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General Services

GOVBUY PROCUREMENT CONFERENCE

November 21-22, 2024

Empire State Plaza Convention Center, Albany, NY



OGS IT Umbrella Manufacturer and Distributor Contracts

Nov. 21, 2024 | 12:00 PM – 1:15 PM

PANELISTS

Joseph Better, Assistant Director, OGS
Kylesha Davis, Assistant Director, OGS

SESSION TOPICS

Overview of Umbrella contracts
Changes in the Manufacturer contract
(deep dive)



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Umbrella Manufacturer and Distributor Contracts Overview

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Umbrella Manufacturer and Distributor Contracts

- These contracts are used to obtain IT products from the Manufacturer or one of their designated resellers for the contract, or from the Distributor in cases where the items are not available from the Manufacturer.
 - Manufacturer Umbrella – hardware, software, cloud and implementation services
 - Distributor Umbrella – only hardware and software (no cloud)



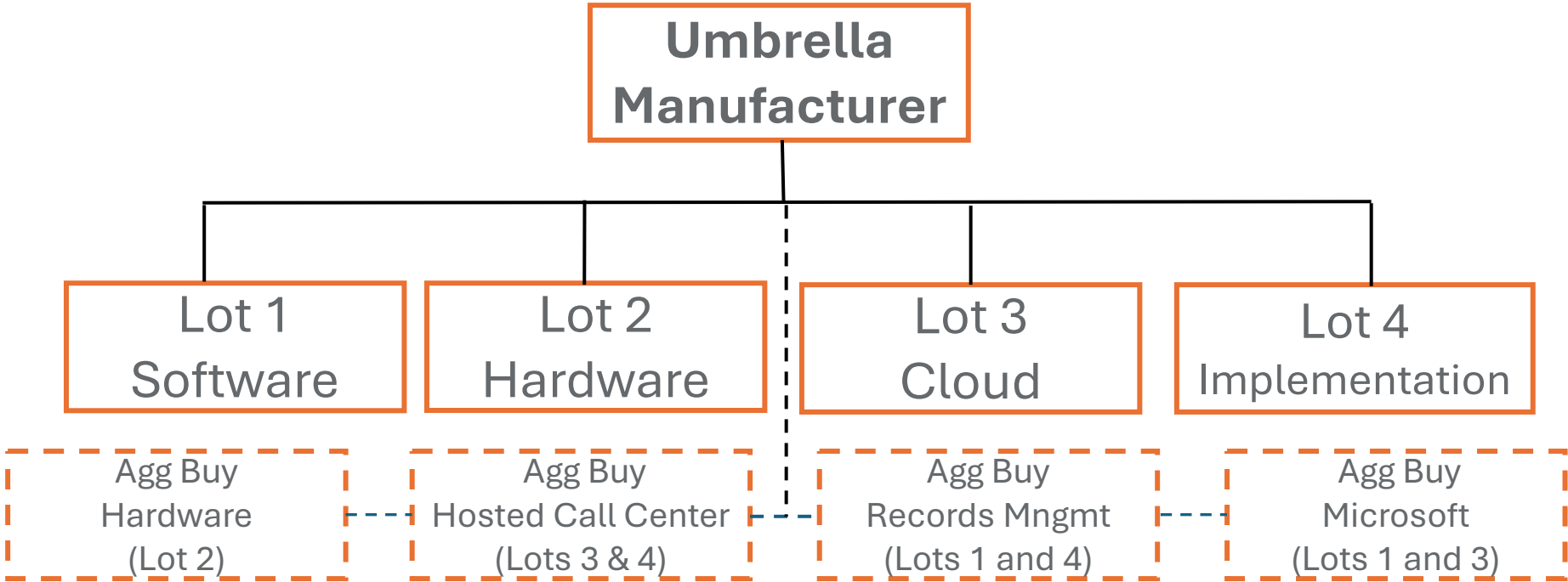
Umbrella Manufacturer and Distributor Contracts

	Manufacturer Umbrella	Distributor Umbrella
Vendor Type	Manufacturers and their Resellers	Distributors only
Vendor Pool	212 Manufacturers/1000+ Resellers	4 Distributors (infinite manufacturers)
Lots/Products	4 Lots - Hardware, Software, Cloud, Implementation	2 Lots – Hardware, Software, Related Services (NO CLOUD!)
Pricing Model	Discount from List	Cost-plus
Purchasing Model	Mini-Bid Required	Mini-Bid Required
Purchasing Benefits	A single transaction can be made within any of the Lots individually or across multiple Lots	A single transaction can be made within each Lot or across both Lots



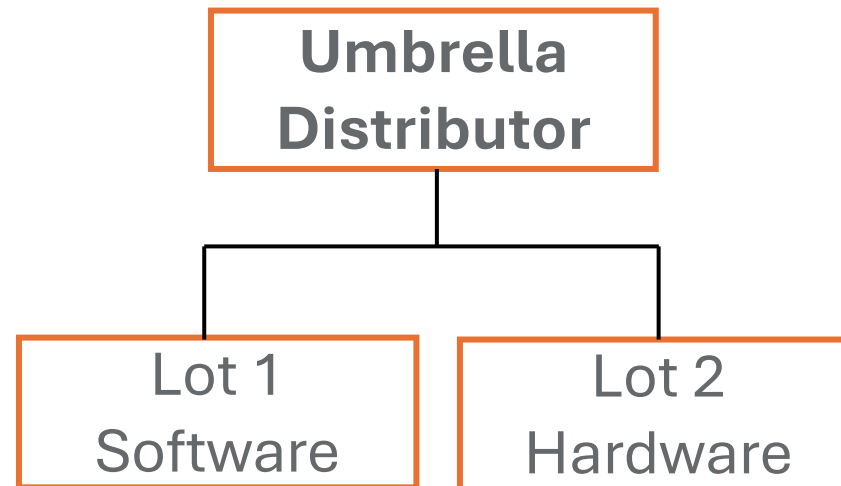
Umbrella Manufacture Structure

The contract is divided into lots based on Product type



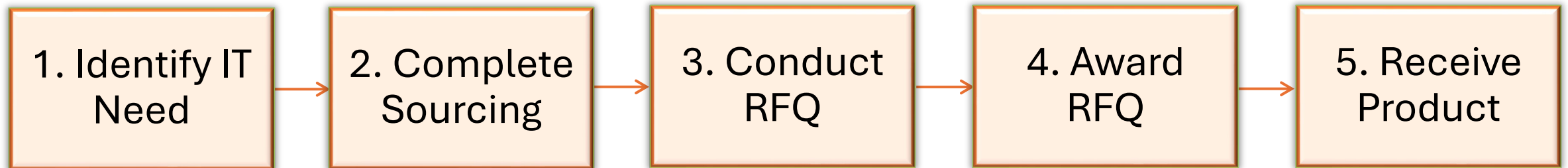
Umbrella Distributor Structure

The contract is divided into lots based on Product type



Manufacturer & Distributor Process Overview

The process is similar with both contracts



Umbrella Considerations for Success

- Read the How to Use
- Use the Templates
- Clearly define technology needs
- When in doubt, reach out





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Changes in the Manufacturer Contract

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Additional or Alternate Terms and Conditions



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Current Status and Recommended Process



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Additional or Alternate Terms and Conditions

- Appendix B, *Modification of Contract Terms...* (clause 28) allows contractors to propose additional or alternate terms and conditions (T&Cs)
- Certain “carved out” provisions of the contract cannot be waived or altered by the additional or alternate T&Cs
 - For example, Appendix A
- Contractors cannot condition their RFQ on the AU accepting their vendor T&Cs



Additional or Alternate Terms and Conditions (cont.)

Action	Example
The contractor proposes specific additional or alternate T&Cs referencing the sections and language to change using the RFQ Deviations template	“Section 1.2.3 defines data as [insert definition]. Contractor X is proposing to replace this definition [insert proposed definition].”
The contractor explains why the additional or alternate T&Cs result in a transaction that is overall more favorable to the AU	“Section 1.2.3 requires Products to meet Standard X. Standard X doesn’t apply to our Products but we exceed this standard. “
The AU reviews contractor’s proposed additional or alternate T&Cs and explanation, and then determines if this results in an overall more favorable transaction for the AU	If the contractor proposed to shorten the acceptance testing period but grant the AU better pricing and a longer warranty, the AU could determine this results in a transaction that is overall more favorable to them
The AU notifies the contractor in writing that it approves the additional or alternate T&Cs (or the AU may either reject or require more information or explanation	The AU RFQ states “Section 1.2.3 of the Contract is revised by changing the definition of Data to be...”



OGS Recommended Approach

- When an AU is limiting its RFQ to one contractor, the AU and the contractor should agree to the additional or alternate T&Cs before the AU issues the RFQ
- The contractor and reseller are bound by these previously-agreed upon additional or alternate T&Cs incorporated in the RFQ
- Please follow the flow chart on the last page of Appendix K, Authorized User How to Use:
https://online.ogs.ny.gov/purchase/snt/awardnotes/7360022802HowToUse_PRB02.pdf



Contractor Recommended Actions

- Contractors:
 - Should not include links or standard vendor paper
 - Should not include provisions addressed in the carve outs
 - Should demonstrate to the AU that the additional or alternate T&Cs result in a more favorable transaction for the AU





Future State Additional or Alternate Terms and Conditions



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New Process Extension Amendment in 2025

- AU Agreements cannot include Less Advantageous Terms and Conditions.
- Contractor cannot attempt to offer some More Advantageous Terms and Conditions and some Less Advantageous Terms and Conditions and use this as a justification for the Less Advantageous Terms and Conditions.
- Contractor may still offer More Advantageous Terms and Conditions only.
- Contractors can still include their Commercial Supplier Documents (e.g. SLAs), but any Less Advantageous Terms and Conditions are not binding on the AU.
- AUs will still need to review Contractor's technical terms for technical compliance with the Contract.
- AUs with RFQs limited to one Contractor with Five or More Resellers must work with the Contractor to develop an AUA before the RFQ is issued.



Commercial Supplier Documents

- Contractor may include, as part of an AU Agreement or in response to, its Commercial Supplier Documents such as Service Level Agreements (SLAs), Security Documents, licensing documents, etc.
- These documents include Technical terms and conditions that establish a performance standard on the Contract.
- Any Less Advantageous Terms and Conditions in these Commercial Supplier Agreements will not be binding against the Contract, so no legal should be needed.



Commercial Supplier Documents (Cont.)

- Example:

Contractor ACME Tech Mfr. Has 5 plus Resellers in Lot 3 and Includes its SLA as part of the AU Agreement to acquire Cloud Licenses. The SLA includes a Warranty Provision that is a Less Advantageous Term and Condition than the Contract. The Warranty Provision in the SLA is not binding against the Contractor as it is a Less Advantageous Term and Condition.



Technical Terms

- Contractor must demonstrate it meets the technical requirements of the Contract (for example encryption) and any AU technical requirements with its Technical Terms. Technical Terms are part of Contractor's Commercial Supplier Documents.
- As with all other Commercial Supplier Documents, any Less Advantageous Terms and Conditions in the Technical Terms are not binding on the AU.
- AUs cannot decline to review these or refuse to accept Technical Terms unless the AU determines these don't meet technical specifications.



Technical Terms (Cont.)

- Example:

Contractor Fast Cloud has 6 resellers for Lots 3 and 4. Great Teams School District reaches out to Fast Cloud to set up an Authorized User Agreement prior to issuing an RFQ. As part of this, Fast Cloud provides its Technical Terms. Great Teams reviews these and determines that Fast Cloud meets all contract and Authorized User cybersecurity requirements. This information is included in the resulting Authorized user Agreement.





Cloud Skus and Meeting the Definition of a Cloud Manufacturer



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Definition of Manufacturer – Cloud Solutions

- An organization or Business Entity that:
 1. Sells its own Proprietary Cloud Solution; or
 2. Assembles a package of Products or Services into its own Proprietary Product to create a Cloud Solution. This Product may include the services of one or more organizations or Business Entities that directly produce and/or provide components of the package (Cloud Package).

The Cloud Solution, must be branded, supported, and maintained by the entity for the life of the transaction.



Additional Requirements of a Cloud Solution

- Cloud Solutions must not include Customization Services, Custom Configuration, Custom Implementation, Custom Training, Consulting, etc.
- Cloud Solutions must be a Commercially Available Product.
- Cloud Solution must conform to the Cloud Solution Manufacturer's specifications, Documentation, performance standards (including applicable license duration, warranties, guarantees, Service Level Agreements, service commitments, and credits).



Cloud Solution Package

- The Contractor must assemble the third-party manufacturer components into its Proprietary Product.
- The resulting Cloud Solution Package must be branded, supported, and maintained by the Contractor.
- The Cloud Solution Package must be a Commercially Available Product.
- The components must not be assembled using Lot 4 Implementation Services.



Cloud Solution Package (Cont.)

Example:

ACME Cloud has developed a Product that incorporates some of Strong Fortress, Inc.'s (Strong Fortress) Security Features. ACME has embedded Strong Fortress' Code into its ACME Great Cloud Product so that the Strong Fortress Code is already integrated with ACME's. ACME (or its resellers do not need to use Implementation Services to integrate their offering with Strong Fortress' embedded code.



Prohibited Actions For Cloud Manufacturers

- Passing through only Third-Party Cloud Products and/or Performing Implementation of Third-Party Cloud Products
- Including a small Cloud offering Manufactured by the Contractor that has not been previously assembled into the Contractor's Proprietary Product
- The Contractor must not use Lot 4 Implementation Services to Implement Third Party Cloud Products



OGS Future Reviews for Cloud Solutions Packages

#	Requirement	Mandatory Information
1.	Contractor must be the Manufacturer of a Proprietary Cloud Product that comprises the Cloud Solution	<p>Manufacturer's specifications, Documentation, and/or performance standards (including applicable license duration, warranties, guarantees, Service Level Agreements, service commitments, and credits) published by the Contractor that:</p> <ul style="list-style-type: none"> • Demonstrate the Contractor manufactured the Product, and • Includes or references Contractor's Trademarks, patents, Copyrights, trade secrets or other protected Intellectual Property and confirm that these apply to the Contractor's Product
2.	Contractor's must have assembled the components into its Proprietary Product to create a COTS Product, not an Implementation.	<p>Manufacturer's specifications, Documentation, and/or performance standards (including applicable license duration, warranties, guarantees, Service Level Agreements, service commitments, and credits) published by the Contractor that:</p> <ul style="list-style-type: none"> • Demonstrate the Contractor has assembled these third-party Manufacturer's Products or services into its Proprietary Product without performing any Implementation Services such as Custom Configuration, and • The Cloud Solution Package consisting of the Third-Party manufacturer's Products assembled into the Contractor's Proprietary Product is a Commercially available Product available via Contractor's normal marketing channels.
3	The Contractor must brand, support, and maintain the Cloud Solution for the life of the transaction.	<p>Manufacturer's specifications, Documentation, and/or performance standards (including applicable license duration, warranties, guarantees, Service Level Agreements, service commitments, and credits) published by the Contractor that:</p> <ul style="list-style-type: none"> • Are on the Contractor's vendor paper • Demonstrate the Contractor will be supporting the Cloud Solution.



OGS Future Reviews for Cloud Solutions Packages (Cont.)

- OGS will be posting the previous chart in an updated version of Appendix C, Contract Modification Procedures:

https://online.ogs.ny.gov/purchase/snt/awardnotes/7360022802AppendixC_PRB02.pdf

- OGS will be reviewing and not approving proposed Skus if the Contractor doesn't provide the aforementioned required information to demonstrate they are the Manufacturer of the Cloud Solutions Package.





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Questions?

MEETING ROOM 1 | 12:00 PM – 1:15 PM

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