3 PROCUREMENT AND CONTRACTOR MANAGEMENT

Purpose

The purpose of Procurement and Contractor Management is to provide basic information and direction regarding procuring commodities or services within New York State and to recommend strategies for managing the resulting contract. Once the need for services and/or products has been identified, procurement activities should be initiated as soon as possible, since the process may take a significant amount of time to accomplish.

Roles

- Project Manager
- Project Sponsor
- Project Team Member
- Customer

The Project Manager may be responsible for the actual procurement of the services or products needed to develop and implement the project, or may be directing these activities through a contracting or procurement Team Leader. These activities may have a significant impact on the Project Budget and Schedule, so they must be integrated into the overall Project Plan and Project Schedule.

3.1 PROCUREMENT STRATEGIES

Once a determination has been made that outside resources or products are needed, a procurement strategy must be developed. In developing this strategy several options are available.

A ***turnkey*** procurement involves securing a complete vendor-supplied solution that is provided to the Customer "ready to operate" (just turn the key). The contracted vendor acquires all the necessary parts, products and services, and all required labor to construct and install the turnkey solution. This type of procurement requires the contractor to perform the day-to-day management of the Project Team and project processes, while the Project Manager focuses on contractor performance and management of the product transition to the Performing Organization. In a turnkey procurement, the purchaser generally takes ownership of all products purchased, either at time of purchase or at time of transition, depending on the contract terms.

While turnkey procurements are a possible option, it is more likely that the Project Manager will choose to procure several products and services, and to manage the resulting contracts. Examples of typical procurements associated with a project include:

Product Acquisitions: These may range from typical products such as furniture and personal computers, to highly specialized products for the project such as digital scanners, servers, and the software needed to operate them. Frequently, projects involve the purchase of a "Commercial Off The Shelf" (COTS) software system that may meet most of the functional requirements of the project. Such a system usually requires customization to provide all required functionality, or to meet specific technical requirements of the Performing Organization. Customization may be done by in-house staff, or by the contractor's staff as part of the contract to purchase the system.

Staff Augmentation: Frequently, while in-house resources are available to perform a significant amount of the project work, additional resources are needed to complete the project on time or to provide some needed skill. One strategy is to obtain outside resources, usually consultants, to augment the project staff. If consultants are hired to provide a missing skill, having them work along side in-house staff facilitates acquisition of that skill by in-house staff during the development phase of the project. This, in turn, facilitates the takeover of system maintenance activities after the system is deployed and the consultants leave.

Selective Outsourcing: Outsourcing also involves contracting additional staff services, but in this case the contractor assumes responsibility for performing all aspects of a selected service, usually to specific standards and for a fixed cost. In this type of scenario, the Customer usually does not own the products associated with the production or delivery of the service, but purchases the specific service. Examples might include demolition services, disaster recovery services, and data conversion services.

3.2 GENERAL CONTRACTUAL INFORMATION

Every contract with a New York State agency must include Appendix A (Standard Clauses for all New York State Contracts), MacBride Principles, and Article 15A Provisions. Agencies may also have their own standard contract provisions. Agency staff should discuss with their Office of General Counsel the standard forms and language to be used.

Among the statutory and regulatory requirements applicable to the procurement of goods and services by New York State agencies are Section 112(2)(a) of the State Finance Law, which provides that a contract in excess of $15,000 must be approved by the State Comptroller before it becomes effective, and Section 163(6) of the State Finance Law, providing that a contract in excess of $15,000 must be awarded pursuant to a formal competitive process. The Office of the Attorney General must also approve such contracts. The NYS Procurement Council Procurement Guidelines and other general information concerning the statutes and regulations governing state contracts can be found at the websites maintained by the New York State Office of General Services (http://www.ogs.state.ny.us/purchase/) and the Office of the State Comptroller (http:// www.osc.state.ny.us/agencies/).

3.3 CONTRACT TERMS

The procurement strategy will frequently define the method by which the selected contractor's performance will be managed.

3.3.1 Fixed Price

Outsourcing and turnkey procurements are generally done on a fixed price or fixed fee for deliverables basis. This type of contract is best used when the specific service or product to be delivered can be fully defined and specified before the start of work. The contractor is required to successfully perform the specified work and deliver agreed-upon products or services. The specifications are described in detail, ensuring complete understanding of the requirements by both parties. The responsibility and risk for the delivery of the specific product/service is on the contractor. If the contractor exceeds the contract cost, he must still deliver the product for the agreed-upon amount. However, responsibility for the detailed specification and the management of scope change belongs to the Project Manager. If the scope of the project is changed, a change request must be processed and the cost of the changes, which may not exceed established limits, must be agreed upon. As long as scope can be adequately defined, this type of contract is good for controlling cost, but changes in scope must be managed.

3.3.2 Time and Materials

Staff augmentation procurements are generally done using a time and materials contract. These contracts pay for services rendered at a fixed rate and for materials at cost plus a handling fee. This type of contract is usually employed if the scope of the work to be completed is not well defined and does not permit a fixed level of effort or a fixed price to be estimated. A contract is developed to secure services for a range of technical skills, with negotiated hourly rates. The contract is usually assigned a maximum amount payable. This contract type is particularly well suited to situations where the principal "deliverable" is labor hours. The Project Manager must provide for the management of each individual contract staff person's performance, and specific performance standards for each type of resource must be established. This may be particularly difficult if different performance standards are being used for contract staff and for in-house staff performing the same functions. In this type of contract, the burden is on the Project Manager to control Project Scope and cost by defining individual and ensuring performance standards and monitoring contractor performance.

If the scope of the project is not fully defined, some of the attributes of a fixed price contract could be used to try to minimize disadvantages of using the time and materials contract. The contract can be established with defined rates for specific technical skills, as in the standard time and materials model, up to a maximum amount payable ("cost not to exceed"). As specific deliverables are defined, specifications can be developed and a fixed price can be agreed upon for the delivery of these items. Once all parties agree to the scope and cost, this item would be treated as a fixed price deliverable.

3.3.3 Cost Reimbursement

In some cases, usually when there are such uncertainties of performance that a price cannot be estimated with sufficient accuracy to ensure that it is fair and reasonable, cost reimbursement contracts may be preferred. A cost reimbursement contract allows for payment to the contractor of all costs incurred, within a predetermined ceiling and allowable cost standards, after the work of the contract is performed. Cost reimbursement contracts place the least cost and performance risk on the contractor. They basically only require the contractor to use "best efforts" to complete the contract. These contracts are not often in the best interest of the state, but may be useful in certain circumstances. There are a number of different types of reimbursement contracts, including:

- Cost – This type involves the payment of all incurred costs within a predetermined total estimated cost.
- Cost Sharing – The agency and the contractor agree to split the costs of performance in a predetermined manner. No fee is given. This type of contract can sometimes create additional liability issues of which the Project Manager should be aware.
- Cost-plus-fixed-fee – This type allows for payment of all incurred costs within a predetermined amount, plus an agreed upon fee which will not change.
- Cost-plus-incentive-fee – This provides for an adjustment of the fee (up or down) using a pre-determined formula based on the total allowable cost in relation to total targeted costs.

- Cost-plus-award-fee – Provides for a negotiated base fee with an award fee that can be given based upon an evaluation of contractor performance and cost control.

The advantages of the cost reimbursement contract are better control of project cost while still providing some flexibility when scope has not been fully defined.

3.3.4 Indefinite Delivery Contracts

Indefinite delivery contracts are also known as "on call," "term" or "back drop" contracts. In general, they provide for delivery of goods and services upon the issuance of a delivery or task order when specific needs arise. Many agencies use these predefined contracts to simplify the procurement process. Utilizing an indefinite delivery contract minimizes the requirement to establish agency terms and conditions since it is only necessary to go through the process of defining the agency's requirements once. In many cases an agency will enter into a contract before the project starts. These contracts usually state the type of service to be provided, a length of time that the service can be requested (usually 3 to 5 years) and a maximum contract amount. The contracts can significantly reduce the amount of time it will take to secure services, but are normally only used on smaller, less complex projects.

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Payment incentives and disincentives can be included in many types of contracts. They can be based on predetermined performance standards that are agreed to by all parties to the contract. For example, an incentive fee could be included in a contract and awarded to a contractor if the product is delivered ahead of schedule, and a disincentive fee could be assessed if the product is delivered late. To ensure that these items have a positive effect on the contract and to create a win-win situation, it is recommended that incentives only be used when the contract also includes disincentive clauses.

3.4 UTILIZING EXISTING CONTRACTS

There are existing statewide and agency contracts that may be utilized when procuring products and services. This is often the most efficient and cost effective method to secure the required goods and/or services, since it can reduce the procurement cycle time.

Within the Office for Technology, the Strategic Technology Acquisition and Assessment Team (STAAT) has established a consistent approach to technology procurements and manages a number of statewide technology contracts that provide significant savings due to anticipated quantity purchases/licenses. They can also assist agencies with predictive cost modeling tools and relevant market data on current and emerging technology trends to improve overall strategic planning.

Similarly, the Office of General Services maintains a number of statewide contracts for commodities and selected goods and services that agencies can take advantage of without conducting a full procurement. Procurement Guidelines have been issued by the New York State Procurement Council and endorsed by the Office of the State Comptroller (OSC), the Division of the Budget (DOB), and the Office of General Services (OGS). Full text of the Guidelines can be found on the OGS website at http://www.ogs.state.ny.us. As set forth in Section 5.B of the Procurement Guidelines, the statewide contracts that agencies may use include:

Statewide or Regional Single Vendor Contract: The agency may purchase directly from the contractor.

Statewide or Regional Multiple Vendor Contracts with Agency Selection Among Contractors: The agency may select from commodities, technology or services offered and then purchase directly from a selected contractor.

Backdrop Contracts with Agency Selection Based Upon a Mini-Bid: State agencies and the OGS Procurement Services Group may establish backdrop contracts with multiple vendors that require a subsequent bid process and award among the contracted vendors. Backdrop contracts are based on continuous recruitment and require all bidders to provide not-to-exceed pricing which establishes the ceiling pricing for the term of the contract. The agency must conduct a mini-bid among the pre-qualified backdrop contracts. There are special options available to streamline this process even further, e.g., the “Fast Track” option, provided certain criteria are met. Complete information on these options is available on the OGS website noted above.

Centralized Contracts with One or More Contractors Allowing Subcontracts with Agency Specific Modifications: These centralized contracts contain general terms and conditions for services and/or technology with discounted pricing. An agency may obtain services directly from the vendor using the centralized contract or may execute and obtain approval of a subcontract with specific modifications to the terms and conditions.

Discretionary Purchases: In situations where a commodity, service or technology is not under a centralized contract, an agency may purchase goods or services directly from a responsive and responsible bidder, up to the discretionary limits established. The current discretionary limit for most agencies is $15,000, or $50,000 if the purchase is made from a New York State Small Business Enterprise (SBE), certified Minority-owned Business Enterprise (WBE) or Woman-owned Business Enterprise (WBE).

Depending on the contract used, and subject to State Finance Law, Article XI, the agency may have flexibility in defining the contract terms, and payment methodology, for the particular engagement (i.e., fixed fee, time and materials, etc.).

3.5 ESTABLISHING NEW CONTRACTS

If the required products and services cannot be obtained within existing state or agency contracts, the Project Manager will have to incorporate the establishment of the new required contracts into the overall Project Plan. New York State Finance Law, Article XI, "State Purchasing" and the Procurement Guidelines referenced in 3.2 above provide guidance to state agencies when establishing new contracts to procure commodities, services and technology. Pursuant to Section 4 of the Procurement Guidelines, the following choices are available when establishing a new contract to purchase commodities, products, technology, or services.

3.5.1 Preferred Source

In an effort to advance certain social and economic goals, some providers of commodities have Preferred Source status under the law. Any acquisitions from these providers are not subject to competitive procurement requirements. The Preferred Source status for commodities has been given to the NYS Department of Corrections (DOCS) Industries Program (Corcraft). The Preferred Source status for services and commodities is also given to qualified charitable non-profit agencies for the blind, qualified charitable non-profit agencies for other severely disabled persons, qualified special employment programs for mentally ill persons and certain veterans' workshops. State agencies must purchase from a Preferred Source if the commodity or service required appears on the List of Preferred Source Offerings published by OGS.

In addition to Preferred Sources, other statutes establish a policy to promote small businesses, women-owned businesses and minority-owned businesses in New York State. (See Section 4.A of the Procurement Guidelines; see also Appendix C of the Procurement Council Guidelines for additional information.)

3.5.2 Sole Source/Single Source Procurement

In Sole Source procurement only one vendor can supply the commodity, technology and/or perform the service required by the agency. This method of procurement requires a Procurement Record explaining a) the unique nature of the requirement; b) the basis upon which it was determined that there is only one known vendor able to meet the need; and c) the basis upon which the agency has determined the cost to be reasonable. All of the above documentation is required by OSC to review the proposed contract.

A Single Source procurement is one in which two or more vendors can supply the commodity, technology and/or service required, but the agency selects one vendor over the others for reasons such as expertise or previous experience with similar contracts. This type of procurement requires a Procurement Record explaining a) the circumstances leading to the selection of the vendor, including the alternatives considered; b) its rationale for selecting the specific vendor; and c) the basis upon which it determined the cost was reasonable. All of the above documentation is required by OSC to review the proposed contract. (See Section 4.F of the Procurement Guidelines.)

3.5.3 Emergency Situations

An emergency is an urgent and unexpected requirement by an agency where health, public safety or the conservation of public resources is at risk. An agency's failure to plan in advance does not constitute an emergency. When an emergency arises, an agency may let procurement contracts without complying with formal competitive requirements. Under these circumstances, the agency head must approve a waiver of the competitive bidding requirements.

The agency must document in the Procurement Record each transaction entered into as a result of the emergency, explaining the nature of the emergency situation, the potential effect on the health, safety or conservation of public resources, and a detailed description of the commodities, services or technology to be provided. (See Section 4.G of the Procurement Guidelines.)

3.5.4 Competitive Procurements

Competitive procurements utilize either an Invitation for Bid (IFB) or a Request for Proposal (RFP) process. Generally, commodities are awarded on the basis of lowest price, as a result of an IFB. While services or technology may be awarded on lowest price as well, they are more often awarded on the basis of best value as a result of an RFP process. (See Section 4.E of the Procurement Guidelines.)

All solicitations of $5,000 or above must be published in the Contract Reporter in conformance with applicable statutes and regulations. (See Section 7 of the Procurement Guidelines.)

The Project Manager should consult with STAAT and OGS prior to initiating a competitive procurement. These agencies may be able to save significant time and effort for the Project Team by providing references to other agencies that have already developed similar RFP's or IFBs, with evaluation and selection methods and processes, good contractual language, and performance standards. By utilizing established procurement best practices the Project Manager can more effectively and efficiently complete the procurement. The RFP process summarized here is described in greater detail in Section 7 of the Procurement Guidelines.

RFP Development:

The RFP should contain a comprehensive and concise statement of work (SOW) that clearly defines the products desired, their functional requirements, operating and performance characteristics and required interfaces with other agency systems and processes. The RFP process enables the agency to obtain and evaluate recommended solutions from a number of different vendors.

The RFP should also contain the invariable and mandatory terms and conditions of the contract. The agency counsel must participate in the development of this element of the RFP. This section will include such items as the method of payment, required Project Schedule, location of work, method of product delivery, warranties, and damages for non-performance, source code escrow, etc.

The RFP must describe the required qualifications for the responding vendors. It must also include a description of the evaluation and selection process and general criteria that will be used in the evaluation. Finally, the administrative aspects of the procurement, such as contacts, key dates, policy and bidding requirements, format of proposals, etc., must be detailed.

Independent Estimate:

An independent estimate of the time and cost to complete the project should be developed. This should be a realistic and not overly optimistic estimate that takes into consideration the technologies and skills involved in the project, especially if "bleeding-edge" technologies are involved. Sometimes this is done through an RFI (Request for Information) process prior to the decision to develop the RFP, to assess the available competitive field and state of the marketplace for the particular industry, as well as to establish a baseline for costs.

This independent estimate will provide a baseline for comparing proposals during the selection process. If there are significant variations between cost and schedule estimates in submitted proposals, the lowest bid may not always be the best value. If the low bid is significantly lower then the independent estimate, it should be looked at very carefully. If the contract is not profitable it can generate many problems for the contractor and the agency.

Selection, Negotiation and Award:

Generally, there are three independent panels or committees involved in the evaluation and selection process:

- A technical evaluation committee reviews and evaluates the technical and functional aspects of the proposals.
- A cost or financial committee reviews and evaluates the cost proposals.
- A selection committee receives the reports of both evaluation committees and recommends the final selection to the Agency Head, Commissioner, or other officer who must authorize the final decision.

> Specific criteria, the evaluation instruments, the weighting of individual elements, the cost component, and the technical component must all be defined and sealed before initial receipt of offers (proposals). It is paramount that this process provides equal and fair opportunity to each proposal.

Ideally, the contract language included in the RFP will be of sufficient detail that limited negotiation is required after a proposal has been selected.

3.6 CONTRACTOR MANAGEMENT

After a contractor has been selected to provide commodities, technology or services, the Project Manager is responsible for managing contractor performance, either directly or through a Team Leader. The Project Manager must ensure that responsibility is established for contractor oversight, and that the contractor receives clear direction regarding all contractual matters. Wherever possible, the project management processes defined in this ***Guidebook*** should be required of all contractors.

The keys to successful contractor management are an unambiguous and mutual understanding of the contract and a good business relationship. The performance standards for the contractor must be articulated in the contract, and the contractor should demonstrate a complete understanding of the standards and show that a process has been established for meeting each of these standards. There are benefits to both the contractor and the state agency if a positive relationship can be established and maintained in which risks and benefits are shared.

The Project Manager should hold regularly scheduled meetings with the contractor to obtain information about how effectively the contractor is achieving the contractual objectives. Periodic reviews with the contractor should be established to ensure contractor adherence to standards and compliance with project processes and schedules.