

**Proposal to the New York State Procurement Council
by the Office of the State Comptroller**

To: Procurement Council Members **Date:** October 7, 2025

From: Melody Goetz
 Seconded by Jaclyn Brillling
 and Winifred Schiff

Subject: Motions to Ensure Compliance with
 State Finance Law Section 162 and the
 Preferred Source Guidelines with respect to
 Preferred Source Price Reviews Conducted
 by the New York State Office of General
 Services

The Office of the State Comptroller (“OSC”) proposes that the New York State Procurement Council (“Council”) (i) direct the Office of General Services (“OGS”) to immediately rescind its policy, dated May 28, 2025, titled “Preferred Source Checklist & Guide to Prevailing Markets” (“OGS Policy”), (ii) further direct OGS to adhere to the requirements of State Finance Law (“SFL”) § 162(6) and the definition of “prevailing market price” as set forth in the New York State Procurement Council Bulletin: Preferred Source Guidelines, dated February 2024, revised February 2025 (“Preferred Source Guidelines”), and (iii) ensure, through additional actions as necessary including but not limited to forming a working group and/or supplementing the Preferred Source Guidelines, that the method used to determine “prevailing market price” for purposes of preferred source price review conducted by OGS pursuant to SFL § 162(6) conforms to the requirements of SFL and the definition of “prevailing market price” as set forth in the Preferred Source Guidelines. In accordance with Procurement Council Rule III(b), we provide the following regarding this proposal:

- 1) an executive summary of the proposal, including specific actions OSC is requesting the Council vote on via motion at the soonest available Council meeting;
- 2) justification, explanation, and documents in support of the proposal / motions; and
- 3) the name and contact information of the Council member proposing the action and the name and contact information of two Council members who have agreed to second the proposal for purposes of consideration by the Council.

Executive Summary

I. Proposal

By implementing the OGS Policy in May 2025, OGS not only acted outside the scope of its authority and trespassed upon the statutory authority of the Council, as expressed in the Preferred Source Guidelines, but further developed requirements contrary to governing law, namely SFL § 162(6).

Pursuant to SFL § 161, among other things, the Council has the authority to “[e]stablish and, from time to time, amend guidelines concerning state procurement and provide for the appropriate distribution and dissemination of such guidelines and other information concerning all matters relating to procurement of products, construction items or services for state agencies.” Pursuant to the authority vested in the Council pursuant to SFL § 161 to establish and amend guidelines concerning state procurement, in February 2024, the Council issued the Preferred Source Guidelines which specifically provide that “[p]revailing market price means the price at which a vendor of the same or equivalent commodity or service offers to sell such commodity or service under similar terms in the same market” (Preferred Source Guidelines, at p. 5). These guidelines are consistent with SFL § 162(6) which provides that “it shall be the duty of the [OGS] commissioner to determine, and from time to time review, the prices of all commodities and to approve the price of all services provided by preferred sources . . . [i]n determining and revising the prices of such commodities or services, consideration shall be given to the reasonable costs of labor, materials and overhead necessarily incurred by such preferred sources under efficient methods of procurement, production, performance and administration; however, the prices of such products and services shall be as close to prevailing market price as practicable, but in no event greater than fifteen percent above the prevailing market prices for the same or equivalent commodities or services” (SFL § 162(6)(a), (b)). Despite the language of the statute and Preferred Source Guidelines, the OGS Policy instead utilizes the “lowest price same or equivalent service or commodity” to determine “prevailing market price,” starting with a review of lowest pricing offered on OGS Centralized Contracts, in contradiction of SFL and the Preferred Source Guidelines.

Due to the detrimental impact to the preferred source program that will result from this misapplication of SFL § 162(6) in contravention of the express purpose of that law, OSC proposes that a Council meeting be convened to discuss this proposal as soon as possible consistent with Procurement Council Rule III(b) which requires a written proposal be provided 14 days in advance of the Council meeting, but in any event no later than the next Council meeting currently scheduled for November 19, 2025. OSC further proposes that the Procurement Council direct OGS to rescind the unauthorized OGS Policy, effective immediately, and further direct OGS to conduct preferred source price reviews in accordance with SFL § 162(6) and the Preferred Source Guidelines.

OSC proposes that the Council take steps, through additional actions as necessary including but not limited to forming a working group and/or supplementing the Preferred Source Guidelines, to ensure that the method used to determine “prevailing market price” in the context of SFL § 162(6) conforms to the requirements of SFL and the definition of “prevailing market price” as set forth in the Preferred Source Guidelines.

OSC further proposes that any denials of preferred source applications acted on by OGS pursuant to their standing authority to review and approve preferred source applications which meet certain criteria pursuant to the July 14, 2004 Resolution of the Council (“2004 Resolution”), be presented to the Council

at the next scheduled meeting after the denial, in the same manner as approvals are currently presented to the Council pursuant to the 2004 Resolution.¹

II. Motions Before the Council

In accordance with the proposal detailed herein, as supported by the justification, explanation, and supporting documents provided, we move the Council to:

- 1) Convene a meeting to hear the proposal set forth herein, as soon as possible in accordance with the notice requirements set forth in Procurement Council Rule III(b) which requires a written proposal be provided 14 days in advance of the Council meeting, but in any event no later than the next Council meeting currently scheduled for November 19, 2025;
- 2) Direct OGS to rescind the OGS Policy, effective immediately, as contrary to SFL § 162(6) and outside the scope of OGS' authority as the Procurement Council has acted in this area pursuant to its authority under SFL § 161 by issuing the Preferred Source Guidelines;
- 3) Direct OGS, when conducting preferred source price reviews, to adhere to (i) the requirements of SFL § 162(6), including consideration of the reasonable costs of labor, materials and overhead necessarily incurred by preferred sources under efficient methods of procurement, production, performance and administration, and a comparison to prevailing market price, and (ii) the definition of "prevailing market price" as set forth in the Preferred Source Guidelines;
- 4) Ensure that the method used to determine "prevailing market price" for purposes of preferred source price review conducted by OGS pursuant to SFL § 162(6) conforms to the requirements of SFL and the definition of "prevailing market price" as set forth in the Preferred Source Guidelines, by acting as necessary, including but not limited to forming a working group and/or supplementing the Preferred Source Guidelines;
- 5) Review the 2004 Resolution, and, at a minimum, amend the 2004 Resolution to require that, in addition to approvals, any denials of preferred source applications acted on by OGS pursuant to their standing authority to review and approve preferred source applications which meet certain criteria be presented to the Council at the next scheduled meeting after the denial.

¹ The 2004 Resolution provides, "OGS may approve preferred source applications which meet these criteria: (i) the preferred source price is within 10% of prevailing market, (ii) projected annual sales volume is less than \$500,000, and (iii) an application review by Empire State Development does not identify objections from the business community." The 2004 Resolution further provides that "OGS will notify the Council of action taken with respect to applications **approved** pursuant to this delegation at the next regularly scheduled meeting of the Procurement Council" (emphasis added).

Justification, Explanation, and Documents in Support of the Proposal / Motions

I. OGS Impermissibly Contravened the New York State Preferred Source Guidelines with Issuance of its Policy on Preferred Source Price Review

Pursuant to SFL § 161, among other things, the Council has the authority to “[e]stablish and, from time to time, amend guidelines concerning state procurement and provide for the appropriate distribution and dissemination of such guidelines and other information concerning all matters relating to procurement of products, construction items or services for state agencies.” The Council exercised this statutory authority in relation to preferred source procurement in February, 2024 by promulgating the Preferred Source Guidelines. In relevant part, the Preferred Source Guidelines provide, “[p]revailing market price means the price at which a vendor of the same or equivalent commodity or service offers to sell such commodity or service under similar terms in the same market” (Preferred Source Guidelines, at p. 5).

The Preferred Source Guidelines are consistent with SFL § 162(6), which provides,

it shall be the duty of the [OGS] commissioner to determine, and from time to time review, the prices of all commodities and to approve the price of all services provided by preferred sources . . . [i]n determining and revising the prices of such commodities or services, consideration shall be given to the reasonable costs of labor, materials and overhead necessarily incurred by such preferred sources under efficient methods of procurement, production, performance and administration; however, the **prices of such products and services shall be as close to prevailing market price as practicable, but in no event greater than fifteen percent above the prevailing market prices for the same or equivalent commodities or services**

(SFL § 162(6)(a), (b) (emphasis added)).

As the statutory authority to establish guidelines concerning state procurement was vested with the Procurement Council, and the Council exercised same in establishing the Preferred Source Guidelines, OGS must abide by and may not substantively deviate from the guidelines.

Nevertheless, OGS acted outside of its statutory authority in establishing guidance that is inconsistent with the Preferred Source Guidelines (and the State Finance Law as discussed below), through issuance of the OGS Policy.² Namely, the OGS Policy is inconsistent on its face with the Preferred Source Guidelines in the way prevailing market price is determined. Specifically, the OGS Policy adds the following language that radically shifts the cost calculation: “The **lowest price same or equivalent service or commodity** will be used to set Prevailing Market Price utilizing the order of preference of A through H” (emphasis added).³ Notably, “NYS OGS Centralized Contracts” are listed as A in the order of preference.

² This Office contacted Dhanraj Singh, the Chief Procurement Officer at OGS as well as the Chair of the Council, via letter, dated June 23, 2025, requesting additional information regarding the OGS Policy, specifically asking for “the justification, data and/or information used to inform the issuance of the policy,” why the OGS Policy was not brought before the Council, “the analysis that was conducted to determine if, and how, this change may impact the ability of businesses to continue employing to same extent, individuals with disabilities,” and “the overall impact this change will have on the disabled individuals who participate in the Preferred Source Program” (Letter, dated June 23, 2025, from Melody Goetz to Dhanraj Singh (“June 2025 Goetz Letter”). Singh responded via letter, dated July 28, 2025 (“July 2025 Singh Letter”); however, such response failed to satisfactorily address these requests.

³ OGS indicates that the OGS Policy did not recently change, and it is instead a longstanding policy in effect since at least 2009, as evidenced by a 2009 letter from OGS to NYSID setting forth the policy (July 2025 Singh Letter, at pp.

OGS uses the “lowest price same or equivalent service or commodity” starting with OGS Centralized Contracts; whereas the Preferred Source Guidelines, consistent with the applicable statute, require the “price at which a vendor of the same or equivalent commodity or service offers to sell such commodity or service under similar terms in the same market.” These two standards are vastly different and shift the playing field for preferred source vendors to their detriment and stated legislative intent of the purpose of the program.

Accordingly, OGS acted outside of its authority in issuing a policy regarding prevailing market price inconsistent with the Preferred Source Guidelines approved by the Council.⁴ To allow the OGS Policy to remain in effect would erode the statutory role of the Procurement Council.

Notwithstanding the fact that OGS lacked authority to independently issue the OGS Policy, even if the OGS Policy had been presented to the Council for action, the Council could not have adopted such a policy as it is contrary to law, as more fully set forth below.

II. The OGS Policy is Inconsistent with Statutory Directives Regarding Price Setting for Preferred Sources and Undermines the Policy Objectives of the Preferred Source Program

The OGS Policy contravenes the clear language of the State Finance Law by substituting a review of preferred source pricing against the “lowest price same or equivalent service or commodity” in lieu of the less restrictive actual statutory requirements. Namely, as stated above, the statute provides that “[i]n determining and revising the prices of such commodities or services, consideration shall be given to the reasonable costs of labor, materials and overhead necessarily incurred by such preferred sources under efficient methods of procurement, production, performance and administration; however, the prices of such products and services shall be as close to prevailing market price as practicable, but in no event greater than fifteen percent above the prevailing market prices for the same or equivalent commodities or services.” SFL § 162(6)(b). By price setting using the lowest price, rather than the statutory standard of “prevailing market price,” OGS is creating barriers to entry for preferred sources that do not exist in law and undermine the spirit of the statute.⁵

1-2; *see* Letter, dated August 11, 2009, from OGS to NYSID (“2009 OGS Letter”). This is irrelevant to the instant concerns because (i) whether the policy changed recently or not does not alter the defects in the policy that need to be addressed as a policy cannot contradict the law or other binding administrative action; (ii) there is no evidence that the Council ever voted on or approved the OGS policy - the letter from OGS to NYSID does not constitute notice to the Council; (iii) as mentioned, the OGS policy was not incorporated into the recent amendment to the Preferred Source Guidelines – arguably a time when OGS was required to / should have disclosed this policy to the Council; and (iv) the OGS Policy did in fact change in May 2025.

⁴ OGS posited that its Policy was not subject to Council review and approval because of its role pursuant to SFL § 162(6), which gives OGS the authority to review preferred source pricing (July 2025 Singh Letter, at p. 2). This statutory authority does not operate to usurp the Procurement Council’s authority to establish guidelines pursuant to SFL § 161 much less permit it to act in conflict with the State Finance law.

⁵ “*Preferred source purchasing* . . . is a deliberate exception to the ‘lowest price’ standard that the Legislature adopted ‘To advance special social and economic goals’ . . . the application of a ‘low price’ analysis for a preferred source provider would be punitive and discriminatory and ignores the differences between a small New York based preferred source supplier that must, in many cases, modify their facilities, equipment, and workflows to accommodate individuals with disabilities to align with New York State employment and social goals vs. a traditional low bid/national vendor, cooperative contract” (March 2025 NYSID Letter, at pp. 3-4). On this note, several articles of correspondence were sent from representatives for the preferred source community to OGS and legislative representatives indicating the concern that the OGS Policy harms the preferred source program. *See* E-mail, dated May 30, 2025, from Ernest Dodge, President / CEO of JM Murray, a subcontractor to NYSID to Assemblymember

“Lowest price” (the OGS Policy standard) does not equate to “prevailing market price” (the SFL and Preferred Source Guidelines standard).⁶ SFL § 162 was expressly enacted “[t]o advance special social and economic goals” and to do so provided that procurement from preferred source providers “shall be exempted from the competitive procurement provisions of [SFL § 163] and other competitive procurement statutes” (SFL § 162(1)). Therefore, unlike competitive procurement statutes which require price competition and are generally awarded to the lowest priced responsible bidder, in furtherance of its intent to encourage procurement through preferred sources, SFL § 162 does not require competitive pricing. While exempting preferred sources generally from a lowest responsible bidder requirement, to ensure a measure of cost reasonableness, the statute requires that the price be no more than fifteen percent of the “prevailing market price.” Although “prevailing market price” is not specifically defined in this section, “fair market price” is defined earlier in that same section in relation to prices established by the commissioner of corrections and community supervision, as “the price at which a vendor of the same or similar product or service who is regularly engaged in the business of selling such product or service offers to sell such product or service under similar terms in the same market” (SFL § 162(5)(a)).⁷ It is contrary to accepted rules of statutory interpretation and illogical to maintain that a “fair market price” is based on general market conditions while “prevailing market price” is anchored to the lowest price available, especially via centralized contract. Indeed, a review of any dictionary definition of “prevailing” proves instructive, and undermines any linkage between “prevailing market price” and “lowest price” (*See, e.g.,* <https://www.britannica.com/dictionary/prevailing> (“usual, common, or popular”); <https://www.merriam-webster.com/thesaurus/prevailing> (“**as in conventional:** accepted, used, or practiced by most people”)).⁸ If “fair market price” reflects general market conditions, then certainly the “prevailing,” “usual,” or “common” market price reflects a price that is equal to or greater than fair market price. Pointedly, OGS centralized contracts are authorized under SFL § 163, which specifies the criteria used to determine whether to establish a centralized contract, including “the availability of a volume discount” and the “aggregate amount of public sales by potential vendors” (SFL §§ 163(3)(b)(i); (3)(b)(x); (4)(b)(iii)(B)). Accordingly, OGS centralized contracts reflect the lowest pricing based on Statewide volume sales, the potential for lower bids in order for a vendor to obtain the benefits of State contracts, and the State market as opposed to the entire market; OGS centralized contract pricing is not “prevailing,” “usual,” or “common.” Therefore, the OGS Policy of utilizing “lowest price” as the benchmark upon which preferred source pricing is assessed

Kelles and Senator Webb; Letter, dated June 2, 2025, from Procurement Council Members Winifred Schiff and Jaclyn A. Brilling to Dhanraj Singh; Letter, dated June 5, 2025, from Gregory J. Sorrentino, NYSID Board Member to Assemblymember McDonald; Letter, dated June 6, 2025, from Randi Rios-Castro, NYSID Board Member to Assemblymember Patrick J. Carroll; Letter, dated June 6, 2025, from Stanford J. Perry, NYSID Board Member to Assemblymember Ari Brown; Letter, dated June 12, 2025, from Patrick Bardsley, Chairman of the Board at NYSID to Assemblyman Daniel Norber.

⁶ The New York State Industries for the Disabled, Inc. (“NYSID”), a preferred source provider, in a letter sent to OGS by counsel, agreed with this position: “Although the State Finance Law and OGS regulations do not define ‘prevailing market price,’ those words have a well-known plain meaning . . . [of] ‘the most common or frequent’ . . . the term ‘prevailing market price’ plainly means the most frequent or predominant price charged for the commodity or service in the given market . . . It is basically a *mode, average* or other representative of typical prices available in the market . . . ‘Prevailing market price’ is defined by what is normal in the market, it is not defined by lowest price outliers, loss leader pricing, or products that distort pricing through volume commitments, cross subsidization and contract bundling” (Letter, dated March 20, 2025, from John Jay Bove, Esq. of The D’Amato Group, LLP on behalf of NYSID to OGS (“March 2025 NYSID Letter”), at pp. 2-3).

⁷ It is well-settled maxim of statutory construction that “[a] statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent.” McKinney’s Cons Laws of N.Y., Book 1, Statutes § 97.

⁸ “When a word used in a statute is not defined in the statute, dictionary definitions serve as “useful guideposts” in determining the word’s ‘ordinary’ and ‘commonly understood’ meaning” (*People v. Aleynikov*, 31 N.Y.3d 383, 397 (N.Y. 2018) (internal citations omitted)).

is inconsistent with statutory directives calling for a “prevailing market price” benchmark and must be rescinded.

Accordingly, the OGS Policy is inconsistent with the intent and purpose of the preferred source program as enacted by SFL § 162 and must be rescinded.

III. Attached Supporting Documentation

- 1) New York State Procurement Council Bulletin: Preferred Source Guidelines, dated February 2024, revised February 2025 (“Preferred Source Guidelines”)
- 2) OGS’ “Preferred Source Checklist & Guide to Prevailing Markets,” updated May 28, 2025 (“OGS Policy”)
- 3) July 14, 2004 Resolution of the Council (“2004 Resolution”)
- 4) Letter, dated June 23, 2025, from Melody Goetz to Dhanraj Singh (“June 2025 Goetz Letter”)
- 5) Letter, dated July 28, 2025 from Dhanraj Singh to Melody Goetz (“July 2025 Singh Letter”)
- 6) Letter, dated August 11, 2009, from OGS to NYSID (“2009 OGS Letter”)
- 7) Letter, dated March 20, 2025, from John Jay Bove, Esq. of The D’Amato Group, LLP on behalf of NYSID to OGS (“March 2025 NYSID Letter”)
- 8) Correspondence from representatives for the preferred source community to OGS and legislative representatives: E-mail, dated May 30, 2025, from Ernest Dodge, President / CEO of JM Murray, a subcontractor to NYSID to Assemblymember Kelles and Senator Webb; Letter, dated June 2, 2025, from Procurement Council Members Winifred Schiff and Jaclyn A. Brillling to Dhanraj Singh; Letter, dated June 5, 2025, from Gregory J. Sorrentino, NYSID Board Member to Assemblymember McDonald; Letter, dated June 6, 2025, from Randi Rios-Castro, NYSID Board Member to Assemblymember Patrick J. Carroll; Letter, dated June 6, 2025, from Stanford J. Perry, NYSID Board Member to Assemblymember Ari Brown; Letter, dated June 12, 2025, from Patrick Bardsley, Chairman of the Board at NYSID to Assemblyman Daniel Norber.

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