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# When and How to Use Discretionary Spending

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#2018NYGovBuy  @NYSPro  @nysprocurement



# Presenter Information

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# What is Discretionary Spending Authority?

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

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

# Step 1: Identify Your Need

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

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

# “Form, Function, and Utility”

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

# First

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



# Preferred Sources

Preferred Source status is granted to

- Dept. of Corrections & Community Supervision –  
— Corcraft: [www.CORCRAFT.org](http://www.CORCRAFT.org)
- NYS Preferred Source Program for People who are Blind: [www.NYSPSP.org](http://www.NYSPSP.org)
- NYS Industries for the Disabled: [www.NYSID.org](http://www.NYSID.org)
- <http://nyspro.org.ny.gov/content/buying-preferred-source-0>



# Second

If no Preferred Source meets your need (form, function, and utility)...

Can the need be met by using  
**Office of General Services (OGS)**  
**Centralized Contracts?**





# Types of OGS Centralized Contracts

- **Commodities**

<http://www.ogs.ny.gov/purchase/spg/lists/commodity.asp>

- **Services**

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

- **Technology**

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





# Types of OGS Centralized Contracts

## Example Contracts

- A/V Equipment
- Athletic Equipment
- Copy Paper
- Furniture
- HBITS
- Highway Materials
- Rock Salt
- Office Supplies
- Medical Equipment
- Fuels
- Rubbish Removal
- Administrative Services
- Umbrella
- Bank Card Services
- PBITS
- Elevator Maint.
- Telecommunications
- Printers
- Computer Hardware & Software

## Contract Terms

- ~1500+ contracts; ~7,000+ Authorized Users
- Terms vary; may be awarded up to 5+ years
- Single award, multiple award, backdrop with RFQ/Mini-Bid
- Estimated quantities, IDIQ, Filed Requirements
- Sales result when purchases are made off the contract



# Third

If no Preferred Source or OGS Centralized Contract meets your need (form, function, and utility)...

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





# Fourth

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

The Agency then conducts its own procurement





# Step 2: Determine Cost

## Ask Yourself

- What is the estimated cost?
- Is your estimated cost under the Discretionary Purchasing Threshold –
  - under \$50,000 ?
  - \$50,000 - \$200,000 ?



# One Year Rule

## Determination of Threshold Amount

### State Finance Law § 163(6-b):

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





# Step 3: Determine Vendor Pool

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



# Limiting to M/WBEs and Small Businesses

- New York State Finance Law states that agencies may procure from M/WBEs or Small Businesses pursuant to the guidelines set by the State Procurement Council
- State Procurement Council Discretionary Spending Guidelines
  - Agencies may determine, based upon experience, knowledge and a current analysis, that it is appropriate to limit the discretionary purchase opportunity to M/WBEs or Small Businesses.



# Minority/Women-Owned Business Enterprise

A Minority and/or Women-Owned Business must be certified by NYS Empire State Development in accordance with NYS Executive Law Article 15-A.

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



# New York State Small Businesses

A New York State Small Business is defined as:

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

*There is no certification process for “New York State Small Business.”*



# Limiting to SDVOBs

- Chapter 569 of the Session Laws of 2015 extended State Finance Law § 163(6) discretionary purchasing authority to purchases from certified SDVOBs
- Commissioner of OGS given authority to create guidelines for “the process to be used in the exercise of discretionary authority” for SDVOBs [9 NYCRR 252.2(j)]





# Service-Disabled Veteran Owned Business

- A Service Disabled Veteran Owned Business (SDVOB) must be certified by OGS pursuant to Executive Law Article 17-B
- For information about certifying as an SDVOB, please contact the OGS Division of Service-Disabled Veterans' Business Development at:  
<https://ogs.ny.gov/Veterans/default.asp>





# SDVOB Set Asides

- Executive Law Article 17-B allows for agencies to set-aside procurements for Certified Service-Disabled Veteran-Owned Businesses (SDVOBs)
  - Agency may determine “based upon experience, knowledge and current analysis whether it is appropriate to use a set aside for such discretionary purchase...”
- Guidance for use of set-aside contracts is available at <https://ogs.ny.gov/Veterans/docs/Guidelines.pdf>
- Note: may also use set aside contracts for competitive purchases (as well as discretionary)





# Recycled/Remanufactured and NYS Food

- Recycled or Remanufactured Products:  
“commodities or technology that is recycled or remanufactured”
- Food Grown, Produced or Harvested in New York:  
“commodities that are food, including milk and milk products, grown, produced or harvested in New York State”
  - Agriculture & Markets “New York Grown & Certified Program” is an option for such purchases





# Step 4: Advertise

- Economic Development Law Article 4C
  - Contract Reporter Ad required for \$50,000 or more, unless an exemption applies
- Procurement Council approved scripts
  - Agencies can use the discretionary spending “Pursuant to guidelines established by the state procurement council”
    - IMPORTANT FOR OSC APPROVAL
- Agencies must submit ad at least 15 business days prior to bid/proposal due date

# Advertising – Approved Scripts

- NYS Procurement Council Guidelines
  - <http://ogs.ny.gov/procurecounc/pdfdoc/DiscretionaryPurchasingGuidelines.pdf>
- Common Elements
  - Contracting Agency name
  - A description of the goods/services sought
  - The statutory authority for discretionary purchase



# Advertising – Approved Scripts

- Best Practices Language #1
  - Agency X intends to purchase (**insert project description, 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, grown, produced or harvested in New York State. Interested parties should contact (**agency designated contact/purchasing officer**) to discuss this opportunity.



# Advertising – Approved Scripts

- Best Practices Language #2
  - Agency X intends to purchase (**insert project description, 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.

# Advertising – Approved Scripts

- Best Practices Language #3
  - 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.
- Best Practices Language #4
  - 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.

# Advertising – Approved Scripts

- Best Practices Language #5
  - 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, businesses certified pursuant to Article 15-A of the New York State Executive Law, if applicable, businesses selling commodities or technology that are recycled or remanufactured or commodities that are food, including milk and milk products, grown, produced or harvested in New York State.



# Additional Advertising Requirement for NYS Food Purchases

- **NYS Food Purchases** – In addition to the contract reporter, New York State Finance Law requires you to advertise on your agency website for “a reasonable period of time” and make the discretionary purchase based on the lowest price that meets the agency’s form, function and utility.

## Step 5: Make an Award

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



# Negotiating Price

- This is an informal competitive process
- When negotiating price, keep in mind:  
Award need not go to the lowest quote, but the price must be **reasonable**
  - Exception: NYS produced food (SFL § 163[6-c])
- Must be fair to all vendors





# Reasonableness of Price

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



# Reasonableness of Price

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





# Step 6: OSC Approval

- Sufficiency of Advertisement
  - Use one of 5 approved scripts
- Justification of Vendor
  - Why is this vendor the right choice
- Reasonableness of Price
  - Depends on particular circumstances
- Vendor Responsibility
  - Over 100k – complete questionnaire at OSC's Vendor Responsibility website:  
<http://www.osc.state.ny.us/vendrep/>
  - Under 100k – verify responsibility otherwise (i.e., agency should represent they've done a review)



# Recap

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

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



# Resources

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