


*Ins and Outs
of State Procurement Procedures*

Practical Issues in Procuring Goods and Services

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TOPICS AND ISSUES

- Public Procurement Foundations
- “High Value” Contract Approval Procedure
- Cooperative Purchasing Group Contracts
- Prohibited Contracts due to Foreign Investments
- Vendor Requests for Modifications to Terms
- Non-compliant Vendor Proposals
- Safety Label Inspections
- Contract Negotiations
- Intellectual Property Ownership
- Sovereign Immunity & Required Contract Terms
- E-Procurement Fees
- Business Risk



Foundations of Public Procurement

- Competition
- Equal Protection
- Due Process



HIGH VALUE CONTRACTS

- **\$1 million or greater value,**
 - Purchase of goods and services
 - Over entire term, including potential renewals
- **Must be approved by P&C Contract Management Division prior to award**
 - Duty shifted from AG's designee
 - Some exemptions (UNC – university counsel, Treasurer's office for investment contracts)
- **Despite exemptions, ALL high value contracts require notice to P&C**



COOPERATIVE PURCHASING

- a/k/a **"competitive bidding group purchasing program"**
- Use requires P&C approval on a per transaction basis

Two Requirements:

- 1) The cooperative contract was established through competitive bidding
- 2) The price is "competitive" with alternative sources
 - Two "recent" quotes
 - Apples-to-apples comparison



IRAN DIVESTMENT and ISRAEL BOYCOTT

Iran Divestment Act: G.S. 147-86.59

- If on treasurer's list, ineligible to contract with State entity or political subdivision
- Certification by Vendor for each contract no longer required

Divestment from Companies Boycotting Israel: Session Law 2017-193 (G.S. 147-86.82)

- If on treasurer's list, ineligible to contract with State entity or political subdivision

Both Statutes

- Contract void
- Duty of compliance on agency



VENDOR MODIFICATIONS TO TERMS

- Vendor takes exceptions and submits alternative language
- Vendor submits a modified solicitation document with redlined edits
- Vendor submits its own standard Ts & Cs
- Vendor says that Proposal is subject to further negotiations
- Vendor says that Proposal is not a firm offer for acceptance and that a mutually acceptable contract must be negotiated



A LEVEL PLAYING FIELD SOLUTION

If Vendors have questions, issues, or exceptions regarding any term, condition, or other component within this RFP, those must be submitted as questions in accordance with the instructions in Section 2.4 PROPOSAL QUESTIONS. If the State determines that any changes will be made as a result of the questions asked, then such decisions will be communicated in the form of an RFP addendum. Other than through this process, the State rejects and will not be required to evaluate or consider any additional or modified terms and conditions submitted with Vendor's proposal. This applies to any language appearing in or attached to the document as part of the Vendor's proposal that purports to vary any terms and conditions or Vendors' instructions herein or to render the proposal non-binding or subject to further negotiation. Vendor's proposal shall constitute a firm offer. By execution and delivery of this RFP Response, the Vendor agrees that any additional or modified terms and conditions, whether submitted purposely or inadvertently, shall have no force or effect, and will be disregarded. Noncompliance with, or any attempt to alter or delete, this paragraph shall constitute sufficient grounds to reject Vendor's proposal as nonresponsive.



EVALUATION OF AWARD
(Substantial Compliance)

- 1) Agency may waive informality in proposal (if it does not prejudice another proposal)
- 2) Agency may accept deviations to specifications and requirements
- 3) Agency will consider the degree to which Vendors have proposed or failed to propose solutions that will satisfy the Agency's needs as described in the solicitation. Except as may be specifically stated, no one requirement shall automatically disqualify a Vendor from consideration.



DEVIATIONS

- Vendor must describe nature of deviation
- Are claims consistent with its product literature?
- All specs have equal importance, but some specs are more equal than others
 - Use judgment – don't disqualify deviations blindly
 - Does the spec affect usability, compatibility, safety
- Apply deviations equally



SAFETY LABELS

- State law – see G.S. §66-25
- List of NC-certified testing labs available on State Fire Marshal's (Dept. of Insurance) site
- Canadian, Chinese, EU labels not acceptable

P&C No Longer Inspects for Compliance



NEGOTIATIONS

“Reject and negotiate”

- Rejection is implicit
- Negotiate with all vendors “within a competitive range”

Request for BAFO

- Is a formal record of negotiations
- No requirement that all vendors receive same BAFO request



BASIS OF REJECTION

- Offer(s) unsatisfactory as to quality or quantity, delivery, price or service offered
- Non-compliance with requirements or intent of solicitation
- Lack of competitiveness
- Error(s) in specifications or evidence that revision will be advantageous to the State
- Cancellation or changes in the intended project or any decision that proposed requirement is no longer needed
- Limitation or lack of available funds
- Circumstances that prevent determination of the best offer
- Decision that rejection is in the best interest of the State



NO ASSIGNMENT

- Policy: "A contract with the State is not a fungible asset to be transferred from vendor to vendor."
- Exception: If notified in advance, State may agree to assignment to surviving entity of purchase or merger
 - Because the State has chosen the specific vendor with which it will contract
 - If no response from State in 30 days, deemed approved
 - Alternative: State may terminate contract without fault or cost to the State



INTELLECTUAL PROPERTY

"All deliverable items and materials produced for or as a result of this contract shall constitute property of the State, and Vendor hereby assigns all ownership rights in such deliverables, including all intellectual property rights, to the State; provided, however, that as to any preexisting works imbedded in such deliverables, Vendor hereby grants the State a fully-paid, perpetual license to copy, distribute and adapt the preexisting works."

- Imbedded Software
- Software as a Service (SaaS)



SOVEREIGN IMMUNITY

a/k/a, It's Good to be King

- **ONLY** the General Assembly can waive sovereign immunity
 - No State official or employee is authorized to waive
- So far, only immunity waivers in N.C. are:
 - Workers' Compensation
 - Torts, to the extent insurance is applicable
 - Breach of contract, damage claims



IMMUNITY-RELATED Ts & Cs

- **Situs of contract**
- **Governing law**
- **Agency cannot not indemnify any other person or entity**
- **Agency cannot not waive any right or remedy**
 - Cannot agree to arbitration or to waive jury trial
 - Cannot agree to "submit" to an injunction or to be enjoined, but can agree allow vendor to "seek" an injunction
 - Cannot waive right to any type of damages, but may agree to limit damages
- **Cannot waive sovereign immunity**

STATUTORY REQUIREMENTS

- **State and agency auditors shall have access to persons and records (G.S. 143C-6-8)**
- **All payments subject to availability of funds (G.S. 143-49)**
- **None of Vendor's owners, officers, directors convicted of securities violation in past 10 years (G.S. 143-59.2)**
- **Bid is submitted competitively and without collusion (G.S. 143-54)**
- **No gift offered or accepted (G.S. 133-32)**
- **Vendor not ineligible due to refusal to remit use tax (G.S. 143-59.1)**
- **Vendor complies with E-verify requirement (if more than 25 employees in NC) (G.S. 143-48.5)**

E-PROCUREMENT FEES

ALL goods contracts are charged e-procurement fee (unless contract is specifically exempted by P&C)

- Notice to vendor of e-procurement fee in three locations
 - In solicitation (twice)
 - During registration in e-procurement system
 - On back of purchase order
- Must dispute fee invoice within 30 days
- Per G.S. 147-86.23, interest and a late payment fee shall be charged



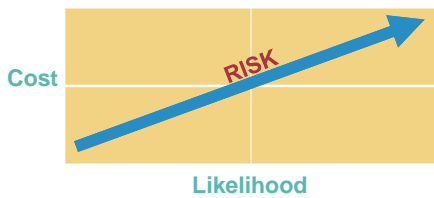
WHAT IS BUSINESS RISK?

Events or factors that:

- May delay or prevent successful completion of contract performance
- Result in greater cost or expense to the State



RISK MATRIX



*TERMS THAT AN AGENCY OUGHT TO INCLUDE
IN SIGNIFICANT SERVICE CONTRACTS*

Performance Risk Questions:

- What is it that needs to be accomplished? (scope)
- What is involved in getting it done? (tasks)
- What is the best source for doing it? (vendor qualifications)
- What is the measure of success? (performance standards)
- What justifies payment? (acceptance criteria)
- What risks exist and how can they be minimized? (compliance)
- What happens at the end of the contract? (transition)



The last slide...

Fini

Any questions?

Purchasing statutes: Chapter 143, Article 3
Administrative Code: Title 01, Chapter 05