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NYS Procurement Bulletin Discretionary Purchasing Guidelines

I. INTRODUCTION

The purpose of this bulletin is to provide guidelines for the use of the discretionary purchasing authority granted by the New York State Finance Law.

This bulletin applies to all State agencies, boards, commissions, offices and institutions. It applies to purchases up to \$50,000 (or up to \$85,000 or \$200,000 as described below) for services and commodities not available in the form, function and utility that meet an Agency's needs from Preferred Sources or an Office of General Services (OGS) Centralized Contract.

Agencies shall consider the reasonably expected aggregate amount of all purchases of the same commodities or services to be made within a twelve (12) month period commencing on the date of purchase when determining which procurement methodology to use. Aggregate purchases of the same commodities or services within a twelve (12) month period are deemed a single transaction. When an Agency can reasonably anticipate repeat purchases are necessary, the Agency should select the appropriate procurement process to cover such aggregate needs, which may include a competitive bid. Purchases of Services or Commodities shall not be artificially divided for the purpose of satisfying the discretionary buying thresholds. A change to or renewal of a discretionary purchase shall not be permitted if the change or renewal would bring the reasonably expected aggregate amount for all purchases of the same commodity or services from the same provider within the twelve month period commencing on the date of the first purchase to an amount greater than the discretionary buying threshold amount.

NOTE: This bulletin applies only to those purchases made under §163 of the State Finance Law. It does not apply to procurements governed under other sections of law including, but not limited to construction, architecture, engineering and surveying services. In addition, the thresholds are different for SUNY and CUNY, as their authority is derived from NYS Education Law §§355.16 and 6218 respectively. Please refer to the outline in the Discretionary Threshold Chart on the OGS web site for additional guidance:

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

II. DISCRETIONARY BUYING THRESHOLD

The Discretionary Buying Threshold for services and commodities, not available from Preferred Sources or from the OGS Centralized Contracts, is \$50,000 for State agencies; \$85,000 for OGS Agency Specific Contracts; and \$125,000 for SUNY. In addition, the threshold is \$200,000 for purchases: from a NYS small business; from a firm certified as a Minority and/or Women Owned Business Enterprise (M/WBE) by the New York State Department of Economic Development; for purchases of commodities or technology that are recycled or remanufactured (~~State Finance Law §163(6)~~); or for purchases of commodities that are food, including milk and milk products, grown, produced or harvested in New York state (State Finance Law §163(6)).

Purchases up to the Discretionary Buying Threshold are not subject to the formal competitive bidding requirements set forth in State Finance Law §163, but are subject to the advertising requirements set forth in Economic Development Law Article 4-C and State Finance Law §163(6-c). Agencies must, however, comply with their internal policies and procedures governing discretionary purchases, which should include an assessment as to whether a formal competitive procurement process, or one that is less formal but still competitive, may best meet the Agency's needs. State Finance Law §112(2)(a) requires prior approval by the Comptroller for contracts exceeding \$50,000 except for OGS Agency specific contracts, in which approval by the Comptroller is required for contracts exceeding \$85,000. There is no prior approval by the Comptroller for OGS Centralized Contracts let after April 1, 2012.

Additionally, prior approval by the Comptroller for SUNY contracts is only for non-construction service contracts valued over \$250,000.

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

- i) ensure that the commodities and services acquired meet its form, function and utility needs;
- ii) document and justify the selection of the vendor;
- iii) document and justify the reasonableness of the price; and
- iv) ensure that the State buys from responsible vendors.

NOTE: Discretionary purchases \$50,000 or over must be advertised in the Contract Reporter (Economic Development Law § 141(3)). Quarterly Contract Reporter ads are required for purchases between \$5,000 and \$50,000. (SUNY and CUNY have different thresholds.) (See NYS Procurement Bulletin - Contract Reporter Advertising Thresholds and Notice Requirements www.ogs.ny.gov/procurecounc/pdfdoc/bulletin-contractreporterquarterlylistings_2_.pdf)

In addition to advertising in the NYS Contract Reporter, State Finance Law §163(6-c) requires that for the purchase of commodities that are food, including milk and milk products, grown produced or harvested in New York State, where such commodities exceed fifty thousand dollars in value, state agencies must advertise the discretionary purchase on the state agency website for a reasonable period of time and make the discretionary purchase based on the lowest price that meets the state agency's form, function and utility.

III. "HOW TO" PROCEDURES

Each Agency must first review the "List of Preferred Source Offerings" <http://www.ogs.state.ny.us/procurecounc/pdfdoc/pslist.pdf> and determine if the desired commodity or service is available from a Preferred Source in the form, function and utility that meets its needs (see State Finance Law §163(3)(a)(i) and §163(4)(a); see also NYS Procurement Bulletin – Preferred Source Guidelines.). Secondly, the Agency must review OGS Centralized Contracts. Thirdly, the Agency must review its own Agency or multi-Agency specific contracts to determine if the desired commodity or service is available to meet the Agency's need.

If the above reviews do not meet the Agency's needs, the following steps may apply:

- A. Purchases Under \$50,000:** Agencies must maintain justification to support both the vendor selection and the reasonableness of the price. Methods for determining reasonableness of price include, but are not limited to:

Informal quotes (e.g., telephone or written),
Cost to other governmental entities,
Historical cost or price comparisons, or
OGS or Less, where applicable

Document in the Procurement Record the basis for the conclusion that the price is reasonable. "Reasonable" means a "fair market price" based on normal competitive conditions and not necessarily the lowest possible price.

Agencies are required to advertise in the Contract Reporter on a quarterly basis for anticipated purchases between \$5,000 and \$50,000. Agencies are encouraged to consider vendors responding to advertisements in the Quarterly Listings.

- B. Purchases over \$50,000.00:** In addition to the above, Contract Reporter advertisement documentation is required.

C. Purchases up to \$200,000.00: In accordance with State Finance Law §163(6), this range applies to procurements from New York State Small Businesses, New York State certified Minority and/or Women Owned Enterprises, for commodities and technology that are recycled or remanufactured, or commodities that are food, including milk and milk products, that are grown, produced or harvested in New York state. To identify certified M/WBEs, an Agency consults the Department of Economic Development's directory of certified minority and women-owned business enterprises (<https://ny.newnycontracts.com/FrontEnd/VendorSearchPublic.asp>)

In addition to advertising in the NYS Contract Reporter, State Finance Law §163(6-c) requires that for the purchase of commodities that are food, including milk and milk products, grown, produced or harvested in New York State, where such commodities exceed fifty thousand dollars in value, state agencies must advertise the discretionary purchase on the state agency website for a reasonable period of time and make the discretionary purchase based on the lowest price that meets the state agency's form, function and utility.

As applicable, obtain vendor certification that the commodity or technology is recycled or remanufactured or that a small business meets the appropriate criteria.

NOTE: State Finance Law §160(8), defines the terms "small business concern" or "small business" as meaning a business which is resident in this state, independently owned and operated, not dominant in its field and employs one hundred or less persons.

In addition to the requirements stated above in A and B, OSC prior approval and a written quote from the selected responsible vendor are required for contracts valued over \$50,000. OSC expects, at a minimum, to see informal competition in the form of multiple quotes. If less than three quotes are received, the contracting agency will have to document how it determined that the cost is reasonable.

IV. RECOMMENDED LANGUAGE FOR CONTRACT REPORTER NOTIFICATION:

Several alternative narratives follow to advertise a procurement opportunity when the agency will use its discretionary purchasing authority and it is reasonably anticipated that the procurement will exceed \$50,000 but be less than \$200,000. Agencies are reminded that in all cases, justification of reasonableness of price must be included in the procurement record.

Alternative I

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

Alternative II

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

Alternative III

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

IV. PURCHASING GUIDELINES FOR FRESH EGGS, FRUITS AND VEGETABLES

An Agency may purchase within a 15-day period, without formal competitive bidding, up to \$10,000 for each of the categories of fresh eggs, fresh fruit, and fresh vegetables from a NYS grower, NYS producer, or NYS association of growers and producers (9 NYCRR § 250.2(i)). An Agency must determine the price is reasonable and comparable to current market prices.

V. GUIDELINES FOR ENCOURAGING THE USE OF NEW YORK STATE FOOD PRODUCTS

In an effort to comply with the requirements of State Finance Law §165(4), agencies are encouraged to include provisions in their solicitations which encourage vendors to fulfill the requirements of any contract awarded pursuant to that solicitation with products that are grown, produced, harvested or processed, in whole or in part, in New York State.