



STATE OF NEW YORK

ANDREW M. CUOMO  
GOVERNOR

LAWRENCE SCHWARTZ  
SECRETARY TO THE GOVERNOR

**MEMORANDUM**

**TO:** Heads and Chief Financial Officers of State Agencies and Public Authorities  
**FROM:** Larry Schwartz, Secretary to the Governor *Larry Schwartz*  
**SUBJECT:** Responsibility Provisions in State Contracts  
**DATE:** April 3, 2013

The State must conduct business only with responsible entities. Taxpayer dollars should not be paid to entities that lack financial ability and integrity. New York law and public policy have long required that entities wishing to bid for State contracts be found to be responsible at the time of contract award. A determination of responsibility should be made only when the entity demonstrates the requisite financial ability, organizational capacity, legal authority, integrity (of both the entity and its principals), and, where appropriate, satisfactory performance of all prior government contracts.

But our attention to the responsibility of entities that we do business with must not end with the contract award process. Circumstances may change, and we need to be certain that our vendors and grantees remain responsible throughout the term of their contracts. In order to ensure that the State is protecting taxpayer dollars, effective immediately, all State agencies are required, and State public authorities are strongly encouraged, to include in every State contract, lease, grant, or equivalent legal instrument, the following provisions:

1. A clause requiring that every vendor or grantee remain responsible throughout the life of the contract;
2. A clause authorizing the procuring or granting State entity to immediately suspend work under the contract when it discovers information that calls into question the responsibility of the vendor or grantee; and
3. A clause authorizing the procuring or granting State entity to terminate the contract for cause based upon a determination that the vendor or grantee is non-responsible.

Attached is model language to be incorporated into every new contract, lease, grant or other equivalent instrument. Any variation from the attached language must be first submitted to and approved by the Counsel to the Governor.

If a State agency or authority discovers information that indicates a vendor or grantee may no longer be responsible, the agency or authority shall conduct an investigation. Such investigation may entail summoning representatives of the vendor or grantee to a meeting to answer questions and address the concerns raised by the agency or authority. If the investigation reveals that the vendor or grantee is not responsible—that is, based on the information now known, the agency or authority would not award a contract to the vendor or grantee—then the agency or authority has two options: (1) Depending on the nature or seriousness of the issue, and only if there is some way the vendor or grantee could fix the problem (e.g., terminate an executive who has been indicted for fraud), then the agency or authority could, at its sole discretion, give the vendor or grantee the opportunity to take appropriate remedial measures to become responsible. (2) If there is no reason to give the vendor or grantee an opportunity to fix the problem (e.g., the vendor was clearly trying to cheat the government), or if there is no way the vendor or grantee could readily fix the problem, or if the vendor or grantee refuses to fix the problem, then the agency or authority shall suspend activities under the contract and terminate the contract.

Any termination of a contract for reasons of non-responsibility shall be reported to the Office of General Services (“OGS”) by the procuring or granting State entity within 30 days of the notice of termination to the vendor or grantee. The State entity shall provide OGS with the name of the vendor or grantee and the date of the termination. OGS shall post a list of the non-responsibility terminations on the OGS public website. Each posted termination shall remain on the list for five years or until OGS receives notice of a finding by a court of competent jurisdiction that the non-responsibility determination was in error.

If you have any questions about the implementation of this memorandum within your agency or authority, you should contact the Assistant Counsel to the Governor assigned to your agency or authority. For general guidance, you may want to review a presentation that OGS offered on performing vendor responsibility reviews at the May 2010 State Purchasing Forum. You will find the presentation materials (a Powerpoint presentation and handouts) posted on the OGS website at <http://www.ogs.ny.gov/purchase/snt/overviews/SPFpps.asp>. Scroll down the webpage to the bullet labeled “Contract Administration / Vendor Responsibility.” In addition, questions may be sent to OGS at: [LegalServicesWeb@ogs.ny.gov](mailto:LegalServicesWeb@ogs.ny.gov). Finally, OGS will be conducting vendor responsibility training at the May 15-16, 2013 State Purchasing Forum to be held at the Empire State Plaza in Albany.

Attachment

cc: Mylan Denerstein

All Agency and Authority General Counsels

All Assistant Counsels to the Governor

All Deputy and Assistant Secretaries to the Governor

## ATTACHMENT – MODEL LANGUAGE

1. General Responsibility Language

The Contractor shall at all times during the Contract term remain responsible. The Contractor agrees, if requested by [the Head of State Agency/Authority] or his or her designee, to present evidence of its continuing legal authority to do business in New York State, integrity, experience, ability, prior performance, and organizational and financial capacity.

2. Suspension of Work (for Non-Responsibility)

The [Head of State Agency/Authority] or his or her designee, in his or her sole discretion, reserves the right to suspend any or all activities under this Contract, at any time, when he or she discovers information that calls into question the responsibility of the Contractor. In the event of such suspension, the Contractor will be given written notice outlining the particulars of such suspension. Upon issuance of such notice, the Contractor must comply with the terms of the suspension order. Contract activity may resume at such time as the [Head of State Agency/Authority] or his or her designee issues a written notice authorizing a resumption of performance under the Contract.

3. Termination (for Non-Responsibility)

Upon written notice to the Contractor, and a reasonable opportunity to be heard with appropriate [Agency/Authority] officials or staff, the Contract may be terminated by [Head of State Agency/Authority] or his or her designee at the Contractor's expense where the Contractor is determined by the [Head of State Agency/Authority] or his or her designee to be non-responsible. In such event, the [Head of State Agency/Authority] or his or her designee may complete the contractual requirements in any manner he or she may deem advisable and pursue available legal or equitable remedies for breach.