



Office of  
General Services

# GOVBUY PROCUREMENT CONFERENCE

November 21-22, 2024

Empire State Plaza Convention Center, Albany, NY



NEW  
YORK  
STATE

Office of  
General Services

# NYS Contract Terms and Conditions

**GOVBUY** PROCUREMENT  
CONFERENCE





# NYS Contract Terms and Conditions

Meeting Room 2 | 2:00 PM – 3:00 PM

## Presenter

Tyler Feane  
Supervising Attorney  
NYS Office of General Services

# Class Description

This session provides an overview of the structure and scope of New York State Contract Terms and Conditions. More specifically, it looks at the difference between statutory and non-statutory terms and conditions (Appendix A and B), how these are incorporated into OGS contracts, what is negotiable and what is not, and how and when vendors can provide feedback on terms and conditions without negatively impacting the procurement process.



# What are terms and conditions?

- Set of legal requirements that define the legal parameters of the contract and establish the rights and responsibilities of both parties to the contract
- Some terms and conditions are required by law
- Others may be required by agency policy, executive order, control agency requirements, federal funding requirements, etc.
- Ts and Cs legally bind both parties



# Why do we need terms and conditions?

- To protect the interests of the State and its taxpayers in the execution and performance of the contract
- By clearly setting out the Ts and Cs in the contract, parties reduce the risk of miscommunication or disagreement later on
- Avoid alternative understandings and expectations in the performance of the contract
- Risk to both parties is minimized by having clear Ts and Cs



# How do terms and conditions get included in State contracts?

- The State agency or other public entity often includes their standard terms and conditions as a part of the solicitation to inform interested bidders of the terms by which they will be bound once the contract is awarded.
- Sometimes, an actual draft contract may be included in the solicitation as an attachment or exhibit
- Solicitations may often say that by submitting a bid, a bidder is indicating its acceptance of the terms and conditions which would form the basis of the contract
- As a part of the response, the bidder may be permitted to submit exceptions to the State agency or public entity's terms and conditions or provide terms and conditions of their own for consideration
- Oftentimes, a bidder's corporate terms and conditions are in direct conflict with the State agency's or public entity's terms.



# What terms and conditions does OGS use?

Appendix A (Standard Clauses for New York State Contracts) June 2023

- 1. Executory Clause
- 2. Non-Assignment Clause
- 3. Comptroller's Approval
- 4. Workers' Compensation Benefits
- 5. Non-Discrimination Requirements
- 6. Wage and Hours Provisions
- 7. Non-Collusive Bidding Certification
- 8. International Boycott Prohibition
- 9. Set-Off Rights
- 10. Records
- 11. Identifying Information and Privacy Notification
- 12. Equal Employment Opportunities for Minorities and Women
- 13. Conflicting Terms
- 14. Governing Law
- 15. Late Payment
- 16. No Arbitration
- 17. Service of Process
- 18. Prohibition on Purchase of Tropical Hardwoods
- 19. MacBride Fair Employment Principles
- 20. Omnibus Procurement Act of 1992
- 21. Reciprocity and Sanctions Provision
- 22. Compliance with Breach Notification and Data Security Laws
- 23. Compliance with Consultant Disclosure Law
- 24. Procurement Lobbying
- 25. Sales Tax Certification
- 26. Iran Divestment Act
- 27. Admissibility of Contract





# Appendix B – General Specifications

- Bid Submission Terms
  - Bid Opening, Late Bids, Confidential/Trade Secret Materials, Taxes, etc.
- Bid Evaluation Terms
  - Tie Bids, Timeframe for Offers, Debriefings, Contract Publicity, etc.
- Legal Terms
  - Termination, Default, Remedies for Breach, Force Majeure, Indemnification, Limitation of Liability



# What happens if a bidder wants to take exceptions to the terms and conditions? Can they be negotiated?

- Maybe: Terms and conditions that are set forth in the law cannot be altered, but others may be modified, if done properly.
- It depends: Which terms, and when was the exception taken?



# Key: When was the exception taken?

- If issues are raised early, the State agency may still have an opportunity to make changes while maintaining level playing field, open competition, transparency, fairness to all bidders
- e.g., questions should be raised or proposed alternative language should be suggested during Q&A period
- At that time, State agency still has the opportunity to accept or reject, and all bidders can still bid accordingly



# When Exceptions are Raised Too Late

- Often, bidders will wait until they have been awarded a contract to raise questions or seek revisions of contract terms and conditions (they often don't even show their attorneys until then)
- This is dangerous and risky for the bidder: it may be too late
- Ex. Material terms cannot be negotiated post-award, due to level playing field issues; not fair to other bidders
- Very common with indemnification, limitation of liability, etc.



# Depending on contract type, may be other opportunities to negotiate terms

- OGS Backdrop Centralized Contracts with second tier competition (RFQ, mini-bid, task order, etc.)
- Some piggyback contracts structured similarly (Master Contract, Piggyback agreement)
- In some cases, additional terms and conditions may be permitted at the transaction level, within certain limitations.



# *Modification of Contract Terms clause*

- Permits additional or alternative terms and conditions, with certain restrictions
- “Carveouts”:
- “no additional or alternative term and condition shall be valid or binding on the Authorized User to the extent that such additional or alternative term and condition is less favorable to the Authorized User than, or conflicts with, any of the following provisions: All provisions of Appendix A (Standard Clauses for New York State Contracts); Appendix B sections 47 (Termination), 56 (Security), 61 (Indemnification), 62 (Indemnification Relating to Infringement), 63 (Limitation of Liability for Lot 1 - Software and Lot 2 - Hardware), 63A (Limitation of Liability for Lot 4 - Implementation) 63B (Limitation of Liability for Lot 3 - Cloud); the sections of the Contract entitled Contractor’s Obligation for Reseller Participation, Performance of Services, Contractor Responsibility for Subcontractors, Lot 3 – Cloud Specific Terms and Conditions; Security; Contractor Portable Devices; the Contract insurance requirements; and the NYS Net Pricing on the Contract.”



# Online Terms and Conditions

- We often find that Contractors have their own standard terms and conditions posted online or via mobile app with “click-through” acceptance
- This can be problematic when Contractor’s terms and conditions conflict with the terms and conditions included in the Contract (e.g., Governing Law, Jurisdiction, Venue clauses)
- Ability for Contractor to make unilateral changes to terms and conditions is also problematic for State agency contracts
- May need to create a static document and attach it to the contract, rather than allow for unilateral changes at any time
- Many states (not NY yet) have passed laws that automatically void certain online terms and conditions



# Best Practices/Tips

## State agency/Public entity

- Include terms and conditions in solicitation document
- Identify terms that are non-negotiable
- Give clear instruction to bidders about how to propose exceptions or submit deviations
- Actually consider proposed exceptions when possible
- Don't just reject; try to explain & provide reasoning

## Bidders/Contractors

- Raise issues and concerns early/ during Q&A period
- Involve attorneys during solicitation phase
- Don't wait for contract award to start reviewing terms
- Take advantage of other opportunities to incorporate terms at the transaction level
- Understand State agencies/public entities are not private companies







Office of  
General Services

# GOVBUY PROCUREMENT CONFERENCE

Questions?

MEETING ROOM 2 | 2:00 PM – 3:00 PM

# NYS Contract Terms and Conditions