop Most Important Requirements (MIRs), which reinforce the goal of maintaining competition and serve as guiding principles for the entire source selection process. A useful practice is to publish requests for information (RFIs), which can provide the government with good understanding of the capabilities of the supplier community. When adequate planning and scoping occurs before the solicitation, a more diverse group of stakeholders is likely to weigh in, including possible vendors, public employees, elected officials, citizens, and consultants. The wider the range of input, the greater the likelihood that any potential issues and problems will surface early and can be dealt with before the solicitation document is issued. Planners should also set up information systems to facilitate frequent and systematic feedback, for example, by scheduling public forums and designing websites to send comments and responses.

Recommendation #4. Develop clear, specific, and effective contract requirements.

Contract requirements should reflect organizational goals and mission. To the extent possible, clearly and precisely describe key aspects of a project (inputs, processes, technologies, outputs, and/or outcomes) that are essential to its success. Consider developing a summary contract term sheet with key contract principles and requirements to include in the solicitation documentation. Contract

requirements should balance the needs for specificity and flexibility, and opportunities for mutual adjustment. When drafting contracting specifications, look for opportunities for operational efficiencies from the existing method of delivery. In addition, be sensitive to contract requirements that inadvertently encourage delays or indirectly transfer unnecessary costs to the government by shifting risks and uncertainties to the vendors that get priced back to taxpayers. Finally, the contract type (e.g., fixed-price, cost plus, and time and materials) should be determined with due consideration for such factors as service type, price, labor certainty, available suppliers, acceptable levels of risk, and the adequacy of structures in place for monitoring and accounting.

Recommendation #5. Encourage competition at different stages of the project. Gains in efficiency are premised upon attracting competition and optimizing the supplier base. There are many ways that competition can be encouraged at the early stages of project planning as well as in the contract negotiation, specification, and implementation phases. Match the scope of the contract to the market and to supplier availability to attract the highest number of quality bidders. Avoid developing contract specifications that are too narrow and unnecessarily exclude potential providers from bidding. Consider using a mix of public, private, and nonprofit providers to avoid “thinning the market” during the contract term. Limit the use of excessively long contract terms while providing opportunities for contract renewal based on performance. Release a draft solicitation document and request feedback from vendors during a reasonable period of time, revise the solicitation document using that feedback, and issue a final document. Finally, consider using indefinite delivery/indefinite quantity (IDIQ) contracts that foster an ongoing

competitive environment by promoting competition for task orders that are part of a larger contract, motivating contractors to be innovative and deliver superior performance, and providing the government entity the leverage needed for changing requirements and workload. Policymakers should be engaged on an ongoing basis to reduce regulatory barriers associated with sustaining markets. They must also ensure that sufficient rules are in place to reduce the likelihood of collusion among suppliers and/or improprieties between procurement staff and bidders.

Recommendation #6. Select the “best” suppliers and partners.

There are several steps to selecting the “best” suppliers and partners. After optimizing the supplier base and prior to awarding the contract, there should be a rigorous and objective evaluation of potential suppliers and partners. Seek all relevant information about the reputation, capabilities, and past performance of potential suppliers. A method for evaluating responses and selecting the winner should be in place, including clearly identified and ranked or weighted evaluation criteria. Evaluation criteria should reflect such considerations as capability and approach, proposed service levels, price, the adequacy of the contractors’ management team, and the contractors’ past performance.

Recommendation #7. Spend adequate time negotiating and crafting the contract document.

Once partners and suppliers are selected, the final terms of the contract must be negotiated and specified. Policies should be in place to ensure probity of negotiations. Assess the government’s capacity to gather relevant information, negotiate the contract terms, and adequately specify the contract. If government does not have the right skill sets on hand, con-

sider bringing in outside consultants to augment the expertise of procurement staff. Identifying and complying with all the relevant procurement requirements takes time. Contracts should establish clear expectations, roles, and responsibilities. Review the appropriate contract term with due consideration for the level of partners' investments, performance expectations, risk tolerance, prior performance, and cost associated with timing of renegotiation. Plan for an assessment of performance at the end of a contract term and make contract renewals contingent upon satisfactory performance. Finally, identify and plan for challenges during transition between providers when designing contract terms.

Recommendation #8. Assess contract performance both during and at the end of the contract.

The prior recommendations provided some prerequisites for performance monitoring and assessment. Policies should be in place up front to insulate performance evaluations and contract disagreements from undue political influence. The contract should clearly identify milestones, expectations for service levels, output measures, and standards. Monitoring performance should be considered an iterative and dynamic process, where learning, change, and innovation can occur. Especially with high-value procurements, a periodic project review should be implemented where both parties can discuss challenges with execution as well as identify additional cost savings that could be achieved through a collaborative approach. Optimize monitoring with technology by making it frequent and by relying on multiple sources of feedback. Leverage information technology to facilitate data collection and evaluation. Obtain feedback from contractors' managers and employees, as well as from citizens, consultants, and community groups. Collect performance

data that is meaningful to decision makers and can be acted upon to improve performance. Share performance information with internal managers, external stakeholders, and contractor staff and their principals. Finally, take advantage of less adversarial approaches to resolving disputes and handling performance issues, like mediation or arbitration.

Recommendation #9. Minimize service disruptions and other difficulties associated with transitioning at the end of the contract.

In addition to designing the contract with end-of-contract challenges in mind, other planning can facilitate smooth transitions. Planning for contract transition cannot wait until 12 months before the end of the performance period. Successful transitions are addressed in the original proposal submission and updated throughout the contract period. Governments must anticipate capacity issues and costs if they must resume activity, for example, by ensuring access to and transfer of all relevant information, materials, and technologies. The contracting entity is cautioned to carefully craft and review contract clauses that may affect transition, including rights to documents, successors in interest, and any proprietary rights to knowledge and equipment. Government officials should ensure that the initial contract includes provisions regarding government ownership of all data and intellectual property related to the project. Particular attention must be given to penalty, early termination, and buy-back clauses that commit the government to a long-term relationship. If the government decides at some point that a better approach makes sense (e.g., switching suppliers or insourcing), it needs to have an unfettered hand to undertake such a change. It is also important that contracting officers maintain contact information for alternative suppliers and key employ-

ees should the need arise to prematurely terminate a contract.

Chief Procurement Officer Authority

As previously illustrated, the process of the selection of a service contractor to provide a government service or manage a government facility is complicated. The best practice is for such procurements to be under the authority of the Chief Procurement Officer working closely with the user agency that will have oversight of the contractor. That team approach ensures that the handing over of a government service is conducted with the expertise needed for success—procurement professionalism and the experience and knowledge of the subject matter that the user agency offers.

A LOOK AT HUMAN SERVICES CONTRACTING

Contracting for human services providers is one example of alternative delivery of government services. There are many unique aspects to this kind of contracting. One of them is that they involve human subjects with the objective of making life better for the individuals receiving the services.

Another unique feature is that there are, in most cases, a significant number of federal laws that apply to the delivery of these types of services. In fact, the requirement of state and local governments to provide these services generally started with the United States Congress's passage of the Social Security Act in 1935. One of the subsequent drivers toward contracting out to provide these services was the increased unionization within the public sector that made contracting out more cost effective.

Funding for these services is also different from most other state and local government procurements. It can consist of a complex mixture of federal and state government dollars along with,

in some cases, charitable donor funds. Examples of services that the federal government funds through state and local governments are: child welfare; health services to the aged, the disabled, and individuals and families with low incomes; and a variety of services to individuals and families with special needs relating to conditions such as mental illness, addiction, and developmental disabilities.

The supplier community delivering these types of services is also atypical. A significant portion of them are nonprofit entities.

The methods through which state and local governments determine payments to providers also vary from the manner that payments are determined for other types of services. Some of the standard payment methods are: cost reimbursement based on government accounting standards; unit cost based on a fixed cost that the government establishes for a particular service; and payment for performance or outcomes.

In many cases, competing and awarding contracts every five years does not work. The state or local government needs some flexibility to add providers and modify levels of service after contracts are awarded because the services are based, in part, on a fluctuating population. Another unique characteristic of the procurement of human services is the need for the state or local government entity to ensure the maintenance and growth of a steady stream of good providers. Maintaining a robust set of potential providers is essential because the demand is so high. Good human services procurement is creative enough to permit a continuous competition for and addition of new contractors on a regular basis.

Thus, the competitive process that state and local governments use to select providers must involve a careful balance. The process must set high standards for a provider to qualify, including financial soundness; but must avoid being so complex that it bears heavily on the supplier

community, particularly the small nonprofit providers who do not have the same monetary resources that the for-profit providers have. Ultimately, a well-functioning procurement/contracting process for human services should be characterized by:

- The ability to create and manage a competitive process among providers in a manner that results in competitive prices with high-quality privatized or outsourced services
- The creation and successful negotiation of a legally binding contractual agreement that requires the provider to deliver the service at the levels of quality and comprehensiveness specified
- The capacity to effectively monitor performance of the provider, ensure accountability, and require corrective action when necessary and appropriate
- The ability to critically analyze contract outcomes and incorporate what is learned into successive contracts with providers to improve future services and results

CONCLUSION

Contracting for services can present a challenge to procurement officers. Human talent is never generic, often elusive to define, and can be difficult to evaluate objectively. The procurement officer can employ procurement strategies to make the process successful, but should do so in close partnership with the using agencies.

ENDNOTES

1. A copy of the Model Procurement Code is available at: <http://apps.americanbar.org/dch/committee.cfm?com=PC500500>
2. Access to the NIGP Dictionary is available at: <http://www.nigp.org/home/find-procurement-resources/dictionary-of-terms>
3. See Endnote 2.
4. 2 CFR §200.319(c). The regulation may be found at: <https://www.gpo.gov/fdsys/pkg/CFR-2017-title2-vol1/pdf/CFR-2017-title2-vol1-part200.pdf>
5. 2 CFR §200.319(a). The regulation may be found at: <https://www.gpo.gov/fdsys/pkg/CFR-2017-title2-vol1/pdf/CFR-2017-title2-vol1-part200.pdf>
6. See also the importance of the concept of *accepting* the services delivered, which is discussed in Chapter 13, *Quality Assurance*.
7. 2 CFR 200.53. The regulation may be found at: <https://www.gpo.gov/fdsys/pkg/CFR-2017-title2-vol1/pdf/CFR-2017-title2-vol1-part200.pdf>
8. 2 CFR 200.301. The federal requirements define a *performance goal* as “a target level of performance expressed as a tangible, measurable objective, against which actual achievement can be compared, including a goal expressed as a quantitative standard, value or rate.” 2 CFR §200.76.
9. https://datasmart.ash.harvard.edu/sites/default/files/2018-02/IU_SPEA_Government_Outsourcing_Report.pdf