PRACTICAL APPLICATIONS FOR

STATE PROCUREMENT

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# Section 1: Introduction

## 1.1 Introduction

This document is designed to assist procurement professionals with operationalizing the New York State Procurement Guidelines. It is intended to expand upon the guidelines by providing detailed information and examples regarding the various options and steps that procurement agencies may take to implement the guidelines in accordance with applicable statutory requirements and regulations. This document is meant to be reviewed in conjunction with the guidelines and treated as supplementary information, rather than to be viewed as a substitution for them.

The first step in any procurement process is to determine what your needs are with specificity. This step should include, but is not limited to:

* Assessing the category of need (e.g., commodity, service, or technology)
* Delineating any technical requirements, specifications, or qualifications that must be met
* Outlining the geographical area(s) that will be covered by the procurement activity
* Establishing the necessary timeframe or deadline by which the procurement must be completed
* Evaluating cost considerations and budgetary restrictions
* Estimating incremental and/or total costs
* Determining the required outcomes of the procurement

Once your procurement needs have been determined, the process that you should use to select the appropriate procurement method to meet those needs can be ascertained using the flow chart below.

## 1.2 Selecting a Procurement Method

The need for a commodity/ service/ technology is identified

**YES**

**YES**

Optional paths, if applicable

Required paths

**NO**

**NO**

**YES**

[***IFB***](#IFB)***,*** [***RFP***](#RFP), Sole Source, Single Source, Emergencies, Piggybacking

[Discretionary Buying](https://ogs.ny.gov/procurement/nys-procurement-bulletin-discretionary-purchasing-guidelines) \*\*

These are not in any order; choose based on cost, scope, and market research.

**NO**

Other means of contracting:

Select solicitation methodology based on requirements

Is there an established agency or multi-agency contract available that meets your desired form, function, and utility?

Do any preferred sources provide for the desired form, function, and utility? Use the [Preferred Source Guidelines](https://ogs.ny.gov/procurement/nys-procurement-bulletin-preferred-source-guidelines) to make this determination.

**NO**

Is the commodity/service/ technology available in the required form, function, and utility through an [OGS centralized contract](https://ogs.ny.gov/procurement/ogs-centralized-contracts)? Remember to follow the specific contract terms\*

\*State Agencies where the head of the agency is not appointed by the Governor including but not limited to the State Education Department, the Department of Law and the Department of Audit and Control may but are not required to use centralized contracts to acquire services and technology.

\*\*In addition to agency specific discretionary thresholds, higher thresholds exist for SBEs, MWBEs, SDVOBs, NYS Textiles, BSC Customers, Recycled or Remanufactured Commodities or Technology, and NYS Foods.

[Apply good faith efforts to fulfill MWBE, SDVOB, SBE, NYS Textile & Environmentally Preferred requirements in all procurements](https://ny.newnycontracts.com/)

[Website: New York Contract System](https://ny.newnycontracts.com/)

An [SDVOB set aside](https://ogs.ny.gov/system/files/documents/2018/10/guidelines_0.pdf) may be used at any point after Preferred Sources

# Section 2: Preferred Sources

## 2.1 Introduction To Preferred Sources

Purchases from preferred sources take precedence over all other sources of supply and competitive procurement methods. It is the obligation of each State agency and other purchasers covered by these guidelines to buy from preferred sources whenever possible.

There are currently three preferred source providers: the Correctional Industries Program (known as Corcraft), which is run by the Department of Corrections and Community Supervision (DOCCS); the New York State Preferred Source Program for People Who are Blind (NYSPSP); and the New York State Industries for the Disabled, Inc. (NYSID). Among these entities, there is a prioritized order for purchasing commodities and services, if available:

1. Commodities from Corcraft
2. Commodities and services from NYSPSP
3. Commodities and services from NYSID or from qualified veterans’ entities

Commodities and services produced by a qualified veterans' entity provide job and employment-skills training to veterans where such a (workshop) entity is operated by the United States Department of Veterans Affairs and is manufacturing products or performing services within this state and where such entity is approved for such purposes by the Commissioner of Education.

It should be noted that the three preferred source entities also offer commodities and services that do not have preferred source status, which are therefore subject to all statutory requirements for open market procurement. The catalogs offered by preferred sources are required to clearly identify approved commodities and services.

All of the commodities and services available through the preferred sources can be found on the List of Preferred Source Offerings, which is continuously updated and maintained by the New York State Office of General Services (OGS). The list includes pricing for the offerings and is posted under the “Guidelines and Offerings List” section on the preferred sources page on the OGS website, which can be accessed at:

<https://ogs.ny.gov/procurement/preferred-sources>

The process of updating the list includes approval of pricing, and OGS seeks to ensure that offerings are as close to prevailing market price as practicable and that prices do not exceed 15 percent above prevailing market prices for the same or equivalent commodities or services.

Additional information regarding preferred sources can be found on the OGS website at:

<https://ogs.ny.gov/procurement/nys-procurement-bulletin-preferred-source-guidelines>

## 2.2 When to Use Preferred Sources

Preferred sources should be used for your procurement when their offerings meet the form, function, and utility that you require within the pricing limitations of the preferred source statute. If you have reviewed all of the preferred source offerings against your procurement needs and have determined that they cannot meet the form, function, and utility that you require, or, for Preferred Sources other than Corcraft, that their offerings are not available at a price no greater than fifteen percent above the prevailing market prices, then you can fulfill your procurement using another available option.

## 2.3 Preferred Source Procurement Processes

The process for procuring a preferred source offering differs between commodities and services. The procedures below outline the steps that must be performed by both the purchasing agencies and preferred sources[[1]](#footnote-2) to complete the procurement. The 10-day notification requirement detailed in Step 5b for commodities, and in Step 3a and 3b for services, applies only to those commodities that have been approved as preferred source offerings on a statewide basis, and to those services approved for one or more New York State agencies, political subdivisions, or public benefit corporations as indicated on the List of Preferred Source Offerings. For commodities or services approved for purchase only by a specific purchasing agency, the 10-day notification requirement applies only to the specific agency

Throughout this section, for simplicity’s sake, the term “preferred source” is used to refer to both preferred sources as well as their facilitating agencies. Facilitating agencies are non-profit-making corporations established to facilitate the distribution of orders among approved preferred sources. Facilitating agencies serve the preferred sources as their agent by processing inquiries and orders as a “one-stop” contact for purchasers and by facilitating the distribution of those commodities and services provided by preferred sources. The activities involving preferred sources will actually be performed by the facilitating agencies where the commodity or service is offered by a blind or other severely disabled preferred source. Purchasing staff should directly contact the facilitating agencies involved.

## 2.4 Purchasing Commodities from Preferred Sources

* **Step 1:** The purchasing agency determines and defines its need for a particular commodity.
* **Step 2:** The purchasing agency reviews the current List of Preferred Source Offerings to determine if the commodity being sought is one provided by at least one of the preferred sources. Purchasing agencies should broadly interpret the generic listing of commodities.
* **Step 3**
	+ **a:** If the commodity is identified on the list as available from one or more preferred sources, the purchasing agency determines which preferred source has priority and reviews the preferred sources’ catalogs to generally determine whether the commodity meets the agency’s specific needs. Purchasing agencies should consult directly with the preferred sources to gain additional information and/or clarify catalog descriptions. If necessary, the purchasing agency should proceed through each of the preferred sources’ catalogs that, based on the list, offer the commodity being sought to locate one that meets the specific procurement needs. If one is identified, proceed to Step 4.
	+ **b:** If the commodity is not identified on the list as being available from a preferred source, State agencies *should*, and local governments and public benefit corporations *may*, review OGS centralized contracts to determine if the commodity is covered by such a contract. If not, the purchasing agency may proceed with an appropriate competitive procurement in accordance with the applicable law.
* **Step 4:** If the commodity is on the list, and in the preferred source catalog, the purchasing agency shall determine whether the commodity is in the form, function, and utility required. To apply the form, function and utility standard, the agency should define the commodity in terms of the minimum essential requirements that will meet its needs. Every effort should be made to purchase from the preferred source so long as the item meets the agency’s needs. Requirements may includequality, quantity, delivery, packaging, performance standards and compatibility, among others. Requirements should not be inflated or overstated to eliminate preferred source suppliers, nor should the purchasing agency acquire a preferred source product which is materially unsuited to the needs of the agency.

In making the form, function and utility determination, purchasing agencies should at least consider the following:

* Does the commodity offered by the preferred source meet either agency specifications or industry standards that may be applicable?
* If there are deviations from specifications, will the commodity suffice or substantially meet the minimum requirements for function and performance?
* Are delivery schedules, installation requirements, and performance standards reasonable, necessary, and within accepted commercial practices? For example, is the divergence between the purchasing agency’s desired deliver date and the preferred sources’ delivery date withing reason or so great as to impede the agency from accomplishing its goals (e.g., six weeks versus six months)?
* Has the preferred source been consulted with? Can the preferred source make necessary accommodations to meet the purchasing agency’s needs?
* **Step 5**
	+ **a:** If the commodity meets the form, function, and utility required by the purchasing agency, the agency completes the purchase from the preferred source at the price determined by OGS or established by the New York State Department of Correctional Services.If a state agency is purchasing a commodity valued at $50,000 or more (exceptions below), the agency must also obtain approval from the Office of the New York State Comptroller (OSC). The purchasing agency should not put the commodity out to bid to determine prevailing market price.
	+ **b:** If the purchasing agency determines that the commodity does not meet the form, function or utility required, the agency shall provide a written notification to the preferred source (i) describing the basis for its finding; (ii) providing the name, address, and phone number of the responsible agency purchasing official; and (iii) indicating the date on which the Contract Reporter insertion form (if required) will be submitted, or the date on which competitive solicitations will be made by the agency. This notification must be received by the preferred source at the address provided in the List of Preferred Source Offerings at least 10 days prior to the date indicated in (iii) above. Proof of notification should be retained by the agency.
* **Step 6:** Within the 10 days provided, the preferred source may:
	+ **a:** Contact, in writing or other form, the agency purchasing officer indicating agreement with the agency;
	+ **b:** Provide no response to the purchasing officer; or
	+ **c:** Contact, in writing or other form, the agency purchasing officer indicating disagreement with the agency’s finding.
* **Step 7**
	+ **a:** If Step 6a or (b) in Step 6 occurs, the purchasing agency may proceed with the procurement from OGS centralized commodity contracts or with an appropriate competitive procurement in accordance with the applicable law.
	+ **b:** If (c) in Step 6 occurs, the preferred source or facilitating agency may consult or negotiate with the agency regarding procurement options including, but not limited to, the commodity offered, a modified version of the required commodity, delivery schedules, etc.
* **Step 8**
	+ **a:** If the procurement is negotiated to the satisfaction of the purchasing agency, the agency shall proceed with the procurement from the preferred source.
	+ **b:** If negotiations are unsuccessful, the purchasing agency will so advise the preferred source and proceed with alternative procurement procedures, including Contract Reporter notification, if required.
* **Step 9:** The preferred source may elect to inform the commissioner or other chief executive for the purchasing agency as to its objection to the agency decision. A copy of such objection must be included with contract documents or vouchers sent by State agencies to the Office of the State Comptroller.
* **Step 10:** All documentation of findings, actions, decisions, and objections are to be retained by the purchasing agency, in conformance with standard records retention schedules, as part of the procurement record for that acquisition.

## 2.5 Purchasing Services from Preferred Sources

* **Step 1:** The purchasing agency determines and defines its need for services.
* **Step 2:** The purchasing agency reviews the current List of Preferred Source Offerings to determine if the service being sought is one provided by at least one of the preferred sources. Purchasing agencies should broadly interpret the generic listing of services. If the service is clearly not on the list, the agency may proceed with a competitive procurement.
* **Step 3**
	+ **a:** The agency must make reasonable efforts to notify preferred sources of the need for services appearing on the List of Preferred Source Offerings. Notification, including a description of the purchasing agency’s requirements, should be provided to the preferred source(s) at the address provided in the list. Proof of notification should be retained by the agency.
	+ **b:** If a preferred source responds within 10 days of the notification, with a notice of intent to provide the service in the form, function, and utility required, identifying the specific preferred source that will be performing the service, either independently or with a corporate partner, the agency shall proceed with the procurement as indicated in Step 4 below. If more than one preferred source submits notice of intent to provide the service and all meet the requirements, cost shall be the determining factor.
	+ **c:** If no preferred source responds within the 10-day period with a notice of intent, or the preferred source(s) provides a notice that it has no interest in providing the required service, the purchasing agency must next determine if there is an OGS centralized services or technology contract that meets its form, function, and utility needs before it may proceed with a competitive procurement. *If* the purchasing agency decides to pursue a competitive procurement, and one or more preferred sources elects to “bid” on that procurement, the purchasing agency must award on the basis of the method of award chosen for such procurement, *irrespective* of the preferred sources’ special status. In other words, in such a case, preferred sources are treated as any other vendor.
* **Step 4:** Once a service has been identified as available from a preferred source, the purchasing agency shall determine whether the service is in the form, function, and utility required by the agency. To apply the form, function and utility standard, the agency should define its service requirements in terms of the minimum essential requirements. In other words, every effort should be made to purchase from the preferred source so long as the service meets the agency’s needs. Requirements may include quality, timeliness, and performance standards, among others. Requirements should not be inflated or overstated to eliminate preferred source suppliers, nor should the purchasing agency acquire a preferred source service that is materially unsuited to the needs of the agency.

In making the form, function and utility determination, agencies should consider the following:

* Does the service meet either agency specifications or industry standards which may be applicable?
* Are deviations from specifications minor? Will the service, or could the service be made to suffice or substantially meet the minimum requirements for function and performance?
* Are start-up lead times and performance standards reasonable, necessary and within accepted commercial practices?
* Has the preferred source been consulted with? Can the preferred source make necessary accommodations to meet the agency’s needs?
* **Step 5**
	+ **a.** If the service meets the form, function and utility needs of the agency and cost $50,000 or more, the preferred source must obtain OGS price approval before the agency completes the purchase. In addition, if the service is valued at $50,000 or more (exceptions below) and the purchase is by a stateagency, the state agency must obtain OSC approval. The price of services shall be approved by OGS as being as close to practicable to prevailing market price but may not be greater than 15 percent above prevailing market price among responsive and responsible offers for equivalent service. The purchasing agency *should not* put the service out to bid to determine prevailing market price. OGS shall follow the requirements of Section 162 of the State Finance Law and ensure that the price of services offered by preferred sources are within the 15 percent cap based on the agency’s detailed specification. To assist OGS, agencies should provide any price information they have available in order to ensure that the prevailing market price is accurately identified for the agency’s specific services.
	+ **b:** If the purchasing agency determines that the service does not meet its form, function or utility needs, the agency must first determine if there is an OGS centralized services or technology contract that meets its form, function and utility needs before it may proceed with a competitive procurement. Again, if a preferred source elects to “bid” on such procurement, the purchasing agency shall make the award on the basis of the method of award chosen for such procurement, treating preferred sources as any other vendor.
* **Step 6:** The preferred source may elect to inform the commissioner or other chief executive of the purchasing agency as to its objection to the agency decision. A copy of such objection must be included with contract documents or vouchers sent by State agencies to the OSC.

**Step 7:** All documentation of findings, actions, decisions, and objections are to be retained by the purchasing agency in conformance with standard records retention schedules as part of the procurement record for that acquisition.

# Section 3: OGS Centralized Contracts

## 3.1 Introduction to OGS Centralized Contracts

State Finance Law requires agencies to use centralized contracts to purchase commodities and services (including technology) that meet their agencies’ requirements with respect to form, function, and utility. OGS Procurement Services is the state's centralized procurement office. OGS Procurement Services manages approximately as 1,500 contracts for commodities, services, and technology that are in demand by New York government entities. These centralized contracts are made available to government entities within the state of New York including, but not limited to:

* State agencies
* Local governments
* School districts
* Non-profit organizations

## 3.2 When to Use an OGS Centralized Contract

OGS centralized contracts should be considered after a determination your procurement needs cannot be met by any of the preferred sources and there is an OGS centralized contract that meets the form, function and utility required by an organization. If you have reviewed all of the offerings available on OGS centralized contracts against your procurement needs and you are unable to find an OGS centralized contract that meets the form, function, and utility needed by an organization.

## 3.3 Becoming an Authorized User

If you are, among others, a state agency, a public authority or benefit corporation, a local government or political subdivision, a volunteer organization (such as an ambulance service or fire company) or a registered charitable organization, you may be eligible to use OGS centralized statewide contracts. This can be confirmed by your applying to participate in the New York State Contract Extension Program.

If your organization qualifies under the Laws of NY, the Program will issue you an OGS Customer ID Number, assuring state contractors that your organization is authorized to use their NYS centralized statewide contract. The application form is available at the following link:

<https://ogs.ny.gov/procurement/ogs-procurement-services-centralized-contract-eligibility-application>

## 3.4 Accessing OGS Centralized Contracts

OGS has over 1,500 contracts and over 8,000 authorized users for its centralized contracts. More information on OGS centralized contracts, and a complete listing of all statewide contracts can be found at:

<https://ogs.ny.gov/procurement/ogs-centralized-contracts>

## 3.5 OGS or Less

Many commodity contracts contain an “OGS or Less” clause. Agencies can buy from suppliers other than those participating in a centralized contract when more beneficial to the acquiring State agency. This procedure applies only to products not available from a Preferred Source. “OGS or Less” cannot be used if the existing state contractor will match the lower non-contract price.

Pursuant to State Finance Law § 163(3)(a)(v), OGS centralized commodities contracts that contain a clause known as “OGS or Less” may allow an agency to obtain needed commodities from a non-contract vendor in order to take advantage of non-contract savings that may develop in the marketplace. “OGS or Less” purchases may not be made if the commodities are available from:

* Legally established preferred sources in the form, function and utility required;
* State contracts based on filed requirements (e.g., fuel, oil, etc.); or
* Agency-specific contracts.

After determining that the needed commodity cannot be obtained from these sources, the agency must determine, and document in the procurement record, that the purchase price, including delivery, warranty and other relevant terms, offered by the non-contract vendor is more economically beneficial than what is offered on OGS centralized contract(s) for a commodity substantially similar in form, function and utility. Agencies must not solicit multiple offers from the same vendor and must not create a bidding war. State contractors must be allowed a minimum of two business days to match the lower non-contract price. If the State contractor provides written confirmation that it will match the lower price, the agency proceeds with the purchase in accordance with agency purchasing procedures. If the State contractor is unable or unwilling to match the lower price, the agency must document this in the procurement record, and in lieu of purchasing the commodity from the OGS centralized contractor at the OGS centralized contract price, may procure through either a discretionary or competitive procurement, as applicable.

## 3.6 Backdrop Contracts

Additionally, OGS establishes backdrop contracts that prequalify vendors for provision of services. These contracts establish standard terms and conditions, set maximum not-to-exceed prices, and satisfy many legal requirements associated with State procurements, such as advertisement in the New York State Contract Reporter, vendor responsibility determination, and sales tax certification. OGS identifies its backdrop contracts as either “CMT” (Centralized Management – Technology) or “CMU” (Centralized Management – Unknown).

Utilization of backdrop contracts may require additional competitive procurement processes at the authorized user level (e.g., a mini-bid) and as applicable, approval of OSC, prior to the purchase of services. An authorized user may conduct a formal mini-bid process by developing a project definition that outlines its specific requirements and solicits bids from qualified backdrop contractors to determine the best value solution. The best value may also be the lowest price. The exact processes to be followed are set forth either in the OGS backdrop contract or the guidelines associated with that contract on the OGS website.

An authorized user and contractor cannot amend the terms and conditions of the backdrop contract, but may, through the mini-bid process, agree to pricing or terms more favorable to the State or the authorized user only (e.g., delivery terms, longer warranty period, no-cost maintenance). Under no circumstances can the authorized user and the contractor trade off terms for pricing. For example, the authorized user cannot agree to a waiver of indemnity or agree to indemnify the contractor in return for better pricing.

# Section 4: Established Agency or Multi-Agency Contracts

## 4.1 Introduction to Established Agency or Multi-Agency Contracts

Agency or multi-agency contracts are established by one or more New York State agencies to procure on an ongoing basis. A multi-agency contract is one awarded with the intention that it will be used by more than one agency. This step in the order of priority recognizes a State agency’s ability to leverage and adopt already existing competitive agency or multi-agency contracts.

These are contracts established by an agency or multiple agencies to procure on an ongoing basis. They enumerate the specific terms and conditions binding both the vendor and the State. These contracts are usually in effect for multiple years. An agency may also use an agency or multi-agency established contract to purchase commodities, but typically these items can be obtained through use of a purchase order or a purchase authorization.

## 4.2 When to Use an Established Agency or Multi-Agency Contract

Using an established agency or multi-agency contract may be considered after a determination that your procurement needs cannot be met by any offerings available through preferred sources or OGS centralized contracts. This procurement method requires a multi-step process to ensure that the resulting contract successfully fulfills the form, function, and utility required by an organization. This step is not applicable if no established agency or multi-agency contracts available meet the form, function, and utility required by an organization.

## 4.3 Types of Established Agency or Multi-Agency Contracts

**Competitively Bid Contract** – A contract awarded pursuant to an IFB or RFP.

**Sole Source Contract** – A sole source procurement is one in which only one vendor can supply the commodities or services required by an agency. The agency must document why the proposed vendor is the only viable source for the commodities and/or services needed by the agency. OSC approval must be obtained for a sole source contract if the contract’s value is over the State Finance Law §112 discretionary threshold. In addition, if the agency is seeking a waiver from advertising in the New York State Contract Reporter, OSC must approve the exemption.

**Single Source Contract** – A single source procurement is one in which, although there are two or more potential offerers, the agency has determined that it is in the best interest of the State to procure from a particular vendor. (A typical example would be where an agency needs maintenance for a particular piece of equipment, and that maintenance must be provided by a particular vendor to maintain the warranty.) OSC approval must be obtained for a single source contract if the contract’s value is over the State Finance Law §112 discretionary threshold. In addition, if the agency is seeking a waiver from advertising in the New York State Contract Reporter, OSC must approve the exemption.

**Piggyback Contract** – At times, an agency may find it more efficient to establish a contract based on another governmental entity’s contract. This is known as “piggybacking” and may be used in accordance with the criteria established by OGS in the contract. The agency must seek approval for the use of a piggyback contract from OGS. Finally, the agency must create a New York State contract and obtain all approvals necessary for the specified contract value.

**Emergency Contracts** – An emergency procurement is one in which an urgent and unexpected situation occurs where health and public safety or the conservation of public resources is at risk. Where an emergency exists, an agency may issue procurement contracts without complying with formal competitive bidding requirements. However, an agency should make a reasonable attempt to obtain at least three oral quotes. An agency’s failure to properly plan in advance – which then results in a situation where normal practices cannot be followed – does not constitute an emergency. OSC approval must be obtained for an emergency contract if the contract’s value is over the State Finance Law §112 discretionary threshold. In addition, if the agency is seeking a waiver from advertising in the New York State Contract Reporter, OSC must approve the exemption.

# Section 5: Discretionary Purchasing

## 5.1 Introduction to Discretionary Purchasing

Discretionary purchasing involves a government entity directly purchasing goods from a vendor or service provider within the government entity’s discretionary limit without the need for a formal competitive process.

## 5.2 When is Discretionary Purchasing Appropriate?

Discretionary purchasing is applicable when an offering that meets the form, function and utility that you require is not available through the preferred sources, on OGS centralized contract, or on an established agency/multi-agency contract. Additionally, the aggregate purchase over a 12-month period must meet a dollar value at or below the appropriate thresholds outlined in the chart that can be found at:

<https://web.osc.state.ny.us/agencies/guide/MyWebHelp/Content/files/XI2_A_state_finance_law_thresholds.pdf>

Discretionary purchasing is generally applicable for procurements up to $50,000 (or up to $500,000 in certain instances) when offerings that meet the required form, function and utility of the procurement are not available from preferred sources, on OGS centralized contract, or on an established agency/multi-agency contract. The purchasing agency may proceed to exercise its discretionary purchasing authority only after it has verified that the discretionary purchasing method is appropriate. Further, when make a discretionary purchase, an agency must:

* Ensure that the commodities and services acquired meet their form, function and utility needs, including relevant State law and policy requirements
* Document and justify the selection of the vendor
* Document and justify the reasonableness of the price to be paid
* Buy from a responsible vendor
* Comply with the agency’s internal policies and procedures

State agencies and other purchasers should consider the reasonably expected aggregate amount of all purchases of the same offerings within a 12-month period commencing on the date of purchase when determining which procurement methodology is appropriate. Aggregate purchases of the same offerings within a 12-month period are considered a single transaction. When a purchaser can reasonably anticipate that repeat purchases are necessary, the purchaser should select the appropriate procurement process to cover such aggregate needs, which may include a competitive bid. Purchases of commodities, services or technology should not be artificially divide for the purpose of satisfying the discretionary buying thresholds. A change to, or renewal of, a discretionary purchase should not be permitted if the change or renewal would bring the reasonably expected aggregate amount for all purchases of the same commodity, services or technology from the same provider within the 12-month period commencing on the date of the first purchase to an amount greater than the discretionary buying threshold amount.

More information can be found in the NYS Procurement Bulletin on Discretionary Purchasing Guidelines, which can be access at:

<https://ogs.ny.gov/procurement/nys-procurement-bulletin-discretionary-purchasing-guidelines>

**NOTE:** This bulletin applies only to those purchases made under §163 of the State Finance Law. It does not apply to purchases governed under other sections of law, including but not limited to construction, architecture, engineering, and surveying services. In addition, the thresholds are different for the State University of New York (SUNY) and the City University of New York (CUNY), as their authority is derived from NYS Education Law §§355.16 and 6218, respectively. Please refer to the New York State Purchasing Requirements for BSC Customer Agencies, which can be found at:

<https://bsc.ogs.ny.gov/system/files/documents/2023/03/purchasingrequirements_03-15-23.pdf>

## 5.3 Discretionary Buying Threshold

The discretionary buying threshold for commodities, services and technology not available from preferred sources or from OGS centralized contracts is typically:

* $50,000 for State agencies
* $85,000 for OGS agency-specific contracts
* $250,000 for SUNY

Exceptions include purchases for commodities that are food (including milk and milk products) that have been grown, produced, or harvested in New York State, for which the threshold is $200,000. In addition, the threshold is $500,000 for purchases:

* From a New York State small business
* From a minority- and/or women-owned business enterprise (M/WBE) certified by Empire State Development
* Of commodities or technology that are recycled or remanufactured (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 also 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. Agencies may also determine, based upon experience, knowledge and a current analysis, that it is appropriate to limit the discretionary purchase opportunity to M/WBEs or to New York State small businesses. 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. Additionally, prior approval by the Comptroller for SUNY contracts is $250,000 for non-construction service contracts and $125,000 for single/sole source purchases, contracts with bid protests, low bid/best value not selected, and award not in accord with RFP/IFB. Non-construction service contract approval thresholds may be lower ($50,000/$75,000) for certain campuses/hospitals with inadequate controls.

For purchases up to the discretionary buying threshold, each agency must:

1. Ensure that the commodities, services or technology acquired meet its form, function and utility needs
2. Document and justify the selection of the vendor
3. Document and justify the reasonableness of the price, and
4. Ensure that the State buys from responsible vendors

**NOTE:** Discretionary purchases of $50,000 or over must be advertised in the New York State Contract Reporter (Economic Development Law §143(3)). Quarterly Contract Reporter ads are required for purchases between $5,000 and $50,000. (SUNY and CUNY have different thresholds.) See the NYS Procurement Bulletin on Contract Reporter Advertising Thresholds and Notice Requirements, which can be found at:

<https://ogs.ny.gov/procurement/contract-reporter-advertising-thresholds-and-notice-requirements-0>

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, that have been grown, produced or harvested in New York State, where such commodities exceed $50,000 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.

## 5.4 “How To” Procedures

Each agency must first review the List of Preferred Source Offerings and determine if the desired commodity, service or technology 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 the NYS Procurement Bulletin – Preferred Source Guidelines). Secondly, the agency must review OGS centralized commodities contracts. Thirdly, the agency must review OGS centralized service contracts (except state agencies where the head of the agency is not appointed by the governor, including but not limited to the State Education Department, the Department of Law, and the Department of Audit and Control). Fourthly, the agency must review its own agency or multi-agency specific contracts to determine if the desired offering is available to meet the agency’s need.

If the above reviews do not meet the agency’s needs, the following steps may apply:

1. **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
	+ OGS or Less, where applicable

The basis for the conclusion that the price is reasonable should be documented in the procurement. “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 New York State 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.

The NYS Contract Reporter can be accessed at:

<https://www.nyscr.ny.gov/>

Information on how to advertise procurement opportunities in the NYS Contract Reporter can be found here:

<https://www.nyscr.ny.gov/advertise.cfm>

1. **Purchases Over $50,000**

In addition to the above, Contract Reporter advertisement documentation is required.

1. **Purchases Up to $200,000 or $500,000**

In accordance with State Finance Law §163(6), this range applies to purchases up to $200,000 for commodities that are food (including milk and milk products) that have been grown, produced, or harvested in New York State; for purchases up to $500,000 for New York State small businesses, New York State certified minority- and/or women-owned business enterprises, or for purchases up to $500,000 for recycled or remanufactured products. To identify certified M/WBEs, an agency should consult Empire State Development’s NYS M/WBE Directory of Certified Firms, which can be accessed at:

<https://ny.newnycontracts.com/FrontEnd/searchcertifieddirectory.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, that have been grown, produced, or harvested in New York State, where such commodities exceed $50,000 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” as meaning a business which is resident in this state, independently owned and operated, not dominant in its field, and employs one hundred or fewer 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 fewer than three quotes are received, the contracting agency will have to document how it determined that the cost is reasonable.

## 5.5 Recommended Language for Contract Reporter Notification

Several alternative narrative examples 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, e.g., 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, that have been 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, e.g., 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, e.g., 1,000 widgets) pursuant to its discretionary purchasing authority under State Finance Law §163(6). This procurement opportunity is limited to New York State businesses certified pursuant to Article 15-A of the New York State Executive Law.

**Alternative IV**

Agency X intends to procure (insert project description, e.g., 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.

**Alternative V**

Agency X intends to procure (insert project description, e.g., 1,000 widgets) pursuant to its discretionary authority understate 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, that are grown, produced, or harvested in New York State.

## 5.6 Exceptions to Discretionary Purchasing Thresholds

###  5.6.1 Purchasing Guidelines for Fresh Eggs, Fruits, and Vegetables

Within a 15-day period, an agency may purchase up to $10,000 for each of the following categories supplied by a NYS grower, NYS producer, or NYS association of growers and producers (9 NYCRR § 250.2(i)):

* Fresh eggs
* Fresh fruit
* Fresh vegetables

An agency must determine the price is reasonable and comparable to current market prices.

### 5.6.2 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.

## 5.7 Estimating the costs of commodities, services, or technology

The total value of the proposed procurement must be reasonably estimated to ensure the most appropriate and efficient procurement method is selected. This can be determined based on previous contract values, past purchases, historical usage, other agency pricing, percentages or estimated quantity of actual items/units, or engineer’s estimates, etc. Such estimates must be reasonable and rational in relationship to historic patterns of use, except where the agency can document that there is a reasonable basis to believe that there will be a material change in the future, or where no historic use is available.

### 5.7.1 Price Estimate

A price estimate is generally used for supplies, equipment, and simple services that are routinely available on the open market at competitive prices. This may include prices and quotes, such as published or current catalog prices; previous prices and quantity purchased; quantity of items to be purchased; and market surveys and other miscellaneous source of pricing data.

### 5.7.2 Cost Estimate

The cost estimate is a detailed projection of expenditures for services, systems construction, and non-commercial supplies estimated to exceed the simplified purchase threshold. Costs are generally divided into the primary cost elements of labor, payroll additives (burden or fringe), other direct costs, indirect costs (overhead), general and administrative costs (“G&A”), and profit/fee (for contracts primarily, but may include assistance requirements). Consider the following methods to determine cost:

(1) Lump Sum

(2) Top-Down (Parametric/Ball-Park), and

(3) Bottom-Up (Engineering/Detailed)

In many instances a combination of these methods may be used.

**Lump Sum Cost Estimating**

1. Experts develop the estimate based on their technical expertise and knowledge of the market. The degree of accuracy is dependent on the expertise of the participants.
2. Compare previously completed program costs that are similar to the current requirement. The known costs are adjusted by adding or subtracting elements of material, time, and economic or inflationary changes as necessary.

**Top-Down Cost Estimating**

Based upon pricing major measurable units such as man-hours, number of trips/people/days for travel, cubic yards, the number of moves, number of immunizations, number of laboratory tests or number of computers, major computer systems requirements, etc. to determine an approximate estimate of the costs. This method would be used in the early planning stages of a project when the precise quantities or needs are not yet known or when requirements are not fully known, or detailed specifications are not available. The estimate would result in an "order-of-magnitude” projection of costs and would have to be refined as the work product becomes more defined.

**Bottom-Up Cost Estimating**

Detailed estimate separated into organized tasks/activities, and pricing is applied to each element such as labor, overhead, travel, equipment, other direct costs and G&A. The data for a bottom-up estimate has to be very detailed and represents the accumulated experiences of previous and similar projects. This bottom-up estimation process is the most accurate because it involves estimating costs for each task.

## 5.8 Procurement Card Program

The State’s Procurement Card (P-Card) Program is a procurement and payment method designed to expedite purchases and payments. When properly used, the P-Card is an efficient and cost-effective alternative to a variety of traditional labor-intensive procurement and payment tools. Some purchases and payments that can be made with a P-Card include:

* Commodities or services from preferred sources;
* Commodities or services from an OGS centralized contract; and
* Supplies and materials.

Employees must be authorized by their agency to have a P-Card. The maximum single transaction limit for a P-Card holder cannot exceed the agency’s discretionary purchasing threshold. Agencies may set lower limits for specific employees and can impose additional limits in order to control P-Card activity.

The P-Card contract can be found at:

<https://online.ogs.ny.gov/purchase/snt/awardnotes/7900823217can.htm>

P-Card holders should also review their agency’s policies and procedures pertaining to P-Card use. Ultimately, it is the P-Card holder who is responsible for the proper use and safekeeping of a P-Card.

## 5.9 Purchase Orders

A purchase order (PO) is a basic contractual document, issued by an agency’s finance office or other authorized individual(s), and is generally for “one time” purchases. A PO usually consists of the vendor’s name/address, a description of the item, quantity, cost per item, shipping terms, total cost and some data for State use (cost center, object code, and the applicable OGS or purchase authorization contract number). The PO solidifies the terms of the purchase. POs are used to procure from preferred sources, OGS centralized contracts, and agency open market purchases (except preferred source services over $50,000 and open market services over $50,000 in which multiple payments will be made and thus may require a contract). Appendix A must be incorporated in the agency’s purchase orders.

## 5.10 Purchase Authorizations

A purchase authorization (PA) is issued by a State agency and is similar in both form and function to OGS centralized commodity contracts, in that once the PA is approved, agencies can issue purchase orders against the PA without further approval of OSC. An example is when an agency knows that a particular product, not available through a preferred source or an OGS centralized contract, will be needed over an extended period of time, but the exact quantity is not known at the time of establishing the PA.

The primary benefit of the PA is that it allows an agency to establish terms and pricing of a product without needing to encumber funds at the time of submission of the PA to OSC. However, if the contract provides for a guaranteed minimum purchase, OSC requires a purchase order encumbering the guaranteed purchase amount prior to approval. Additional information, as well as a standard format for the PA and award letter, is available through the OSC Guide to Financial Operations, Chapter XI.5: Purchase Authorizations, at:

<http://www.osc.state.ny.us/agencies/guide/MyWebHelp>

# Section 6: Piggybacking, Sole Source, Single Source, and Emergencies

## 6.1 Piggybacking

A newly created agency contract based upon a contract awarded by the United States government, or any State or any political subdivision thereof, in accordance with the requirements of State Finance Law § 163(10) (e).Piggyback contracts allow you to receive the same commodities, services, and technology as the contract holder at the same price.

<https://ogs.ny.gov/procurement/piggybacking-using-other-existing-contracts-0>

## 6.2 Sole Source

A procurement in which only one bidder is capable of supplying the required commodities or services (State Finance Law § 163(1)(g)).

## 6.3 Single Source

A procurement in which, although two or more bidders can supply the required commodities or services, the Commissioner or State agency, upon written findings setting forth the material and substantial reasons, therefore, may award the contract to one bidder over the other. The Commissioner or State agency shall document in the procurement record the circumstances leading to the selection of the bidder, including the alternatives considered, the rationale for selecting the specific bidder, and the basis upon which it determined the cost was reasonable (State Finance Law § 163 (h)).

## 6.4 Emergencies

An emergency procurement occurs when there is an urgent, unexpected situation that may endanger public health and safety, or put the conservation of public resources at risk. In these types of situations, an immediate payment may be required. It should be noted that purchases resulting from the failure to properly plan in advance under normal business circumstances do not meet the requirements to be considered emergency procurements.

# Section 7: Solicitations

## 7.1 Introduction to Solicitations

Discretionary purchases and solicitations are two methods of procurement that should be considered after exploring all of the options above. Solicitations cover multiple methods of procurements, that involve a New York State government organization conducting their own competitive procurement.

## 7.2 Procurement Ethics

Procurements are an expenditure of public monies, and public employees must always ensure that all procurements are conducted so as not to cause any concern that special considerations have been shown to a vendor. Actions such as providing a vendor with information that is not available to other vendors, accepting a gift, or having lunch with a potential vendor could be construed as showing favoritism to a vendor, and may violate State law. Certain meetings with existing or potential vendors may also need to be reported in the State’s online Project Sunlight database. Questions regarding procurement ethics should be directed to the Agency Ethics Officer and/or the New York State Commission on Ethics and Lobbying in Government (COELIG). Information on Project Sunlight reporting is available at:

<http://projectsunlight.ny.gov>

COELIG information and restrictions are available at:

<https://ethics.ny.gov/>

## 7.3 Gathering Information

### 7.3.1 Mandatory Requirements

State procurements, whether using an invitation for bids, request for proposals, or other method, must comply with a number of different statues, regulations, and policy requirements. Principal among these are:

* Procurement Lobbying Law;
* Sales tax certification;
* Vendor responsiveness and responsibility;
* Office of Information Technology Services (ITS) approval, as applicable;
* Prevailing wage schedules;
* Consultant disclosure;
* Reference and compliance with Executive Law Article 15-A (M/WBE & EEO)
* Workers’ compensation insurance and disability benefits insurance;
* Bidders’ right to a debriefing; and
* Green purchasing goals, policies, specifications and standards. See Exhibit C: Green Purchasing for a list of State requirements and http://www.ogs.ny.gov/EO/4/Default.asp for a list of current approved specifications).

More information on a number of these areas is provided in subsequent sections. Additional information can also be found at:

<http://www.ogs.ny.gov/BU/PC/SPC.asp>

<http://osc.state.ny.us/agencies/guide/MyWebHelp>

In addition, there are standard clauses that must be included in every State contract. This body of clauses is commonly referred to as “Appendix A.” It can be found at:

<http://www.ogs.ny.gov/purchase/bidcreation.asp>

It should be noted that, depending on the nature of the procurement, additional requirements may apply. Check with your agency counsel or contracts management office.

### 7.3.2 State Reserved Rights

In addition to mandatory requirements, there are a number of State reserved rights that are typically included to provide additional protections to the agency conducting the procurement. These should be clearly stated in the solicitation. The following is the most common set:

The [name of agency] reserves the right to:

* Reject any or all proposals received in response to the IFB/RFP;
* Withdraw the IFB/RFP at any time, at the agency’s sole discretion;
* Make an award under the IFB/RFP in whole or in part;\*
* Disqualify any bidder whose conduct and/or proposal fails to conform to the requirements of the IFB/RFP;
* Seek clarifications and revisions of proposals;\*
* Use proposal information obtained through site visits, management interviews and the State’s investigation of a bidder’s qualifications, experience, ability or financial standing, and any material or information submitted by the bidder in response to the agency’s request for clarifying information in the course of evaluation and/or selection under the IFB/RFP;
* Prior to the bid opening, amend the IFB/RFP specifications to correct errors or oversights, or to supply additional information, as it becomes available;
* Prior to the bid opening, direct bidders to submit proposal modifications addressing subsequent IFB/RFP amendments;
* Change any of the scheduled dates;
* Eliminate any mandatory, non-material specifications that cannot be complied with by all of the prospective bidders;
* Waive any requirements that are not material;
* Negotiate with the successful bidder within the scope of the IFB/RFP in the best interests of the State;
* Conduct contract negotiations with the next responsible bidder, should the agency be unsuccessful in negotiating with the selected bidder;
* Utilize any and all ideas submitted in the proposals received;
* Unless otherwise specified in the solicitation, every offer is firm and not revocable for a period of 60 days from the bid opening; and,
* Require clarification at any time during the procurement process and/or require correction of arithmetic or other apparent errors for the purpose of assuring a full and complete understanding of an offerer’s proposal and/or to determine an offerer’s compliance with the requirements of the solicitation.\*

\***NOTE:** Failure to include these specific reserved rights (marked with an asterisk) in the solicitation precludes their use in that procurement.

Depending on the nature of the procurement, there may be additional State reserved rights beyond those presented here.

### 7.3.3 Procurement Lobbying Law

State Finance Law §§139-j and 139-k impose certain restrictions on communications between an agency and an offerer/bidder during the procurement process. An offerer/bidder is restricted from making “contacts” (defined in the law as communications intended to influence the procurement) from the date of the earliest notice of intent to solicit offers/bids through the date of the final award, and, if applicable, approval of the contract by the Office of the State Comptroller, to other than designated staff (as identified by the agency). The interval between these points is known as the “restricted period.” Certain exceptions to this restriction are set forth in State Finance Law §139-j (3) (a). An example of an exception would be communication during contract negotiations.

Employees are also required to obtain certain information when contacted during the restricted period and to make a determination of the responsibility of the offerer/bidder pursuant to these two statutes. Certain findings of non-responsibility can result in rejection for contract award. In the event of two such findings within a four-year period, the offerer/bidder is debarred from obtaining governmental procurement contracts. Further information about these requirements can be found on the OGS website:

[www.ogs.ny.gov/Aboutogs/regulations/defaultAdvisoryCouncil.html](http://www.ogs.ny.gov/Aboutogs/regulations/defaultAdvisoryCouncil.html)

Procurement staff have several methods available to them for gathering and exchanging information with potential bidders, prior to issuing a solicitation or making a purchase. These methods enable information gathering while promoting openness, fairness, and transparency. The most common information-gathering options are described below.

As a best practice when gathering information, it is suggested that an agency issue a notice in the New York State Contract Reporter to ensure that there is a level playing field among potential bidders. Other means of identifying potential bidders, such as market- based research and newspaper/trade journal advertisements, may be used depending upon the nature of the agency’s need.

### 7.3.4 Gathering and Exchanging Information Prior to Solicitation

Procurement staff have several methods available to them for gathering and exchanging information with potential bidders, prior to issuing a solicitation or making a purchase. These methods enable information-gathering while promoting openness, fairness, and transparency. The most common information-gathering options are described below.

As a best practice when gathering information, it is suggested that an agency issue a notice in the New York State Contract Reporter to ensure that a level playing field among potential bidders is provided. Other means of identifying potential bidders, such as market-based research and newspaper/trade journal advertisements, may be used depending upon the nature of the agency’s need.

### 7.3.5 Request for Information

A request for information (“RFI”) is a research and information gathering document used when an agency seeks to learn about the options available for addressing a particular need or want to obtain information to help create viable requirements for a potential solicitation. For example, an agency needs to buy decals to affix to the exterior of a vehicle but does not know how various materials (such as stock or ink) withstand long-term exposure to the elements. Issuing an RFI to potential bidders would elicit responses that would enable the agency to write specifications to provide the agency with the best solution.

Consider using an RFI to gather information about the types of goods/services that are available. Certain types of products evolve rapidly; therefore, sending an RFI to vendors may provide insight on newer, more efficient products or services that better address the needs of the agency. It is also strongly recommended that an RFI be advertised in the New York State Contract Reporter to provide additional vendors with an opportunity to respond to the RFI. In addition, all attempts to gather information should include MWBEs, SDVOBs and SBEs. Use the agency compliance office to help contact these vendors.

### 7.3.6 Request for Comment

A request for comment (“RFC”) is used to solicit input from all potential bidders about a solicitation’s structure and language to assess its impact on potential bidders. For example, an agency has drafted a request for proposals (solicitation) but is unsure if potential bidders will find the language too restrictive or the requirements unclear. The RFC allows the agency to gather information, revise the solicitation as appropriate, and issue a document to which potential bidders would be more likely to respond. This practice differs from sending a draft solicitation, in that the agency is only sending the sections of the solicitation that are open for discussion.

### 7.3.7 Draft Solicitations

An agency may submit a draft solicitation to all potential bidders for remarks/comments prior to issuance.The cover letter releasing the draft solicitation should state for which sections of the document the agency is requesting feedback. It should be noted that certain sections of the solicitation are not subject to amendment (e.g., Appendix A, which sets forth the standard clauses for New York State contracts).

### 7.3.8 Roundtable Sessions

A roundtable session generally is an open meeting among all potential bidders and the agency involved in the procurement before the release of a competitive solicitation. These meetings allow potential vendors and agency staff to ask questions of each other and allow for an open exchange of information.It is suggested that these meetings be moderated to ensure that all attendees are provided an equal opportunity to participate. Techniques that can be used include: agendas detailing the topics to be discussed; prior submission of questions; and restricting time allowed for responses.

### 7.3.9 Discussion with the State Comptroller

Prior to issuing the solicitation, consideration should be given to discussing complicated and/or sensitive solicitations or unique evaluation methodologies with the OSC Bureau of Contracts to ensure that the procurement is undertaken in an appropriate manner.

## 7.4 Invitations for Bids

An invitation for bids (IFB) is the appropriate solicitation to be used when the method of award is to be based on lowest price only. An IFB describes the administrative process; defines specifications; establishes required delivery terms, bidder qualifications, method of award, and terms and conditions; and provides instructions for responding.

For commodities, award shall be made on the basis of lowest price among responsible and responsive offers (State Finance Law §163(3)(a)(ii)). In the case of services, the award must be based on “best value” (State Finance Law §163(4)(d). For certain services procurements, best value can be equated to low price. See Chapter V: Specific Guidance: Requests for Proposals.

Steps for conducting an IFB:

* Develop specifications for the commodity/service needed referring to State green purchasing requirements where available and appropriate. For a list of current approved specifications, see:

<https://ogs.ny.gov/greenny/approved-greenny-specifications>

* Prepare the solicitation document;
* Advertise the procurement opportunity (New York State Contract Reporter);
* Distribute the IFB to all potential bidders;
* Conduct site visits and pre-bid conferences (as necessary);
* Receive questions and provide responses (as necessary);
* Receive bids;
* Conduct the bid opening;
* Conduct administrative review of bid submissions;
* Verify responsiveness and responsibility of apparent low bidder;
* Make award;
* When necessary, obtain approvals; and,
* Issue purchase order or contract.

More detail about each of these steps follows.

### 7.4.1 Develop Specifications

There are several methods for creating specifications. The most common are:

* **Make and Model or Equal** *-*If an agency is not limiting the procurement to a specific brand, it may use a brand name and model as a reference to describe requirements such as functionality, style or capacity. The agency would award to the low bid offering the specified product or one of equal characteristics. (For example, “XYZ Corporation’s washing machine Model #123 or equal.”)
* **Make and Model Specific** *-*If an agency determines (and can justify in writing for inclusion in the procurement record) that only one product (specific brand) or certain products meet its needs, the solicitation must state that bids will be accepted on the specified items only and no substitutions will be considered. (For example, “XYZ Corporation’s Part #.”)
* **Technical Specifications** *-*Describes, without reference to a brand or manufacturer, the product, usually detailing the physical components, method of assembly and, in some cases, chemical composition. (For example, a chain must be made of a certain material, a particular gauge, and have a specific tensile strength.) For services, describes the who, what, when, where, why and how, including: qualifications such as licensed practitioners, etc.; thorough description of services needed; frequencies and/or duration; locations, travel, etc.; expected outcomes; requirements on technique, reporting, etc.
* **Performance Specifications** *-*Describes, without reference to a brand or manufacturer, the performance standards required for the product and/or service that is being procured. The bidder must ensure that the product or service offered will meet the performance specifications. (For example, a window washing contract on a set schedule.)
* **GreenNY Council** *-*Executive Order No. 22, “Leading By Example: Directing State Agencies to Adopt a Sustainability and Decarbonization Program”, establishes the GreenNY Council which will have the ability to develop and issue sustainable procurement specifications for use by Affected Entities in the procurement of commodities, services, and technology, or where applicable, in the development of new public works solicitations and contracts. In developing procurement specifications, the council will consider the following factors:
	+ Protection of public health and the environment, including vulnerable populations and residents in Disadvantaged Communities
	+ Avoidance of hazards from the use or release of toxic substances
	+ Pollution reduction and prevention
	+ Sustainable resource management and use, and sustainable manufacturing and production processes
	+ Low impact development and climate resilient design practices, and standards and priorities for entities providing construction, engineering, and other similar services
	+ Reduction of greenhouse gas emissions
	+ The use of renewable and zero-emission resources, remanufactured components, and reused or recycled content
	+ Waste reduction, materials reuse, recyclability, and compostability
	+ Water conservation
	+ Quality, durability and utility of the item of procurement
	+ Minimizing adverse impacts throughout a commodity's or technology's life cycle (i.e., as identified by life-cycle assessment or other supply-chain impacts)
	+ Cost
	+ Extended producer responsibility
	+ Legal and regulatory requirements applicable to the use and procurement of commodities, services, and technology, or where applicable, the procurement of public works

Current members of the GreenNY Council can be found at:

<https://ogs.ny.gov/greenny/greenny-council>

A comprehensive list of all approved green purchasing requirements can be found at the following link:

<https://ogs.ny.gov/greenny/approved-greenny-specifications>

### 7.4.2 Prepare the Solicitation Document

In addition to the product/service specifications, the solicitation informs potential bidders of the nature of the procurement, any statutory requirements, the deadline for submission of bids, the location where bids must be sent, delivery terms, any special delivery requirements, and the basis for the award (e.g., lowest price).

The solicitation must also include information advising bidders that a debriefing may be requested by any unsuccessful offerer, within a reasonable timeframe after the contract award, regarding the reasons that the proposal or bid submitted by the unsuccessful offerer was not selected for an award.

The solicitation may also include other terms that the procuring agency desires or requires to be in the contract. For example, if the agency chooses to allow for cost adjustments, the basis for the cost adjustment must be specified in the IFB. Cost adjustments may be based on standard measures such as the U.S Bureau of Labor Statistics Consumer Price Index (CPI) or the Producer Price Index (PPI). An agency may also include insurance requirements that specify that a bidder must provide insurance on behalf of the State. Insurance requirements, including limits, should be tailored to the scope of the contract. Inform the potential bidder of the contract period, the price structure, (hourly, per item, per carton, square foot, etc.), the agency’s bid protest / dispute resolution policy (if applicable), performance requirements, contract monitoring, termination rights and any optional requirements. The solicitation should also outline any bidder qualifications that the agency requires, such as licensing, if required, special equipment, financial viability, minimum years of experience, etc. If a specified qualification results in reduced competition, the agency may need to justify the requirement.

The document must inform potential bidders of the State’s “reserved rights.”. Agencies are encouraged to review the list and add to it, as needed.

The solicitation should inform potential bidders of the method of award – that is, whether the award will be by lot, item, region, or some other method.

The solicitation should also inform bidders of the requirements of Appendix A and depending on the nature and/or value of the contract, other requirements that must be included in the IFB.

### 7.4.3 Advertise the Procurement Opportunity

### 7.4.4 Distribute the IFB

Once the IFB has been completed and the advertisement(s) placed, the IFB should be distributed to all known potential bidders and any bidder that requests a copy as a result of the advertisement(s). Potential bidders can be identified through web searches, previous procurements, bidder lists maintained by the agency, and/or the Empire State Development list of New York State Certified M/WBEs. The IFB (or notice of the IFB) can be distributed via postal mail, e-mail, posting to agency website, and other means.

### 7.4.5 Conduct Site Visits and Pre-Bid Conferences

Prior to the due date for bids, an agency may require site visits to ensure that bidders are aware of site conditions. The agency may also hold a pre-bid conference to allow bidders to ask questions and/or exchange information with agency staff. The solicitation must identify the date, time and location of such events, if planned, and whether attendance is mandatory in order to bid.

### 7.4.6 Answer Questions

The agency should allow a period of time for bidders to submit written questions, and for the agency to provide written responses. All questions raised and answers provided, including those arising during site visits and pre-bid conferences, must be confirmed in writing and shared with all potential bidders.

### 7.4.7 Receive Bids

The IFB must state the location, time and date for the submission of the bids. Any bid received must be kept in a secured area by the agency and not opened prior to the date and time of the bid opening. As a general rule, bids received after the deadline specified in the IFB cannot be accepted.

### 7.4.8 Conduct Bid Opening

The bid opening should be conducted at the location and time stated in the IFB. At this time, all timely bids are opened and recorded. It is suggested that a minimum of two staff conduct the bid opening; one to open and announce the bids and one to record them. This will create a “bid tabulation,” which must be kept as part of the procurement record and must accompany the bid package sent to OSC for approval, if necessary.

The bid tabulation must include all timely bids received. It should be signed and certified by the agency staff responsible for opening and recording the bids. Bid prices listed in the bid tabulation should state the prices required by the method of award.

### 7.4.9 Conduct Administrative Review of Bid Submission

The agency must ensure that the bid submission is complete and accurate. This includes: confirming that the bidder understood the specifications and can perform/deliver at the bid price, particularly if there are large variances in the bid prices between the apparent low bid and the next low bid, and ascertaining that all materials are submitted and appendices are signed.

### 7.4.10 Verify Responsiveness and Responsibility of Apparent Low Bid

Beginning with the apparent low bid, the agency must verify that: 1) the winning bid is responsive by meeting all mandatory requirements and specifications of the IFB; and 2) the

winning bidder is responsible. If the apparent low bidder is not found to be responsive or responsible, the bid must be rejected and the next lowest price bid must be reviewed. In addition, notice should be provided to an apparent low bidder who is being rejected as non-responsive or non-responsible.

**NOTE:** In the event of a tie bid, the decision as to the winning bid must be made in accordance with the State Finance Law §163(10)(a) and any policy stated in the IFB.

### 7.4.11 Make Award

Once the agency has reviewed and verified the lowest responsive and responsible bidder(s), the award(s) shall be made in accordance with the method of award in the IFB. The agency must retain the supporting documentation as part of the procurement record.

### 7.4.12 Obtain Approvals

Contracts resulting from an IFB are subject to review and approval first by the Office of the Attorney General (OAG) (with certain exemptions for OGS centralized contracts), and second by the OSC, in accordance with State Finance Law §112.

The OAG generally requires only the contract document for its review and approval, but may require the entire procurement record. The agency may choose to submit the entire procurement record to the OAG, and request that, upon OAG’s approval of the contract, OAG forward the file to OSC for its review and approval.

As provided for in State Finance Law §112, procurements over certain thresholds must be approved by OSC. If the value of the procurement is below the agency’s State Finance Law §112 discretionary purchasing authority, the agency may proceed to issue the purchase order or contract. However, when the contract’s value exceeds the State Finance Law §112 discretionary threshold, the agency must prepare an award package to submit to OSC for prior approval.

As part of the OSC contract approval process, agencies must identify the intended encumbrance amount (purchase order amount) on the Single Transaction Summary (STS) / AC 340-S Form. Agencies are not required to submit paper copies of contract related purchase orders to OSC. Agencies are encouraged to review the following sources for information related to encumbering a contract in SFS: the OSC Guide to Financial Operations, Chapter 11: Procurement and Contract Management, available at:

<http://www.osc.state.ny.us/agencies/guide/MyWebHelp>

Agencies are also encouraged to review the OSC Contract Advisories, available at:

<http://www.osc.state.ny.us/agencies/contract_advisories/index.htm>

### 7.4.13 Issue Purchase Order or Contract

Once the above steps have been completed and all necessary approvals have been obtained, the agency may proceed to issue the purchase order or contract to the vendor.

## 7.5 Request for Proposals

### 7.5.1 Introduction

A request for proposals (RFP) is generally used for the procurement of services or technology in situations where price is not the sole determining factor and the award will be based on a combination of cost and technical factors (Best Value). Through its proposal, the bidder offers a solution to the objectives, problem, or need specified in the RFP, and defines how it intends to meet (or exceed) the RFP requirements.

Appropriate planning is essential for a successful RFP. The first step is to view the process as a project and to develop a timeline of events to meet the agency’s programmatic needs and effectively budget staff time. It is also essential to focus on and develop the contract scope of service and deliverables that are required before proceeding to develop the methodology for evaluating proposals.

**NOTE:** If a vendor participates in the development or writing of the specifications for the RFP, that company is generally prohibited from participating in the procurement. (See State Finance Law §163(2); and for technology procurements, see State Finance Law §163-a.)

### 7.5.2 Essential RFP Contents

An RFP should clearly convey all the information needed for potential bidders to determine their interest in participating in the solicitation and to offer a competitive proposal. At a minimum, the RFP should include language addressing each of the following items:

**1. Table of Contents:** A detailed and accurate Table of Contents improves the ability of potential bidders to grasp and keep track of all aspects of the RFP and to respond effectively.

**2. Description of Program Objectives and Background:** This RFP section provides a general description of the agency’s overall objectives and the underlying reasons for the procurement.

**3. Scope of Services:** This section generally describes the scope of services necessary to meet the agency’s needs. The section should include any strategic and tactical plans/direction of the agency to be affected by the required services.

**4. Detailed Requirements/Specifications:** This section details the technical specifications, which may be presented as specific, individual requirements or as a part of a deliverable. Specifications should not be written to favor a particular vendor and should clearly indicate the agency’s needs as well as the performance standards to which the contractor will be held. This section should also describe the relative roles and responsibilities that the contractor and the agency are expected to undertake during the term of the contract.

**5. Performance Standards:** This section should describe the performance standards that will be used to assess the contractor’s compliance with the contract requirements. If recommended by agency counsel, this section can include liquidated damages provision(s).

**6. Green Performance Standards:** This section should describe the environmental performance standards that will be used to assess the contractor’s compliance with the contract requirements. For example, compliance with green cleaning best practices. For a list of approved State green performance specifications see:

 <https://ogs.ny.gov/greenny/approved-greenny-specifications>

**7. Mandatory Versus Optional Elements in the Response:** The RFP should specify which aspects or features of the requested deliverables are critical to the agency, and therefore to the response the proposer provides, based on the following categories:

* Mandatory – Minimum required goods or services that the agency deems essential to the program including, but not limited to, the M/WBE goals, service-disabled veteran’s small business goals, local foods, and environmental attributes (see Exhibit C: Green Purchasing).
* Options – Goods or services that the offerer must propose, but that the agency is not obligated to purchase.
* Desirable – Goods or services that the agency prefers, but that the offerer is not obligated to propose.
* Alternative – An approach proposed by the offerer that provides a different solution to the agency need.

**8. Overview of the Solicitation Process:** This section should provide information about how the agency will conduct the administrative aspects of the solicitation, selection, and contract development process. Procurements must be conducted in accordance with the process described in the RFP.

**9. Timeline and Calendar of Events:** This section should provide a specific timetable for the procurement process. Important milestones to be specified typically include:

1. Dates for Question Submission and Agency Response – The RFP should provide the time frames for submission of questions and responses to those questions. The method for submitting questions should be stated. The question-and-answer process may be multiphase, allowing for questions and answers prior to, during, and/or after the pre-bid conference. If no pre-bid conference will be held, the agency should still provide for a question-and-answer period. Answers provided must be vendor neutral and provided in writing to all potential offerers.
2. Date for Pre-Bid Conference – The schedule should provide the date for the pre-bid conference if the agency decides to conduct one. Pertinent details such as time, specific location, security sign-in procedures, and parking arrangements should be included. Attendance must be defined as optional or mandatory; if attendance is mandatory, proposals may only be considered from offerers who participated.
3. Date for Notice of Intent to Bid (optional or mandatory) – The RFP may require a vendor to provide, by a specified date, notice of its intent to submit a bid. This notice may be optional or mandatory, at the agency’s discretion, although agencies are encouraged to provide maximum flexibility for receipt of bids from all interested offerers. If the notice of intent to bid is made mandatory, the agency should only consider proposals from those vendors who have submitted the notice of intent to bid on or before the date specified. Furthermore, the agency should distribute any amendments to the RFP and other communications only to such vendors. An exception would be if the amendment constitutes a material change that could have affected the ability of potential vendors to bid. In that event, the agency should provide the amendment to all potential vendors including those who did not submit a notice of intent to bid by the required deadline.
4. Date for No Bid Reply Form – Agencies may choose to include in the RFP a form that vendors will submit indicating their intention not to bid. The form should include space for vendors to explain why a bid is not being submitted. The form should indicate that a no bid response will not impact participation in future solicitations. A date for its return should be specified. Return of this form is usually requested no later than the proposal due date and time. The no bid reply form helps the agency demonstrate that proposals were shared with others besides those responding, and to understand why a company did not bid.
5. Date for Submission of Proposals – The earliest possible due date for submission of proposals is fifteen (15) business days after the advertisement appears in the New York State Contract Reporter. However, when selecting the submission date, consideration should be given to time frames necessary for intervening activities, such as the pre-bid conference and the question-and-answer period. Other factors, such as the complexity of the RFP, the time needed for vendors to prepare an effective response and obtain necessary internal approvals, and holidays that may impact availability of the agency and offerers, should also be taken into account.

**10. Anticipated Start Date and Term of Contract:** The term of the contract and any renewal/extension provisions must be specified in the RFP and the resultant contract.

**11. Method of Award:** This section should identify the method of award as best value. State Finance Law § 163(4)(d) mandates that a contract for services (including technology) be awarded on the basis of best value which takes into consideration cost as well as technical or non-cost factors. For certain service and technology procurements, however, best value can be equated to low price. An RFP should be used for the procurement of services even where best value is equated to low price.

The RFP should indicate whether the agency anticipates making a single or multiple award pursuant to the solicitation. If there will be multiple awards, it should also state whether awards will be made by lot, region, type of service, or some other characteristic.

**12. Evaluation Criteria:** The RFP must present the criteria that will be used for the evaluation of proposals. At a minimum, the agency must disclose in the RFP the relative weights that will be applied to the cost and technical components of the proposals. An example would be: 30 percent for cost and 70 percent for technical.

An agency may elect to include in the RFP a more detailed breakdown of the evaluation criteria, such as specifying the relative weights for detailed categories (e.g., Experience = 20 percent, Staffing = 15 percent, energy efficiency = 10 percent, and so forth). Additional information about developing and using evaluation criteria can be found in subsequent sections of this chapter.

**13. Offerer’s Minimum Qualifications:** The RFP should state any qualifications that the offerer must meet to be eligible for consideration. Minimum qualifications may address characteristics of the business such as company capacity, staffing, licenses or certifications, experience (company and/or employee), recently completed projects of similar scope/size, and references.

**14. Mandatory Requirements: Refer to NYS Procurement Guidelines**

**15. Reserved Rights:** The RFP must inform potential bidders of the agency’s “reserved rights.”

**16. Method for Issuing Clarifications or Modifications to the RFP:** This section should specify how the agency will issue any clarifications or modifications to the RFP that may arise after it is first issued.

### 7.5.3 Additional Content Considerations

**Prequalification Criteria:** An agency may establish minimally acceptable qualifications that an offerer must meet in order to be deemed responsive. These may include but are not limited to: adequacy of resources, experience, and past performance. If the agency elects to apply a prequalification screening, it must disclose in the RFP both the prequalification criteria and that offerers not meeting these criteria will be eliminated without further evaluation. Typically, prequalification criteria are scored on a pass/fail basis.

**Risk Management / Required Assurances:** An agency may opt to mitigate risk by requiring some form of financial assurance such as a letter of credit, performance bond or insurance coverage.

**Cost Adjustments:** If the agency chooses to allow for cost adjustments (whether up or down), the basis must be specified in the RFP. Cost adjustments may be based on standard measures such as the Consumer Price Index (CPI).

**References:** If the agency requires a bidder to submit references as part of the response, the agency must, at a minimum, verify the references provided as part of its evaluation process. If the agency opts to score reference checks, the scoring methodology must be disclosed in the RFP.

**Insurance:** An agency may include insurance requirements that specify that a bidder must provide insurance on behalf of the State. Insurance requirements, including limits, should be tailored to the scope of the contract.

### 7.5.4 RFP Distribution and Receipt of Proposals

**Advertisement of the Solicitation:**

**Distribution of the RFP:** Once the RFP is finalized, it should be distributed to all known potential bidders and any bidder that requests a copy as a result of the advertisement. Potential bidders may be identified through lists maintained by the agency, web searches, previous procurements, and/or Empire State Development’s list of M/WBEs. The RFP (or notice of the RFP) can be distributed via postal mail, e-mail, and/or posting to the agency website, among other means.

**Receipt of Proposals:** As noted above, the agency must state in the RFP the date and time that proposals are due. As a general rule, late proposals cannot be accepted. However, if permitted by agency policy and if no timely and responsive proposals are received, a late proposal may be accepted. Before accepting a late proposal, agencies should contact OSC. The agency must certify that proposals were received in accordance with the RFP.

### 7.5.5 Evaluation of Proposals – Overview

The objective of the evaluation process is to develop and apply criteria that will ensure that proposals are evaluated objectively, fairly, equally and uniformly and that the agency selects the best value solution among the submitted proposals.

Typically, evaluations are an analysis of the technical proposals, a separate comparative analysis of the cost proposals, and a method for combining the results of the technical and cost proposal evaluations to arrive at the selection of the proposal deemed to be the best value to the State. Thus, there are up to three distinct parts to the evaluation process:

* Administrative review of prequalification criteria (optional);
* Technical evaluation – An examination of the non-cost elements that were not considered during the administrative review, such as the functional specifications (e.g., hardware requirements, scheduling); and
* Cost evaluation – A comparison of the price proposed (and, at the agency’s option, other costs of the project) to the prices and costs of other competing proposals.
* More detail is provided in subsequent sections of this chapter.

### 7.5.6 Evaluation Team

It is strongly recommended that the agency establish an evaluation team. The agency may also establish various oversight roles to provide policy, guidance, and direction for the evaluation process and team, and to ensure the integrity of the procurement. An individual may be designated a lead role to coordinate all activities within the process.

The number and selection of evaluators should be based on many factors including the complexity of the procurement and the level of knowledge possessed by the potential evaluators available to analyze the proposals. There may be rare instances where a single evaluator must be used for the entire technical evaluation, or a portion of it, such as when available expertise for evaluating the technical considerations is limited.

It is strongly recommended that technical and cost proposals be reviewed by different evaluation sub-teams although it is recognized that in limited situations separate teams may not be feasible. Both approaches are addressed briefly below.

**Separate Team Approach:** Under this approach, the technical and cost evaluation teams may conduct their reviews simultaneously.

**Technical Proposal Review Team:** This team is typically comprised of program and technical experts, and may conduct its evaluation under the direction of a technical evaluation manager or a team leader. The team is responsible for all aspects of the evaluation of the technical proposal. This may include review of vendor qualifications, such as the number of past projects performed of a similar size and scope, and proposed personnel resources, such as staff capacity. Depending on the nature of the RFP, the team may also be responsible to perform such activities as benchmark tests, site visits, and reference checks.

**Cost Proposal Review Team:** The cost proposal review team is typically comprised of one individual, but may be a team of people, responsible for evaluating and scoring the cost proposals submitted in response to the RFP. The cost team works under the direction of a procurement director or coordinator.

**NOTE:** While it may be necessary for the cost team to obtain technical information to clarify the association between costs and technical components, the technical evaluators must not be provided with the proposed costs until after their evaluation is complete.

**Single Team/Evaluator Approach:** Under this model, one team or one individual evaluator conducts all evaluations. When a single team/evaluator is used, the cost proposals must remain sealed until completion of the technical evaluation.

### 7.5.7 Conducting the Administrative Review

At its discretion, the agency may conduct an administrative review of proposals to:

* Ensure that all required documents and forms are included in the submission. Proposals found to be materially incomplete may be disqualified as provided for in the RFP.
* Determine on a pass/fail basis that certain minimum mandatory qualifications (e.g., minimum experience requirements) set forth in the RFP have been met.

Depending on the number and complexity of proposals expected to be submitted, the agency should designate an individual or team to conduct this review.

### 7.5.8 Conducting the Technical Evaluation

The technical evaluation measures the extent by which a proposal will meet the agency’s needs and relies upon the evaluators’ expertise in assessing the strengths and weaknesses of each response. The technical evaluation is a critical part of the ultimate goal of determining which proposal presents the best value to the State. The main steps for performing the technical evaluation are discussed below.

**Development of the Technical Evaluation Criteria:** The criteria selected for evaluation must reflect the agency’s objectives, scope of services, and requirements as set forth in the RFP. Examples of typical technical evaluation criteria include, but are not limited to:

* Work plan and methodology to achieve desired end results;
* Degree to which the proposal satisfies mandatory, optional, desirable and/or alternative green performance standards;
* Experience of the offerer in providing the required services and/or technology;
* Management capability of the offerer;
* Offerer’s overall past performance;
* Qualifications and experience of the offerer’s proposed staff;
* Conformance with the schedule of work set forth in the RFP; and
* Offerer references.

**NOTE:** Agencies are reminded that the criteria and sub-criteria may, but are not required, to be disclosed in the RFP.

**Assignment of Values to Technical Evaluation Criteria:** Once the technical evaluation criteria have been determined, values must be assigned to the criteria and any sub-criteria. Following are three examples of the ways in which values are typically assigned:

**Example 1:** Points are assigned to each technical evaluation criterion. Evaluators review the technical proposals and assign a score up to the maximum points for each technical evaluation criteria category. Illustration:

* Work plan and methodology to achieve desired end results = 20 points
* Satisfaction of green performance standards = 15 points
* Offerer’s experience in providing the required services and/or technology = 10 points
* Offerer’s management capability = 10 points
* Proposed staffing plan = 10 points
* Conformance with the schedule of work set forth in the RFP = 5 points

**Example 2:** The technical criteria may be further broken down into sub-criteria and a subset of points is assigned to each sub-criterion. Evaluators review the technical proposals and score each sub-criterion. Illustration:

* Proposed Staffing Plan = 10 points
* Staffing Plan proposes at least ten Programmer I positions = 2 points
* Staffing Plan proposes at least four Programmer II positions = 2 points
* Staffing Plan proposes at least three Analyst I positions = 2 points
* Staffing Plan proposes at least one Analyst II position = 2 points
* Staffing Plan proposes at least three Trainer positions = 2 points

**Example 3:** The technical criteria may be considered according to a pre-established scale. Evaluators grade the technical proposals and assign points for each criterion within the scale. Illustration:

* Excellent Staffing Plan = 8-10 points
* Good Staffing Plan = 5-7 points
* Fair Staffing Plan = 3-4 points
* Poor Staffing Plan = 0-2 points

In rare instances, due to the nature of the procurement, alternative concepts for assigning value to the technical criteria may be permissible. In such instances, it is recommended that the agency consult with the OSC Bureau of Contracts before beginning the procurement.

**NOTE:** The evaluation criteria and the values assigned must be consistent with any information provided in the RFP.

### 7.5.9 The Technical Evaluation Instrument

The evaluation criteria and methodology for evaluating proposals must be completed and secured prior to the initial receipt of proposals. This principle applies to both technical and cost components.

The evaluation instrument is the tool that will be used by the evaluators to apply the evaluation criteria to the proposals and may include, but is not limited to:

1. Evaluator instructions
2. Evaluator confidentiality/conflict of interest statement
3. Rating sheet which defines the allocation of points
4. Evaluator forms and summary evaluation sheet
5. Scripted interview questions
6. Scripted reference checks
7. Oral/product presentation/agenda

### 7.5.10 Evaluating Technical Proposals

As a preliminary step, proposals should be reviewed for compliance with the minimum mandatory technical requirements set forth in the RFP. After the preliminary review, the technical proposal evaluation must be conducted as documented in the RFP and the evaluation instrument. The evaluation team members apply scores to the pre-determined criteria and sub-criteria if applicable. Scoring is based on information provided in the submitted proposal. However, additional factors, as established in the RFP and/or the evaluation instrument, may be considered. Examples include:

* Product or service demonstrations and presentations;
* Reference checks (staff and/or company performance);
* Vendor site inspections;
* Interviews of key proposed managers and technical experts;
* Written proposal clarifications; and
* Rating services (such as Moody’s or Dun & Bradstreet)

The above factors may be used for non-scored validation purposes, as cumulative information to be considered together with submitted information, or as separately scored criteria. For example:

* A reference check might be used to verify submitted information (e.g., the proposer has in fact successfully completed three jobs of similar size/scope). A reference check might also be used as a separately scored criterion (e.g., the average satisfaction rating from three references is 7 on a scale of 0 – 10).
* Presentations and interviews might be used as cumulative information along with submitted documentation for scoring a criterion (e.g., experience, work plan). A presentation might also be used as a separately scored criterion.

The agency has the authority to waive mandatory requirements that are not material provided that:

* The RFP discloses to the offerers the agency’s reserved right;
* The mandatory requirements are not met by all offerers;
* The waiver does not disadvantage the State;
* The waiver does not benefit the proposed contractor; and
* The waiver does not prejudice any non-winning bidder or potential bidder.

Following completion of the initial technical proposal review, evaluation scores are adjusted and finalized, as provided for in the evaluation instrument.

Regardless of the scoring methodology utilized, evaluators must document the basis for the rating using narrative to explain the proposal’s strengths and weaknesses, thereby justifying the score. For example:

“The offerer’s proposed Project Director was given the maximum number of points because this individual has successfully managed a project of similar complexity and he/she will be critically important to the success of our project.”

### 7.5.11 Conducting the Cost Evaluation

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

The two most common methods for comparing the cost proposals are:

*Conversion of Price to a Weighted Point Score*

Points = (Lowest bid divided by the bid being evaluated) x cost points

*Comparison of Life Cycle Costs*

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

An example of life cycle costs for a computer system conversion would be the offer price of the new system combined with other expenses, such as, but not limited to, upgrades to existing infrastructure, additional staff requirements, if necessary, and the cost of end-of-life management.

Once the total life cycle costs for competing proposals have been determined, the life cycle costs associated with each proposal must be converted to a weighted point score using the formula above.

**NOTE:** If an agency wishes to use a cost evaluation method other than those described above, such as “banding” or “competitive cost range,” it should contact OSC for further discussion before proceeding.

**Price/Cost Adjustments**

If the agency chooses to allow for price adjustments (whether up or down), the basis and frequency must be specified in the solicitation. Adjustments may be based on standard measures such as the Consumer Price Index (CPI), Producer Price Index (PPI), Prevailing Wage, Minimum Wage, Living Wage, or industry-specific indices, based on the type of commodity or service.

### 7.5.12 Determining the Final Score

The agency should weigh the technical and cost evaluation results as two components, which together total 100 percent of the evaluation. For example, the technical evaluation could be weighted at 70 percent and the cost evaluation weighted at 30 percent. After the technical evaluation has yielded a technical score and the cost evaluation has yielded a cost score, the scores are weighted and combined to produce a final score for the proposal.

### 7.5.13 Agency-Recommended Award and Notification

**Agency-Recommended Award:** The agency’s selection of the vendor must be in accordance with evaluation criteria developed prior to the initial receipt of proposals. The agency may reject all proposals or – if provided for in the RFP – may reject separate parts of the scope of services. (State Finance Law §163(9)(d)). The agency may award a contract to an offerer if only one proposal was submitted, provided that the agency documents that the RFP did not restrict competition and that the cost is reasonable.

**Notification of Award:** Upon completion of the evaluation and vendor selection, the agency must send notification of award to all successful and non-successful offerers. Notification to the selected offerer(s) should indicate that the award is subject to approval by control agencies before the contract is finalized. The agency must provide non-successful bidders the opportunity for a debriefing, if requested.

While a debriefing is typically conducted in person, it may be conducted by video conference, over the phone, or through written summaries, if agreed to by the bidder. During the debriefing, the State agency may do one or more of the following:

* Limit the discussion to the reasons why the bid was not successful
* Discuss the reasons why the winning bid was selected
* Offer advice and guidance to the bidder to improve future bids

### 7.5.14 Contract Negotiation

In cases where the RFP has specifically provided for negotiation of terms and conditions, the agency may engage in negotiation with the successful bidder prior to settling on the contract terms. Revisions must not substantially alter the requirements or specifications set out in the RFP. To assess whether a potential revision constitutes a substantial change, the question should be asked: “Would other bidders or non-bidders have responded differently if the term or condition to be revised as a result of negotiation had been included in the RFP?” If the answer is "yes" or "possibly," then the provision may not be revised.

### 7.5.15 Documentation Requirements for Control Agency Review and Approval

Contracts resulting from an RFP are subject to review and approval first by the Office of the Attorney General, and second by the Office of the State Comptroller, in accordance with State Finance Law §112 (except centralized contracts awarded by OGS). Depending on the nature of the procurement, approval from other control agencies may be required.

Generally, when OAG approval is required, only the contract itself needs to be submitted for review. However, OAG may, for any particular contract, request the entire procurement record. The agency may also ask OAG if the entire procurement record can be submitted for forwarding on to OSC upon OAG’s approval of the contract.

The OSC Bureau of Contracts conducts the final review and provides its determination. OSC’s review includes but is not limited to ensuring that:

* The procurement was conducted in accordance with the process established by the agency;
* The procurement and resulting contract complies with all relevant laws; and
* The contract terms and conditions are in the best interests of the State.

(State Finance Law §112 and State Finance Law §163(9)(g)).

**NOTE:** As part of the OSC contract approval process, agencies must identify the intended encumbrance amount (purchase order amount) on the STS / AC 340-S Form. A copy of this form can be accessed at:

<https://www.osc.state.ny.us/files/state-agencies/2017-11/agency-form-ac340s-fe.pdf>

Agencies are not required to submit paper copies of contract related purchase orders to OSC. Agencies are encouraged to review the following sources for information related to encumbering a contract in SFS: the OSC Guide to Financial Operations, Chapter 11: Procurement and Contract Management, available at:

<http://www.osc.state.ny.us/agencies/guide/MyWebHelp>

Agencies are also encouraged to review the OSC Contract Advisories, available at:

<http://www.osc.state.ny.us/agencies/contract_advisories/index.htm>

## 7.6 General Solicitation Concepts

**Use Appropriate Terminology:** Use understandable, plain language. Eliminate agency/state-specific or technical language as much as possible or explain/define what it means. Be consistent in the use of words. Don’t use more than one word to mean the same thing. Consider including a glossary of defined terms.

**Avoid Conflicting Information:** Don’t repeat the same information in multiple sections of the solicitation. Make it easy for bidders to identify what must be included with the bid and the requirements of the contract by stating what is needed only one time. If referencing information found elsewhere in the document, identify the specific section (e.g., “as described in Section 4.4 – Reporting Requirements”).

**Avoid Ambiguity:** Do not use vague language such as: sufficient, consistently, generally, periodically, reasonable. Such language may be open to differing interpretations. Definitive language that is clear and concise, such as weekly or quarterly, is difficult to dispute. Don’t say “in accordance with manufacturer’s specifications,” as these may change. Include the actual specifications so contractors know what is expected.

**Be Specific:** Where possible, give quantitative measurements of deliverables or requirements. For instance, if the scope requires electronic storage of documents, what is the size of those documents (e.g., MB, GB, TB)? Avoid specifics that are tailored to a particular vendor unless critical to documented legitimate form, function, and utility needs.

**Be Thorough and Comprehensive:** Remember, if it isn’t in writing, it isn’t included. Even if something is common practice in the industry, if it is not specified in the scope, the contractor does not have to provide it. Make sure all relevant terms are included in the solicitation or include a sample contract with all relevant terms. Have someone review the final draft solicitation who is not familiar with the procurement to identify gaps, conflicting information, or scope that is too broad or narrow.

## 7.7 Scope of Work

A scope of work provides a thorough summary of what is being purchased, minimum qualifications to bid, pricing methodology, and method of award. While there is no "one way" to write a scope of work, the fundamental principles are similar in each solicitation. Think about what information a bidder would want or need to know to develop a plan and a price. Section and subsection titles will vary depending on what is being procured (e.g., equipment maintenance vs. consulting).

Specifications should be as clear, inclusive, and as informative as possible. Specifications should be precise enough so that the agency will receive the commodity or service needed, yet broad enough to encourage competition. The agency should develop generic requirements that do not favor a particular vendor. The agency should describe the relative roles and responsibilities that the contractor and the agency are expected to undertake during the term of the contract. Roles and responsibilities must include any terms that apply to any other party (e.g., resellers, dealers, distributors, or sub-contractors).

If procuring a commodity, service, or technology for the first time, extensive research should be performed to provide sufficient details. The solicitation may incorporate any information obtained from research regarding the products and/or services available. For all others, the agency should evaluate prior procurements to ensure inclusion of all necessary terms and conditions.

### 7.7.1 Scope Content to Consider

The following items should be considered during scope development, as appropriate. Please note that this is not an exhaustive list and additional topics may be appropriate to consider based on the details of the procurement.

Introduction/Overview: Describe in general high-level terms what the commodity, service, or technology requires or entails and expected outcomes. This section should summarize who, what, where, when, and why.

Background/Existing Environment: If deemed helpful to potential bidders, give current and/or historical usage or spend and explain how this work may relate to other work/contracts.

Commodities or Service Requirements: Describe the commodity to be delivered or actual work to be performed; use subsections for different specifications or pieces of the work - for example: floor sweeper, monthly preventative maintenance; periodic overhaul; annual electrical current testing, etc.

Equipment to be Serviced: Identify equipment/systems – include make and model, age, capacities, sizes, etc.

Location of Services or Delivery: Identify on-site vs. at contractor’s location; building names and address, inside delivery, security restrictions, FOB destination (unless otherwise specified) is required for all deliveries, etc.

Schedule/ Frequency: Describe when and how often the commodity is to be delivered or the work is to be performed; identify coordination, access, time, and frequency requirements, etc.

Transition: Describe the responsibilities for the transition period where one vendor is ending their contract and a new vendor is starting service. This may include, but is not limited to, knowledge transfer, overlapping services, equipment or data transfers to the agency, another agency or successor contractor before or at the end of the contract.

Reporting Requirements: List and describe all required status meetings and written documentation to be provided. Include details, formatting, frequencies, who to submit to, etc.

Warranties: Identify warranty requirements based on market research. Typical minimum is one-year materials and workmanship or manufacturers standard, whichever is greater.

Deliverables: Describe each deliverable expectation and final work product to be provided.

Acceptance: Describe when and how each product or deliverable will be deemed complete and accepted. Identify acceptance criteria, including timeframes, and testing requirements, etc.

Staffing Requirements Describe how the contract needs to be staffed, including credentials and licenses/certifications, specific titles, number of staff, specific days/hours, experience, etc. This section should include EEO requirements as appropriate.

M/WBE and SDVOB Requirements: After consulting with agency compliance staff, identify the specific M/WBE and SDVOB opportunities to set subcontracting/supply goals for these commodities or services. Also include all compliance document requirements, good faith effort documentation, and penalties for failure to comply.

Green Purchasing Requirements: State agencies should consider environmental attributes and green performance standards as part of their overall assessment of the agency’s need for goods or services. In this way, specifications and contracts can be developed efficiently to meet State requirements and goals. Contact your agency's designated sustainability coordinator for more information regarding applicability of environmental policies for your agency’s needs. The list of approved EO 22 green procurement specifications can be found at:

<https://ogs.ny.gov/greenny/approved-greenny-specifications>

The list of sustainability coordinators can be found at:

<https://ogs.ny.gov/greenny/greenny-sustainability-coordinators>

Executive Orders: Include in scope all requirements to comply with applicable Executive Orders.

Training: Specify what training the contractor needs to provide, including when, where, who, in-person vs. online, number of people to train, class size, specific topics/materials, etc.

Prevailing Wage Rate: Include prevailing wage requirements for building services under Article 9 or construction related services under Article 8 of the NYS Labor law. Include Prevailing Rate Case (PRC) number issued by DOL in the solicitation.

<https://dol.ny.gov/public-work-and-prevailing-wage>

OSHA: Identify any training and worker safety requirements such as OSHA and Right to Know. Requirements may differ between blue-collar and white-collar work.

<https://dol.ny.gov/public-employee-safety-health>

Data Security Requirements: Reference applicable security or privacy clauses such as Health Insurance Portability and Accountability Act (HIPAA), Criminal Justice Information Services (CJIS), Family Educational Rights and Privacy Act of 1974 (FERPA), Payment Card Industry Data Security Standard (PCI-DSS), Internal Revenue Service Publication (IRS PUB 1075), or any applicable ITS technology policies or standards, etc.

Background Checks: Identify specific background checks required based on access to the site, agency information or nature of service.

System Requirements/Functionality: Describe what the system needs to do; if contractor is to provide a system, it can be design based (sizes, capacities, etc.), or performance based (needs to process 100 units per day, must produce a daily report, etc.) Include description of current and future needs.

Data Ownership: Identify who will own work products, etc.

Performance or Other Bonds: Include in limited circumstances based on a risk assessment.

Performance Standards: Describe the performance standards that will be used to assess the contractor’s compliance with the contract requirements. Discuss with agency counsel about including provisions for service credits or liquidated damages.

## 7.8 Determining Procurement Type: Commodity, Service, or Technology

Due to the ongoing advancement of cloud computing, internet of things (iot), smart, etc., many products that were formally procured as commodities may now be technology.

Additionally, certain work that was traditionally procured under Public Buildings Law that involves providing products that may now be technology which could make the work technology services.

To determine if a product the state agency is intending to procure is a technology, state agencies should review the definition of technology and consider the following:

* Does the product touch or interact with the cloud?
* Does the product require some form of programming to active or use it?
* Is the product part of a technology system that transmits, receives, etc. data automatically and electronically?
* Does the product and the services require data breach/cyber liability insurance and technology professional liability/errors and omissions?

Just because a product has qualities of technology, it does not necessarily mean that it is a technology. Based on this information, the state agency should determine and document in its procurement record if the product and associated services are technology.

If the state agency determines a product is a technology, to determine if work that was traditionally obtained under Public Buildings Law § 8 or Education Law § 376, state agencies should consider the following:

* Does the work involve hands-on physical work on the product?
* Does the work involve direct electronic actions upon the product (e.g., programming)?
* Would separating this work from implementing the product affect the warranty, functioning, operations, cyber/network integrity, or interoperability, etc. of the product?
* Would separating the work still allow for the provision of the product as per the NYS Building Codes?
* Is the work incidental but directly necessary for the product, or is it just convenient to perform the work at the same time?
* If a “structural” change, is it:
* Only being performed because it is necessary to implement the product
* Not a material alteration to the building but instead an incidental adjustment?
* Not a major renovation?

Based on this information, the state agency should determine and document in its procurement record if the work is technology services and not subject to Public Buildings Law § 8 and Education Law § 376.

## 7.9 Specifications

The solicitation should specify which aspects or features of the requested deliverables are critical to the agency, and which are therefore expected to be included in the bid or proposal. Specifications generally fall into one of the four categories outlined below.

* **Mandatory**:Minimum required goods or services that the agency deems essential to the program. Don’t include requirements that are unnecessary and could limit competition and drive up cost. Ensure all mandatory requirements will be evaluated and, if not met, the bidder will be disqualified. Define each task that needs to be performed.
* **Optional:** Goods or services that are mandatory for the bidder to propose, but that the agency is not obligated to purchase. In order to be included in the resulting contract, the options must be evaluated for technical and cost. (Agency should include a note on the Price pages instructing bidders that they MUST offer a price for OPTIONAL goods/services or their bid will be disqualified.)
* **Desirable:** Goods or services that the agency prefers, but that are not mandatory for the bidder to propose.
* **Alternative:** An approach proposed by the bidder that provides a different solution to the agency need.

### 7.9.1 Specification Methodology

### 7.9.2 Developing a Brand Name or Equal Specification

A brand name or equal specification is a specification that uses one or more products, brand names, makes, manufacturer’s names, catalog numbers or similar identifying characteristics to describe the standard of quality, performance, functionality, or other characteristics needed to meet the State agency’s form, function, and utility, and that authorizes vendors to offer commodities, services, or technology that is equivalent or superior to those named or described in the specification.

In developing specifications for either a mini-bid on a centralized contract or an agency-specific procurement, a state agency may specify a Brand Name or Equal Specification provided that the state agency determines this is the most practical and feasible way to describe the standard of quality, performance, functionality, and other characteristics that meet the agency’s form, function, and utility.

The state agency:

* Is entitled to determine what constitutes commodities, services, or technology that are equal to or superior to the Brand Name or Equal Specification, and
* Must accept any commodity, service, or technology that is equal or superior the Brand Name or Equal Specification; and
* May list multiple acceptable products, brand names, makes, manufacturer’s names, catalog numbers or similar identifying characteristics as the Brand Name or Equal Specification but this must not be an exhaustive list.

 The state agency must not:

* Use a Brand Name or Equal Specification to Include features, characteristics, or other specifications that are not necessary to meet the agency’s form, function, and utility but instead limit competition by preventing other commodities, services or technology that meet the agency’s form, function, and utility from being determined to be equal or superior to the Brand Name or Equal Specification; or
* Use a Brand Name or Equal Specification for a technology system where there are specific statutory, regulatory, code (e.g., NYS Building Codes), or Industry Standards that require the use of one manufacturer’s products, brand names, makes, manufacturer’s names, catalog numbers or similar identifying characteristics.
* The state agency must state in the solicitation or mini-bid on the centralized contract that the specification is a Brand Name or Equal Specification. For example: Brand XYV Corporation or equal.

When an offeror that is susceptible to award proposes a different commodity, service, or technology than the Brand Name or Equal Specification, the state agency must review and determine if this is an equal or superior offering than the Brand Name or Equal Specification as follows:

* The state agency must require the offeror to provide technical information to the state agency for review;
* The state agency will review this information to determine if the commodity, service, or technology is equal or superior to the Brand Name or Equal Specification; and
* If the state agency determines the vendor’s offering is equivalent or superior to the Brand Name or Equal Specification, the state agency will proceed with reviewing the offeror’s mini-bid response or bid proposal.

The state agency must document this information in its procurement record.

### 7.9.3 Developing a Brand Name Specification

A brand name specification is a specification limited to one or more products, brand names, makes, manufacturer’s names, catalog numbers or similar identifying characteristics. For either a mini-bid on a centralized contract or a procurement, a state agency may only use a brand name specification, a state agency must comply with the following:

1. The state agency must demonstrate the brand name specification is the only commodity, service, or technology that meets its form, function, and utility based on factors such as compatibility with existing technology
2. For any procurement to establish a single-award centralized contract or an agency-specific contract, there must be at least three suppliers authorized to offer the brand name specification in the location where the contract is to be performed or the product delivered
3. For any mini-bid on a centralized contract:

a. The centralized contract must expressly allow in writing for a brand name specification, and

b. The brand name specification must be offered by the required number of vendors on the centralized contract to limit competition to the contractor’s offering the brand name specification

1. A brand name specification must not be used to circumvent the requirements for a sole source contract or for using a centralized contract that allows a state agency to work directly with one contractor provided the state agency complies with the requirements of the centralized contract
2. The state agency must document this information in its procurement record

### 7.9.4 Developing Performance Specifications

Performance specifications are results and use oriented, leaving the supplier with decisions on how to make the most suitable product. When drafting performance specifications, state agencies should consider the following:

* What are the actual needs of the state agency as opposed to desirable features?
* What skills, qualifications, etc. are mandatory for the vendor and its personnel to mitigate the state agency’s risk and ensure only qualified and reliable vendors are awarded?
* When, where, and how will work be performed or goods delivered?
* What constitutes acceptance?
* Will there be schedules/milestones to meet and is there specific payments associated with this progress or milestone?
* Do the specifications align and reflect any applicable statutes, regulations, etc.?
* Do the terms and conditions adequately address the commodity, service, or technology being procured?
* Are the specifications feasible, verifiable, and specific?

State agencies must document this information in its procurement record and should use a functionality matrix to rate performance specifications in its procurement.

## 7.10 Minimum Bidder Qualifications

An agency may establish minimally acceptable qualifications that a bidder must meet in order to be deemed responsive*.* These may include but are not limited to: adequacy of resources, staffing, licenses or certifications, experience (company and/or employee), recently completed projects of similar scope/size, references, M/WBE or SDVOB utilization and past performance. If the agency elects to establish minimum qualifications, it must disclose in the solicitation both the qualification criteria and that bidders not meeting these criteria will be eliminated without further evaluation. Minimum qualification criteria are scored on a pass/fail basis.

## 7.11 Submissions and Evaluations

Prior to establishing method of award and evaluation criteria the agency must determine whether the award will be based on lowest price or best value. For commodities, award shall be made based on lowest price among responsible and responsive offers (State Finance Law§ 163(3)(a)(ii)). In the case of services, the award must be based on “best value” (State Finance Law § 163(4)(d)). However, best value can be equated to lowest price.

An invitation for bids (IFB) is generally used for a procurement when the award is based on lowest price only, while a request for proposals (RFP) is generally used for the procurement of services or technology in situations where price is not the sole determining factor and the award will be a best value procurement based on a combination of cost and technical factors.

Regardless of whether the solicitation is lowest bid or best value, consider including total cost of ownership or life cycle costs. This may include ongoing costs of maintenance, ongoing cost of consumables, incidental upgrades to existing infrastructure, additional training and staff support requirements, if necessary, and end of life costs, such as destruction and disposal.

Life cycle costs are the overall costs associated with the full life of a product, service, or system. Life cycle costs include all initial costs, such as purchase price; recurring costs, operation and maintenance; and final disposition costs at the end of life (i.e., recycling, salvage, or disposal).

End of life is a term used to describe the point in a product’s lifecycle when it has reached the end of its useful life in its current form. Product disposition costs, including the costs of recycling or disposal, are important to factor into purchasing decisions since certain materials can be expensive to recycle or dispose of properly.

If an agency is considering using a cost evaluation method other than those described above, such as “banding” or “competitive cost range,” consider contacting OSC for discussion.

## 7.12 Types of Solicitations

### 7.12.1 Lowest Price Solicitation

The solicitation should identify the method of award as a lowest price procurement awarded to lowest responsive and responsible bidder. The solicitation should indicate whether the agency anticipates making a single or multiple award pursuant to the solicitation. If there will be multiple awards, it should also state whether awards will be made by lot, region, item, grand total, type of service, or some other characteristic.

A multiple award is a contract that is awarded to more than one responsive and responsible bidder who meets the requirements of a bid specification in order to satisfy multiple factors and needs as set forth in the bid document. These factors may include complexity of terms; various manufacturers; differences in performance required to accomplish or produce required end results; production and distribution facilities; price; compliance with delivery requirements; and geographic location (State Finance Law § 163(10)(c) and 9 NYCRR § 250.10(c)).

The agency should specify in the solicitation how ties will be broken. In the event of a tie bid, the decision as to the winning bid must be made in accordance with the State Finance Law § 163(10)(a).

### 7.12.2 Best Value Solicitation

**Method of Award**

The solicitation should identify the method of award as a best value procurement, which takes into consideration cost as well as technical or non-cost factors. The solicitation should indicate whether the agency anticipates making a single or multiple award pursuant to the solicitation. If there will be multiple awards, it should also state whether awards will be made by lot, region, type of service, or some other characteristic.

The agency should specify in the solicitation how ties will be broken*.* In the event of a tie bid, the decision as to the winning bid must be made in accordance with the State Finance Law § 163(10)(a).

**Evaluation Criteria**

The solicitation must present the criteria that will be used for the evaluation of proposals. At a minimum, the agency must disclose in the solicitation the relative weights that will be applied to the cost and technical components of the proposals. An example would be: 30 percent for cost and 70 percent for technical.

An agency may elect to include in the solicitation a more detailed breakdown of the evaluation criteria, such as specifying the relative weights for detailed categories (e.g., Experience = 20 percent, Staffing = 10 percent, quantitative factor or diversity practices = 2.5 percent, sustainability and environmental considerations = 10 percent and so forth). Evaluation criteria must be finalized prior to the initial receipt of bids.

The criteria selected for evaluation must reflect the agency’s objectives, scope of services, and requirements as set forth in the solicitation. Examples of typical technical evaluation criteria include, but are not limited to:

* Work plan and methodology to achieve desired end results
* Degree to which the proposal satisfies mandatory, optional, desirable and/or alternative green performance standards
* Experience of the bidder in providing the required services and/or technology
* Management capability of the bidder
* Bidder’s overall past performance
* Qualifications and experience of the bidder’s proposed staff
* Conformance with the schedule of work set forth in the solicitation
* Bidder references

**NOTE:** Agencies are reminded that the criteria and sub-criteria may, but are not required to, be disclosed in the solicitation.

Once the technical evaluation criteria have been determined, values must be assigned to the criteria and any sub-criteria. Points are assigned to each technical evaluation criterion. Evaluators review the technical proposals and assign a score up to the maximum points for each technical evaluation criteria category. The technical criteria may be further broken down into sub-criteria and a subset of points is assigned to each sub-criterion. In rare instances, due to the nature of the procurement, alternative concepts for assigning value to the technical criteria may be permissible. The evaluation criteria and the values assigned must be consistent with any information provided in the solicitation.

## 7.13 Development of Pricing Methodology

**Commodities/Lowest Price**: Identify if pricing is by item, lot, region, grand total, and/or pricing tied to an index. Also, identify whether it will be a single, multiple, or tiered award.

**Services/Technology Best Value**: Identify if pricing is based on hourly, monthly, annual, or per service rates; deliverable, project, or solution-based and whether it includes hardware, software, or equipment. Also, identify whether the pricing is based on an index, labor, and materials, or a cost-plus model; and if there will be recurring costs.

**Inclusive Pricing**: If requiring all-inclusive pricing, the bid price must include all components required to provide the commodities, services, or technologies as specified, including, but not limited to, labor, travel, licenses, insurance, administrative costs, overhead, profit, customs, duties, surcharges, ancillary costs, fees, and delivery. If allowing additional line items, the solicitation must specify what line items are allowed and any applicable limitations or restrictions. Further guidance is below.

**Delivery**: When buying goods, the recommended practice is to require that quotes or bids be based on “Free on Board (F.O.B.) Destination.” This requirement ensures that bids can be evaluated in an equal manner. Further, it ensures that the agency does not assume the risk of loss until the product is delivered to the agency and any problems during transport are the vendor’s responsibility. By contrast, the title to items purchased Free on Board (F.O.B.) Origin (a.k.a “F.O.B. Shipping Point”) transfers upon shipping to the agency. Special circumstances may require unique delivery instructions, e.g., inside delivery, security restrictions, site-specific delivery restrictions, or electronic delivery of software licenses.

**Travel/Meals/Lodging**: If an agency is allowing for reimbursement, please refer to the Office of State Comptroller website:

<https://web.osc.state.ny.us/agencies/guide/MyWebHelp/Default.htm#XIII/1.htm?TocPath=XIII.%2520Employee%2520Expense%2520Reimbursement%257C_____1>

### 7.13.1 Pricing Submissions

Pricing pages must be structured in accordance with the selected pricing methodology. All bidders must provide the same pricing components and where possible, pricing should be collected from all bidders in the same format.This may include requiring all bidders to use the pricing sheets provided in the solicitation.

Agencies should request early payment discounts for payments made in less than 30 days after receipt of a proper invoice.A bidder must detail the discount by providing on the bid proposal form, the percentage of discount and the specific number of days within which the payment must be made for the discount to apply. If the bidder offers multiple discounts, it must provide the details for each discount offered (for example: 2%/15 days; 1%/20 days). A discount for early payment does not affect bid amounts nor is it considered in making awards, except that a discount may be considered in resolving tie bids.

### 7.13.2 Pricing Estimates

The solicitation must describe how pricing will be evaluated. If there is a known or fixed quantity, provide those details in the solicitation.For purchases with unknown or estimated quantities, agencies should include in the solicitation anticipated quantities for the bidder to base price on. These estimates can be based on historical usage or other benchmarks. For estimated quantities, include language in the solicitation notifying bidders that the quantity referenced is not guaranteed and the agency will only be responsible for actual quantities ordered.

For projects with deliverables that include hourly rates, agencies should request both hourly rates and estimates of number of hours to complete the deliverable.

Pricing proposal forms should be developed in a manner that applies weight according to quantities and timeframes expected. For example, if bidding multiple items, be sure to factor the anticipated quantities for each. The weight of each component could affect the outcome of the bid.

## 7.14 Documentation

### 7.14.1 Required Document Submissions

Format of Submissions: The solicitation should specify the documents required to be submitted in an electronic or hard copy format (paper, flash drive, USB, online submission, etc.), number of copies required, packaging and labeling, and separation of technical and financial submittals, if applicable*.* Identify any security or building access procedures that may affect the delivery of a submittal.

References: If the agency requires a bidder to submit references as part of the response, the agency must, at a minimum, verify the references provided as part of its evaluation process. If the agency opts to score reference checks, the scoring methodology must be disclosed in the solicitation.

Financials: The agency may require documents to establish the financial capacity of the bidder or reserve the right to request this information at any time prior to or after award.

### 7.14.2 Document Preparation

All information should be categorized under a section heading/subsection heading. Avoid using a run-on list of random thoughts or including information under a heading where it doesn’t belong. Sections and subsections should follow a uniform numerical structure, and where appropriate, be in chronological order, as shown in this example:

* 1. HVAC Equipment to be serviced
		1. Motors
			+ Motor #1 make Acme / model xyz
			+ Motor #2 make Acme / model pqx
		2. Cooling Towers
* Tower #1 make Ronco / model h2o
* Tower #2 make Ronco / model h2o

In addition to the product/service specifications, the solicitation informs potential bidders of the nature of the procurement, any statutory requirements, the deadline for submission of bids, the location where bids must be sent, delivery terms, any special delivery requirements, and the basis for the award (e.g., lowest price).

The solicitation may also include other terms that the procuring agency desires or requires to be in the contract. For example, if the agency chooses to allow for cost adjustments, the basis for the cost adjustment must be specified in the solicitation. Cost adjustments may be based on standard measures such as the U.S Bureau of Labor Statistics Consumer Price Index (CPI) or the Producer Price Index (PPI).

An agency must also include insurance requirements that specify that bidders must provide insurance in accordance with the scope of the solicitation. Insurance requirements, including limits, should be tailored to the scope of the contract. Additional information on insurance requirements may be found in Section 4.21.

Solicitation instructions should inform the potential bidder of the contract period/term and any extensions or renewals, the price structure, (hourly, per item, per carton, square foot, etc.), the agency’s bid protest dispute resolution policy (if applicable), performance requirements, contract monitoring, termination rights and any optional requirements.

**Bid Protest (also known as a Bid Dispute):** A formal written complaint made against the methods employed or decisions made by a State agency in the process leading to the award of a contract.

The solicitation should also outline any bidder qualifications that the agency requires, such as licensing, if required, special equipment, financial viability, minimum years of experience, etc. If a specified qualification results in reduced competition, the agency may need to justify the requirement.

The solicitation must inform potential bidders of the State’s “reserved rights.” A list of reserved rights is included in Section 4.22 and should be the minimum used. Agencies are encouraged to review the list and add to it, as needed.

The solicitation should inform potential bidders of the method of award – that is, whether the award will be by lot, item, region, or some other method.

The solicitation should also inform bidders of the requirements of Appendix A and depending on the nature and/or value of the contract, other requirements that must be included in the solicitation (e.g., federal requirements/clauses).

### 7.14.3 Order of Precedence/Conflict of Terms

The solicitation should inform bidders of all documents that will be included in the resulting contract and how any conflicts of terms among those documents will be resolved. Consult with agency counsel before finalizing order of precedence. Appendix A must be first in the order of precedence. Below is a sample;

1. Appendix A – Standard Clauses for NYS Contracts
2. Amendment(s) to the Contract/Award Document
3. Contract/Award Document
4. Clarifications and Addenda/Amendments to the solicitation
5. Solicitation, Appendices, Attachments and Exhibits
6. Clarifications to the Bidder’s Proposal
7. Bidder’s Proposal

In the event of a conflict in any provisions of these documents, the order of precedence shall be as listed above from the highest to the lowest.

### 7.14.4 Formatting

Table of Contents: A detailed and accurate Table of Contents improves the ability of potential bidders to grasp and keep track of all aspects of the solicitation and to respond effectively.

Adapting Standard Formats to the Specific Procurement: In general, previously issued solicitations and/or solicitation templates can be very helpful when creating a solicitation document for a new procurement. However, it is important to recognize that such models must often be adapted to suit the particular circumstances. Be aware that changes in law may have occurred since the example was created, which in turn may alter the provisions that must be included. Some amount of tailoring is typically necessary to construct an appropriate and effective solicitation package.

For additional guidance in adapting a template or a previously used format to suit the procurement situation at hand, it is advisable to refer to the agency’s policy and procedures and consult with experienced procurement personnel.

## 7.15 Procedural Matters

### 7.15.1 Conducting Site Visits and Pre-Bid Conferences

Prior to the due date for bids, the agency may hold site visits and/or pre-bid conferences. These provide an opportunity for bidders to ask questions and obtain a better understanding of what is needed and what might be offered. For agencies, these events are an opportunity to explain in detail what is being sought or highlight unique or specific requirements of the solicitation or the work environment. For example, a site visit may be useful in a procurement for janitorial services so potential bidders can know exactly what the equipment and/or facility looks like, whether there is access for vehicles, what the security procedures are, and other factors.

Pre-bid conferences are an opportunity for prime vendors to meet subcontractors, including M/WBE and SDVOB vendors. Consider hosting a meet and greet for primes and subcontractors connected with a pre-bid conference for large contracts or projects.

Pre-bid conferences can be conducted via a conference call, in-person, or as a combination of both. The agency must document who attended, the questions raised, the location, time, and other salient information.

The solicitation must identify the date, time and location of such events, if planned, and whether attendance is mandatory in order to bid. All attendees should be advised that any information or answers provided are not binding on agency.

Only answers provided in the published questions and answers (Q&A) will be binding.

### 7.15.2 Questions and Answers (Q&A)

The agency should allow a period of time for bidders to submit written questions, and for the agency to provide written responses. All questions raised, and answers provided, including those arising during site visits and pre-bid conferences, must be in writing and shared with all potential bidders.

**Receiving Questions**

All questions should be received in writing by a designated contact, or recorded by the agency before, during, or after a site visit or pre-bid conference. The agency must keep the original format of the question as received and should copy all questions into a single document. It is helpful to sort the questions by sections of the solicitation in a logical order. The agency may also break apart compound questions for ease of response.

Agencies may, at their discretion, respond to questions received after the published deadline as long as the response is published or distributed to all bidders consistent with the solicitation.

Before answering questions, the Q&A sheet should remove the identity of the bidder asking the question and any potentially identifying information within the question. This vendor neutrality should remain throughout the Q&A process including publication, to maintain a level playing field. If an agency believes an additional clarification is necessary, it may include its own question and answer.

**Answering Questions**

When responding, provide as much guidance, clarity, and specificity as possible to assist the bidders in understanding the requirements in order to submit a responsive bid. If a yes or no answer is appropriate, provide that answer followed by an explanation if necessary. Do not paraphrase the solicitation, provide a direct citation to the solicitation section or quote the text.

If revising the solicitation based on either a question or the agency determines that a change is necessary, issue an addendum indicating the change. If there is a revision to the solicitation or attachments, bidders must be instructed regarding how the revised documents affect the bid submission, e.g. if the price pages are revised, failure to submit the revised price page may result in disqualification.

If there are significant changes, or the agency believes bidders would benefit from an additional Q&A period, consider adding one and extending the due date for the bid submission. Any addenda must be issued to all eligible bidders. It is recommended that bidders acknowledge receipt and submit with the bid. Agencies may make this acknowledgment mandatory.

**Intent to Bid**

Agencies may but, are not required to request a bidder to submit an intent to bid. This may help the agency gauge the number of responses to anticipate and may help subcontractors and suppliers identify bidders who are interested in the work. Agencies should advise bidders that submission of an intent to bid does not require them to submit a bid in response to the solicitation.

As a best practice, a response to an intent to bid should be made optional to maximize the participation. In limited circumstances, a submission of an intent to bid can be made mandatory as determined by the requirements of the solicitation. However, a mandatory intent to bid should be used sparingly because it will limit the vendor pool.

**Evaluation Instrument**

Evaluation instruments must be complete and revised to reflect any addenda before the initial receipt of proposals. See Section 4 of the Procurement Guidelines for more information.

**NOTE:** Do not open bids until evaluation instruments are finalized. For low bid solicitations or best value solicitations where the cost is 100 percent of the score, the evaluation instrument will include a mandatory requirement checklist and a process to verify cost. Best value solicitations with technical evaluations will also require an evaluation team.

**Evaluation Team**

The agency must establish an evaluation team for a best value solicitation with a technical evaluation. The agency may also establish various oversight roles to provide policy, guidance, and direction for the evaluation process and team, and to ensure the integrity of the procurement. An individual may be designated a lead role to coordinate all activities within the process.

The number and selection of evaluators should be based on many factors including the complexity of the procurement and the level of knowledge possessed by the potential evaluators available to analyze the proposals. There may be rare instances where a single evaluator must be used for the entire technical evaluation, or a portion of it, such as when available expertise for evaluating the technical considerations is limited.

It is strongly recommended that technical and cost proposals be reviewed by different evaluation sub-teams although it is recognized that in limited situations separate teams may not be feasible. Both approaches are addressed briefly below.

**Single Team/Evaluator Approach**

Under this approach, one team or one individual evaluator conducts all evaluations. When a single team/evaluator is used, the cost proposals must remain sealed until the completion of the technical evaluation.

**Separate Team Approach**

Under this approach, the technical and cost evaluation teams may conduct their reviews simultaneously.

**Technical Proposal Review Team**

This team is typically comprised of program and technical experts and may conduct its evaluation under the direction of a technical evaluation manager or a team leader. The team is responsible for all aspects of the evaluation of the technical proposal. The evaluation team may be asked to review the entire technical bid, or a portion of the bid based on specialties or expertise needed. The evaluators must review the same portions of all bids. This may include review of vendor qualifications, such as the number of past projects performed of a similar size and scope, and proposed personnel resources, such as staff capacity. Depending on the nature of the solicitation, the team may also be responsible to perform such activities as benchmark tests, site visits, and reference checks.

**Cost Proposal Review Team**

The cost proposal review team is typically comprised of one individual, but may also be a team of people, responsible for evaluating and scoring the cost proposals submitted in response to the solicitation.

**NOTE:** While it may be necessary for the cost team to obtain technical information to clarify the association between costs and technical components, the technical evaluators must not be provided with the proposed costs until after their evaluation is complete.

**Receive and Open Bids**

Any bid received must be time-stamped upon receipt and kept in a secured area by the agency and not opened prior to the date and time of the bid opening. As a general rule, bids received after the deadline specified in the solicitation cannot be accepted. However, if permitted by agency policy a late bid may be accepted.

The bid opening should be conducted at the location and time stated in the solicitation. At this time, all timely bids are opened and recorded. It is suggested that a minimum of two staff conduct the bid opening; one to open and announce the bids and one to record them. The bid tabulation must include all timely bids received. It should be signed and certified by the agency staff responsible for opening and recording the bids. This will create a “bid tabulation,” which must be kept as part of the procurement record and must accompany the bid package sent to OSC for approval, if necessary.

The agency must certify that bids were received in accordance with the solicitation. For low bid solicitations, this certification includes a list of bidders and the cost proposed. Bid pricing pages must be posted with certification. For best value solicitations, this certification includes only a list of bidders submitting a response. These certifications must be posted on the NYS Contract Reporter and may be posted on the agency website or in other public forums.

**Timeline and Calendar of Events**

This section should provide a specific timetable for the procurement process. Important milestones to be specified typically include:

* **Solicitation Release Date** -The schedule should include the solicitation release date.
* **Date for Pre-Bid Conference/Site Visit** -Attendance must be defined as optional or mandatory and vendor's attendance must be recorded on a sign-in sheet. If attendance is mandatory, vendor’s attendance must be recorded on sign-in sheet and the agency should distribute any amendments to the solicitation and other communications only to vendors attending the mandatory conference/site visit and bids may only be considered from bidders who participated.
* **Dates for Question Submission and Agency Response** -The solicitation should provide the time frames for submission of questions and responses to those questions. The method for submitting questions should be stated. Bidder should be notified that any requested deviations must be submitted during the question and answer (“Q&A”) period. Deviations are proposed changes to the scope, terms and conditions, or other requirements of a solicitation. Consider providing bidders with a form or standard format to submit their questions. The Q&A process may be multiphase, allowing for questions and answers prior to, during, and/or after the pre-bid conference/site visit. If no pre-bid conference/site visit will be held, the agency should still provide for a Q&A period. Answers provided must be vendor neutral and provided in writing to all potential bidders.
* **Notice of Intent to Bid (optional or mandatory)** -The solicitation may require a bidder to provide, by a specified date, notice of its intent to submit a bid. This notice may be optional or mandatory, at the agency’s discretion, although agencies are encouraged to provide maximum flexibility for receipt of bids from all interested bidders. If the notice of intent to bid is made mandatory, the agency should distribute any amendments to the solicitation and other communications only to vendors submitting the intent to bid, and bids may only be considered from bidders who submitted the intent to bid.
* **Date for Submission of Bids** -The earliest possible due date for submission of bids is 15 business days after the advertisement appears in the New York State Contract Reporter*.* The solicitation should specify the manner for determining on time submission (specific clock in a specific location, time zone, receipt of email or submission of email based on time stamp, etc.). The solicitation should identify how late submissions will be addressed. When selecting the submission date, consideration should be given to time frames necessary for intervening activities, such as the pre-bid conference/site visit and the Q&A period. Other factors, such as the complexity of the solicitation, the time needed for vendors to prepare an effective response and obtain necessary internal approvals, and holidays that may limit the availability of agency staff and bidders, should also be considered.
* **Date for No Bid Reply Form** *-*Agencies may choose to include in the solicitation a form that vendors will submit indicating their intention not to bid. The form should include space for vendors to explain why a bid is not being submitted. The form should indicate that a no bid response will not affect participation in future solicitations. A date for its return should be specified. Return of this form is usually requested no later than the bids due date and time. The no-bid reply form helps the agency demonstrate that the solicitation was shared with others besides those responding, and to understand why a vendor did not bid.
* **Method for Issuing Clarifications or Modifications to the Solicitation** *-*This section should specify how the agency will issue any clarifications or modifications to the solicitation that may arise after it is first issued. Include how and where to submit questions. The solicitation should specify how deviations/exceptions proposed by the bidders will be handled.
* **Interviews, Oral Presentations or Demonstrations** *-*The solicitation may require a vendor to provide, either prior to or following proposal submission, an oral presentation, interview or demonstration. These may be scored or used to substantiate a proposal. The solicitation shall identify the timeframe and manner in which these will occur.
* **Confidentiality and Non-Disclosure Agreement (Optional or Mandatory)** *-*The solicitation may require a vendor to provide, by a specified date, a signed Confidentiality and Non-Disclosure Agreement in order to obtain confidential information contained in exhibits, appendices, etc. to assist with the preparation of its bid. If made mandatory, the agency should distribute any amendments to the solicitation and other communications only to bidders providing a signed agreement by the specified date.
* **Contract Anticipated Start Date -** The date the contract is projected to start should be included in the calendar of events section.

## 7.16 Evaluation and Award

The objective of the evaluation process is to apply the criteria set forth in the solicitation to ensure that bids are evaluated objectively, fairly, equally and uniformly.

### 7.16.1 Administrative Review to Verify Responsiveness

The agency must ensure that the bid submission is complete and accurate. This includes, but is not limited to:

* Ensuring that all required documents and forms, including M/WBE and SDVOB utilization plans are included in the submission and signed if required
* Reviewing of price submission for completeness and accuracy of calculations
* Determining on a pass/fail basis that all minimum mandatory qualifications to submit a bid (e.g., minimum experience requirements) set forth in the solicitation have been met.

Bids found to be incomplete may be disqualified as provided for in the solicitation. See Section 6.10 for more information on disqualifications.

**NOTE:** For low bid solicitations, administrative review should begin with the apparent low bid after verifying all calculations for all bidders. If the apparent low bidder is not found to be responsive, the bid must be rejected, and the next lowest price bid must be reviewed. In addition, notice should be provided to an apparent low bidder who is being rejected as non-responsive. For best value solicitations, any bids failing to meet administrative requirements should not be advanced for evaluation of technical and cost. Consider evaluating cost proposals last.

### 7.16.2 Best Value Evaluation

Best value evaluations include an analysis of the technical proposals, a separate comparative analysis of the cost proposals, and a method for combining the results of the technical and cost proposal evaluations to arrive at the selection of the proposal deemed to be the best value solution for the State in accordance with the requirements set forth in the solicitation.

1. Technical evaluation - An examination of the non-cost elements that were not considered during the administrative review, such as the functional specifications (e.g., proposed staffing and project plan, scheduling, solution model, diversity practices, or quantitative factors)
2. Cost evaluation – Evaluation of the prices proposed

There are many ways to score bids. One way is provided at the end of this section.

### 7.16.3 Technical Evaluation

After the administrative review, the technical evaluation must be conducted as documented in the solicitation and the evaluation instrument. The evaluation team members apply scores to the pre-determined criteria and sub-criteria if applicable. Scoring is based on information provided in the submitted bid, and other factors as set forth in the solicitation, examples include:

1. Product or service demonstrations and presentations
2. Reference checks (staff and/or company performance)
3. Vendor site inspections
4. Interviews of key proposed managers and technical experts
5. Written proposal clarifications

The above factors may be used as cumulative information to be considered together with submitted information, or as separately scored criteria. For example:

1. A reference check might be used to verify submitted information (e.g., the proposer has successfully completed three jobs of similar size/scope). A reference check might also be used as a separately scored criterion.
2. Presentations and interviews might be used as cumulative information along with submitted documentation for scoring a criterion (e.g., experience, work plan). A presentation might also be used as a separately scored criterion.

The agency has the authority to waive mandatory requirements that are not material provided that all the following are met:

1. The solicitation discloses to the bidders this reserved right.
2. The mandatory requirements are not met by all bidders.
3. The waiver does not disadvantage the State.
4. The waiver does not solely benefit the proposed bidder.
5. The waiver does not prejudice any non-winning bidder or potential bidder.

Evaluation scores may be adjusted and finalized, as provided for in the evaluation instrument.

Regardless of the scoring methodology utilized, evaluators must document the basis for the rating using a narrative to explain the bid’s strengths and weaknesses, thereby justifying the score. For example:

“The bidder’s proposed Project Director was given the maximum number of points because this individual has successfully managed a project of similar complexity and he/she will be critically important to the success of our project.”

### 7.16.4 Combined/Final Score

The agency should weigh the technical and cost evaluation results as two components, which together total 100 percent of the evaluation. For example, the technical evaluation could be weighted at 70 percent and the cost evaluation weighted at 30 percent. After the technical evaluation has yielded a technical score and the cost evaluation has yielded a cost score, the scores are weighted and combined to produce a final score for the proposal. An example has been provided below.

**NOTE:** In the event of a tie bid, the decision as to the winning bid must be made in accordance with the State Finance Law §163(10)(a) and any policy stated in the solicitation.

### 7.16.5 Involving Upper Management

It is recommended that the final selection of a bidder be reviewed by a manager who has a broad perspective of the agency’s operations and knows the strategic considerations related to the procurement. Management may: 1) concur with the selection; 2) request a re-evaluation in accordance with the pre-established evaluation methodology; or 3) determine that all bids should be rejected, and a new solicitation issued.Management may not direct an award to a specific bidder who is not the low bidder or who has not offered the best value in accordance with the pre-established evaluation methodology.

### 7.16.6 Negotiations

Lower pricing may be negotiated with the winning bidder, so long as the scope of work is not changed as a result. In cases where the best value solicitation has specifically provided for negotiation of terms and conditions, the agency may engage in negotiation with the successful bidder prior to settling on the contract terms. Notes should be kept of all negotiation discussions and all revisions should be tracked in writing to ensure that the contract being signed contains all agreed upon terms and conditions.

Revisions must not materially alter the requirements or specifications set out in the solicitation. To assess whether a potential revision constitutes a material change, the question should be asked: “Would other bidders or non-bidders have responded differently if the term or condition to be revised as a result of negotiation had been included in the solicitation?” If the answer is "yes" or "possibly," then the provision may not be revised.

## 7.17 Contract Administration and Monitoring

The approved contract must be administered and monitored properly for the duration of the contract. Regular, diligent oversight of all activities and actions regarding the contract is an important part of the overall life cycle of a contract. The agency should assign staff who will be responsible for ensuring that the contractor performs the requirements of the contract in accordance with the contract’s terms, conditions and specifications. Proper oversight and administration of the contract may entail educating and communicating with agency personnel who will be direct users of the goods, services or technology acquired and who are in the best position to monitor the contractor’s performance of contract. Regular performance monitoring is critical to ensure that required performance specifications and standards are met and maintained.

Staff assigned to manage the contract should review the terms and conditions of the contract to identify required metrics, reporting requirements, and/or deliverables to be managed over the life of the contract. Staff may want to create a checklist of important dates and/or deliverables. It is important to obtain and manage detailed records on the contract over the life of the contract. Documentation should be maintained for any meetings, actions or issues occurring during the contract period.The procurement record (from solicitation through contract end date or final payment, whichever occurs later) must be maintained a minimum of six years plus the balance of the calendar year, following the conclusion of the contract. Contract records must follow agency’s record retention policy, which may require a longer retention period.

Additional guidelines for contract administration and monitoring can be found in the Procurement Council’s Receiving Agency Inspection Guidelines at:

[www.ogs.state.ny.us/procurecounc/pdfdoc/inspgdl.pdf](http://www.ogs.state.ny.us/procurecounc/pdfdoc/inspgdl.pdf)

Additional guidance can also be found in the OSC Guide to Financial Operations, Chapter XI.11.F: Contract Monitoring, at:

<http://www.osc.state.ny.us/agencies/guide/MyWebHelp>

## 7.18 Effective Contract Management

Kick-off Meetings/Progress Meetings: Contract managers should consider holding meetings at the beginning of the contract period with the contractors to review expectations, requirements of the contract, invoice management, contract logistics, and reporting requirements. In addition, contract managers should consider holding progress meetings at regular intervals throughout the life of the contract.

Contract Logistics: Contract managers should ensure contractors remain compliant with the requirements of the contract throughout the life of the contract. Some logistics that may be included in the contract include:

1. Certifications/Licenses
2. Background Checks
3. Delivery
4. Worksite Access/Location
5. Prompt Payment/Discounts
6. Certified Payrolls
7. Scheduling of Services
8. Deliverables/Acceptance Policy
9. Updated Utilization Plans and Detailed documentation of good faith efforts

Vendor Responsibility: Contract managers should review the contractor’s responsibility periodically throughout the life of the contract or upon discovery of adverse information. Consult with agency counsel upon identification of contractor responsibility issues before any action is taken.

# Section 8: Best Practices

This chapter highlights practices that experience has shown will make a procurement easier to manage, help ensure that the appropriate goods/services are obtained, increase the ability to receive control agency approval, and minimize the likelihood of a bid protest.

## 8.1 Knowing the Business Needs

Know what the “end result” needs to be. Before starting the procurement process, have a good understanding of what the agency needs, what a product will be used for, whether there will be a need for modifications to existing equipment or facilities, and what is available in the marketplace. Identification of the business needs may require meeting with end-users to bring added clarity to the scope of the transaction and the various components of the transaction, such as the intended product usage, what services are needed, or site conditions.

## 8.2 Proper Planning

Proper planning is the single most important factor in conducting a successful procurement. Proper planning includes allowing adequate time for advertisement, writing a clear and concise solicitation, allowing sufficient time for potential bidders to ask questions and prepare bids/proposals (taking into account the complexity of the solicitation), reviewing the bids/proposals, and conducting internal/external reviews of the final contract.

## 8.3 Thorough Information Gathering

Consider using a request for information (RFI), to gather information about the types of goods/services that are available. Certain types of products evolve rapidly; therefore, sending an RFI to vendors may provide insight on newer, more efficient products or services that better address the needs of the agency. It is also strongly recommended that an RFI be advertised in the New York State Contract Reporter to provide additional vendors with an opportunity to respond to the RFI.

## 8.4 Green Purchasing

Assess the environmental attributes of goods and services to protect human health and the environment. For many products, green specifications that include guidance about such assessments and appropriate environmental goals can be found on OGS’s website at:

<https://ogs.ny.gov/greenny/approved-greenny-specifications>

These specifications detail performance requirements such as ingredient disclosure, the efficient use of resources (including water, energy, and virgin materials) durability, recyclability and reductions in packaging. Products and services with green attributes are integrated into State contracts and are highlighted on the OGS website in various locations, including the ones referenced below.

*Energy Efficient Products/Renewable Power Sources/Alternative Fueled Vehicle Contracts:*

<http://www.ogs.ny.gov/purchase/spg/pdfdocs/EE-Products.pdf>

*Environmentally Preferable Cleaning Products, Programs, Equipment and Supplies Contracts:*

<https://online.ogs.ny.gov/purchase/spg/awards/3900023245CAN.HTM>

*Recycled Content and Energy Efficient Contracts:*

<http://www.ogs.ny.gov/purchase/spg/pdfdocs/EnergyRecycled.pdf>

*100% Recycled Content Copy Paper Contracts:*

<https://online.ogs.ny.gov/purchase/spg/awards/5021123078CAN.HTM>

In situations where applicable green specifications have not yet been issued, agencies should seek to procure product or services that increase positive environmental impacts, support the health and well-being of users and manufacturers of the products, and provide the needed product or service at a reasonable price. Additional detail on the requirements related to environmental attributes are described in Exhibit C: Green Purchasing.

## 8.5 Conducting Pre-Bid Conferences

Pre-bid conferences can be very helpful to both agency staff and prospective bidders, particularly with respect to complex procurements. A pre-bid conference provides the prospective bidders and agency staff an opportunity to ask questions and obtain a better understanding of what is needed and what might be offered. Participation by potential bidders in a pre-bid conference can be deemed mandatory or optional. The conference can be conducted via a conference call, in-person, or as a combination of both. If a pre-bid conference is held, the agency must document who attended, the questions raised, the location, time, and other salient information. Questions and answers must be provided to all potential bidders after the conference is conducted. Questions should remain “vendor neutral” – that is, the identity of the vendor asking the question should not be revealed in the presentation of either the question or the answer.

## 8.6 Providing for Site Visits

Site visits can be very beneficial for both potential bidders and agency staff. These can be deemed mandatory or optional. For example, a site visit may be useful in a procurement for janitorial services so potential bidders can know exactly what the equipment and/or facility looks like, whether there is access for vehicles, what the security procedures are, and other factors. Consideration may also be given to visiting the bidders’ sites to ensure that they have the necessary equipment and/or facilities to meet the contract requirements.

## 8.7 Discussion with the Office of the State Comptroller

Prior to issuing the IFB/RFP, consideration should be given to discussing complicated and/or sensitive solicitations or unique evaluation methodologies with the OSC Bureau of Contracts to ensure that the procurement is undertaken in an appropriate manner.

## 8.8 Use of F.O.B. Destination

When buying goods, the recommended practice is to require that quotes or bids be based on “Free on Board (F.O.B.) Destination,” meaning that there is no additional delivery charge and the title (ownership) does not transfer until the product reaches its destination. This requirement ensures that bids can be evaluated in an equal manner. Further, it ensures that the agency does not assume risk of loss until the product is delivered to the agency and any problems during transport are the vendor’s responsibility. By contrast, title to items purchased Free on Board (F.O.B.) Origin (a/k/a “F.O.B. Shipping Point”) transfers upon shipping and the agency is therefore responsible for any risk of loss or problems during transport.

## 8.8 Review of Terms and Conditions Proposed by Vendors

Carefully read all terms and conditions that are proposed by the vendor to ensure that nothing conflicts with Appendix A. In addition, any terms proposed by the vendor such as limits of liability, indemnification, and warranties, or those that may be detrimental to the State, should be discussed with agency counsel.

**NOTE:** Material terms of a contract awarded pursuant to a competitive bid cannot be negotiated.

**NOTE:** When issuing a purchase order on an OGS centralized contract, agencies and vendors are not authorized to change the terms and conditions of that contract, unless such changes are more favorable to the State.

## 8.9 Negotiating Effectively

The following are suggestions for negotiating contracts that are most commonly awarded via an RFP, or under a single or sole source theory:

* Prior to negotiating, the agency should identify all known issues and outline its position and acceptable alternatives.
* To the maximum extent possible, negotiations should be conducted at the agency’s office. Always allow sufficient time to discuss the issues fully.
* Look for a “win-win.” Often, it is possible for vendors and procurement staff to agree on terms that are beneficial to both parties. Making any necessary concessions incrementally will aid in working towards a “middle ground” that is satisfactory to all.
* Notes should be kept of all negotiation discussions and all revisions should be tracked in writing to ensure that the contract being signed contains all agreed upon terms and conditions.

**CAUTION:** Material terms of a contract awarded pursuant to a competitive bid cannot be negotiated.

## 8.10 Involving Upper Management

Even procurements that are limited in scope or are relatively simple have the potential to become controversial. It is recommended that the final selection of a contractor be reviewed by a manager who both has a broad perspective of the agency’s operations and knows the strategic considerations related to the procurement. Management may: 1) concur with the selection; 2) request a re-evaluation in accordance with the pre-established evaluation methodology; or 3) determine that all offers should be rejected and a new procurement conducted. Management may not, however, direct an award to a specific vendor who is not the low bidder or who has not offered the best value in accordance with the pre-established evaluation methodology.

## 8.11 Documenting

Documentation of all phases of the procurement, including communications with bidders or agency program staff, should be included in the procurement record. Note that contacts with bidders must also be documented in accordance with the requirements of the Procurement Lobbying Law.

## 8.12 Adapting Standard Formats to the Specific Procurement

In general, previously issued solicitations and/or solicitation templates can be very helpful when creating a solicitation document for a new procurement. However, it is important to recognize that such models must often be adapted to suit the particular circumstances. Be aware that changes in law may have occurred since the example was created, which in turn may alter the provisions that must be included. Some amount of tailoring is typically necessary to construct an appropriate and effective solicitation package.

Sample outlines for developing an IFB and an RFP are included in these Guidelines in Chapter VIII. Exhibits. Consistent with the point made above, depending on the scope and nature of the specific procurement project, not all of the sections and clauses in these samples may apply. Similarly, the scope and nature of the procurement may require sections and clauses that are not listed in the respective samples.

For additional guidance in adapting a template or a previously used format to suit the procurement situation at hand, it is advisable to refer to the agency’s policy and procedures and consult with experienced procurement personnel.

## 8.13 Insurance Requirements

Solicitations and contracts should require bidders/contractors to obtain insurance on behalf of the State of New York as a condition of doing business with the State. This insurance is in addition to the requirements for the provision of Workers’ Compensation and Disability insurance discussed herein. In an effort to standardize insurance requirements among State entities, the New York State Procurement Council and the New York State Council of Contracting Agencies adopted guidelines for insurance requirements which provide model insurance specifications and suggestions on how to monitor compliance with those requirements. Those guidelines can be found at:

<https://ogs.ny.gov/system/files/documents/2021/10/cca_procurementcouncil_insurancerequirementsincontracts.pdf>

**APPENDIX 1: EXAMPLE OF EVALUATON FOR BEST VALUE SOLICITATION**

Once the technical evaluation criteria have been determined, values must be assigned to the criteria and any sub-criteria. In this example, the total available points are 100, the technical score is 70% of the total or 70 points maximum and cost is 30% or 30 points.

**Technical Evaluation**: Points are assigned to each technical evaluation criterion. Evaluators review the technical proposals and assign a score up to the maximum points for each technical evaluation criteria category. Illustration:

* 1. Work plan and methodology to achieve desired end results = 20 points
	2. Satisfaction of green performance standards = 5 points
	3. Diversity Practices = 5 points
	4. Bidder’s experience in providing the required services and/or technology = 10 points
	5. Bidder’s management capability = 10 points
	6. Proposed staffing plan = 10 points
	7. Conformance with the schedule of work set forth in the solicitation = 10 points

Technical evaluation formula:

|  |  |  |
| --- | --- | --- |
|  |  |  |

The following chart is an example of the technical evaluation formula (Total Weighted Points for this section is 700):



The technical criteria may be further broken down into sub-criteria and a subset of points is assigned to each sub-criterion. Evaluators review the technical proposals and score each sub-criterion. Illustration:

* Proposed Staffing Plan = 10 points
* Staffing Plan proposes at least ten Programmer I positions = 2 points
* Staffing Plan proposes at least four Programmer II positions = 2 points
* Staffing Plan proposes at least three Analyst I positions = 2 points
* Staffing Plan proposes at least one Analyst II position = 2 points
* Staffing Plan proposes at least three Trainer positions = 2 points

The technical criteria may also be considered according to a pre-established scale. Evaluators grade the technical proposals and assign points for each criterion within the scale. Illustration:

* Excellent Staffing Plan = 8-10 points
* Good Staffing Plan = 5-7 points
* Fair Staffing Plan = 3-4 points
* Poor Staffing Plan = 0-2 points

In rare instances, due to the nature of the procurement, alternative concepts for assigning value to the technical criteria may be permissible. In such instances, it is recommended that the agency consult with the OSC Bureau of Contracts before beginning the procurement.

NOTE: The evaluation criteria and the values assigned must be consistent with any information provided in the solicitation.

The following chart is an example of the Cost Evaluation formula:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Vendor | Bid |  |  |  |
| Vendor A | 89,000 |  |  |  |
| Vendor B | 75,000 |  |  |  |
| Vendor C | 81,000 |  |  |  |

Combined/final score from the example:

|  |  |  |  |
| --- | --- | --- | --- |
| **Vendor Name**  | **Technical Score**  | **Cost Score**  | **Total Score**  |
| Vendor A | 556.70 | 252.80 | 809.50 |
| Vendor B  | 490.00 | 300.00 | 790.00 |
| Vendor C  | 566.70 | 277.78 | 844.48 |

A. SAMPLE OUTLINE FOR AN “INVITATION FOR BIDS”

The following provides a detailed example of sections and clauses that can be considered for inclusion in an Invitation for Bids (IFB). The scope and nature of the IFB may require sections or clauses that are not listed here. For additional information, refer to the agency’s policy and procedures.

1. OVERVIEW/COVER LETTER

1.1 Designated Contact

1.2 Minimum Qualifications

1.3 Key Events/Timeline

1.4 IFB Questions and Clarifications

1.5 Instructions for Bid Submission

2. ADMINISTRATIVE INFORMATION

2.1 Issuing Office

2.2 Method of Award

2.3 Term of Contract

2.4 Price (Including Price Adjustment Provisions)

2.5 Method of Payment

2.6 Electronic Payment

2.7 Reserved Rights

2.8 Dispute Resolution

2.9 Prime Contractor Responsibilities

2.10 Glossary of Terms

2.11 Rules of Construction

2.12 Debriefing Information

3. SPECIFICATIONS/SCOPE OF WORK

3.1 Operations Standards

3.2 Scope

3.3 Site Visit, as required

3.4 Resources and Specific Requirements

3.4.1 What the Contractor Shall Provide

3.5 Contract Delivery/Contract Period

3.6 Contract Representative

3.7 Reporting Requirements

3.8 Performance Guarantees (i.e. Progress Payments, Letters of Credit)

4. CONTRACT CLAUSES AND REQUIREMENTS

4.1 Order of Precedence

4.2 Procurement Lobbying Requirement

4.3 Contractor Insurance Requirements

4.4 Tax Law Section 5-A Clause

4.5 Contractor Requirements and Procedures for Equal Employment and Business Participation Opportunities for Minority Group Members and New York State Certified Minority- and Women-Owned Business Enterprises

4.6 Freedom of Information Law/Trade Secrets

4.7 General Requirements

4.8 New York State Vendor Responsibility Questionnaire

4.9 Ethics Compliance

4.10 Contract Modification Procedure

Attachments to an IFB

Agency practices differ. However, the solicitation should set forth any required documents, such as those listed below, that the bidder should be aware of and should complete and submit as necessary. Reference to on-line versions of a form may also be used in certain circumstances.

• Appendix A: Standard Clauses for New York State Contracts

• NYS Vendor Responsibility Questionnaire

• Taxation and Finance Form ST-220 CA

• Procurement Lobbying Forms

• Cost Proposal Form

• M/WBE / EEO Compliance Documentation Forms

• Sample Contract

• Workers’ Compensation and Disability Insurance

• NYS Required Certifications

B. SAMPLE OUTLINE FOR A “REQUEST FOR PROPOSALS”

The following provides an example of sections and clauses that can be considered for inclusion in a Request for Proposal (RFP). Depending on the scope and nature of the specific RFP, not all of these sections or clauses may apply. Further, the scope and nature of the RFP may require clauses that are not listed here. For additional information, refer to the agency’s policy and procedures.

1. INTRODUCTION

1.1 Overview

1.2 Designated Contact

1.3 Minimum Qualifications

1.4 Key Events/Timeline

2. PROPOSAL SUBMISSION

2.1 Intent to Submit a Proposal

2.2 RFP Questions and Clarifications

2.3 Proposal Format and Content

2.4 Instructions for Proposal Submission

2.4.1 Packaging of RFP Response

3. ADMINISTRATIVE INFORMATION

3.1 Issuing Office

3.2 Method of Award

3.3 Term of Contract

3.4 Price (Including Price Adjustment Provisions)

3.5 Method of Payment

3.6 Electronic Payment

3.7 Reserved Rights

3.8 Exceptions to RFP

3.9 Waiver of Rights

3.10 Dispute Resolution

3.11 Inspection of Books

3.12 Prime Contractor Responsibilities

3.13 Prevailing Wage

3.14 Glossary of Terms

3.15 Rules of Construction

3.16 Debriefing Information

4. EVALUATION AND SELECTION PROCESS

4.1 Proposal Evaluation

4.1.1 Technical Evaluation

4.1.2 Cost Evaluation

4.2 Notification of Award

5. SCOPE OF WORK

5.1 Operations Standards

5.2 Scope

5.3 Site Visit, as required

5.4 Resources and Specific Requirements

5.4.1 What the Contractor shall provide:

5.5 Performance Guarantees (i.e. Progress Payments, Letters of Credit)

5.6 Contract Representative

5.7 Reporting Requirements

6. CONTRACT CLAUSES AND REQUIREMENTS

6.1 Order of Precedence

6.2 Procurement Lobbying Requirement

6.3 Contractor Insurance Requirements

6.4 Tax Law Section 5-A Clause

6.5 Contractor Requirements and Procedures for Equal Employment and Business Participation Opportunities for Minority Group Members and New York State Certified Minority- and Women-Owned Business Enterprises

6.6 Freedom of Information Law/Trade Secrets

6.7 General Requirements

6.8 Contract Terms

6.9 Procurement Rights

6.10 Termination

6.11 New York State Vendor Responsibility Questionnaire

6.12 Ethics Compliance

6.13 Contract Modification Procedure

Attachments to an RFP

Agency practices differ. However, the solicitation should set forth any required documents, such as those listed below, and any additional statutory requirements pertaining to the particular service being procured (such as consulting disclosure forms), that the bidder should be aware of and should complete and submit as necessary. Reference to on-line versions of a form may also be used in certain circumstances.

• Appendix A: Standard Clauses for New York State Contracts

• NYS Vendor Responsibility Questionnaire

• Taxation and Finance Form ST-220 CA

• Procurement Lobbying Forms

• Cost Proposal Form

• M/WBE / EEO Compliance Documentation Forms

• Sample Contract

• Workers’ Compensation and Disability Insurance

• NYS Required Certifications

C. GREEN PURCHASING

State agencies can simultaneously improve environmental quality, protect public health, and save money and other resources through green purchasing. While green purchasing is a relatively new term, agencies have long been required to consider environmental quality, health and safety when making purchasing decisions. Existing policies require State agencies to:

• Conserve, improve and protect natural resources and the environment;

• Prevent water, air and land pollution;

• Enhance the health, safety and welfare of State residents and their overall economic and social well-being;

• Promote cost effective methods to reduce energy and resource consumption;

• Reduce greenhouse gas emissions;

• Reduce or eliminate the use of hazardous substances and the generation of hazardous substances, pollution and waste at the source; and

• Reduce the generation of solid waste, reusing materials, and recycling materials that cannot be reused.

State agencies should consider environmental attributes and green performance standards as part of their overall assessment of the agency’s need for goods or services. In this way, specifications and contracts can be developed efficiently to meet State requirements and goals. Below is a list of the primary State policies that are most relevant to green purchasing at this time. For more information, specific goals and applicability for your agency’s needs, contact your agency's designated sustainability coordinator.

1. [↑](#footnote-ref-2)