New York State Procurement Council Bulletin:

Discretionary Purchasing Guidelines

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Section I: Introduction

The purpose of this bulletin is to provide guidelines for the use of the discretionary purchasing authority granted by the New York State Finance Law.

This bulletin applies to all State agencies, boards, commissions, offices and institutions. It generally applies to purchases up to $50,000 (or up to $1,500,000 in certain instances, as described below) for commodities, services or technology not available in the form, function and utility that meet an Agency's needs from Preferred Sources or an Office of General Services (OGS) Centralized Contract.

Agencies shall consider the reasonably expected aggregate amount of all purchases of the same commodities, services or technology to be made within a twelve (12) month period commencing on the date of purchase when determining which procurement methodology to use. Aggregate purchases of the same commodities, services or technology within a twelve (12) month period are deemed a single transaction. When an Agency can reasonably anticipate repeat purchases are necessary, the Agency should select the appropriate procurement process to cover such aggregate needs, which may include a competitive bid. Purchases of commodities, services or technology shall not be artificially divided for the purpose of satisfying the discretionary buying thresholds. A change to or renewal of a discretionary purchase shall 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 twelve-month period commencing on the date of the first purchase to an amount greater than the discretionary buying threshold amount.

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 SUNY and 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.

Section II: Discretionary Buying Thresholds

Under State Finance Law § 163, 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 and $85,000 for OGS agency-specific contracts and OGS Business Services Center (BSC) contracts made on behalf of customer agencies (NOTE: There is also a $125,000 threshold for SUNY, however this does not fall under SFL 163).

Higher discretionary buying thresholds apply to purchases from New York State small businesses ($500,000), certified minority- and/or women-owned business enterprises (MWBEs) ($1,500,000), certified service-disabled veteran-owned businesses (SDVOBs) ($1,500,000), and purchases of recycled or remanufactured commodities or technology ($500,000); and purchases of food, including milk and milk products grown, produced or harvested in New York State (NYS Foods) ($200,000), or animal or plant fiber products grown, produced, harvested or processed in NYS as well as textile products manufactured from animal or plant fiber grown or produced predominantly in New York State (NYS Textiles) for which the threshold is $200,000.

Purchases up to the discretionary buying threshold are not subject to the formal competitive bidding requirements set forth in New York State Finance Law § 163 but are subject to the advertising requirements set forth in NYS 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 MWBEs, SDVOBs, and/or to New York State small businesses.

State Finance Law § 112(2)(a) generally requires prior approval by the NYS Comptroller for contracts exceeding $50,000 except for OGS agency-specific contracts or BSC contracts made on behalf of customer agencies, for which approval by the Comptroller is required if the contract exceeds $85,000. For OGS centralized contracts, prior approval by the Comptroller is required if the contract exceeds $125,000. For purchase orders or other procurement transactions issued under OGS centralized contracts, prior approval by the Comptroller is required when such purchase orders or transactions exceed $200,000. Additionally, prior approval by the Comptroller is required at $75,000 for SUNY contracts for goods and services and SUNY construction contracts; and $150,000 for SUNY healthcare facility contracts.

For purchases up to the discretionary buying threshold, each State 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 more must be advertised in the New York State Contract Reporter per Economic Development Law § 141(3). Quarterly NYS Contract Reporter ads are required for purchases between $5,000 and $50,000. (SUNY and CUNY have different thresholds.) See NYS Procurement Bulletin – Contract Reporter Advertising Thresholds and Notice Requirements for additional information.

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 grown, produced, or harvested in NYS, where such commodities exceed $50,000 in value, State agencies must advertise the discretionary purchase on the agency's 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.

Section III: "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 NYS Procurement Bulletin – Preferred Source Guidelines). Secondly, the Agency must review OGS Centralized Commodities Contracts. Thirdly, the Agency must review OGS Centralized Services 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 commodity, service or technology is available to meet the Agency's needs.

If the above reviews do not meet the Agency's needs, the following steps may apply:

A. 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, or
- OGS or Less, where applicable.

Document in the Procurement Record the basis for the conclusion that the price is reasonable. "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 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.

B. Purchases over $50,000:
In addition to the above, Contract Reporter advertisement documentation is required.

C. Purchases up to $200,000 or $1,500,000:
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 are grown, produced or harvested in New York State; for purchases up to $200,000 for New York State (NYS Textiles); for purchases up to $500,000 from New York State Small Businesses; for purchases up to $500,000 for recycled or remanufactured products; and for purchases up to $1,500,000 from New York State certified MWBEs or SDVOBs. To identify certified MWBEs, an Agency may consult the Department of Economic Development's directory of certified minority and women-owned business enterprises. To identify certified SDVOBs, an Agency may review the SDVOB Directory available at: https://sdves.ogs.ny.gov/business-search.

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, 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 concern" or "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 less than three quotes are received, the contracting agency will have to document how it determined that the cost is reasonable.

Section IV: 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 the applicable discretionary threshold amount.

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, 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 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.

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Section V: Purchasing Guidelines for Fresh Eggs, Fruits, and Vegetables

An Agency may purchase within a 15-day period, without formal competitive bidding, up to $10,000 for each of the categories of fresh eggs, fresh fruit, and fresh vegetables from a NYS grower, NYS producer, or NYS association of growers and producers (9 NYCRR § 250.2(i)). An Agency must determine the price is reasonable and comparable to current market prices.

Section VI: 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.

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