

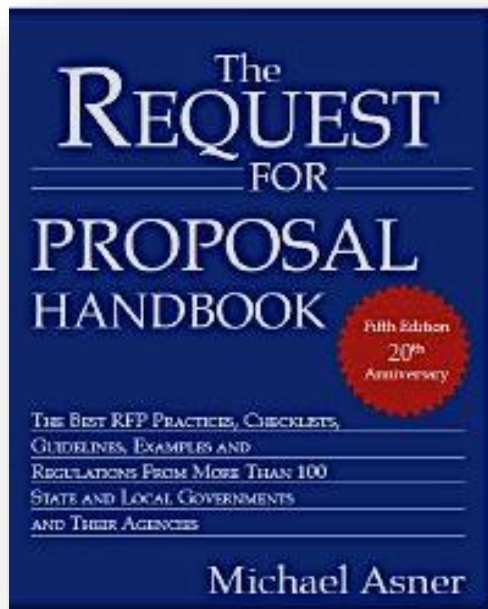
The
REQUEST
FOR
PROPOSAL
HANDBOOK

Fifth Edition
20th
Anniversary

THE BEST RFP PRACTICES, CHECKLISTS,
GUIDELINES, EXAMPLES AND
REGULATIONS FROM MORE THAN 100
STATE AND LOCAL GOVERNMENTS
AND THEIR AGENCIES

Michael Asner

The Request for Proposal Handbook



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Fifth Edition
20th Anniversary

Michael Asner

THE REQUEST FOR PROPOSAL HANDBOOK

Fifth Edition
Michael Asner

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Disclaimer

Great care has been taken to ensure that the information presented is accurate; however, this information is still subject to errors and subject to change. The examples have been obtain from many jurisdictions throughout North America and may not be applicable in every jurisdiction.

RFPs and the law of contracts

The process of issuing an RFP and receiving proposals does, by design or inadvertently, establish contractual rights and obligations. Each RFP and the associated process should be reviewed by your lawyer or legal department prior to issuing the RFP. The examples and sample RFPs used throughout this text have been used in many different jurisdictions in the past. The author makes no claim about the appropriateness, correctness, or legal consequences of these examples or sample RFPs. Competent legal advice should be obtained to review your Request For Proposal and the associated process.

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PREFACE

This book was first published in 1995. Since then, it has been expanded and revised every five years. Used by more than 5000 agencies and departments, primarily at the state and local government level, The RFP Handbook has become a trusted reference for procurement professionals. I'm both grateful and amazed at its wide acceptance by my colleagues in government procurement.

Now, it's time for a revision. And in creating the Fifth Edition, I have not only updated all the content but added 60 new references and 20 new topics - issues which I believe are not adequately dealt with in any single existing text that I've found. These issues include the following:

- Understanding the worldwide view of public procurement
- Knowing the law
- Testing your evaluation procedure before issuing the RFP
- Using risk as an evaluation factor
- Using a Fairness Officer on high-risk RFPs
- Providing a step-by-step narrative of an actual evaluation procedure
- Non-numerical evaluation of cost
- Using Past Performance data in your evaluation

This book leads the reader through the entire Request for Proposal process and provides best practices from more than 100 jurisdictions. It is based on my experience as an independent consultant specializing in public procurement and the RFP process. These best practices have emerged as a practical strategy for building 'fair, open and transparent' into public procurement.

This book includes material generously provided by two of my colleagues. John Adler, a past president of NASPO and an important voice for procurement reform, and Denis Chamberland, a lawyer internationally recognized as a procurement expert.

I also want to thank my colleagues who have contributed ideas, suggestions and content for making this Handbook an accepted resource for RFP information. As always, comments, and suggestions on any topic are appreciated. Simply call me at (604) 530-7881 or email me at michael@rfpmentor.com.

Best regards

Michael Asner
Sept., 2014

Chapter One

A WORLDWIDE VIEW OF PUBLIC PROCUREMENT

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Chapter One

A WORLDWIDE VIEW OF PUBLIC PROCUREMENT

This book is only about Requests For Proposals (RFPs) and the related best practices. It is significant that RFPs and best practices are not determined by the location, they are not confined to any particular city or county or state. In fact, they are not unique to your organization or even your country.

Your problems have been experienced by many other jurisdictions, sometimes thousands of miles away in different countries.

The solution to a specific problem developed in one country is often directly transferable to many other jurisdictions.

RFPs as they exist today are a creation of similar public policies on a worldwide basis. These public policies have been shaped by many factors. This book deals with some of these factors such as laws, the courts, ordinances, and regulations.

These public policies are also being influenced by international organizations, treaties, and the approaches adopted in other countries.

In the remainder of this brief narrative dealing with public procurement from a global perspective, I want to discuss these issues and how they are viewed by some of the major external stakeholders. Each of these issues contributes directly to the future of public procurement and best RFP practices.

Public Procurement is a Big Deal

The amount of money spent by governments on goods and services is huge! It represents 10% to 15% of most countries Gross Domestic Products (GDP). According to the February 2008 issue of Government Procurement magazine, state and local governments in the U.S. purchased \$1.74 trillion in goods and services in 2007 (including expenditures for education, wages, and capital investment), exceeding the federal government's spend of \$999 billion.

Trade liberalization, the flow of goods and services across borders with few trade barriers, requires a level playing field. To promote competition, governments and international organizations have adopted policies and practices to encourage the adoption of fair, open and transparent competition.

While the global goal is fair trade and fair, open and transparent competition, corruption in public procurement is a serious issue and varies greatly from country to country. Programs to reduce public corruption are in place in many countries and international organizations.

Public procurement promotes fair, open and transparent competition, supports the adoption of best practices and active measures to reduce corruption. While there are many best practices and common objectives there is no single book of common knowledge for public procurement.

Khi Thai, Editor of the International Handbook of Public Procurement, has written about the worldwide challenges in public procurement. While there is no book of common knowledge for public procurement, there are shared challenges. Here is his list:¹

...the sheer magnitude of procurement outlays has a great impact on the economy and needs to be well managed...

...public procurement has been utilized as an important tool for achieving economic, social and other objectives...

...public procurement has been perceived as an area of waste and corruption...

...how to comply with their government's procurement regulations and social and economic procurement goals without violating regional and/or international trade agreements...

...a sound procurement system (must satisfy both) management requirements and policy requirements...

...public procurement cannot be perceived as mere a 'clerical routine' as procurement practitioners are and should be involved in strategic procurement planning...

The Goals of Key Worldwide Stakeholders

In the remainder of this section, I discuss some of the issues from the perspective of several key stakeholders. The adoptions of fair, open and transparent practices and reducing or eliminating corrupt practices are their overriding objectives. The

information provided here is only a thumbnail sketch of each organization or initiative. However, the endnotes provide extensive information for those who want to investigate specific programmes and approaches.

WORLD BANK

The World Bank is an international financial institution that provides loans to developing countries for capital programs.

The World Bank's involvement in any project in any country requires that all related procurement be based on efficient, fair, and transparent procedures and that corruption be actively discouraged. Here are two illustrative quotes that indicate how the World Bank frames its procurement objectives:

The Bank gives equal importance to supporting the management and reform of public procurement systems in borrower countries. Increasing the efficiency, fairness, and transparency of the expenditure of public resources is critical to sustainable development and the reduction of poverty. ²

The Challenge

Public procurement is an essential government function. According to the OECD, public procurement can account for up to 5% of GDP in developing countries and averages about 20% of public expenditures. Perhaps most importantly, procurement can provide a means for socio-economic development and some measure of social equity, particularly in fragile situations. In developing countries, service delivery is important both in alleviating poverty and enhancing government's credibility, and is the primary means by which goods and services are provided to constituents. High performing and transparent procurement systems are fundamental to guarantee cost-effective delivery of these goods and services for societies at large and particularly for the poor. ³

UNITED NATIONS (UN)

The UN is an intergovernmental organisation created in 1945 to promote international cooperation. At its founding, the UN had 51 member states; there are now 193.

The UN has an aggressive program for promoting fair, open and transparent public procurement for itself and to its members and for fighting corruption. Here is a brief description of each of their initiatives:

- First, there are the UN's⁴ own procurement policies and procedures which are designed to 'achieve best value for money' and to ensure 'a competitive, fair and transparent process'.
- Their 287-page Procurement Manual⁵ provides guidance on procurement policies, procedures and practices for all UN staff.
- The United Nations Commission on International Trade Law (UNCITRAL)⁶ is focused on 'the modernization and harmonization of rules on international business.' In 2011 they revised their Model Law on Public Procurement.⁷

The Model Law on Public Procurement contains procedures and principles aimed at achieving value for money and avoiding abuses in the procurement process. The text promotes objectivity, fairness, participation and competition and integrity towards these goals. Transparency is also a key principle, allowing visible compliance with the procedures and principles to be confirmed.

The 2011 Model Law replaces the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services. While the 1994 text was recognized as an important international benchmark in procurement law reform, in 2004, the Commission agreed that the 1994 Model Law would benefit from being updated to reflect new practices, in particular those resulting from the use of electronic communications in public procurement, and the experience gained in the use of that Model Law as a basis for law reform. Nonetheless, the principles and main procedures from the 1994 text, the foundation of its success, have not been changed.

- Their 54-page guidebook⁸ on anti-corruption in public procurement and the management of public finances also provides useful information:

This Guidebook serves as a reference material for governments, international organizations, the private sector, academia and civil society, by providing an overview of good practices in ensuring compliance with article 9 of UNCAC, which requires establishing appropriate systems of public procurement, as well as appropriate systems in the management of public finances.

(From the Executive Summary)

The Guidebook starts with an overview of public procurement as a major risk area for corruption; an overview of UNCAC and public procurement; and a review of the most common forms of corruption in public procurement. Chapter I analyses the requirements of article 9 of UNCAC, in terms of the objectives of public procurement. The flow of the entire public procurement cycle (divided into the pre-tender, tender and post-tender stages) is discussed in chapter II, which maps important corruption risks and identifies examples of responses to these risks of corruption. It also covers remedy systems in public procurement, as well as

further corruption-prevention strategies, such as electronic procurement. Chapter III analyses the requirements of article 9 of UNCAC, in terms of the objectives of public finance systems. A series of good practice examples—two of which won the United Nations Public Service Award (UNPSA)—are covered in the final chapter, chapter IV. Annex I briefly introduces other standards and policies in the area of public procurement, which have been sponsored by other international organizations. Annex II includes a checklist for meeting minimum requirements set out by article 9 of UNCAC.

(From page 1 of the Guide)

It is the sheer volume involved in public procurement that make it so vulnerable to corruption. In fact, public procurement is estimated to account for 15-30 per cent of the gross domestic product (GDP) of many countries. This means that thousands of billions of dollars are spent by governments every year to purchase different kinds of goods, services and works. Although the costs of corruption are difficult to measure, due to its clandestine nature, it is obvious that corruption in public procurement has an enormous negative impact on government spending. These costs arise in particular because corruption in public procurement undermines competition in the market and impedes economic development. This leads to governments paying an artificially high price for goods, services and works because of market distortion. Various studies suggest that an average of 10-25 per cent of a public contract's value may be lost to corruption. Applying this percentage to the total government spending for public contracts, it is clear that hundreds of billions of dollars are lost to corruption in public procurement every year.

Then there is a UN Development Programme for Public-Private Partnerships that promote best practices.⁹ This web site deals with the question of 'What are the rules of fair procurement?'

Procurement and tendering should be conducted in a fair, open and transparent manner. The most important and broadly accepted principle underlying a modern procurement system is open competition – unrestricted, universal access to the procurement market. In addition, the procurement process – the selection of bidders, tendering procedures and the award of contracts – should be open to public examination and review, thus making it a transparent process.

A transparent procurement system ensures that all qualified suppliers have equal access to all elements of the system, including:

- *methods of procurement;*
- *legislation;*
- *evaluation criteria and technical specifications;*
- *rights and responsibilities of government as a buyer; and*
- *due process.*

To promote transparency, the procurement process should be made open to public scrutiny. The transparency of the process is further reinforced when contract awards, and the overall procurement process itself, is subject to the scrutiny of national parliaments, external audit bodies and the media.

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

OECD is an international economic organisation of 34 countries founded in 1961 to stimulate economic progress and world trade. It is a forum of countries committed to democracy and the market economy, providing a platform to compare policy experiences, seek answers to common problems, identify good practices and co-ordinate domestic and international policies of its members.

OECD has major programs to assist governments in reforming their public procurement systems. They believe that 'an efficient and effective procurement system is the backbone of a well-functioning government'. They have done major work in the areas of establishing best procurement practices, reviewing the efforts of member countries, and promoting integrity in public procurement. Many of their publications are excellent – providing much information, advice and best practices all based on actual studies and experience.

OECD has developed a set of Principles for Enhancing Integrity in Public Procurement.¹⁰ These principles provide guidance to policy makers to enhance integrity in public procurement.

These principles are based on:

- Transparency
- Good management
- Prevention of misconduct, compliance and monitoring
- Accountability and control.

OECD has developed a Toolbox¹¹ of existing public procurement best practices that provides some pragmatic advice and examples of best practices.

This toolbox deals with the entire procurement process, from the pre-tendering phase until the post-award phase. Guidelines are provided for 26 activities including:

- Criteria for selecting appropriate tender methods
- Guidelines for supplier debriefings
- Indicators of procurement risk.

OECD has made a major financial commitment to developing reports and reference documents dealing with public procurement. Their web-based library contains dozens of publications dealing with a variety of topics including Strategic Public Procurement, Public Procurement Spending, studies of public procurement in different countries and Integrity in Public Procurement.¹²

WORLD TRADE ORGANISATION (WTO)

*WTO deals with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.*¹³

WTO believes that government procurement is an important aspect of international trade and that increased competition provides significant benefits.

There are three main aspects of the WTO's work on government procurement:

- The **Agreement on Government Procurement (GPA)** provides an international framework for conducting trade in government procurement markets among the participating countries that include both Canada and the U.S.
- Work on **transparency in government procurement** to define standards to be considered as part of other WTO trade agreements.
- Multilateral negotiations on services procurement by governments

Efforts to Reduce Corruption

The globalization of trade and the adoption of 'fair, open and transparent' as the worldwide goal for public procurement have promoted the development of major programs. These programs are designed to end corruption by promoting ethical behaviour by governments in public procurement. It is beyond the scope of this chapter to describe these programs in detail. Here are brief descriptions of some agencies, organizations and programs designed to fight corruption in public procurement.

TRANSPARENCY INTERNATIONAL – CORRUPTION PERCEPTIONS INDEX¹⁴

This international non-governmental organisation monitors and publicizes corporate and political corruption in international development. It publishes an annual Corruption Perceptions Index, a comparative listing of corruption

worldwide. This index is an annual ranking of countries 'by their perceived levels of corruption, as determined by expert assessments and opinion surveys.' The CPI generally defines corruption as 'the misuse of public power for private benefit'. The CPI currently ranks 176 countries 'on a scale from 100 (very clean) to 0 (highly corrupt)'. The Corruption Perceptions Index has been widely credited with putting the issue of corruption on the international policy agenda.

The Corruption Perceptions Index ranks countries and territories based on how corrupt their public sector is perceived to be. A country or territory's score indicates the perceived level of public sector corruption on a scale of 0 - 100, where 0 means that a country is perceived as highly corrupt and 100 means it is perceived as very clean. A country's rank indicates its position relative to the other countries and territories included in the index. This year's index includes 177 countries and territories.

For 2013, Denmark and New Zealand tied for first place with a score of 91 (out of 100). Australia and Canada were tied for ninth place with a score of 81. The US and Uruguay tied for nineteenth place with scores of 73. In 175th place were Algeria, North Korea and Somalia with scores of 8.

OECD'S EFFORTS TO REDUCE PUBLIC CORRUPTION

OECD has undertaken a major initiative in leading the fight against public procurement.

... public procurement is the government activity most vulnerable to waste, fraud and corruption due to its complexity, the size of the financial flows it generates and the close interaction between the public and the private sectors.¹⁵

As part of their efforts they have published an excellent reference text: Integrity in Public Procurement – Good Practice from A to Z.¹⁶

This book contains the Irregular Payments in Public Contracts index in which they have surveyed estimates of how common it is for firms throughout the world to make undocumented extra payments or bribes connected with awarding of public contracts. The scores range from 1 (common) to 7 (never occurs).

In 2013, the top scorer was Iceland with 6.7. Canada got a 5.5; US a 5.0 and in 125th place (last) was Bangladesh with 2.0.

PROFESSIONAL ASSOCIATIONS' CODES OF ETHICS

Many professional associations dealing with public procurement have published Codes of Ethics for their members. One of the best is that of the Institute for Systems Management as it is accompanied by a Guide entitled Principles and Standards of Ethical Supply Management Conduct with Guidelines.¹⁷ This 16-page publication provides ten statements of ethical principles and the related guidelines. For example, their statement about Impropriety is followed by a brief explanation and four recommended guidelines to ensure compliance.

ENCYCLOPEDIA OF ETHICAL FAILURE (EEF)¹⁸

This publication contains a series of case studies that illustrates poor judgement on the part of United States federal employees. In general, an ethical failure is a bad decision that intentionally or unintentionally breaks a law, transgresses a compliance mandate or violates an organization's code of conduct.

The purpose of the tool is to provoke discussion by illustrating the serious consequences of ethics violations. The goal is ultimately to motivate federal employees to contact their agency's ethics counselors when in doubt about the right way to handle a situation. The Department of Defense doesn't want to retire employees prematurely because of their moral lapses. To instruct them in right from wrong, DOD compiles the Encyclopedia of Ethical Failure, short object lessons that retell the real-life shortcomings of their own workers, and those from other government agencies.

The surprise is that the newly updated compendium can be laugh-out-loud funny. About ten percent of the examples deal with public procurement. Here's one example from the latest edition:

Employees Fail to Profit from Red Tape

Two workers at the Veterans Affairs' Consolidated Mail Outpatient Pharmacy, which mails prescriptions to veterans, were charged with taking kickbacks for purchasing a product from a supplier at more than twice the normal price. The product? Red tape. The employees were charged with purchasing 100,000 rolls of the tape, which is stamped with the word "security" and is meant to deter tampering, at \$6.95 a roll rather than its \$2.50 retail value. In return, they received kickbacks of more than \$1 per roll.

The duo will have plenty of time to appreciate the irony of their situation, as they face a sentence of 15 years in jail.

POLICIES OF SPECIFIC GOVERNMENTS

These days, transparency in public procurement is commonly a media event. In every public procurement scandal, the demand is 'when did they know' and 'what did they know'? The result is often a cry for 'more transparency in public procurement'.

In North America, transparency is an evolving, sometimes nebulous, sometimes poorly defined concept. It's providing an 'adequate' level of documentation. Here is the definition offered by National Institute of Governmental Purchasing (NIGP):

Transparency: In an ethical context, the idea that the more information disclosed about a business, financial or economic activity the better. Transparency improves ethical conduct. Maximum disclosure is for the betterment of the public and will help to discourage more regulation. (Miller, 2006)

Clearly, this definition is vague, with no standard for determining compliance.

Australia is different! Here, they have an exemplary approach to transparency. In Australia, they seek to have procurement as a 'fair, open and transparent' process. However, they introduce a new concept, at least new to North America, that of 'probity'. Probity is defined as:

. . . the evidence of ethical behaviour in a particular process.

The requirement that transparency be demonstrable by evidence changes the entire game. No longer can you forget to document a key decision, or the results of a meeting with a vendor. Nor can you forget to obtain signed Conflict of Interest forms from the Evaluators.

This concept of probity is pervasive in Australia. There are policies, guides, and directives related to probity as well as a probity template.

The Australian federal government and several of the state governments, especially Victoria, have developed some great documents dealing with ethical behavior. Their training document, Guidance on Ethics and Probity in Government Procurement¹⁹, provides a solid introduction into the area of quality assurance techniques related to 'fair, open and transparent'.

This Guide discusses a variety of topics including Probity Plans, Probity Experts, and Managing a Good Procurement Process.

OTHER INITIATIVES

There are many other activities being conducting on a worldwide scale designed to promote fair, open and transparent competition. In addition to the initiatives described above, there are training programs dealing with ethical issues in public procurement as well as the emergence of a new role, that of Ethics Officer. This role is called Probity Officer (in Australia) or Fairness Commissioner (in Canada).

An Ending Comment

In this Chapter, we have described the quest for fair, open and transparent public procurement on a worldwide scale. The rest of this book deals with these concepts as they relate to RFPs and best practices.

End Notes

-
1. Reference 1. This list presents thumbnail sketches. Please consult Chapter 1 of the full text for the details. International Handbook of Public Procurement, Khi V. Thai Editor, 2009, 836 pgs, <http://sate.gr/nea/international%20handbook%20of%20Public%20Procurement.pdf>
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18. Reference 18. U.S. Dept. of Defense, Encyclopedia of Ethical Failure, 167 pgs, www.dod.mil/dodgc/defense_ethics/dod_oge/eef_complete_2012.doc
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Chapter Two

PUBLIC PROCUREMENT – THE LAW

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Chapter Two

PUBLIC PROCUREMENT – THE LAW

This Chapter was written by Denis Chamberland, a public procurement lawyer ranked in Chambers Global (Band 1), in Who's Who Legal and in Best Lawyers. He has extensive experience advising clients on large public projects in the United States, Canada and China.

Caveat: Readers are cautioned that what follows may not be current in all respects, as the legislative and trade law requirements evolve, and court decisions are issued. It should also not be relied on as legal advice. Readers should consult with a public procurement lawyer to assess their specific circumstances.

It is a public policy requirement in both Canada and the United States that public procurement be fair, open and transparent. The legal framework in each jurisdiction differs significantly, however.

In the United States, the legal framework that applies in the Federal environment is distinctive and varies significantly from the legal framework that applies at the state and local government level.

In Canada, public procurement largely came to be defined first by the decisions of the courts, particularly by those issued by the Supreme Court of Canada, and later by the requirements of the trade agreements, both domestic and international. More recently, spurred on by the transgressions and other misdemeanor of a few government entities, select provinces have stepped up their involvement in the field by passing legislation, such as Ontario's Broader Public Sector Procurement Directive, in 2011. Some of the larger municipalities, including the City of Toronto, have also launched important reforms in this area.

This Chapter highlights some of the important legal issues that inform how procurement is conducted in each jurisdiction, with a focus on request for proposals (RFPs).

United States - Federal

LEGISLATION

What is the applicable legislation?

The laws on public procurement in the United States operate at the federal, state and local government level. This section of the Handbook focuses on federal procurement. In fiscal 2010, federal contract spending amounted to US\$535 billion.

At the federal level, the procurement process for executive branch agencies (i.e., not including the legislative and judicial bodies) is governed by a number of statutes, including two particular important ones: the *Federal Property and Administrative Services Act*, and the *Armed Services Procurement Act*. To streamline the various procurement rules introduced by statute is the Federal Acquisition Regulation (“FAR”), which governs acquisitions by all federal executive agencies. FAR is codified in Title 48 of the United States Code of Federal Regulations. It is issued pursuant to the Office of Federal Procurement Policy Act of 1974 (Pub. L. 93-400 and Title 41 of the United States Code), Chapter 7.

Part 52 of the FAR contains standard contract clauses and solicitation provisions, some of which are typically incorporated by reference into contracts with contractors. The number of provisions incorporated by reference can be numerous. In addition, agencies typically issue their own acquisition policies and regulations, which supplement, or otherwise articulates how FAR is implemented. These are known as “FAR Supplements”. The FAR Supplements often impose additional requirements on contractors.

FAR Supplements include the following:

- Army Federal Acquisition Regulation Supplement (“AFARS”);
- Commerce Acquisition Regulation (“CAR”); and
- Department of Defense Supplement (“DFARS”).

Does the legislation relate to or interact with any applicable trade agreement, such as the North American Free Trade Agreement (“NAFTA”)?

NAFTA was entered into between the United States, Canada and Mexico in 1995. Chapter 10 of NAFTA, entitled "Government Procurement", applies to the measures adopted or maintained by the parties to NAFTA.

NAFTA generally applies to federal procurement, although many exceptions exist, including in the event of "[A]cquisitions of arms, ammunition, or war materials, or purchases indispensable for national security or for national defense purposes". (FAR 25.401(2))

As well, agency regulations include provisions dealing with the application of the trade agreements unique to individual agencies (FAR 25.400(b)).

What are the basic underlying principles of the legal framework (such as value for money, transparency and equal treatment)?

While federal procurement seeks to promote process integrity, value-for-money and fairness, it also seeks to achieve a wide range of policy objectives, including social, economic and political (see article by Kristi D. Caravella Robinson *U.S. Federal Government Procurement: Organizational Structure, Process, and Current Issues*, Chapter 13 in *International Handbook of Public Procurement*, edited by Khi V. Thai, CRC Press).

Is aerospace and defense procurement treated differently from other types of procurement?

There are special rules regarding the acquisition of military materiel, whether these appear in the aerospace or defense environment. As noted above, FAR Supplements are developed by specific agencies. In the defense sector, the Defense Federal Acquisition Regulation ("DFARS") was developed by the Department of Defense ("DoD"), and governs DoD procurement activities.

APPLICATION OF THE STATUTORY PROCUREMENT LAWS

Which public agencies are covered by the laws?

In federal procurement, in general all executive agencies are covered by the FAR, and the other laws referenced above.

Which private entities are covered by the laws?

The laws generally applicable in federal procurement normally apply to private companies depending on their status in the procurement process.

Which types of contracts are covered?

FAR generally covers all procurement contracts for goods, services and construction. In addition, the applicable trade agreements (such as NAFTA) set monetary thresholds prescribing the requirements to conduct an acquisition competition for each type of contract. For example, NAFTA stipulates that an open competition must be conducted where the value of the goods and/or services or construction exceeds the following thresholds (see FAR 25.402):

- supply contract: \$25,000 Canada, \$70,079 Mexico;
- service contract: \$70,079 Canada, \$70,079 Mexico; and
- construction contract: \$9,110,318 Canada, \$9,110,318 Mexico.

Are there anti-avoidance rules (including laws on bid rigging)?

Subpart 3.3 of the FAR focuses on suspected antitrust violations. As examples of antitrust abuses, FAR 3.301(a) identifies collusive bidding, follow-the-leader pricing, rotated low bids, collusive price estimating systems and sharing of the business. Under FAR 3.303(b), agency personnel are obligated to report, in accordance with their own agency regulations, any evidence of antitrust abuse.

Similarly, under FAR 303(a), agencies are required by 41 U.S.C. 253b(i) and 10 U.S.C. 2305(b)(9) to report to the Attorney General bids or proposals that demonstrate evidence of antitrust abuse. The provision goes on to list a number of practices or events having the potential to evidence antitrust abuses.

PROCUREMENT PROCEDURES

What procurement procedures apply?

Under FAR, agencies have a broad range of flexibility to determine which method of procuring to use. The most common include the following:

- Bids, as in Invitation for Bids (“IFB”), in sealed bidding.

- Offer, as in Solicitation for Offers (“SFO”) or Request for Offers (“RFO”).
- Proposal, as in Request for Proposals (“RFP”).

See FAR 6.102 for various competitive procedure available for achieving “full and open competition”.

Are there any rules on the specifications/criteria?

As a rule, federal procuring agencies set out detailed criteria/specifications describing their needs, which tends to increase the likelihood that the agencies will optimize value-for-money. By specifying detailed needs, agencies contribute to a more transparent procurement process and allow contractors to submit more responsive bids.

For example, whether issuing an IFB or a RFP, the solicitation document should include all of the information that bidders will need to submit a responsive bid and it must also clearly state the basis upon which the bids will be evaluated for award. In the case of an IFB, the specifications should be fully described to provide prospective bidders with a clear understanding of the work required to be performed, and it should establish a standard for determining the rights and obligations of the parties. Specifications fall into three groups: design, performance and functional specifications.

In the case of an RFP, the criteria to be used to evaluate the proposals should be comprehensively described, and the RFP should also establish the standard for determining the rights and obligations of the parties.

Can certain prospective bidders be excluded from the competition?

There a number of ways in which bidders – prospective and actual – may be excluded from a competition. These include the following:

- A pre-qualification document (i.e., a Request for Qualifications) may be issued that results in pre-qualifying the participants, which will then be permitted to submit responses in the competitive process to follow.
- A bidder may have submitted a non-responsive (i.e., a non-compliant) bid, which leads to the disqualification of the bidder’s submission.

- An agency may be authorized to conduct a sole sourcing process, in circumstances, which means that would-be bidders will have no chance to submit a response.
- An agency may suspend or debar a bidder and exclude it from a competition, if the bidder has been convicted of a criminal offense, or has a civil judgment against it related to fraud in the performance of a public contract or the preponderance of evidence shows a wilful failure to perform a public contract.
- An exception may exist in FAR that has the effect of excluding certain prospective bidders from the competition, including: (i) acquisitions set aside for small businesses; (ii) acquisitions for military purposes, or relating to national security or national purposes; and (iii) acquisitions of end products for resale.

Are there any rules on the awarding of contracts?

There are rules in FAR that govern the awarding of contracts, although those may be supplemented by an agency's own rules.

Among others, FAR sets out the following rules in this area: FAR 8.4 (Federal Supply Schedules) which includes Multiple Award Schedules in respect of contracts awarded by the Government Services Administration for supplies and services with more than one supplier, at varying prices; FAR 13 (Simplified Acquisition Procedures) prescribing simplified acquisition policies and procedures for the acquisition of supplies, services and commercial items not exceeding certain thresholds; FAR 14.4 (Opening of Bid and Awards of Contract) involving sealed bids; and FAR 15.3 (Source Selection) which prescribes the policies and procedures for selection in competitive negotiated acquisitions.

Can bidders combine to submit a bid?

In federal procurement in the United States, generally prospective bidders may collaborate with another party in submitting a single, integrated response. This is a common practice on large procurements where a single bidder may not internally possess all of the resources/capabilities required to submit a competitive response.

Are there any rules on alternative bids?

Section 14.404-2(b) of FAR specifies that any bid that does not conform to the essential requirements of the invitation for bids will be rejected. However, if the invitation specifically authorizes the submission of alternative bids and the supplies offered as alternates meet the requirements prescribed in the invitation, the bid will not be rejected.

EXEMPTIONS TO COMPETITIVE BIDDING

Are there any exemptions to competitive bidding?

Under FAR, agencies are mandated to promote and provide for “full and open competition” in soliciting offers and awarding contracts (FAR 6.101), but certain exceptions exist. Some of these include:

- the property or service is available from only a single responsible source;
- the agency’s needs for supplies or services is of such an urgent and unusual and compelling urgency that that the agency would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals;
- the award to a particular contractor is required to maintain supplies or services in case of a national emergency or to achieve industrial mobilization; to establish or maintain an essential engineering, research, or development capability, or to acquire the services of an expert for litigation;
- the terms of an agreement or treaty between the United States and a foreign government or organization preclude full and open competition;
- a statute expressly requires that the acquisition be made through another agency or from a specified source or the agency’s need is for a brand name commercial item for authorized resale;
- disclosure of the agency’s needs would compromise national security; and

- the agency determines that non-competitive procedures are in the public interest and provides Congress with at least 30 days written notice prior to contract award.

In addition, other exemptions/exceptions to competitive bidding are contained in the various FAR Supplements.

REMEDIES AND ENFORCEMENT

Are there any remedies and enforcement mechanisms in the legislation?

FAR expressly authorizes the Government to end a contract sooner than anticipated by the terms of the contract. There are two primary types of terminations: “terminations for default” and “terminations for convenience” (See FAR 49.1). When the Government terminates a contract for default based on a contractor’s failure to perform, it has the right to recover from the contractor the costs of reprocurement and also may pursue any other rights and remedies provided under the law. In contrast, the Government may terminate a contract for “convenience” without cause and simply because it perceives that it is in its best interests to do so.

Are remedies available outside the scope of the legislation?

The Government has numerous remedies at its disposal to recover damages for breaches of contract or improprieties related to the procurement process. For example, the *False Claims Act* (“FCA”), 31 USC §§3729, *et seq.*, permits the Government to recover treble damages from contractors that submit false claims for payment to a federal agency. The FCA’s “*qui tam*” provisions allow whistleblowers or other private citizens to file lawsuits on behalf of themselves *and* the Government and to share in any recovery against the contractors.

The Government also may institute criminal proceedings against a contractor that commits procurement-related fraud. The available criminal statutes include, among others, the *Criminal False Claims Act* (18 USC § 287), the *Procurement Integrity Act* (41 USC § 423, implemented at FAR 3.104), and the *Anti-Kickback Act* (41 USC §§ 51, *et seq.*).

Contractors that engage in procurement improprieties can be suspended and/or debarred from competing for government contracts for a specified time. Grounds

for debarment include the conviction for a criminal offense, the imposition of a civil judgment arising from fraud in the performance of a public contract, or a judgment showing a willful failure to perform a public contract (FAR 9.406-2). A contractor also may be temporarily suspended pending completion of an investigation into the grounds for possible debarment (FAR 9.407).

Is there a specific forum before which disputes are heard?

The US Court of Federal Claims and the US Court of Appeals for the Federal Circuit have primary jurisdiction over disputes concerning procurement decisions. The Court of Federal Claims has jurisdiction over bid protests and claims against the United States based upon express or implied-in-fact contracts. The Federal Circuit has jurisdiction over appeals from decisions of the Court of Federal Claims and from the Boards of Contract Appeals under the Contracts Disputes Act. The US District Courts have primary jurisdiction over civil suits brought by the Government and *qui tam* relators to recover damages under the FCA and also for procurement-related criminal prosecutions by the Department of Justice.

Are there any timing requirements where a party wants to enforce?

A contractor may appeal an adverse decision by an agency to the appropriate Board of Contract Appeals within 90 days of an adverse decision or file suit against the Government in the Court of Federal Claims within one year. The Government and contractors have 60 days after judgment to appeal a decision of the Court of Federal Claims and 120 days to file an appeal of a decision by a Board of Contracts Appeals. Civil and criminal causes of action in US District Court are subject to applicable statutes of limitation.

What are the leading court decisions involving procurement disputes?

There are numerous court decisions interpreting US law in the context of government procurement. Decisions in this area include those by the US Supreme Court, US Court of Federal Claims, US Court of Appeals for the Federal Circuit, as well as decisions by the Boards of Contract Appeals. Examples of significant court decisions are: *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (federal contracting programs that use racial classifications must undergo the highest “strict scrutiny” level of review to pass constitutional muster); *United States v. Winstar Corp.*, 518 U.S. 839 (1996) (government contracts should be adjudicated by applying normal contract law principles); *Department of the Army v. Blue Fox, Inc.*,

525 U.S. 255 (1999) (sovereign immunity bars unpaid subcontractor from bringing an action directly against the Government to recover its losses or for the Government's failure to require the prime contractor to post a bond); *Scanwell Lab., Inc. v. Shaffer*, 424 F.2d 859, 864 (D.C. Cir. 1970) (prospective contractors injured by arbitrary and capricious Government actions should be able to sue or protest to "vindicate their very real interests, while at the same time furthering the public interest").

OTHER RELEVANT RULES OF LAW

Are there any related bodies of law of relevance to procurement by public agencies?

Many laws of general application apply to federal agencies in procurement. There are also other laws that govern specific aspects of federal procurement, such as the *American Recovery and Reinvestment Act of 2009*, the *False Claims Act*, 31 USC §§3729, *et seq*, which imposes liability on persons and companies who defraud governmental programs, and other statutes noted under Section 5(b) above.

LOOKING AHEAD

Are there any proposals to change the law in the future?

Federal procurement and contracting is a highly regulated process with many changes currently in progress, including an aggressive acquisition reform program being pushed through in the defense sector, with an emphasis on a greater number of fixed-price contracts. The acquisition process by the Pentagon is now regulated by new laws that were recently enacted by the Government.

An important change currently making its way through is a proposal to amend FAR to require contractors to complete training that deals with the protection of privacy, in accordance with the *Privacy Act of 1974*, 5 U.S.C. § 552a, Public Law No. 93-579 and the handling and safeguarding of personally identifiable information.

United States - State and Local Governments

BACKGROUND

State and local government procurement is now much more complex than it was just 10 years ago, and it is constantly the subject of reform. The publication in 1979 by the American Bar Association (ABA) of its Model Procurement Code for State and Local Governments (Code) was a turning point in state and local government procurement in the United States. The ABA revised the Code and its implementing regulations in 2000, and it published a Model Code for Public Infrastructure Procurement in 2007.

Although much has happened since the publication of the Code in 1979, the Code remains a major milestone in the development of state and local government procurement. Many states went on to embrace significant components of the Code, making it an integral part of their laws on public procurement. The following states did so in whole or in part: 1979, Kentucky; 1979, Arkansas; 1980, Louisiana; 1980, Utah; 1981, Maryland; 1981, South Carolina; 1982, Colorado; 1982, Indiana; 1983, Virginia; 1983, Montana; 1983, Guyam Territory; 1984, New Mexico; 1984, Arizona; 1988, Alaska; 1989, Rhode Island; 1994, Hawaii; 1998, Pennsylvania; and 2008, South Carolina.

In addition, since the introduction of the Code, the trend towards trade liberalization has continued unabated, with many trade agreements coming into force. Among those, the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) Agreement on Government Procurement (GPA), which came into force in 1995, continue to raise the bar on the quality of public procurement at the so-called sub-national level.

Since the GPA came into force, 37 states have agreed to comply with its requirements, which prescribe a wide range of obligations, including precluding the application of in-state or "Buy American" preferences as applied to the vendors of the signatory countries. Among other administrative requirements, the GPA requires that states annually publish procurements expected to come within the agreement's dollar thresholds and that they publish quarterly contract awards to which the agreement is applicable.

THE FRAMEWORK

Although the trade agreements provide some degree of uniformity to state-level procurement, the state legislation and local government laws are not nearly so well-ordered. State and local government procurement in the United States presents significant complexities for bidders, procurement professionals and advisors (including lawyers). This is partly because (a) the legal framework is sometimes not easily accessible (which in itself contributes to making procurement opaque, contrary to the requirement that procurement be 'open, fair and transparent'), (b) the concepts are not always well articulated and understood, and (c) the laws on procurement are not uniform. Mainly for this later reason, this part of the chapter does not lend itself to the question-and-answer approach found in earlier parts of this chapter.

GENERAL OVERVIEW

The structure, organization and contents of state and local government laws vary significantly from state to state. Some states have introduced state-wide public procurement laws that are clearly based on the Code (the 1979 version and its 2000 update), and are supported by comprehensive regulations that provide detailed explanations on the requirements of the law, and the procedures to follow across the entire lifecycle of the procurement process. In some cases, detailed state guides were prepared to assist public procurement professionals in the discharge of their duties. For example, shortly after New Mexico adopted the Code in 1984, the Purchasing Division | General Services Department published a model RFP, and in 1988 it published the Request for Proposals Procurement Guide, which sets out a wide range of procurement techniques, procedures and processes. The Guide has since been updated and revised multiple times.

In other cases, states have formulated and passed their own public procurement code, which applies at the state level only, with other statutes applying at the local government level. In Illinois, for example, the *Illinois Procurement Code* (30 ILCS 500/1-1) applies to "to all purchases and contracts by or for any State agency." At the municipal level, the *Illinois Municipal Code* (65 ILCS 5/Art. 8 Div. 9 heading) applies to municipalities under 500,000 in population while the *Municipal Purchasing Act* (65 ILCS 5/8-10) applies to those under 500,000 or more in population.

The *Municipal Purchasing Act* may also be supplemented by a municipality's own procurement code, as is the case with the *Municipal Code of Chicago* (Chapter 2-92), which broadly applies to the City's procurement activities. A range of other

statutes also apply to state and municipal procurement, such as, for example, the *Criminal Code of Illinois* that addresses public contracts (720 ILCS 5/33E).

As can be seen, there is no one set of laws that applies to all municipalities within a single state, much less nationally across all states. For this reason, it is necessary to research in each case whether a particular municipality has passed its own procurement laws. Assistance in this regard is available through the Municode Library, a service of the Municipal Code Corporation, which publishes municipal laws and ordinances.

At the state level, help is also available in the form of the American Bar Association's Guide to State Procurement: A 50 State Primer on Purchasing Laws, Processes and Procedures, which sets out each state's procurement laws, practices and key issues.

Just as the procurement laws at the state and local government level vary significantly from jurisdiction to jurisdiction, so do the contents of the applicable laws. There are, however, some guiding legal principles that universally apply and that procurement professionals, bidders, contractors and other interested parties should bear in mind when contracting with state and local government. What follows is by no means intended to be comprehensive, but merely illustrative of the types of legal issues that can make the difference between a successful business outcome and one that ends in frustration and disappointment.

Is the Individual Competent to Bind the Government?

The legal principle of 'apparent authority' applies well in the private sector. It is a standard principle of agency law that says that when a principal delegates a defined authority to an agent, the agent is able to legally bind the principal. The agent may even bind the principal where it exceeds its delegated powers. If in the eyes of a counterparty the agent appears to have the authority to bind the principal, the principal is bound. As such, the counterpart will enjoy the benefit of the contract even if it omits to conduct any due diligence on the legal status or competency of the agent (ie, the employee acting on behalf of its employer). This is the law in the private sector.

In state and local government procurement law, the agent – or more specifically for our purposes, the procurement professional on point for the specific procurement – must be actually authorized to bind the public agency. Actual authority to bind is

the general rule in government procurement in the United States. Apparent authority cannot bind a state or local government.

Since apparent authority is a non-starter in government, one might assume that bidders might be tempted to inquire as to the legal authority of the procurement professional, and particularly the contracting officer whose procurement process it is, to bind the government. Perhaps remarkably, it is surprising how rare it is to see a bidder or would-be bidder ask a procurement professional whether he or she is actually authorized. It is important to note that the concern here is typically not one of bad faith, but of inadvertence. The procurement professional who is exceeding their legal mandate to operate is usually doing so by 'accident', not because they purposefully wanted to bind either their government employer or the contractor into an improvident commercial arrangement.

The consequences of this state of affairs is to put an onus on bidders and other government contractors to verify that the relevant procurement professional is actually competent (in the sense of legally empowered) to commit the government it represents. Thus anyone dealing with government assumes the risk of having to ascertain whether the official or procurement professional is acting within the bounds of his or her authority. Those dealing with government need to be proactive and make the appropriate inquiries upfront. In some jurisdictions, procurement professionals have warrants authorizing them to sign contracts. It is not inappropriate or unbecoming to ask a procurement professional to see their warrant, provided it is done tactfully!

Are there exceptions to Actual Authority?

While apparent authority is a non-starter when contracting with government, some exceptions chip away at the principle of actual authority. The application of these can vary from jurisdiction to jurisdiction. One such exception is the concept of 'implied actual authority', which implies that the authority is not express, in the sense that it is not clearly articulated in a written document. A court's interpretation of implied authority is that the authority to contract comes within the person's job description, even if not written down. As the court said, it is an 'integral' part of the person's job:

"Contracting authority is integral to a government employee's duties when the government employee could not perform his or her assigned tasks without such

authority and the relevant agency authority regulation does not grant such authority to other agency employees.”¹

Put differently, the implied authority to contract must be indispensable to the procurement professional’s ability to perform those tasks that need doing.

No effort is made here to comprehensively set out the exceptions to the principle of actual authority. Where appropriate, the reader is advised to consult counsel in the jurisdiction where the matter is in question.

Is the Government Authorized to Contract?

Closely related to the question of the procurement professional’s legal competency to bind the government is whether the government enjoys the capacity to contract. The two questions sometimes overlap, as plaintiffs often merge the two in arguments before the courts.

The established principle is that if the authority of the government has been exceeded, a contract cannot be assumed to have come into force. It is said to be null and void, and therefore unenforceable. As one court put it, “A municipal contract which is legally prohibited or beyond the power of the municipality is absolutely void and cannot be ratified by later municipal action.”² Again, a bidder or contractor is presumed to know the limitations of the powers of the government it is planning to contract with, which again emphasizes the importance of conducting appropriate due diligence when contracting.

What Are the More Common Procurement Methods?

There are many types of approaches to procuring and almost certainly the most standard is **competitive sealing bidding**, where price is the only evaluation criterion and where what is being acquired is commoditized, including non-professional services. An Invitation for Bids (IFB) is normally used for this purpose.

With this method, discretion may be exercised only to assess whether what is being acquired meets the purchase description. Under competitive sealed bidding, no change in bids is allowed once they have been opened, save for correction of errors

¹ Flexfab, LLC v. United States, 62 Fed.Cl. 139, 148 (2004)

² *Ad-Ex, Inc. v. City of Chicago*, 565 N.E. 2d 669 (Ill. 1990).

in limited circumstances. Once the discretionary aspects of the evaluation are completed, award is made on a purely objective basis to the lowest responsive and responsible bidder. “Responsive” and “responsible” are terms of art, which generally have a common meaning across jurisdictions, although local nuances may apply.

It is significant that competitive sealed bidding was the default sourcing method for decades until the 1980s when the requirements of buyers and the materials available (particularly in construction) became more complex. The choice of the appropriate procurement method is in fact an issue in some cases, as it can lead to non-transparent procurement processes. It is the reality of modern procurement that most buyers want to take into account much more than just price, regardless of the goods, services and construction being procured. A very large number of IFBs explicitly include a variety of evaluation criteria – sometimes clustered in a single provision, sometimes sprinkled throughout the document – but fail to explain how such criteria will be assessed against the principle of awarding on the basis of the lowest price. Because these criteria typically become relevant only when a buyer has a concern with the lowest bidder, they are often not well considered during the document drafting phase, either in substance or from a process perspective.

The bias in favor of competitive sealed bidding survives. For example, the Code (at Section 3-203) prescribes that the procurement officer must determine in writing that the use of competitive sealed bidding is either not practicable or not advantageous before using the competitive sealed proposal method, discussed below. It also notes that rules may prescribe types of procurements that, by type, are not practicably or advantageously purchased through competitive sealed proposals. In addition, the Section’s commentary articulates some criteria to consider when making a decision about the desired selection method to use, as follows:

1. whether or not to utilize a fixed-price or cost-type contract under the circumstances;
2. whether quality, availability, or capability is overriding in relation to price in procurements for research and development, technical supplies, or services (for example, developing a traffic management system);

3. whether the initial installation needs to be evaluated together with subsequent maintenance and service capabilities and what priority should be given these requirements in the best interests of the jurisdiction; or
4. whether the marketplace will respond better to a solicitation permitting not only a range of alternative proposals but evaluation and discussion of them before making the award (for example, computer software programs).

Whether a procurement method other than competitive sealed bidding may be used depends on the laws in force in the specific jurisdiction, which vary considerably across the United States. Where procurement laws are passed or amended at the state and local government level, it is best to avoid being prescriptive with procurement methods and to expressly grant procurement professionals the discretion required by them to make the best decision in the circumstances. Given the complexity of government procurement, there is no substitute for good judgment based on sound knowledge and broad experience.

The other major approach to procurement which has been gaining ground rapidly since the 1980s is **competitive sealed proposals**, where discretion is applied, not only to assess whether what is being acquired meets the purchase description, but to evaluate the specific evaluation criteria that are developed to assess the proposals received. A request for proposals (RFP) document is typically used for this purpose. As always, the particulars of how the evaluation criteria may be presented and assessed, and what form the RFP may take is prescribed by the procurement laws of the specific jurisdiction. Note that the above-mentioned trade agreements play a role in defining the flexibility available to state and local governments to set the rules in this regard.

With an RFP, pricing is only one criterion among many. The evaluation criteria are evaluated and the rights of the buyer to deal with the top-ranked proponents are defined by the applicable legislation, regulations, policies, and of course the terms of the RFP document, which must be consistent with the broader regulatory framework.

Importantly, during the evaluation of the proposals, the evaluators are allowed to clarify certain matters and to correct certain errors, provided that doing so does not perpetrate any unfairness on the other proponents in the competition. As well, under competitive sealed proposals, negotiations may be conducted with select proponents regarding the quality of the solution being proposed, focusing on

specific aspects of the products and/or services being procured, a process that contributes significantly to optimize the value achieved by the procuring entity. In the end, under competitive sealed proposals, the award is made to the responsible bidder whose proposal is most advantageous to the buyer.

Many other procurement methods are available, depending on the jurisdiction, applying variously to the many stages of the procurement lifecycle. These include **e-procurement** (involving the sourcing of goods and/or services by electronic means), **Joint or co-operative purchasing** (involving a group of buyers joining forces to place larger orders), **Purchasing cards** (facilitating small one-off purchases up to a pre-determined amount), **Competitive quotations** (for smaller purchases and for more commoditized procurements), **RFIs** (to solicit information from the market regarding the technical feasibility or market price of certain goods or service specifications, or a process to assess whether there is a sufficient number of vendors in the market to justify issuing an RFP), **Standing offers (or vendors of record)** (allowing operating departments (typically in a larger government) to order goods directly from a pre-approved supplier without putting the order through the procurement department), **Sole sourcing** (to acquire goods or services without conducting a competition where only supplier is available to source the goods or services), and **Single sourcing** (to acquire goods or services without conducting a competition where there is no, or may not be, another supplier or suppliers capable of delivering these goods or services).

BID PROTEST PROCEDURE

Bid protest procedures play a critical role in maintaining and promoting the integrity of the procurement system in place because they provide a mechanism for unsuccessful bidders to challenge government decisions. By so doing, they also allow third parties to review the decisions made by government, which in turn promotes confidence in the system by the market and by the citizens, who are able to satisfy themselves that the laws have been complied with and that value for money has been optimized. There is also the important though rarely mentioned fact that a well-functioning bid protest mechanism makes government procurement stronger and better.

The Code sets out a model dispute resolution regime (Article 9) with the Commentary noting that under the above-mentioned trade agreements, the United States must require the state and local governments to “have an appropriate bid

protest procedure". How this gets implemented of course varies greatly from jurisdiction to jurisdiction at the state and local government level.

In general, protests are heard by the procuring entity (of the contracting officer) or by a designated official within the state or local government (such as the Chief Procurement Officer or a senior finance official). How this is structured takes into account a broad range of considerations, from the cost of conducting a bid protest mechanism to the apparent and real independence of the reviewer, which contributes to the perceived objectivity of the reviewed decision. Some states, such as Maryland, have opted for a more formal bid resolution process, where protests are heard by administrative judges. Protests are sometimes also heard by quasi-judicial tribunals where the reviewers may or may not be legally trained, but have access to specialist counsel (typically in-house).

In the more common circumstance where the protest is heard by someone within the procuring organization, an appeal lies to either an administrative body or to the courts. Depending on the jurisdiction, varying degrees of formalities may exist before being permitted to proceed. Some states, such as Utah, have procurement appeal boards, with procedures that must be complied with strictly.

Many critical questions arise when considering launching a protest, either prior to contract award or after the award, including the all-important issues of jurisdiction and standing. Jurisdiction goes to the question of whether the government in question legally allows protests against itself. Standing goes to the question of who specifically is allowed to challenge a government's procurement process. These questions go to the heart of a potential protest and need to be clarified early before much time and effort is spent on articulating the grounds of the protest.

Finally, there is the fundamental question of the remedy available in the event of a successful protest. There is no purpose in spending a great deal of time and money where the reward in the event of success is out of step with the effort invested. The remedies available on a bid protest at the state and local government range from cancelling and re-tendering of the contract, award of the contract, recovery of bid preparation costs and recovery in damages (loss profits). In Maryland, a wide range of remedies are available, including the right of the judge to refer a matter for prosecution for fraud and other violations where appropriate in the circumstances.

In addition to the remedies sanctioned by statute at the state and local government level, the courts typically enjoy a broad discretion to award remedies, subject to the requirements of the applicable legislative framework. As always, the remedies available in one state as defined by the case law may not apply elsewhere, so it is critical to consult with a specialist government contracts lawyer in the relevant venue to ensure the bid protest is grounded and susceptible to being successful.

Ending Comment

Doing business at the state and local government level can be a high risk proposition because of the layers of authority to contract that must be acknowledged and complied with and the various levels of government. Not only does a uniform approach not exist from jurisdiction to jurisdiction, but a uniform approach sometimes does not exist even within a single jurisdiction, with the laws and procedures applying differently depending on the specific business unit or department involved. It is critical to be aware of the laws, regulations, rules and policies applicable in any given procurement.

Canada

In broad terms, two distinct types of RFPs are found in Canada. The first, referred to as the 'Contract A' RFP, does not allow for any form of negotiations with the successful proponent(s). The award is made to the bidder that achieves the highest score on the evaluation.

The source of the Contract A RFP is a separate body of common law that is generally referred to as "Contract A/Contract B", where Contract A gives rise to a so-called bidding contract, with an "implied duty of fairness". Contract B constitutes the contract for goods, construction or services which is ultimately awarded. The courts have supported the principle that a bidding contract does not come into effect unless the bidder submits a "compliant bid", namely one that complies with the terms and conditions of the bid call document (whether a tender or request for proposals). Where it is in place, a bidding contract is treated by the courts as an ordinary contract, albeit one with many implied terms. Public agencies may opt out of the bidding contract by stating in their bid call document that the bidding contract will not apply.

The second type of RFP reflects the almost universal practice of negotiating with one or more bidders after completing the evaluation process, or conducting a 'best and final offer' (BAFO).

Regardless of the type of RFP, the Canadian procurement process must be "open, fair and transparent" ("open" means that anyone can bid; "fair" that bidders and prospective bidders are treated equally; and "transparent" that the rules may be known to anyone). The underlying purpose of a procurement process that is open, fair and transparent is to support the principle of "value for money".

LEGISLATIVE FRAMEWORK

What is the principal legislation that regulates public procurement? What regulatory authorities are responsible for public procurement enforcement?

REGULATORY FRAMEWORK

Legislation to regulate public procurement in Canada is in place in only a few Canadian jurisdictions, and there is no Canada-wide statute that applies uniformly. Except for Ontario, Nova Scotia and Québec, public procurement law in Canada has largely been defined by common law (that is, decisions by the courts in their efforts to resolve individual procurement disputes).

At the federal level, the most significant sources of guidance in federal procurement are Public Works and Government Services Canada's (PWGSC) Supply Manual and the Treasury Board of Canada's Contracting Policy. Other relevant sources include the:

- Financial Administration Act.
- Government Contracts Regulations (enacted pursuant to the Financial Administration Act).
- Defence Production Act in respect of defence procurement.

The PWGSC's Supply Manual is primarily intended for use by PWGSC, although other federal departments and agencies can rely on it to conduct their procurement activities. Federal procurement statutes work in harmony with the applicable trade agreements, including the WTO Agreement on Government Procurement (GPA) and the North American Free Trade Agreement (NAFTA), among many others.

At the provincial level, Ontario's Broader Public Sector Procurement Directive (Directive), which came into force on 1 April 2011, provides 25 mandatory requirements that govern how public procurement is to be conducted in Ontario. Although the Directive was developed and introduced by the Ontario Ministry of Finance, there is no Ministry or other body that is responsible for the enforcement of the requirements of the Directive. Mandatory Requirement #25 under the Directive prescribes that every organization that is subject to the Directive "must communicate [their] bid protest procedures for suppliers in all competitive and procurement documents to ensure that any dispute is handled in a reasonable and timely fashion".

Québec's 'An Act respecting contracting by public bodies (Québec Act)', which came into force in October 2008, provides the conditions that regulate contracts between the government and private parties. The statute emphasizes the principles of accountability, honest and fair treatment of bidders, and transparency.

Provincial statutes that govern public procurement are also intended to complement the applicable trade agreements. In Ontario, for example, the Directive expressly states that no part of the Directive is intended to amend or otherwise impact the applicable domestic Agreement on Internal Trade (AIT), which broadly applies at the sub-national level in Canada, including Ontario.

REGULATORY AUTHORITIES

There is generally no regulatory body that deals specifically with public procurement matters in Canada, with perhaps the exception of the Canadian International Trade Tribunal (CITT), which hears complaints filed by suppliers on federal procurement and makes recommendations on the appropriate remedy to be applied and implemented by the department concerned. Similarly, the Province of Nova Scotia has established a Vendor Complaint Process, which "applies to all procurement activity carried out by the Province of Nova Scotia's departments, agencies, boards and commissions". However, this process is purely political, designed to demonstrate that the Province is committed to sound public procurement.

In Québec, the Chair of the Treasury Council (*Conseil du trésor*) keeps a register of companies that are not eligible for public contracting and conducts audits to ensure that contracts are awarded in accordance with the Québec Act.

More broadly, the Canadian Competition Bureau is mandated to investigate allegations of bid-rigging occurring anywhere in Canada, at all levels of government.

Except for the federal jurisdiction where the CITT hears public procurement complaints filed in respect of federal procurement, the public procurement rules are enforced by the courts in Canada.

What are the overriding principles of the legislation?

In Canada, public procurement must be all of the following:

- Open to anyone who wishes to bid. The opportunity must be advertised broadly so it can become known to those who are interested.
- Fair to all of the bidders and prospective bidders. They must be treated the same way, without discrimination in favor of, or against, any bidder or potential bidder.
- Transparent, so the rules of the process and how they were applied must be known or capable of being known to the bidders.

A public procurement that is "open, fair and transparent" is generally considered to support the principle of "value for money".

The applicable legislation also tends to harmonize with the principles arising from the body of common law decisions in public procurement, which over the years have established a balancing of the rights of the public agencies and bidders (even though many of the court decisions either conflict or appear to conflict among themselves on the relevance and the application of the legal principles).

SCOPE OF THE RULES

Which entities must comply with the procurement rules? Are there any exemptions?

At the federal level, the federal departments and several categories of the many crown and quasi-crown corporations are subject to the applicable public procurement framework. In general, public bodies that have been created by statute and have a mandate to compete with the private sector are not subject to the public procurement laws, including the statutory framework in place. Given

the large number of bodies that fall into this category, it is important to verify whether the specific body is covered by the framework.

Similarly, across the provinces, not all of the public agencies are equally subject to the applicable procurement framework. In Ontario, the Directive currently applies to a broad range of public agencies, including, but not limited to:

- Colleges and universities.
- School boards.
- Hospitals.
- Every approved agency designated as a children's aid society under subsection 15(2) of Part I of the Child and Family Services Act.
- Every community care access corporation.

It is expected that the Directive will apply to the municipalities in the future, although no timeline has been set for this. The Québec Act applies to all public agencies in Québec.

The procedural fairness requirements that arise from court decisions are capable of applying to the procurement processes of private companies if the framework is introduced by the language of the specific bid call document.

Are there specific thresholds to determine if a contract is subject to the public procurement regime? Are there any aggregation/anti-avoidance rules?

THRESHOLDS

Certain monetary thresholds set out in the applicable trade agreements prescribe competitive procurement. While the thresholds vary slightly between trade agreements, those set out in the domestic Agreement on Internal Trade (AIT) (as it applies in the Province of Ontario) apply broadly to the public sector across Canada, as follows:

- For goods:
 - Can\$25,000 for government ministries;
 - Can\$100,000 for the broader public sector;
 - Can\$500,000 for crown corporations.

- For services:
 - Can\$100,000 for government ministries;
 - Can\$100,000 for the broader public sector;
 - Can\$500,000 for crown corporations.
- For construction:
 - Can\$100,000 for government ministries;
 - Can\$100,000 for the broader public sector;
 - Can\$5 million for crown corporations.

Aggregation/anti-avoidance rules

The Competition Act (Canada) contains civil and criminal provisions that prohibit anti-competitive behavior. The statute provides for criminal penalties for practices such as:

- Bid-rigging.
- Conspiracies to lessen competition.
- Price discrimination.
- Price maintenance.
- Refusal to supply.
- Predatory pricing.

Practices that are subject to review by the federal Competition Tribunal include:

- Mergers.
- Abuse of dominance.
- Tied selling.
- Refusal to deal.
- Exclusive dealing.
- Market restriction.
- Delivered pricing.

PROCUREMENT PROCEDURES

What procedures do regulated entities use when carrying out procurements? Can regulated entities freely choose between the procedures? When is it appropriate to use each procedure?

Provided a public agency complies with the applicable public procurement principles, it has a great deal of freedom in choosing the public procurement procedure it can apply, as long as the process can be considered to be fair, open, and transparent. Guidance is available on the specific procedures available, among others, from the applicable trade agreements, including the World Trade Organization's GPA, NAFTA, the domestic AIT, the common law, as well as the agency's internal procedures and policies. The main procedures include the following:

Freedom of choice

The procedure of choice varies depending on the strategy, purpose and timing of the procurement process put in place by the public agency.

Key features

The key features for each procedure are:

- **Purchase cards.** These facilitate small one-off purchases up to a pre-determined amount, and also allow management to track individual expenditures, which promotes accountability.
- **Joint or co-operative purchasing.** This involves a group of buyers joining forces to place larger orders, which secures more favorable purchasing conditions.
- **E-procurement.** Electronic procurement is the sourcing of goods and/or services by electronic means, which in some cases may include e-tendering, where bidders submit their responses electronically.
- **Standing offer (or vendors of record).** This constitutes a purchasing scheme that allows operating departments (typically in a larger government) to order goods directly from a pre-approved supplier without putting the order through the procurement department.
- **Request for quotation.** This is a formal process in a commoditized procurement process where selected vendors are invited to submit their best price.

- **Request for Expression of Interest (REI).** An REI is a formal process designed to identify which vendors, if any, might be interested in participating in a subsequent RFP process.
- **Request for Quotation (RFQ).** An RFQ is a formal process intended to pre-qualify the most capable vendors, in accordance with selected criteria, with a view to participating in a subsequent RFP process.
- **Request for Information (RFI).** An RFI is a formal process where information is solicited from vendors regarding the technical feasibility or market price of certain goods or service specifications, or a process to assess whether there is a sufficient number of vendors in the market to justify issuing an RFP.
- **Request for Proposals (RFP).** An RFP procedure is typically applied to prescribe the desired business outcome, leaving the vendors to determine how they propose to provide the goods and/or services, recognizing that RFP terms and conditions vary significantly depending on the public agency's needs and published requirements, which are evaluated on the basis of a variety of criteria where price is not the dominant criterion. RFPs may or may not be legally binding depending on the expressed intent of the public agency.
- **Request for Tender (RFT).** An RFT is a procedure commonly applied in supply contracts involving a well-defined good, service or construction, and where the price is the dominant, and sometimes the only, evaluation criterion.
- **Sole source.** This is the use of a non-competitive procurement process to acquire goods or services where there is only one available supplier for the source of the goods or services.
- **Single source.** This is a non-competitive method of procurement of goods or services from a supplier in situations where there is, or may be, another supplier or suppliers capable of delivering these goods or services.
- **Alliance purchasing.** This operates under various names, such as alliance contracting, industry alliance programs, or strategic alliance

arrangements. It constitutes co-operative procurement arrangements intended to achieve a high degree of economic value by spreading production, procurement, and distribution costs.

In general, public agencies in Canada enjoy a great deal of flexibility in choosing and defining the features of the procurement procedure to conduct a particular procurement.

With limited restrictions, the agency is free to determine:

- The terms and conditions of its proposed contract.
- The method and format of the vendors' offers.
- The minimum or maximum number of vendors to be invited to a procurement process.
- The manner in which the contract is intended to be finalised, such as conducting single or dual-track negotiations, or holding a BAFO.

Some of the main restrictions on public agencies when procuring include the following:

- Provided the applicable monetary thresholds have been met, public agencies must make use of an electronic bulletin board to advertise their bid opportunities (*AIT*). According to the *AIT*, each notice must contain:
 - a brief description of the procurement contemplated;
 - the place where a person can obtain information and tender documents;
 - the conditions for obtaining the tender documents;
 - the place where the tenders are to be sent;
 - the date and time limit for submitting tenders;
 - the time and place of the opening of the tenders, if public; and
 - a statement that the procurement is subject to the relevant *AIT* chapter.
- Sole or single sourcing can be used but only on an exception basis, and in accordance with any of the defensible justifications set out in the applicable trade agreements.

- During the course of the evaluation and negotiation process, a public agency is only authorized to conduct the process in a way that is consistent with the contents of the bid call document (that is, RFP), and cannot improvise, either by creating new evaluation criteria after the closing of the bids, or negotiating in ways that do not come within the ambit of the requirements set out in the bid call document.
- A bid call document must generally remain public and available to potential bidders for a reasonable period of time in the circumstances, after the release of the bid call document (*Article 506, paragraph 5, AIT*).
- Vendors must be provided with a minimum time of (Directive Mandatory Requirement #7: Timelines for Posting Competitive Procurements of Ontario's Broader Public Sector Procurement Directive):
 - 15 calendar days for the procurement of goods and services valued at Can\$100,000 or more; and
 - 30 calendar days for complex, high-risk, or high-dollar value procurements.

TECHNICAL SPECIFICATIONS

Are there any requirements concerning technical specifications of tenders?

Public agencies in Canada generally enjoy significant freedom in determining the requirements of their bid call documents, provided specifications are not, for example, inconsistent with the requirements of Article 504, paragraph 3 of the AIT, in respect of non-discrimination, and do not do one of the following:

- Impose conditions on the invitation to tender, registration requirements or qualification procedures that are based on the location of a supplier's place of business or the place where the goods are produced or the services are provided or other similar criteria.
- Be biased in technical specifications in favor of, or against, particular goods or services, including goods or services included in construction contracts, or in favour of, or against, the suppliers of goods or services for the purpose of avoiding the obligations under the AIT.

- Time events in the tender process so as to prevent suppliers from submitting bids.
- Specify quantities and delivery schedules of a scale and frequency that may reasonably be judged as deliberately designed to prevent suppliers from meeting the requirements of the procurement.
- Divide required quantities or divert budgetary funds to subsidiary agencies in a manner designed to avoid the obligations under the AIT.
- Use price discounts or preferential margins to favor particular suppliers.
- Unjustifiably exclude a supplier from tendering.

Can certain prospective bidders be excluded from the competition?

- It is possible to exclude prospective bidders from the competition through the RFQ pre-qualification process where, for instance, entities must pre-qualify based on a range of criteria, such as experience and financial strength. Where a pre-qualification process has been established, only those prospective bidders that meet the requirements may submit a bid.
- In addition, certain prospective bidders – or companies that otherwise would have bid – may be excluded from the competition even if they have met the RFQ requirements for a number of reasons such as, for example, poor performance under an earlier contract with the public agency, previous instances of fraud, or litigation between the entity and the public agency. In such instances, the procedure to exclude an entity must have been established well ahead of the particular competition in which the public agency seeks to exclude the entity, and the exclusion procedure must be complied with.
- It is also possible to exclude all but a single entity, where sole sourcing is permitted pursuant to the applicable framework.
- There are no prescribed rules on short-listing bidders. Public agencies typically address this question in their internal policies and procedures.

Are there any rules on the specifications/criteria?

MANDATORY REQUIREMENTS

Most bid call documents include mandatory requirements, which all submitted bids must satisfy. Any bid that fails to meet even a single mandatory requirement is deemed non-compliant.

EVALUATION CRITERIA

Only the criteria that were published in the bid call document may be relied on to evaluate the bids that are submitted, which means that the evaluation criteria must be developed before the release of the bid call document, which must be transparent.

A public agency may make adjustments to the evaluation criteria after selecting the preferred bidder, but the right to make adjustments must be reserved in the bid call document.

ALTERNATIVE BIDS

Are there specific rules in relation to alternative bids?

There is no law in Canada that prescribes how and when alternative bids can be requested or handled by a public agency, although some best practices are currently becoming common which inform how alternative bids should be considered. For example, section 11.2.6 of Ontario's Broader Public Sector Procurement Directive Implementation Guidebook explicitly recognises alternative procurement approaches, provided that appropriate guidance has been obtained.

An alternative bid is defined as the submission by a bidder of a second bid that complies with the evaluation criteria provided in the bid call document, or the submission of a second bid that does not comply with the criteria provided in the bid call document. While the former is acceptable, the latter, being non-compliant with the requisite criteria, must not be considered.

CONTRACT AWARD CRITERIA

What are the requirements relating to contract award criteria?

The bid call document must specify the criteria on which the contract is to be awarded, for example best value or lowest price. The criteria can include the public agency's internal procedures and policies. While the agency is entitled to insert significant reservations in a bid call document, these reservations will not be enforced by the courts when found to defeat the principle of procedural fairness.

Can bidders combine to submit a bid?

There is no bar to submitting a joint bid, although in some circumstances bidders will need to be mindful of the requirements against bid rigging set out in the Competition Act.

ENFORCEMENT

Who can bring a claim for non-compliance with procurement legislation? What are the available review procedures? Are there any associated statutes of limitation?

RIGHT TO BRING A CLAIM

With the exception of the complaint procedure in place in federal procurement, generally any aggrieved party in the procurement process can bring a claim for non-compliance with the applicable procurement legislation or rules, or a claim in tort if applicable. These claims are brought before the courts typically in the form of a statement of claim, or occasionally in the form of an injunction seeking a specific remedy.

An expedited procurement complaint process is in place at federal level, in which complaints are brought before the CITT. A detailed procedure prescribes the timely filing and manner of submitting complaints before the CITT.

ENFORCEMENT PROCEDURES

Parties can resort to the provincial courts or to arbitration if the terms of the bid call document indicate that disputes are to be resolved by arbitration. The

applicable remedy will normally be damages, because the matter is dealt with long after the procurement has ended.

Federal procurement complaints lodged before the CITT are typically heard within three to four months of the complaint being filed. Where a complaint is successful, in some circumstances where feasible, the contract may be allocated to the successful complainant. An unsuccessful complaint before the CITT can have the same effects as a proceeding before the federal court.

STATUTES OF LIMITATION

Limitation periods depend on the applicable law in a given jurisdiction, in Canada an area that constitutionally falls within the jurisdiction of the provinces. In most provinces, the basic limitation period for claims of breach of contract is two years from the time the claim arises or the time the claimant should have known of the existence of the claim, although different limitation periods may vary by province or subject matter of the claim.

In federal procurement, complainants have ten working days to file a complaint with the CITT after the day on which the basis of the complaint became (or reasonably should have become) known to them.

Is there a specific forum before which disputes are heard?

Typically the bid call document will prescribe how disputes are to be treated, which may include binding arbitration. At the federal level, pursuant to the Trade Agreements, disputes are typically first brought before the Canadian International Trade Tribunal.

What are the leading court decisions involving procurement disputes?

There have been many court decisions involving procurement disputes, including those by the Supreme Court of Canada, which are followed by the lower courts across Canada. These main Supreme Court of Canada decisions are the following:

- *Ontario v. Ron Engineering*, in which the Supreme Court of Canada established the Contract A/Contract B paradigm;

- *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Limited*, in which the Supreme Court of Canada held it was an implied term of the tender contract that the owner was under an obligation to accept only a “compliant” tender;
- *Martel Building Limited v. Canada*, in which the Supreme Court of Canada found an implied obligation to treat all bidders fairly and equally;
- *Double N Earthmovers Ltd. v. Edmonton (City)*, in which the Supreme Court of Canada held that owner/buyers were under no duty to investigate whether an apparently compliant bidder could actually comply with the requirements of Contract B;
- *Tercon Contractors Ltd vs. British Columbia (Ministry of Transportation and Highways)*, in which the Supreme Court of Canada held that a well drafted, unambiguous exclusion clause could be sufficient to exclude liability for a breach of the duty of fairness.

REFORM

Are there any proposals for reform of the procurement legislation? If so, when are they likely to be implemented?

Ontario's Broader Public Sector Procurement Directive, which currently applies to colleges, universities, school boards and hospitals, among other bodies, came into force on 1 April 2012. Although the Province has no current intentions to amend the Directive, it is anticipated that its reach will eventually be extended to municipalities, although no definite timeline has been set.

In Québec, as of 1 June 2012, an Act to prevent, combat and punish certain fraudulent practices in the construction industry and to make other amendments to the Building Act (Québec) (Bill 35), came into force. The new statute amends parts of the Québec Act, and among other things, businesses convicted of certain offences will now be prohibited from entering into public contracts in Québec for a period of five years following conviction.

An important development with the potential to significantly affect the competitive procurement environment in Canada for many decades or generations, is the possibility of a comprehensive trade and economic agreement being concluded within the next few months between Canada and the members of

the EU. It is well understood that the members of the EU have made access to public procurement opportunities, at all levels of government in Canada, a main objective of the negotiations, which have been underway for more than two years. In the event of an agreement, it is anticipated that any impact of a new deal would be felt most, and primarily, by public agencies operating at the third level of government, such as municipalities, hospitals, and others.

REGULATION OF SPECIFIC INDUSTRIES

Are any industries subject to specific regulation?

The Canadian public procurement laws generally apply irrespective of the specific industry sector, although public agencies can introduce specific requirements that either prescribe new legal requirements or simply establish practices in the sector. Canada's offset requirements for major military procurements are reflected in the Industrial and Regional Benefits (IRB) program, which requires successful bidders to make investments in advanced technology in selected sectors and areas of Canada, in amounts sometimes equal to the value of the specific contract. In addition, if a procurement is declared to be subject to the federal Defence Production Act, the underlying documents will be exempt from the rigorous disclosure requirements applicable under federal laws, helping to ensure that sensitive technology and information are appropriately protected.

PRIVATISATIONS AND PUBLIC-PRIVATE PARTNERSHIPS (PPPs)

Are privatisations and PPPs subject to the procurement regime? If not, what are the relevant legal rules?

Both Privatisations and PPPs are subject to the applicable public procurement framework.

RECENT TRENDS

What are the recent trends in the public procurement sector?

Perhaps the most notable current trend in public procurement in Canada is the newly found interest in the best and final offer (BAFO) technique, which can be used to great advantage in significantly improving the value achieved in a procurement process. Although BAFO has been extensively used in some

jurisdictions (most notably the state of New Mexico in the United States), it has historically been rarely used in Canada. It is now becoming popular in the healthcare and municipal sectors, in particular.

Additionally there is an increasing emphasis on sustainable procurement across the public sector in Canada, and at the municipal level in particular where Leadership in Energy and Environmental Design (LEED) practices have made significant inroads.

The most notable decision to be issued in the last year or two is the Supreme Court of Canada's decision in *Tercon Contractors Ltd vs. British Columbia (Ministry of Transportation and Highways)* (2010). Although many had hoped that *Tercon* would provide clarity to the complex and controversial Contract A/Contract B paradigm (that is, establishing procedural fairness duties), which was introduced by the Supreme Court almost 30 years earlier in *R v Ron Engineering and Construction (Eastern) Ltd* (1981), the *Tercon* decision casts a shadow of continuing uncertainty. Although the Supreme Court judges rallied around a new test for determining whether to enforce liability disclaimers, they were not able to agree on how to apply it to the facts of the case.

On the facts, the Supreme Court's decision was split five-to-four, which illustrates the singular complexity of public procurement law in Canada. While signaling the end of the principle of fundamental breach, *Tercon* asserts the principle of freedom of contract.

Chapter Three

FUNDAMENTAL ISSUES

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Chapter Three

FUNDAMENTAL ISSUES

The decision to employ a Request For Proposal (RFP) commits an organization to a formal procurement process based on fair and open competition. (In the Model Procurement Code¹, this procurement method is called Competitive Sealed Proposals.) This decision forces the organization to systematically define the acquisition process, and the basis on which the proposals will be assessed. The RFP itself provides a standardized framework for vendor proposals and highlights the business, technical and legal issues that must be included in the final contract. By employing an RFP, an organization can obtain much information on which to base its decision. The RFP process, although often costly and time-consuming, increases the probability of success.

What is an RFP?

Our discussion of RFPs begins with the term itself. What is a Request For Proposal? There are many different definitions. Some are complex; others, simple. The one that I prefer is: A Request For Proposal is a formal invitation from an organization to a supplier to submit an offer. The offer is to provide a solution to a problem or a need that the organization has identified. An RFP is a procurement process in which the judgment (by the evaluators) of the supplier's experience, qualifications and solution may take precedence over price.

There are several key concepts in this definition. First, an RFP is a document inviting suppliers to submit solutions to a stated problem. It is also a process in which the evaluators base the decision on more than price. It is price plus a variety of factors as judged by the purchaser. Another concept is that of competition. The evaluation process is based on having several proposals from different vendors.

Stated another way, an RFP is a written request to suppliers that invites them to propose solutions (and prices) that satisfy functional requirements described in that document. This definition introduces the concept of satisfying requirements: proposals and suppliers are evaluated in terms of the ability of the solution as described in the vendor's proposal to satisfy a stated set of requirements.

A comprehensive definition of the term RFP must include all of these concepts.

A Request for Proposal (RFP) is a document in which an organization describes its requirements, asks suppliers for their proposed solutions, describes the key criteria which will be used in evaluating proposals, and outlines the terms and conditions under which the proponent will operate or supply goods or services.

A Request For Proposal is also a process for obtaining offers from competing organizations, evaluating those proposals against stated requirements using a pre-defined evaluation process and a pre-defined set of evaluation criteria in which price is not the only factor. The process must be both effective and able to withstand legal challenges from disgruntled suppliers.

For the sake of completeness, let's define the term "proposal" before leaving this section. A proposal is a formal offer by a supplier to provide certain goods and services. A proposal documents the response to the requirements of the RFP, describes the proposed solution, identifies the costs, and often indicates acceptance of the contractual terms and conditions stated in the RFP.

The State of Utah, Department of Administrative Services Division² has a good, but lengthy definition of an RFP:

Request for Proposal (RFP): The competitive sealed proposal process is used when the procurement officer determines that the RFP process is more advantageous to the State than the IFB process. The RFP process is used when the needs of the state agency may not be completely clear, negotiations may be necessary, and cost is just one of several criteria necessary to make an award. Usually the RFP process is used to procure professional or human services or information technology equipment. An RFP will contain technical specifications of a Scope of Work for which the offeror must respond with a sealed technical proposal and prices. A formal proposal close date and time will be specified, following which any proposal received will not be considered. Evaluation criteria will be established and listed in the RFP and used by the Division to select the contractor. Frequently evaluation committees are impaneled to assist in the evaluation of proposals. At the proposal opening only the names of the offerors are disclosed. After award of the contract, both successful and unsuccessful proposals become public information except for qualified business confidential information.

The State of South Dakota provides the vendor community an explanation of its RFP process:³

(Procurement Management) also may utilize a Request for Proposals (commonly referred to as an "RFP") for requirements that preclude the use of a specification.

A RFP is a competitive method of procurement whereby offerors are asked to submit proposals for the supply of goods and/or services in a format, which allows for the consideration of factors in addition to the price in the evaluation and award process. This method of solicitation is used when it is determined by (Procurement Management) that the use of competitive sealed bidding is not practicable or is not advantageous to the State. The RFP solicits sealed price proposals from prospective vendors and seeks to obtain the "best value" for the State.

The RFP method does not use the cost of the project as the single determining factor, rather, uses a combination of lowest cost plus best proposed solution to determine the award. RFPs are used when the project does not lend itself to the creation of a clear and accurate Statement of Work and the objective of the solicitation is to determine a vendor who can offer the best possible solution at the most reasonable cost.

When is an RFP Used?

In theory, a formal RFP document and process are used whenever there is a need for obtaining goods and services as a solution to a stated problem. But if the anticipated solution costs only \$20,000, for let's say, an evaluation of a technical design, then the cost of the RFP process must also be small.

The cost of preparing an RFP document can be small, especially if a similar one has previously been used by the organization. However, the cost of preparing the document is only one of many costs. Often, the costs of the RFP process far exceed the costs of the document. Costs incurred in the process include those for defining the requirements or the problem, for preparing documents, having them reviewed, issuing them, answering suppliers' questions, defining evaluation procedures and criteria, evaluating proposals, and preparing reporting memos. Sometimes, there are additional costs for defending the final selection as fair.

There is little sense in spending \$10,000 of time and effort on an RFP document and process to acquire a \$20,000 solution. A quicker route must be taken. Regardless of cost, the process for the \$10,000 solution should still follow the principles of your purchasing policies and still must be fair, open and transparent. Even if your organization permits you to award small contracts on the strength of a telephone call or a letter, you must ensure that the process for asking or selecting vendors is fair and can be defended. You can't simply call the same supplier time after time, year after year, even if the individual contracts cost little.

As a principle, most public bodies and suppliers recognize that the effort must be commensurate with the amount to be spent. Formal RFPs are usually employed

when there is a high visibility project or when the expenditures exceed a certain specified amount. The acquisition of many types of Information Technology (IT) goods and services (such as personal computers, training courses, or software) is accomplished by simpler procurement methods such as the Request For Bids. However, the most complex IT acquisitions, and the most expensive ones, invariably employ the RFP process. These projects, such as the outsourcing of a major processing function, or design and implementation of a document imaging facility, may take several years and cost tens of millions of dollars. This process is also used to acquire a wide range of services such as engineering studies, printing and design services, as well as janitorial services.

Many organizations have developed guidelines related to the level of effort and the value of the project. In some organizations, guidelines are informal and not standardized across the organization. One individual in one department may not employ the same standards as another person in a different department. In other organizations, guidelines have been adopted as policy. They have been written down and distributed to all managers to ensure that all suppliers are treated in the same way. This information is frequently published on the department's web site.

Deciding When to Use an RFP

Using an RFP is never the first choice for a competitive procurement. A brief review of the practices in many jurisdictions indicates that there are several different approaches to deciding when to use an RFP. Here are descriptions of the most common methods.

Develop a procurement plan. This plan determines the procurement method to be used based on factors such as the existing market, recent market developments, complexity of the decision-making process and price.

Here is a definition of the process from St. Johns River Water Management District:⁴

Procurement Planning is the process by which the District, after determining the need to outsource the requirement, defines the existing market for the goods, services, or construction elements, estimates the anticipated cost, and determines the most appropriate method of procurement. Planning is critical to the success of the procurement.

The Organization for Economic Cooperation and Development (OECD) has developed a Template for Market Study Report⁵ which contributes to the determination of when to use an RFP. Here is their description of the purpose of this study:

(The purpose is to) define realistic and unbiased tender requirements, assist in the choice of tender method, facilitate planning and budgeting, inform tender evaluation through the collection and analysis of information on the market structure, suppliers' capabilities and price trends.

A template for a market study report provides a means to document and file information collected and analysed by procurement practitioners during the pre-tendering phase of the procurement cycle. Standardised templates help to ensure that information can be readily shared between procuring authorities, as is recognised as a good practice in market studies, and to serve as materials in training programmes.

Use an RFP as the last resort. If the item being sought can be defined as a commodity, that is a purchase with only mandatory requirements or specifications, then it can be acquired using something other than an RFP. Depending on circumstances and local definitions, a quotation, bid, tender, small procurement, or minor purchase may be used. In other circumstances, an agency can avoid using an RFP if the goods and services can be obtained from a purchasing cooperative or by using another agency's agreement with a vendor, often referred to as a 'piggyback' agreement.

In Alaska, their Procurement Code⁶ states that if you cannot award a contract by Competitive Sealed Bidding (known as a quotation in many jurisdictions), then you must use a Request For Proposal. This is the most common approach and has its origins in the Model Procurement Code of 1979. This approach acknowledges that bids incorporating only mandatory requirements are simpler.

Prescribe when an RFP can be used. Another approach for deciding if an RFP is required is based on a description of specific situations. For example, here's how the State of Utah identifies when an RFP is appropriate:⁷

SO, YOU WANT TO DO AN RFP

A Request for Proposal (RFP) is one of several procurement tools. The State Purchasing agent will determine if the RFP process is appropriate. Generally, most products and services can be procured through the Invitation to Bid process.

At times, the RFP process may be a better tool. Among the criteria the Purchasing agent will consider are:

Specifications or the needs of the agency cannot be clearly defined.

The agency has defined a need and requests the Offerors to propose the best method for accomplishing it.

Cost is only one criterion in determining the award and needs to be weighed against other factors in determining the best value.

Other factors as deemed appropriate by Purchasing.

When NOT to Use an RFP

Using an RFP when it's not needed or when it would be misleading leads to wasted time and effort and vendor complaints.

When you have no intention of acquiring anything. If the organization has no intention of procuring goods and services, it should not issue an RFP. If it is interested in learning about products and services available in the marketplace, there are simpler and better procedures. The common approach is to use a Request for Information (RFI). The organization identifies the types of problems or types of services in which it is interested and invites suppliers to provide information. Another, sometimes better, approach is to call up two or three vendors and invite them to present information about their products or solutions. Most vendors will gladly provide information about their products and services and will welcome the opportunity to learn more about an organization, including its problems and requirements. There is no conflict of interest or impropriety in inviting vendors to present their credentials. Inviting one supplier to present its credentials may raise some concerns about favoritism. Inviting several competing suppliers to brief you on their capabilities is not favoritism but good business - keeping up-to-date with a changing marketplace.

There are other approaches besides issuing an RFI to promote exchange of information with industry, including industry or small business conferences, market research, and site visits.

In many organizations, budgetary approval must be obtained prior to issuing an RFP. Some organizations still issue RFPs for unfunded projects, a highly questionable act.

It is highly unethical to issue an RFP when there is no intention of accepting any proposal.

When you simply can't support fair and open competition. The final word in this section on "Other Procurement Options" goes to the State of Arizona. They have recognized that sometimes you simply can't have a "fair and open competition"; sometimes there is only one course of action. In these cases, they invoke their policy dealing with Impracticable Procurements. Here's what they say:⁸

An impracticable procurement should be an infrequently used procurement method. The determination and approval of an impracticable situation should occur prior to the initiation of the procurement and should be supported by clear and convincing evidence that such procurement is in the best interests of the State.

An impracticable circumstance is one in which the need for materials, services, or construction cannot be expeditiously or cost-effectively met through normal procurement methods. An impracticable procurement shall be limited to those materials, services, or construction necessary to satisfy the momentary need. Should an ongoing need exist, a competitive source selection shall be employed as soon as feasible.

Following are a few situations from which an impracticable condition may arise:

- A state office is hosting a workshop on a highly technical project. An international expert on the topic is needed as the keynote speaker. The agency has worked on the project with one speaker who has both the credentials and the audience appeal;*
- The legislature has mandated a contract for services from a specific provider; or*
- Time-sensitive follow-up work is required on a highly complex project.*

Each situation is unique in its own right and must be justified and documented with a thorough analysis of the circumstances to substantiate the determination. For the purposes of making such a determination, please consider that impracticable is not impractical! Impracticable means "impossible to do or carry out," while impractical means "unwise to implement or maintain in practice" or "incapable of dealing efficiently with practical matters, especially finances." Public procurement requires that impediments to competition be overcome, if possible and unless it is not in the best interests of the State to do so. Probably the biggest difference between private and public sector procurement is the requirement to remove as many impediments to competition as possible. The

agency should incorporate as much competition as is feasible and negotiate a suitable agreement while pursuing an impracticable solicitation.

While this policy seems obviously sensible and highly useful, it appears to be unique to Arizona.⁹

How Much Effort is Warranted?

There is a high cost associated with being "visibly fair" or holding a "fair and open" competition. Often there are dozens, if not hundreds, of potential suppliers for a specific service. How do you select an architect or a systems integrator to perform a \$10,000 preliminary evaluation from 100 qualified firms?

Obviously, the RFP effort must be related to the size of the expenditure. Even with small procurements issues of fairness, transparency and public scrutiny must be addressed.

Many organizations have defined a building-block approach to procurements using RFPs. With each increase in the level of expenditure, additional effort is justified and additional approvals are required.

A SPECIFIC EXAMPLE

Here is how one government agency deals with this issue. As the estimated value of the procurement increases, the process becomes increasingly formal with additional documents, procedures and approvals being required. All procurements based on factors other than lowest price require some form of RFP.

The manager initiating the procurement first develops an estimate of the value of the procurement. This estimate determines the approach and the required approvals. As the expenditure level increases, the approach changes from phone calls, to letters, to a formal RFP. Similarly, the required approvals progress from one signature on a purchase order to a formal review of the project and the contract. Managers are advised to ensure that all contract awards can stand up to public scrutiny, even those for less than \$1000.

These guidelines were developed by a small organization. Larger ones often have similar guidelines but the cost categories are much larger. For example, the highest category might be "over \$2 million" rather than "over \$100,000". Here are the guidelines that they use:

Estimated Value	Approach:	Approvals:
Less than \$1000	Telephone one qualified supplier to identify the work, discuss the price and award the contract. Use P-card if possible.	None.
Between \$1000 and \$5,000	Telephone at least 3 qualified suppliers to identify the work, discuss various approaches and request proposals in the form of letters. Evaluate the proposals, document your decision, and award a contract. Keep the letters.	1. Approval of the project Plan is not required. 2. Contract approval is required.
Between \$5,000 and \$20,000	Issue a letter to at least 5 suppliers describing your requirements and the selection criteria. Request formal proposals but ensure that the evaluation process and RFP are kept as simple as possible. Evaluate the proposals, document your decision and award a contract.	1. Preliminary project approval. 2. Project approval. 3. Contract approval.
Between \$20,000 and \$100,000	Issue a formal RFP to known suppliers. Follow the RFP process described in our procedures manual. Use an evaluation committee. Advertise locally.	1. Preliminary project approval. 2. Project approval. 3. RFP Package approval. 4. Management approval of the winner. 5. Contract approval.
Over \$100,000	Issue a formal RFP to known suppliers. Follow the RFP process described in our procedures manual. Use an evaluation committee. Advertise at least at the state level and on our web site.	1. Preliminary project approval 2. Project approval 3. Finance Dept. approval 4. RFP Package approval. 5. Management approval of winner 6. Contract approval

Within the guidelines, each type of approval was defined:

Preliminary project approval is required to initiate this process. The project's sponsor is advised to speak to the next level manager with contracting approval authority. The amount of work required to obtain this approval (and buy-in) from management will be commensurate with the size of the project. Small projects may require only a short conversation or memo. Larger projects may require many pages of justification, even at this preliminary level. Management will ensure that the proposed project complies with existing plans, budget commitments and restrictions. It is a good practice to document all requests for preliminary approval. This need not be elaborate. A short e-mail message is sufficient for small projects.

Project approval is required before preparing an RFP. Send the senior administrator a memo requesting approval for the project. Attach your project plan. In the memo, indicate the estimated total expenditure and the duration of the project. A project plan details the tasks to be done, the timing for each, the relationships among tasks and the responsibility for completing each task.

Finance Dept. approval is required before issuing an RFP for a contract where the total potential cost is likely to exceed \$100,000. No RFP can be issued unless the funds have been approved or approval is imminent.

RFP package approval is required before issuing an RFP. Approval by the Manager, Finance and Administration must be obtained when the estimated contract value is more than \$20,000.

The following documentation is to be sent to the Manager, Finance and Administration for approval prior to issuing an RFP:

- Terms of reference
- Project plan
- Required approvals
- Business case
- The Request For Proposal
- Evaluation process and weights
- Method for identifying potential suppliers

Management approval of the winner is required before awarding a contract. Approval is given upon receipt and review of a memorandum identifying the recommended supplier and summarizing the evaluation process and the results.

Contract approval is required prior to any contract being executed. It is a formalized procedure with levels of signing authority depending on the total contract value.

The importance and complexity of the selection process increases with the dollar value of the project - as does the amount of work to be done. There is often great pressure on managers and project planners to break a large project into smaller pieces. While this is often a good project management practice, it can be viewed as a strategy to subvert these guidelines.

For example, three \$20,000 projects may be easier to get approved than one valued at \$60,000. This practice is prohibited in most jurisdictions. Using the guidelines quoted above, the \$20,000 projects only require that letters be sent to five suppliers. The \$60,000 project requires both approval of the RFP package by management and use of a local advertisement to publicize the competition.

SOME OTHER EXAMPLES

In many jurisdictions, Purchasing Officials are given specific authority to ensure that the effort is commensurate with the value. In Alaska, for procurements under \$50,000, there is more discretionary power granted to the commissioner to establish less formal procedures. In exercising this authority (to promote simple practices for small value contracts), the Procurement Code cautions about artificially dividing projects into small pieces:¹⁰

Section 36.30.320 Small Procurements

(a) A procurement for supplies, services, or professional services that does not exceed an aggregate dollar amount of \$50,000, construction that does not exceed an aggregate dollar amount of \$100,000 or lease of space that does not exceed 3,000 square feet may be made in accordance with regulations adopted by the commissioner for small procurements.

(b) [Repealed, Sec. 48 ch 137 SLA 1996].

(c) Small procurements need not be made through competitive sealed bidding or competitive sealed proposals but shall be made with competition that is practicable under the circumstances.

(d) Procurement requirements may not be artificially divided or fragmented so as to constitute a purchase under this section or to circumvent the source selection procedures required by AS 36.30.100 - 36.30.270.

(e) The procurement officer shall give adequate public notice of intent to make a procurement under this section in accordance with regulations adopted by the commissioner.

In the Yukon, as in many comparable jurisdictions, dollar limits determine the procurement procedure. The language and limits are different than those used in Alaska, but the intent is similar:¹¹

Yukon's Contracting Directive states that

... for value-driven contracts, the procurement authority:

(a) may use informal or formal solicitation methods for procurement up to and including a value of \$25,000 (this can be referred to as low-cost procurement);

(b) must use formal solicitation methods for procurement above \$25,000 and up to and including \$50,000;

(c) must use a formal, open solicitation method for procurement over \$50,000.

The approach of increasing the level of formality, the required approvals, and the level of publicity is common and found in most jurisdictions. In some organizations, the "full-blown" process with major advertising occurs when the estimated contract value exceeds \$25,000 or \$50,000. However, in large organizations, those making many large procurements each year, the most formal RFP process is not initiated until the estimated project cost is much higher: over \$500,000 or, in some places, over \$1 or \$2 million.

Advantages and Disadvantages

Advantages	Disadvantages
Promotes Competition Promotes Better Understanding Promotes Clarity Standardizes the Evaluation Reduces Bias Improves Quality of the Proposals Reduces risks	Increases Time Increases Cost Reduces Flexibility

No reference book would be complete unless it presented some of the arguments for and against the RFP. Within the public sector, there is little choice. Organizations must use this process for certain specified procurements as a matter of public policy: to promote competition, and to provide fair and open access to government buying activities. Remember that this process is also employed by private sector firms not governed by public policy. RFPs cost a lot and consume time. Why do both public and private sector organizations use RFPs? Listed below are some of the reasons.

ADVANTAGES OF AN RFP

The use of RFPs is often based on law (in government), regulation (in agencies or local government bodies), or policy (in private sector firms). Regardless of the reason, RFPs are a legitimate and valuable management tool. Their use increases the probability of making a sound decision which will stand the test of time. An RFP is preferable to less formal methods of acquisition. Some of the advantages accruing to organizations using RFPs are discussed below.

Promotes Competition. The underlying strategy in employing competitive procedures is that competition promotes quality and generally results in lower prices, more value, greater flexibility in approaches, and more creative solutions being proposed.

Promotes Better Understanding. The development of detailed requirements fosters a better understanding of the specific needs by all those involved within the organization. Generally, documentation for external use is more carefully prepared and more complete than internal documentation. As part of the preparation of an RFP, users are forced to identify their needs in enough detail for the vendors to propose realistic alternatives. This process often highlights misunderstandings between different user groups or stakeholders, and lack of corporate policies.

A well-managed RFP process may also give the Purchaser a psychological advantage. Vendors recognize that the Purchasers have done their homework. The vendors, therefore, concentrate on structuring their proposals to address the users' specific needs.

Promotes Clarity. Communicating the organization's requirements to the vendors in writing ensures that all of the suppliers get the same information. In so doing, each vendor addresses the same problem - the one defined by the organization.

When requirements are communicated verbally to the vendors, there is an increased frequency of misunderstandings. Vendors can then innocently or intentionally misunderstand the information. This may become a major issue should the proposal, once accepted, not provide the results expected by the users.

A formal process is the only way the purchaser can document that each vendor has received the identical information.

Standardizes the Evaluation. Insisting that each vendor provide similar information in a similar format has several advantages. It is obvious, in reading a proposal, when a vendor has deliberately chosen to avoid issues or direct answers. Having a fixed format for all proposals makes the job of comparing the various offerings easier as information is presented in the same sequence and format.

Reduces Bias. Formalizing the requirements and the selection process often produces better results. Individual preferences or biases may prove difficult to defend in a process which incorporates pre-defined selection criteria, written evaluations, and public scrutiny.

From another perspective, the requirement for fair, open and transparent competition causes organizations to use RFPs. This, in turn, reduces the opportunities for arbitrary awards and improper procurement practices.

Improves Quality of the Proposals. The structuring of a formal proposal process elicits better, more complete information from a supplier. The process itself requires the active participation of users and management. This often improves the quality of the decision.

Reduces Risks. The RFP Process permits you to examine the breadth and depth of the vendor's organization, products and services including their track record, their approach to negotiations, their technical skills and their past performance. This information reduces the risk of a bad decision done in haste and based on materially incomplete information.

DISADVANTAGES OF AN RFP

The adoption of a formal RFP process carries with it some significant disadvantages. Organizations issuing RFPs are quick to recognize the two major

problem areas are related to time and cost. Some of the people familiar with the process claim that the only change imposed by an RFP on a major selection is the sequence and timing of certain events. Using an RFP, the homework must be done before the document is issued. Specifications must be precise. Contract terms defined. Project management strategies identified. When an RFP is not used, the definition of specifications, contract terms and project management strategies can be deferred until they are actually needed.

Increases Time. One experienced person, working with a favored supplier, can identify the "best solution" for an organization quickly. The adoption of an RFP process can add months, sometimes even years, to the date that an acceptable solution is implemented. The RFP carries with it a large bill for people's time.

The RFP process requires extensive staff time to define the requirements, prepare the RFP, set the evaluation process, perform the evaluations, and interact with vendors.

The seemingly long delay between the decision to acquire a solution and its delivery often frustrates staff who must work with the existing system.

Increases Costs. The time spent by staff on RFP tasks is expensive. Some organizations, not having much experience in this area, hire consultants to guide them through the process.

Often, there is an opportunity cost associated with not having a solution in place. Delays introduced by the RFP process carry a cost in terms of lost opportunities, reduced information, or reduced service levels. These delays can bring into question the effectiveness of the entire organization.

This process can be very expensive for the vendors. Often proposals require input from many people within a vendor's organization: accountants, technical staff, marketing staff and senior management. Presentations and negotiations can also add significantly to the vendor's investment in one proposal. Using nominal salary amounts of a few hundred dollars per day, the costs for people's time can quickly accumulate to thousands of dollars. Complex proposals from Information Technology vendors can represent more than \$100,000 in costs to each vendor.

Reduces Flexibility. The RFP process is often inflexible or flawed, restricting the actions of the Evaluators.

The RFP process is rigid. Once you begin the journey, the steps are defined and difficult to change. Once you've issued an RFP, you can't change much. And if you make a lot of changes or a major change late in the process, then you end up re-issuing the RFP. In most jurisdictions, once the RFP has been issued, you can't change the evaluation factors, you can't make major changes to the rules, and you can't make material changes to the specifications. Now this rigid reality would be highly workable if we had accurate and complete information before we began the process. But, by its very nature, the RFP process is intended to obtain information and identify the best solution. Often, when the RFP is issued, we know much less than after we evaluate the proposals. Often, when we issue an RFP:

- The specifications are incomplete, and, sometimes, inaccurate.
- The technology being proposed is not fully understood.
- The risks are not well understood.
- The budget is under-stated.
- The evaluation factors don't fit the (yet-to-be) proposed solutions.

None of these deficiencies may be obvious until we have received and analyzed one or more proposals.

At the end of the RFP process, evaluators often realize the information they were missing when they were writing the RFP. Sometimes, they can be heard to say that the original RFP would have been very different based on what they learned from the proposals.

So, the objective in creating an effective RFP is not to make it perfect. This is impossible. The objective is to ensure that the deficiencies in the document or in the defined processes are minor.

Another antidote for a flawed RFP is to have a less rigid process, one that does permit some level of flexibility. I know of only two tasks which can offset some of the deficiencies of this procedural rigidity by providing proponents the opportunity to revise their proposals (at least in part): the use of Best and Final Offers and the use of negotiations. Not all jurisdictions permit Best and Final Offers and some jurisdictions restrict negotiations to specific issues. These two tools don't work all the time. They cannot be used to correct every deficiency. But they can mitigate some of the limitations of the RFP process and transform a proposal from 'mediocre' to 'excellent'.

Other Procurement Options

Other competitive procurement options and sourcing methods are supported by policy and can be used instead of an RFP. The State of Washington employs eight different methods:¹²

Acquisition Methods

IT resources may be acquired through several methods: by conducting competitive solicitations such as (i) Requests for Proposals (RFP), (ii) Requests for Quotation (RFQ), or (iii) Requests for Quotation and Qualification (RFQQ); (iv) by using Master Contracts; (v) by using solicitations by state agencies authorizing follow-on use; (vi) through the sole source method; (vii) through technology brokering and leasing done by DIS; or (viii) by interagency transfer.

The last three methods are not competitive and require written determinations before completing the acquisition.

St. Johns River Water Management District in Florida has several different competitive procurement methods defined in their Procurement Manual:¹³

- Invitation for Bid (IFB)
- Request for Proposals (RFP)
- Invitation to Negotiate (ITN)
- Request for Qualifications (RFQ)
- Construction Manager at Risk (CMR).

In addition, St. Johns permits many different types of non-competitive procurements in prescribed circumstances.

All organizations experience situations for which competitive procurement methods simply don't make sense. An emergency (such as the failure of a generator) requires immediate action to reduce its impact. In these circumstances, the immediacy of the requirement takes precedence over the policy to have vendors compete for an award. While the use of non-competitive procurements offends public policy, it is a recognition of the realities of a variety of special circumstances.

The most obvious exception to competition is in an emergency when there are severe consequences of delaying the acquisition, delaying the provision of assistance, or of replacement equipment. However, there are many other situations

in which competition provides few, if any benefits. Here is St. Johns' list of permissible non-competitive procurements:¹⁴

1. *Informal Procurement.*
2. *Sole Source Procurement.*
3. *Emergency Procurement*
4. *Purchases of used equipment.*
5. *Purchases of State or Federal surplus equipment.*
6. *Purchases made pursuant to inter-governmental cooperative purchasing methods . . .*
7. *Purchases of parts, repairs, upgrades, modifications, or maintenance services for vehicles or other equipment from the original equipment manufacturer, seller, or an original equipment manufacturer-authorized repair facility.*
8. *Subscriptions for periodicals.*
9. *Books and other copyrighted materials.*
10. *Training and educational commodities and related services.*
11. *Purchases in the best interest of the District due to opportune price discounts, sales or bulk purchases, with the approval of the Executive Director.*
12. *Legal services, including paralegals, expert witnesses (including appraisal services), and court reporters.*
13. *Rental of rooms and facilities for training and meetings . . .*
14. *Artistic services, including advertising.*
15. *Catering and entertainment services.*
16. *Maintenance and licensing of computer software.*
17. *Tower rentals for signal transmission.*
18. *Franchise utility services or other utility services where no competition is available.*
19. *Medical and health services, both physical and mental . . .*
20. *Services from . . . federal, state, and local governmental entities.*
21. *Services from universities and colleges, including community colleges.*
22. *Procurement actions related to an existing contract following the breach, or early termination for cause, of the existing contract and necessary for either uninterrupted performance of the work or mitigation of damages.*

An Ending Comment

In this chapter, we've established that an RFP is a complex procurement strategy which should be used only when simpler techniques are not appropriate. The RFP process requires more time, energy, knowledge and skills than other approaches and is riskier. A simplified RFP process should be used for low value procurements.

In the next Chapter, we begin our detailed examination of the how's and why's of RFPs. We start by discussing the development and purpose of an effective policy – one which promotes fair and open competition.

End Notes

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4. Reference 23. St. Johns River Water Management District (FL), “Procurement Manual”, May 21, 2008, 145 pgs. While this excellent document is in the public domain, it is not available from their web site. It can be requested from procurement@sjrwmd.com.
5. Reference 24. OECD Procurement Toolbox, Template for Market Survey Report, 5 pgs, <http://www.oecd.org/governance/procurement/toolbox/templateformarketstudyreport.htm>
6. Reference 25. State of Alaska, Department of Administration, Division of General Services, State Procurement Code, 2013 Alaska Statutes, Title 36, Chapter 30, 61 pgs, <http://doa.alaska.gov/dgs/pdf/AS3630.pdf>
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 12. Reference 29. State of Washington, Department of Information Services, Information Technology Investment Standards, Revised 2009, 15 pgs, see page 6, <http://www-stage.ofm.wa.gov/ocio/policies/documents/2015.pdf>
 13. See Reference 23.
 14. Reference 30. St. Johns River Water Management District (FL), Policy II, Procurement of Commodities and Services, 88-05, Pages 3-4. *While* this document is in the public domain, it is not available from their web site. It can be requested from procurement@sjrwmd.com.

Chapter Four

IMPLEMENTING AN EFFECTIVE RFP POLICY

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Chapter Four

IMPLEMENTING AN EFFECTIVE RFP POLICY

Different Approaches to Policy Development

In this chapter, we present different approaches to establishing and promulgating approved RFP policies and practices throughout an organization - policies and practices which will enable purchasers to understand and achieve the organization's objectives. Approaches vary greatly. Some policies have their origins in statutes and regulations. These are usually found in senior levels of government such as states or provinces.

Some organizations only provide their buyers or suppliers with high level statements of policy; for example, "All purchasing will be done in a visibly fair, ethical and prudent manner." Other organizations develop detailed sets of guidelines, procedures or examples to be followed. Still others take the middle ground, providing buyers and vendors with handbooks such as "Preparing an RFP" or "The Request For Proposal Process" containing a mixture of policy, principles, examples and rules. And, finally, some organizations deal with policies on an individual basis. They have separate policy documents and guidelines on specific issues such as transparency.

Politicians at all levels laud the importance of fair, open and transparent procurement. On his first day in office, President Obama confirmed that fair, open and transparent would be guiding principles in his administration.

A SAMPLING OF PURCHASING POLICIES ON FAIRNESS AND DISCLOSURE

There are lots of examples of purchasing policies. Statements appear on most public agencies' procurement web sites and in hundreds of different documents. Here are some simple, short statements of policy. Some emphasize fairness; others, accountability, competition, ethical behavior or legality.

Every purchase is made in the public interest. All vendors will receive a fair and equal opportunity . . .

State of South

Dakota¹

Fairness – to observe procedural policies free of bias, personal interest and conflict of interest.

Openness and transparency – to create the maximum number of competitive procurement opportunities, and to be transparent in the way business is conducted.

Fiscal responsibility – to justify contracting and procurement decisions and actions as appropriate in the circumstances.

Competition – to open procurement opportunities to the maximum number of respondents.

Value for money – to focus on efficiency, economy and effectiveness to obtain the maximum benefits with the resources available.

Accountability – to be willing and able to account for the way contracting and procurement activities have been conducted.

Yukon Government²

. . . to establish and maintain a high level of confidence in the procurement process by ensuring that all public sector procurement is carried out in an open, fair, consistent, efficient, and competitive manner.,

Province of Nova Scotia³

Contracts shall be awarded by competitive sealed bidding except as otherwise provided . . .

Arizona⁴

Throughout the entire competitive bidding process, business is conducted in a fair, ethical and professional manner to ensure that all vendors have an equal opportunity to bid. All pricing and other proprietary data furnished by the vendor during this process shall remain confidential. All unsuccessful vendors are promptly and courteously informed of the outcome with an explanation that does not betray the successful vendor's confidence.

Princeton University⁵

The Purchasing Division's mission is to ensure the acquisition of quality goods and services at the lowest total cost for the City and to promote fairness and open competition for all suppliers.

City of Anaheim, CA⁶

While these thumbnail sketches hint at the major policy issues, they aren't detailed enough. Procurement policy is multi-dimensional. It's not exclusively about "buying stuff". It's about public policy and the goals of the organization. Procurement is a large economic force which is often harnessed to actualize other social goals.

In 1979, The American Bar Association (ABA) published its Model Procurement Code⁷ – a document that has helped shape the role of public procurement since then. Here is what they said both in 1979 and in the 2000 Edition about the purpose of their code and of procurement:

(2) Purposes and Policies. The underlying purposes and policies of this Code are:

- a) to simplify, clarify, and modernize the law governing procurement by this [State];*
- b) to permit the continued development of procurement policies and practices;*
- c) to make as consistent as possible the procurement laws among the various jurisdictions;*
- d) to provide for increased public confidence in the procedures followed in public procurement;*
- e) to ensure the fair and equitable treatment of all persons who deal with the procurement system of this [State];*
- f) to provide increased economy in [State] procurement activities and to maximize to the fullest extent practicable the purchasing value of public funds to [State];*
- g) to foster effective broad-based competition within the free enterprise system; and*
- h) to provide safeguards for the maintenance of a procurement system of quality and integrity.*

Some jurisdictions, including many states and major cities, model their procurement policy on that of the ABA. Alaska's procurement policy is one of many that closely follows that of the Model Procurement Code.

There are more modern and expansive definitions of procurement policy. The State of Washington is a good example. Their purchasing policy is based on four principles – ethical behavior, open competition, supporting the state's socio-economic goals, and value for money. Unlike many other jurisdictions, they have linked purchasing principles to actions in their policy statement: ⁸

2.2. General Procurement Principles

The State expects Purchasing Personnel will adhere to the following basic purchasing principles:

2.2.a. PRACTICE ETHICAL BEHAVIOR AND CONDUCT

- *Always strive to advance and protect the best interest of the state in all purchasing transactions.*
- *Act with impartiality, fairness, openness, integrity, and professionalism in dealings with suppliers, customers, and the public.*

2.2.b. ENSURE OPEN AND EFFECTIVE COMPETITION

- *Achieve the most beneficial outcome for the state.*
- *Ensure suppliers are given a reasonable opportunity to do business with the state.*
- *Bolster public confidence and optimize taxpayer dollars.*

2.2.c. ADVANCE THE SOCIO-ECONOMIC GOALS OF THE STATE

- *Enhance the opportunity for suppliers and producers of Washington agriculture products to be considered for business.*
- *Increase the procurement of recycled content products by state governmental agencies, and serve as a model for Washington State citizens and businesses in their purchase of recycled content*
- *Support Correctional Industries in lowering the costs associated with operating the state's criminal justice system and breaking the cycle of recidivism through the purchase of goods and services from inmate work programs.*
- *Advance employment and career opportunities for disadvantaged persons and persons with disabilities by encouraging state agencies to purchase products and/or services manufactured or provided by Washington State Certified Community Rehabilitation Programs*
- *Discourage barriers to opportunities for Washington based businesses desiring to do business with other states*
- *Encourage a diverse supplier pool, including small, veteran, minority, and women - owned firms, and encourage their participation in state business*

- *Exercise sustainable practices in support of the Governor's Executive Order 05*
- *Reduce the amount of mercury utilized in government operations, and to eliminate the purchase of products that contain added mercury whenever economically feasible alternatives exist.*
- *Reduce energy and water consumption and reduce pollution through purchasing products that meet minimum efficiency performance levels*

2.2.d. OBTAIN VALUE FOR MONEY

- *Achieve the best possible return from state spend on goods and services.*
- *Use the "total costs of ownership" or "whole -of-the-life-costs" perspective which may include consideration of environmental factors*
- *Ensure fitness for purpose of the goods or services received*
- *Consider all relevant price and non-price factors before a final procurement decision is made.*

The final word on policy goes to the courts. We leave it to them to re-affirm the fundamental nature of public sector procurement:⁹

(In the case cited, the) . . . decision is that the truly damaged party is the taxpayer, not one who has lost a bid through some claimed error. We stated that the "[competitive-bidding] statutes were enacted for the benefit of the taxpayers, not the bidders." . . . We further stated that competitive-bidding statutes were "not intended to be a bestowal of litigable rights upon those desirous of selling to the government"

WHAT IS "POLICY"?

In order to consider "policy", we have to agree on what it is. There are many definitions but a useful definition of "policy" is "course or general plan of action adopted by government, party, person, etc." Policy is usually thought of as a directive which has been formulated by senior management. Policy is used to set goals and expectations. Policy is implemented using rules or instructions or procedures, but policy itself is simply a general expression of management intent. Policy furnishes broad guidelines for organizational behavior. It guides and determines future decisions.

Policy can provide important guidance on the day-to-day decisions. This is especially true when an organization doesn't have procedures or rules, or when new situations arise. Each of the day-to-day decisions can be evaluated for its conformance to the policy.

Many jurisdictions, including most provinces in Canada and local government bodies throughout North America, enshrine procurement rules, not in law, but in policy documents. Those that don't have formal written published policies or procedures manuals run their procurement function by 'established practices'. Laws are rigid, and subject to review by the courts. They are typically more accessible to the public and more enforceable than policies or procedures.

HOW CAN POLICIES DIFFER?

Every public body has its own purchasing policy. In almost all organizations, policies are available in writing; in a few, policy is simply part of the culture. Informal policies ("we know what it is so we don't have to write it down") are becoming rare and are often rightfully attacked as being contrary to public policy. The rules of the game must be known by all.

Purchasing policies can differ widely in terms of their intent and application. A few examples will illustrate some major differences.

In most jurisdictions, the purchasing policy requires that all suppliers be treated equally. This policy ensures that suppliers from other jurisdictions do not suffer a price penalty. In other places, the purchasing policy is designed to encourage local industry. So, suppliers from other jurisdictions are penalized by increasing their quoted prices for comparison with the prices from local suppliers. For example, Alaska gives a 10% preference to bidders having a place of business in the state.

The winning proposal is the one judged as providing the greatest value for the money, usually the proposal with the highest score. However, these different policies will lead to the selection of different proposals as being the "best value".

WHAT IS AN EFFECTIVE POLICY?

Before attempting to evaluate (and improve) your organization's purchasing policy, we should define effectiveness. How are we going to assess a policy? And why is this important?

Many organizations believe that an effective policy has seven important characteristics:

- It is reasonable.
- It is clearly stated.
- It is available in writing.
- It is known throughout the organization and by the public.
- It is consistently applied in all appropriate situations.
- It is legal.
- It is accompanied by “how to” guidelines, manuals and directives.

It is reasonable. The policy makes sense. It appears to be both tolerable and fair. Reasonable policies are easy to implement. People understand them and agree with them. Organizations whose policies have become out of date or are unreasonable require strategies and procedures for monitoring compliance with the policy on a day to day basis. Reasonable policies do not require “policy police” to ensure compliance.

It is available in writing. Policies are public documents which tell people how an organization will behave in specific circumstances. All organizations require written policy statements.

It is known throughout the organization and by the public. Both staff and the public should have access to the same documents describing purchasing policies.

It is consistently applied in all situations. In some organizations, each department performs its own procurement, subject to policies and rules developed by a central group. Often, there is a problem in using this approach. All policies and rules are subject to differing interpretations. It is important that the central procurement group provide each department with training and direction to ensure that policy is applied consistently.

It is legal. Few organizations perform an audit of their procurement policies, procedures, documents and forms to ensure that they are still legal. The courts in many jurisdictions have influenced RFP practices. They have condoned some practices, prohibited others, and prescribed specific rules of conduct. An organization's ability to change the content of the RFP, and to deal with suppliers is constrained by laws, and court rulings. Laws change and courts constantly issue rulings which influence procurement. If your organization has not reviewed its

documents and practices in the last few years, there is a good possibility that some of your terms and conditions, or practices are no longer proper, or legal.

Most jurisdictions are subject to access to information laws governing the release of information by public bodies. Using these laws, much information previously kept secret is now routinely released, released as part of the debriefing process, or released upon formal application by a vendor. So ensuring that your policies, documents and practices comply with the governing laws is more critical than ever.

Implementing Policy

There are many different ways of implementing RFP policy. In some jurisdictions it's done simply by high level statements such as "all procurements shall be made in a visibly fair, ethical and prudent manner". In others, it's done by passing laws and regulations. Still others, use guidelines and standardized documents. There seems to be no consistent approach. This is not surprising. The requirements of each organization are different. There are vast differences in budgets, and in the influence of organizations.

Among the many different approaches used to promote effective RFP practices are laws, regulations, administrative manuals, the use of standardized documents, policy statements, and handbooks. When RFP policy is established by statute, it is much less subject to differing interpretations. It is readily available to the public and enforced by the courts. In the U.S., many states have procurement statutes. In Canada, public procurement policy related to RFPs has been established primarily by rulings of the Supreme Court.

Clearly, the recognition of the need for stringent procedures is greater at the state and provincial level than at the local government level. Unfortunately many cities, towns and government agencies have RFP policies and procedures that are poorly written, significantly flawed or fail to provide a framework for a fair, open and transparent RFP Process.

There is no "best" approach to implementing RFP policy in terms of effectiveness. To make matters worse, there is no simple way to illustrate how different organizations have dealt with this complex issue. Procurement policies come in many different shapes and sizes. Some policies are comprehensive; others deal with single issues.

Consequently, we've taken the approach of providing detailed examples for five organizations. Some of these policies are comprehensive; others are narrow and deal with single issues. Not all of these examples are from the U.S. Best practices for RFPs are found in other jurisdictions that share the goal of fair, open and transparent procurement. These include Canada, Australia and the European Union.

In the remainder of this chapter, we focus on five organizations' RFP policies. The first two examples illustrate short, focused single-issue policies. The remaining three examples illustrate more comprehensive policies.

SINGLE-ISSUE POLICIES

These two policies, one from the state of Queensland in Australia and one from the National Institute of Governmental Purchasing (NIGP) deal with narrower issues and are much shorter and easier to understand than the comprehensive policies presented in Examples 3 through 5.

Example #1: National Institute of Governmental Purchasing

This is an example of a more limited policy. This one deals with transparency in public procurement, part of a series entitled Principles and Practices of Public Procurement, produced by CIPS and NIGP.¹⁰ (Both of these are major associations dedicated to public procurement.)

This 3-page policy deals only with transparency. It is well written, easy to understand, well organized and concise.

It begins with a definition of transparency:

transparency can be defined as timely, easily understood access to information. Transparency assists in ensuring that any deviations from fair and equal treatment are detected very early, and makes such deviations less likely to occur. It protects the integrity of the process and the interest of the organization, stakeholders, and the public.

It then describes five critical success factors for ensuring your procurement processes are transparent:

Element 1.1: Integration of Technology to Achieve Transparency

Ease of public access to government-generated data greatly depends on the jurisdiction's use of technology-oriented operations. Procurement should integrate and utilize technology systems to enhance transparency.

Element 1.2: Access to Information

Procurement should provide access to reliable information about the activities of the procurement organization. This is a key safeguard against corruption and aids in the improvement of competition, and the relationships between procurement and stakeholders.

Element 1.3: Transparency and Supplier Relationships

Procurement should strengthen relationships with the supplier community through transparent practices.

Element 1.4: Transparency and the Procurement Professional

Procurement professionals must adhere to a code of ethics and declare conflicts of interests as soon as they become apparent and disqualify themselves if there is a conflict or the appearance of a conflict,

Element 1.5: Transparency and the Procurement Organization

Procurement organizations must provide adequate resources and accurate information to employees in order to achieve a sustainable transparent procurement process

It also provides some background information about the critical role of transparency in public procurement and in supporting confidence in the public procurement process.

This policy paper includes citations from international sources such as United Nations and Transparency International.

Example #2: Queensland (Australia)

Few jurisdictions in North America have translated ethical public procurement into specific policies and procedures. (The theory is that ethical issues are embedded in all of the other policies and procedures.) There is no model ethics policy; no discussion of principles; no list of procedures to ensure ethical public procurement and few examples of documents which deal directly with the policy of ethical public procurement.

To find excellence in this area, we have to consider Australia where the federal and state governments have developed policies, guides, templates and checklists – all related to ethical public procurement.

In Australia, ethical public procurement is called ‘probity’ which is defined as ‘evidence of ethical behavior’. Note that it is ‘evidence’ not simply ‘ethical behavior’. You must be able to prove that you behaved properly by citing documents, emails, meeting notes, webcasts and similar independent sources of information.

Here is a sample document which illustrates the Australian approach.

ETHICS, PROBITY AND ACCOUNTABILITY IN PROCUREMENT¹¹

This 25-page document provides ‘best practice guidance to assist Queensland Government agencies and employees in conducting procurement.’

Here is the introduction:

Queensland Government employees must apply the highest levels of ethical behaviour in all areas of their work. This is particularly important in procurement which involves the expenditure of public money and is subject to more than usual public scrutiny.

Probity means integrity, uprightness and honesty. Maintaining probity in procurement involves more than simply avoiding corrupt or dishonest conduct. It means ethical behaviour that upholds public values and ensures impartiality, accountability and transparency.

Transparency and accountability in procurement gives suppliers confidence to participate in the Government marketplace. An ethical culture minimises the cost of managing risks and enhances confidence in public administration.

Ensuring probity of action is part of every public official’s duty, with the adoption of processes, practices and behaviour that enhance and promote public sector values and interests.

The Guide deals with seven major topics:

- Ethics in procurement
- Probity in procurement
- Principles of probity in procurement

- Probity in procurement at the agency level
- Probity in procurement at the employee level
- Managing the key areas of procurement risk
- Probity advisors and probity auditors

The Guide contains a 4-page checklist of 38 tasks and documents which support ethical public procurement. For example, the first group of ten tasks deals with Planning. Here are the first three tasks:

Probity checklist

Task	Documents
<p>Planning</p> <p>Check budget approval is obtained Prior to any communication with the market Approval of funds needs to be assured before commencing the project.</p>	<ul style="list-style-type: none"> • minutes, memos etc verifying approval
<p>Ask for conflict of interest declarations</p> <p>Required at the outset of the procurement process, from all steering committee and procurement team members and any external personnel involved in the offer. Remind members of the Agency's Code of Conduct and other ethical and probity obligations.</p> <p>Members must also disclose any conflicts of interest arising during the procurement process.</p>	<ul style="list-style-type: none"> • conflict of interest declarations • minutes of meetings
<p>Obtain Confidentiality Agreements</p> <p>Required from all personnel involved in the procurement process.</p>	<ul style="list-style-type: none"> • confidentiality statement

COMPREHENSIVE POLICIES

This section contains three examples: from St. Johns River Water Management District in Florida, Yukon (a Territory in northern Canada) and the state of Alaska. These examples illustrate several of the different ways in which procurement policy and RFP direction can be implemented. Each of these organizations has procurement defined by a law. However, the route taken by Yukon and St. Johns is much simpler and shorter than that of the State of Alaska. Each of these entities

provides significant help to ensure that the users and the public share the same understanding of how procurement and the RFP process work.

Example #3: St. Johns River Water Management District (FL)

This jurisdiction has done an excellent job in implementing an effective RFP policy. The official rules are much simpler than those for Alaska. Their Procurement Manual does a great job in establishing best practices for users.

The use of RFPs in SJRWMD is prescribed by 3 instruments:

District Policy 88-05¹². This 3-page policy establishes objectives and procedures for procurement of commodities and contractual services.

Administrative Directive 88-06¹³. This directive sets forth the detailed procedures to fulfill Policy 88-05.

Procurement Manual¹⁴. This 145-page document is the “working document” for procurement staff.

DISTRICT POLICY 88-05.

This short document contains their purchasing policy:

II. STATEMENT OF POLICY

Pursuant to subsection 373.083(1), Florida Statutes, the Governing Board is authorized to contract with public agencies, private corporations, or other persons, in addition to other powers and duties allowed by law. In furtherance of the authorization prescribed in subsection 373.083(1), Florida Statutes, the Governing Board recognizes that: (1) fair and open competition is a basic tenet of public procurement; (2) such competition reduces the appearance and opportunity for favoritism and inspires public confidence that commodities and contractual services are procured equitably and economically; and (3) documentation of the acts taken and effective monitoring mechanisms are important means of curbing improprieties and establishes public confidence in the process by which commodities and contractual services are procured. It is, therefore, the policy of the Governing Board that, unless otherwise authorized by law or this policy, all procurement actions shall be awarded by competitive procurement procedures.

Their policy establishes the district’s rights, delegation authority, and the powers of the executive director.

ADMINISTRATIVE DIRECTIVE 88-06

This directive deals with the details of their procurement function. In terms of RFPs, it defines when they are to be used and the central elements of the RFP process:

C. Request for Proposals (RFP)

- 1. An RFP is utilized when it is not practicable to define the SOW (Statement of Work) with sufficient specificity for an IFB and the District seeks a Responsible Respondent to proposal commodities or contractual services that meet the scope of the solicitation. An RFP is an invitation to prospective respondents to propose resolution of a District need within the limitations set forth in the RFP.*
- 2. Evaluation criteria for proposals shall provide that the weight afforded to the total cost of the proposal shall not be less than 40 percent; provided, however, that upon approval of the director of the office or division responsible for the solicitation or the Assistant Executive Director, a lesser percentage may be applied toward cost, but in no case less than 30 percent. The weight afforded to cost should only be reduced when there is substantial uncertainty as to the nature of the SOW or respondents are required to demonstrate extraordinary creativity and/or expertise in formulating and implementing the SOW.*
- 3. To assure full understanding of a responsiveness to the solicitation, discussions may be conducted between respondents and the procurement staff after advertisement but prior to submittal of proposals. However, no interpretation of specifications, the SOW, or other contract documents, nor correction of any apparent ambiguity, inconsistency or error therein, will be made orally. Any such request shall be in writing and addressed to the named procurement staff member..*

PROCUREMENT MANUAL

This manual provides additional details about procedures, process and best practices. Several sections are excellent.

Chapter 2, Planning for Procurement, deals with the entire RFP process and provides some guidance on the Chartering Meeting, a topic often neglected in other manuals:

Conducting a Chartering meeting [Chartering Tools]

Chartering is a structured process used to guide a project team through the process of defining itself — its purpose, critical success factors, goals, roles and

responsibilities, operating guidelines, and interpersonal behaviors, as well as other elements that give a team the clarity of purpose essential for high-quality performance. A chartering session is different from a conventional project “kickoff” or “procurement review meeting” in that these meetings tend to focus on one-way communication of the “whats,” such as milestones, deliverables, schedules, etc., whereas chartering uses two-way communication to engage team members and other participants to define the “hows” of the project, such as responsibilities, operating guidelines, etc. A tangible product of this process is a written charter document that has been endorsed by all of the participants of the chartering session.

Chapter 7, Procurement Options and Process Flow, provides “best practices” on many topics including a pre-advertisement meeting, how to handle a single response to an RFP, and the debriefing process.

3.12.3 Pre-advertisement meeting.

3.12.3.1 If necessary, the Evaluation Team meets with the CA (Contract Administrator) prior to the initial advertisement to become familiar with the requirements of the procurement process. This is not a publicly advertised meeting and it is not necessary to electronically record the meeting. This meeting serves to familiarize the Evaluation Team, prior to reviewing submittals, with the solicitation’s requirements, the evaluation process and procedures, the source selection plan, and the rating system.

3.13.3.2 The CA asks team members if they know of any firm or individual that they would like to make sure is aware of the upcoming solicitation. If so, they provide the CA with their name and fax number. This information is used when uploading the solicitation documents to DemandStar to add them as supplemental suppliers (refer to DemandStar instructions for Supplemental Suppliers.)

3.12.3.3 The CA instructs the team regarding the importance of an independent evaluation without consultation with other team members, and advises them about responding to inquiries from interested respondents. Unauthorized contact with a team member may disqualify a respondent or, in extreme cases, result in terminating the procurement. Team members are instructed to refer all such calls to the CA.

3.12.3.4 As a result of the meeting, changes may be made to the procurement package prior to its upload to DemandStar and distribution.

3.25.3 Debriefing Respondents

3.25.3.1 Purpose. After the contract has been awarded and signed by the parties, or a PO issued, the CA may talk with respondents. Generally, respondents who were not awarded the contract are interested in learning why their submittal did

not result in a contract award. The debriefing should be candid, informative, and a learning tool for both parties. The CA should ask the respondent what it believes the District can do better next time and acknowledge the strong points of respondent's submittal, whenever possible. The purpose of a debriefing is to:

- (a) Explain the rationale for the contract award decision;
- (b) Explain to an unsuccessful respondent why it was not selected for award;
- (c) Instill confidence in the respondent that it was treated fairly;
- (d) Assure the respondent that its submittal was evaluated in accordance with the solicitation procedures and applicable laws and regulations;
- (e) Identify weaknesses in respondent's submittal so it can prepare a better submittal in the future; and
- (f) Reduce misunderstandings and protests.

A debriefing is not:

- (a) A point-by-point comparison of one respondent's submittal to another;
- (b) A debate over the award decision or evaluation results; or
- (c) An opportunity for discussion or review of the other submittals. Any such review should be made pursuant to a public record's request, which is a separate matter from the debriefing.

3.25.3.2 It is recommended that any debriefing be conducted solely by the CA. However, the CA may invite the PM to participate if the reasons for award include significant technical considerations. The conversation should deal with the particular respondent's submittal or offer and any reason(s) it was not selected for award. The CA can indicate the area(s) in which the respondent awarded the contract scored higher, but should avoid discussing why any other respondent was scored as it was.

3.25.3.3 Disclosure issues. While almost all information in response to a solicitation is a public record, the CA must ensure that information protected under Florida law as a trade secret is not released. When in doubt as to whether the information may be released, promptly contact OGC before releasing the information verbally or in written form or allowing any third party to view the information.

Documentation. The CA shall place a brief memo describing the debriefing session in the solicitation file. This memo should include the date, place, parties present (name and affiliation), questions and answers provided in the debriefing, and a brief summary of any other topics discussed.

Example #4: Yukon Government (Canada)

The Yukon Government (Yukon is a Canadian Territory next door to Alaska) is one of the few jurisdictions in Canada that has dealt with RFPs in Regulations and

Directives. Most provinces, territories, cities and other public bodies in Canada deal with RFPs in a policy document which takes into account rulings of the courts. In Canada, the rules for procurement have been established, for the most part, not by legislation, but by the Supreme Court.

Use of RFPs is prescribed by 2 instruments:

Contracting and Procurement Regulation¹⁵. Issued pursuant to Section 24(3) of the Financial Administration Act, these regulations establish a framework for procurement.

Contracting and Procurement Directive¹⁶ applies to all departments defined in the Public Sector Act and provides the specific rules and procedures to be followed.

CONTRACTING & PROCUREMENT REGULATION

These Regulations have some interesting features. First, they are Regulations enacted under a law (Section 24(3) of the Financial Administration Act, Yukon Government). This, in itself, is unusual. Many jurisdictions, including many provincial and most local government bodies, enshrine procurement rules, not in law, but in policy documents. Some public bodies don't even have formal published policies or procedures manuals. Instead, they run their procurement function by 'established practices'.

Laws are rigid, and subject to review by the courts. Regulations are typically more accessible to the public and much more enforceable than policies or procedures not supported by the force of law. Informal policies get interpreted in the light of changing circumstances.

The Regulations establish a framework for procurement within Yukon. They are only five pages in length and establish the overall approach to procurement. (The Directives provide the details.)

While many of the topics and much of the content of each of this Regulation's 12 Articles are similar to those found in other jurisdictions and certainly not exciting to read, there are some interesting features. A review of these features can help your organization improve its RFP practices.

There are five key areas dealt with in this document:

- The objectives of this policy
- Provision of access to documents
- Principles of competition
- Fair and open competition
- The right to challenge an award

The objectives are identified as more than simply to ensure that procurement is done in a fair and open manner. The introduction of "fiscally responsible" and "accountable" sets a tone not usually found in procurement law.

The regulations provide access to material in a non-discriminatory way.

Any government document that sets out government policy in respect of contracting or procurement, or that relates to any particular contracting or procurement matter or transaction, is to be made reasonably available to any person who requests it.

The key principles of competing for government contracts are identified: competition will be open to all; and, the rules will be published in the RFP;

The evaluation process will be visibly fair. Key information will be provided in the RFP and proponents will be provided information about losing proposals.

Competition guidelines

5 (1) Procurement authorities must use fully competitive processes to undertake procurement, except where a management board directive authorizes procurement to be undertaken otherwise.

(2) Evaluation criteria and standards used to evaluate bids and proposals must be fully and clearly described in requests, and only those evaluation criteria and standards may be used to evaluate bids or proposals received.

The final principle established in these Regulations is the right of a proponent to challenge an award, to receive some compensation for monies spent, and to change the procurement process:

Dispute resolution mechanism

In respect of any contract, or any anticipated contract, for which bids or proposals were received, the applicable procurement authority must ensure that there is available a dispute resolution mechanism based on the following terms of reference (a) bidders and proponents must be given a reasonable opportunity to register complaints;

- (b) both the complainant and the applicable procurement authority have a responsibility to make all reasonable attempts to settle their dispute before referral of the matter to the dispute resolution mechanism;*
- (c) there is an opportunity for redress, including compensation for costs of complaining and bid/ proposal preparation costs; and*
- (d) the mechanism includes an opportunity for the Deputy Minister to be informed, in writing, of any recommended changes to the government's procurement and contracting procedures and policies.*

YUKON GOVERNMENT CONTRACTING & PROCUREMENT DIRECTIVE

This Directive provides the specific rules and procedures embodying the policies and principles established in the Contract Regulations. The Contracting Directive is organized into 79 clauses covering 27 pages.

Some of the noteworthy features detailed in the Directive are:

- A list of contemplated contracts over \$75,000 is made public.
- Dollar limits determine the RFP procedure.
- A pre-qualification process is governed by RFP rules.
- The information in the RFP is defined explicitly.
- Reasons for rejecting a proposal are defined explicitly.
- Evaluations can only be based on the criteria in the RFP.
- Extended contracts must be identified to the public.
- The bid challenge process uses a committee that includes five representatives from the public.

The remainder of this section provides a more detailed description of each of these features.

- A list of contemplated contracts over \$75,000 is made public. The list is to be created annually. Publication of this list permits suppliers to identify upcoming opportunities before the RFP is announced.

Procurement authorities will, before the end of each fiscal year . . . provide to the Deputy Minister a listing of contracts and standing offer agreements in excess of \$75,000 contemplated to be tendered in the following fiscal year . . .

- Dollar limits determine the RFP procedure. These limits are consistent with those in other comparable jurisdictions.

(4) As of April 1, 2014, and for services and construction, the procurement authority:

(a) may use informal or formal solicitation methods for procurement up to and including a value of \$50,000, (this can be referred to as low-cost procurement)

(b) must use formal solicitation methods for procurement above \$50,000 and up to and including \$75,000,

(c) must use a formal, open solicitation method for procurement over \$75,000.

- A pre-qualification process is governed by RFP rules. It is used to establish a qualified source list that is only valid for up to one year. No names can be added to the qualified source list except through the formal process. This is an excellent approach. In many jurisdictions, the pre-qualification process is less formal and, therefore, more subjective and more difficult to defend as being "fair and open".

Pre-qualified source lists (for planned contracts)

(1) Where a procurement authority pre-qualifies bidders or proponents before issuing a request for bids or proposals for contracts, it will establish a pre-qualified source list pursuant to this directive, which will be valid for up to one year and up to three years if an extension is authorized by the Deputy Minister. As defined in this Directive, a pre-qualified source list is "a list of bidders or proponents who meet the evaluation criteria specified for planned contracts".

(2) The procurement authority will define the scope of each pre-qualified source list in terms of the specific contracts which are contemplated.

Procurement authorities will publicly advertise for bidders or proponents to submit their qualifications for pre-qualified source lists.

Responses to requests for qualifications issued pursuant to Section 43 will be considered proposals as defined by this directive, and will be evaluated accordingly. Notwithstanding Section 53 (Form of evaluation criteria), for pre-qualifying bidders or proponents, price is not a mandatory criterion.

A procurement authority will not add the name of a bidder or proponent to pre-qualified source lists except through the evaluation and acceptance of the proponent's qualifications submitted in response to the request for bids or proposals.

- The information to be contained in the RFP is defined explicitly. This type of information is found in many other organization's directives and policies. However, some organizations do not insist that the RFP contain the contract terms, nor a full description of the evaluation process.

Information in request for bids or proposals

A request for bids or proposals will include the following information:

- (a) *the essential terms of the contract(s) or standing offer agreement(s) to be awarded, including:*
- (i) *a full description of the goods or services or construction to be delivered, including estimated quantities where applicable and all performance requirements;*
 - (ii) *the form, amount, and terms and conditions of any required performance security, or any performance penalty or performance bonus permitted by law, if any;*
 - (iii) *the completion date or any other timing considerations which are to be terms of the contract(s) or standing offer agreement(s);*
 - (iv) *provisions relating to the confidentiality of the bids or proposals;*
 - (v) *information relating to post contract completion performance evaluations;*
 - (vi) *other terms and conditions which would be relevant in setting a price for the goods or services;*
 - (vii) *indication that the request for bids or proposals is for a screened qualified source list, pre-qualified source list, or a standing offer agreement, if this is the case; and*
 - (viii) *a statement that the procurement is subject to Chapter 5 of the Agreement on Internal Trade, if applicable.*
- (b) *terms and conditions for the submission of bids or proposals, including:*
- (i) *the form in which bids or proposals are to be submitted;*
 - (ii) *the information required to be provided in the bid or proposal;*
 - (iii) *the place to which bids or proposals must be submitted;*
 - (iv) *irrevocability period, if applicable and if not applicable, the irrevocability period may be removed if the process in Section 22 (5) (Request for Analysis of Procurement) has been followed; and*
 - (v) *the closing date and time.*
- (c) *a full description of the manner in which bids or proposals will be evaluated, including:*
- (i) *the method to be used to evaluate bids or proposals;*
 - (ii) *the evaluation criteria, stated in such a manner as to clearly identify all the information to be provided by the bidder or proponent which will be used to evaluate the bid or proposal (see Section 53 Form of evaluation criteria);*
 - (iii) *the weighting assigned to each evaluation criterion, where the criteria are used for ranking; and*
 - (iv) *the process for negotiation with the bidder(s), if a non-Contract A, negotiated format is employed after the Request for Analysis of Procurement process has been followed (see Section 22).*
- (d) *the tax-exempt status of the Government of Yukon under the Goods and Services Tax or Harmonized Sales Tax (GST/HST), except in the case of procurements by Government Corporations which pay taxes;*
- (e) *a provision that bids or proposals do not contain an amount for the GST/HST;*
- (f) *the name, title and contact information of the designated contact person; and*
- (g) *in the case of publicly advertised requests for bids or proposals, the time and place of tender opening.*

- Reasons for rejecting a proposal are defined explicitly. In stating the formal reasons, the organization removes the appearance of arbitrary actions.

Rejection of timely bids or proposals

(1) The procurement authority will only reject a bid or proposal which has been received prior to the closing time where:

- (a) it is not submitted in the required form;*
- (b) there are significant omissions of required information;*
- (c) a bid or proposal is not signed as required in the request for bids or proposals;*
- (d) the required bid security in the required form is not provided (if it is a requirement of the procurement);*
- (e) the bid or proposal has conditions attached which are not authorized by the request for bids or proposals (unless the format is non- Contract A and the process in Section 22 (5) (Request for Analysis of Procurement) has been followed); or*
- (f) the bid or proposal fails to meet one or more standards specified in the request for bids or proposals.*

- Evaluations can only be done using the criteria in the RFP.

Procurement authority to evaluate and rank bids or proposals

The procurement authority will evaluate and rank bids or proposals not rejected pursuant to Sections 58 (Late bids or proposals) or 59 (Rejection of timely bids or proposals) solely on the basis of the evaluation criteria and requirements contained in the request for bids or proposals.

- The bid challenge process uses a committee that includes representatives from the public. It is unusual to have members of the public participate in the challenge process.

The (bid challenge) committee will be made up of a chair, an alternate who will act in the absence of the chair, five (5) representatives from the Government of Yukon, and five (5) representatives from the public.

A complaint registered with the committee which is found by the chair to warrant a hearing will be heard by a panel of three (3) members consisting of the chair and one (1) member appointed by the chair from the representatives of the government and one (1) member appointed by the chair from the representatives of the public.

Debriefing

Unsuccessful bidders or proponents must be notified of the results and offered the opportunity for a debriefing on their bid or proposal, which will include a full explanation of why their bid or proposal was not successful. Successful bidders or proponents may also participate in a debriefing.

Example #5: State of Alaska

Alaska has done an excellent job of implementing an effective RFP policy. The basic rules are set out in their 45-page Procurement Code and associated Procurement Regulations. Some of the rules are clarified in the Administrative Manual.

The Purchasing Section has produced some excellent user documentation including the Policies and Procedures Manual and the standardized RFP Shell.

These five documents prescribe the use of RFPs:

1. Procurement Code¹⁷. This is a state law which establishes the framework for all procurements. It requires, for example, that sole source procurements be used only after clear and compelling evidence is provided in writing.
2. Procurement Regulations¹⁸. These provide additional details to implement the law. For example, the regulations declare that written permission from the Chief Procurement Officer is required and provide examples of circumstances in which sole source procurement might be appropriate.
3. Administrative Manual¹⁹. Section 81 of this manual describes various aspects of procurement from the Department's perspective. It provides five pages of detail about RFPs.
4. Procurement Policies and Procedures Manual²⁰. This Manual describes the major aspects from the perspective of the Procurement Unit, Division of Administrative Services. It provides five pages of details about RFPs and consolidates the information presented in the Procurement Code, Regulations, and Administrative Manual.
5. Standardized RFP Shell²¹. Provides a model of an RFP with many options. Use of this document is a time-saving approach to help purchasing officials generate consistent documents that comply with policy, regulations, law, and administrative requirements.

Each of these instruments is described in more detail in this section.

1. PROCUREMENT CODE

This 45-page law has some interesting features. First, it is a law providing more than twenty pages of instructions and direction dealing with the details of the procurement process. It is also representative of many of the jurisdictions that have based their procurement code on the American Bar Association's Model Procurement Code.

Some of the noteworthy features detailed in this law are:

- The Chief Procurement Officer must have procurement experience (this is not a political appointment).
- Specifications cannot be unduly restrictive.
- RFPs must provide 21 days to develop a proposal.
- Proposals are public documents.
- 'Best and final' offers are permitted.
- Single source procurements must be justified in writing.
- There is a formal protest procedure.

While many of the topics and much of the content of each of this law's Articles are similar to those found in other jurisdictions and certainly not exciting to read, there are some interesting features. A review of these features can help your organization improve its RFP practices.

The remainder of this section provides a brief description of the salient parts of the Procurement Code and many of its noteworthy features. (Much of this descriptive material is provided in the language of the Procurement Code itself.)

Purpose. The Procurement Code identifies nine "underlying purposes and policies" focusing on developing consistent practices throughout the government, providing fair and equitable treatment for all, fostering broad-based competition, and safeguarding the integrity of the process. Here is the language of the original Preamble to the Procurement Code related to purpose:

(1) simplify, clarify, and modernize the law governing procurement . . .

(2) establish consistent procurement principles for all branches of State government

(3) provide for increased public confidence . . .

(4) ensure the fair and equitable treatment of all persons who deal with the procurement system. .

(5) provide increased economy in State procurement activities . . .

(6) foster effective broad-based competition within the free enterprise system

(7) provide safeguards for the maintenance of a procurement system of quality and integrity

(8) permit the continued development of State procurement practices . . .

(9) eliminate and prevent discrimination in State contracting . . .

Organization of State Procurement. This part of the Procurement Code deals with a wide range of organizational issues. It defines the responsibilities of the chief procurement officer and the right to establish regulations. It defines the use of bidders' lists, and specifications to promote competition.

- The Chief Procurement Officer must have purchasing experience.

The chief procurement officer must have at least five years of prior experience in public procurement, including large scale procurement of supplies, services, or professional services, and must be a person with demonstrated executive and organizational ability. The chief procurement officer may be removed by the commissioner only for cause. The term of office of the chief procurement officer is six years.

- The Procurement Code requires the establishment of regulations.

Sec. 36.30.040. Procurement regulations.

a. The commissioner shall adopt regulations governing the procurement, management, and control of supplies, services, professional services and construction by agencies . . . The commissioner may audit and monitor the implementation of the regulations and the requirements of this chapter with respect to using agencies.

b. The commissioner shall adopt regulations pertaining to

1) suspension, debarment, and reinstatement of prospective bidders and contractors;

2) bid protests;

- 3) *conditions and procedures for the procurement of perishables and items for resale;*
- 4) *conditions and procedures for the use of source selection methods authorized by this chapter, including single source procurements, emergency procurements, and small procurements;*
- 5) *the opening or rejection of bids and offers, and waiver of informalities in bids and offers;*
- 6) *confidentiality of technical data and trade secrets submitted by actual or prospective bidders or offerors;*
- 7) *partial, progressive, and multiple awards;*
- 8) *storerooms and inventories, including determination of appropriate stock levels and the management of agency supplies;*
- 9) *transfer, sale, or other disposal of supplies;*
- 10) *definitions and classes of contractual services and procedures for acquiring them;*
- 11) *providing for conducting price analysis;*
- 12) *use of payment and performance bonds in connection with contracts for supplies, services, and construction;*
- 13) *guidelines for use of cost principles in negotiations, adjustments, and settlements;*
- 14) *conditions under which an agency may use the services of an employment program;*
- 15) *a bidder's or offeror's duties under this chapter; and*
- 16) *the elimination and prevention of discrimination in state contracting because of race, religion, color, national origin, sex, age, marital status, pregnancy, parenthood, handicap, or political affiliation.*

The Procurement Code defines "specifications" and encourages careful definition to foster competition:

Sec. 36.30.060. Specifications.

(b) Specifications for construction of highways must conform as closely as practicable to those adopted by the American Association of State Highway and Transportation Officials.

(c) The commissioner may obtain expert advice and assistance from personnel of using agencies in the development of specifications. Specifications must promote overall economy for the purposes intended and encourage competition in satisfying the state's needs, and may not be unduly restrictive. The requirements of this subsection regarding the purposes and nonrestrictiveness of specifications apply to all specifications, including those prepared by architects, engineers, designers, and other professionals.

Competitive Sealed Proposals. This article of the Procurement Code states that if you can't award a contract by Competitive Sealed Bidding (known as a quotation in many jurisdictions), then you must use a Request for Proposal. This Article then imposes some conditions on the RFP, proposals and the procurement officer:

- Evaluation factors must be stated in the RFP.

A request for proposal must contain that information necessary for an offeror to submit a proposal or contain references to any information that cannot reasonably be included with the request. The request must provide a description of the factors that will be considered by the procurement officer when evaluating the proposals received, including the relative importance of price and other evaluation factors . .

- Adequate notice must be given.

Sec. 36.30.130. Public notice of invitation to bid.

The procurement officer shall give adequate public notice of the invitation to bid at least 21 days before the date for the opening of bids. If the procurement officer determines in writing that a shorter notice period is advantageous for a particular bid and adequate competition is anticipated, the 21-day period may be shortened. Notice shall be posted on the Alaska Online Public Notice System (AS 44.62.175). The time and manner of notice must be in accordance with regulations adopted by the commissioner of administration. When practicable, notice may include

- 1) publication in a newspaper calculated to reach prospective bidders;*
- 2) notices posted in public places within the area where the work is to be performed or the material furnished; and*

- Proposals are public documents.

Sec. 36.30.230. Disclosure of proposals; return of proposals.

The procurement officer shall open proposals so as to avoid disclosure of contents to competing offerors before notice of intent to award a contract is issued. A register of proposals containing the name and address of each offeror shall be prepared in accordance with regulations adopted by the commissioner. The register and the proposals are open for public inspection after the notice of intent to award a contract is issued under AS 36.30.365. To the extent that the offeror designates and the procurement officer concurs, trade secrets and other proprietary data contained in the proposal documents are confidential.

- "Best and final" offers can be used. Offerors are permitted to revise proposals based on discussions with procurement officer prior to best and final offers:

Sec. 36.30.240. Discussion with responsible offerors and revisions to proposals.

As provided in the request for proposals, and under regulations adopted by the commissioner, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors reasonably susceptible of being selected for award shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and before the award of the contract for the purpose of obtaining best and final offers. In conducting discussions, the procurement officer may not disclose information derived from proposals submitted by competing offerors. AS 44.62.310 does not apply to meetings with offerors under this section.

- Selection must be based on only those factors identified in the RFP:

The procurement officer shall award a contract under competitive sealed proposals to the responsible and responsive offeror whose proposal is determined in writing to be the most advantageous to the state taking into consideration price and the evaluation factors set out in the request for proposals. Other factors and criteria may not be used in the evaluation. The contract file must contain the basis on which the award is made.

- Multi-step proposals can be used. The evaluation of unpriced technical proposals can be used to identify qualified firms. These firms can then be issued an RFP.

Sec. 36.30.265. Multi-step sealed proposals.

When it is considered impractical to initially prepare a definitive purchase description to support an award based on listed selection criteria, the procurement officer may issue an expression of interest requesting the submission of unpriced technical offers, and then later issue a request for proposals limited to the offerors whose offers are determined to be technically qualified under the criteria set out in the expression of interest.

Other Procurement Methods. The Procurement Code identifies and defines a number of additional procurement methods and when each may be used: single source, limited competition, innovative, emergency, employment and youth job training, correctional industries, and small procurements.

- **Single Source Procurements.** This method may only be used when a responsible official has determined in writing that there is only one source for the required procurement.

Sec. 36.30.300. Single source procurements.

A contract may be awarded for supplies, services, professional services, or construction without competitive sealed bidding, competitive sealed proposals, or other competition in accordance with regulations adopted by the commissioner. A contract may be awarded under this section only when the chief procurement officer or, for construction contracts or procurements for the state equipment fleet, the commissioner of transportation and public facilities determines in writing that

- 1) *it is not practicable to award a contract by competitive sealed bidding under AS 36.30.100 , competitive sealed proposals under AS 36.30.200, or limited competition under AS 36.30.305 ; and*
- 2) *award of the contract under this section is in the state's best interest.*

- **Limited Competition Procurements.** Under certain circumstances the formal processes of competitive sealed bidding or competitive sealed proposals can be replaced with simpler, shorter processes.

Sec. 36.30.305. Limited competition procurements.

A construction contract under \$100,000, or a contract for supplies, services, or professional services, may be awarded without competitive sealed bidding or competitive sealed proposals, in accordance with regulations adopted by the commissioner. A contract may be awarded under this section only when the chief procurement officer determines in writing that a situation exists that makes

competitive sealed bidding or competitive sealed proposals impractical or contrary to the public interest, except that the attorney general may make the determination for services of legal counsel, and the commissioner of transportation and public facilities may make the determination for construction contracts under \$100,000 or procurements for the state equipment fleet. Procurements under this section shall be made with competition that is practicable under the circumstance. . .

- **Innovative procurements**

Sec. 36.30.308. Innovative procurements.

A contract may be awarded for supplies, services, professional services, or construction using an innovative procurement process, with or without competitive sealed bidding or competitive sealed proposals, in accordance with regulations adopted by the commissioner. A contract may be awarded under this section only when the chief procurement officer, or, for construction contracts or procurements of the state equipment fleet, the commissioner of transportation and public facilities, determines in writing that it is advantageous to the state to use an innovative competitive procurement process in the procurement of new or unique requirements of the state, new technologies, or to achieve best value.

- **Small Procurements.** For procurements under \$50,000, there is more discretionary power granted to the commissioner to establish less formal procedures:

Sec. 36.30.320. Small procurements.

(c) Small procurements need not be made through competitive sealed bidding or competitive sealed proposals but shall be made with competition that is practicable under the circumstances.

(d) Procurement requirements may not be artificially divided or fragmented so as to constitute a purchase under this section or to circumvent the source selection procedures required by AS 36.30.100 - 36.30.270.

Contract Formation and Modification. This Article provides for a notice of intent to award a contract. During the notice period, suppliers who believe they have been aggrieved, can initiate a formal protest.

At least 10 days before the formal award of a contract (from a competitive sealed proposals process) . . . , the procurement officer shall provide to each bidder or offeror notice of intent to award a contract . . .

Procurement Records and Reports. This Article defines the record keeping required for different types of procurements, the public's right to information, and the content of the commissioner's report to the legislature. Every two years, the commissioner must report to the legislature. The report must identify and summarize the procurement activity. Information is provided on a number of topics including all Sealed Competitive Proposals procurements, single source and emergency procurements, as well as a description of any matters that involved litigation.

- Publicly accessible contract files must be kept by the commissioner and the contracting agency:

A contract file open for public inspection shall be kept by the commissioner and the contracting agency for each contract awarded under competitive sealed proposals. The file kept by the commissioner must contain a summary of the information in the file of the contracting agency. The file kept by the contracting agency must contain

- (1) a copy of the contract;*
- (2) the register of proposals prepared . . . and a copy of each proposal submitted;*
and
- (3) the written determination to award the contract . . .*

- Records of Single Source and Emergency Procurements. All single source procurements must be recorded in a listing by the commissioner:

The commissioner shall maintain for a minimum of five years a record listing all single source procurements contracts . . . and emergency procurements . . . The record must contain

- (1) each contractor's name*
- (2) the amount and type of each contract; and*
- (3) a listing of the supplies, services, professional services, or construction procured under each contract. . .*

- Public Access To Procurement Information. Many public sector bodies attempt to maintain as confidential as much information as possible. In Alaska, the law is clear: information is public as set out in Sec. 36.30.540 "Procurement information is public except as otherwise provided by law."

Legal and Contractual Remedies. This Article establishes the framework and major features of the supplier complaint process. This topic is discussed at length in Chapter 10. Alaska's Procurement Code specifies both civil and criminal penalties.

Sec. 36.30.930. Civil and criminal penalties.

The following penalties apply to violations of this chapter:

- 1) a person who contracts for or purchases supplies, equipment for the state fleet, services, professional services, or construction in a manner the person knows to be contrary to the requirements of this chapter or the regulations adopted under this chapter is liable for all costs and damages to the state arising out of the violation;*
- 2) a person who intentionally or knowingly contracts for or purchases supplies, equipment for the state fleet, services, professional services, or construction under a scheme or artifice to avoid the requirements of this chapter is guilty of a class C felony.*

ALASKA PROCUREMENT REGULATIONS

These regulations provide additional details, rules, clarifications, and procedures related to the Procurement Code. The regulations are organized into 16 Articles, covering 53 pages. Here are some of the more important features:

Article 1: Source Selection. The most interesting paragraph of this article deals with conflict of interest where one supplier has "inside" information. This Article anticipates the situation in which the person helping to create the RFP wants to submit a proposal:

2AAC 12.020 Exclusion of Prospective Contractor from Competition

A procurement officer may exclude a prospective contractor from submitting bid or proposal, or may reject a prospective contractor's bid or proposal, after making a written determination that the prospective contractor assisted in drafting the invitation to bid or request for proposal, or gained substantial information regarding the invitation to bid or request for proposal that was not available to the general public.

Article 2: Specifications. This article attempts to ensure that competition is fair and open by defining the purpose and nature of specifications.

2AAC 12.080 Purpose of Specifications

(a) *The purpose of a specification is to serve as a basis for obtaining, in a cost effective manner, a supply, service, or construction item suitable for the state's needs.*

(b) *Specifications must, to the extent practicable, emphasize functional or performance criteria necessary to meet the needs of the state. Specifications emphasizing functional or performance criteria are primarily applicable to the procurement of supplies and services and might not be practicable in construction, apart from the procurement of supply type items for a construction project.*

(c) *It is state policy to procure standard commercial products if practicable.*

2AAC 12.090 No Unduly Restrictive Specifications

. . . all specifications must describe the requirements to be met without having the effect of exclusively requiring a proprietary supply, service, or construction item, or procurement from a single source, unless no other manner of description will suffice.

Article 4: Competitive Sealed Proposals. This article defines the evaluation process, information that must be contained in the RFP, and the rules regulating discussions with individual offerors to obtain best and final proposals.

2AAC 12.260 Evaluation of Proposals

(a) *The procurement officer, or a procurement evaluation committee consisting of at least three state employees or public officials shall evaluate proposals . . .*

(b) *The evaluation must be based only on the evaluation factors set out in the request for proposals. The relative importance or weighting value of each evaluation factor shall be set out in the request for proposals. Numerical rating systems may be used, but are not required. If a numerical rating system is not used, the procurement officer, or each member of the evaluation committee, as applicable, shall explain his or her ranking determination in writing.*

(c) *Price must be an evaluation factor unless (the procurement is for architectural engineering or land surveying services). The proposal with the lowest price must receive the highest available rating allocated to price. A proposal that has a higher price than the next lowest must receive a lower rating for price.*

For the purposes of evaluating price, the proposed price of an offeror who qualifies as an Alaska bidder . . . shall be reduced by five percent . . .

2AAC 12.270 Only One Responsive Proposal

If . . . only one responsive and responsible proposal is available for award, the procurement officer may make an award . . . , may reject the proposal, or may reject the proposal and resolicit proposals.

2AAC 12.290 Proposal Discussions with Individual Offerors

(a) Offerors of proposals reasonably susceptible for award as determined in the evaluation . . . may be offered the opportunity to discuss their proposals with the procurement officer or evaluation committee at the discretion of the procurement officer. The procurement officer may limit discussions to specific sections of the proposals received or specific sections of the request for proposals. The opportunity for confidential discussions, if held, must be extended to all offerors submitting proposals deemed reasonably susceptible for award. Auction techniques that reveal one offeror's price to another, and disclosure of any information derived from competing proposals, are prohibited.

(b) Any oral modification of a proposal resulting from proposal discussions under (a) of this section shall be reduced to writing by the offeror.

(c) Following discussions, the procurement officer shall set a date and time for the submission of best and final proposals. Best and final proposals may be submitted only once. However, the chief procurement officer or the head of a purchasing agency may make a written determination that it is in the state's best interest to conduct additional discussions or change the state's requirements and require another submission of best and final proposals. Otherwise, discussion of or changes in the best and final proposals may not be allowed before award. If an offeror does not submit a best and final proposal or a notice of withdrawal, the offeror's previous proposal is considered the offeror's best and final proposal.

The evaluation of a proposal may be adjusted as a result of a discussion under this section. The conditions, terms, or price of the proposal may be altered or otherwise changed during the course of the discussions provided the changes are within the scope of the request for proposals. After best and final proposals are received, final evaluations will be conducted . . .

Article 7: Single Source Procurement. This article describes when and how single source procurement can be made. The determination must be in writing, and must be approved by the chief procurement officer.

2AAC 12.410 Conditions for Use of Single Source Procurement

(a) A request by a purchasing agency that a procurement be restricted to one potential contractor shall be accompanied by a written explanation . . . as to why it is not practicable to award a contract by competitive sealed bidding, competitive sealed proposals, or small procurement procedures, and why award to a single source is the state's best interest. An agency may advertise its intent to make a

single source award to determine if such award is appropriate. The agency shall include in the written explanation the evidence needed for an independent examination and determination of the material facts of the procurement . . . the award of a single source procurement may not be made without the prior written approval of the Chief Procurement Officer or the Commissioner of Transportation and Public Facilities . . .

(b) A determination (that there is only one source for the required procurement) must specify the duration of the determination's effectiveness.

(c) A procurement officer shall conduct negotiations, as appropriate, as to price, delivery, and terms of a single source procurement.

(d) The following are examples of circumstances in which single source procurement might be appropriate:

(1) if the compatibility of equipment, accessories, or replacement parts is the main consideration;

(2) if a specific item is needed for trial use or testing, including testing of a prototype;

(3) if an item is to be procured for resale;

(4) (repealed)

(5) if there exists a sole source of expertise required to perform a specific professional service;

(6) if the procurement is for operation of a concession contract on State of Alaska property by a nonprofit organization whose sole purpose is to operate the concession and provide other public services on the property;

(7) if the procurement is with a government police agency to provide investigative, enforcement, or support services in support of state law enforcement objectives;

(8) if the procurement is for the services of legal counsel for the purpose of advising or representing the state in specific civil or criminal proceedings or on A specific matter before a federal or state regulatory agency, board, or commission;

(9) if the procurement is by the Office of the Governor for lobbying, labor negotiation, or consulting by a foreign national.

2AAC 12.420 Record of Single Source Procurement

A record of every single source procurement shall be made and forwarded to the Chief Procurement Officer, and must include

- (1) the supplier's or contractor's name
- (2) the amount and type of each contract
- (3) a listing of the supplies, services, or construction procured under each contract; and
- (4) the identification number of each procurement file.

Article 8: Limited Competition Procurements. This Article ensures that competitions are open to all suppliers unless limitations or restrictions have been specifically justified in writing.

2AAC 12.430 Conditions for Use of Limited Competition Procurement.

A request by a purchasing agency to limit a procurement to two or more potential contractors must be accompanied by a written explanation as to why the solicitation should be limited, and why the competitive sealed bidding, competitive sealed proposals, or small procurement procedures are impractical or contrary to the public interest. The agency must include with the written explanation the evidence necessary for an independent examination and determination of the material facts of the procurement . . . To determine if other sources are available and interested in a procurement, an agency may advertise an intent to make a limited competition procurement . . .

Article 15: Miscellaneous Provisions. This Article provides the chief procurement officer the authority to amend RFPs. It also identifies acceptable reasons for canceling an RFP, rejecting all proposals, or rejecting a specific proposal.

2AAC 12.850 Extension of Solicitation; Cancellation of Solicitation; Amendment of Solicitation

(a) Before the opening of bids or proposals, a solicitation may be amended, or time for opening may be extended, upon the procurement officer's determination that the extension or amendment is in the state's best interest. All potential bidders or offerors known to have copies of the solicitation shall be advised of the extension or amendment.

(b) Before the opening of bids or proposals, a solicitation may be cancelled in whole or in part if the Chief Procurement Officer or the head of a purchasing agency issuing a solicitation determines that cancellation is in the state's best interest. Reasons for cancellation include the following:

- (1) the state no longer requires the supplies, services, or construction;*
- (2) the state no longer can reasonably expect to pay for the procurement;*
- (3) proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable; or*
- (4) the officer, after consultation with the Attorney General, determines that a solicitation is in violation of the law.*

2AAC 12.860 Rejection of All Bids or Proposals

After the opening of bids or proposals or after notice of intent to award but before award, all bids or proposals may be rejected in whole or in part by the Chief Procurement Officer or the head of a purchasing agency issuing the solicitation.

Reasons for rejection include the following:

- (1) the supplies, services, or construction being procured are no longer required;*
- (2) ambiguous or otherwise inadequate specifications were part of the solicitation;*
- (3) the solicitation did not provide for consideration of all factors of significance to the state;*
- (4) prices exceed available money and it would not be appropriate to adjust quantities to accommodate available money;*
- (5) all otherwise acceptable bids or proposals received are at unacceptable prices;*
- (6) there is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith; or*
- (7) the award is not in the best interests of the state.*

2AAC 12.870 Rejection of Individual Bids or Proposals

Reasons for rejecting an individual bid or proposal include the following:

- (1) the business that submitted the bid or proposal is not responsible . . .*
- (2) the bid or proposal is non-responsive;*
- (3) the bidder or offeror did not meet the qualification of requirements . . .*
- (4) the supply, service, or construction item fails to meet the specifications or other acceptability criteria set out in the solicitation; or*
- (5) the bid or proposal fails to meet the goals or other provisions set out in the solicitation to eliminate and prevent in state contracting discrimination because of race, religion, color, national origin, sex, age, marital status, pregnancy, parenthood, or disability.*

3. ALASKA ADMINISTRATIVE MANUAL (AAM)

Section 81 of this manual deals with procurement. It is intended to supplement the Procurement Code and the Regulations. It provides helpful advice and best practices to all agencies.

Much of the section sets out requirements that are in addition to those detailed in statute and regulation. Some sections contain policy clarifications that address specific questions or problems brought to our attention.

Section 81.400 deals with RFPs and provides clarification on a number of issues:

81.400 *Competitive Sealed Proposals*
81.410 *Preparing a Competitive Sealed Proposal*
81.420 *Professional Services*
81.430 *Definition of Professional Services*
81.440 *Authority to Procure Professional Services*
81.450 *Forms for Professional Services Contracts*
81.460 *Receipt of Proposals*
81.470 *Evaluating Proposals*
81.470(1) *Evaluation Criteria*
81.470(2) *Experience Factor*
81.470(3) *Cost Evaluation Factor*
81.470(4) *Alaskan Offeror's Preference*
81.470(5) *Clarification of Offers*
81.470(6) *Other Discussions With Individual Offerors*
81.480 *Contract Negotiations*

Here are some of the more important features.

Section 81.410 provides advice and guidance on handling deficiencies once an RFP is issued:

RFP REVIEW: Offerors shall carefully review this RFP for defects and questionable or objectionable materials. Offerors' comments concerning defects and questionable or objectionable material must be made in writing and received by the purchasing authority at least 10 days before the proposal opening date. This will allow time for the purchasing authority to issue an amendment if one is required. It will also help prevent the opening and exposure of proposals upon which award cannot be made. Offerors should send comments to the purchasing authority at the address shown on the front of this RFP.

Section 81.470 provides guidance on evaluating proposals:

The proposals may be evaluated by the procurement officer, or a Proposal Evaluation Committee (PEC). If the purchasing agency uses a PEC, it shall consist of at least three State employees or public officials. Individuals who are not State employees or public officials may serve on a PEC if you meet the minimum requirement for State employees or public officials. However, you must exercise caution to ensure that conflicts of interest do not exist. A nonresident of the State of Alaska, other than State employees or officials, may not serve in a voting capacity without prior written approval by the Commissioner of DOA. Requests for nonresident evaluators should explain the value of their participation on the PEC. The procurement officer should review all proposals for responsiveness before distributing them to the PEC. Proposals deemed non-responsive should not be evaluated by the PEC. A representative from the Information Technology

Group must be consulted for procurements of software development that will interact with the State's mainframe computer.

Section 81.470(2) indicates how required experience can be properly described:

It may be valuable to consider specific experience when evaluating proposals. If this criterion is used, you should consider task-related experience and not agency-related experience. A description of the experience considered valuable should be limited to those specific characteristics necessary to accomplish the goal of the RFP.

A good example of necessary experience might be:

Experience designing Oracle database applications in a Windows NT environment.

If this experience is necessary for the project, then you should make it a minimum requirement and not evaluate it using points. You may use a combination of minimum experience and points evaluation. A bad example of necessary experience might be:

Previous experience working with department Y, division X.

It is legitimate to consider the offeror's experience in Alaska performing similar work.

In many jurisdictions, the differences between clarifications, discussions and negotiations are blurred. Section 81.470(5) attempts to clarify the distinctions:

AAM 81.470(5) Clarification of Offers

During the evaluation process, the procurement officer or the PEC may communicate with an offeror to clarify uncertainties or eliminate confusion. This communication may not result in a material or substantial change to the proposal, but it may result in an adjustment to the procurement officer or PEC's evaluation.

AAM 81.470(6) Other Discussions with Individual Offerors

The procurement officer or PEC may give offerors whose proposals are reasonably susceptible for award the opportunity to meet with the procurement officer or PEC, as set out in 2 AAC 12.290. If you hold discussions under 2 AAC 12.290, you must offer an opportunity to participate in the discussions to all those deemed reasonably susceptible for award.

4. PROCUREMENT POLICIES AND PROCEDURES MANUAL

This 57-page Manual provides seven pages of details about RFPs and consolidates the information presented in the Procurement Code, Regulations, and Administrative Manual for important RFP issues:

RFP Contents
RFP Evaluation Criteria
Public Notice
RFP
Questions/Amendment/Extension/Cancellation
Treatment of Proposals/Register of Proposals
Proposal Discussions
Proposal Evaluation Committee (PEC)
Proposal Evaluation
Award/Notice of Intent to Award
RFP Materials

For example, the section on Public Notice is based on the Code (AS 36.30.210), the Regulations (2 AAC 12.220) and the Administrative Manual (AAM 82.110). It consolidates the information from each of these three sources and provides some additional details:

Public Notice

Public notice of all RFPs must be given at least twenty-one (21) days before the date of the opening of the proposals. Notice of all RFPs must be published in the Alaska Administrative Journal. Contact the Commissioner's Office, telephone number 465-2200, to place your notice. Additionally, RFPs must either be mailed to those contractors appearing on the contractor's list for that particular service code, or published in a newspaper of general local circulation in the area pertinent to the contract or in other appropriate media. All notices must include the RFP number.

The twenty-one (21) day time frame may be shortened after the procurement officer has independently determined that it is advantageous to the State and adequate competition is anticipated. If a division advertises the RFP, a copy of the Advertising Order Affidavit and a copy of the actual advertisement must accompany your contract package when submitted for approval.

AS 36.30.210; 2 AAC 12.220; AAM 81.090

5. REQUEST FOR PROPOSAL SHELL²²

The State of Alaska has developed a standardized document, 39 pages in length, consisting of an RFP and the instructions to the procurement officer for modifying it as is appropriate.

This document, based on many years of experience, includes much valuable information to promote "best practices" and to ensure that the RFP and the related process comply with the law and regulations. For example, the document contains detailed sample calculations related to costing, and sample evaluation sheets for scoring proposals.

The document is an easy way to ensure that RFPs are kept up to date. Each time a change is made in law, regulations, or administrative procedures the document is revised. The document clearly reduces the time to prepare an RFP by providing the Procurement Officer with a standardized document. The Officer needs only to ensure that the shell is appropriately modified to reflect the specific situation.

Here is a sample from the document. Section 1.15 deals with subcontractors. The Procurement Officer is required to specify whether subcontractors will be allowed. The Procurement Officer is not permitted to delete this section from the RFP. If no subcontractors are allowed, the Officer selects the appropriate clause. If subcontractors are allowed, the Procurement Officer can include the sample clause either as is or appropriately modified.

Subcontractors

Procurement Officer Note: REVISE as REQUIRED.

Subcontractors will not be allowed.

OR

Subcontractors may be used to perform work under this contract. If an offeror intends to use subcontractors, the offeror must identify in the proposal the names of the subcontractors and the portions of the work the subcontractors will perform.

If a proposal with subcontractors is selected, the offeror must provide the following information concerning each prospective subcontractor within five working days from the date of the state's request:

- a) complete name of the subcontractor;
- b) complete address of the subcontractor;
- c) type of work the subcontractor will be performing;
- d) percentage of work the subcontractor will be providing;
- e) evidence that the subcontractor holds a valid Alaska business license; and
- f) a written statement, signed by each proposed subcontractor that clearly verifies that the subcontractor is committed to render the services required by the contract.

An offeror's failure to provide this information, within the time set, may cause the state to consider their proposal non-responsive and reject it. The substitution of one subcontractor for another may be made only at the discretion and prior written approval of the project director.

This RFP shell contains several noteworthy practices. These are discussed in Chapter 6.

An Ending Comment

In this chapter, we've discussed some of the concerns in implementing an effective RFP policy. In addition, we've provided five examples of how policy has been implemented in different jurisdictions using different approaches.

In the next chapter, The RFP Process, we provide some insights into the problems to be expected and ways to reduce the most common risks which cause many RFP problems.

End Notes

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1. Page 5, Reference 22.
 2. Page 11, Reference 28.
 3. Reference 31 Nova Scotia, Government Procurement, How to Sell Your Goods and Services to the Nova Scotia Government, pg 4, 4 pgs,
http://www.novascotia.ca/tenders/policy/pdf_files/procurement_brochure.pdf
 4. Page 35, Reference 27

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5. Reference 32. Princeton University, Purchasing Dept., How to Do Business with Princeton University, pg 2, 2 pgs,
<http://finance.princeton.edu/how-to/buying-paying/buying-paying-basics/cooperative-liaison-purch/HowToDoBusinessWithPrincetonBrochure.pdf?sq=how%20to%20do%20business>
 6. Reference 33. City of Anaheim, Purchasing, home page,
<http://www.anaheim.net/title/Finance/Purchasing/page.htm>
 7. Reference 20.
 8. Reference 34, State of Washington, Dept. of General Administration, The Washington Purchasing Manual, revised 2011, pgs 6-7, 83 pgs,
<http://des.wa.gov/SiteCollectionDocuments/ContractingPurchasing/Washington-Purchasing-Manual.pdf>
 9. Reference 35. Iowa Supreme Court, “No. 202/00-0371, Jan. 24, 2002, Garling Construction vs City of Shellsburg et al”, pg 3, 8 pgs,
<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=ia&vol=sc\20020124\00-0371&invol=1>
 10. Reference 36. NIGP and CIPS, Transparency in Public Procurement, 2012, 3pgs
<http://www.globalpublicprocurement.org/Documents/Resources/public-procurement-practices/Transparency.pdf>
 11. Reference 37. Queensland (Australia) Government, Queensland Purchasing, Ethics, Probity and Accountability in Procurement, 25 pgs,
<http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2014/5414T5146.pdf>
 12. Reference 30.
 13. Reference 38, St. Johns River Water Management District (FL), Administrative Directive II, Procurement of Commodities and Contractual Services, Number: 88-06, 20 pgs, While this document is in the public domain, it is not available from their web site. It can be requested from procurement@sjrwmd.com.
 14. Reference 23.
 15. Reference 28.
 16. Reference 28.
 17. Reference 25.

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18. Reference 39. State of Alaska, "Procurement Regulations, AAC Title 2, Chapter 12", Revised 05/15/06, 51 pages,
<http://doa.alaska.gov/dgs/docs/2aac12am.doc>
 19. Reference 40, State of Alaska, Administrative Manual, Section 81 Procurement, July 15 1999, 35 pgs,
<http://doa.alaska.gov/dof/manuals/aam/resource/81.pdf>
 20. Reference 41. State of Alaska, Dept. of Administration, "Procurement Policy & Procedures Manual", 57 pages, 4-21-99,
<http://doa.alaska.gov/das/Procurement/doc/pandp.pdf>
 21. Reference 42. Alaska, Dept. of Administration, Division of General Services, "RFP Shell", 39 pages,
<http://doa.alaska.gov/dgs/docs/rfp0908.doc>
 22. Reference 42.

Chapter Five

THE RFP PROCESS

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Chapter Five

THE RFP PROCESS

Acquiring a solution to a problem by using a Request For Proposal is a process. Not surprisingly, this process is similar in many different organizations. The basic approach of many local government bodies is not radically different than that found in private sector firms: requirements are identified; offers are solicited; and, proposals are evaluated. Some differences do exist. They are usually related to the characteristics of the goods and services being acquired, and the culture and policies of the organization. The provision of food services to an educational institution requires different terms and conditions than supplying a production planning system to a manufacturing facility. Also, the requirements related to the amount of 'fair and open competition' can be very different in the public and private sectors.

Private sector firms don't have to engage in "fair and open" competition. They can, for example, decide to negotiate with one supplier directly. However, there are more than 80,000 public entities in North America that must use the RFP process.

Using an RFP process to procure goods and services is always a part of a larger organizational initiative. To design a new facility, you may need to engage an architect to provide a design. To run an institution, you may need to engage a maintenance firm. To improve an organization's cash flow, you may need to acquire a new financial software package, or engage a systems integration company to perform the work.

The RFP document and the RFP process are only a small part of each of these projects - a critical part nonetheless.

The primary objective of the RFP process is to acquire a solution to a problem or need. If this were the only objective, the task would be simple and straightforward: you could call a supplier, discuss your requirements, and ask for a proposal. Alternatively, you could define your requirements and send them to one or more potential suppliers. Both of these approaches would produce solutions which could solve the problem in a reasonable manner.

In most organizations, especially public sector bodies, there are many more objectives than simply finding a solution, even one within budget. Some of these objectives result from business considerations. Others originate in public policy, law, or administrative requirements imposed by the organization on itself or by an external stakeholder such as a State government. In one jurisdiction, one of the objectives might be to ensure that local vendors receive preferential treatment; in another, that restrictive forms of competitive procurement can only be used as specified in the policy.

The overarching policy objective in a public agency is to conduct its procurement activities in a manner that is demonstrably fair, open and transparent.

In the last few years, many organizations have modified their RFP processes to recognize the following trends:

- The public often distrusts government. Consequently, the increase in demand by the public for fair, open and transparent procurement;
- The difficulties in acquiring complex software and related services;
- The use of a Fairness Officer, an independent third party observer, for high-risk, high-visibility procurements to ensure that the process is fair, open and transparent.

This chapter deals with some of the elements of success for an RFP process through discussion of critical issues and by presenting examples from several jurisdictions.

Planning the Process

It is important to regard the RFP process as a project. It is not a part-time undertaking that can be scheduled "as time permits". It is a project requiring resources, staff, and an appropriate amount of time. A successful RFP project requires:

- Formal definition of tasks
- Understanding of the requirements
- Sufficient time and budget

- An experienced procurement officer who understands the roles of different stakeholders
- Active support and involvement of the stakeholders, including legal services
- Knowledge of best practices including use of standardized documents and checklists
- Knowledge of major risks and problems

Much work must be done prior to the actual acquisition process. This work usually begins with a clear articulation of the problem, the project, and the risks.

Often, there is a project initiation document prepared for management approval. Typically, this document provides the following information:

- A description of the problem or opportunity
- A discussion of alternatives considered
- Explanation as to how this acquisition will meet the agency's needs
- Preliminary time and cost estimates
- Acquisition strategy to be used
- Stakeholders

NEW MEXICO

In the state of New Mexico, the planning step for an RFP-based technology procurement requires the production of an initiation document. This document, which is sent to the Chief Information Officer for approval, contains the following data:¹

- *Request for approval to conduct an RFP-based information technology procurement.*
- *The contract term and renewal options.*
- *The initial contract term amount.*
- *The total estimated contract amount including all renewals.*
- *The detailed statement/scope of work.*
- *A description of all contract deliverables.*

- *A statement describing contract protections (acceptance testing, retainage, bonding, other).*

Also, in the state of New Mexico, state agencies are required to provide the State Procurement Agent with the following information before initiating any RFP process:²

- *a brief description of the items of tangible property or services to be acquired or the statement of work to be performed for professional services;*
- *a statement regarding proposed use of the price agreement or contract;*
- *a statement addressing the agreement term and renewal provisions;*
- *the estimated price of the products or cost of services to be acquired;*
- *a copy of the updated Concept Memorandum; and*
- *a specific request that the named individual be granted the authority to serve as the Procurement Manager on behalf of the governmental entity.*

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT (FL)

At St. Johns River Water Management District in Florida, they define procurement planning as:³

. . . the process by which the District, after determining the need to outsource the requirement, defines the existing market for the goods, services, or construction elements, estimates the anticipated cost, and determines the most appropriate method of procurement. Planning is critical to the success of the procurement.

Their Handbook emphasizes the team effort required and the significance of the Statement of Work:⁴

2.1.1.2 In developing a procurement the factors provided below should be considered. Advice should be sought from other disciplines, such as legal, financial management, budget, and risk management, when circumstances warrant.

- (a) The nature, complexity, and dollar value of the anticipated work;*
- (b) The applicability and thoroughness of the statement of work;*
- (c) Scheduling and urgency (time frames);*
- (d) Permitting issues;*
- (e) Accessibility;*
- (f) The most appropriate source selection method;*

- (g) Budget and funding levels based on anticipated expenditures by fiscal year;
- (h) Industry and entity capabilities;
- (i) Diversity considerations;
- (j) Risk assessment.

2.1.2 *Team Effort.* Primary to planning the procurement are the Project Manager (PM), who will be responsible for development of the Statement of Work (SOW), oversight over implementation of the work, and many other related matters, and the Contract Administrator (CA), who assists the PM with the administrative aspects of the procurement and has primary responsibility, under the direction of the Procurement Director (PD) for ensuring compliance with the District's procurement procedures. The duties of the PM, CA, and PD are generally described in AD 88-06, section XV.B., and are further described in greater detail in this manual. See section 3.3 of this manual.

2.1.3 *Statement of Work.* The SOW is an essential part of every procurement that must be substantially completed at the outset in order to determine the appropriate procurement methodology and other aspects of the procurement. The SOW is the portion of the agreement that describes the goods or services to be provided, the time frame in which they will be provided, the project budget, any interim deliverables or payment schedule based upon these deliverables, and all other matters specific to the procurement that are not encompassed within the contract template used to create the agreement. For construction or other technical contracts, the SOW may be referred to as "Technical Specifications." Depending on the complexity of the solicitation, the SOW may be developed in-house or outsourced. The time needed to complete The SOW must be considered by the PM in planning the solicitation. OGC will review the SOW to ensure that it provides sufficient specificity to constitute a binding contract with specific deliverables. However, OGC is not in a position based upon available time and information about the project to delve into detail regarding the SOW. Reliance is placed on the PM to ensure that the SOW is carefully developed to describe the deliverables and the specific expectations of the contract. A carefully developed SOW is essential to avoiding contract disputes in implementing the work. The SOW must be prepared in accordance with the SOW planner in the Procurement Tools. The project budget must be sufficiently detailed in the SOW to meet the requirements of the procurement.

CITY OF TORONTO

The City of Toronto held an inquiry into a procurement scandal that involved elected and senior officials. This inquiry produced a report on best practices that included the following checklist dealing with appropriate preparations for any procurement process:⁵

A standard checklist should be prepared indicating all of the elements that should be in place before the City launches a tender.

The City should not find itself in the position of appearing to have rushed into an acquisition before it has carried out all due diligence. A checklist can ensure appropriate preparations are made. Items for the check-list could include these questions.

- *Has the business case been adequately explained?*
- *Has a detailed needs assessment been carried out?*
- *What benefits will accrue to the City as a result of this procurement?*
- *Is the procurement method appropriate?*
- *Has the person responsible for the bidding process been identified?*
- *Have all relevant staff stakeholders been made aware of the intended acquisition?*
- *Have staffing requirements been identified?*
- *Has there been adequate time to develop the request document?*
- *Does the request document need to be reviewed by the Legal Services Division?*
- *Will prospective vendors have adequate time to respond?*
- *Will the evaluation committee have time to evaluate, prepare the necessary reports to committee and Council, select the right vendor, and negotiate the contract?*
- *Is the document clear and unambiguous?*
- *Does it identify and describe the scope of the work to be done?*
- *Are the specifications complete and accurate?*
- *Have municipal procurement policies been taken into account?*
- *What steps have been taken to ensure that the evaluation process will be fair?*

GEORGIA TECHNOLOGY AUTHORITY

This organization has developed a 12-page template for planning a procurement.⁶

Purpose of the Procurement Plan

The overall objective of a Procurement Plan is to document and inform project stakeholders about how the procurements will be planned, executed, and managed throughout the life of the project. This Procurement Plan should outline the specific actions necessary to execute the approved acquisition strategy. The Procurement Plan documents the approach to be taken for items such as the actual acquisition, contracting, and fiscal, legal, personnel, considerations, etc. The Procurement Plan should also address any policy, process, regulatory, etc. necessary to comply with any other requirements related to the specific acquisition.

This template provides guidance on developing the content of a procurement plan. It is organized into two sections. The first deals with Background and Objectives and with issues such as 2.1 Statement of Need and 2.7 Risks. The second deals with Plan of Action and issues such as 3.5 Budget and Funding and 3.18 Acquisition Cycle Milestones.

Designing Your RFP Process

While each process must conform to the organization's structure, policies, and culture, there are generic characteristics of successful processes. In reviewing your own RFP process, keep in mind the following critical success factors:

1. Know the characteristics of a winning proposal.
2. Build on the experience of others.
3. Promote fair and open competition.
4. Ensure that the RFP process is transparent.
5. Demand risk management information.
6. Recognize potential problems.

If you can incorporate these factors into your process, then the risks of problems or failure will decrease dramatically. The procurement will be consistent with your organization's policies, and public policy; and few objections will be raised by disgruntled suppliers. The procurement will select a responsible supplier offering a low-risk solution.

When this occurs, there is a good chance that the selected supplier will perform as expected - an acceptable solution will be implemented on time and within budget, and your organization (and your boss) will acknowledge that the project was a success.

In the remainder of this section, each of these factors is discussed.

CRITICAL SUCCESS FACTOR #1: KNOW THE CHARACTERISTICS OF A WINNING PROPOSAL

It's often helpful to stop and consider the characteristics of a winning proposal and a successful RFP process before you begin. When planning the RFP process, it is helpful to consider the desired results and to ensure that your plan will promote the desired outcomes. This preliminary examination often introduces changes in the approach adopted, the detailed tasks, the RFP document, timing and the

requirements. Let's first examine the proposals that we want vendors to produce in direct response to our RFP. What are we looking for? How do we define the proposal contents? What questions do we ask to help us determine the best supplier? How do we evaluate the proposals? By answering these questions, we can identify specific information to be included in our RFP. This information will direct suppliers in preparing their proposals.

The winning proposal invariably **provides the evidence** to persuade the reader that the supplier is the best organization. Winning proposals have four characteristics in common. They convince the reader:

- That the supplier fully understands the needs and problems;
- That the supplier knows how to satisfy the needs or solve the problems and offers a suitable plan;
- That the supplier is well qualified by virtue of experience and resources, including personnel, to carry out the proposed plan;
- That the price asked is reasonable and is consistent with the program described and is within the organization's budget.

In creating the RFP, we should ensure that we solicit enough specific information to evaluate these four characteristics. This evidence, in total, helps each evaluator assess the risk of failure (or the chances of success) associated with each proposal. Often, the winning proposal is not the one that costs the least, nor the one with the "leading edge" technology. It is often the one with the greatest probability of success - the one with the best combination of management skills, corporate experience, costs and technology. It is rarely the "least cost"; it is often "least risk".

There are still many remaining questions such as: What are we looking for? How do we define the proposal contents? What questions do we ask to help us determine the best supplier? How do we evaluate the proposals? These can be answered by examining the experience of other people and organizations.

CRITICAL SUCCESS FACTOR #2: BUILD ON THE EXPERIENCE OF OTHERS.

This book is filled with information about best practices, discussions of major issues, and many examples. One of the obvious questions is: "where do you start?"

Which ideas, best practices, checklists, and procedures are helpful? Which ones are essential and necessary for success? Here is a short list that I've used when discussing essential practices. If someone said to me "I have to run an RFP for an important project. I've never done it before. Which tasks will help me prevent a major disaster?" This is my list of five critical tasks.

Don't start with a blank piece of paper. Identify similar RFPs produced by other agencies. Contact the agency to discuss their RFP. Ask them what they learned and how they would improve the RFP. In the U.S., most states and many cities and counties have their own electronic procurement sites. In Canada, MERX (www.merx.com) contains RFPs from the federal government and all ten provinces. Other sources of RFPs include private sector electronic tendering sites, consulting firms, and professional associations.

Don't stop there. Identify recent RFPs that your agency has issued. Does it have a standard template or list of standard contract clauses? Discuss this RFP with senior people in your agency who have run major RFPs.

Issue a draft RFP. It is often difficult to get the stakeholders to develop a solid statement of requirements. It is also difficult to know if your RFP contains requirements that unduly restrict competition or favor one supplier. In these situations, some organizations issue a draft RFP. The RFP contains a notice that it is a draft and vendors are invited to identify requirements which they believe unduly restrict competition. The vendors' comments are evaluated and, if appropriate, the RFP is revised. If no comments are received, the draft RFP becomes the official RFP.

A draft RFP is issued, not to solicit proposals, but to solicit input from potential proponents and other interested parties including the public. Usually, the draft RFP is announced using the same procedures as a regular RFP – the newspaper or a web site. The RFP contains a notice that it is a draft and vendors (and others) are invited to identify requirements which they believe unduly restrict competition. Often, the draft RFP is used to solicit public input on the planned project. The vendors' (and others') comments are evaluated and, if appropriate, the RFP is revised. If no comments are received, the draft RFP becomes the official RFP.

There are some situations well suited to a draft RFP:

- When the Agency suspects there may be serious flaws in the requirements due, for example, to rapidly changing business models or technology
- When the Agency needs confirmation of its procurement strategy by industry
- When the Agency has had to cancel an earlier RFP for the same goods and services and now wishes to be especially cautious
- When the Agency suspects one or more of its critical requirements are unduly restrictive

Draft RFPs are often used by federal agencies. Here's what the Naval Air Warfare Center says about them:⁷

Draft Request for Proposal

The Draft Request for Proposal (DRFP) is the initial, informal, documents that communicate the Government's intentions/needs to industry and requests questions, comments, suggestions, and corrections that improve the final product. The DRFP results from a combination of IPT effort, early industry interface through posting of sections on the internet, and effective acquisition planning. This process often results in major improvements in the product or service offered.

The DRFP need not include all the sections of the final RFP, but should contain as much as possible of the "business" sections necessary for industry to provide meaningful comments. As a minimum, it should have Section L, Section M, the Specification and SOW (or SOO and TSRD). Where possible, it should include anticipated delivery schedules, special provisions, contract security requirements, and CDRLs.

Normally, the DRFP is issued about two weeks prior to a presolicitation conference (if one is held). This allows industry attendees to read the DRFP beforehand, thereby making the conference more meaningful. Prior to release, the DRFP must be approved by the PCO and the Program Director.

Draft RFPs are rarely used by state and local governments. However, when warranted, their use can provide added flexibility by identifying and resolving critical issues not previously known to the Agency. They are an easy-to-use vehicle that attracts attention of the vendor community, the public and sometimes the media.

Test the evaluation procedure before releasing the RFP. Have the evaluation committee complete the scoring sheets for different hypothetical proposals. Consider how the various scores would be handled. What happens if one supplier has a great technical solution, but is over budget? What happens if the lowest-priced proposal has a weak technical solution but still gets the most points? What happens if the “winning” proposal is only 5 points ahead of the second place one that costs \$100,000 less? Which do you choose? It is often important to find out before you issue the RFP how senior management views the trade-offs between risk, quality and price.

Based on this test, revise the evaluation procedure. Ensure that the evaluation procedure is acceptable to the senior executives supporting the project. There is little point in recommending an unacceptable solution or supplier.

This ‘gaming’ of the evaluation procedure is a ‘best practice’ which permits the Evaluation Team to test their procedure, see how it performs with different simulated scores which represent different simulated proposals. The Evaluation Team can then fine tune the evaluation factors, their weights and the scoring methodology before the RFP is finalized.

In some agencies, this practice is never used. In others, they have a computer program that permits users to see how the evaluation process works based on different weights and a range of different scores for each evaluation factor. However, you don’t need a computer to apply this best practice. All you need is a piece of paper, a white board or a flip chart.

Let’s see how this works.

Suppose we have already defined our draft Evaluation Procedure. We have identified the Evaluation Factors (Project Management Abilities, Technical Solution, Corporate Capabilities and Cost). We have defined the subfactors for each major factor. For example, Project Management Abilities will be evaluated in terms of the Project Manager’s resume, the project management methodology, and the problem escalation process. We have also set the weight for each Evaluation Factor and have decided how we will assign the individual scores from 1 to 10, with 10 being ‘excellent’ – exceeds each sub-factor’s minimum requirements and has no deficiencies with any subfactor.

We now construct a table. The first column is 'Evaluation Criteria'; the second, 'Weight'. Column 3 is reserved for Proponent A; Column 4, Proponent B, etc. We have created Proponent A as a vendor whose Project Management capabilities are 'excellent', whose Technical Solution and Corporate Capabilities are mediocre and whose Price is the lowest.

So, in this test, Proposal A receives scores of 3 out of 10 for Project Management; 30 out of 40 for Technical Solution; 15 out of 20 for Corporate Capabilities; and 30 out of 30 for Price. (They submitted the lowest price.) This yields a total score of 78 for Proposal A.

In a similar way, we attribute test scores to Proponent B based on imagined characteristics of its proposal. In this case, we decided that this proposal was much more expensive than Proponent A's and using the procedure for converting price to points we calculated that B would only get 30 points for price.

Now, as can be seen in the table below, Proponent A obtained 78 points; B, 70. Suppose that A was \$200,000 less than B. In this case, do we want A to win? Does A represent 'best value'? Or does our management really need the \$200,000 to fund another program and therefore B should win?

Or alternatively, should we impose a minimum score on Project Management and revise our draft RFP to state that 'We believe that Project Management is a critical success factor. For this reason, proposals receiving less than 7.0 points for this Evaluation Factor will be eliminated from further consideration.' If this were done, then Proposal A would be eliminated.

Evaluation Criteria	Weight	Proposal A	Proposal B	Proposal C
Project Management	10	3		
Resume	4	1	9	
Methodology	4	1	4	
Problem escalation	2	1	3	
			2	
Technical Solution	30	20	18	
-				

-				
Corporate Capabilities	20	15	13	
-				
-				
Price	40	40	30	
TOTAL SCORE	100	78	70	

Testing the Evaluation procedure and seeing the results of different scores/weights in determining the winner is a valuable exercise that can improve the entire RFP process and help ensure that the winning proposal does reflect the objectives of all the stakeholders.

Do an independent review of the RFP and the Evaluation Procedure before releasing the RFP. This review should be done by someone who wasn't involved in developing the RFP. This person should be familiar with the RFP process, the law, your policies and procedures. Often, simply having a second set of eyes will identify some errors, omissions and potential problems.

Pre-audit the award. Before signing a contract with the successful vendor, audit the process. Ensure that the RFP, proposal, contract and evaluation were done in compliance with your policies and procedures. In New York State, this pre-award audit is performed by an independent group in the Comptroller's Office, not by the procurement people.

CRITICAL SUCCESS FACTOR #3: PROMOTE FAIR AND OPEN COMPETITION.

Being in the public sector means that you have an obligation to suppliers, to your organization, as well as the public. Being in government means that you work in a fish-bowl environment and must often deal with conflicting objectives. Policy often conflicts with operational effectiveness. For example, you may be required to issue a formal RFP but you don't have the time or staff to prepare an adequate description of your requirements. It is unrealistic to prepare an RFP, and issue it to forty suppliers for a \$10,000 project. Many organizations provide policy guidelines to assist staff in determining the amount of effort warranted by the expenditure.

These guidelines serve several purposes. They ensure that different procurement officials adopt similar practices and they assure the supplier community that procurement is governed by a set of reasonable and defensible rules.

In the public sector, the pressure to justify each and every major purchase is increasing. State (in the U.S.) and Provincial governments (in Canada), cities, utilities, school boards, in fact, all public sector bodies, are being subjected to more and more public scrutiny. Each of these organizations is required by law, by policy, or by regulation to conduct its procurement activities in a visibly fair manner. This is often expressed in phrases such as "fair acquisition process", "fair, open and competitive procurement process" or "visibly fair, ethical and prudent" purchasing practices or "free and open competition". In Oregon, "Fair Procurement Practices" are defined as "solicitation activities based upon clear and non-restrictive specifications administered by knowledgeable and impartial evaluators."

Whatever the words, your specific actions must be easily defended.

The most obvious objectives in issuing an RFP are to solve a problem by selecting a proposal, and to obtain fair value for money. However, there are many other objectives imposed on this process by the courts, by law, by policy and by accepted practice.

Laws, regulations and the courts in both the United States and Canada have established that the issuer of an RFP cannot act in an arbitrary manner. The issuer has certain obligations to all potential suppliers who receive or respond to the RFP, not only to the winner of the competition. These duties relate to disclosure of important information and fair treatment of suppliers. Furthermore, the RFP cannot be unduly restrictive in defining specifications.

The test of a policy is how it is reflected in practice. All suppliers must be treated equally. The RFP Process must be open, fair and transparent. These characteristics must be readily demonstrable both through your actions and by a review of project documents.

Many organizations have developed guidelines to help their staff comply with their RFP policy and the law. Here are some guidelines which can be used by an organization as a checklist to ensure that its RFP process is both visibly fair and publicly defensible. (Not all of these rules or "best practices" are required; not all of

them are necessary, nor is each necessarily valid in any particular jurisdiction. But as a group, they do represent a reasonable set of “best practices”.)

Full Disclosure of Information. You must fully disclose all relevant information to all suppliers. You have to provide suppliers with all information that you have which could affect their decision to submit a proposal, or the details of their proposal. You have to inform them of any known dangers which may not be obvious from the RFP documents. You must provide them with accurate information and not misrepresent the situation.

The specifications that you provide must be reasonable and not constructed so as to unduly limit competition. In some jurisdictions, this is very important and is quoted in their information for suppliers. The examples which follow are from South Dakota⁸ and Yukon respectively.⁹

South Dakota

It is the intent of Procurement Management that specifications are provided in order to encourage free and open competition. The bidder has, however, a responsibility to advise Procurement Management if, in the bidder’s opinion, the language of the specification inadvertently restricts or limits the procurement to a single source. Such notification must be submitted in writing at least twelve business days prior to the official bid opening date. In addition, Procurement Management strives to design specifications for compatibility with standard trade practices and to use procedures that will accomplish its mission in accordance with the law and prudent business practices. Potential bidders are encouraged to notify Procurement Management whenever, in their judgment, specifications are not considered as permitting open competition, complying with standard trade practices or imposing an impractical or unreasonable burden.

Yukon

Procurement authorities must not use standards, specifications, evaluation criteria, time limits to respond to requests for bids or proposals, standing offer agreements, contribution agreements, source lists, or other means to unfairly limit competition.

Fair Treatment of Suppliers. You must treat all suppliers in a fair and equal manner. Each supplier must have the same chance of winning the competition based on the information in the RFP. Suppliers often argue that the incumbent is at

an advantage, currently working for the organization. What matters is whether you are treating the incumbent and other proponents the same. Is the person who deals with the incumbent on a day-to-day basis also evaluating the proposals? Has the manager been instructed to take care not to inadvertently disclose information about the RFP process, or the budget to the incumbent?

The test of fair treatment is whether an experienced vendor relying only on its knowledge of the market and the information in your RFP is capable of creating a proposal that could win.

Inviting Suppliers to Compete. The criteria for inviting suppliers to submit proposals must be reasonable and applied equally to all potential suppliers.

The use of lists or pre-qualification procedures often skews this process. It's sometimes difficult to justify the fairness of one vendor being on your "special" list but not its competitor. Pre-qualification has its own problems. When do you pre-qualify vendors? And can you pre-qualify vendors on an annual basis or only do pre-qualification for a specific RFP? At a minimum, a pre-qualification should be for a specific RFP and performed not more than a few months before the RFP is issued.

With the widespread use of the web to announce RFPs, it's simple to ensure that each vendor gets the same information at the same time.

Issuing the RFP. The RFP must be released to all suppliers at the same time. While this measure seems obvious, favored suppliers are sometimes telephoned to pick up the RFP. Other suppliers receive the RFP several days later by post or courier. A few days can be a significant advantage when the proposal is due only two or three weeks later. The appearance of favoritism can, by itself, taint the process. Not only must the procurement process be fair but it must also appear fair.

Providing Information to Suppliers. The same information must be communicated to all suppliers. It is often difficult to remember precisely the information which you convey to a supplier in a telephone conversation. For this reason, there is normally one designated person who deals with all supplier inquiries. Furthermore, many organizations insist that all supplier questions be submitted in writing. These same organizations often answer these questions only in writing. This has been made easier with the wide acceptance of email.

In many organizations, it is standard procedure to provide all suppliers with copies of all questions received and answers issued.

Many organizations take minutes at suppliers meetings and distribute the minutes to all suppliers that attended or who received an RFP. To avoid accusations that important information stated at the meeting was not included in the minutes, some organizations have a court reporter at the meetings. They distribute transcripts rather than minutes. This procedure costs only a few hundred dollars and works well although there is sometimes a delay in producing the transcript.

Today, technology offers some options over the traditional minutes of the meeting or transcript, or travelling to the meeting location. Some organizations webcast the meeting or offer conference calls for out-of-town vendors. Webcasts can be recorded and distributed to the vendors who participated in the meeting as well as those who missed the meeting. This provides each vendor a complete record of the entire meeting at little cost.

Establishing the Rules. The RFP rules should be contained in the RFP and must not be changed. This principle has been established by the courts in some jurisdictions. If you want to give preference to local companies, then it must be stated in the RFP. In many jurisdictions, local suppliers are afforded a 10% price advantage. This is quite proper so long as the specific rule is described in the RFP and supported by law or regulation.

The Evaluation Process. All proposals must be evaluated in the same manner, using the same process and by the same people. The evaluation team often consists of specialists, including accountants, network designers, project managers, and user representatives. Typically, each member of the evaluation team reviews the same sections of all proposals and assigns each a score, according to a pre-determined method of scoring.

The evaluation criteria must be fair. Consider the following illustrative example. A purchaser wanted to ensure that the supplier's service staff could reach their site within a few hours, when needed. So, in deciding on which suppliers to invite, the Procurement Officer stated that "suppliers must have a service office in our city". This was unreasonable as several suppliers were located in another city, but only 90 minutes away by train or car. The criterion should have been "service staff must be available and able to reach our site within four hours of being called."

The Debriefing Session. Unsuccessful suppliers often have the opportunity of a debriefing session. This is a standard practice in almost all jurisdictions. The debriefing provides an opportunity for a proposer to learn what the evaluators believed were its particular strengths and weaknesses.

If you do offer vendors a debriefing session (as their reward for not winning the competition), then the debriefing document¹⁰ developed by the Government of the United Kingdom will likely be very helpful to you and your agency.

Access to information legislation exists in almost every jurisdiction. Under these laws, many of the documents normally found in a project file can and must be released upon application by a supplier. These documents can include evaluation criteria and weights, list of bidders invited, list of proposals received, evaluation committee members' notes, and summary of all evaluations. In some jurisdictions, the proposals and contracts (with confidential information redacted) are also available. Armed with this information, suppliers can judge for themselves whether they believe the process was visibly fair.

So regardless of how little information a supplier is given at a debriefing, much information is readily available under access to information laws. In fact, you cannot guarantee that something will not be released under the terms of the access to information act applicable in many different jurisdictions throughout North America.

There are other approaches being taken by several states to make access to procurement information more readily available. In Missouri, for example, almost every document associated with a particular procurement can be found on their "public access" web site.¹¹ You can review the winner's proposal, correspondence with the Agency regarding the solicitation, as well as the documents and correspondence related to the evaluation of the proposals. In Montana and Florida and several other states debriefings are not necessary as the evaluation committee meetings are open to the public.

Here are some of the rules related to open meetings and the evaluation process from Montana:¹²

Evaluation Committee Meetings

Once the proposals have been evaluated and scored by individual committee members, the next step is for the entire committee to get together to discuss the

proposals and arrive at a final score. At this point, several factors need to be considered:

Meetings of an evaluation committee that involve an evaluation process of competing offers where the award of a contract is being considered must be electronically posted to the State's OneStop Vendor Information website 72 hours in advance of the meeting.

Minutes must be kept at each meeting.

A quorum of the committee must be present to take any official actions.

The meetings must take place in an ADA accessible location.

All members of the public are welcome to attend the evaluation committee meeting; however, they may not participate in the evaluation process. Comments from attending public must be directed to the procurement officer alone as the evaluation committee members cannot be influenced by any comments or opinions offered by the public. When sections of the proposals involving confidential materials are discussed, the meeting must be temporarily closed to the public.

A master scoring sheet should be compiled with the total score for each proposal.

Compliance with Policies. The process must comply with your organization's purchasing policy and established practices and laws. The policy must be reasonable, clearly stated, and available in writing. In 2010, The Province of Ontario prescribed new rules for procurement in its Broader Public Sector Procurement Directive. This document has the force of law and applies to most public bodies that receive more than \$10 million annually in funding from the Province. This document imposes 25 mandatory requirements related to a wide variety of issues including Requirement Thresholds, Evaluation Criteria, and Records Retention. Here are two illustrative requirements:¹³

7.2.9 Mandatory Requirement #9: Evaluation Criteria

Evaluation criteria must be developed, reviewed and approved by an appropriate authority prior to commencement of the competitive procurement process.

Competitive procurement documents must clearly outline mandatory, rated, and other criteria that will be used to evaluate submissions, including weight of each criterion.

Mandatory criteria (e.g., technical standards) should be kept to a minimum to ensure that no bid is unnecessarily disqualified.

Maximum justifiable weighting must be allocated to the price/cost component of the evaluation criteria.

All criteria must comply with Section 7.2.14, Non-discrimination, of the Directive.

The evaluation criteria are to be altered only by means of addendum to the competitive procurement documents.

Organizations may request suppliers to provide alternative strategies or solutions as a part of their submission. Organizations must establish criteria to evaluate alternative strategies or solutions prior to commencement of the competitive procurement process. Alternative strategies or solutions must not be considered unless they are explicitly requested in the competitive procurement documents.

7.2.10 Mandatory Requirement #10: Evaluation Process Disclosure

Competitive procurement documents must fully disclose the evaluation methodology and process to be used in assessing submissions, including the method of resolving tie score.

Competitive procurement documents must state that submissions that do not meet the mandatory criteria will be disqualified.

The Evaluation Process Must Be Documented. Most organizations insist that the evaluation criteria and weights be established prior to opening the proposals. This avoids accusations that the evaluation criteria were established only after reviewing a specific supplier's proposal. It is an emerging 'best practice' to prepare an Evaluation Guide. This topic is dealt with in Chapter 9.

Requests for an RFP. Any supplier requesting an RFP must be given one. Some organizations insist that only invited suppliers or registered suppliers can submit proposals. This often creates problems. There are always new suppliers in town, suppliers who haven't had the time to register, or suppliers from out-of-state, or from another country who want to submit a proposal. Some jurisdictions refuse to issue RFPs to unknown firms. In other jurisdictions, RFPs are issued to anyone who requests one. The assumption is that the evaluation process will identify the best supplier, and if an unknown supplier wants to submit a proposal, it should be permitted. Some public sector organizations have discovered that it is easier to hand out an extra RFP and evaluate another proposal than to explain, at the political level, why an important company was not permitted to compete.

Publicizing the RFP. The RFP must be publicized in a manner consistent with its value and importance. Minor competitions can be done using the telephone; major competitions (even in this, the 21st century) may require ads in newspapers or official posting as prescribed by regulation. In the last few years, there has been a significant increase in the use of Web sites to announce procurement opportunities. Most states, provinces, and major cities have their own web sites. In addition, suppliers often turn to commercial web sites to provide information about newly issued RFPs.

Providing Information about the Evaluation in the RFP. The RFP must contain some information about the evaluation process. At a minimum, it must sketch the evaluation process, identify the major categories of evaluation criteria, and indicate the most important criteria.

Ideally, the RFP should describe the evaluation process, identify the major evaluation criteria and their weights.

The Model Procurement Code states that “. . . Only criteria disclosed in the solicitation may be used to evaluate the items bid or proposed”¹⁴ It also states that:

. . . (the RFP) set forth the relative importance of the factors and any subfactors, in addition to price, that will be considered in awarding the contract. A statement in the RFP of the specific weighting to be used by the jurisdiction for each factor and subfactor, while not required, is recommended so that all offerors will have sufficient guidance to prepare their proposals.

Current practices vary radically. At one extreme, and now uncommon, some RFPs provide little information about the evaluation process, and only hint at the evaluation criteria. At the other extreme, organizations provide several pages of descriptive information about the evaluation process, a detailed description of each of the major evaluation factors and its weight. Over the last five years, the provision of the major evaluation factors and their numerical weights has become common practice and is becoming the standard practice. In many states and in Canada, the courts have ruled that the evaluation factors must be published in the RFP.

CRITICAL SUCCESS FACTOR #4: ENSURE THAT THE RFP PROCESS IS TRANSPARENT.

Since President Obama came to office, there has been a renewed emphasis on ‘fair, open and transparent’ procurement. More and more politicians at every level of

government are demanding that their procurement people deliver ‘transparency’. ‘Transparency’ means the ability to demonstrate to a bidder/proposer that a specific procurement was done in a fair and open manner consistent with laws, policies, procedures and best practices. This is not difficult if you have a well-documented RFP process and you ensure that all material documents are placed in the Project File.

Here is a checklist used by King County (WA) to ensure that each procurement is transparent. This checklist is placed in every project file and used by the procurement person to ensure that all required documents have been retained.

File Checklist

<input type="checkbox"/> Waiver	<input type="checkbox"/> Public Bid Opening Certification	<input checked="" type="checkbox"/> EB form
<input type="checkbox"/> Grant Funds	<input checked="" type="checkbox"/> Bid Response Report	<input checked="" type="checkbox"/> Affidavit & Cert of Compliance
<input type="checkbox"/> Advertisement	<input checked="" type="checkbox"/> Excluded Parties Check	<input checked="" type="checkbox"/> Personnel Inventory Report
<input checked="" type="checkbox"/> SOAW (SCS)	<input checked="" type="checkbox"/> Evaluation Summary	<input checked="" type="checkbox"/> Union Statement of Compliance
<input checked="" type="checkbox"/> Original ITB/RFP	<input checked="" type="checkbox"/> Final Bid Tab	<input checked="" type="checkbox"/> Consultant Disclosure Form
<input checked="" type="checkbox"/> Document Holders	<input checked="" type="checkbox"/> Selection Letter	<input checked="" type="checkbox"/> Protest Correspondence
<input checked="" type="checkbox"/> Original Submittals	<input checked="" type="checkbox"/> Non-Selection Letter	<input checked="" type="checkbox"/> Contract Agreement Signed
<input checked="" type="checkbox"/> Submittals List	<input checked="" type="checkbox"/> Insurance Cert & Endorsement	<input checked="" type="checkbox"/> Contract Approved in System
<input type="checkbox"/> SCS Reporting	<input checked="" type="checkbox"/> Entry into Access	

CRITICAL SUCCESS FACTOR #5: DEMAND RISK MANAGEMENT INFORMATION.

There are two families of risks experienced during the RFP Process and the resulting Contract Management Process.

The first family is related to the RFP Process itself. We all know that the RFP Process is often flawed, sometimes poorly organized and sometimes done too quickly. During this process there are risks. For example, if the timeframe is too short, we may have restricted competition.

The second family of risks is related to delivering the goods and services specific in the contract which resulted from the RFP. For example, we may have unknowingly omitted one or more activities from the contract. This could lead to change orders

and additional, unanticipated costs which may not have been included in the original project budget.

This section deals with risks experienced during the RFP Process. It does not discuss the risks occurring during the execution of the contract.

Viewing procurement from the perspective of risk management is not new. However, this is a practice not in common usage and often not formalized.

The State of Tasmania in Australia has developed a really good 9-page checklist for these risks. They have identified 11 tasks in the RFP/Contract Management Process.¹⁵

*Checklist of potential risks in the goods and services procurement process
(Version 2 – December 2006)*

1. *Identifying the need and planning the purchase*
2. *Developing the specification*
3. *Selecting the purchasing method*
4. *Purchasing documentation*
5. *Inviting, clarifying and closing offers*
6. *Evaluating offers*
7. *Selecting the successful tenderer*
8. *Negotiations*
9. *Contract management*
10. *Evaluating the procurement process*
11. *Disposals*

For each of these 11 tasks, they have identified risks, consequences and preventive actions. Here is one example for 'Evaluating offers'.

Evaluating offers

Risk	Likely consequences	Action
Failure to follow effective evaluation procedures	Inconsistent evaluations Possible complaints from tenderers Subjective not objective evaluation of offers	Provide staff with appropriate tender assessment and evaluation training and experience Improve tender assessment and evaluation processes Maintain, audit and review evaluation procedures Ensure that Evaluation Committee members declare any conflicts of interest

Risk	Likely consequences	Action
Breaches of security	Claims of unethical or unfair practices Loss of faith with tenderers	Maintain, audit and review security procedures Provide staff with appropriate training and experience and monitor performance Ensure that Evaluation Committee members understand and sign Confidentiality Agreements
Offers fail to meet needs	Need to call tenders again Additional costs Delay in delivery	Improve market knowledge Improve tender documentation Conduct market research Develop functional and performance specifications
Failure to identify a clear winner Decision made on subjective grounds	Claims of unethical and unfair behaviour Complaints from tenderers	Ensure evaluation criteria contain the critical factors on which the assessment of tenders will be based and that they are clearly identifiable to tenderers in tender documents Ensure evaluation criteria are appropriate and measurable Ensure that Evaluation Committee members sign Declaration of Conflict and Confidentiality Agreements

CRITICAL SUCCESS FACTOR #6: RECOGNIZE POTENTIAL PROBLEMS.

Thousands of procurement people have issued hundreds of thousands of RFPS. And, in doing this, they've learned a lot. Some have paid dearly for the experience of receiving five proposals, all over budget. Or of having the auditor reject your award because he or she had determined that the process was not fair.

This section contains the real-world advice from agencies that, in some cases, have paid a high price for learning about vendors, RFPs, the law and best practices. This section deals with common problems and pitfalls.

Mistakes are great teachers! There is a lot to be learned from other jurisdictions in terms of best practices. However, the significant lessons are often in terms of mistakes we have made. But, unfortunately, not a lot of people publish lists of their errors. They keep these lessons as 'local knowledge'.

Let's begin by acknowledging that most organizations have problems with at least a few of their RFPs. The evaluation factors are not correct, or the specifications are

too general, or the expected costs are much lower than reality, or the stakeholders disagree. Problems abound!

During the last twenty years, I've dealt with some of these problem areas in my workshops. Rather than attempting to describe all potential sources of problems, an impossible task, I've focused on five areas that I believe are critical to success. These are issues that can be addressed in the RFP. And when they are dealt with in the RFP, the problems disappear.

Problem #1 – All Proposals are Over Budget.

Often the RFP misleads the vendors. The RFP demands a leading-edge solution that will survive for ten years. But, in fact, the unknown budget doesn't support that level of solution. You can, for example, only afford a short-term patch.

Solution: There are at least three appropriate solutions which will generate potentially acceptable proposals. First, just publish the budget or the budgetary range in the RFP: "we anticipate the winning proposal will cost between \$130,000 and \$175,000." Or, second, describe your specific situation in detail: "We cannot afford a leading-edge solution. We are looking for an inexpensive, short-term solution which will permit us to function effectively for the next two years until we can develop our strategic plan." Or, third, award most of the points, say 70 out of 100, to the lowest priced proposal and publish this information in the RFP. This will focus the vendors' attention on low-cost solutions.

Problem #2: Lack of Convincing Evidence.

The proposal doesn't contain details to support the claims being made.

Solution: Ensure that questions solicit the appropriate level of detail. Don't simply require the vendor to provide a project plan. Rather, instruct the vendor to provide a project plan, identifying each specific activity and deliverable, where no activity is more than two weeks in duration. Instruct the vendor to identify the specific people who will undertake each activity and the amount of time they will spend on the activity. Instruct the vendor to identify the experience of each person in performing similar tasks on other similar projects.

Problem #3: Failure to Discuss Past Performance

Past performance is a great indicator of future performance. This measure is far superior to references. References only deal with the overall performance of the firm. Past performance deals with similar projects using (ideally) the same staff and the same technology.

Solution: In the RFP, instruct the vendors to provide specific information about past performance. For example, “describe similar or related contracts that your firm has had in the recent past. Provide information about your firm’s contractual, technical, managerial, schedule and cost performance (track record) for this work. Be specific - provide details about each project cited.”

Problem #4: Specifications are Unduly Restrictive

Sometimes unduly restrictive specifications are simply an unforeseen consequence of seemingly benign requirements. Other times, procurement people and stakeholders are misled or misinformed. And this information makes its way into the RFP. They define what they think are general specifications but what turns out to be highly restrictive – making it difficult or impossible for some credible vendors to comply.

Solution: Issue the RFP in draft form with a provision that vendors have ten days in which to notify you about any terms which they believe restrict competition. This permits you to revise the RFP prior to its release without a major delay. Or hire a consultant who specializes in the goods and services being acquired. Get the consultant to review the specifications to ensure that they do not favour one particular solution or one particular vendor.

Or include a similar clause in the issued RFP. While this does not let you solve the problem prior to issuing the RFP, it does ensure that you are notified promptly and can possibly then have time to solve the problem.

Hundreds of Potential Problems

This list of five problems is just the tip of the iceberg. There are hundreds of potential problems in every RFP and in every proposal. Let’s examine some other views of this issue.

Some public sector organizations, especially the larger ones with centralized direction of procurement, have written about problems that they've encountered over the years. These lessons, often based on expensive errors which have cost the agency or its vendors millions of dollars, have been identified as "problem areas" or "triggers", or "pitfalls" or "flaws". Here are some of these expensive and important lessons:

Triggers to Attract Your Auditor (from the state of New York)
Pitfalls in Running an RFP Process (also from New York)

Triggers to Attract Your Auditor¹⁶

In New York State, the Office of State Comptroller is responsible for reviewing all contracts and purchase orders over \$50,000 before the contract award.

The Comptroller's contract review process adheres to rigorous standards and legal requirements. The Bureau of Contracts staff has a wide range of expertise and examines contracts for construction projects, grants, consultants, commodities, concessions, professional services, intergovernmental agreements, leases, and land purchases and sales. As part of its examination, the staff ensures that:

- *The method used to select the contractor complies with applicable statutory, regulatory and policy requirements;*
- *The selection of the contractor was performed in a fair manner;*
- *The cost is reasonable;*
- *The contract is sufficiently funded;*
- *The contract language is reasonable;*
- *Any errors or unreasonable transactions are corrected before a financial obligation is incurred or an expenditure made;*
- *The agency has performed due diligence to ensure that the vendor is responsible, has the legal authority to do business in New York, has provided reasonable service in the past and satisfies other requirements*

Here is some information about the Comptroller's role from NY State's Procurement Guidelines.¹⁷

M. Documentation Requirements for Control Agency Review and Approval

Contracts resulting from an RFP are subject to review and approval first by the Office of the Attorney General, and second by the Office of the State Comptroller, in a accordance with State Finance Law §112. Depending on the nature of the procurement, approval from other control agencies may be required.

Generally, when OAG approval is required, only the contract itself needs to be submitted for review. However, OAG may, for any particular contract, request the entire procurement record. The agency may also ask OAG if the entire procurement record can be submitted for forwarding on to OSC upon OAG's approval of the contract.

The OSC Bureau of Contracts conducts the final review and provides its approval. OSC conducts its review to ensure that:

- The procurement was conducted in accordance with the process established by the agency;
- The procurement and resulting contract complies with all relevant laws; and
- The contract terms and conditions are in the best interests of the state.

The Office of State Comptroller has produced a 4-page document¹⁸ which identifies general reasons it can refuse to approve an award. For each general reason there are specific reasons. For example, one of the general reasons is 'Award Not Justified'. Here are the specific reasons that can be cited:

- *Insufficient justification for vendor selection*
- *Insufficient justification for rates/cost reasonableness*
- *Explanation for limited competition*
- *Explanation how procurement was restrictive*
- *Explanation how procurement was not ambiguous*
- *Additional Responsibility Review Required*
- *Explain the need for early completion bonus/ justify value*
- *Explain decision to let bidder(s) withdraw*
- *Explanation of how selection was made among tied bids*
- *Explain rationale used in accepting a late bid(s)*
- *Procurement record shows mathematical errors*
- *Insufficient justification for site selection (lease)*
- *Insufficient analysis of cost reasonableness (lease)*
- *No estimate for rehabilitation costs provided (lease)*
- *Need analysis of all properties considered (lease)*
- *Explain how contract amount was arrived at*
- *Breakdown of contract amount needed*

Pitfalls in Running an RFP Process

The following table was constructed from a presentation provided by New York State procurement and audit staff to the agencies preparing RFPs. While some of the terms and titles are unique to New York, the content has wide applicability.

Their approach is based on Openness, Fairness and Due Diligence.

Examples of Openness include:

- Questions and answers are disclosed to all bidders.
- No verbal (one on one) communication with vendors.
- Debriefing losing vendors upon request.

Examples of Fairness include:

- The provision of clear, detailed specifications.
- No altering of evaluation criteria after bids have been received.

Due diligence requires knowledge of all applicable rules, regulations, laws and best practices.

	Pitfall	Possible Solutions/Preventive Measures
1.	Agency identifies a need for contractual services but does insufficient homework. The resulting procurement takes too long and is flawed.	Survey other divisions or bureaus within your agency or other State agencies to determine if they have recently faced a similar need and how that organization handled their procurement. <ul style="list-style-type: none"> • What procurement vehicle did they use? • What method of award? • What problems did they encounter in procurement or managing performance?
2.	Agency does not have a “framework” for a solution - the agency does not know what products or services the vendor community has available.	Survey current providers through a Request For Information (RFI). An RFI contains a preliminary description of the program objectives and goals, and solicits input from the vendor community as to the availability of products, services, or technology to meet their needs. An open meeting to solicit additional information is the recommended approach. No award may be made under the RFI process.
3.	Agency lacks adequate resources for managing the project.	Seek outside assistance by surveying your agency/other agencies for qualified staff. Determine if you need to procure the services of a project manager to accomplish your program goals.
4.	All available procurement vehicles were not evaluated in developing bid documents.	Review all procurement vehicles to insure the correct fit. Consider all vehicles including Preferred Sources, OGS centralized contracts, OGS backdrop contracts, discretionary purchasing, IFB’s, RFP’s, single or sole source.

5.	An RFP was used when an IFB would have fit the scope of services causing: <ul style="list-style-type: none"> • an unnecessary administrative burden • Increase in processing time (inception to commencement of work) • extra cost. 	Use an IFB when exact specifications are known and price is very important. Use an RFP when exact specifications are not known, a highly complex technical solution is needed, and technical appraisal outweighs importance of cost.
6.	An old RFP was used for the current procurement which was not in accordance with all applicable State statutes and procedures	Review the old RFP to insure that it complies with all applicable State statutes and procedures and update if, if necessary.
7.	Agency program staff other than contracts or purchasing staff do a procurement.	This practice is not recommended. If it does occur, Contracts/Purchasing staff must advise those staff about proper procurement practices (laws, regulations, etc.)
8.	Contract performance did not produce a meaningful result.	<ul style="list-style-type: none"> • RFP/IFB/Contract should, wherever possible, be for specific outcomes (deliverables). • RFP/IFB/Contract should have identifiable measures of performance. • RFP/IFB/Contract should define penalties for non-performance, including the cost formula to be used. • Require a letter of credit or performance bond.
9.	Agency develops an unclear specification and/or provides insufficient bidding information; this can result in an insufficient number of firms bidding or a bid protest.	Develop clear, detailed specifications allowing bidders to submit responsive proposals. If needed, seek outside assistance.
10.	Agency writes restrictive specifications resulting in a lack of adequate competition, complaints or protests.	Restrictive specifications are a reason for rejection and rebid of a contract.
11.	Failure to establish criteria prior to receipt of bids, including the use of a finalist slate, if applicable.	Contract will be rejected.
12.	A percentage, rather than a number, is used to determine who qualifies for the finalist slate. For example, the RFP states all bidders within 10 percent of highest composite score qualify for the finalist slate. Only one bidder meets this standard. The RFP allows for interviews for finalists	Use a number, for example, the top three highest composite scores will qualify for the finalist slate; this ensures adequate competition in the final round.

	only.	
13.	Failure to publish relative weights in bid document (technical vs. cost).	The contract will be rejected.
14.	The price offered does not reflect the amount of work to be done.	The technical proposal should include a schedule of staff/time to help determine if the proposed level of effort is realistic in regard to achieving the end work product.
15.	A notice of Multiple Award was not contained in the RFP/IFB or the bid document lacked a defined selection procedures as to how the work will be distributed.	You must define the “up to” number of firms that can be awarded a contract. You must define your selection procedure for the actual work (task orders, etc.). Deficient contracts will be rejected.
16.	When using the formula in the Procurement Guidelines, a high dollar bid may skew the points assigned to the mid-range bids.	Use the following recommended formula to provide a more balanced assignment of cost points: Cost score = Maximum points for cost x low bid Bid being evaluated
17.	Agency did not respond to a vendor’s request for debriefing; did not notify unsuccessful vendors in a timely manner	Debriefing is mandatory.
18.	The agency’s application of evaluation scoring differs from their RFP/IFB evaluation instrument.	A rebid of services may be required. Develop the RFP and evaluation instrument at the same time.
19.	The award is being made to a non-responsive bidder - one that did not meet the specification requirements or submit proper forms, etc.	This is not acceptable and is subject to rejection and rebid of services.
20.	Agency awards a reduced scope of work from that originally required in the RFP/IFB.	This is not acceptable unless it is a minor reduction. The agency must be able to defend that any bidder or potential bidder was not adversely affected.
21.	Agency incurs large cost overruns during a project.	At the outset of the procurement process, the agency should perform a detailed cost analysis, including staff training time, equipment needs, contractual costs, set-aside for contingencies, etc.
22.	Agency fails to publish mandatory contract provisions in the RFP or IFB.	While not required, this practice allows potential bidders to raise concerns prior to submitting a bid. It also eliminates a vendor unwilling to meet these mandatory provisions, thus avoiding prolonged and fruitless contract negotiations (if this vendor is the highest ranked firm). This will save the agency time and money and avoid delays in meeting their program needs.

PROBLEM #6 – YOUR AWARD MAY BE CHALLENGED IN COURT.

There is a significant risk that at least one of the losing proponents will send in their lawyers and, quite possibly, initiate a legal challenge to the award.

The solution is simple, use a Procurement Fairness Officer for high risk RFPs

Procurement people often know when events will likely become public spectacles. We have a good sense of when we will likely be sued or challenged on the 6:00 p.m. news. In these situations, it is prudent to hire a Procurement Fairness Officer. This person is an expert in public procurement who acts as an independent advisor to the agency and ensures that the RFP process can survive public scrutiny and a court challenge.

The use of a Procurement Fairness Officer (also called a Fairness Commissioner, Probity Officer or simply a Procurement Officer, depending on the jurisdiction) for RFPs is a well-established practice in Australia. In Canada, it's a growing practice nurtured by some significant scandals during the last ten years. And in the U.S., it's rarely used. In the last ten years, I've only acted as a Fairness Officer twice in the U.S., both times for high-visibility, high-value RFPs where the risk of litigation was real and significant.

The use of a Fairness Officer depends upon the Agency's size, visibility and track record. However, there are some guidelines.

From the Victoria Government Purchasing Board in Australia:¹⁹

An external probity auditor may be needed where:

- *the transaction is of high value (e.g. over \$10 million) ;*
- *the matter is highly complex, unusual or contentious; or*
- *the nature of the market place makes bidder grievances more likely (e.g. where commercial secrets are commonplace, or where competition is particularly fierce).*

Several years ago, there was a scandal related to a Leasing Contract issued by the City of Toronto.²⁰ This contract became the agenda for a public hearing headed by Justice Bellamy. One volume of the resulting report dealt with best procurement practices and has become an important source of information within public procurement. Here is what Justice Bellamy wrote about Fairness Commissioners:

Procurement Fairness Commissioners

From the literature, practices in other jurisdictions, and expert interviews, it is apparent that the use of fairness commissioners is an important emerging risk mitigation tool aimed at strengthening both the reality and perception of integrity in public procurement. A fairness commissioner is an individual who monitors the procurement process with a view to:

Providing the purchasing organization with assurance that procurement management practices and processes are of the highest standards.

Communicating/demonstrating to external and internal observers that fairness, objectivity, impartiality, clarity, openness & transparency has been maintained.

The commissioner can be an internal person (e.g. from the central purchasing authority) for small to mid-size projects, often at the invitation of the line department, particularly where there is some foreknowledge or anticipation of a higher than normal degree of external scrutiny. For larger, more complex projects, it is much more likely to be an external expert.

Experts in both the public and private sectors suggest that having a fairness commissioner results in a higher level of confidence among prospective bidders that the process will be managed fairly. There is also evidence to suggest that the private sector is less likely to challenge a particular procurement if a fairness commissioner has been involved.

The greater prevalence of and interest in fairness commissioners is generally viewed as arising from procurement processes and procurements becoming more complex in response to changing external and internal requirements. According to experts, this approach is often adopted in response to political concerns (frequently raised initially by unsuccessful vendors) with respect to the perceived fairness of the process.

In terms of best practices, the fairness commissioner should not be seen as an advisor only to the officials responsible for the procurement. It was emphasized by experts that this individual should have an independent oversight role and capacity to ensure that disagreements with the officials managing the procurement on the government side are brought to the attention of and resolved by appropriate senior management. In addition, fairness commissioners are often engaged much earlier on in the process, particularly with respect to large and complex undertakings. This would generally be after the business case has been developed and approved but before the procurement methodology has been finalized and more formal pre-release discussions with the private sector have commenced.

While there is no standard 'job description' for a Procurement Fairness Commissioner, there are a number of good sources of information.

From the City of Toronto:²¹

Fairness Commissioner:

The title of Fairness Commissioner reflects the intended broad scope of advice and oversight across all the stages of a competitive call. In this model, involvement usually begins at the early stages of a procurement to provide overall guidance and advice throughout the call. A Fairness Commissioner may be retained after the business case and call document completion stages, but prior to the call release stage.

Sometimes, a Fairness Commissioner is retained even earlier in the process to oversee pre-call development activities where staff undertake vendor and other party consultations to gather intelligence on potential solutions. Such meetings are becoming more common for complex, multi-year, RFPs (having mandatory and other criteria for evaluation, but where there are varying solutions/methods possible). In these cases, it is often expected that the consultant will have a role to advise on the development of the call itself. Fairness Commissioners are often experts in the product or service field of the procurement and have early-stage, mid-stage, and late-stage process review roles, including:

- Advice on call development methods;*
- Guidance to meet intended purposes of pre-call release consultations;*
- Advice on call design/development features, objectives and evaluation techniques;*
- Pointing out any artificial barriers to vendor participation;*
- Ensuring call scope and deliverables are described clearly and appropriately;*
- Assessing clarity of evaluation criteria;*
- Confirming that terms and conditions are fair and reasonable;*
- Attention to evaluation integrity such as, avoidance of bias or undue influence;*
- Confirming that the evaluation process is properly designed;*
- Requiring adequate documentation of the proceedings;*
- Often, reporting to senior management at pre-identified key points;*
- Advising post-evaluation on confidentiality factors, de-briefing of unsuccessful proponents/vendors, and approaches to negotiation/service level agreements; and*
- Preparing a final report describing activities, process and degree of fairness compliance.*

Typically, it costs between \$25,000 and \$50,000 in fees for a Fairness Officer for one RFP, from inception to awarding of the contract. During that time, the Fairness Officer deals with issues as they arise, attends critical planning meetings and all meetings of the Evaluation Committee, and reviews all documents before their release. At the end of the process, the Procurement Fairness Officer submits a

report describing the process and key events and provides his or her conclusions concerning the fairness of the procurement process.

Fairness Officers often employ a plan or checklist of tasks that represent the minimum requirements related to fair, open and transparent. For example, here is a checklist of forty required activities²² related to 'fair, open and transparent' procurement:

	Task
1.	Ask for conflict of interest declarations Required at the outset of the tender process, from all steering committee and procurement team members and any external personnel involved in the tender. Remind members VPS Code of Conduct and VGPB policies. Members must also disclose any conflicts of interest arising during the procurement process.
2.	Obtain confidentiality agreements Required from all external personnel involved in the tender
3.	Check budget approval obtained Approval of funds needs to be assured before commencing the project
4.	Ascertain if a probity auditor or adviser is required Guidance is available from the Best Practice or Probity
5.	Determine if it is necessary to go to public tender
6.	Check procurement team members' credentials. They need to be properly authorised to represent stakeholders and be selected on the basis of their expertise. Where necessary, external expertise is to be engaged to ensure a full range of qualifications, skills and experience is available
7.	Settle details of the Probity Plan Complete any outstanding matters with the Probity Plan
8.	Check procurement team members are familiar with and have access to all relevant policies
9.	Ensure that all tenderers have access to the same information .Significant clarification or further detail is to be provided to all bidders equally. Telephone queries are handled by a single person, file notes are made of conversations, etc, No information should be provided for the benefit or detriment, of particular parties.
10.	Set up confidentiality procedures Confidential information must be protected and only be available to those who need it.
11.	Set up proprietary information procedures If tenderers are required to bid on the basis of matters such as innovation, all ideas they consider proprietary must not be communicated to competitors. The procurement team needs to establish ground rules to ensure that bidders have confidence in the process and the Government is not barred from sharing information which is commonly known. Categories of proprietary information should be defined early in the process and stated in the tender documentation.
12.	Brief all staff involved Confidentiality and security procedures need to be explained to all staff associated with tender.

13.	Review probity at completion of PLANNING milestone At this point, the Procurement Team should check that it has met all of the requirements of the Probity Plan.
14.	Settle invitation documents (RFT) Invitation documents should be designed to elicit the information necessary for proper assessment of each against the selection criteria. Settle performance measures and targets and detail how the contractors' performance will be evaluated. All legal issues, accountability and intellectual property restrictions are to be clearly set out. Detail evaluation criteria, weightings and selection processes, state how late and non-conforming bids will be dealt with and request declarations of any bidder's conflicts of interest. Include transition in and transition out arrangements.
15.	Review probity at completion of TENDER PREPARATION milestone At this point, the Procurement Team should check that it has met all of the requirements of the Probity Plan
16.	Set up process for receipt, recording and acknowledging bids Ensure no bids are read prior to the close of the tender period
17.	Check advertising arrangements This includes press advertisements, registration on website etc
18.	Arrange tender briefing meetings Record who attended. Prepare a summary report and post it on a website or make it available in hard copy.
19.	Check tenders are received according to Conditions of Tender
20.	Secure documents Ensure tenderers information is secure at all times.
21.	Review probity at completion of TENDER INVITATION STAGE milestone At this point, the Procurement Team should check that it has met all of the requirements of the Probity Plan
22.	Notify bidders of any significant alternations that may occur in the future due to change of circumstances Criteria should never be altered to give advantage to any particular party and all bidders should have access to the same information. If there are changes, allow all bidders the same time and opportunity to re-submit amended bids.
23.	Assess bids as quickly as possible
24.	Ensure all bids are compared on the same basis Evaluation criteria is to be followed, and responses assessed against pre-determined criteria. Detail reasons for the choice of the preferred tenderer, and ensure these reasons are clear and defensible. Note: The evaluation criteria should be established and documented prior to calling for bids.
25.	Notify shortlisted tenderers of interview Ensure same information has been provided to all tenderers except matters specific to an individual tenderer. Ensure that substantially the same time is allocated to each interview.
26.	Notify tenderers not shortlisted It is desirable to notify tenderers not shortlisted as soon as possible and hold any debriefs after the successful tenderer(s) has been informed.

27.	Document interviews and post tender negotiations This is usually with short listed tenderers only
28.	Perform due diligence of short listed tenderers This may include corporate information including ownership, litigation, director's profiles, financial security and past history. Referee checking procedures should be substantially the same and confidentiality assured
29.	Plan and document site visits (if conducted) An agenda prepared by the Procurement Team before the visit. A Chairperson is to lead the visit and ensure that there is a record of the meeting. Ensure fairness is maintained.
30.	Brief Reference Group (if appropriate) Ensure stakeholders are apprised of likely outcome and ensure that this process complies with arrangements for confidentiality and security.
31.	Review probity completion of EVALUATION milestone At this point, the Procurement Team should check that it has met all of the requirements of the Probit Plan
32.	Prepare Supplier Selection Report Prepare justification report consistent with reasons for selection and non-acceptance of bids
33.	Review probity at completion of SUPPLIER SELECTION RECOMMENDATION REPORT Review process from a probity perspective. Obtain probity report from probity auditor, if one has been engaged.
34.	Prepare Supplier Selection Report for Ministers' or Secretaries' approval
35.	Submit Supplier Selection Report to APU or VGPB for approval
36.	Notify the successful tenderer. This should be accepted subject to contract.
37.	Notify unsuccessful tenderers their offers are not accepted
38.	Debrief unsuccessful tenderers This should be done by the Chair of the procurement team, with at least one other team member
39.	Settle transition arrangements
40.	Store all documents Provide a complete and accurate record of how key functions and activities were carried out, in accordance with the Public Records Act 1973.

A word of caution – don't hire a Procurement Fairness Commissioner unless you are prepared to listen to his or her advice and don't hire one after you have committed some major error. BC Hydro, a major public agency in British Columbia, hired a Fairness Commissioner for a specific RFP. Two weeks into the job, the Fairness Commissioner discovered that the firm that had written the specifications used in the RFP had also submitted a proposal in response to that RFP – clearly a conflict of interest. The Fairness Commissioner immediately declared that this was a conflict of interest and the event would be documented in his report at the end of the project.

BC Hydro, hearing this, decided it didn't want a report and proceeded to fire its own Fairness Commissioner. This event was subsequently noted in the Legislature,

in a news article, in a business columnist's weekly article and on the editorial page of the largest regional newspaper, The Vancouver Sun.²³

Typical Timing

Most people involved in the RFP process for the first time underestimate how long it will take. There are many activities, many reviews and approvals, and many pitfalls. The section discusses some of the factors influencing the estimate of the required time. If the timetable is too long, the organization suffers as the required solution is not available. If the timetable is too short, suppliers can and do claim that they are being treated unfairly. It is unreasonable to expect a supplier to prepare a creative proposal to a complex problem in a few days. It is also unreasonable to expect that all of the members of the evaluation committee will be available when required. Approvals often take longer than expected due to the absence of key individuals or the delay until the next scheduled meeting of the Management Committee or Board. While some contracts can be negotiated quickly, unusual terms or seemingly severe demands by one party can add weeks to the negotiations and contract approval process. The evaluation of proposals may prove to be more complex than anticipated.

Don't underestimate the amount of elapsed time a project will take. Don't underestimate the amount of your time the detailed, day-to-day management of this process will take. If you issue your RFP to ten suppliers, their questions could cause much additional, unexpected discussion and work.

Don't underestimate the amount of time the contract may be retained by your legal department.

BE CONSERVATIVE.

PLAN CAREFULLY.

Times vary radically, depending on many factors including the following:

- The type of project
- Organization of the procurement effort
- Value of the goods and services
- Complexity of the analysis
- Number of departments or stakeholders involved

- Sophistication of the vendors and the agency
- Experience of the agency with similar procurements

I have encountered situations in which the entire RFP process was executed in as little as four weeks or as much as one year.

With all of these caveats, let's discuss each of the major milestones in a typical process and some of the potential sources of delay:

- Define the user requirements
- Construct the RFP
- Release the RFP
- Hold a suppliers meeting
- Receive the Proposals
- Complete the evaluations
- Finalize the contract

Define the user requirements. Often the production of a clear, unified, cohesive statement of requirements by the user group, also called a Statement of Work, takes much longer than the rest of the RFP process. Once the requirements have been given to the project manager, this manager must ensure that they are in a useful, easy-to-understand form. Often, the requirements must be rewritten for the RFP. Additional details concerning the organization and its structure must be added to the description. Requirements can be produced in a few days, or, in the extreme, in several years.

When several departments are involved, then the review and approval process may be delayed beyond any reasonable expectation. The requirements document can be a battle ground for competing departmental objectives.

Construct the RFP. Combining the users' statements of requirements, the administrative rules, and the terms and conditions into a cohesive, consistent RFP document can be done quickly. It can be completed in less than one week, but only if all of the required information is available somewhere in the organization.

To do it quickly requires the time and energy of two people with different skills: one knowledgeable about the problem or requirements; the second, about RFPs. Even when these people are available, the pressures of other duties may make it

impossible for them to devote sufficient attention to this work to complete it quickly.

In many organizations, the person responsible for the project is also responsible for creating the RFP. Often, this person has little experience with previous RFPs. Some organizations, as a quality control measure, insist that the RFP package be reviewed by management prior to its release. This review can identify deficiencies not apparent to the project manager which may require additional time and energy to correct.

Before beginning the finalization process, certain critical questions must be answered. While these vary from project to project, here are some examples:

- Are the specifications unduly restrictive? Do the specifications or statement of work favor one vendor or one type of solution? How do we ensure that the Statement of Work is fair, complete and accurate?
- How are we going to deal with contract issues? Will the RFP contain a draft contract, or important contract terms? Will the contract terms be mandatory? Have we identified our specific issues; for example, do we require a bid bond? Or a performance bond?
- For an RFP involving software development or acquisition, have we identified the process for acceptance testing and correction? Who will do it? Will we provide a separate test facility?
- How will we structure the evaluation process? Will it work or will it simply prove that all the suppliers can do a reasonable job? How will we differentiate among the various suppliers? Will we require demonstrations or trial usage of software or a proof of concept?

Release the RFP. Once the RFP has been approved, it can be announced and released. In many jurisdictions, "release" is accomplished by sending notices to appropriate suppliers registered with the organization, by placing advertisements in newspapers, or by announcing the procurement opportunity on a designated web site.

The process of obtaining approval for an advertisement is not always straightforward. Often, the advertisement will raise concerns about the description

of the work. Do we really want to say we have a problem, or a deficiency in a system, or a requirement for yet another study? The announcements created by Project Mangers sometimes become subject of senior management concerns and scrutiny. This always adds time to the process.

The placement of the ad may be the responsibility of a communications group within the organization. This group may have its own procedures and introduce additional unanticipated delays.

Hold a suppliers meeting. Suppliers meetings may or may not be mandatory. They are held after the RFP has been released, and after the suppliers have had sufficient time to review the RFP and identify their concerns and questions. If the RFP has only been distributed locally, then allowing one week between the receipt of the RFP and the meeting is appropriate. However, if the RFP has wide distribution, some additional time may be needed to permit organizations coming from remote locations to plan and schedule their attendance at the meeting. Alternatively, video conferencing or telephone conferencing may be used.

Receive the proposals. Most proposals, those for expenditures of less than a few million dollars, are usually due two to four weeks after the RFP has been issued. Two weeks is the minimum time to digest a simple RFP and produce a proposal. Four weeks is more reasonable for many proposals. A few RFPs provide the vendor 90 days or more to develop its proposal.

Timing is always a concern. Some organizations have timing set by law; others by, policy. In some, timing is set by the project manager.

In Alaska, timing is prescribed by law.²⁴

Sec. 36.30.130. Public notice of invitation to bid.

The procurement officer shall give adequate public notice of the invitation to bid at least 21 days before the date for the opening of bids. If the procurement officer determines in writing that a shorter notice period is advantageous for a particular bid and adequate competition is anticipated, the 21-day period may be shortened. Notice shall be posted on the Alaska Online Public Notice System (AS 44.62.175). The time and manner of notice must be in accordance with regulations adopted by the commissioner of administration. When practicable, notice may include

- 1) *publication in a newspaper calculated to reach prospective bidders;*

- 2) *notices posted in public places within the area where the work is to be performed or the material furnished; and*
- 3) *notices mailed to all active prospective contractors on the appropriate list maintained under AS 36.30.050.*

Failure to comply with the notice requirements of this section does not invalidate a bid or the award of a contract. If the state fails to substantially comply with the requirements of (a) of this section, the state is liable for damages caused by that failure.

Suppliers are suspicious when they believe the time is too short to prepare a comprehensive proposal. While "too short" is difficult to define, it is obvious when it happens. A few years ago, I saw a solicitation announced in a major newspaper by a government agency looking for a new financial package. The time permitted for response was five working days. Any responsible supplier learning about this solicitation for the first time couldn't possibly develop a proposal in only five days. It is hard to imagine how the issuing organization could argue that five days was reasonable or fair.

The classic question, repeated at many, many supplier meetings is: Can the closing date be extended? Suppliers complain that they are not given sufficient time to prepare a reasonable offer.

If complaints are received before the closing date and you believe that they are valid complaints, you can provide more time for all suppliers to respond.

When suppliers have been pre-selected, and all suppliers agree to the extension, then simply adding a few weeks onto the deadline is an easy task. However, in many situations it is extremely difficult, if not impossible, to extend the deadline on an RFP. Some suppliers may have decided not to submit a proposal because the deadline was short. Informing those suppliers who did decide to submit a proposal that they have another month does nothing for the supplier who initially declined to participate. In fact, this supplier has been totally disadvantaged. In this situation, to extend the deadline requires you to cancel the original RFP and re-issue a new RFP. In this way, all suppliers are treated in a fair and equal manner.

Some purchasers intentionally keep the time short. Their argument is that they are testing the supplier's ability to manage a project, the development of a proposal. Their argument states that if a supplier is incapable of managing this small project, the development of a proposal in a month, how are they ever going to manage the

actual project. There is some merit in this argument. However, the overriding principle must be fairness not expediency.

Some suppliers will initiate this complaint about insufficient time during the RFP process as a tactic for justifying a later complaint if they do not win the competition. Having protested the timing during the process, they may, if they lose, request that the process be repeated since it was, in their opinion, unfair.

It is easier to get it right the first time. Consider key factors such as the complexity of the task, the timing of holidays, and the value of the contract when deciding on the amount of time provided to prepare a proposal. However, even if you do "get it right", you may still receive complaints from suppliers.

Complete the evaluations. Suppliers require some notice before the presentations. Once presentations have been held, the evaluation team may decide to perform a proof of concept demonstration for software, negotiate the contract with one or more suppliers, or call for 'best and final' offers. These activities can add many weeks to the process.

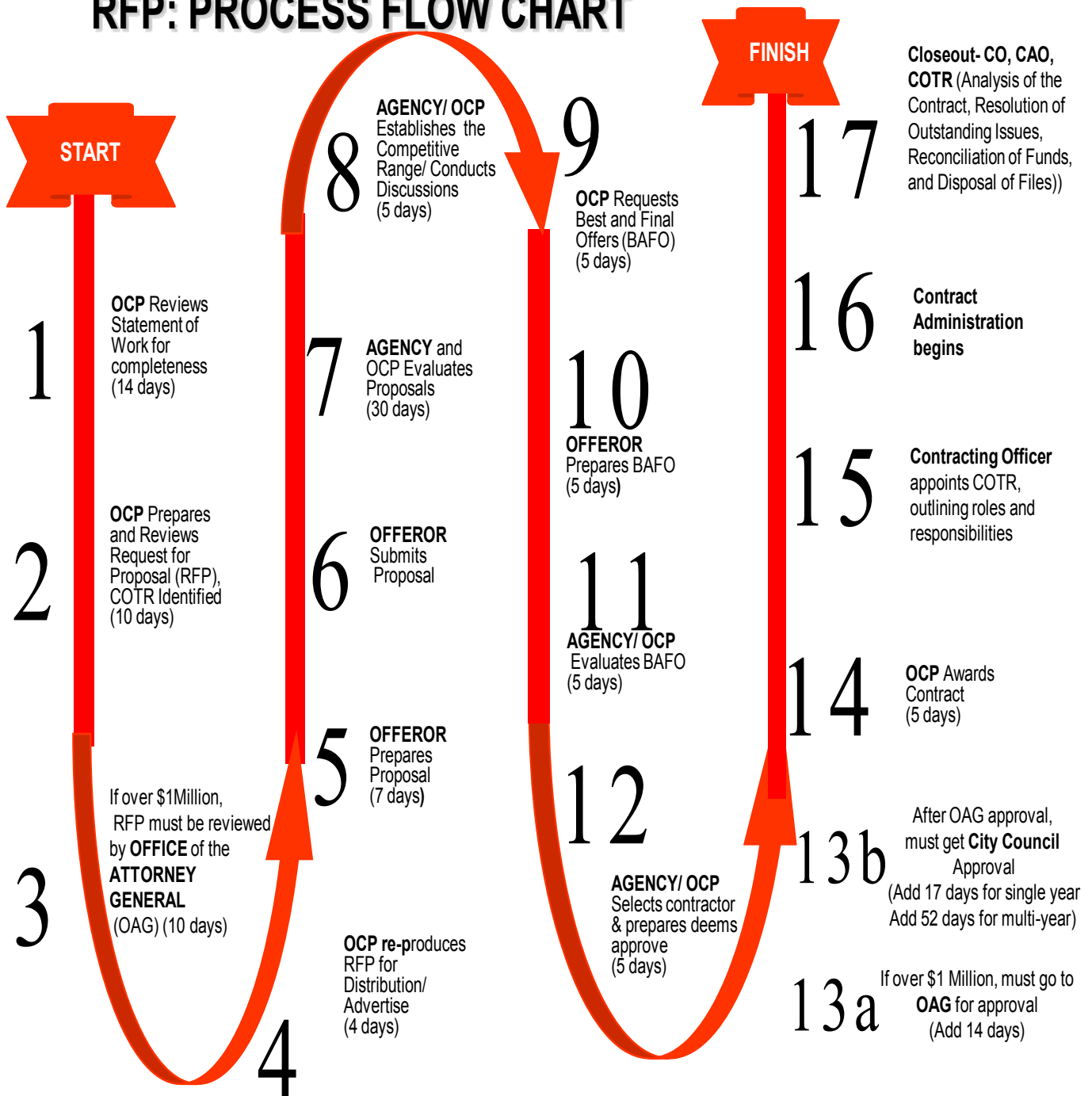
Finalize the contract. Some organizations insist that suppliers sign their standard contract. This is accomplished in different jurisdictions in different ways. A contract can be imposed either as a condition in the RFP, by including the contract in the RFP, during negotiations or as part of a 'best and final' offer. This approach leads to a quick conclusion since the supplier either accepts the standard contract or is considered "non-compliant" and eliminated from further consideration.

In other jurisdictions, or with other RFPs, contracts must be negotiated. To ensure that negotiations are completed quickly, some RFPs include a clause that restricts negotiations to five or fifteen or thirty days. At the end of the stated time, negotiations are terminated with that supplier, presumably the one that scored highest on the evaluation, and begun with the second highest supplier.

Organizations with new types of clauses or non-standard terms often require approval from their own lawyers before signing a contract. This can add significant amounts of time to the project start date.

The Process Flow Chart and timings from the User's Guide from the District of Columbia²⁵ can be found on the next page.

RFP: PROCESS FLOW CHART



Changing the RFP Process

How much change can you make in the RFP process once the RFP has been issued? Can you change the due date? Can you modify the requirements or other information contained in the RFP?

Before attempting to answer these questions, let's identify the types of changes that may be considered and their significance. The first category is that of "no change" or "minor change", including modifications to correct minor errors, ambiguities, and typos. Second, there is "changing the deadline". Finally, there are "material changes" such as changes in the published evaluation criteria or weights, in the mandatory conditions or major changes in the requirements or technical information provided in the RFP.

The rules regarding change are established by statutes, the courts, the organization's policies, the information contained in the RFP, and by established practices. The nature of permissible changes varies within and between jurisdictions. There is no established standard in this area. The discussion which follows deals with each type of change and how it is handled in different jurisdictions and organizations.

Change disrupts the smooth execution of the process. Too much change and suppliers will abandon their efforts to prepare an effective proposal.

- **No Change.** Ideally, there are no changes in the RFP as issued. This idealized situation does occur but infrequently. Minor changes are common. However, even with minor changes, there is a limit to the amount of change that can be introduced and still have a managed process.

Minor Change. These changes are identified by the Issuer after the RFP that has been released, or in response to inquiries from suppliers about obvious omissions, errors, or ambiguities in the RFP. It is common practice for organizations to amend RFPs shortly after they have been issued. In some jurisdictions, this practice is sanctioned by law or by policy. Most organizations state in the RFP words to the

effect that the agency reserves the right to revise the document and/or issue amendments to it.

- Extension of the Deadline. Sometimes, for quite legitimate reasons, the deadline for submission is extended. However, this change is, at best, awkward. At worst, it is unfair and may be challenged by a supplier.

In open competitions, some suppliers may receive the RFP and, on the basis of the deadline, decide to "no bid". In reviewing the document, they concluded that there was not sufficient time for them to prepare a proper proposal. If, two weeks later, the Issuer announces an extension of the deadline by two weeks, they still may "no bid". The extension provided them with no additional time. Those firms, on the other hand, that had begun to create their proposal when they received the RFP, would have an extra two weeks to prepare. For these reasons, firms that initially decided to "no bid" may be aggrieved by the extension and, quite legitimately, complain about the fairness of the process.

In competitions where the suppliers are pre-qualified and therefore known to the Issuer, the Issuer could seek the agreement of all the potential proponents to the extension. In this case, if accepted by all, it would be implemented. If not, the original deadline would survive. To do otherwise, would risk a challenge to the fairness of the process.

In competitions where all of the potential suppliers attend the suppliers meeting, when the meeting is mandatory, the Issuer could seek agreement as with the pre-qualified group.

- Material Changes. Material changes involve important new data or substantial changes in the content of the RFP. For example, material changes would be: published weight of an evaluation factor was increased from 10% to 50%; a new mandatory condition was imposed; 10 pages of new detailed requirements were added. All of these constitute material changes.

It is difficult to introduce major changes and still defend the process as being fair. Often organizations are forced to cancel the RFP when these types of changes are identified. It is much easier to 'get it right' the first time.

In some jurisdictions, the introduction of major changes after issuing the RFP is prohibited by law, by policy or by practice.

Radical changes in RFPs after they are issued are unusual since they often generate protests from vendors who initially decided to 'no bid'. These vendors may have decided to 'no bid' for lack of the very same information that was being provided as an amendment. It is often easier to simply cancel the RFP. (Some organizations, rather than suffering the embarrassment of canceling an RFP or having to explain the cancellation to senior management, let it run its course and then award no contract. This practice while infrequently used is inappropriate. It misleads vendors who are pursuing a contract which will never be awarded and wastes their time, effort and money.)

Vendors will cease to submit proposals to an agency that has repeatedly issued deficient, incomplete or poorly written RFPs. Vendors rely on a smooth, well managed RFP process.

Examples of the RFP Process

In this section, we provide an overview of the RFP process as seen by different organizations. These descriptions sometimes include flowcharts or checklists. Regardless of their style, you will note that the steps are invariably similar. Only the emphasis and level of detail are different. In this section, we provide examples which illustrate different approaches to describing the RFP Process including an exemplary Guide from New Mexico:

Example #1: Publishing a narrative

Example #2: Publishing a procedure

Example #3 Illustrating the Process with a Flowchart

Example #4: Using a List of Tasks and Standardized Forms

Example #5 Developing a comprehensive Guide

EXAMPLE #1 – PUBLISHING A NARRATIVE

Here is a description of the RFP process for a relatively unsophisticated acquisition of a new, small computer system, the steps are applicable to many RFP-based acquisitions.

Steps to a Successful Project. The selection and implementation of a system can be thought of as a process consisting of 6 steps:

- Initiate the project.
- Establish your requirements.
- Issue the Request For Proposal.
- Select the vendor.
- Negotiate an agreement.
- Implement the system.

Before beginning any of the steps, the project manager should prepare a detailed plan consisting of a list of tasks, timetable, budget and available staff. This plan should then be reviewed by the Steering Committee.

Initiate the project. The purpose of this step is to establish whether a computer-based system is warranted. During this step, the project manager attempts to ensure that this project, if successful, will help the organization achieve a defined goal. In particular, the project manager should investigate three questions:

- What are our problems or requirements? Can a computer system help solve these problems?
- How are computers being used in other organizations, especially those of similar size?
- What companies offer software that addresses our needs?

Establish your requirements. The purpose of this step is for the organization to identify those current procedures and practices which may be replaced by new systems; e.g., Payroll, Billing, Office Automation.

More specifically:

- Document the current systems, their strengths and shortcomings, the flow of information and the processing volumes.
- Identify which systems are to be computerized.

This step often entails much work with little apparent progress. However, the information obtained during this step will simplify selecting the best system, ensure a good match with the organization's requirements, and provide good information for developing a report for management.

If you do solid work during this step, it will mitigate two common problems affecting the selection and acceptance of a new system. First, incomplete definitions of user requirements make the selection process difficult, and often cause lengthy discussions with suppliers to define the specific requirements. Furthermore, a clear definition of your requirements, developed by a cross section of staff, will ensure that staff's expectations about the new system are realistic, and that staff has had a say in the determination.

In reviewing the current systems, examine the following performance characteristics: timeliness, accuracy, usefulness of information, efficiency, necessity, completeness, and reliability of information.

The volume of transactions identified during this step will be used by the suppliers to determine the amount of equipment required and the costs of software licenses. (Some vendors have standard worksheets used to determine the information they require concerning volumes.) Don't depend on guesswork. Count the transactions for a month and adjust the counts to reflect your peak season or anticipated changes in your business. Be sure to include how much detailed information you want to keep on file and for how long. Consider also future growth, and demands for information not met by the current system.

A typical statement of requirements for an application system, such as General Ledger or Production Scheduling may be 5 to 50 pages long and would consist of the following information:

- A narrative of the current system
- Copies of forms and reports currently used
- Statement of volumes
- A description of the problems to be solved by the new system or identified enhancements
- A statement of expected benefits and priorities.

Often, these descriptions include information which the auditors have previously prepared, such as information flow diagrams.

Issue the Request for Proposal. During this step, the Request For Proposal is prepared, reviewed and approved by the Steering Committee and issued to vendors.

The preparation of an RFP can be a major activity, especially for the first time. It can take many months of elapsed time. The draft version is often shown to the organization's lawyers and auditors to ensure that their concerns are addressed by the document.

Select the vendor. There are many different methods of evaluating proposals. Some methods assign points to each feature and award the contract on the basis of the most points per dollar.

Some organizations simply form an assessment group. Vendors failing to meet mandatory requirements are often eliminated during the initial review. Each evaluator attends the demonstrations and reviews all of the proposals. Following this, each member of the group assesses each vendor and its proposal based on four major criteria:

- Quality of the supplier and its proposal based on discussions and reference checks
- Quality of the applications programs and how closely they satisfy the organization's requirements
- Price as determined from a five year cash flow analysis
- Quality of support offered by the supplier.

Negotiate an agreement. In the public sector, negotiation is often only clarification since the RFP contained a contract or a description of key contractual issues. Once terms have been clarified, the contract is signed.

Implement the system. The management and planning of the implementation process is a major undertaking.

During the implementation phase, the equipment is delivered, and the application programs installed. It is during this step that most of the problems will surface - problems which will affect the success of the project.

New application systems should be installed one at a time. For example, the General Ledger system will be installed and tested. Following this, the system will be used for a sufficient length of time to validate its accuracy and to ensure that staff understand its complexities. Once this application has been formally accepted

by the organization, the next system will be addressed. In this way, should there be problems with one system, the problems can be isolated

In no circumstances should the new system be used for production work until it has functioned error-free to the satisfaction of staff.

EXAMPLE #2 – PUBLISH A PROCEDURE

A procedure is a set of commands or directions on how to accomplish something. Some procedures are extremely detailed. For example, a high-level procedure might simply state ‘Prepare the RFP for review by the Committee’. The step-by-step procedure might be 10 pages or more and define, discuss and instruct the reader about each and every item to be included in the RFP. This example, from North Carolina, is that of a high-level procedure. It identifies the significant issues and major steps in The RFP Process but does not describe in detail how each step is to be accomplished.

This 7-page documents deals with all the major RFP process-related issues:²⁶

- Best Value Source Selection
- Cross-Function Teams
- Potential Conflict of Interest
- Confidentiality
- Award Authority
- Evaluation Committee
- Evaluation Plan
- Draft Solicitation
- Prepare Solicitation Document
- Enterprise Project Management Office Review
- Agency Legal Review
- IT Procurement Office Review
- Enterprise Architecture Review
- Issue Solicitation
- Solicitation Addenda
- Public Opening
- Evaluation Committee Meeting
- Initial Review
- Individual Evaluation
- Consensus Evaluation

- Enterprise Architecture Review of Offers
- Negotiation
- Performing Cost/Technical Trade-offs
- Recommendation for Award
- Agency Review
- Statewide IT Procurement Office Review
- Remove of Confidential Information
- Award
- Notice of Award
- Protests

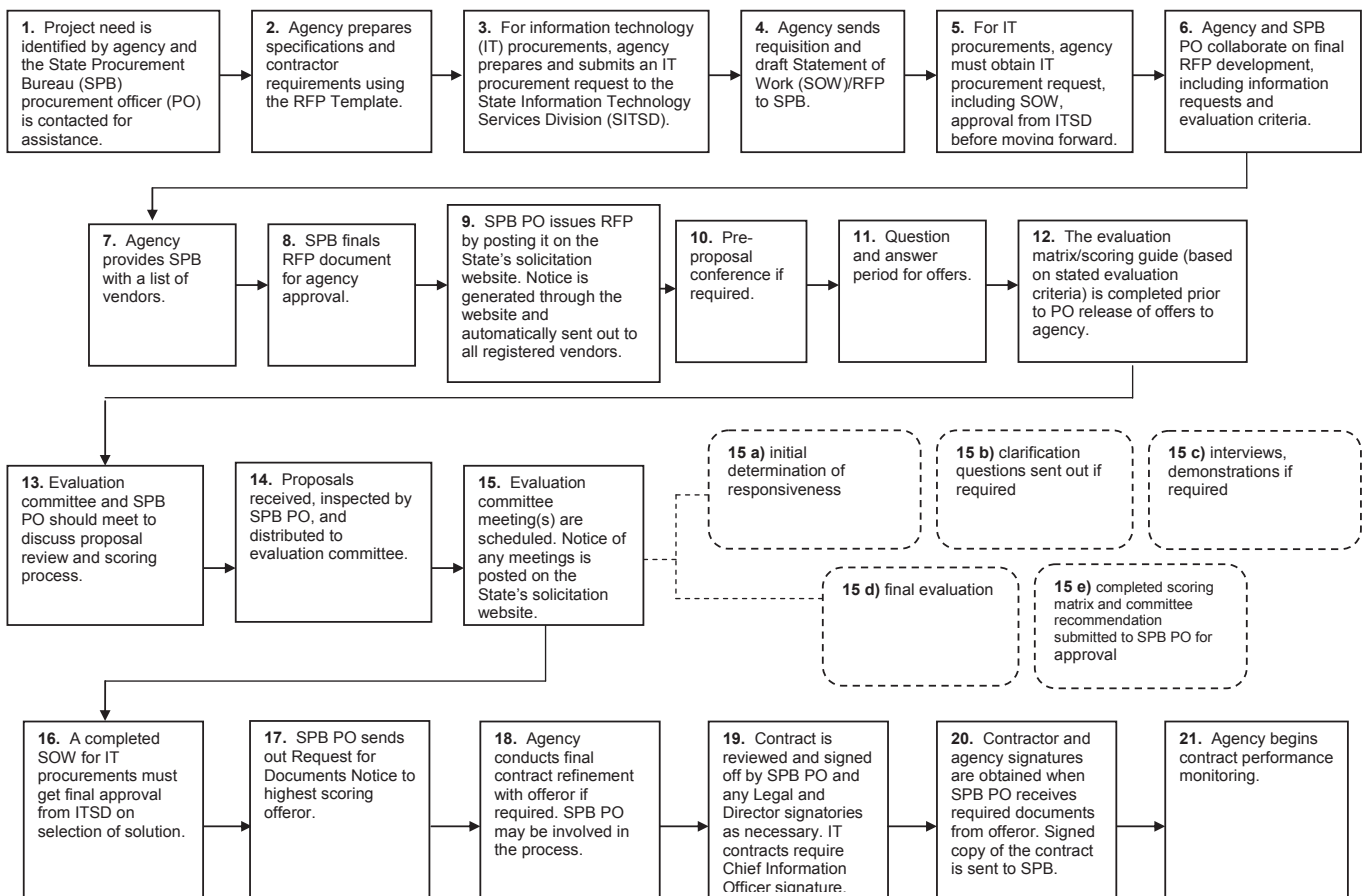
This document, while short, contains some great advice based on their experience:

- *Best value source selection is used to determine which proposal offers the best trade-off between cost and non-cost factors and which has the highest probability of success, where quality is considered an essential performance factor.*
- *The evaluation committee should be formed when the project is initiated and a project manager has been assigned.*
- *Evaluation committee members are not required to review each proposal in its entirety; however, each member should review the same portions of all proposals.*
- *A cross-functional committee should draft the solicitation. When doing so, be sure to define the problem, not the solution.*
- *If references are requested in the solicitation they must be checked.*
- *It is recommended that the committee then agree and assign points by consensus scoring. Evaluations should include a written justification for each scoring category.*

EXAMPLE #3 – ILLUSTRATING THE PROCESS WITH A FLOWCHART

Montana does an excellent job in their 50-page guide, *Initiating and Navigating the Request For Proposal Process*.²⁷ They describe each step in the RFP process and build-in concrete examples and templates.

THE REQUEST FOR PROPOSAL FLOWCHART



Revised 2/13

They also deal with many common concerns and questions such as:

HOW LATE IS LATE?

Any proposal not received by the designated time and date at the designated final destination will be rejected as late. Even if the proposal is only one minute late, it will be rejected regardless of cause.

WHAT IS A "RESPONSIBLE OFFEROR"?

A responsible offeror means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability, which will assure good faith performance. (Mont. Code Ann. § 18-4-301(8).)

Montana's one-page flowchart deals with the process at a high level. The State of New Mexico, in their Purchasing Guide,²⁸ has expanded many of these tasks and represented them in five more detailed flow charts:

- RFP Preparation & Release
- RFP Pre-Proposal Conference, Q/A's & Amendments
- Proposal Receipt
- Evaluation Process
- RFP Finalization and Award.

EXAMPLE #4 – USING A LIST OF TASKS AND STANDARDIZED FORMS

In the Department of Administrative Services – State Purchasing Division (Georgia), the buying process is broken down into the 7 Stages of Procurement.²⁹ This is a forms driven approach in which each stage of the sourcing methodology is defined by the required operational forms.

Here are the steps:

- Need Identification
- Pre-Solicitation
- Solicitation Preparation
- Solicitation Process
- Evaluation Process
- Award Process
- Contract Process

Each of the 7 stages has a set of operational forms to be used during stage. Here are the forms for Stage 5 – Evaluation Process. These forms, often accompanied by instructions, are detailed and prescriptive. In total, these documents structure and standardize the entire Evaluation Process.

Administrative Review Requirements Summary Sheet	Template to be used by the Issuing Officer to determine if the supplier is responsive and responsible
Evaluation Committee Agenda	Form used by Issuing Officer to organize and document planned evaluation committee sessions
Supplier Technical Evaluation	Template used by each evaluator to score suppliers' responses
Request for Clarification	Form used by the Issuing Officer to request clarification of a supplier's response
Master Technical Evaluation Template	Template to be used by the Issuing Officer to consolidate individual evaluation committee members' scores and validated scores
Request for Cost Negotiation (Best and Final Offer)	Form used by the State to request cost negotiations (RFP only)
Evaluation Committee Guidelines	Evaluation guidelines for the Issuing Officer and the Evaluation Committee for RFPs and scored RFQCs
General Confidentiality Form	Form to be used by individuals other than evaluation committee members that will be participating in the procurement process

There is a lot of work, experience and 'best RFP practices' embedded in these documents. Let me provide you with two examples, The Evaluation Committee Agenda and the Master Technical Evaluation Template.

The Evaluation Committee Agenda³⁰ is a one-page 'form used by Issuing Officer to organize and document planned evaluation committee sessions'. This form structures the project by defining the contents of Evaluation Committee meetings as the process moves forward: There are very few public sector sites that deal with the contents of specific Evaluation Committee meetings.

Review of the Evaluation/Negotiation Process

First Meeting:

Evaluation Committee (EC) Guidelines, SPD-EP023

*Identify Offerors deemed “responsive and responsible” and “non-responsive” based on Administrative Review Requirements Summary Sheet (SPD-EP001)
Explain how the Evaluation Committee will utilize the Supplier Technical Evaluation (SPD-EP007) to independently score each proposal*

Second Meeting:

EC will thoroughly discuss each scored question

IO will utilize the Master Technical Evaluation Template (SPD-EP013) to build validation of each scored question

Third Meeting or during the second half of the second meeting:

After validation has been reached on the technical proposals, the IO will disclose the cost proposals and cost analysis.

The IO will utilize the Master Technical Evaluation Template (SPD-EP013) to show the overall total score

The EC will identify offeror(s) to participate in negotiations (if applicable) or make an award recommendation

Fourth Meeting:

Complete Negotiation Plan (SPD-EP016)

Complete Negotiation Script (SPD-EP017)

Fifth Meeting:

Conduct Negotiations with identified offerors pursuant to the RFP and GPM

Sixth Meeting:

Reevaluate Proposal Revisions which is based on the outcome of negotiations

Make award recommendation or determine if second round of negotiations is needed and identify offerors

The second example is the Master Technical Evaluation Template.³¹ While variations of this document can be found in several jurisdictions, this is the most complete and the easiest-to-understand that I’ve found. Its purpose is to record the Technical Evaluations completed by the Evaluation Committee.

The document is printed as 6 separate pages and, when assembled is a 25” x 30” document that provides both graphics and text explaining how to use the two accompanying templates to (i) record each Evaluators Initial and Final Scores and ii) to summarize all of the scores.

An Ending Comment

This chapter has dealt with the RFP process. In the next chapter, we explore the RFP document and provide examples of excellence.

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Chapter Six

THE RFP DOCUMENT

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Chapter Six

THE RFP DOCUMENT

PART ONE – THE BASICS

Successful RFPs start with an excellent Statement of Work (SOW). In many, likely most, public agencies the SOW is produced by the Users and not by Procurement. Procurement inherits this SOW and then develops the RFP incorporating the SOW information and adding all the other required RFP sections.

In this chapter, we first discuss the SOW. We then move on to the RFP document. Both topics, SOW and the RFP document, are dealt with in terms of key issues, problems and best practices.

Statement of Work

A poorly written SOW will often put success beyond the reach of any Project Team.

I believe that flaws in the SOW are the single largest contributor to RFP problems and major project problems including budget overruns (due to an excessive number of change orders) and missed deadlines. Procurement people know about best practices and how to ensure that the procurement is fair, open and transparent. But in many organizations, Procurement does not establish the standards or practices related to SOWs. In these organizations, the quality of the SOW is often poor. It is incomplete, or lacking required details.

In this section, we will discuss ways to identify flaws in a SOW. We will discuss techniques for verifying the accuracy and completeness of the SOW. And we will identify checklists, templates and guides which can materially assist in the creation of an excellent SOW.

The RFP Document

There are many types and sources of information about the RFP document:

- Your organization's policies, rules and guidelines

- Copies of old RFPs
- Tables of Contents of old RFPs
- Standardized documents and contracts
- Reference publications
- Access to experienced people

In this section, we focus on the RFP document by examining RFPs from several organizations, in different jurisdictions. We first discuss the information required in an RFP. We then provide examples of three excellent RFPs. The final section of this chapter discusses different approaches to standardizing either the entire RFP document or specific sections.

How do you prepare an RFP? What must be included in the document? Suppose you are briefing a new manager with only limited experience in this process. What information and tools do you provide to promote the efficient production of an effective RFP?

Since the RFP document has a pivotal role in the procurement and contracting process, it is extremely important that it be accurate, comprehensive, easily understood, and complete. It must reflect your organization's policies and practices. It must provide sufficient information about the requirements and the evaluation process for an effective and practical proposal to be prepared.

The Statement of Work – The Foundation of Your RFP

This section is a new edition to this text. Over the last twenty years, I've given dozens of workshops on Best RFP Practices and I've had hundreds of conversations about RFP problems. Ask any procurement person about their list of the ten most vexatious and ubiquitous RFP problems and then combine the lists and you will see that this issue is one of the most common widespread problems. In many jurisdictions, procurement is not involved or only nominally involved in the production of this critical document.

This section contains an overview of this important issue and some highlights from the literature. A more detailed narrative discussion about this topic is beyond the scope of this book. However, this section does identify some of the major sources of information about SOWs.

Statements of work developed by users with little input from procurement are often incomplete, lacking details, and sometimes factually wrong. And Procurement people are not Subject Matter Experts (SMEs), so close scrutiny of the SOW is frequently lacking.

The challenge to procurement is to promote the development of a high quality Statement of Work, or, alternatively, to identify and correct the flaws and shortcomings in a SOW. In this section, we address both of these issues.

In this section, information about SOWs is organized into three broad topics:

- The Basics
- Becoming an Instant Subject Matter Expert
- Your SOW Tool Kit

THE BASICS

Here are several views of this important document presented as answers to “What is a Statement of Work?”

“a narrative description of products or services to be supplied under contract.”

PMI Project Management Book of Knowledge

“...a description of the work requirement which describes the buyer’s requirements in performance terms”

IEEE (Institute of Electrical and Electronics Engineers)¹

“... should specify in clear, understandable terms the work to be done in developing or producing the goods to be delivered or services to be performed by a contractor ...(and)...define all performance requirements for contractor effort...”

NASA

The Federal Acquisition Regulations (FAR) have a solid definition of this document.²

**37.602-1 Statements of work.*

Generally, statements of work shall define requirements in clear, concise language identifying specific work to be accomplished. Statements of work must be

individually tailored to consider the period of performance, deliverable items, if any, and the desired degree of performance flexibility . .

When preparing statements of work, agencies shall, to the maximum extent practicable—

(1) Describe the work in terms of "what" is to be the required output rather than either "how" the work is to be accomplished or the number of hours to be provided

. . .

(2) Enable assessment of work performance against measurable performance standards;

(3) Rely on the use of measurable performance standards and financial incentives in a competitive environment to encourage competitors to develop and institute innovative and cost-effective methods of performing the work . . .

Here are two different overlapping high-level views of the information contained in a SOW.

First, a Statement of Work should include the following information:

Introduction & Background

References the original agreement containing legal terms and conditions.

Objectives

Provides well-defined statement of the results to be achieved in order for the work to be accomplished.

Identifies quantifiable criteria that must be met for the work to be acceptable and accepted.

Scope of Work

States briefly what the scope of work does and does not cover

Includes:

-an outline of the extent of work

-brief overview of the steps of the project

-brief description of the methodology used

-description of the location of the work or where work will be performed

-price breakdown

Alternatively, here is another list of the information that goes into a SOW:

- *List requirements/needs.*
- *Describe all work elements.*
- *Describe pertinent previous efforts.*
- *Describe known risks.*
- *Describe tasks in sequence.*
- *Describe reporting requirements.*
- *Describe schedules.*
- *May be a requirement for a final report.*

- Describe work products.
- Describe special considerations.
- Describe need for formal meetings.
- Describe any technical data requirements.
- Describe the criteria for determining whether the requirements have been met.
- Describe the type of deliverables and what a deliverable is.

And, finally, when we do have a statement of work in front of us, how do we know if it is good, bad or excellent. Here are some attributes of good SOW requirements:³

- *Complete: Completely defines the buyer's need to be satisfied*
- *Consistent: Requirements do not conflict with each other*
- *Correct: All requirements are known to be achievable*
- *Clear: There is only one semantic interpretation*
- *Traceable: There is a trail to the driving requirement's need*
- *Modifiable: Any necessary change can be made completely and consistently*
- *Verifiable: It is technically possible to prove the requirements have been satisfied*
- *Implementation free: Free of design decisions, unless they are mandated constraints*

BECOMING AN INSTANT SUBJECT MATTER EXPERT

Without being a Subject Matter Expert, Procurement can quickly become informed about the subject matter and can identify a plan for validating the SOW. Procurement, without spending a lot of time, energy or money can take steps to ensure that a SOW developed by the users is accurate, complete, comprehensive and not unduly restrictive.

Procurement people own the RFP process. They know how to create an RFP; they know how to organize an evaluation committee; they receive training in best practices. With all of this knowledge, procurement people are rarely subject matter experts (SMEs). In a year, a senior procurement person could be responsible for a wide variety of RFPs including computer software, new technology for recycling plastics, janitorial services, and banking services. It would be rare that this senior procurement person was a SME for any of these RFPs.

In many organizations, it is a user group that develops the SOW; often without any input from Procurement. Procurement is often handed an SOW when it has been completed and instructed to get on with the RFP. Now most procurement people

know that a user-developed statement of work can be a source of trouble later in the process. SOWs that are not complete, detailed, comprehensive or unbiased lead to failed projects – projects that are late, with poor deliverables, and with lots of change orders and additional, unanticipated costs.

So, how does a procurement person who is not an SME do quality control on a user-prepared SOW? How does this procurement person make certain that the SOW is solid? How does the procurement person identify the shortcomings in the SOW? And how does the procurement person get the user group to remedy deficiencies in the SOW?

My approach is simple. I lock my door and spend some time researching this topic on the web. In the remainder of this section, I will describe the steps I took in one specific situation to validate an SOW.

I was presented with a SOW related to an enterprise business process management system (BPM) and directed to identify the best supplier/proposal using an RFP process. At that time, I had no idea what a BPM was, what it cost, who did it, or what the risks were. I knew nothing about this type of software nor the companies that provided or supported this product.

I performed several searches using Google and Yahoo with the terms ‘BPM’, ‘BPM Software’, ‘BPM RFP’, ‘BPM associations’, ‘BPM books’, and ‘BPM Reports’.

Here is what I found:

- Several websites including Wikipedia dedicated to explaining BPM basics
- Several websites dedicated to all aspects of BPM
- Software vendors’ sites describing their software and presenting case histories
- Articles on how to choose the right BPM software
- Actual RFPs for BPM Software
- RFP templates and questionnaires
- BPM RFP Questions and Answers
- Articles and reports dealing with BPM implementation
- BPM Associations
- BPM Books
- BPM Reports
- BPM Conferences

- Consultants specializing in BPM

In addition, there is a social network for business, LinkedIn.com, that has thousands of people who identify themselves as experienced at BPM and there are several LinkedIn Groups that deal with BPM.

Based on this research, we understood the fundamentals of BPM; its complexity, challenges, scope, issues and risks. This information permitted us to establish a strategy for ensuring that the SOW was complete, accurate and unbiased. We decided to:

- Purchase an RFP Template and Questionnaire
- Download some actual RFPs
- Engage a BPM Consultant to review the SOW.

All of these activities were completed in less than two weeks. The consultant's fees for reviewing the draft SOW were less than \$10,000. All of this information was shared with the Project Team and was used to revise the SOW.

YOUR SOW TOOL KIT

Many organizations have not formalized the SOW document. These organizations use a variety of tools: templates, examples, notes on the contents. But all of these are informal and were produced within user departments, not by Procurement and often these tools are not sufficiently detailed. The resulting SOWs can be flawed – incomplete, inaccurate, lacking required details – and often cause major problems during the RFP process and while the resulting contract is being executed.

A better approach is for the Procurement Dept. to develop a standard approach to be used by all User Groups in developing a SOW. Often, these standard approaches will involve the use of a Writing Guide, a Template, or Checklist of Questions. Here are a few documents which illustrate what others have done. There are hundreds of examples from procurement web sites. These three are the ones I currently use in my workshop on SOWs – Getting Them Right!

Guide to Preparing a Statement of Work (AZ)⁴

This 18-page Guide being currently used by both the State of Arizona and St. Johns River Water Management District (FL) provides a lot of information in a few pages. It begins with a definition of SOW:

A statement of work (SOW) is a narrative description of a contract's goals/agenda. It is also a valuable project management tool. The SOW is the key in the evaluation of proposals received and contractor selection. After award of a contract, the SOW becomes the standard against which the State of Arizona (State) will measure a contractor's performance. It should set measurable limits as to what the State can demand and what a contractor must perform in order to be compensated. An SOW should include the following sections:

- I. Introduction/Background*
- II. Objectives*
- III. Scope*
- IV. Task Identification*
- V. Time Frames and Deliverables*

It then describes the purpose and contents of each section. For the Objectives section, it defines "Objectives". It then provides some guidance and examples.

II. OBJECTIVES

Objectives are well-defined statements of the results to be achieved in order for the overall mission of the work to be accomplished. In other words, work objectives are the quantifiable criteria that must be met for the work to be considered successful. This section must communicate a concise description of work objectives and how those objectives interrelate.

The following acronym can be used to remember the essentials that characterize a statement of objectives. A work objective must be SMART

:

Specific

Measurable

Attainable

Realistic

Time-limited

Following are examples of contract objectives:

- 1. The objective of this study is to obtain information defining the relationship between parameters X, Y, and Z.*

2. *The objective is to develop and implement a cost-effective project control system that would track and measure the performance of projects with respect to their schedule and budget, by December 31, 2001.*
3. *The objective of this work is to develop training materials in the area of Managing Teams and to train supervisory personnel by December 30, 2001.*
4. *The objective of this contract is to procure 120 10-mile-range radio units for use in government vehicles.*
5. *The purpose of this work is to develop, mail, analyze, and interpret the results from a questionnaire/survey to 10,000 residences to measure the residents' perception regarding the quality of the water in the city of Palatka.*
6. *The objective of this work is to undertake a feasibility study to determine the technical and economical feasibility of a 4-day workweek by December 31 . . .*

Montana Statement of Work Template⁵ and Guide⁶ (2 documents)

The 9-page Template provides an organizational structure for the SOW:

Table of Contents

<ul style="list-style-type: none"> 1.0 Introduction <ul style="list-style-type: none"> 1.1 Project Title 1.2 Background 1.3 Objectives 1.4 Reference to other applicable documents 2.0 Staffing Roles and Responsibilities <ul style="list-style-type: none"> 2.1 Staffing <ul style="list-style-type: none"> Project Manager – Contractor Project Manager – Agency 2.2 Roles and Responsibilities Matrix <ul style="list-style-type: none"> Contractor Staff, Roles and Responsibilities Agency Staff, Roles and Responsibilities 3.0 Key Assumptions 4.0 Risks 5.0 Scope of Work 	<ul style="list-style-type: none"> 5.1 Inclusions 5.2 Exclusions 5.3 Deliverables 5.4 Milestones 6.0 Work Approach 7.0 Completion Criteria and Final Acceptance Criteria <ul style="list-style-type: none"> 7.1 Completion Criteria 7.2 Final Acceptance 8.0 Schedule 9.0 Project Management (if applicable) 10.0 State Policies Standards and Computing Environment 11.0 Timeline and Period of Performance 12.0 Compensation and Payment Schedule 13.0 Miscellaneous
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The Template provides placeholders for information and some basic instructions for the author. The Guide provides additional information. For example, the Template has a section entitled “Objectives” and the Guide contains the following entry:

Objectives

Given the historical background and drivers (this is why Background must come before Objectives), state what the project must accomplish. This should be brief and high-level– describe the final outcome that will address the problem or opportunity described in the background.

Example: “The objectives of this project are:

- to install and make operational a shared services repository that would ensure centralized documentation, facilitate shared services searches, align with state enterprise perspectives.....and, to develop standards for developing and documenting shared services that would ...*

NC Statement of Work Template⁷ and Risk Management Guide⁸ (2 documents)

This 11-page document identifies 15 major elements in a SOW and briefly describes the required content.

It is noteworthy that the Template includes a section on Risk Assessment.

In an accompanying 48-page document, risk management is discussed and the reader is instructed how to create a risk management plan. This document is a tutorial on risk management and provides lots of guidance:

4. *Risk Management Process Guidelines*

Identify Risks

Potential Areas of Risk

Classify Risks by Type

Risk Mitigation Plan

Risk Mitigation Guidelines

Recording Risk Mitigation

Risk Profile

Risk Profile Guidelines

Risk Watch List

Risk Watch Required Elements

How Much Information?

One of the fundamental issues faced by most organizations is "how much information do we provide to suppliers?" In principle, the approach adopted by many jurisdictions is simple: provide suppliers with as much information as possible. These organizations reason that the more information suppliers have, the better will be the proposals. Creative solutions often require much detailed information about the specific issues and problems.

I believe that a qualified vendor using its knowledge of its industry and the information in an RFP should be able to create a proposal that is capable of winning. This is the operational response to the question of how much information should be in an RFP.

Several other factors also support this approach. First, in many jurisdictions, there are access to information laws which permit suppliers to audit the RFP process. Under these laws, suppliers can obtain the evaluators' notes and details of the process. It is increasingly difficult, if not impossible, for purchasers to conceal details of their work.

A typical policy statement about information access follows:⁹

Any government document that sets out government policy in respect of contracting or procurement, or that relates to any particular contracting or procurement matter or transaction, is to be made reasonably available to any person who requests it.

Second, when suppliers are fully informed about the details of the procurement, the requirements and the process, they can make informed decisions related to producing a proposal. Suppliers can spend tens of thousands of dollars preparing a proposal. With more information, a supplier might be better able to determine beforehand that its approach will not succeed. It will, therefore, "no bid" and save itself much time and money.

Alternatively, a supplier might determine from the details in the RFP that it could win if it remedied one shortcoming. For example, the supplier identifies the need for an expert in geology which it does not have. Rather than "no bid", the supplier could enlist the assistance of another organization with the required expertise

either as a partner or as a sub-contractor. In either case, the issuer would obtain a better proposal.

In this environment, one of a reasonably free exchange of information, there are fewer complaints from suppliers concerning the award.

Finally, in many jurisdictions, the courts have been called upon to enforce procurement and contract laws. Their decisions have caused organizations to include more, rather than less, information in the RFP. Some courts have declared that purchasing organizations have several duties towards the vendors submitting proposals; for example:

- Duty to treat all suppliers in a fair and equal manner
- Duty not to misrepresent the situation
- Duty of full disclosure of information
- Duty to warn vendors of known dangers

What Goes into an RFP Document?

There are several ways to specify the contents of an RFP: by law, by policy, by using guidelines or simply by example. At the operational level, all organizations use old RFPs to help prepare new ones. Later in this chapter, we will present sample RFPs and RFP guidelines.

First, let us see how RFPs are specified in law, or in policy. In Alaska, the State Procurement Code deals with the contents:¹⁰

A request for proposal must contain that information necessary for an offeror to submit a proposal or contain references to any information that cannot reasonably be included with the request. The request must provide a description of the factors that will be considered by the procurement officer when evaluating the proposals received, including the relative importance of price and other evaluation factors . .

Many organizations through their directives and policies identify the specific pieces of information to be contained in the RFP. However, some organizations do not insist that the RFP contain the contract terms, nor a full description of the evaluation process. Here is an example from Government of Yukon:¹¹

A request for bids or proposals will include the following information:

(a) the essential terms of the contract(s) or standing offer agreement(s) to be awarded, including:

(i) a full description of the goods or services or construction to be delivered, including estimated quantities where applicable and all performance requirements;

(ii) the form, amount, and terms and conditions of any required performance security, or any performance penalty or performance bonus permitted by law, if any;

(iii) the completion date or any other timing considerations which are to be terms of the contract(s) or standing offer agreement(s);

(iv) provisions relating to the confidentiality of the bids or proposals;

(v) information relating to post contract completion performance evaluations;

(vi) other terms and conditions which would be relevant in setting a price for the goods or services . . .

(b) terms and conditions for the submission of bids or proposals, including:

(i) the form in which bids or proposals are to be submitted;

(ii) the information required to be provided in the bid or proposal;

(iii) the place to which bids or proposals must be submitted . . .

(v) the closing date and time.

(c) a full description of the manner in which bids or proposals will be evaluated, including:

(i) the method to be used to evaluate bids or proposals;

(ii) the evaluation criteria, stated in such a manner as to clearly identify all the information to be provided by the bidder or proponent which will be used to evaluate the bid or proposal . . .

(iii) the weighting assigned to each evaluation criterion, where the criteria are used for ranking; and

(iv) the process for negotiation with the bidder(s), if a non-Contract A, negotiated format is employed after the Request for Analysis of Procurement process has been followed (see Section 22).

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(f) the name, title and contact information of the designated contact person; and

(g) in the case of publicly advertised requests for bids or proposals, the time and place of tender opening

The Policy and Procedures Manual for the State of Alaska specifies the required content:¹²

RFP Contents

The department has a standard boiler plate RFP that contains many of the requirements applicable to all RFPs. You can obtain a copy from DAS. All RFPs must contain the following:

- The date, time and place for delivery of proposals.
- A specific description of the supplies, construction, services or professional services to be provided and the terms under which they will be provided. See Specifications.
- A requirement that proof of the proposer's valid Alaska business license be submitted at the time the proposals are opened.
- A description of the evaluation factors that will be used in evaluating proposals and their relative weight in the overall evaluation.
- The following statement must appear in every RFP:

"Offerors shall carefully review this RFP for defects and questionable or objectionable materials. Offerors comments concerning defects and questionable or objectionable material in the RFP must be made in writing and received by the purchasing authority at least ten (10) days before the proposal opening date. This will allow time for an amendment to be issued if one is required. It will also help prevent the opening of a defective solicitation and the exposure of offerors proposals upon which award cannot be made. Offerors' comments should be sent to the purchasing authority at the address shown on the front of this RFP. A copy of the offerors' comments should be forwarded to Commissioner, Department of Administration, P.O. Box 110200, Juneau, Alaska 99811-0200."

- Any information necessary for an offeror to submit a proposal or contain references to any information that cannot reasonably be included with the request.
- A requirement that the bidder or offeror certifies under penalty of perjury that the price submitted was independently arrived at without collusion.
- A "subject to funding" clause if the funding for the contract is dependent upon legislative approval for future periods.
- Copies of standard agreement forms with appendixes, including insurance requirements.
- A list of evaluation criteria.

Our final example is provided by the state of Massachusetts:¹³

LISTING OF MINIMUM CONTENTS OF A REQUEST FOR RESPONSE (RFR)

1. Description or purpose of the procurement
2. Acquisition method (fee-for-service, outright purchase, rental, term lease, Tax Exempt Lease-Purchase and/or license)
3. Request for single or multiple contractors
4. Use of a procurement by a single or multiple departments

5. *Anticipated duration of contract, including renewal options*
6. *Anticipated expenditures and compensation structures*
7. *Performance and contract specifications*
8. *Instructions for submission of responses*
9. *Deadline for responses and procurement calendar*
10. *RFR attachments/required specifications*

The Anatomy of Three Excellent RFP Documents

Examples are an excellent way of transmitting detailed information about actual RFP documents and practices. Using web-based electronic tendering systems and search engines, it is now easy to locate appropriate examples.

This section contains three examples of relatively complex RFP documents that illustrate a variety of best practices. The first two examples are old and appeared in the 4th Edition of this book. These examples are still valuable and illustrate important RFP best practices which still prevail. The third example, an Information Technology RFP for Consulting Services from Wisconsin, is new. Each writeup begins with a list of key features of that particular RFP.

EXAMPLE 1: TARRANT COUNTY



TARRANT COUNTY¹⁴
PURCHASING DEPARTMENT

REQUEST FOR PROPOSALS
FOR
INTEGRATED CRIMINAL JUSTICE
INFORMATION SYSTEM (ICJIS)
2002

Some Key Features. There are some great features in this RFP, each contributing to its effectiveness:

- The project is divided into phases.
- Each phase includes the same acceptance activities.
- Each phase includes the production of an updated risk analysis.
- Each phase has a go/no-go ramp.
- Samples of work products are required.
- Payment is tied to deliverables.
- Each phase has a not-to-exceed fixed fee pricing schedule.
- The RFP contains a detailed narrative of the evaluation process.

- BAFO/Negotiations is part of the process.

Here are the details.

Some Background.¹⁵ This RFP was issued in August, 2002. Notice of the County's intent to bid was advertised in local newspapers, shown on cable television for two weeks; and posted on the Internet and at the Fort Worth Metropolitan Black Chamber of Commerce and the Fort Worth Hispanic Chamber of Commerce. One hundred and sixty-three (163) vendors were contacted and requested to participate in this proposal process. All documents pertaining to this RFP were posted on the Tarrant County website and were downloaded by interested parties. A pre-proposal conference held on August 21, 2002, was attended by seventeen (17) vendors as well as representatives from the Information Technology Department and Purchasing. Eleven (11) proposals and three (3) no-bids were received.

Scoring Results. Proposals were scored on the technical and financial information. Technical assessment was based on 750 points; financial, 250 points. Sierra Systems obtained the highest total score. They topped the technical scores with 690, and received the third highest financial score of 169. The value of their proposal was \$365,000. The lowest priced proposal was \$247,000.

The Project is Divided into Phases

Lots of time and effort were expended in planning this project. The project was divided into 8 phases:

- Planning
- Analysis and Design
- Development
- Testing
- Acceptance
- Deployment
- Operations
- Training

In five pages, the RFP described each phase, its key elements, and critical deliverables.

The first phase, to be completed during contract negotiations, requires the successful proposer to develop a comprehensive Statement of Work based on the agency's work to date. This is a key element permitting the contractor to review and revise the Agency's Statement of Work based on the Contractor's approach and experience.

Statement of Requirements

The County desires to engage a professional services provider to assist the Information Technology Department in planning, analysis, design, development, deployment, and support of an Electronic Case Filing solution for the District Attorney. Below is a high level overview of the anticipated services and deliverables that are required.

Planning

The County expects the Proposer to be able to provide the resources required to properly plan, control, and execute an application development project. The Proposer will review the current Project Plans and make formal recommendations for the County's consideration. The Proposer will be solely responsible for planning all aspects of the design and development of the intended solution.

During contract negotiation, the successful Proposer will be required to develop a comprehensive Statement of Work. The Statement of Work will identify deliverables, budget, schedule, hardware, software, and resources requirements for the Project. The Statement of Work will form the basis for contract administration and service level management.

Each Phase Included the Same Acceptance Activities

Phases 2 (Analysis and Design) through 7 (Operations) included the following acceptance tasks:

... the Proposer is expected to participate in the following acceptance activities:

- *Conduct a Project Team Walk Through of the System Design.*
- *Produce a revised Project Work Plan and Schedule.*
- *Conduct a System Design Sign-off Work Session.*

Each Phase Includes the Production of an Updated Risk Analysis

Phases 2 (Analysis and Design) through 7 (Operations) included the following tasks:

During (this Phase), the County expects the Proposer to perform a comprehensive risk assessment for the proposed solution. As part of the risk assessment, the Proposer must identify all known risks for the Project and make recommendations on how to best mitigate the risk.

Each Phase has a Go/No-Go Ramp

Phases 2 (Analysis and Design) through 7 (Operations) included the following acceptance tasks:

Although the County fully intends to proceed with the Project, the County also expects to make a "Go/No-Go" decision based on the (deliverables produced to date) and Risk Assessment provided by the Proposer. At that point, the County in its sole discretion may elect to cancel the Project. The successful Proposer will be paid for the System Design based on the agreed fixed-fee not to exceed price and no additional work will be authorized.

Samples of Work Products are Required

The evaluators are not simply relying on the Contractors statement of its own capabilities, or its proposed work plan. Rather, the Evaluators want to examine work products from other projects.

The Proposer shall provide a sample of work that clearly demonstrates the Proposer's experiences in successfully delivering professional services required by this RFP. Specifically, the Proposer shall provide samples of the following work products:

- * Statement of Work*
- * Project Management – Project Plan*
- * Application Development – Design Document*
- * Application Development – Test Plan*
- * Application Support – Deployment Plan*
- * Application Support – Training Plan*

Payment is Tied to Deliverables

The contract links payment with the acceptance of specific results. The Statement of Work is part of the contract and includes a payment schedule:

The Statement of Work shall include:

- (a) A description of the Work;*
- (b) The Schedule of Deliverables;*
- (c) Performance timeframes or milestones relating to the Deliverables;*
- (d) Documentation and reporting obligations required by County;*
- (e) Any applicable acceptance criteria and acceptance testing process; and*

(f) The payment schedule.

Each Phase has a Not-to-Exceed Fixed Fee Pricing Schedule.

Not-To-Exceed Pricing

The Financial Proposal shall include a total Not-To-Exceed Price (“Not-To-Exceed Price”) for requirements set forth in this RFP. The Not-To-Exceed Price shall encompass all costs identified in the Technical Proposal. This section must include a Not-To-Exceed Price for each deliverable set forth in this RFP. The Not-To-Exceed Price must be an aggregate of unit costs set forth in the Itemized Deliverable Costs.

The Not-To-Exceed Price must identify any assumptions made by the Proposer, and the financial impact of each thereof, regarding the proposed use of any County resources.

This approach is built in to the Model Contract:

V. PAYMENT.

5.1 Payment Amount. The Maximum Not-To-Exceed Compensation, which includes any allowable expenses, payable to Consultant for the Work, Deliverables and Work Products as defined in Exhibit A is \$_____. Consultant and the County agree that Consultant shall continue performing the Work until completion and delivery of all Work Products and that no additional compensation will be paid unless authorized by a lawful amendment to this Contract. The County shall pay Consultant for the Work, Deliverables and Work Products identified in Exhibit A as each phase of the project is completed and accepted by the County.

The Evaluation Process

It is important that Contractors view the RFP as a “quality document”. When this occurs, they invest the time and energy to ensure that their proposal is a good fit for the requirements. The Evaluation Process as described in this RFP presents a clear, concise view of this critical process and helps establish this RFP as a “quality document”.

Proposal Evaluation and Award

Approach

The Tarrant County Purchasing Department will guide the evaluation of the responses received. An Evaluation Committee will be established to evaluate and

score the submitted Proposals. The Evaluation Committee may consist of representatives from the following County Departments:

- Information Technology
- District Attorney
- Purchasing Department

The County reserves the right at its sole determination to include additional Department(s), Employee(s), or Contractor(s) in the evaluation of proposals, as the County deems necessary.

Evaluation Process

The County intends to conduct evaluation of the proposal responses in eight (8) phases:

- Phase 1: Evaluation of Administrative Proposal Requirements
- Phase 2: Evaluation of Technical Proposal
- Phase 3: Evaluation of Cost Proposal
- Phase 4: Initial Ranking of Proposals
- Phase 5: Results of Oral Presentations
- Phase 6: Final Ranking of Proposals
- Phase 7: Best and Final Offer
- Phase 8: Contract Negotiation

The County reserves the right at its sole discretion to determine the process for proposal evaluation and may elect to accelerate the evaluation process by combining or eliminating evaluation phases, if it is deemed in the public interest to do so.

Evaluation of Administrative Proposal

The purpose of this phase is to determine if the Proposal meets the Minimum Proposal Requirements required by Tarrant County. Proposals will be reviewed to determine if they are complete. Failure to comply with the instructions or to submit a complete Proposal may result in it being deemed non-responsive. Only those Proposals determined to be responsive to the Administrative Proposal Requirements will be considered. The County reserves the right to reject any or all Proposals if it is deemed in the public interest to do so.

Evaluation of Technical Proposal

Proposals will be scored according to how well the Proposer responded to each of the requirements in the Technical Proposal Section. Technical Proposal evaluation points given by each evaluator will be summed and divided by the number of evaluators to compute an average performance score for each Proposal. Cost

Proposal information will not be available to the Evaluation Committee during the Technical Proposal evaluation phase.

<i>Point Basis: possible:</i>	<i>Points</i>
<i>Methodology</i>	<i>125</i>
<i>Relevant Experience</i>	<i>250</i>
<i>Project Staffing</i>	<i>250</i>
<i>Corporate and personnel reference checks.</i>	<i>125</i>

*Maximum Technical Points:
750 points*

Evaluation of Cost Proposal:

Proposals will be evaluated separately to assess the Cost Proposal. Cost Proposal points will be awarded based upon price/rate. The lowest Cost Proposal price/rate will be awarded the Maximum Cost Points. Cost Proposals with higher prices or rates will be awarded a percentage of the Maximum Cost Points available based on the percentage of their Cost Proposal price/rate relative to the lowest Cost Proposal price/rate.

Maximum Cost Points: 250 Points

Initial Ranking of Proposals

The points awarded to the Technical and Cost Proposals will be added together to determine the total score and the ranking of each Proposal.

Results of Oral Presentations

The Proposals with the five (5) highest scores may be invited to provide an Oral Presentation to the Evaluation Committee. Prior to the Oral Presentation, the Proposer will be provided with a detailed agenda that reflects specific topics that are of interest to the County. At a minimum, the Proposer will be expected to present the Proposed Project Team to the County. Oral Presentations will last no longer than ½ day.

Scoring of the Oral Presentation will be based on the same criteria used for the ranking of the Technical and Cost Proposal.

<i>Point Basis:</i>	<i>Points possible:</i>
<i>Technical Proposal;</i>	<i>750</i>
<i>Cost Proposal;</i>	<i>250</i>

Maximum Oral Presentation Points: 1000 points

The County reserves the right at its sole discretion to determine if Oral Presentation(s) are in the best interest of the County. The County is under no obligation to conduct Oral Presentation(s).

Final Ranking of Proposals

The points awarded to the Oral Presentation will determine the total score and the final ranking of the remaining Proposals.

In the event, the County elects not to conduct Oral Presentation(s), the final ranking of the remaining Proposals will be determined by the Initial Rankings previously described.

Best and Final Offer (BAFO)

The Proposals with the three (3) highest scores may be invited to prepare a Best and Final Offer for consideration by the Evaluation Committee.

The County reserves the right at its sole discretion to determine if pursuing BAFO(s) is in the best interest of the County. The County is under no obligation to pursue BAFO(s).

In the event, the County elects not to pursue BAFO(s), Contract Negotiation will be conducted based on the Final Rankings previously described.

Contract Negotiation

The Tarrant County Purchasing Department will conduct Contract Negotiations along with representatives from the District Attorney and Information Technology Departments.

The County reserves the right at its sole discretion to determine if a pursuing Contract Negotiation is in the best interest of the County. The County is under no obligation to pursue Contract Negotiation.

EXAMPLE 2 - EXCELLENCE AND INNOVATION IN CALIFORNIA, STRATEGIC PROCUREMENT AT ORANGE COUNTY SANITATION DISTRICT (OCSD)¹⁶

The following innovations and features were included in the RFP:

- The use of a two-step evaluation process
- Inclusion of Risk and Environmental Issues as evaluation criteria in the proposal
- Development of a long list of reserved rights

- Utilization of Minimum Acceptable Qualifications to discourage unqualified vendors from submitting proposals
- Requirement for a product marketing plan
- Developing a sensitivity analysis for key product variables

Each of these features is described briefly in the following section.



Over the last ten years, OCSD, and hundreds of similar facilities, have experienced rising costs for processing biosolids, stricter environmental regulations and increasing litigation to limit their activities within the community.

Creating a Plan for Innovation. In 2001, OCSD's Planning Group, was given the task of developing a long-range plan which would permit OCSD to comply with tougher regulations, reduce its processing costs, and reduce the amount of litigation. OCSD engaged CH2M Hill, a consulting engineering firm to assist in the development of a plan. The terms of reference for CH2M Hill included identifying new technologies that OCSD could employ to recycle 100% of its output into useful products. "Useful Products" were products that could be sold, products for which a market exists. One such example would be "direct use of biosolids for production of energy (electricity)".

In 2004, Orange County Sanitation District (OCSD) completed their Long Range Biosolids Management Plan (LRBMP), which provided a number of recommendations for management of biosolids over the next ten to fifteen years. A key recommendation of this plan was the utilization of new technologies. Their objective was to diversify the processing of biosolids products, markets, and contractors. The report set the direction for the future:

- It identified the markets/technologies to be sought.
- It recommended that each market be allocated not more than 50% of OCSD's production;
- It recommended that no supplier process more than 50% of OCSD's production.

This entire approach was innovative. Identifying markets for products was an innovation. And then evaluating technologies which could provide products for these markets was a second innovation. Using multiple RFPs was innovative. Another key innovation was that each vendor would be required to propose a “total” solution - a complete management system.

It is OCSD's intention that the Proposers provide a complete management system, not just components. The services should include hauling of biosolids from designated points at OCSD's two wastewater plants, generation of energy or interim energy products and supply of the energy or interim product(s) to suitable markets.

And, finally, developing and issuing concurrent RFPs for four different technology/markets was both an innovation and a challenge to OCSD's organizational capabilities.

Planning for Excellence. The RFPs were carefully planned to incorporate many of the ‘best practices’ found throughout North America. OCSD was going to use this opportunity to establish its procurement function as a leader in their industry.

The two major objectives in running this complex procurement were to (i) select the most appropriate vendors based on the Long Range Biosolids Management Plan and to (ii) use an exemplary RFP process based on “fair and open” competition. This process must be capable of withstanding the closest scrutiny by the public and the courts and thereby serve as a model for other jurisdictions.

Organizing the Procurement Effort. Once the Long Range Plan was accepted, the procurement process was started. The size and complexity of the procurement process, the level of risk, and the large amount of money involved demanded a high level of planning. The high visibility of the project imposed additional requirements related to transparency and the ability to easily demonstrate that the process was both fair and open.

The following were key elements of their procurement strategy:

To use dedicated senior staff - The process was planned, directed and managed by a Senior Procurement Person who would be actively supported by senior management.

To ensure that the process would survive scrutiny by the public and the courts - The Procurement Officer hired a Fairness Officer whose role was to ensure that the process was conducted in an unbiased and defensible manner; He attended all project team meetings to provide guidance and assistance in planning the process, developing the RFPs and performing the evaluations.

To ensure that the evaluators did not compromise the process - Each member of the Evaluation Committee was required to declare that he/she had no conflict of interest in this procurement and to agree to a code of behavior to ensure that his or her activities would not favor, nor appear to favor, any particular supplier;

To involve legal staff - General Counsel was actively involved in the preparation of the RFPs and would review each RFP prior to it being issued;

To have the RFPs developed by the Project Team - The project team consisted of senior staff from key departments including Planning, Operations, Environmental Compliance, and Finance. Attendance at the monthly planning meetings would be mandatory. The Project Team would later evaluate the proposals.

To document the entire process - The process would be document-driven to ensure that “fair and open” could be easily demonstrated. In addition to the RFPs, the following documents would be produced/utilized:

- Procurement Plan
- Evaluator agreement form
- Evaluation Guide
- Fairness Plan

Four different RFPs were prepared and issued at the same time. Each RFP solicited proposals for managing a portion of OCSD’s biosolids through a different technology. These four RFPs were almost identical, differing only in their specification of the particular technology to be utilized or the market into which the resulting products were to be sold. These RFPs were carefully crafted over a period of about six months to reduce the risks of misunderstandings, miscommunications, and litigation. OCSD took great care to structure the RFP process and the documents to ensure that all of their actions could survive close public scrutiny:

The RFPs were relatively complex although they were less than 40 pages in length. There were lots of notable features, innovations, and “best practices” built into these RFP.

The Use of a Two-Step Evaluation Process. Four different RFPs were issued for four different markets/technologies. During the first step, all the proposals received for the first RFP were evaluated and a “winner” selected. This was done for each of the four RFPs resulting in four “winners”. The selection was based on the stated evaluation criteria which emphasized technical, marketing, and corporate factors. During the first step, cost would be only worth 10%.

Phase 2 selection was made of the ‘best of breed’ from among the four surviving proposals. During Phase 2, these “winners” were re-evaluated and negotiations undertaken in the order that they had been ranked. Cost, environmental factors and risk were the factors, not technology, so it was a business decision driven by money, probability of success and strategic issues related to environmental concerns (key with public).

Here is how the RFP summarized this process.

The Evaluation Process

Phase 1

There is a two step selection process. First, we will evaluate the proposals for each of the four technologies separately and select the proposal which represents the “best value” for each technology.

Phase 2

We will now have identified the “best value” proposal for each technology. We will then review and evaluate each of these leading proposals based on the following factors:

- *An analysis of the risks*
- *Total life cycle cost*
- *Environmental concerns and impact.*

Inclusion of Risk and Environmental Issues as Evaluation Criteria in the Proposal. The evaluation factors for Step 2 were selected and finalized only after a great deal of discussion and deliberation by members of the Project Team. Risk Analysis often provides insights into the project which are truly informative and assist the Project Team in their evaluation. Some previously unidentified risks may directly influence the evaluation of a vendor’s project plan, staffing, or timetable. Total Life Cycle Costs provides another perspective on the financing of the project. The final factor, environmental issues, was developed specifically in response to

the Project Team's concerns related to the potentially negative effects of any technology.

Section 10 *Risk Analysis*

Identify the major risks associated with this project. For each risk, identify those activities which can be undertaken to reduce, mitigate or eliminate the risk. Identify the associated responsibilities. Ensure that these activities are reflected in your project and management plans.

Section 11 *Total Life Cycle Costs*

During Phase 2 of the evaluation, OCSD will calculate the total life cycle costs. Identify any value-added costs or benefits which you believe should be included in our costing analysis.

Section 12 *Environmental Issues*

We want Proposers to identify the environmental impact of the Proposer's procedures and technologies for processing and handling biosolids. We want the Proposers to identify ways in which the environmental impacts can be mitigated.

Potential impacts include factors such as:

- *air emissions*
- *annual power consumption*
- *water consumption*
- *nuisances (odor complaints, traffic, aesthetics, etc),*
- *buildup of constituents in the soil, etc from our processing, hauling and our offsite management of our product.*
- *Proposals could, for example, mitigate environmental impacts by the following activities:*
- *managing the material in closer proximity to the OCSD (fewer truck miles, emissions, less traffic etc),*
- *taking wetter material (less dewatering energy needed, pumped material = no trucks etc),*
- *creating products that do not add constituents (contaminants) to soil (bricks, synthetic coal, glass tile, etc) or air, or*
- *having low or no emission vehicles haul the material.*
- *creating a product within our service area or utilizing the material within our service to reduce hauling impacts*
- *growing trees to offset CO₂ emissions.*

Identify the environmental impacts of your proposed biosolids management program. Identify your plans for mitigating any negative environmental effects.

Development of a Long List of Reserved Rights. Most organizations take great care to ensure that all of the rights that they might invoke are identified in the RFPs. This serves several purposes. First, it re-iterates what the lawyers in that jurisdiction believe are important issues. This keeps the legal team member happy.

Just as importantly, it serves to make the vendors aware of the “small print” in the RFP – special circumstances and behaviors that the Buyers may invoke. For example, one of the reserved rights is the right to eliminate mandatory requirements unmet by all Proposers. This instructs Proposers that if one mandatory condition is impossible to meet, and they believe that all the others are in a similar situation, then they should still consider submitting a proposal.

Section 1.17 Rights Reserved By OCSD

Many of the technologies are unproven and potentially high risk. This RFP does not obligate OCSD to accept any proposal or proceed with negotiations and award of a contract. To enable OCSD to acquire goods and services that represent the “best value,” OCSD reserves the right to:

- a. Accept or reject any and all submittals, in whole or part;*
- b. Discuss different or additional terms to those included in this RFP or received in any response;*
- c. Amend or modify any terms of this RFP;*
- d. Cancel this RFP and issue an alternative RFP;*
- e. Define requirements to meet OCSD’s needs and to modify, correct and clarify requirements at any time during the process provided the changes are justified and that modifications would not materially benefit or disadvantage a Proposer;*
- f. Eliminate mandatory requirements unmet by all Proposers;*
- g. Establish evaluation criteria relating to quality, quantity, performance and cost; establish the relative importance of each criterion; and evaluate proposals as well as award contracts on the basis of these criteria. As a result, service and technology procurements administered through an RFP process would not necessarily be awarded to the responsible Proposer submitting the lowest cost proposal.*
- h. Waive the requirement to include in the Proposer’s submittal those mandatory items set forth in Table 5 by allowing the Proposer to submit a supplement to its proposal within 72 hours of receiving notice from OCSD, provided that OCSD determines that (i) the Proposer gains no advantage from the opportunity to correct the deficiency; and (ii) other Proposers suffer no disadvantage.*
- i. Disqualify proposed solutions that fail to meet mandatory requirements;*
- j. Include an assessment of total life cycle costs and benefits in addition to the Proposers’ costs in selecting the proposal most advantageous to OCSD;*

k. Consider every offer as firm and not revocable for a period of 180 days from the Proposal Due Date or such other period of time specified in the solicitation. Subsequent to such 180 day or other specified period, an offer may be withdrawn in writing;

l. Negotiate with several Proposers concurrently;

m. Ask for best and final offers;

n. Terminate negotiations with any Proposer after a period of not less than two weeks if, in the judgment of OCSD, an acceptable contract has not been agreed to. (We may then invite the Proposer who submitted the next highest scoring proposal for that technology to negotiate a contract with us.)

o. Award a contract for any or all parts of a proposal and negotiate contract terms and conditions to meet OCSD's program requirements consistent with the solicitation;

p. Establish that in the event two offers are found to be substantially equivalent, total life cycle cost shall be the basis for determining the award recipient or, when total life cycle cost and other factors are found to be substantially equivalent, the determination of the OCSD Board of Directors to award a contract to one or more of such Proposers shall be made in the sole discretion of OCSD and shall be final. The basis for determining the award shall be documented in the Procurement Record;

q. Elect to award a contract to one or more responsive and responsible Proposers, provided that the basis for the election among multiple contracts at the time of purchase shall be the most practical, environmentally sensitive and economical alternative and shall be in the best interests of OCSD;

r. Require, at the discretion of OCSD and where not otherwise mandated by law, a bond or other guarantee of performance be submitted with the proposal, and to approve the amount, form and sufficiency thereof.

s. To reject the use of any subcontractor selected and proposed by Contractor for the performance of more than one-half of one percent (.005) of the total value of the agreement between District and Contractor. Rejection shall be for cause only, based on District's determination of subcontractor's prior breach of contract or breach of performance standards in similar contractual situations with District or other public agency.

Utilization of Minimum Acceptable Qualifications to Discourage Unqualified Vendors from Submitting Proposals. The Project Team was concerned that unqualified vendors could, at least in theory, read an RFP and decide that they

could win. To discourage unqualified vendors from spending money needlessly and to promote good vendor relationships, the Project Team decided to publish their minimum qualifications. This list was accompanied with the statement that “Firms failing to satisfy these minimum qualifications, as defined, will be eliminated from further consideration.”

Section 4.3 *Minimum Acceptable Qualifications*

There are many potential risks associated with this project related to a wide range of factors such as acquisition of a suitable site, financing, permitting and experience of the Proposer’s team. We have identified some of these critical success factors and a corresponding set of minimum acceptable qualifications as criteria in Table 1 on the next page.

Firms failing to satisfy these minimum qualifications, as defined, will be eliminated from further consideration.

These Minimum Acceptable Qualifications were rudimentary but did serve to stop some totally unqualified vendors from submitting proposals. These qualifications also caused some vendors to seek partners possessing the missing qualifications so that they could, when combined, submit solid proposals.

Here is the table from the RFPs.

Table 1: Minimum Qualification Criteria

Criteria	Instructions to Proponents
1. Siting	Provide evidence that you have a suitable site. Examples of acceptable evidence are (i) a copy of lease/purchase documentation or option to lease/purchase document or (ii) a copy of a Memorandum Of Understanding with site owner.
2. Biosolids Management Experience	Provide one reference for your experience in biosolids management or similar organic management in North America. (Note that this experience does not necessarily have to be based on management involving the same process as that proposed and could be based on hauling, for example.) Include the name of the person, the public entity, its address, and telephone number for whom you provided such service.
3. Design, Construction & Operation Experience	Provide at least 1 reference for design, construction, and operations experience of a currently operating facility using similar processes anywhere in the world. (Note that the process or processes are not limited to biosolids feedstocks and could involve, for example, trash, or wood waste.) Include the name of the person, the public entity, its address, and telephone number for whom you provided such service.

4. Product Quality	Provide documentation from tests or other facilities using the same process of feedstock and product quality and anticipated product quality for OCSD based on biosolids quality data provided in Attachment 1.
5. Product Markets	Provide at least one letter of interest from an organization willing to purchase or consume product(s), or identify the team member that is the end user. For each, provide the name and address of the entity, the name of the contact and telephone number, and the quantity of product they anticipate to acquire each month.
6. Insurance Capabilities	Provide a completed Acknowledgement of Insurance Form which is provided in Attachment 6 of the RFP. Provide documentation to show that you, or one of the team member's bond rating, from a third-party bond rating firm, is A or better.
7. Non-compliance, Criminal & Financial Disclosure	Complete the Declaration of Minimal Suitability that is provided in Attachment 7 of this RFP.
8. Health & Safety Record	Provide the following documentation for construction and operations sections of the team: <ul style="list-style-type: none"> • Experience Modification Rater (EMR) for the three most recent years. If EMR is > 1, provide explanation. • OSHA 200 logs for the three most recent years. • Statement that the company has a drug screening program for all employees, including sub contractors. (Supporting documentation will be required before a contract is finalized.)

Requirement for a Product Marketing Plan. The RFP was seeking proposal for a complete management system, not just components. One of the key components would be the Proposers ability to market and sell the products produced. While many vendors possess technology which could be used to process biosolids, and other vendors have good marketing and selling skills, few vendors possess both. The specification of product marketing as an important factor was to encourage suppliers to propose complete systems, not simply pieces.

Section 6 *Product Marketing and Revenue*

The Proposer should present the marketing plan for use of the biosolids product(s). This should include identification of the range of products to be manufactured, the target markets, current and future size of the markets and acceptability of biosolids products in these markets. The status of contracts with the end users should be presented. If the end user is already a part of the team, this should be stated, along with information on the end use, such as maximum amount of biosolids that can be used and the anticipated life-span of that specific use. Product specifications for each target market should be included in the marketing plan. Any seasonal variations in the market should also be identified and product storage or other methods of managing seasonal variations should be presented.

Developing a Sensitivity Analysis for Key Product Variables. The Project Team was concerned that a small change in one underlying factor could have a dramatic negative impact on the effectiveness of a particular solution. They wanted the Proposers to provide information about key product variables. For example, what happens to the unit cost if gasoline, or natural gas charges double? Will the Proposer go bankrupt? What happens if a particular marketing initiative fails? Does the Proposer have alternative markets for the products?

Sensitivity Analysis

The effect of key project variables on the project economics should be discussed. Pertinent variables may include project size, location, energy costs, fuel costs, and product markets.

Other RFP Features to Promote Excellence. The RFPs had many other features that promoted the development of complete proposals, improved the information content for the evaluators, or made the process easier to defend as “fair and open”. Here are thumbnail sketches of some of them:

- Providing addition information – Rather than establish a document room, OCSD ensured that the critical documents were available from their web site.
- Identifying Proposers’ responsibilities – The RFP identified the tasks each Proposer had to complete for is proposal to be responsive. These tasks included submitting responses by the required dates, and satisfying the mandatory requirements as specified.
- Generating a timely complaint – The RFP instructed the Proposer that information about “unduly restrictive”, or “contradictory provisions” must be sent to OCSD within seven days of receipt of the RFP.
- Providing adequate preparation time – This was a complex RFP requiring lots of information and documentation from the Proposers. For these reasons, the RFP was open for 90 days. As expected, there still were requests for additional time.
- Identifying mandatory requirements - The Project Team identified 35 mandatory requirements. Proposal that failed to satisfy one or more, or proposals that missed a mandatory requirement would be eliminated

from further consideration. To assist vendors in submitting compliant proposals, all of the mandatory requirements were identified in a table which Proposers could use as a checklist.

- Providing adequate time for evaluation – The Project Team anticipated that there might be an extensive period of negotiation with one or more Proposers. To accommodate this requirement, Proposals were to be irrevocable for 180 days.
- Reducing the risk of non-performance – The RFP required that the Contractor post a performance bond equal to twice the annual value of the contract.
- Ensuring fair and open competition – The Statement of Work contained in the RFP was prepared by the consulting engineers who developed the long term plan. This firm was prohibited from submitting a proposal or assisting any other entity in the preparation of its proposal, or being a sub-contractor on any proposal.
- Identifying all the players – The RFP required each Proposer to provide information about “Proposed legal and working relationship between Proposer and all subcontractors, if applicable, and all entities having a financial interest in the proposal.” It also required a letter for “each subcontractor or entity having a financial interest in this proposal that it has read the proposal and agrees to be bound by any resulting contract.”
- Declaring that public participation was important – The RFP stated that “the Proposer will implement a proactive public participation and community involvement program to cover the product manufacturing facility, as well as product markets.” The requirement provide the Proposers with direction and the public with re-assurance that the issue was important to OCSD.
- Eliminating under-capitalized or poorly finance Proposers – While cost was only given a weight of 10% during Phase 1 of the evaluation, financial health was critical. The RFP stated that “firms failing to get at least 70% score on our evaluation of Section 8A of your proposal will be eliminated from further consideration.

EXAMPLE #3: STATE BUREAU OF PROCUREMENT, STATE OF WISCONSIN

Recently, I gave a workshop on Best RFP Practices to the Procurement group at the State of Wisconsin. While doing that, I came across an exemplary RFP - not perfect but one that does embody some great practices.

This 24-page RFP for Consulting Services¹⁷ (to move several state agencies' processing centers into the central unit) is well organized and easy to understand. It has been included, not because it is perfect, but because it incorporates many best practices, including several rarely used by Agencies. Here are some of its highlights:

- The first page contains Definitions to promote common understanding.
- The RFP accurately identifies the actual purpose of the RFP.
- The Statement of Work clearly identifies each deliverable.
- The Organization and Format of each section of the required Proposal is prescribed.
- The Award Process is explained in an easy-to-understand way.
- Each vendor is required to deal with the issue of a critical person leaving once the project has begun:
- Experience is used as Proof of Concept.
- Unlike many RFPs, this one requires the vendor to provide a risk management strategy.
- The Budget is published.

The first page contains Definitions to promote common understanding. This page, often omitted from RFPs, helps to ensure that the meaning of each key term, acronym and abbreviation are is clear. For example, "proposal" does not mean any document submitted by a vendor but only a complete document:

"Proposal" means the complete response of a proposer submitted on the approved forms and setting forth the proposer's prices for providing the services described in the RFP.

The RFP accurately identifies the actual purpose of the RFP. The purpose of this RFP is not simply to invite vendors to submit proposals or to describe the Agency's problem but rather to provide vendors with *all* the information needed to create a proposal capable of winning.

The purpose of this Request for Proposal (RFP) is to provide interested parties with information to enable them to prepare and submit a proposal for shared IT infrastructure strategic consulting services. The Department of Administration (DOA), Division of Enterprise Technology (DET), as represented by the DOA State Bureau of Procurement, intends to use the results of this solicitation to award a contract for such services as a one-time engagement.

The Statement of Work clearly identifies each deliverable, for example, under Communications:

- *Develop and provide a standard communication plan framework*
- *Draft a list of FAQ's at the program level*
- *Build a program level website (SharePoint)*

The Organization and Format of each section of the required Proposal is prescribed in two pages of instructions. Many RFPs are unclear or intentionally ambiguous about Mandatory Requirements, often using phrases such as 'proposals failing to meet a mandatory requirement *may* be rejected, this RFP is quite clear:

Response to Mandatory Requirements

Provide a point-by-point response to each requirement specified in Sections 4.1-4.2 of this RFP. Responses that fail to meet the mandatory requirements shall be rejected.

The Award Process is explained in an easy-to-understand way.

Award and Final Offers

The State will compile the final scores for all sections of each responsive proposal. The award will be granted in one of two ways. The award may be granted to the highest scoring responsive and responsible proposer. Alternatively, the highest scoring proposer or proposers may be requested to submit final and best offers. If final and best offers are requested by the State and submitted by the proposer, they will be evaluated against the stated criteria, scored and ranked by the evaluation committee. The award then will be granted to the highest scoring Proposer. However, a Proposer should not expect that the State will request a final and best offer.

Each vendor is required to deal with the issue of a critical person leaving once the project has begun. This is always a problem when it occurs and is intolerable on time-critical projects where 'time is of the essence':

Identify and provide a resume for the Project Manager that will be assigned to this project and any additional projects they will be involved in during the Contract. The Project Manager will be the primary point of contact for DET and must be available on an as-needed basis. Describe how the Project Manager will guarantee availability to DET during the entire duration of the project.

Experience is used as Proof of Concept. (A Proof of Concept is a term used in Information Technology meaning a demonstration, usually of software, to prove or verify that it does what was claimed by the vendor. In this context, using Experience as proof of concept means that the Evaluators want each proponent to demonstrate by its directly applicable past actions that it is capable of doing this specific work. Information Technology firms understand the meaning of “Proof of Concept”. Using this term in the RFP informs the Vendors that this is critical information, a pivotal issue in the evaluation. The RFP demands examples of work done, and details about methodologies and approaches used

5.1 Experience as Proof of Concept

5.1.1 A critical objective of this engagement is to produce a repeatable tool the DET can use as a standard to successfully onboard agencies to a consolidated IT infrastructure. Considering the deliverables required and identified in Section 1.4 for each of the service components of this project, describe your company’s experience providing similar services and tools in the following concentrations:

*Project Management
Organizational Design
Communications
Human Resources
Process Management
Infrastructure
IT Contracts and IT Budget*

5.1.2 Provide one (1) example each of a transition plan and project charter produced on behalf of another client organization with needs similar to those described in this RFP.

5.1.3 Describe the methods your company uses to identify work efficiencies, inefficiencies, unnecessary duplication of efforts and process redundancies in consolidation efforts such as this. Include a brief, illustrative example where these methods have been applied and successfully executed.

5.1.4 Describe the methodologies your company will use during the supplemental information gathering process (e.g. survey tools, interviews) to review and analyze agency organizational structures. Include all information and resources your company would require from DET and/or impacted state agencies to complete this process.

5.1.5 Describe your company's experience with motivating key stakeholders to implement change during a project. Include the strategies your company uses and provide one (1) brief, illustrative example where these strategies were successfully implemented.

5.1.6 Provide one (1) example of a communication plan produced on behalf of another client organization with needs similar to those described in this RFP.

5.1.7 Provide brief illustrative example(s) work products provided to clients with similar needs (e.g. website screen shots, Frequently Asked Questions (FAQs), etc).

5.1.8 Provide one (1) example of a mapping template for mapping agency processes to Enterprise ITIL.

5.1.9 Provide an example of the tool(s) used to inventory IT contracts, budget, asset life cycles and inflight projects for impacted agencies in engagements similar in scope to this RFP.

Unlike many RFPs, this one requires the vendor to provide a risk management strategy:

Describe the methods your company uses to identify risks to a project's success and the strategies to mitigate them. Include a brief, illustrative example where these methods and strategies have been applied.

The Budget is published to ensure that Proponents understand the small amount of funding available for the seemingly large amount of work required.

Proposer must provide a total project cost to include all requisite services, materials, work products and ancillary expenses. The engagement will be a time and materials project and the total cost of the entire engagement cannot exceed \$45,000.

PART 2 – GETTING IT RIGHT

PROBLEM-SOLVING FEATURES OF RFP DOCUMENTS

Many problems occur from jurisdiction to jurisdiction and from RFP to RFP. Yet many fundamental issues are the same. I was recently given the opportunity of participating in a very exciting project: to select a systems integrator for a multi-million dollar project involving development, process and support for a health-care initiative.

The RFP which we constructed had a number of interesting features which, we believe, helped shape the project, and would contribute to its overall success. The RFP was some 220 pages in length, consisting of about 60 pages of administrative details and 160 pages of functional specifications for the systems.

In this section, we have identified some of the important features of this RFP, and discuss the problems that each feature is intended to address.

PROBLEM 1: MULTIPLE PROPOSALS ARE DIFFICULT TO EVALUATE

Suppliers often have several different approaches, or several different options or techniques that they can propose. Each option or technique has its merits and may be viewed differently by the evaluation committee. For this reason, some suppliers like to provide options within their proposal and let the evaluators decide on the selection of a particular option. This approach can make the evaluation process extremely complicated and provide an unfair advantage to a supplier proposing a solution constructed of various options to be chosen by the customer.

To eliminate this problem, the RFP included the following paragraph:

Proponents are advised that the submission of multiple proposals, or alternative approaches to specific sections of the requirements, will be considered non-compliant and those proposals will be disqualified. We are relying on the proponent as expert, to identify in its proposal the approach which the proponent believes will be the most effective to produce the required systems and services on time and within budget.

Some organizations permit multiple proposals from the same vendor but insist that each alternative be presented as a complete proposal. In recent years, this has emerged as a common practice.

PROBLEM 2: AUTHORITY IS OFTEN UNCLEAR

On large projects, it is often unclear as to who can instruct the supplier to do some additional work. The project manager or director may not have spending authority or may not even be an employee of the purchaser, but rather under contract.

To eliminate this problem, the RFP included the following paragraph:

With respect to this RFP, only the Project Authority is empowered to:

- *sign contracts or other commitments;*
- *commit the Province to the payment of any money pursuant to contracts signed;*
- *issue instructions to a successful proponent;*
- *accept any deliverable.*

Any specific delegation of this authority will be conveyed to the contractor in writing.

The Project Authority is: (name)

On large projects, payment is usually tied to "acceptance" of certain products or "completion" of certain tasks. But when does "acceptance" or "completion" occur? And who decides when it occurs.

To eliminate this problem, the RFP included the following paragraph:

4.0 ACCEPTANCE AUTHORITY

4.1 All work performed under any resultant contract or any extension thereof must be approved by the Project Authority.

4.2 The Project Authority will provide an Acceptance Testing Group with the responsibility to develop testing procedures, prepare test data, and perform acceptance tests of all equipment, software, applications programs, communications capabilities as well as documentation and training materials.

4.3 The Acceptance Testing Group will implement a testing methodology and standards and will provide these to the Systems Integrator and any other stakeholders.

4.4 The Acceptance Testing Group will identify all deficiencies in writing and provide this information to the Systems Integrator. The Acceptance Testing Group has no authority to change any specifications, terms, or requirements.

4.5 The Acceptance Testing Group will inform the Project Authority of the test schedule, the status of each test when run.

4.6 Should the work or any portion thereof be deemed unacceptable or fail to pass an acceptance test, the Project Authority reserves the right of rejection or to request correction.

PROBLEM 3: THE PRIME CONTRACTOR'S ROLE IS TOO LIMITED

Systems Integrators often include a list of responsibilities within their proposals. In fact, they are stating those activities, tasks, and items for which they will assume responsibility. Their usual approach is to ensure that all other tasks default to the purchaser. As new tasks are identified during the course of the actual project, the Systems Integrator increases the price. The identification of unanticipated but required tasks during the course of a project is known as 'scope creep'. This approach can increase the cost of the project by 10% or more beyond the original budget. On occasion, changes have been known to equal the original contract price.

Here's a simple example of scope creep. Suppose both the systems integrator and the purchaser failed to identify "preparation of test data" as an activity defined in either the RFP or the proposal. Since the responsibility for this task was not identified in the proposal, the Systems Integrator would argue that it is an extra charge (to be paid by the purchaser).

To resolve this issue beforehand, the RFP stated that all tasks are the responsibility of the Systems Integrator except those few which were described in the RFP and assigned in the RFP to the purchaser. In this way, the argument was decided beforehand: if a new task arose, it was the responsibility of the Systems Integrator and it was, therefore, included in the original price.

Here is the wording used in the actual RFP:

4.1 Prime Contractor

The System Integrator selected as a result of this RFP and the evaluation process will be the prime contractor responsible for all aspects of the development, installation, testing, and operation of the Pharmacy Network. All responsibilities and work except that specifically excluded from the project within this document is the responsibility of the System Integrator.

PROBLEM 4: CONTRACT PROVISIONS ARE "DEAL STOPPERS"

The purchasers wanted to ensure that all of the major contract terms were identified in the RFP and dealt with in the supplier's proposal. In this way, disagreements over key contract issues could be avoided or, at least, identified and quickly resolved.

The RFP identified five pages of desirable clauses and approaches but none of these was declared as being mandatory. The proponents were instructed to identify (in the executive summary of their proposal) any contract terms that were not acceptable and to propose alternatives which would be acceptable. The Agency can use this information to negotiate with proponents before evaluations are concluded.

7.9 Proposed Contract Terms

We have prepared a list of clauses and issues which we believe should be included in any contracts resulting from this RFP in order to ensure that there is a complete understanding of the business relationship between the parties. These terms are listed below.

The resulting contracts developed with the selected proponent should include but not be limited to these clauses. . .

Proponents must indicate acceptance of the contract clauses indicated in this section. Alternatively, if the proponent is unwilling to agree to a proposed clause or term, then your Executive Summary must reference an appendix, which identifies those clauses in dispute and should

(a) suggest a specific alternative term, clause, or approach;

(b) provide an explanation of your reasons.

We anticipate that some proposals will have several alternative clauses.

Alternatively, there are other ways to resolve “deal stoppers”. The state of New Mexico includes the actual contract in their RFPs. Vendors are permitted to comment on specific clauses and suggest alternatives. New Mexico then revises the contract and uses the Best and Final Offer process to impose the contract on all Proposers.

PROBLEM 5: FINANCIAL DATA BIASES THE EVALUATION

From the outset, the Project Director recognized that there could be significant differences in the costs associated with each proposal. It was also felt that knowledge of the cost might influence the evaluators who were looking at functionality. To ensure that the process was fair, the people evaluating the proposed solution did so without any knowledge of the associated costs.

In preparing your proposal, the financial section should be completely separated from other sections, and should be provided under separate cover.

This procedure of having two envelopes, one for the technical proposal and a separate one for the costs, removes any argument related to the Evaluators being influenced by their knowledge of the costing information. Using this approach, Evaluators do not learn about the costs until they have assessed the technical proposal.

This is the accepted practice in most jurisdictions.

PROBLEM 6: PROJECT MANAGEMENT IS POORLY DEFINED

Many organizations know that project management is a critical success factor. However, it is often difficult to decide on the questions to be included in the RFP. If the questions are not detailed enough, then it is difficult to judge the soundness of the plans. We believed that Project Management issues would be critical to the success of the project. We, therefore, emphasized this factor.

The following information is required whenever project management issues are discussed in your proposal:

- *Project Management Approach: Describe your project management approach including: (1) the method used in managing the project; and (2) the project management organizational structure including reporting levels and lines of authority.*
- *Project Control. Describe your approach to project control, including details of the methods used in controlling project activities*
- *Project Schedule. A chart of project progression from beginning to completion that includes the achievement milestones upon which progress payments will be claimed.*
- *Status Reporting to the Project Authority. Describe your status reporting methodology including details of written and oral progress reporting.*
- *Interface with the Project Authority. Describe your contact points with the Project Authority includes types of communications, level of interface, and identify by name those personnel who may commit your organization and to what extent.*

PROBLEM 7: SUBCONTRACTORS CAN CONFUSE RESPONSIBILITIES, ROLES AND RISKS

This was a large project which would, by its very nature, promote working partnerships among companies, the use of sub-contractors, and the formation of consortia. It was important both in terms of legal agreements as well as working relationships that the organization know the status of each person on the project and their skills. The RFP placed demands on the proponents in excess of those normally found in smaller RFPs. The organization wanted to know who was going to do the work, their corporate affiliation, and their skills and experience.

The organization was also concerned that key individuals, with essential experience, not be arbitrarily removed from the project.

Here is what the RFP stated:

Subcontracted Work

Your proposal must include the following:

- A statement indicating the exact amount of work to be done by the prime contractor and each subcontractor, as measured by percentage of the total 3-year cost.*
- If a subcontractor is proposed, a statement on the subcontractor's letterhead should be included in the proposal which is signed by an authorized offer of the subcontracting firm and states the general scope of the work to be performed by the subcontractor, and the exact legal relationship between the prime contractor and subcontractor (distributor, agent, etc.)*
- A statement identifying the linkage (that is, the legal relationship) between the Prime Contractor and each person proposed on the project.*

(d) Personnel

All proposed project personnel including all subcontractor staff must be identified with a resume in the proposal. Each person's role in the project is to be identified and documented using the prescribed form. Pharmacare reserves the right to approve or disapprove any change in the successful proponent's project team members whose participation is specifically offered in the proposal. This is to assure that persons with vital experience and skill are not arbitrarily removed from the project by the prime contractor.

PROBLEM 8: RISKS ARE LEFT INTENTIONALLY VAGUE

USING RISK AS AN EVALUATION FACTOR

Your next RFP will attract better proposals if it deals with risk. Don't ask vendors to describe "their understanding of the project." Rather, ask them to provide a three-page analysis of risks. Let them identify each risk, its source, and the steps that can be taken by each stakeholder to eliminate or reduce the risk. Then instruct them to include these tasks in their project plan (and cost).

Make risk one of the evaluation factors or part of each major evaluation factor. Simply introducing a paragraph into your RFP demanding Risk Management information will markedly improve the quality of information you receive and your ability to evaluate the vendors and their proposals.

The management of risk is a standard business practice. Risk analysis is the process of assessing, managing and communicating risks. It is an established profession with books about the subject, several journals, and associations. Because of the ubiquitous nature of risk, risk analysis is inherently an interdisciplinary subject with many content-specific applications in engineering, finance, health, transportation and military systems.

Risk analysis and knowledge about this discipline is all around us. If you do a search on the web using "risk analysis" or "risk management", you'll get hundreds of thousands of "hits": books, associations, courses, consulting firms, software, articles, and scholarly papers.

In recent years, risk analysis has emerged from the back room of insurance companies, and disaster planners. It is now a popular and accepted business tool. The military has always included risk analyses in its RFPs. However, few non-military RFPs mention risk, and even fewer have Risk Management as an evaluation factor.

Many government entities such as cities or counties have Risk Managers who concern themselves with activities such as subdivision development, provision of sewer services, and traffic management. But few deal with RFPs! Or projects!

The Federal Perspective

In the U.S., at the federal level, the use of risk as an evaluation factor is well understood. The Federal Acquisition Regulations state that the risks associated with each proposal shall be documented in the project file:¹⁸

15.305 Proposal evaluation.

Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully. An agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation. Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file.

Two examples will illustrate the federal approach, one from the Census Bureau and one from the Air Force.

Census Bureau

The Census Bureau includes risk in its determination of Best Value¹⁹ and Best Value includes an assessment of risk.

M.1 BASIS FOR AWARD

The Census Bureau's source evaluation will be based on best-value principles. Accordingly, award will be made to the responsible and technically acceptable Offeror whose proposal provides the greatest overall value to the Government, price and other factors considered. This best-value determination will be accomplished by comparing the value of the differences in the technical factors for competing offers, based on their strengths, weaknesses, and risks, with differences in their price to the Government. In making this comparison, the Government is more concerned with obtaining superior technical, and management capabilities than with making an award at the lowest overall cost to the Government. However, the Government will not make an award at a significantly higher overall price to achieve slightly superior technical approach.

US Air Force

As a second and final example, the US Air Force uses Proposal Risk as an Evaluation Factor³: "In accordance with the RFP, award will be made to the offeror proposing the combination most advantageous to the government based upon an integrated assessment of the evaluation factors and sub factors. The evaluation factors are past performance, proposal risk, mission capability, and cost/price."

In accordance with the RFP, award will be made to the offeror proposing the combination most advantageous to the Government based upon an integrated assessment of the evaluation factors and subfactors. The evaluation factors are Past Performance, Proposal Risk, Mission Capability, and Cost/Price. Past Performance and Proposal Risk are equal and each is significantly more important than Mission Capability, which in turn, is significantly more important than Cost/Price. Within the Mission Capability Factor, the Subfactors are of equal importance. All evaluation factors other than Cost/Price, when combined, are significantly more important than Cost/Price. The four subfactors under Mission Capability Include (1) Operation & Maintenance (O&), Repair, Launch/Power Plan Support (2) Contractor Computerized Management System (CCMS) (3) Reliability Centered Maintenance (ReM), and (4) Phase-In.

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The Government assessed the offeror's proposal risks inherent in the proposed approach, the impacts on cost and schedule associated with the approach, the subcontractor relationships and arrangements to the approach, and the propose personnel's ability to Implement the approach; plus the approach for minimizing the impact of said risks on the overall success of the requirements defined in the SOW.

In both examples, the government assessed the risks inherent in the offeror's approach, the effect on cost and schedule, the subcontractor relationships and arrangements, and the proposed personnel's ability to implement the approach. It also evaluated how well the approach minimized the impact of those risks on the overall success of the defined requirements

State and Local Governments and Their Agencies

In contrast to federal RFPs, the RFPs issued by state and local governments and their agencies are woefully ignorant of risk analysis. Risk is simply ignored as an evaluation factor in almost all RFPs. A search of 'risk' within an RFP often returns 'no hits'.

For those few public sector RFPs from state and local governments and their agencies that actually identify risk as an evaluation factor, there are two approaches.

First, you can use Risk as a totally separate evaluation factor with separate scoring and its own points. Here is some language used to obtain the information from the vendor:

Identify the major risks associated with this project. For each risk, identify those activities which can be undertaken to reduce, mitigate or eliminate the risk. Identify the associated responsibilities. Ensure that these activities are reflected in your project and management plans.

This approach certainly provides much more information than not having risk as an evaluation factor. By establishing a minimum score for this factor, high risk proposals can be eliminated from further consideration.

The second approach is to use risk, not as an Evaluation Factor, but as a subfactor under each major factor. In this approach the RFP would state that:

For each major evaluation factor stated above (Cost, Technical Solution, Project Management), identify the major associated risks. For each risk, identify those activities which can be undertaken to reduce, mitigate or eliminate the risk.

The most sophisticated approach that I have come across is a two-stage evaluation process. The RFP indicated that during Stage 1, each proposal would be evaluated using the specified factors one of which was risk. It then stated:

We will determine a short-list based on the scores from Stage 1. For those proposals that exceeded the minimum required score, a second evaluation will be performed based on only three critical factors:

Factor	Weight
Risk	40%
Cost	40%
Environmental Impact	20%

Often, RFPs require that the proponents state their understanding of the project, or state their experience on similar projects. The Project Director decided to frame this question differently. The RFP would instruct each proponent to identify and discuss the risks associated with the project. This discussion would clearly indicate the proponent's experience on similar projects, as well as providing valuable information for the Project Director.

PROBLEM 9: PRICING IS NOT SUFFICIENTLY STRUCTURED

The RFP structured the pricing information provided by each supplier. There were several interesting features of this section:

- To assist in the determination of the estimated life-cycle cost of the project, suppliers were required to categorize each cost as "fixed", "estimate with a ceiling", "estimate without a ceiling price", etc.

- To simplify the task of ensuring that the costing was complete, costs were to correspond to the project plans. For every project task, there was a corresponding cost.
- To simplify contract administration, payments were to be linked to specific project milestones.
- To reduce the amount of work required to analyze each proposal's costs, proponents were required to submit costs in both hardcopy and electronic form. This permitted the buyer's financial analysts to standardize the analysis, using their own spreadsheet software.

Here is part of the RFP section dealing with costs:

Pricing Instructions

Your response should be submitted in a separate sealed package, clearly labelled on its exterior.

We are interested in obtaining financial data that is as precise as possible. We recognize that there are a variety of "prices" that can be quoted. Some are fixed; others depend on factors such as volume of processing, rate of inflation, or level of effort required.

We are interested in obtaining a fixed-price quotation for goods or services whenever possible. Clearly, the price of a specific piece of equipment can be stated precisely. Other prices, such as yearly maintenance or support can be stated as fixed-price quotations or fixed-price subject to annual review or adjustment. There is a hierarchy of preferences regarding price evaluation. The best, from our perspective is a fixed fee quotation. The worst, in terms of planning and evaluating, is an open ended amount. It is quite acceptable to mix and match different pricing schemes on the different components or phases, as long as a single "best price" is submitted for any unit of work.

Proposals will be preferred which avoid transaction based pricing, but rather deal with the provision of a stated capacity, with allowance for a 20% annual growth rate in business volumes.

Your response must be presented in the same sequence as the building blocks (major project components) identified as sections 5.3.1 through 5.3.6 of this RFP.

Requested Spreadsheets

Spreadsheets of costs must be submitted in hard copy as well as on diskette in either Lotus 1-2-3 or EXCEL format.

... provide a comprehensive schedule of costs that corresponds to plans presented in the "Proponent's Response" section of your proposal. Separate schedules are required for Development, Support, and Processing activities within each section.

Costs must be assigned to the time period in which they will be incurred:

(a) Development Phase - between the start of this project and the start of integration testing . . .

(b) Integration Testing Phase . . .

(c) System Operations Phase - three one-year consecutive terms . . .

Each cost schedule will, therefore, have 5 columns: (a), (b), (c-year 1), (c-year2), (c-year3).

Costs should be identified by project activity and by resources required. For example, one of the entries might be:

Completion of the design of sub-system XYZ \$20,000 (fixed amount) . . .

(2 system designers @ 10 days @ \$800/day)

The far right column on each spreadsheet must identify the basis for the cost:

- Firm (fixed, no change);
- Subject to a ceiling of not more than x% greater in total;
- Subject to an annual adjustment of not more than x%;
- Subject to a specific assumption or rule which is stated in the accompanying notes.

This column should be sufficiently wide to contain the notes or this column can simply provide a note number. In the second case, the notes must be on the next page following the spreadsheet.

Personnel costs shall be identified by labour category for all personnel performing services during the Development Phase. The number of units shall be expressed in days and the unit price shall be the price per day for services to be provided. The sum of costs for each position shall equal the proposal costs for personnel for Development Phase tasks. These costs are required even if you are proposing a fixed fee amount for a specific task.

Payment Projections

The proponent must include a proposed schedule of payments (in both hard copy and electronic spreadsheet format). This schedule must include the total costs. The (basis, timing) trigger for payment for each cost must be identified. All Development Phase

costs, including project management, must be based on milestones including final integrated system acceptance test. Ensure that these schedules take into account the hold-back of 10% for all development activities.

The final payment for Development Phase activities shall be withheld until completion of the related contract including the acceptance of all deliverables and services.

PROBLEM 10: EVALUATION PROCESS IS NOT CLEARLY EXPLAINED

On every project and for every RFP, there is a debate over how much detail to provide about the evaluation process. Some want to publish as little as possible, thereby preserving an element of arbitrariness in the evaluation process. Others want each and every task identified, thereby removing most discretion from the evaluators.

This evaluation process incorporated a structured presentation by the top few proponents. Here is what the RFP stated:

All proposals will be evaluated by an Evaluation Committee made up of Senior Management representatives, PNP Team members, a financial officer, and an independent consultant who is an RFP expert.

The Committee will evaluate and numerically score each proposal in accordance with the evaluation criteria driven by the content of the various sections of this RFP.

The Committee will arrive at a short list of the top proponents, and present those results to the Project Authority for review and approval.

The short-listed proponents will be scheduled for a structured oral presentation and interview. At the end of the Oral Interview the evaluation of the short listed proponents will be completed. The Oral Interview will be scheduled for a total of four hours, structured as follows:

- *1 hour and 45 minutes for the proponent to make a formal presentation to the Evaluation Committee;*
- *15 minute break*
- *2 hour interview of the proponent's representatives by the Evaluation Committee.*

For the Oral Interview, the Proponent:

- *must have present for the entire session both the proposed Project Manager, and an executive empowered to make binding commitments on behalf of the organization;*

- *may have present such other personnel as may be required, with the maximum number of presenters in total not to exceed five.*

The session will be recorded and may be videotaped.

The Evaluation Committee will document all decisions in writing. Responses to any queries from the Evaluation Committee including those made during the Oral Interview, will be made part of the contract file.

Clarifications made during the interview will be appended to the written proposal as if they had been submitted with the proposal itself.

Demands for transparency have increased dramatically in the last five years. Many jurisdictions have adopted the approach that it is better to publish more information rather than being accused of being arbitrary. Their RFPs often contain several pages of information about the detailed steps in the evaluation process.

PROBLEM 11: CONTRACT NEGOTIATIONS BECOME STALLED

The organization was concerned that contract negotiations could drag on for weeks and delay the start of the project. Contentious issues were identified as described in item 4 presented earlier in this section. The organization wanted to ensure that the selected company would entire into a formal contract quickly. For this reason, the organization stated that if, after 14 days, no contract had been signed, then the next best supplier would be selected. This was a powerful lever designed to ensure that negotiations were initiated and concluded quickly.

Here is what the RFP stated:

Negotiation Delay

If an agreement cannot be negotiated within fourteen (14) days of notification to the designated proponent, the Purchasing Commission may, in its sole discretion, terminate negotiations with that proponent and negotiate an agreement with another proponent of its choice.

Guidelines & Templates

Guidelines, templates, and model RFPs are a simple way of capturing experience and making it available to a wide group of interested people. Many organizations produce material to assist in developing effective RFPs. Often this material is organized in a tutorial document that can be used by an inexperienced person to prepare an RFP for

the first time. While there is no substitute for the insights and ideas of someone who has developed complex RFPs which have worked, guidelines provide much value at little cost. Most guidelines address the fundamental issues of when to use an RFP, what goes into an RFP, how to structure an evaluation, and what information, laws, and policies must be reflected in the RFP document.

This section of the book identifies some of the guidelines available from a number of jurisdictions. It discusses two great examples from Alaska, and Georgia.

Why should you standardize? Why should an organization adopt and maintain a model RFP? What are the advantages of a readily available RFP “template”? It takes a lot of work to develop an RFP from scratch. To create a simple RFP, you need to know the process, the requirements, the organization’s policies and guidelines, as well as applicable laws. The process often generates documents and is controlled by documents: review forms, approval forms, contracts, acceptance forms.

Having created one RFP and completed the selection process, the second is a lot easier. In completing the first one, a person obtains real knowledge and experience. Having issued an RFP and evaluated proposals once or twice, organizations start to look for short-cuts. How can they improve the results, simplify the process, and reduce the amount of knowledge needed?

There are a number of different responses to this question of standardization. In some organizations, typically those that issue few RFPs, each time they start anew. However, if the same people are involved, then they build up a body of informal knowledge based on past experience. They have old project files, memos, examples, and their own prior work.

Other organizations go further. They recognize the costs and risks associated with this process. They attempt to extract some value from each effort which will improve the next RFP. These organizations introduce some level of standardization into the process or the document.

For most organizations, some level of standardization of the RFP makes sense. All RFPs must deal with the same two sets of issues. First, the rules for the process; second, the requirements or specifications.

Formalizing and standardizing the rules is relatively straightforward. Simply take the rules from your latest RFP and use these next time. If, in reviewing the new RFP, some

of these rules no longer make sense, then change them. If a new situation arise and rules must be modified or added then revise your standard.

Simply using the previous RFP causes problems. Some of the text, terms or rules which were not needed and therefore deleted from the current RFP may be needed in the future. However, they were deleted.

Since the RFP is both a document and a process, there are many opportunities to introduce some level of standardization. There are many elements which can be used to simplify the process, reduce the risks, reduce the costs, or reduce the amount of expertise needed to prepare an effective RFP:

- Standardize the Table of Contents of the RFP document
- Standardize the Terms & Conditions which are included in every RFP
- Standardize the contract resulting from the process
- Standardize the process by identifying tasks and having a standard project plan
- Standardize the format of the RFP document
- Provide a standardized RFP shell or template
- Provide standard checklist to monitor the tasks before the RFP is issued
- Provide a standard checklist to ensure that contracts deal with all required issues
- Provide a standardized statement of requirements or statement of work for similar types of procurements

Guidelines or templates for specific types of RFPs such as Auditing Services or Banking Services are a helpful creation. They can provide directions for constructing an RFP, a “how to do it” text. More importantly, they often contain insights based on the author’s experience, hints, admonitions, and warnings. These insights often deal not only with the process but with the detailed requirements for a particular type of service.

In this section, we present two examples of highly standardized RFPs. Each presents a different perspective on standardization: the Georgia template illustrates an RFP for a specific purpose (audit); the Alaska template illustrates a generic RFP with many potential uses.

EXAMPLE #1: GEORGIA - GUIDELINES AND A TEMPLATE

A few years ago, I came across some guidelines for developing an RFP for financial and compliance auditing services – an RFP for auditors. These guidelines were developed by the State of Georgia, Dept. of Audits and Accounts for “use by all local governmental entities, including cities, counties, school districts, as well as state government agencies and Regional Commissions in contracting for professional financial and compliance auditing services.”

This section discusses the structure and content of these guidelines and the RFP Template.

Guidelines for Preparation of Requests for Proposals

This publication is intended for use by all local governmental entities, including cities, counties, and school districts, as well as state government agencies and Regional Development Centers in procuring quality audit services.

The RFP Guide²⁰ is 43 pages and is divided into six chapters and four appendices:

<p><u>TABLE OF CONTENTS</u></p> <p>CHAPTER 1 - INTRODUCTION CHAPTER 2 - PLANNING CHAPTER 3 - COMMUNICATING AUDIT REQUIREMENTS AND SOLICITING PROPOSALS CHAPTER 4 - TECHNICAL EVALUATION CHAPTER 5 - THE WRITTEN AGREEMENT CHAPTER 6 - AUDIT MONITORING APPENDIX 1 - CHECKLIST OF RFP CONTENTS APPENDIX 2 - SAMPLE PROPOSAL EVALUATION DOCUMENTS APPENDIX 3 - REPORTING MATRIX APPENDIX 4 – REQUEST FOR PROPOSAL FOR AUDIT SERVICES SHELL</p>
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Chapter 1 describes the intended use of this document, the scope of an RFP and the scope of these guidelines.

It is essential that requests for proposals for auditing services be comprehensive and cover all matters, issues, and subjects that have a bearing on the audit. Information about the entity to be audited and necessary elements of the audit requirements must be provided to the independent auditors to assure clear and complete responses. Interested respondents usually respond to requests for proposals with a detailed audit proposal which outlines the firm’s qualifications, references, proposed audit work plan, and the price of doing the audit. However, RFPs issued by local governments and the audit

proposals submitted in response to those requests often differ widely in style and scope. Because of such wide differences in RFPs, auditors may find them difficult to understand or may respond with a work plan that does not meet all audit requirements. These guidelines establish a reasonable degree of consistency in form and content of the Request for Proposals and of the expected response from independent auditors.

As part of the introduction, the Guide identifies critical success factors:

- *planning (determining what needs to be done and when);*
- *fostering competition by soliciting proposals (writing a clear and direct solicitation document and disseminating it widely);*
- *technically evaluating proposals and qualifications (authorizing a committee of knowledgeable persons to evaluate the ability of prospective auditors to effectively carry out the audit);*
- *preparing a written agreement (documenting the expectations of both the entity and the auditor); and*
- *monitoring the auditor's performance (periodically reviewing the progress of that performance).*

Chapter 2 identifies important elements in the planning process:

Planning to procure a quality audit requires time and attention. Nevertheless, the resources a government entity spends on planning are likely to be rewarded by a smoother, more timely, higher quality, and often less expensive audit.

This Guide then describes these important issues to be addressed:

- Defining the entity to be audited
- Delineating the scope of the financial audit.
- Determining the specific audit requirements.
- Deciding on the appropriate auditing standards.
- Identifying the attributes necessary in an auditor.
- Deciding how to evaluate prospective audit firms.
- Reviewing legal requirements.
- Considering a multiyear agreement.
- Evaluating the auditor rotation option.
- Establishing a work schedule.

Chapter 3 deals with competition and identifies and soliciting proposals. It then describes each of the key elements of an RFP:

- Introductory Information
- Description of Entity and Records to be Audited
- Nature of Services Required
- Scope of the Audit
- Period of Audit
- Term of the Engagement
- Exit Conference Requirements
- Assistance available to Proposers
- Reports Required
- Time Requirements
- Contractual Arrangements
- Report Review, Timing, and Number of Copies
- Working Papers
- Right to Reject

Chapter 4 describes the technical evaluation process.

Once the due date for proposals has passed, the evaluation of bidders' qualifications can begin. The technical evaluation is important for two reasons:

- *it provides a systematic framework for selecting an auditor on the basis of the government entity's established RFP criteria, and*
- *it documents that the auditor was selected fairly.*

Chapter 5 deals with the written agreement:

The lack of a written agreement between the government entity contracting for the audit and the audit firm can contribute to substandard audits performed by certified public accountants. To foster sound and productive communication and to avoid misunderstandings, both parties should agree in writing on important audit-related matters.

Chapter 6 emphasizes the importance of monitoring:

Monitoring the progress of the audit is the most effective way to ensure that the government entity receives both the type and quality of audit services specified in the written agreement. This is a role that the entity's audit committee can carry out most effectively. This group of experts can evaluate the audit while it is taking place, thereby

addressing and resolving problems before the audit is completed. It can also review audit results and assist in post-audit quality evaluation. Thus, not only does the audit product improve but working relationships between the audited entity and auditor are enhanced.

Appendix 1 presents a checklist of RFP contents. As with other checklists, it incorporates a lot of experience, “best practices”, and wisdom gained from past experiences.

APPENDIX 1 - CHECKLIST OF RFP CONTENTS

The prime consideration in preparing an RFP is that it contain enough information to provide bidders with a common basis by which to prepare proposals that address all audit needs. It is also important, however, to consult with the government entity’s purchasing office and/or legal counsel to ensure that the RFP conforms with the laws, regulations, and grant terms applicable to the entity. At a minimum, the RFP should contain the following:

- the name and address of the government entity;*
- the entity to be audited, scope of services to be provided, and specific reports, etc. to be delivered;*
- the period to be audited (with an explanation if the RFP calls for a multiyear procurement);*
- the name and telephone number of a contact person at the government entity;*
- the format in which the proposals should be prepared;*
- the address to which proposals should be delivered or sent;*
- the date and time proposals are due;*
- the number of proposal copies to be submitted;*
- the criteria to be used in evaluating the bid and their relative importance to each other;*
- the method and timing of payment; and*
- any other important points, including the consequences if due dates are missed or work does not meet audit standards.*

The likelihood of receiving high quality proposals will be enhanced if the RFP

- explains the work the government entity does;*
- explains what is to be audited, e.g., general-purpose financial statements, specific funds, or both;*
- describes in some detail the entity’s accounting system, administrative controls, records, and procedures;*
- informs prospective bidders whether the Single Audit Act applies to this audit;*
- identifies the appropriate auditing standards;*
- informs prospective bidders if data from prior years (audit reports, management letters, etc.) will be available, whether major audit findings remain open from prior years, and whether any audits of subrecipients are required;*

- *notifies prospective bidders of requirements for workpaper retention and for making the workpapers available to the entity as well as governmental auditors if they request them;*
- *describes expected audit products, the required format of the audit report, and the format of any required progress reports;*
- *explains any assistance that the government entity will offer, such as staff support to assist the auditor (which could materially reduce audit costs);*
- *outlines the expected schedule of work (completing field work, issuing reports, etc.).*

Finally, a well-prepared RFP will elicit certain information from prospective bidders. For example, it will ask bidding firms to state

- *how they would conduct the audit and, if it were a multiyear contract, how they would approach the work efforts of the subsequent year(s);*
- *their qualifications, those of their local office, if applicable, and those of the proposed audit staff, including their prior government auditing experience;*
- *their policies on notification of changes in key personnel;*
- *whether the proposed staff have received continuing professional education in government accounting and auditing during the last 2 years;*
- *whether they are independent, as defined by applicable auditing standards;*
- *whether they have received a positive peer review within the last 3 years;*
- *whether they have been the object of any disciplinary action during the past 3 years; and*
- *their fee.*

Appendix 2 provides a sample proposal evaluation worksheet. It's very helpful and demonstrates how the evaluators deal with mandatory criteria, cost, and oral interviews.

Request for Proposals Shell²¹

This Request for Proposals shell is designed for use by all governmental entities soliciting proposals for audit services.

This 47-page document is a complete RFP incorporating the format and best practices described in the RFP Guide. It provides instructions to Procurement Officers on the information required to customize the document to meet the needs of a specific agency. It provides a discussion of various options.

This is a great model RFP. It's detailed. It embodies many years of experience in evaluating and selecting auditors. It's complete. It contains instructions to the Procurement Officer. It's free. It comes with a users' manual – the RFP Guide.

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- I. GENERAL INFORMATION
 - A. PURPOSE
 - B. ANTICIPATED SCHEDULE OF EVENTS
- II. GOVERNMENT ENTITY AND RECORDS INFORMATION
- III. STATEMENT OF NEEDS
 - A. AUDIT REQUIREMENTS
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- IV. PROPOSAL PREPARATION AND SUBMISSION REQUIREMENTS
 - A. GENERAL PROPOSAL PREPARATION REQUIREMENTS
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 - 1. TECHNICAL COMPONENT OF PROPOSAL
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- V. EVALUATION AND AWARD CRITERIA
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- VI. GENERAL TERMS AND CONDITIONS
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 - D. MANDATORY USE OF TERMS AND CONDITIONS
 - E. CLARIFICATION OF TERMS
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 - I. CHANGES TO THE CONTRACT
 - J. DEFAULT OF TERMS
 - K. PRECEDENCE OF TERMS
- VII. SPECIAL TERMS AND CONDITIONS
 - A. QUALIFICATIONS OF AUDITORS
 - B. CANCELLATION OF CONTRACT
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 - H. IDENTIFICATION OF PROPOSAL ENVELOPE
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 - M. INTEGRATED AGREEMENT
 - N. WORKERS' COMPENSATION
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 - P. HIGHER LEVEL AUDIT SERVICES

Q. CHANGES IN AUDITING STANDARDS/FEDERAL REQUIREMENTS
R. RATES FOR ADDITIONAL PROFESSIONAL SERVICES
S. COMPLIANCE WITH STATE VENDOR MANUAL
T. DRUG FREE WORKPLACE

ATTACHMENT A: GOVERNMENT ENTITY AND RECORDS INFORMATION
ATTACHMENT B: MANDATORY PRE-QUALIFICATION FORM
ATTACHMENT C: MODEL FORMAT OF PROPOSAL
ATTACHMENT D: SAMPLE FORMAT FOR NOTIFICATION OF INTEREST LETTER
ATTACHMENT E: FORM OF AGREEMENT

This is an RFP for audit services; consequently, many of the details of this RFP are prescribed by a number of professional associations and regulations such as:

- American Institute of Public Accountants
- Government Audit Standards of Comptroller of the United States
- Official Code of Georgia

Attachment C of this RFP is very helpful. It instructs firms what information to provide, the level of detail, and the format. In three pages, it standardizes all of the responses to ensure that the evaluation process is efficient.

Here is how they describe the proposal format:

ATTACHMENT C: MODEL FORMAT OF PROPOSAL

To simplify the review process and obtain the maximum degree of comparability, proposals should be organized in the manner specified by the RFP. The following outline includes all the information called for in the RFP.

COMPLETE COPY OF THE REQUEST FOR PROPOSALS

1. *Provide a complete copy of the Request for Proposals, including all Attachments.*
2. *Sign the Request for Proposals in ALL places requiring signature.*
3. *Complete and sign the Mandatory Pre-Qualification Form.*

TECHNICAL COMPONENT OF PROPOSAL

Title Page

Show the RFP subject, the name of the proposer's firm, local address, telephone number, name of the contact person, and the date.

Table of Contents

Include a clear identification of the material by section and by page number.

Letter of Transmittal

Limit to one or two pages.

1. Briefly state the proposer's understanding of the work to be done. Make a positive statement that deadlines specified in the RFP will be met.
2. State the names of the persons who will be authorized to make representations for the proposer, their titles, addresses, and telephone numbers.
3. State that the person signing the letter will be authorized to bind the proposer.
4. State the name of the partner assigned to this engagement and the name of the partner assigned the responsibility for the quality of the report and working papers.

Profile of the Proposer

1. State whether the firm is local, regional, national or international.
2. State the location of the office from which the work is to be done and the number of partners, managers, supervisors, seniors, and other professional staff employed at that office.
3. Describe the range of activities performed by the local office such as auditing, accounting, tax service, or management services.

Summary of the Proposer's Qualifications

1. State the identity of the partners and managers who will work on the audit, including staff from other than the local office. Resumes including relevant experience and continuing education for each supervisory person to be assigned to the audit should be included. (The resumes may be included as an appendix.)

Specify governmental CPE attended in the past 24 months by the partner(s) and each person to be assigned to this engagement.

Include the firm's policy on notifying the government entity of changes in key personnel assigned to the engagement.

2. Describe the recent local office auditing experience similar to the type of audit requested. Rank these audit engagements according to total staff hours. Indicate the scope of work, dates when work was performed, engagement partner(s), total hours, and the name and telephone number of the client contact. A maximum of 5 (five) of the most significant audit engagements performed in the last three (3) years similar to the engagement described in this request for proposals should be provided.

Proposer's Approach to the Audit

Submit a work plan to accomplish the scope defined in Section III of this RFP. The work plan must include time estimates for and identify each significant segment of the work and the staff level to be assigned. The planned use of specialists must also be specified. In developing the work plan, reference should be made to such sources as the government entity's budget and related materials, organizational charts, programs, and financial and other management information systems. Proposers will be required to provide the following information on their audit approach:

- a. Sampling techniques and the extent to which statistical sampling may be used in the engagement;

- b. *Extent of the use of EDP software in the engagement;*
- c. *Type and extent of analytical procedures that may be used in the engagement;*
- d. *Approach to be taken to gain and document an understanding of the government entity's internal control;*
- e. *Approach to be taken in determining laws and regulations that will be subject to audit test work; and*
- f. *Approach to be taken in drawing audit samples for purposes of tests of compliance.*

The proposal should identify and describe anticipated audit problems (if any), the firm's approach to resolving these problems and any special assistance that will be requested from the government entity.

Additional Data

Since the preceding sections are to contain only data that is specifically requested, any additional information considered essential to the proposal should be separately bound. The proposer's general information publications, such as directories or client lists, should not be included. If there is no additional information to present, include a statement as the last section of the technical component of the proposal that "there is no additional information we wish to present".

COST COMPONENT OF PROPOSAL

(To be included in a SEPARATE, SEALED envelope) [Modify if electronic submission acceptable.]

State the total hours and hourly rate required by staff classification and the resulting all-inclusive maximum fee, including out of pocket costs for which the requested work will be done. State the amount of professional services, in hours, allowed each year without additional cost to the auditee. A separate all-inclusive fee must be stated for each audit for each year.

EXAMPLE #2: ALASKA RFP TEMPLATE²²



The Procurement Officers in Alaska have less discretionary power than their colleagues in some other jurisdictions. The detailed nature of the State Procurement Code and Regulations removes many options. There is no debate about publishing weights in an RFP or how to convert costs to points. These issues are prescribed by law and cannot be changed. This approach supports the development of a standardized RFP shell.

The RFP shell developed by the State has three groups of important features:

- the structure and use of the document

- the instructions provided to the Procurement Officer
- the terms included in the RFP itself

Each of these groups is discussed in this section.

The Structure and Use of the Document.

The RFP Shell is noteworthy for several reasons:

- The document is easy-to-read (I particularly like the comment in the section on Scope of Work that states “Don’t presume they will “get it” if you don’t say it. Write as if you were trying to explain it to a 12-year old child.”
- The document identifies the laws and regulations governing the content of each section
- The document clearly identifies those sections in which the Procurement Officer has some discretion as well as those sections which must be included in the RFP without alternation
- The document is available to all government Departments via the web
- The document comes complete with attachments

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The Instructions Provided to the Procurement Officer.

The document presents clear instructions to the Procurement Officer. Each section of the RFP shell identifies the options available and the applicable section of the Procurement Code or Regulations which applies.

Instructions to Procurement Officers

Instructions to procurement officers are shaded and begin with "Procurement Officer Notes." Delete these instructions in the final draft of the RFP.

*Procurement officer word choices in a section are in caps, bold print and italics. For example, **WILL / WILL NOT**. You should make the choice, and then enter the word in regular style print, for example, "will not".*

*The location of unique names and numbers are identified like this: **NAME** or **NUMBER**. You should provide the correct name or number and enter that information in regular style print, for example 78492.*

Delete this instruction page in the final draft.

The Terms Included in the RFP Itself.

Many of the specific features of the actual RFP are also noteworthy. Here are some highlights. The actual document is some 50 pages in length. The following items while not unique to this RFP do improve the RFP process and the quality of the document. These specific sections of the RFP contribute to the quality and clarity of the finished document. They improve the content and make it easier for the Procurement Officer to create an effective RFP.

Required Review

It is the vendor's responsibility to ensure that the RFP is not defective and does not inadvertently restrict competition. Protests must be made prior to the due date to permit time for revisions to be issued.

PROCUREMENT OFFICER NOTE: THIS SECTION SHOULD NOT BE ALTERED OR DELETED. HOWEVER, IF A SHORTENED PUBLIC NOTICE PERIOD IS USED, OR IF A PRE-PROPOSAL CONFERENCE IS HELD WITHIN 12 DAYS OF THE PROPOSAL DUE DATE, A PROTEST DOES NOT HAVE TO BE FILED AT LEAST TEN DAYS BEFORE THE DEADLINE. PROTESTS MAY BE FILED ANYTIME BEFORE THE DEADLINE SET FOR RECEIPT OF PROPOSALS (REF. 36.30.565). IF THAT IS THE CASE, MODIFY THE PARAGRAPH BELOW.

Offerors should carefully review this solicitation for defects and questionable or objectionable material. Comments concerning defects and objectionable material must be made in writing and received by the procurement officer at least ten days before the proposal opening. This will allow issuance of any necessary amendments. It will also help prevent the opening of a defective solicitation and exposure of offeror's proposals upon which award could not be made. Protests based on any omission or error, or on the content of the solicitation, will be disallowed if these faults have not been brought to the attention of the procurement officer, in writing, at least ten days before the time set for opening.

Prior Experience

If certain levels of experience are required, they must be measurable and reasonable.

PROCUREMENT OFFICER NOTE: ALTER, REVISE, OR DELETE AS REQUIRED.

No specific minimums have been set for this RFP.

OR

In order for offers to be considered responsive offerors must meet these minimum prior experience requirements.

PROCUREMENT OFFICER NOTE: PROVIDE DETAIL ON THE SPECIFIC PRIOR EXPERIENCE YOU REQUIRE.

STATE THE MINIMUM ACCEPTABLE AMOUNT OF TIME

REMEMBER THERE MUST BE SOME WAY FOR THIRD-PARTY INDEPENDENT VERIFICATION OF THE EXPERIENCE YOU ASK FOR

BE CAREFUL ABOUT WHAT YOU ASK FOR AS YOU MAY SET REQUIREMENTS SO HIGH THAT YOU DISQUALIFY GOOD POTENTIAL CONTRACTORS

SPECIFICATIONS SUCH AS PRIOR EXPERIENCE MAY NOT BE UNDULY RESTRICTIVE PER AS 36.30.060 (C). MAKE SURE THAT YOU HAVE A REASONABLE BASIS FOR THIS AND ALL OTHER SPECIFICATIONS.

PROCUREMENT OFFICER NOTE: THIS SENTENCE SHOULD NOT BE ALTERED, BUT MAY BE DELETED IF NOT REQUIRED.

An offeror's failure to meet these minimum prior experience requirements will cause their proposal to be considered non-responsive and their proposal will be rejected.

Contract Type

The RFP Shell serves as tutorial document for Procurement Officers. It identifies the permissible types of contracts.

PROCUREMENT OFFICER NOTE: IDENTIFY APPROPRIATE TYPE OF CONTRACT.

THERE ARE SEVERAL DIFFERENT TYPES OF CONTRACTS WHICH
MAY BE SUITABLE FOR YOUR PROJECT.

REVIEW THE CONTRACT TYPES LISTED BELOW TO DETERMINE
WHICH WOULD BE THE MOST APPROPRIATE.

THE TYPE OF CONTRACT USED IS LIKELY TO HAVE AN IMPACT ON
COSTS TO THE STATE. THE PROCUREMENT OFFICER SHOULD
SELECT THE TYPE OF CONTRACT THAT WILL BEST SERVE THE
STATE'S NEEDS AT THE MOST REASONABLE COST.

THE FOLLOWING INFORMATION IS FOR PREPARER'S INFORMATION
ONLY AND SHOULD NOT BE PRINTED IN THE FINAL CONTRACT

Fixed Price Contracts

Firm Fixed Price

The most common and easiest contract to administer is a firm fixed price contract. A fixed price contract is one that obligates the contractor to performance at a specified price.

Fixed Price with Adjustment

The use of an equitable price adjustment clause is recommended for state contracts if there is a possibility of significant economic fluctuation during the contract term. Price adjustment clauses generally encourage companies to participate in the state procurement process. The use of a price adjustment clause also allows companies to submit bid prices free of the contingencies that would otherwise be included to compensate for potential economic fluctuations.

A guide to the selection and application process titled Contract Price Adjustments may be viewed on the DGS purchasing documents page located at the following we address:

<http://doa.alaska.gov/dgs/policy.html>

Fixed Price Incentive

A target price, ceiling price, and a profit formula are used in this type of contract. When the contractor performs below the costs stipulated in the target price, the contractor and the state share in the savings. If costs exceed those estimated, the contractor's profit margin declines and the price ceiling is adhered to. In these types of contracts, performance can be quantified in terms of costs and services and/or deliverables.

Cost Reimbursement Contracts

Cost Plus Fixed Fee

Under these contracts, contractors are paid for all allowable costs plus a predetermined fixed fee. These contracts have been found to be beneficial for research and development work.

Cost Plus Incentive Fee

Under this type of contract, a tentative fee based on estimated costs and a target price is established. If actual costs fall below estimated costs, the contractor and state share in the savings. The contractor can lose all or part of their fee, but they must be paid for all costs.

Cost Plus a Percentage of Cost

These contracts are prohibited by statute. Under this type of contract the contractor receives payment for costs of performance plus a specified percentage of such actual costs as a fee. These contracts provide no incentive for efficient and economical contractor performance and must not be used.

Other Types of Contracts

Time and Materials Contracts

In addition to a fixed labor rate, these contracts include separate costs for materials used under the contract.

PROCUREMENT OFFICER NOTE: DELETE THE PREVIOUS CONTRACT INFORMATION AND INCLUDE THE FOLLOWING SENTENCE WITH THE APPROPRIATE INFORMATION IN THE RFP.

This contract is an ENTER NAME OF TYPE contract.

Scope of Work

The Procurement Officer is instructed to list “every event and milestone you can think of.”

PROCUREMENT OFFICER NOTE: ENTER APPROPRIATE INFORMATION - ALTER, REVISE, OR DELETE AS REQUIRED.

INFORMATION YOU PROVIDE IN THIS SECTION TELLS THE OFFERORS WHAT YOU WANT DONE

BE AS SPECIFIC AND COMPREHENSIVE AS YOU POSSIBLY CAN

LET THE OFFEROR KNOW EXACTLY WHAT YOU WANT

DON'T PRESUME THAT THEY WILL "GET IT" IF YOU DON'T SAY IT WRITE IT AS IF YOU WERE TRYING TO EXPLAIN IT TO A 12-YEAR OLD CHILD

The Department of NAME, Division of NAME, is soliciting proposals for WHAT KIND of services.

*The Department wants assistance to do **WHAT**.*

*The consultant will do **WHAT**.*

*The types of staff in state agencies that the contractor must interview are **WHO**.*

*Other helpful informational material that can be provided to the consultant includes **WHAT**.*

*The goal of this project is to **WHAT**.*

Evaluation Criteria and Contractor Selection

The State has standardized the evaluation process – the criteria, number of points or weights, and the evaluation questions. Five standard criteria are used:

- Understanding of the Project
- Methodology Used for the Project
- Management Plan for the Project
- Experience and Qualifications
- Contract Cost
- Alaskan Offeror's Preference

Listed below is the explanation for one of the criteria, Management Plan for the Project.

PROCUREMENT OFFICER NOTE: ALTER, REVISE, OR DELETE AS REQUIRED.

Proposals will be evaluated against the questions set out below:

[How well does the management plan support all of the project requirements and logically lead to the deliverables required in the RFP?

[How well is accountability completely and clearly defined?

[Is the organization of the project team clear?

[How well does the management plan illustrate the lines of authority and communication?

[To what extent does the offeror already have the hardware, software, equipment, and licenses necessary to perform the contract?

Does it appear that the offeror can meet the schedule set out in the RFP?

Has the offeror gone beyond the minimum tasks necessary to meet the objectives of the RFP?

To what degree is the proposal practical and feasible?

To what extent has the offeror identified potential problems?

An Ending Comment

In this chapter, we provided details about the RFP document. Best practices and standards of excellence were illustrated by actual RFPs from two jurisdictions and several RFP templates. In the next chapter, we highlight the best RFP manuals we've found as a source of best practices and ideas for people constructing RFPs.

End Notes

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1. Reference 65, Institute of Electrical and Electronics Engineers, Statement of Work, 2 pgs, http://www.ieee.org/membership_services/services/financial/contracts/statement_of_work.html
 2. Reference 66. Federal Acquisition Regulations, Section 37.602-1 Statements of Work, 1 pg, http://www.acquisition.gov/far/05-05/html/Subpart%2037_6.html
 3. See Reference 65.
 4. Reference 67. State of Arizona, State Procurement Office, Guide to Preparing a Statement of Work, 18 pgs, <https://asmi.az.gov/sites/default/files/documents/files/GUIDE%20TO%20PREPARING%20A%20SOW.pdf>
 5. Reference 68. State of Montana, State Information Technology Service, Statement of work template, 9 pgs <sitsd.mt.gov/content/contract/docs/sowtemplate.doc>
 6. Reference 69. State of Montana, State Information Technology Service, Guideline for Statements of Work, 13 pgs <http://sitsd.mt.gov/content/contract/docs/SOWGuidelines.doc>
 7. Reference 70. North Carolina Statement of Work Template, 11 pgs, www.epmo.scio.nc.gov/library/docs/SOWPLAN.doc
 8. Reference 71. North Carolina, Risk Assessment and Management Process (RAMP), 48 pgs, www.epmo.scio.nc.gov/library/docs/riskanal.doc
 9. Page 3, Reference 28.
 10. Section AS 36.30.210, Reference 25.
 11. Page 21, Reference 28.
 12. Page 16, Reference 41.

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13. Reference 72. Massachusetts, Operational Services Division, Procurement /Contract Checklist, Page 4, 6 pgs,
<http://www.mass.gov/anf/docs/osd/pic/checklist.doc>
 14. This RFP is not available on the web. For more information, contact Tarrant County, PurchasingDept. at:
<http://www.tarrantcounty.com/ePurchasing/site/default.asp>
 15. This information is taken from Tarrant County Texas, Commissioners Court Communication Action Requested memo, dated Oct. 29, 2002.
 16. This RFP is no longer available on the web.
 17. Reference 73, State of Wisconsin, State Bureau of Procurement, RFP #28130-SR, Shared IT Infrastructure Consulting Services, July, 2013, 24 pgs. This RFP is not available on the web but is in the Citations Reference File accompanying this text.
 18. Federal Acquisition Regulations, This subpart prescribes policies and procedures for selection of a source or sources in competitive negotiated acquisitions,
[https://www.acquisition.gov/far/html/Subpart 15_3.html](https://www.acquisition.gov/far/html/Subpart%2015_3.html)
 19. Reference 74. U.S. Census Bureau, Evaluation Factors for an Award, SOLICITATION NO.YA1323-07-RP-0001, 7 pgs,
<http://www.census.gov/procur/www/dads2/section%20m%2017jan07%20221pm%20amend%202.pdf>
 20. Reference 75. Georgia Dept. of Audits and Accounts, Guidelines for Preparation of Requests for Proposals, 40 pgs,
http://www.audits.ga.gov/NALGAD/Files/RFP_GUIDE_2009_Revision.pdf
 21. Reference 76. Georgia Dept. of Audits and Accounts, Request For Proposals Shell, 2009, 47 pgs,
http://www.audits.ga.gov/NALGAD/Files/RFP_2009_Revision.doc
 22. Reference 42.

Chapter Seven

EXEMPLARY RFP MANUALS

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Chapter Seven

EXEMPLARY RFP MANUALS

Learning From the Mistakes and Experience of Others

There are hundreds, possibly thousands, of publications dealing with RFPs. Many large entities such as federal agencies and state governments publish handbooks, guidelines or manuals about RFPs. Some of these publications are excellent – providing many different types of information and advice in a variety of formats.

In this chapter, we identify and discuss some of these exemplary manuals. The basis of selection was simply the level of usefulness. Over the last fifteen years, I've give dozens of workshops on RFP topics. In developing the material, I have spent hundreds of hours reviewing RFP manuals and publications. Of all the manuals I have encountered, these are the ones that I reference first. These manuals have served as a source of material and examples for me and the participants. They reflect the efforts and experience of their authors and the commitment of their sponsors to this task.

Here is my list of exemplary documents discussed in this Chapter.

No.	Agency/Entity	Title/URL
1.	Purchasing Division General Services Department State of New Mexico	Request for Proposals Procurement Guide
2.	New York State Procurement Council	Procurement Guidelines
3.	Federal Transit Administration U.S. Department of Transportation	Best Practices Procurement Manual

4.	Administration and Finance The Commonwealth of Massachusetts	Procurement Information Center
5.	Department of Administration State of Montana	Initiating and Navigating the Request for Proposal Process
6.	State IT Procurement Office North Carolina	Request for Proposal Template

New Mexico

Request for Proposals Procurement Guide¹

In spite of its age (it was first published in 1999), New Mexico's Guide is a great resource. As of 2014, it's still available on the NM Procurement web site. Its 212 pages provide solid information about the entire process. In addition, it contains more than 70 pages of sample documents and forms. It's one of the best I've encountered. It's thorough, well written, and full of practical advice based on experience and well organized. Many of its sections contain 'best practices'; some of them are innovative.

It's one of the few guides I take to my workshops and quote directly during the presentations.

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Purchasing Division State of New Mexico
Management Recommendation Letter

Evaluation Committee Report
Award Notification Letter
Public Inspection Letter
New Mexico Gross Receipt Tax
Three Year Financial History Form

Many of its sections are notable for one of three reasons:

- They identify features and approaches that are either innovative or not commonly found in other jurisdictions.
- They deal with topics not usually found in RFP manuals.
- They deal with topics often found in RFP manuals but the content is explained with unusual clarity or precision.

We have chosen to provide details on only five of these notable sections:

- The Mandatory Use of Best and Final Offers
- Frequently Asked Questions
- Signing the Contract Before the Award
- The Role of a Procurement Library
- A Single, Responsible Person Needs to be In-Charge

THE MANDATORY USE OF BEST AND FINAL OFFERS (BAFO)

New Mexico's Purchasing Division places great importance and reliance on the frequent use of Best and Final Offers. The objective in running an RFP process is to ensure that the winner receives at least 900 of the 1000 possible points. In short, they don't ever want to have to accept a mediocre proposal. To do this, they employ BAFO often. While this takes more work than simply accepting a mediocre proposal, or simply negotiating with one vendor, it results in superior proposals being submitted. Imagine if the last proposal you received got 92% of the available points. In many jurisdictions, this would alter their entire approach to RFPs and contracts.

The New Mexico Procurement Code is based upon the American Bar Association Model Procurement Code. The foundation for the Procurement Code is the premise that the public is best served and public funds, over a specified level, are spent wisely only after being subjected to the rigors of competitive procurement. Among many other things and unlike the procurement statutes for governmental jurisdictions beyond the bounds of the State of New Mexico, the Procurement Code authorizes the agency to conduct a multiple step procurement for RFP-based procurements. This means that the agency can review the proposals submitted,

select finalists offerors and solicit proposal improvements through amendments as part of a best and final offer(s). The Procurement Regulations have provisions for the revision of specifications and the solicitation of second best and final offers as well. The important aspect of these authorizations is the fact, unlike most governmental jurisdictions, the procuring agency has the capability of soliciting and obtaining improved proposals that truly offer the very best match to the agency's requirements at the lowest cost.

The procurement processes addressed and described in this guide take full advantage of the "best and final offer" opportunities provided in the Procurement Code by integrating appropriate steps in the procurement process with proven techniques which when properly implemented provide the maximum advantage to the procuring agency.

FREQUENTLY ASKED QUESTIONS

Each section of this manual ends with some of the most frequently asked questions and the responses given by the Purchasing Division. This feature, the inclusion of Q&As, is both obvious and valuable. However, it isn't found in many RFP manuals. Here is a sample:

Q. A current agency contractor is also a potential offeror. How is this contractor treated?

A. The agency's business must continue as before. The contractor is treated in exactly the same manner as before the procurement was initiated. The contractor's actions and access are limited to the scope of the current contract. The access to information regarding the nature and scope of the procurement is channeled through the Procurement Manager. All potential offerors including the current contractor are given the same access and information.

SIGNING THE CONTRACT BEFORE THE AWARD

Many jurisdictions include sample contracts in their RFPs. But few have an objective of having the contractor's signature on the contract prior to the award. This is a significant innovation which dramatically changes the negotiation process. It takes a lot of work to negotiate contracts with multiple vendors. However, negotiating before opening the proposals gets the State the full attention of each vendor. Vendors failing to come to an agreement with the State are eliminated from the competition.

K. THE CONTRACT

The Procurement Code requires that the RFP document contain all of the relevant terms and conditions. For a number of important reasons including the fact that the Structured Evaluation Methodology requires a uniform foundation set of terms and conditions for the evaluation, the actual contract must be included as a part of the solicitation as an appendix. Yes! The actual contract must be included. The only exception is small software licensing agreements.

The inclusion of the actual contract meets the Procurement Code requirements and allows for the contract negotiation process to be overlapped with the conduct of the procurement. This significant change from the more traditional approach of negotiating the contract after the award resulted from a number of very bad experiences when the contracts could not be negotiated or they took an extended period of time to complete, or the agency ended up with substantially less than what was proposed at the time of the award.

The inclusion of the contract with the RFP requires some up front investment in time but that investment has proven time after time to be worth every minute through the avoidance of negotiation problems and other lengthy delays. The objective of this approach is to have the contractor's signature on the contract prior to the award. Some of the important benefits include the following:

- The negotiation is based upon the agency's contract not some 50 page document prepared by a battery of corporate attorneys that no one assigned to the procurement can understand. In-house governmental counsels can not be experts on the underlying law or other relevant provisions for every type of product or service a procuring agency may require. However, corporate attorneys focus only on a narrow segment of law that pertains to the products and services that they offer. Remember, a contract is generally biased in favor of the side who drafted the contract. Do not be tempted to use the offeror's "standard" contract form.*
- The negotiation is overlapped with the procurement process where limited inhouse legal resources can be scheduled and utilized efficiently and effectively. Most in-house governmental counsels are stretched thinly across all the functions and activities of the procuring agency's activities. This allows the in-house counsel to schedule and allocate specific blocks of time to the procurement activity.*
- The resulting contract matches the contractor's proposal.*
- The agency is in a position to maximize its negotiating position. That position deteriorates substantially after the award.*
- It reduces the involvement and compresses the time frame for corporate counsels. This generally produces a more favorable contract for the procuring agency.*

- *It allows the proposal evaluation to be completed on a truly apples-to-apples comparison basis. For many procurements it is equally important for the offerors to respond in their proposals to the wording of the scope of work or other material contract provisions as their response to the content of the scope of work. This is extremely important to procurements for services. By placing the contract in the RFP document, offerors have an opportunity to carefully review all elements of the contract and respond with alternate wording as may be appropriate.*

There are many sources for the contract. The Purchasing Division staff maintains example contracts in the RFP Library. Most agencies with in-house legal resources have examples as well. The Model RFP document includes the required paragraphs for professional services. The point here is that the creation of the contract is not nearly as difficult as it was in the past when each contract was developed from scratch.

THE ROLE OF A PROCUREMENT LIBRARY

This manual explains the role of a procurement library and how it is used to improve the quality of proposals. This is not a radical innovation but the write-up is informative and not commonly found in RFP manuals.

E. PROCUREMENT LIBRARY

One of the most useful procurement techniques is to establish a procurement library that may contain a wide variety of documents for use by the potential offerors. Since documents contained in the library do not have to be reproduced and distributed with the RFP, much more background and other material may be made available to the potential offerors. Such materials may include the GSD rule 1NMAC5.2 or appropriate procurement regulations, agency organization, systems descriptions, needs analysis, design documentation, program listings, flow charts, floor plans etc.

Access to the library is controlled by the Procurement Manager. Place appropriate instructions in the RFP. The Procurement Manager may also specify what materials may be reproduced as well as the cost for reproductions. Some material may be subject to non-disclosure agreements. It is essential that the Procurement Manager obtain appropriate written authorizations from the manufacturer or owner of the materials prior to their availability in the library. Documents may be added to the library via RFP amendments.

Some Procurement Managers have made multiple sets of the documents so that potential offerors may check a complete set for a specified period of time. The potential offeror may reproduce the documents. Another option is to request that the potential offerors bring a personal copier with them for reproduction of selected materials from the library.

Potential offerors are given equal access to the library.

For the very large, complex procurements the Procurement Library is created first and made available for review by potential offerors before the RFP document is issued. The notification procedure is identical to the issuance procedure except the content of the one-page notice is different. This technique is used to provide the potential offerors an adequate time to study the systems documentation and materials contained in the library in an effort to keep the proposal response period at a reasonable length.

A SINGLE, RESPONSIBLE PERSON NEEDS TO BE IN-CHARGE

This duties checklist is great, useful and thorough.

A. RESPONSIBILITIES APPROACH

The underlying principle of the procurement process is that a single responsible individual, the Procurement Manager, with the responsibility, authority and resources to conduct the procurement will produce the most successful result. This single point of contact and control approach has proven to be very successful.

B. DUTIES AND RESPONSIBILITIES CHECKLIST

The following is a checklist outlining the duties and responsibilities of the Procurement Manager.

- *Get latest copy of model RFP on diskette and example RFP's from Purchasing Division electronic and document library.*
- *Prepare Concept Memorandum*
- *Conduct pre-procurement data gathering*
- *Update the Concept Memorandum*
- *Obtain agency management's approval to conduct the procurement*
- *Obtain Chief Information Officer approval, technology procurements only*
- *Issue a procurement initiation memorandum*
- *Organize the Evaluation Committee*
- *Draft the RFP*
- *Prepare the issuance package*
- *Submit RFP draft and issuance package to Purchasing Division staff or local purchasing support personnel for review and approval*
- *Identify appropriate commodity codes or local vendor registration databases for distributing one page notices*
- *Check with the Purchasing Division or local purchasing staff to confirm that notices were distributed and procurement advertised.*
- *Clip legal notices regarding the procurement from newspaper(s). Place in procurement file.*

- *Distribute copies of the approved RFP*
- *Establish the evaluation subfactors*
- *Prepare Reference Questionnaire*
- *Conduct pre-proposal conference*
- *Prepare and distribute written answers to questions and RFP amendments*
- *Finalize the demonstration agenda*
- *Finalize the Mandatory Requirement Checklist*
- *Receive and time stamp proposals*
- *Distribute demonstration agenda*
- *Verify compliance with mandatory requirements*
- *Remove the Cost Response Form and the response to the contract terms and conditions from the proposals*
- *Deliver all responses to the terms and conditions to the counsel for review*
- *Prepare and distribute written determination letters for non-responsive proposals*
- *Distribute responsive proposals to the Evaluation Committee*
- *Review the response to the contract terms and conditions with counsel to determine acceptability*
- *Obtain proposal clarifications*
- *Conduct the evaluation*
- *Select Finalists*
- *Finalize the oral presentation/demonstration agenda*
- *Obtain input from counsel regarding terms and conditions*
- *Prepare and distribute finalist notification letters*
- *Collect best and final offers*
- *Distribute best and final offers to the Evaluation Committee*
- *Conduct oral presentation/system demonstration*
- *Prepare the Evaluation Committee Report including written determinations regarding the waiver of technical irregularities, correction of mistakes, withdrawal of proposals*
- *Present procurement results to the procuring agency management*
- *Finalize contract*
- *Prepare Management Recommendation Letter*
- *Deliver Management Recommendation letter, the Evaluation Committee Report, signed contracts and one copy of each offeror's proposal including any best and final offers to the Purchasing Division staff*
- *Assist with award, if requested*
- *Publicize award*
- *Prepare procurement file for public inspection and protect confidential data*
- *Obtain remaining contract signatures*
- *Assist with protests, if requested*
- *Prepare contracting package for contract administrator or project manager.*
- *Return proposal and technical document to non-selected offerors*

This Manual contains many other notable features that warrant consideration. Here are some examples:

- Chapter Five deals with subfactoring – the division of the major evaluation factors into their components and methods of scoring each subfactor.
- Chapter Six deals with the pre-proposal conference and contains a list of 17 “dos” and 9 “don’ts”.
- Chapter Nine deals with the evaluation process. The discussion on selecting finalists contains specific examples which illustrate the principles of the process.
- The discussion of the evaluation report is accompanied by two examples, each six pages in length.
- Chapter Fifteen contains 70 pages of examples of major forms and reports.

New York State

Procurement Guidelines²

I like New York State’s write-up about RFPs and best practices (Chapters V and VI of their Procurement Guidelines). While this write-up is only 17 pages long, in the space available, it manages to comment on some of the major considerations and issues, and it does identify several critical RFP concerns and the related Best Practices. Their write-up highlights important issues that are often omitted from other larger publications.

This document is exemplary for two reasons. First, Chapter V identifies some critical issues related to the RFP process and provides specific guidance. And then Chapter VI discusses some best RFP practices.

Here are some of the highlights.

SPECIFIC GUIDANCE: REQUESTS FOR PROPOSALS

- The RFP Process is viewed as a project.

Appropriate planning is essential for a successful RFP. The first step is to view the process as a project and to develop a timeline of events to meet the agency's programmatic needs and effectively budget staff time.

- This particular fundamental conflict is not tolerated.

If a vendor participates in the development or writing of the specifications for the RFP, that company is generally prohibited from participating in the procurement.

- Essential RFP contents support the development of a proposal.

An RFP should clearly convey all the information needed for potential bidders to determine their interest in participating in the solicitation and to offer a competitive proposal.

- The solicitation process must be described in the RFP

This section should provide information about how the agency will conduct the administrative aspects of the solicitation, selection, and contract development process. Procurements must be conducted in accordance with the process described in the RFP.

- Vendors require adequate time to develop solid proposals.

The earliest possible due date for submission of proposals is 15 business days after the advertisement appears in the New York State Contract Reporter. However, when selecting the submission date, consideration should be given to time frames necessary for intervening activities, such as the pre-bid conference and the question and answer period. Other factors, such as the complexity of the RFP, the time needed for vendors to prepare an effective response and obtain necessary internal approvals, and holidays that may impact availability of the agency and offerers, should also be taken into account.

- Evaluation Criteria must be published.

The RFP must present the criteria that will be used for the evaluation of proposals. At a minimum, the agency must disclose in the RFP the relative weights that will be applied to the cost and technical components of the proposals. An example would be: 30 percent for cost and 70 percent for technical.

- References, once requested in the RFP, must be used.

If the agency requires a bidder to submit references as part of the response, the agency must, at a minimum, verify the references provided as part of its

evaluation process. If the agency opts to score reference checks, the scoring methodology must be disclosed in the RFP.

- The Technical Evaluation Instrument process must be defined before proposals are received.

The nature, scope, and complexity of evaluation methods vary widely. However . . . the evaluation criteria and methodology for evaluating proposals must be completed and secured prior to the initial receipt of proposals. This principle applies to both technical and cost components.

- The Evaluators must document the reasons for their scores.

Regardless of the scoring methodology utilized, evaluators must document the basis for the rating using narrative to explain the proposal's strengths and weaknesses, thereby justifying the score. For example: "The offerer's proposed Project Director was given the maximum number of points because this individual has successfully managed a project of similar complexity and he/she will be critically important to the success of our project."

- Contract Negotiation cannot radically alter information provided in the RFP.

In cases where the RFP has specifically provided for negotiation of terms and conditions, the agency may engage in negotiation with the successful bidder prior to settling on the contract terms. Revisions must not substantially alter the requirements or specifications set out in the RFP. To assess whether a potential revision constitutes a substantial change, the question should be asked: "Would other bidders or non-bidders have responded differently if the term or condition to be revised as a result of negotiation had been included in the RFP?" If the answer is "yes" or "possibly," then the provision may not be revised.

- The Office of State Comptroller (OSC) is the gatekeeper for the award.

The OSC Bureau of Contracts conducts the final review and provides its approval. OSC conducts its review to ensure that:

- *The procurement was conducted in accordance with the process established by the agency;*
- *The procurement and resulting contract complies with all relevant laws; and*
- *The contract terms and conditions are in the best interests of the state.*

BEST PRACTICES

Chapter VI of these Guidelines highlights practices that experience has shown will make a procurement easier to manage, help ensure that the appropriate goods/services are obtained, increase the ability to receive control agency approval, and minimize the likelihood of a bid protest. Its Specific Guidance section identifies critical success factors which are not always found in RFP policies and procedures manuals ten times the size.

- Procurement should ensure that the business needs are known and documented.

Know what the “end result” needs to be. Before starting the procurement process, have a good understanding of what the agency needs, what a product will be used for, whether there will be a need for modifications to existing equipment or facilities, and what is available in the marketplace. Identification of the business needs may require meeting with end-users to bring added clarity to the scope of the transaction and the various components of the transaction, such as the intended product usage, what services are needed, or site conditions.

- Proper Planning is a critical success factor.

Proper planning is the single most important factor in conducting a successful procurement. Proper planning includes allowing adequate time for advertisement, writing a clear and concise solicitation, allowing sufficient time for potential bidders to ask questions and prepare a proposal (taking into account the complexity of the solicitation), reviewing the bids/proposals, and conducting internal/ external reviews of the final contract.

- Thorough Information Gathering is also a critical success factor.

Consider using a Request for Information (RFI), as discussed in Chapter IV, to gather information about the types of goods/services that are available. Certain types of products evolve rapidly; therefore, sending an RFI to vendors may provide insight on newer, more efficient products or services that better address the needs of the agency. It is also strongly recommended that an RFI be advertised in the New York State Contract Reporter to provide additional vendors with an opportunity to respond to the RFI.

- The Office of the State Comptroller is the authority for departures from normal practices.

Prior to issuing the IFB/RFP, consideration should be given to discussing complicated and/or sensitive solicitations or unique evaluation methodologies with the OSC Bureau of Contracts to ensure that the procurement is undertaken in an appropriate manner.

- Negotiating effectively and fairly is part of the process.

The following are suggestions for negotiating contracts that are most commonly awarded via an RFP, or under a single or sole source theory:

- *Prior to negotiating, the agency should identify all known issues and outline its position and acceptable alternatives.*
- *To the maximum extent possible, negotiations should be conducted at the agency's office. Always allow sufficient time to discuss the issues fully.*
- *Look for a "win-win." Often, it is possible for vendors and procurement staff to agree on terms that are beneficial to both parties. Making any necessary concessions incrementally will aid in working towards a "middle ground" that is satisfactory to all.*
- *Notes should be kept of all negotiation discussions and all revisions should be tracked in writing to ensure that the contract being signed contains all agreed upon terms and conditions.*

CAUTION: Material terms of a contract awarded pursuant to a competitive bid cannot be negotiated.

Federal Transit Administration (FTA)

Best Practices Procurement Manual³

This Handbook doesn't contain many examples from federal departments and agencies. Most of our readers find federal rules and regulations overly complex and not a particularly good fit for their (usually smaller) jurisdictions. However, this particular document, produced by a branch of the Dept. of Transportation, is an exception. Several of its sections and many of the examples can be easily adapted for use by smaller cities, counties, and states.

Here is the story

In 1996, FTA published the original version of this manual. Since then, it has been expanded and revised several times. The full document is more than 600 pages long and is designed especially for organizations receiving FTA funds.

The current manual consists of eleven chapters:

1. Purpose and Scope
 2. Procurement Planning & Organization
 3. Specifications
 4. Methods of Solicitation and Selection
 5. Award of Contracts
 6. Procurement Object Types: Special Considerations
 7. Disadvantaged Business Enterprises
 8. Contract Clauses
 9. Contract Administration
 10. Close-Out
 11. Disputes
- Appendix A: Governing Documents
Appendix B: Examples

Section 4.5 is about 20 pages in length and deals exclusively with RFPs:

4.5 Competitive Proposals (Request for Proposals)

- 4.5.1 Solicitation & Receipt of Proposals
- 4.5.2 Evaluation of Proposals
- 4.5.3 Competitive Range
- 4.5.4 Discussions and Clarifications
- 4.5.5 Additional Submissions
- 4.5.6 Award Based on Initial Proposals
- 4.5.7 Withdrawal of Proposals
- 4.5.8 Debriefing Unsuccessful Offerors

There are several topics dealt with in this manual that are noteworthy because of their content, their approach, or the quality of the explanation.

The FTA has established a minimum set of requirements which all agencies must incorporate into their RFP processes:

REQUIREMENTS

Requests for proposals shall be publicized.

RFPs shall identify all evaluation factors along with their relative importance.

Proposals will be solicited from an adequate number of qualified sources. You shall make award only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed agreement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

Awards will be made to the responsible firm whose proposal is most advantageous to the grantee's program with price and other factors considered.

In architectural and engineering services procurements, grantees shall use competitive proposal procedures based on the Brooks Act, which requires selection based on qualifications and excludes price as an evaluation factor provided the price is fair and reasonable.

This 20-page document embodies a “common sense” approach to RFPs. It discusses many issues not normally addressed in an RFP Guide or Handbook. It, therefore, provides us with some good insight into their thinking and some words which may make the RFP process more palatable to the vendor community. Here are some of the issues they deal with.

EVALUATION PROCESS

They discuss why we disclose details of the evaluation process:

The purposes for disclosing of the evaluation process are so that:

- *offerors can more accurately respond to your needs rather than solely rely on the technical specifications alone;*
- *proposers will be able to clearly present the information you need to conduct your evaluation; and*
- *the appearance of favoritism or unethical practice in offeror selection will be diminished.*

The competitive proposal process involves a subjective evaluation process and discussions that are typically confidential. Public acceptance and acceptance by

disappointed offerors might be less than in the case of sealed bids, if the evaluation and selection process is not well documented and disclosed in advance.

COMPETITIVE RANGE

They provide some solid direction to their Agencies, especially about determining the competitive range:

At this stage in the competitive proposal procurement, you have received the proposals from interested offerors and have begun the process of evaluation and selection. Negotiation and the repeated analyses and evaluations required can be very time consuming and there is often a wide range of competence or cost-effectiveness in the initial proposals. You may not wish to expend this effort on all the proposals for two reasons:

- *certain proposals, upon evaluation, may be so much worse than others for price or other reasons, that the possibility of accepting a subsequent offer is so remote as to make negotiations unnecessary; and*
- *you may have enough proposals so that you can be assured of negotiating the best buy in dealing only with several of the best; negotiating with more would be wasteful of both your resources and the marginal proposers'.*

For these reasons, a commonly used technique is to conduct negotiations only with offerors determined to be within the competitive range. In assessing the competitive range, competition remains an important objective, and the effort in determining the competitive range is to preserve those proposals which stand a reasonable chance of being found acceptable, not to unduly limit competition by eliminating viable proposers.

Purpose

Competitive range is a difficult concept to define in specific terms which would apply to all potential procurements, because professional judgment must be used in establishing the competitive range. Procedures and factors for determining the competitive range may differ from procurement to procurement.

This manual is noteworthy as it contains a comprehensive and easy-to-understand discussion of 'competitive range'.

The competitive range can be determined so that it is:

- *Not used to unfairly eliminate offerors;*

- *Based on factors and criteria known to all offerors;*
- *Applied uniformly to all proposals; and*
- *Well documented in the procurement files.*

One of your considerations may be that as many offerors as possible be given the opportunity to be considered within the competitive range, so as to attain the goal of full and free competition. Only those offerors whose proposals are determined to be so deficient or so out of line as to preclude meaningful negotiation need be eliminated from the competitive range.

The competitive range can consist of those offerors whose proposals have a reasonable chance of being selected for award, i.e., are acceptable as submitted or can be made acceptable through modification. All responsible offerors whose proposals are determined to be within the competitive range would be invited to participate in any oral and/or written discussions.

Best Practices

While it is not possible to identify all of the specific steps and analyses that could be performed in determining which proposals are within the competitive range, the following are provided for consideration in making this determination:

- *The determination of which proposals are within the competitive range is usually made by the evaluation team (or procuring official, if there is no evaluation team).*
- *Competitive range determinations can be made using cost/price, technical and other factors identified in the solicitation.*
- *Detailed independent estimates prepared by the initiating department or project office can be considered when assessing the cost/price aspects of competitive range.*
- *The evaluation team's scoring of offerors' technical and management proposals is a logical basis for establishing which proposals are within the competitive range, as is scoring of other evaluation/award criteria specified in the solicitation. However, you may paint yourself into a corner if you commit to competitive range determinations based on predetermined "cutoff scores."*
- *Borderline proposals need not automatically be excluded from the competitive range, if they are reasonably susceptible of being made acceptable. Remember that as a general rule, if there is doubt as to whether a proposal should be in the competitive range, the goal of competition is served by including it.*

- *Only those proposals that are judged to be so deficient or so out of line as to preclude further meaningful negotiations need be eliminated from the competitive range.*
- *Competitive range determinations are significant documents in the procurement file. This documentation is helpful to serve as a basis for debriefing offerors, and for responding to inquiries and protests. Many systems notify, in writing, any offerors whose proposals have been eliminated from consideration for award. Such notification occurs at the earliest practicable time after this determination is made.*
- *Written and/or oral discussions are usually conducted with all offerors determined to be within the competitive range.*
- *At the conclusion of discussions with offerors in the competitive range, the procuring official may ask all offerors to submit their best and final offers in writing. This combines complete fairness for each offeror, with competitive incentive for each to make its best realistic offer.*

DISCUSSIONS AND CLARIFICATIONS

Discussions are difficult to structure so that the process remains “fair and open”. They are often described by procurement people as “difficult to manage”, and by vendors as “seemingly unfair” or “favoring one proposer”. FTA’s comments on this process are insightful:

DEFINITIONS

Negotiation - *A procedure that includes the receipt of proposals from offerors, permits bargaining and usually affords offerors an opportunity to revise their offers before award of a contract.*

Discussion - *Any oral or written communication between a procurement official and a potential offeror (other than communication conducted for the purpose of minor clarification) whether or not initiated by the procurement official, that (1) involves information essential for determining the acceptability of a proposal, or (2) provides the offeror an opportunity to revise or modify its proposal.*

Clarification - *A communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in a proposal.*

DISCUSSION

You may wish to obtain clarifications from one or more proposers, or hold discussions with all proposers immediately after receipt of proposals. However, it is also possible to proceed with evaluations and determination of a competitive range as described in the following sections, before discussions are held. Most typically, the first discussions are oral presentations made by a short list of proposers within a competitive range. If discussions are held with any proposer at any phase of the procurement, holding discussions with all remaining proposers (not already excluded from the competitive range as described in Section 4.5.3, "Competitive Range") will increase the likelihood and the appearance of the most accurate and objective evaluation and negotiation.

Best Practices

You are not required to conduct discussions with any offeror provided: (1) the solicitation did not commit in advance to discussions or notified all offerors that award might be made without discussion, and (2) the award is in fact made without any written or oral discussion with any proposer. Normally, however, you will need to conduct discussions. If this is the case, you will preserve the competitiveness and fairness of your procurement by conducting discussions with all offerors who submitted proposals in the competitive range. The competitive range is determined on the basis of cost or price and other factors and includes the proposals that have a reasonable chance of being selected for award. The content and extent of the discussions is a matter of your judgment based on the particular facts of the procurement.

Confidentiality has many advantages during the evaluation process. The name and number of proposals received is not normally considered a public record and need not usually be released to the competitors or the public at large. Your control of this information may ease the proposers' competitive tension and allow you to conduct more meaningful negotiations. Competitive information provided relative to both the technical and cost proposals may include trade secrets protected by statute and can usually be kept confidential during the evaluation process, and, in some instances, after the award of contract. However, state public information laws and the Federal Freedom of Information Act can also affect your latitude, particularly if there is public interest in the procurement and inquiries are made by non-competitors.

If you enter negotiations or discussions (as opposed to simple requests for clarification) with one offeror, an automatic impression of unfairness is avoided by entering them with all remaining offerors. An occasional mistake is to circumvent the process merely by requesting "clarifications" when you are in fact conducting discussions. If the questions, and the concurrent opportunity to respond, are sufficient to lead an offeror into areas of perceived deficiency in its proposal, discussions have been held. If discussions are held, what should the content be or how should they start? Competition and fairness are served by conducting meaningful discussions with offerors.

This includes advising them of deficiencies in their proposals and affording them the opportunity to satisfy the requirements by the submission of revised proposals. You are not, however, obligated to afford offerors all-encompassing discussions, or to discuss every element of a technically acceptable, competitive-range proposal that has received less than a maximum possible score. Also, if a proposal is technically unacceptable as submitted and would require major revisions to become acceptable, you are not required to include the proposal in the competitive range for discussion purposes.

Sometimes you may be in the uncomfortable position of having concluded discussions only to discover there is a significant mistake or an aspect the evaluators do not understand in one proposal. Since allowing one bidder to correct its proposal would constitute discussions with that firm, discussions must be reopened with all bidders in the competitive range and the [offerors] must be allowed the opportunity to submit revised proposals.

During discussions with offerors, you may be requested to ask all proposers to submit proposals with an advantageous approach proposed by one of them. Someone on your team may suggest that a technique used by proposer A would complement proposer B's approach well and could result in an advantageous offer from B. Also, after price proposals have been evaluated, someone may suggest that a proposer with a high technical score should be asked if it can meet a price which happens to be the price of a competitor. Such techniques are considered technical leveling, technical transfusion or auctioning. The disadvantage of these techniques is that proposers may react adversely. Because they are concerned about their position relative to their competitors, and want to keep their strengths confidential from their competitors, they may become more secretive in their discussions with you if they sense you may relay their ideas, pricing, or positions to their competitors. This is not to discourage discussion of price or suggesting major revisions in a proposal, but rather to discourage the disclosure, even indirect, of one proposer's information to another. They may hold back their strengths and valuable information, waiting for a BAFO. This can greatly inhibit the negotiation of the most advantageous proposal.

Commonwealth of Massachusetts

Procurement Information Center⁴



Massachusetts has been very active in procurement reform. In April, 1996, new regulations were promulgated which dramatically changed the focus and execution of procurement-related activities.

These regulations introduced a single solicitation

concept called the Request For Response (RFR), “the mechanism used to communicate contract performance specifications to potential bidders.” This RFR replaces a variety of procurement instruments including RFPs, Invitation To Bid, Request For Quotation and others.

Originally, the State had a single Procurement Policies and Procedures Handbook of more than 300 pages. This Handbook was subsequently replaced by its Procurement Information Center, a web portal acting as a gateway to procurement.

We recognize that a Procurement Information Center, a series of related web pages, is not a single manual. However, this web-based approach is becoming the standard, replacing single manuals with a more comprehensive easy-to-navigate web site.

In the remainder of this section, we discuss the Procurement Information Center and four of its key documents.

PROCUREMENT INFORMATION CENTER (PIC)

The Procurement Information Center (PIC) is a set of companion documents to the Commonwealth’s procurement regulation, 801 CMR 21.00, Procurement of Commodities and Services, Including Human and Social Services. The PIC provides comprehensive guidance to departments on what is required when conducting public procurements, managing contracts and recommended best practices for consideration. The guidance in this document must be followed by all Executive departments and Non-Executive departments that have elected to follow 801 CMR 21.00.

A description of all of the material found at the PIC is beyond the scope of this book. However, the material provided is generally thorough, easy to understand and contains many best practices.

In the remainder of this section, we provide thumbnail sketches of four of the documents found at PIC:

- Procurement Overview
- How to Do a Competitive Procurement
- Procurement/Contract Management Checklist
- Exceptions to Competitive Procurements.

PROCUREMENT OVERVIEW⁵

This 28-page document provides a view of procurement from 20,000 feet. It discusses the organization of the Procurement Information Center, enabling legislation, procurement principles and basic approaches. Here are the topics it covers:

Executive Summary	Conflict of Interest Law
How the Procurement Information Center Is Organized	Using the Commonwealth Procurement Access and Solicitation System - Comm-PASS
Statutory Authority and Oversight of Procurement	Training, Outreach and Quality Assurance
Compliance with 801 CMR 21.00	Procurement Snapshot
Procurement Principles – Best Value	How to Purchase Using Statewide Contracts
Roles and Responsibilities in Procurement and Contracting	Conclusion and Procurement Information Center Preview
	Associated Regulations and Policy Guidance

This document deals with ‘best value’ and provides a more detailed description than that found at most agencies.

Procurement Principles - Best Value

801 CMR 21.00 empowers departments to procure commodities and services at the “best value” for the department and the Commonwealth. Departments may pursue procurements that achieve a balance of interests and offer the best “deal” or “value” by developing solicitation evaluation criteria that measure factors beyond cost. A procurement is considered in the best interest of the Commonwealth (providing the best value) when it balances the nine guiding principles of procurement. A procurement achieves best value when it:

- 1) Supports the Achievement of Required Performance Outcomes*
- 2) Generates the Best Quality and Economic Value*
- 3) Is Timely*
- 4) Minimizes the Burden on Administrative Resources*
- 5) Expedites Simple Purchases*
- 6) Allows Flexibility in Developing Alternative Procurement and Business Relationships*
- 7) Encourages Competition*

8) Encourages the Participation of Quality Contractors

9) Supports Commonwealth and Department Procurement Planning

HOW TO DO A COMPETITIVE PROCUREMENT⁶

This document deals with the entire RFP Process.

List of Topics in This Document

Executive Summary	4. Draft the Evaluation Criteria
Procurement of Legal Services	5. Distribute the RFR to Potential Bidders
Requests for Information - An Optional Planning Tool	6. Designate an Open Solicitation Phase (with Optional Inquiry Period)
Minimum Requirements for the Competitive Procurement Process	7. Evaluate the Responses
1. Designate a Procurement Team Leader and Procurement Management Team	8. Conduct Contract Negotiations
2. Create a Procurement File	9. Notify all Respondents of Contract Execution
3. Draft the Request for Response (RFR)	10. Conduct Debriefings as Appropriate
	Associated Regulations and Policy Guidance

In total, these topics provide ‘how to’ information about the RFP Process. One of the topics is ‘create a procurement file’. The information presented is more detailed and prescriptive than that found in other jurisdictions.

Create a Procurement File

Pursuant to 801 CMR 21.06(1), each procuring department is required to maintain a paper or electronic procurement file for each procurement. The procurement file serves as the central repository for all information concerning the development and release of an RFR, bidder selection, contract negotiation, the award of a contract and debriefings. The department must identify the individual(s), usually the Procurement Team Leader, with responsibility for the creation, maintenance and on-going contract management of each procurement file. Disposal of the procurement file must be handled in accordance with the records retention and disposal requirements of the Secretary of the Commonwealth.

The procurement file is used for two primary purposes:

- 1. To provide an accurate record of the procurement process (the RFR development, evaluation and selection process).*
- 2. To serve as a contract management tool to be used by departments to monitor and document contract performance and contract activity. . .*

Procurement materials:

- *Request for Response and amendments (including all applicable attachments). This requirement is met by either a hard copy of the RFR or, if the RFR was posted on Comm-PASS, the Comm-PASS Solicitation Summary tab screen print containing the RFR title and reference number. Notes, minutes or other related materials generated during the RFR development and bidder selection process.*
- *Record keeping related to the Affirmative Market Program and/or purchase and use of Environmentally Preferable Products.*
- *List or sign-in sheet at bidder's conference (if offered) or copy of the Comm-PASS online forum sign-in page, if offered.*
- *Copies of written questions and answers provided by the PMT, if applicable.*
- *Any correspondence to and from bidders distributed manually, electronically and/or posted on Comm-PASS.*
- *Written summary of the evaluation process, completed evaluation forms and any minutes or notes from evaluation committee meetings.*
- *Evaluation criteria and any amendments (with reasons for the amendments).*
- *Notes from bidder presentations and demonstrations.*
- *Clarification documents (if required).*
- *Reference checks.*
- *Recommendation for selected bidder(s).*
- *Notification of contract execution.*
- *Responses from non-selected bidders (selected responses are already part of the contract package) or location of electronic file if online bid submission through Comm-PASS SmartBid.*
- *Requests for and any correspondence resulting from any debriefing requests or public record/freedom of information requests.*
 - ☞ *For POS Only: Requests for and any correspondence resulting from appeals.*
- *Any other required forms or additional information as required by policy.*

Contract materials:

- *The contract package . . .*
- *Documentation related to payments (invoices, etc.), performance, contract monitoring and evaluation, agreements, correspondence, contract compliance and negotiations pertaining to options to renew.*

PROCUREMENT/CONTRACT MANAGEMENT CHECKLIST^Z

This 6-page document identifies the Minimum Requirements for the Competitive Procurement Process. It identifies the tasks to be completed for both small and

large procurements as well as specific issues to be considered. It also identifies the basic information that must be provided in every RFP:

Minimum Contents of a Request for Response (RFR)

Description or purpose of the procurement
Acquisition method (fee-for-service, outright purchase, rental, term lease, Tax Exempt Lease-Purchase and/or license)
Request for single or multiple contractors
Use of a procurement by a single or multiple departments
Anticipated duration of the contract, including renewal options
Anticipated expenditures and compensation structures
Performance and contract specifications
Instructions for submission of responses
Deadline for responses and procurement calendar
RFR attachments/required specifications

EXCEPTIONS TO COMPETITIVE PROCUREMENTS⁸

This 13-page document provides a detailed discussion of when a competitive procurement is not required. This document also explains why the Regulation establishing competitive procurement does **not** recognize as a procurement exception the concept of a “sole source” procurement.

There are only six exceptions to open competition permitted by law.

Six Procurement Exceptions

Regulation 801 CMR 21.05 recognizes the following six conditions in which a competitive procurement is not necessary.

Legislative exemptions or legal restrictions due to a general or special law or other existing legal obligation

Emergency situations that require the immediate acquisition of a commodity or service

Collective purchasing arrangements

Interim contracts to prevent a lapse in contract performance

Hiring contract employees Incidental purchases

Incidental purchases

1. Legislative Exemption or Legal Restriction from Competitive Procurement

Sometimes the funding source (the state legislature or the federal government) will exempt a department from the competitive procurement requirements through the enactment of a general or special law. A legislative exemption under 801 CMR 21.05(2) may recognize, through statute or line item, a unique business

relationship that it desires the department to pursue or may specifically name the contractor that may be awarded a contract.

2. Emergency Contracts

Regulation 801 CMR 21.05(3) recognizes that unforeseen circumstances may require departments to procure commodities or services on an emergency basis. Some reasons for emergency procurements include:

The avoidance of harm to the government

The provision of mandated services

The provision of services or commodities for the health, welfare or safety of persons

The prevention of property damage

3. Collective Purchase

Regulation 801 CMR 21.05(4) recognizes that opportunities for maximizing the value of a procurement are available through “teaming” with other public entities in the procurement process. Under this competitive procurement exception, departments may execute a contract for the provision of commodities or services when an existing contract has already been established by federal agencies, other states or any other public entity.

4. Interim Contracts

Regulation 801 21.05(5) provides for interim contracts when either (1) an existing contract has been terminated or (2) the existing contract will end but the new procurement has not yet been completed. Under either scenario described below, departments may be faced with an interruption in contract performance, thereby necessitating an interim contract.

5. Contract Employees

When departments require the services of an individual, they must determine if the service qualifies as a competitive procurement exception (contract employee) under 801 CMR 21.05(6) or is subject to a competitive procurement (independent contractor).

6. Incidental Purchases

An incidental purchase is defined as a one-time, non-recurring, unanticipated need for commodities and/or services with a total dollar value of up to \$5,000.

Sole Source is NOT an Exception

Regulation 801 CMR 21.00 does not recognize, as a competitive procurement exception, the concept of “sole source” procurements, in which only one bidder is deemed to be capable of providing the commodity or service (thus eliminating the competitive procurement process). These procurements are counterproductive

because they eliminate competition and the “pool” from which departments select quality contractors.

The concept of an open, fair and competitive procurement is designed to provide a broad opportunity for bidders to compete for Commonwealth contracts. The only way to guarantee this opportunity is to ensure that due diligence is used to determine whether there are other qualified bidders. It is possible that certain bidders may appear to be the only ones capable of providing a commodity or service (due to factors such as unique licensing restrictions or training requirements). Even in these situations, the department must attempt some form of verification by posting an RFR or a notice of their intent to contract with a specific vendor on Comm-PASS using a Solicitation (Universal or Line Item Template) or Free-Form Quick Quote record. If the RFR/notice elicits only one response, the department may proceed with a contract. If additional qualified bidders respond to the RFR/notice, then the basis for a competitive procurement has been established. Please note: Even if there was only one bidder at the time of the original procurement of a proprietary product, a new competitive procurement/notice will be necessary at the end of this contract, since new bidders may have entered the market in the interim.

"A Deal Too Good to Pass Up"

“Best Value” Offers - Departments are sometimes approached unsolicited by a vendor and presented with a great “deal” or a no cost or below market cost offer, which may appear so beneficial or advantageous that rejecting the deal in favor of completing a competitive procurement may seem disadvantageous, wasteful or unjustifiable. Examples of situations that might fall under this provision include offers made to the Commonwealth at zero cost, at a cost significantly lower than market cost and even deals that would result in payments to a department, such as services for the removal of recycled materials. However, something cannot be considered best value unless and until a department has taken steps to confirm, through a public process that is fair, open and competitive, that the “deal” truly represents best value to the Commonwealth and that there is no other bidder that can meet or beat the deal being offered to the Commonwealth. Best Value Offers will result in the acquisition of a good and/or service.

Montana

Initiating and Navigating the Request for Proposal Process⁹

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GUARDIANS OF PUBLIC TRUST

THE TOOLS

WHAT IS A REQUEST FOR PROPOSAL?

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SECTION 1: PROJECT OVERVIEW AND INSTRUCTIONS
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OPTIONAL SPECIFICATIONS
ADDITIONAL RFP TOOLS
SAMPLE PRICE SHEET
PRICING SCENARIO EXAMPLES
SAMPLE SCORING MATRICES
FOR MORE INFORMATION

Montana has developed a 53-page RFP Manual that is easy to read and covers the entire process. This manual was originally published in the 1990s and this is the 6th edition. This manual can be readily adapted for other, relatively small, jurisdictions.

I like this manual. It starts off by acknowledging the conflict between procurement's role of getting the needed supplies and services to support a new program and being the guardian of public trust and ensuring that the process is fair, open and transparent.

GUARDIANS OF PUBLIC TRUST

The spending of public tax dollars is an issue close to everyone's wallet. An effective public procurement program reduces the cost of government and directly improves the quality and timeliness of services rendered by state agencies. For agencies, procurement is a service function, supporting programs by the acquisition of supplies and services. For potential offerors, it is an opportunity to provide supplies and services to government agencies.

Operating under the authority of the Montana Procurement Act, the Department of Administration has the responsibility of developing and administering a fair, legal, cost-effective procurement program. To meet this responsibility, the Department's goals are:

To recognize our obligation to the taxpayers, the utilizing agencies, and the offerors to institute and maintain an effective and economical program for purchasing supplies and services.

To obtain the needed supplies and services at favorable prices without compromise of suitability, appropriate quality, and reliable offeror performance.

Another features which makes this a good model is that the document is easy to navigate with important definitions and concepts highlighted in easily identified shaded text boxes. Here is the entry for Evaluation Criteria:

WHAT ARE "EVALUATION CRITERIA"?

Evaluation criteria are the factors an agency uses to determine which of several competing proposals submitted in response to an RFP would best meet the agency's needs. In establishing effective evaluation criteria, an agency must clearly identify the factors relevant to its selection of a contractor and then prioritize these factors according to their importance in satisfying the agency's needs. Together, the proper identification and weighting of the evaluation criteria will form an evaluation plan that will provide the agency with a common standard by which they will judge the merit of competing proposals. This allows the agency to rank the proposals received while simultaneously providing offerors with a fair basis for comparison. Additionally, effective evaluation criteria will allow proposals to accurately reflect the offeror's understanding of – and ability to deliver – what the agency needs.⁷

There are other noteworthy features:

- The RFP Process is described in 16 pages of text.
- There is a separate section dealing with scoring price using ratio method, best value method, and two-step method.
- The Guide provides answers to basic questions such as:
 - When is an RFP used?
 - How late is late?
 - Trade secret or proprietary information?
 - Responsive or Non responsive?

Other RFP Resources

In addition to the manual, Montana's RFP site contains a number of useful forms and templates:¹⁰

- Agency RFP Checklist
- Client Reference Forms
- Contractor Assessment Program Template
- Declaration Form (Non-Conflict of Interest and Confidential Information)
- Determining Relative Value
- Offeror's RFP Checklist
- Questions and Answers Addendum
- RFP Cost Evaluation Methods
- RFP Evaluation Process - Instructions
- RFP Flowchart
- RFP Manual
- RFP Process Information
- RFP Process Q & As
- RFP Reference Check
- RFP Request for Documents
- RFP Sample Scoring Guide
- RFP Template
- RFP Template Instructions
- Standard Contract
- Standard Terms and Conditions
- Trade Secret Confidentiality Affidavit
- Identifying and Managing Confidential Information in a Solicitation Response

IT RFP Documents

- IT RFP Template
- Standard Terms and Conditions
- Contract Template
- IT Contract Performance Security Information

North Carolina

Request for Proposal Template¹¹

This exemplary document is, in fact, a group of three documents.

The first document is the Request for Proposal Template. It is designed specifically for the acquisition of Information Technology goods and services and, consequently, contains many terms and conditions unique to IT.

The second document is entitled “Instructions and Optional Terms for Preparation of a Request For Proposal (RFP)”.¹² It provides 19 pages of information about each section in the RFP and issues to be addressed.

While the first two documents provide are solid and provide valuable assistance and instruction to the User Departments, it is the third document that makes this group exemplary. This document contains features and information not usually found in the description of an RFP process. The remainder of this Chapter contains a discussion of some of these features.

PROCESS FOR INFORMATION TECHNOLOGY PROJECTS WITH RFP SOLICITATION WHEN PURCHASING SERVICES¹³

This document contains the following features which enhance its usefulness to the User Departments:

- Contains a Responsibility Assignment Matrix.
- Describes the RFP process in 13 steps. Each step is divided into activities and the person responsible for each activity is identified.
- Defines the specific role for each of 21 different players including Agency Business Owner, and Vendor.
- Identifies Key Documents, Templates and Reference Materials.
- Contains some valuable clarifications based on policy and best practices.

Here is a brief discussion of each of these features.

Contains a Responsibility Assignment Matrix

A Responsibility Assignment Matrix . . . describes the participation by various roles in completing tasks or deliverables for a business process. . . Since the procurement process is a cross-functional/departmental process, the (responsibility assignment) matrix is especially useful in clarifying roles and responsibilities of the numerous organizations included in the process.

RASCI is an acronym derived from the five key responsibilities most typically used: Responsible, Accountable, Support, Consulted, and Informed.

Responsible (R) – *The role assigned this key responsibility is responsible for the completion of the work. This role may do the work or may delegate the work to the roles in the Support category below.*

Accountable (A) – *The roles assigned this key responsibility are ultimately accountable for the correct and thorough completion of the deliverable or task. In this procurement process, these roles are typically the final approving authority. The role designated as Responsible is typically accountable to these roles.*

Support (S) – *The roles assigned this key responsibility assist in completing the work.*

Consulted (C) – *The roles assigned this key responsibility represent individuals whose opinions are sought; however, these roles do not do work in a Support role.*

Informed (I) – *The roles assigned this key responsibility are kept up-to-date on the progress of the procurement.*

Describes the RFP process in 13 steps. Each step is divided into activities and the person responsible for each activity is identified.

For example, the first step is “Create the Proposal Evaluation Plan and Rating Method” and it is divided into 11 separate tasks. Here are the first five tasks:

Create the Proposal Evaluation Plan and Rating Method

	Activity	Responsible
	Create the Proposal Evaluation Team, identify the Proposal Evaluation Team Leader, and establish logistics for meetings, security of confidential information, proposal evaluation training, etc. Note: A Contractor may not be involved in the creation of the Proposal Evaluation Plan and Rating Method if the Contractor or the Vendor that employs the Contractor intends to submit a proposal.	Agency Project Manager (R) Agency Business Owner (S) Agency CIO (S, A) Agency Executive Sponsor (S, A) Proposal Evaluation Team Leader (I) Proposal Evaluation Team (I)
	If appropriate, locate the conflict of interest and confidentiality policies and associated forms.	Agency Project Manager (R) Agency Purchasing Office (C)
	Document the Proposal Evaluation Team member roles and responsibilities.	Agency Project Manager (R)

	Activity	Responsible
		Agency Purchasing Office (C) Proposal Evaluation Team Leader (S)
	Document the goals, approach, protocols, and rules for the Vendor Proposal evaluation and clarification questions.	Agency Project Manager (R) Agency Purchasing Office (C) Proposal Evaluation Team Leader (S)
	Prepare a detailed Vendor Proposal evaluation schedule starting from the creation of the Proposal Evaluation Plan and ending with the recommendation of highest ranked Vendor Proposal. Note: This detailed schedule should align with the activity schedule in the RFP.	Agency Project Manager (R) Agency Purchasing Office (C) Proposal Evaluation Team Leader (S)

Defines the specific role for each of 21 different players including Agency Business Owner, and Vendor

Here are the first 5 entries:

Role	Responsibilities
Agency Business Owner	Champions the project and provides executive support for the project. May be same as Agency Executive Sponsor.
Agency Chief Financial Officer (CFO)	Manages the Agency's financial risks and oversees the use and availability of Agency funds.
Agency Chief Information Officer (CIO)	Provides oversight, resources and approval for IT-related projects.
Agency Contracts Manager	Drafts the Contract that results from award of the Vendor Proposal. Monitors the Vendor's and the State's progress and performance to ensure goods and services conform to the contractual requirements.
Agency Executive Sponsor	Provides resources and approval as necessary for successful completion of project.

Identifies Key Documents, Templates and Reference Materials

The table lists the documents, templates and reference materials cited in the Process for IT Projects with RFP Solicitation When Purchasing Service. The items are indicated in the table as follows:

- Documents will be denoted with a (D).
- Templates will be denoted with a (T).
- Reference Materials will be denoted with a (R).

The table also provides a description of each document, template and reference material item as well as its location.

As an example, here are the first four entries in this section:

Document (D) /Template (T) / Reference Material (R) Name	Description and/or Location
Approval to Post the RFP (D)	A letter issued by the Statewide IT Procurement Office to the Agency that authorizes the Agency to issue the RFP.
Authorization to Award Contract (D)	A letter issued by the Statewide IT Procurement Office authorizing the Agency to award the Contract.
Bid Addendum (T, D)	A document issued prior to the opening date of the Vendor Proposal to make changes or corrections to an RFP and/or answer written questions submitted by a Vendor. The template is located on the Statewide IT Procurement Office website: http://www.its.state.nc.us/ITProcurement/Documents/Addendum_Form.doc
Business and Technical Requirements/Specifications (T,D)	Specifications that document the quality or performance of a system, system component or service. Examples include functional specifications, performance specifications, interface specifications, design specifications, development standards, maintenance standards, or similar terms. A specification may be either mandatory (required) or desirable. The template is located on the EPMO website: http://www.epmo.scio.nc.gov/FormsAndTemplates/default.aspx

Contains some valuable clarifications based on policy and best practices.

Contractor

If a Contractor or the Vendor that employs the Contractor is expected to submit a proposal, the Contractor may not be involved in the generation of the requirements/specifications.

Evaluation Criteria

Evaluation criteria communicate to Vendors the relative importance of a specific criterion to the Agency conducting the procurement. The Agency will use the evaluation criteria to determine which competing Vendor Proposals best meet the

Agency's needs. Thus, the evaluation criteria must clearly identify the factors relevant to the selection of a Vendor Proposal.

If used, sub-criteria further categorize the evaluation criteria into smaller groups.

Only the evaluation criteria/sub-criteria provided in the RFP can be used to evaluate Vendor Proposals.

Legal Counsel

The Statewide IT Procurement Office requires review of the RFP draft by Agency Legal Counsel if the estimated procurement is greater than \$500,000.

Rating Methods

Examples of rating methods are: numerical, weighted, narrative, and adjectival. The Statewide IT Procurement Office prefers that Agencies use the narrative rating method to evaluate Vendor Proposals; however, other rating methods are acceptable.

Narrative Rating System

When using the narrative rating system, the Agency must explain in writing how the offers were ranked. The explanation must be rational and consistently applied from competitor to competitor. If using the narrative evaluation method, the team must document the strengths and weaknesses of each criterion of each responsive Vendor Proposal.

If using the narrative evaluation method, (in evaluating each vendor's BAFO) the team must document changes to the strengths and weaknesses of each criterion of each responsive Vendor Proposal that result from the Vendor clarification responses.

Other Rating Systems

If using the numerical, weighted, or adjectival methods, the team must rate the strengths and weaknesses of each criterion of each responsive Vendor Proposal according to the agreed upon Rating Method.

If using the numerical, weighted, or adjectival methods, (in evaluating each vendor's BAFO) the team must document changes to ratings of the strengths and weaknesses of each criterion of each responsive Vendor Proposal in accordance to the agreed upon Rating Method.

Confidential Information

*A Vendor Proposal may not designate as confidential information or trade secret more pages than allowed by the NC Public Records Laws. The laws are provided via the link on the Government Public Records Branch of North Carolina website: <http://www.records.ncdcr.gov/guidelines.htm>
Prices are never considered to be confidential information.*

Non-responsive proposals

Note: The elimination of Vendor Proposal(s) that are non-responsive because of technical or business reasons must be decided via consensus by the entire Proposal Evaluation Team.

Negotiations

Conduct negotiations with highest ranked Vendor(s).

The scope of the RFP must not change, and care must be exercised if requirements/specifications are changed to assure equal advantage to all Vendor Proposals.

All discussions/negotiations must be conducted individually with each Vendor.

It is a best practice for negotiations to be conducted via conference call or face-to-face meeting to facilitate effective discussion. Other communication options include email, FAX, and memorandum/letter sent via postal service.

One person from the Proposal Evaluation Team is designated to lead negotiations, with other team members participating in the talks.

Negotiations may require presence of Agency Legal Counsel and Agency Purchasing Office if specified in the Agency policies or as necessary.

Best and Final Offers

If appropriate, compile a meeting agenda, topics of discussion and areas of functionality to demonstrate.

Requests for BAFOs may be issued to more than one Vendor, and the content may differ for each Vendor. Multiple Requests for BAFOs may be issued to a Vendor.

The Request for BAFO form is intended to be used to formalize the results of negotiations with the Vendor. It is not intended to be used to document clarification questions.

Recommendation Memo

The Vendor Proposal Recommendation Memo documents the justification for selecting the Vendor Proposal. It must summarize the evaluation process from the RFP issuance through the Contract award.

The Vendor Proposal Recommendation Memo and supporting documentation becomes public information after award of the Contract. It must be clear and thorough.

Contract

For most Agencies, the RFP, Vendor Proposal and Vendor BAFO Responses serve as the Contract. However, some Agencies may require additional contractual/agreement documentation.

And Ending Comment

There are thousands of guides, handbooks and policies which attempt to inform the reader how to construct an RFP. These five represent some of the best that I've found so far.

End Notes

1. Reference 43.
2. Reference 53.
3. Reference 77. U.S. Dept. of Transportation, Federal Transit Administration, Best Practices Procurement Manual, Chapter 4.5 Competitive Proposals, 2001, 20 pgs, www.fta.dot.gov/documents/BPPM_fulltext.doc
4. Massachusetts Procurement Information Center, web site, <http://www.mass.gov/anf/budget-taxes-and-procurement/procurement-info-and-res/conduct-a-procurement/procurement-information-center.html>
5. Reference 78. Massachusetts, Operational Services Division, Procurement Information Center, Procurement Overview, 2013, 28 pgs, <http://www.mass.gov/anf/docs/osd/pic/procurement-intro.doc>
6. Reference 79. Massachusetts, Operational Services Division, Procurement Information Center, How to Do a Competitive Procurement, 2007, 26 pgs, <http://www.mass.gov/anf/docs/osd/pic/procure.doc>
7. Reference 80. Massachusetts, Operational Services Division, Procurement Information Center, Procurement/Contract Management Checklist, 2007, 6 pgs, <http://www.mass.gov/anf/docs/osd/pic/checklist.doc>
- 8., Reference 81. Massachusetts, Operational Services Division, Procurement Information Center, Exceptions to Competitive Procurements, 2013, 13 pgs, <http://www.mass.gov/anf/docs/osd/pic/except.doc>
9. Reference 48.
10. This information can be found at Montana's web site, The RFP Process, <http://gsd.mt.gov/ProcurementServices/rfpprocess.mcp>
11. Reference 82, North Carolina , State IT Procurement Office, Request for Proposal template, 36 pgs, www.its.state.nc.us/ITProcurement/.../docs/RFP_form_template.doc
12. Reference 83, North Carolina, State IT Procurement Office, Instructions and Optional Terms for Preparation of a Request for Proposal (RFP), 20f12, 19 pgs <http://www.its.state.nc.us/ITProcurement/Documents/RFP%20OPTIONAL%20Terms.doc>

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13. Reference 84. North Carolina , State IT Procurement Office, Process for Information Technology Projects with RFP Solicitation When Purchasing Services, 2012, 37 pgs, http://www.epmo.scio.nc.gov/library/docs/Process_for_IT_Projects_with_RFP_Solicitation.doc

Chapter Eight

DEALING WITH SUPPLIERS **(Until the Competition Closes)**

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Chapter Eight

DEALING WITH SUPPLIERS

(Until the Competition Closes)

Having prepared the RFP, the battle isn't over. Some would argue that the worst is yet to come. Issuing the RFP carries with it a large number of questions, and many risks:

- How do we identify suppliers?
- How many proposals do we need?
- What if there is seemingly only one qualified supplier?
- If there are only one or two suppliers, can we award the contract without an RFP?
- If there are hundreds of suppliers, can we restrict the competition?
- Do we have to meet with the suppliers? Do we have to answer their questions?

This chapter attempts to answer some of these questions and provides examples of the best practices from many different jurisdictions.

It's hard to know, without a lot of experience, how to invite suppliers to compete, and which suppliers are capable of providing acceptable solutions. As always, there are competing objectives in this process:

- We want to ensure that the process is "fair and open", that all suppliers have access to government procurement opportunities. (This often leads to a large number of suppliers submitting proposals.)
- We want lots of proposals to ensure that we evaluate a wide range of solutions.
- We want to ensure that the costs of preparing and evaluating proposals are commensurate with the money involved. (We really do not want to receive a lot of proposals except for very large projects.)

Underlying all of these objectives is the requirement that the project be successful. A successful project has the following characteristics:

- The procurement process was executed in a professional manner and was consistent with your purchasing policy.
- The procurement process was documented as you went along and could survive public scrutiny.
- No valid objections were raised by suppliers concerning the fairness of the process or the actual selection.
- The selected supplier performed as expected. The solution was implemented on time, within budget and satisfied the requirements.
- Your organization (your boss and the stakeholders) acknowledged that the project was a success.

In recent times, the pressure to conduct fair, open and transparent procurements has increased. Two of the reasons for this change are an increasingly skeptical public and the seemingly more litigious vendors.

Inviting Suppliers to Compete

The process of inviting suppliers to compete is fraught with danger. Unsuccessful vendors, or those not even invited to compete, often claim that this step violates the spirit of "fair and open competition", or similar words taken directly from your organization's purchasing policy. These vendors will argue that this step was not conducted in a "visibly fair, ethical and prudent manner." Some of the frequently heard arguments are listed below:

- We weren't invited or selected so you didn't get the best solution.
- You invited only the top few suppliers who have dominated the market. But their days are over. The market has changed. You were either trying to limit the competition because you favored one of the top players, you weren't familiar with the marketplace, or you were trying to simplify and shorten the evaluation process.
- You invited too many suppliers and wasted our time and money. If we had known that there were 25 potential proponents, we would not have

submitted a proposal. Why did you invite 25 firms to bid on \$50,000 worth of work? The preparation of even a simple proposal cost our firm about \$4000 (that is, your \$50,000 expenditure cost the invited firms a cumulative total of \$100,000.) Your RFP process abused our industry.

- The process for selecting a company to submit a proposal appears to have been arbitrary. Where did you get the list of potential suppliers? Why were we excluded? How old is your list?

How are suppliers identified and invited to compete? There are really only two major ways. Either all suppliers are invited through an open competition or some selected group of suppliers is informed of the RFP. Both of these approaches are discussed in the sections which follow.

BY PUBLIC ANNOUNCEMENT

This approach does not require any prior knowledge of the marketplace by the purchasing organization.

These days most jurisdictions imply make the RFP available on their web site or on the web site of a third party in the business of providing procurement announcements to the private sector.

In some jurisdictions, advertisements in official records or in specified newspapers is still required. In this case, you simply advertise your intention to issue a Request For Proposal and wait for suppliers to respond. If advertisements only cost one dollar and evaluations were free, then this approach would be followed by every organization on every RFP. Some public sector bodies don't maintain vendor lists. They simply announce every RFP in certain specified newspapers, or on their web site or on an e-tendering site such as BidNet or MERX. The vendor community is aware of this practice and monitors these web pages and newspapers. This approach appears to work well and certainly ensures that all vendors have an equal opportunity of knowing about the RFP.

Advertising can be done in newspapers. It can also be done electronically, making the RFP information available on a designated web site. In some jurisdictions this constitutes a 'public announcement'; in others, it does not.

The amount and location of the advertising typically depends on the nature of the procurement and the dollars involved. Usually, the larger the amount, the more widespread is the advertising. If the procurement is for a service only available from large, national firms, then the advertisement may be in a national forum. If the procurement is highly political, subject to much debate, then the advertising may be national as well. Most jurisdictions have an advertising policy which prescribes where the announcements are made based on the estimated value of the procurement.

Often, public announcements of major procurements attract large numbers of vendors. Some organizations are committed, by their policies, to provide each vendor with a copy of the RFP. Typical regulations or policy documents state that prospective bidders and proponents will be provided with copies of requests for bids or proposals upon request or can simply download the documents from a designated web site.

BY INVITATION

Inviting a selected group of suppliers is always a restrictive practice. If your organization's policy is based on open competition, then the restriction must be justifiable. Justification can take many forms: expediency, value of the contract, the cost of processing dozens of proposals, etc. In some organizations, the justification must be made in writing and made available to the public.

There are several different mechanisms for reducing the number of proposals by only inviting a select group of suppliers to submit a proposal: (i) Pre-qualify the vendors to reduce their numbers; or, (ii) select all or some of the vendors from an existing list of interested vendors.

Pre-Qualification

Prequalification requires that a larger number of proponents provide only sufficient evidence of their ability to perform the contract to enable comparisons to be made and a smaller number (normally between five and ten) shortlisted. This process does not require a detailed response for the objective is to reduce the proposal effort by proponents as a group. The request for a prequalification statement should contain mandatory questions carefully worded to enable conclusions to be drawn from the responses.

Some organizations insist that the pre-qualification process be run with the same set of rules as an RFP. They believe that since the process is used to restrict competition, it must be fully defensible. They also insist that the list of qualified vendors can then only be used for the intended purposes, and that the list expires after some pre-defined length of time, typically one year. These practices are intended to be fair yet reduce the number of proposals.

A prequalification phase adds time to the RFP process. But it saves time and effort during the proposal evaluation phase by reducing the number of proposals. It can generate more savings if more than one RFP will be issued to the same group over the next 12 months. This approach can save time and money spent by the vendor community in generating a larger number of proposals.

If you anticipate that a large number of suppliers will want to examine the RFP and submit a proposal, you may want to pre-qualify them to reduce numbers. Pre-qualification is usually performed on the basis of mandatory conditions and is regarded as a separate process.

Consider this example: suppose you wanted a new web-based vendor registration system designed and implemented. There are hundreds of system design firms in your city. How do you restrict the numbers? Well, first identify some of the mandatory requirements. For example, the new system may require specific skills or experiences such as knowledge of specific brand-name computer software or vendor registration systems. Using these factors, the list of several hundred could be reduced to several dozen. With some more thought, additional factors could be identified which would be mandatory and which would reduce the number of potential proponents to a reasonable number. The final process must be rational, easy to explain, and easy to justify.

Once these qualifications are known, they can be used to construct a list, to review your existing lists, or to construct an announcement. The energy spent in searching for suppliers must be reasonable. There is an onus on suppliers that want to do business with organizations to register with them or to seek out opportunities by accessing their web-based tendering or procurement system.

In many jurisdictions, the policy is to accept any proposal that is received before the closing time so long as the vendor would have passed the pre-qualification screening. Some jurisdictions only use this approach when other, more competitive approaches are ruled out. This is the case in Alaska where the evaluation of

unpriced technical proposals can be used to identify qualified firms. These firms can then be issued an RFP:¹

When it is considered impractical to initially prepare a definitive purchase description to support an award based on listed selection criteria, the procurement officer may issue an expression of interest requesting the submission of unpriced technical offers, and then later issue a request for proposals limited to the offerors whose offers are determined to be technically qualified under the criteria set out in the expression of interest.

In some jurisdictions, to preserve the integrity of the RFP process, a pre-qualification process is governed by the same RFP rules. The process is often used to establish a qualified source list that is only valid for a specified time such as a year. No names can be added to the qualified source list except through the formal process. This approach is easy to defend as long as the expiry date is kept relatively short so it does not bar new vendors for very long.

In other jurisdictions, the pre-qualification process is less formal and, therefore, more subjective and more difficult to defend as being "fair and open".

Here is an example of a formal set of rules for this process:²

Pre-qualified source lists (for planned contracts)

(1) Where a procurement authority pre-qualifies bidders or proponents before issuing a request for bids or proposals for contracts, it will establish a pre-qualified source list pursuant to this directive, which will be valid for up to one year and up to three years if an extension is authorized by the Deputy Minister. As defined in this Directive, a pre-qualified source list is "a list of bidders or proponents who meet the evaluation criteria specified for planned contracts".

(2) The procurement authority will define the scope of each pre-qualified source list in terms of the specific contracts which are contemplated.

Procurement authorities will publicly advertise for bidders or proponents to submit their qualifications for pre-qualified source lists.

Responses to requests for qualifications issued pursuant to Section 43 will be considered proposals as defined by this directive, and will be evaluated accordingly. . .

A procurement authority will not add the name of a bidder or proponent to pre-qualified source lists except through the evaluation and acceptance of the proponent's qualifications submitted in response to the request for bids or proposals.

If a procurement authority proposes to undertake procurement for which there is a valid pre-qualified source list, the procurement authority must invite all persons included in the list to submit bids or proposals, as the case may be, in respect of the procurement.

Selection of Names on a List

Many organizations maintain lists of suppliers for various commodities and services. Whenever a supplier contacts them regarding potential business, they encourage the supplier to register with them. Often, the related procurement law or regulations requires that the purchasing organization register vendors. These organizations usually have a registration package describing the types of procurements they make, their procedures and policies. There is a wide variety in the quality of the lists maintained by organizations. Some lists are relatively complete; others only reflect those few suppliers known to the organization. List maintenance is an expensive undertaking and can become a major task. Obtaining new information from suppliers on an annual basis requires staff, computer resources, and a budget. All are increasingly scarce quantities.

It is becoming common for an agency to require the vendor to complete a web-based registration system and to keep its information current. This significantly reduces the time, effort and cost to the agency.

Some organizations have no choice: they are required by an outdated law or by policy to maintain and use supplier lists. Some organizations delete suppliers from the list if the suppliers do not send in a 'no bid' for each RFP; others keep them on their list. Some charge for this service; others register all vendors at no cost.

Setting the rules for lists and operating the administrative machinery for their upkeep and maintenance can be a major effort. Here are some of the approaches to handing lists of vendors who may be interested in receiving RFPs or other bid documents.

In South Dakota³, the Office of Procurement Management maintains a bidders list for the solicitation of formal bids. The registration fee is \$50 per year and "A bidder will be removed from the bidders' list for failure to pay the registration fee for each fiscal year . . ."

In Coconino County, AZ you can register on-line, a step in the right direction:⁴

*The Coconino County Purchasing Office maintains bidders list in which all vendors who indicate a desire to receive Notices of Call for Bids and Proposals will receive such notices as those bids and proposals are issued via an email message. Vendors must register under the **“Notify me” link** on the County main home page. Be sure to include all vendor information and the commodities in which you are interested in receiving Notices for.*

*It is the express responsibility of the vendor to insure that they are on the list **AND** if there are any addresses or other business information changes the vendor must make those changes online themselves.*

Some organizations create complicated administrative processes which are often abandoned or simply fall into disuse. We often find rules⁵ such as “firms who fail to respond may be removed from the bidders list”.

In New Mexico⁶, state law requires that lists be maintained:

Central purchasing offices shall send copies of the notice or invitation for bids involving the expenditure of more than twenty thousand dollars (\$20,000) to those businesses that have signified in writing an interest in submitting bids for particular categories of items of tangible personal property, construction and services and that have paid any required fees.

A central purchasing office may set different registration fees for different categories of services, construction or items of tangible personal property, but such fees shall be related to the actual, direct cost of furnishing copies of the notice or invitation for bids to the prospective bidders.

The fees shall be used exclusively for the purpose of furnishing copies of the notice or invitation for bids of proposed procurements to prospective bidders.

The Procurement Code in Alaska⁷ requires that (a) "the Commissioner shall establish and maintain current lists of person who desire to provide supplies, services, professional services, or construction services" and that (b) "A person who desires to be on a list shall submit to the commissioner evidence of a valid Alaska business license."

Before an RFP is issued, the organization reviews its supplier list and selects those vendors providing the required services. The use of lists can be dangerous. Lists are often incomplete or out of date. The costs of maintaining an accurate list often exceeds its value. Some purchasing organizations require that the users submit a list of suggested vendors. The theory is that the users are more familiar with the particular supplier community and should be able to ensure that the major players

have been identified, even if they have not registered to be on the official suppliers list.

Large organizations may deal with thousands of suppliers, and may have vendor lists exceeding 10,000. Keeping these lists up to date is a major activity costing thousands of dollars each year.

Manually maintained lists, or registration processes with complex rules are remnants of procurement before it was e-procurement. If your organization requires the use of lists because of its operational needs, its policies, or legal requirements, then the list should be as low maintenance as possible. Vendors should register themselves, specify their areas of interest or preferences and the procurement system should automatically inform them of opportunities as they are announced.

Rotation of Names on a List

Lists create problems. Rotating the names on a list creates more problems. For each RFP, vendors are selected from the list according to a rotation system. Rotation of the names requires that the list be segmented into groups and each group is used in turn. For example, suppose you have the names of 100 different suppliers of cleaning services on your list. If the procurement is small and does not warrant inviting all 100 to submit proposals, you might divide the list into five groups of 20. For the first procurement, you would send the RFP to the first group of twenty. The next procurement would go to the second group. This would be repeated as required.

Simple questions are often asked that are difficult to answer. Remember that your selection may be challenged. Is your list accurate? Is it up to date? Would your procedure pass the test of being "visibly fair, ethical and prudent"? Is it fair to exclude a supplier, if you only issue one RFP each year? Is it fair to exclude a supplier from future competitions because it submitted a proposal that did not win? Is it prudent to exclude any supplier?

This method is justified when the list is accurate and up-to-date, and it is unreasonable to invite all registered vendors to submit a proposal. Consider the impact of inviting all 100 vendors to submit proposals. Each vendor might spend \$1000 preparing a short proposal, for a cumulative cost of \$100,000 across all vendors. This amount could exceed the value of the contract.

The list method can be extremely difficult to justify. Suppose a supplier is invited to submit a proposal and loses. The supplier is in the first group of 20 from the 100 suppliers cited above. Having been selected once, the supplier must now wait until all of the other groups have been used. The supplier is excluded from competing further until the balance of the 100 suppliers on the list has been invited. In some organizations, this may take more than a year! So, the reward for losing is being excluded from competition for a year.

Some organizations, through law, regulation, or policy do not permit restricted competitions. All suppliers must be allowed to submit proposals for any RFP. Others permit restricted competition in limited and special circumstances.

In Alaska, under certain circumstances the formal processes of competitive sealed bidding or competitive sealed proposals can be replaced with simpler, shorter processes:⁸

SEC. 36.30.305. LIMITED COMPETITION PROCUREMENTS.

(a) A construction contract under \$100,000, or a contract for supplies, services, or professional services, may be awarded without competitive sealed bidding or competitive sealed proposals, in accordance with regulations adopted by the commissioner. A contract may be awarded under this section only when the chief procurement officer determines in writing that a situation exists that makes competitive sealed bidding or competitive sealed proposals impractical or contrary to the public interest . . . Procurements under this section shall be made with competition that is practicable under the circumstance.

The National Association of State Procurement Officers publishes an annual Survey of State Procurement Practices.⁹ The survey covered all 50 states plus the District of Columbia.

Only eight of the respondents charged a fee for vendors to register. (Alabama, Arkansas, Colorado, District of Columbia, Missouri, Oklahoma, South Dakota, and West Virginia). The fees ranged from \$25 to \$125 per year.

This NASPO report also dealt with RFP distribution:

Most states notify vendors of formal procurement opportunities via email notification and public notices on their website. Some states require vendors to monitor the state procurement website for bidding opportunities. Forty-one states notify vendors of informal (small purchase) opportunities through email

notification. The majority of states notify all vendors registered for informal (small purchase) procurement opportunities of such opportunity, twenty-three states randomly select which vendors to notify of informal (small purchase) procurements, and four states use a rotation system to notify vendors of such opportunities.

Thirty states are required to use legal advertisement for bidding opportunities. Of those who use legal advertisement, twenty-four states are required to advertise construction purchasing, twenty-one highway construction, twenty-three goods, twenty-six services, and twenty IT purchasing.

From Release to Closing

WHAT DOES IT MEAN TO RELEASE AN RFP?

Issuing or releasing an RFP is to have it ready and available for suppliers, to send it to the suppliers, to inform suppliers that it is available, or to make it available on an e-tendering web site.

The RFP must be released to all suppliers at the same time. This is simple when you have the full-text RFPs available on your web site; in other cases, involving hard copy documents, it may be more difficult.

Suppose there is only one out-of-city supplier and your organization informs suppliers that the RFP is available using the mail service. It is quite possible that the out-of-city supplier may receive your notice several days after the local suppliers. Another two days may elapse until a courier service can pick up the RFP and deliver it to the out-of-city supplier. If the proposal due date is only a few weeks ahead, then this loss of several days may be significant, and may be interpreted as an unfair practice. Most organizations distribute notices via email to ensure that all suppliers receive the material at the same time. If the RFP cannot be downloaded, then it is usually the suppliers' responsibility to arrange delivery using a courier service.

The time given to suppliers to prepare their proposals should be commensurate with the complexity of the requirements, and take into account any time delays in dealing with suppliers in distant locations.

There is one situation related to this issue which often poses problems for the purchasing organization. What happens when a supplier hears about the competition and wants a copy of the RFP and the competition is still open? The

supplier complains that it did not know about the competition or only heard of it late in the process.

There are two different situations to be considered - depending on whether it is an open competition or one based on a pre-qualification process or restricted source list.

OPEN COMPETITION

For an open competition, where all suppliers are invited to submit proposals, give the supplier a copy of the RFP. You cannot extend the closing date without significant consequences.

If the competition has closed, the supplier may think that your process is unfair, especially your process for announcing the RFP.

It is not the purchaser's responsibility to ensure that every supplier in the marketplace has been contacted. Your responsibility relates to providing publicity commensurate with the importance of the contract. It is not your responsibility to ensure that all eligible suppliers have registered with your purchasing department or view your web site on a regular basis.

If the purchasing organization has restricted the number of suppliers in some arbitrary but seemingly justifiable manner, then the supplier should be provided with an explanation and assurances related to the next RFP.

PRE-QUALIFICATION

The case involving pre-qualification is not as simple or as straightforward as that for an open competition. If the pre-qualification process was formally defined, well-publicized, based on a set of justifiable mandatory conditions and held recently, then the list can be considered valid. Suppliers who didn't qualify, and suppliers who didn't know about the process can be refused an RFP.

Care must be taken in re-using a pre-qualification list for RFPs other than those for which the process was designed. It may be convenient to use the list of vendors who were pre-qualified as "systems integrators" for selecting a related but not identical "network designer". However, it may also be difficult to justify this action.

Care must be taken to ensure that the pre-qualification process was, in itself, fair and open. If the pre-qualification process cannot stand up to public scrutiny, then the contracts based on it can be successfully challenged.

Finally, care must be taken to ensure that the pre-qualification list is current. The "best practice" is that a pre-qualification list can only be used for its original purpose and for only twelve months. After that time, new vendors may have entered the market, or pre-qualified vendors changed their business practices.

EXPLAINING THE RFP TO SUPPLIERS

Throughout this document, the approach taken is that suppliers should be given more information rather than less. The more clearly suppliers understand the RFP and the evaluation process, the better their proposals and the fewer protests that arise.

In many situations, since the RFP seeks solutions to problems, it is good practice to schedule a supplier briefing. The RFP timetable should indicate a meeting at which any supplier can ask questions regarding the RFP. These days, web-based meetings are common. The use of the web to broadcast the meeting and to obtain questions from vendors not in attendance encourages competition from vendors located outside of the jurisdiction.

The meeting should be scheduled shortly after the RFP has been released (usually one or two weeks later). It should be open to all suppliers. Attendance at the meeting should not be a condition of submitting a proposal unless the actual inspection of the site or some other justification warrants this stringent condition. The purpose of the meeting is to ensure that the suppliers have a sound understanding of the requirements and other terms of the RFP.

Many organizations believe that suppliers should be given as much information as possible. They should be told the names of all of the firms invited to compete. At a minimum, they should be told the number of firms invited to compete. Some electronic tendering systems identify all suppliers who have downloaded a specific RFP.

Infrequently, suppliers may ask questions during and following the suppliers' briefing which require significant modifications to the RFP. It is far better to discover weaknesses at this stage than during the evaluation process.

Typically, the proponents meeting will be chaired by the Procurement Officer or Project Manager and attended by project staff. Members of the project team are advised not to make specific commitments with regard to the timing of the final selection unless they are certain the commitment can be kept. This prevents calls from proponents the day after they expect an announcement.

Often, the meeting begins with the introduction of the players and a brief explanation of their roles. Following this, the project manager may give a brief overview of the work to be done.

Written questions, previously submitted, are then officially answered. Following this, questions are accepted from the suppliers present or attending via the web. In some cases, questions will be answered during the meeting. In other cases, the chair will indicate that a written response will be available with the transcript or minutes of the meeting.

Some form of record of the meeting is required. This varies from organization to organization. The most common practice is to produce minutes of the meeting which contain questions and answers. Minutes are subject to errors - either errors in fact, or errors of omission. It is very easy to dismiss a question as trivial and not include it in the minutes. However, the answer to that question may cause a supplier to "no bid". To avoid making decisions about the importance of statements made during the meeting, some organizations produce an actual transcript. They hire a court reporter who records the meeting and issues a complete transcript. The Procurement Officer sends copies to all vendors having indicated an interest in submitting a proposal, or posts the document on its procurement web pages. Those organizations broadcasting the meeting via the web can simply record the meeting and make the recording available via a link to a web site.

On occasion, some suppliers, anticipating that the RFP process will be unfair or biased, have brought their own court reporters to the meeting. Clearly, this level of open conflict with suppliers is to be avoided.

KEEPING A RECORD OF SUPPLIERS' QUESTIONS

Treating all suppliers equally requires that all suppliers receive the same information.

What happens, then, when a supplier calls a member of the project team and asks some questions? If that member of the project team has not been designated as the official contact, then the supplier should be directed to the Procurement Officer. In addition, on some highly sensitive projects, the project person would be required to inform the Procurement Officer that a supplier had called.

RFPs always encourage supplier questions. The problem is ensuring that each supplier gets the same information. Discussions on the telephone are informal. People often forget their specific words. For example, consider the following situation: Three different suppliers each call up the Procurement Officer to discuss the requirements for a project plan as defined in the RFP. By the end of the third conversation, the Procurement Officer would probably be unable to recall which supplier was told "yearly operating costs are very important" and which one was told "the total life cycle cost is very important". Obviously, the implications of each of these sentences could be different to each supplier. To avoid this level of informality, some organizations insist that all questions be submitted via fax or email "to ensure that we understand your specific questions". The answers are sent via email to all suppliers having received the RFP or posted on the Agency's web site.

Some RFP timetables have a cut-off date for supplier questions. This date is usually a few days or several weeks before proposals are due. This permits the purchaser to answer questions and send the answer to all suppliers.

This process of dealing with suppliers only in writing, while seemingly too formal for many organizations, does ensure that suppliers receive the same information. This is a critical requirement for a "fair and open" competition.

TECHNICAL BRIEFING OF ONE OR MORE VENDORS

Sometimes one or more of the vendors considering responding to an RFP require additional detailed technical information, information not provided in the RFP. For example, if the RFP required the vendor to develop an interface to existing software, then the information required by each vendor might be different. For some vendors, the RFP could have provided all that was required. For others, due to the complexity of their own systems or their particular technology, they may require answers to specific technical questions. Often those questions deal with proprietary aspects of their systems. These discussions should be offered to

vendors and, when held, should deal only with technical issues and be monitored by a member of the Purchasing Department.

Some Important Numbers

How many suppliers constitute a reasonable number? How many suppliers are required to ensure "fair and open competition"? How many proposals are needed to select the "best" supplier?

Firm instructions, rules, or common practices on the number of vendors or proposals vary from organization to organization. However, the following guidelines are representative:

- The objective of the RFP process is to obtain detailed proposals from (typically) between three and six qualified proponents.
- If the number of known and potentially qualified suppliers is fewer than five, reasonable efforts should be made to identify other suppliers, for example, by checking with the user group involved in the procurement, professional associations, or other organizations.
- If the number of known and potentially qualified suppliers is more than 15, it may be reasonable to attempt to reduce the number, depending on circumstances and the value of the contract. This may be done by rotation of qualified names (on your list) or by incorporating a prequalification phase in the RFP process, or by specifying fairly restrictive (but justifiable) minimum requirements in the RFP.

The final number to be discussed is the number of proposals needed to award a contract. What happens if you only get one responsive and responsible proposal? Can you award the contract? The first question is why did you only get one proposal? Were the requirements unduly restrictive? Was there some flaw in the process, or in the selection criteria? Many organizations will, upon receiving only one proposal, contact some of the suppliers who were expected to compete. These suppliers will be asked for their reasons. If this sort of informal investigation fails to uncover any flaw in the process or specifications, then there is no reason not to award the contract. Some organizations give the Purchasing Officer the option of canceling the procurement or awarding a contract in this special situation.

Some organizations explicitly state in their policy documents that if only one proposal is received, the Procurement Officer need not award the contract and can cancel the competition. Cancellation may be justified, at least in the mind of the Procurement Officer, if the Officer is concerned over the lack of competition, if the Officer suspects that the specifications were poorly written or vague, or if the Officer suspects collusion between vendors to restrict competition.

When can a Contract be Awarded Without an RFP?

In most organizations, some form of competitive bidding must be used for all procurements. There are, however, several logical exceptions to this rule of open competition: first, in emergencies; second, some organizations permit restrictive competitions which limit the number of vendors invited to propose. Third, in certain unusual situations, occurring on an infrequent basis, a contract can be awarded without any competitive process.

NEVER - ACCORDING TO THE STATE OF MASSACHUSETTS¹⁰

Regulation 801 CMR 21.00 does not recognize, as a competitive procurement exception, the concept of "sole source" procurements, in which only one bidder is deemed to be capable of providing the commodity or service (thus eliminating the competitive procurement process). These procurements are counterproductive because they eliminate competition and the "pool" from which departments select quality contractors.

The concept of an open, fair and competitive procurement is designed to provide a broad opportunity for bidders to compete for Commonwealth contracts. The only way to guarantee this opportunity is to ensure that due diligence is used to determine whether there are other qualified bidders. It is possible that certain bidders may appear to be the only ones capable of providing a commodity or service (due to factors such as unique licensing restrictions or training requirements). Even in these situations, the department must attempt some form of verification by posting an RFR or a notice of their intent to contract with a specific vendor on Comm-PASS using a Solicitation (Universal or Line Item Template) or Free-Form Quick Quote record. If the RFR/notice elicits only one response, the department may proceed with a contract. If additional qualified bidders respond to the RFR/notice, then the basis for a competitive procurement has been established. Please note: Even if there was only one bidder at the time of the original procurement of a proprietary product, a new competitive procurement/notice will be necessary at the end of this contract, since new bidders may have entered the market in the interim.

IN RESTRICTED CIRCUMSTANCES - ACCORDING TO OTHERS

These sole source procurements, or directed awards, can be highly contentious. They can cause serious problems. Questions may be raised concerning the reasons for the award. The integrity of the organization and the behavior of the Procurement Officer are often questioned. These procurements can become a media event orchestrated by a disgruntled supplier. Alternatively, sole source procurements are often a source of awkward and difficult questions in public forums, councils and legislatures.

Using sole source procurements is a valid and sound business practice when done properly. There are two critical elements of successful sole source procurement: justification, and publicity.

JUSTIFICATION

Awarding a contract on a sole source basis when legitimate competition exists is *always* a bad business practice, and in some jurisdictions not simply unethical but illegal.

Sole source procurements in the public sector must *always* be justified. The amount of justification depends on the organization and the value of the contract. In most organizations, a non-competitive procurement must be supported by market research to show that there is only one supplier that can meet the documented requirements. Obviously, the size of the search should be commensurate with the contract value. Large contracts awarded without a competitive process demand extensive market research; smaller contracts, less.

Justification requires that the Procurement Officer seek companies capable of satisfying a set of requirements. As a "best practice", these requirements should be written down. Recognize that if the award is challenged, the documented requirements will be closely scrutinized. Solid, well-defined, non-restrictive requirements can support the award better than poorly written ones.

There are many different circumstances in which this procurement method is justified: emergencies, when there is only one supplier, and when there isn't enough time for a proper RFP. Sometimes, there are situations where the requirements could be satisfied by more than one supplier, but unusual circumstances do not allow the competition to be carried out in time. For example,

a current service contract expires in 90 days and management estimates that the RFP process will take 120 days. In these situations, a contract could be awarded to the incumbent (or the current contract extended) but for as small an amount as possible (say 90 days).

In examining the rules, policies, regulations and laws related to sole sourcing in different jurisdictions, there are several obvious conclusions:

- There are three different approaches to identifying when sole sourcing can be used. In the first, the organization states that it may be used only in the prescribed situations. In the second, the organization provides examples and leaves the actual determination to the Procurement Officer involved in each particular situation. In the third, sole sourcing is not permitted at all. In the third approach, the Agency announces its intention to award a contract and invites organizations who can compete to come forward.
- Many of the reasons across these different jurisdictions are the same although the language used is very different. Most organizations permit sole sourcing for emergencies, for reasons of technical compatibility and to permit the development of prototypes.

WHEN SOLE SOURCING IS PERMITTED

The remainder of this section contains the rules about sole sourcing from several legal documents since these documents tend to be much more precise than internal policy memos. Two different documents are quoted: the North American Free Trade Agreement (NAFTA) and the State of Alaska's Procurement Regulations.

North American Free Trade Agreement¹¹

2. An entity may use limited tendering procedures in the following circumstances and subject to the following conditions, as applicable:

(a) in the absence of tenders in response to an open or selective call for tenders, or where the tenders submitted either have resulted from collusion or do not conform to the essential requirements of the tender documentation, or . . . on condition that the requirements of the initial procurement are not substantially modified in the contract as awarded;

(b) where, for works of art, or for reasons connected with the protection of patents, copyrights or other exclusive rights, or proprietary information or where there is an absence of competition for technical reasons, the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute exists;

(c) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable . . . the goods or services could not be obtained in time by means of open or selective tendering procedures;

(d) for additional deliveries by the original supplier that are intended either as replacement parts or continuing services for existing suppliers, services or installations, or as the extension of existing supplies, services or installations, where a change of supplier would compel (the purchaser) to procure equipment or services not meeting requirements of interchangeability with already existing equipment or services, including software . . .

(e) where (a purchaser) procures a prototype or a first good or service that is developed at its request in the course of and for a particular contract for research, experiment, study or original development. . . .

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(g) for purchases made under exceptionally advantageous conditions that only arise in the very short term, such as unusual disposals by enterprises that are not normally suppliers or disposal of assets of businesses in liquidation or receivership, but not routine purchases from regular suppliers;

(h) for a contract to be awarded to the winner of an architectural design contents . . .

(i) where (a purchaser) needs to procure consulting services regarding matters of a confidential nature, the disclosure of which could reasonably be expected to compromise government confidences, cause economic disruption or similarly be contrary to the public interest.

3. (Each purchasing organization) shall prepare a report in writing on each contract awarded by it under paragraph 2. Each report shall contain the name of the (purchasing organization), indicate the value and kind of goods or services procured, the name of the country of origin, and a statement indicating the circumstances and conditions described in paragraph 2 that justified the use of limited tendering . . .

State of Alaska

This article describes when and how a sole source procurement can be made. The determination must be in writing, and must be approved by the chief procurement officer.¹²

2 AAC 12.410. CONDITIONS FOR USE OF SINGLE SOURCE PROCUREMENT

(a) A request by a purchasing agency that a procurement be restricted to one potential contractor shall be accompanied by a written explanation that meets the requirements of 2 AAC 12.415 as to why it is not practicable to award a contract by competitive sealed bidding, competitive sealed proposals, or small procurement procedures, and why award to a single source is in the state's best interests. An agency may advertise its intent to make a single source award to determine if such an award is appropriate. The agency shall include in the written explanation the evidence necessary for an independent examination and determination of the material facts of the procurement, subject to AS 36.30.315. Except for a procurement that does not exceed the amount for small procurements under AS 36.30.320, the award of a single source procurement may not be made without the prior written approval of the chief procurement officer or the commissioner of transportation and public facilities, as appropriate under AS 36.30.300 (a).

(b) A determination under AS 36.30.300 (a) must specify the duration of the determination's effectiveness.

(c) A procurement officer shall conduct negotiations, as appropriate, as to the price, delivery, and terms of a single source procurement.

(d) The following are examples of circumstances in which single source procurement might be appropriate:

- (1) if the compatibility of equipment, accessories, or replacement parts is the main consideration;*
- (2) if a specific item is needed for trial use or testing, including testing of a prototype;*
- (3) if an item is to be procured for resale;*
- (4) repealed 6/29/95;*
- (5) if there exists a sole source of expertise required to perform a specific professional service;*
- (6) if the procurement is for operation of a concession contract on state property by a nonprofit organization whose sole purpose is to operate the concession and provide other public services on the property;*
- (7) if the procurement is with a government police agency to provide investigative, enforcement, or support services in support of state law enforcement objectives;*
- (8) if the procurement is for the services of legal counsel for the purpose of advising or representing the state in specific civil or criminal proceedings or on a specific matter before a federal or state regulatory agency, board, or commission;*

(9) if the procurement is by the Office of the Governor for lobbying, labor negotiation, or consulting by a foreign national.

PUBLICITY

There are only a limited number of approaches to publicity about sole source procurements. First, an organization can keep it a secret. The second approach is to publicize the award before the contract is signed. The third approach is to make public the award only after the contract has been signed. All three approaches are in common practice. Obviously, the principles of 'fair, open and transparent' favor announcing the intention to award a contract to see if there are any interested vendors who were overlooked.

No Publicity

Some organizations keep sole source procurements a secret. Or try to. They believe that the awarding of contracts is an internal matter. They often believe that, because of exigencies, emergencies, special circumstances, their actions are justified. This is effective when it works. But with access to information laws and lots of disgruntled suppliers, secret deals are frequently discovered. Recently there was a headline and a feature story in a national newspaper about a government agency that awarded a contract for several million dollars without any competition. This agency was not subject to a procurement law or regulations, only an internal policy related to competitive practices. The senior official was quoted as saying that the policy is "only a guideline" and not always followed!!

Pre-Award Publicity

The purpose of publicizing an intent to award a contract is to alert the supplier community and to identify any potential bidders who may have been overlooked. This approach reduces the number of supplier complaints. Here's how it works. First an organization determines its requirements and documents them. It then surveys the marketplace to identify potential suppliers. Once an organization believes that there is only one supplier in a particular circumstance, it notifies other suppliers in the same industry that it intends to award a contract without a competitive process. It informs the industry of the size of the contract and the reasons that an RFP is not being used. If there are no objections, the contract is awarded. If a supplier objects, the situation is assessed and either the contract is awarded or an RFP is issued.

The Notice of Intent to Contract can be sent to other similar organizations on the supplier list, published in a newspaper, or posted on the agency's electronic tendering web page.

This notice usually contains the following information:

- a brief description of the goods and services included in the proposed contract
- the total value of the proposed contract
- the name of the vendor selected
- the reasons why this approach was taken

Vendors not agreeing with the strategy of awarding the contract without an RFP are invited to discuss the issue with the purchasing organization. Based on the information provided by the vendor or vendors, the purchasing organization may either complete the contract or issue an RFP.

This approach alerts potential of vendors to the existence of the proposed contract and averts many supplier complaints.

Publicity after Signing the Contract

It is better to announce a contract late than not at all. In some jurisdictions, all sole source contracts must be identified either to a senior executive, or to the governing political entity. Other jurisdictions go further and require publication of the information on a scheduled basis, usually not less than annually. The public record usually consists of at least the following information:

- the supplier's or contractor's name
- the amount and type of each contract
- a listing of the supplies, services, or construction procured under each contract

A Test for Transparency and Fairness

I often use the material in this section at my workshops. I've found that these ten questions promote discussion about the topic and provide a simple way of self-assessment. Most of the participants gave their agency a score of '7'; a few obtained the maximum score of '10'; many scored very low, below '4'. Clearly, there is room for improvement!

On his first day in office, President Obama confirmed that fair, open and transparent would be guiding principles in his administration. He also announced

that Freedom of Information legislation would be used to release information, not withhold it.

According to MSNBC (<http://www.msnbc.msn.com/id/28767687/>): "Obama said he would change the way the federal government interprets the Freedom of Information Act. He said he was directing agencies that vet requests for information to err on the side of making information public — not to look for reasons to legally withhold it — an alteration to the traditional standard of evaluation."

Billions upon billions of dollars are spent by public agencies each year. How can we, the public, determine if the process for awarding these contracts has been fair and open? There are several ways to find out. First, after the contract has been awarded, we can use the procedures established by freedom of information (FOI) laws to examine the process. Second, we could simply have each agency voluntarily report on the process it actually used without forcing the public to use FOI. However, this relies on an 'invisible stakeholder' to make the request and raise concerns. It relies on a level of accountability that is 'outside' the process. In addition, the FOI process is often untimely, cumbersome and not without a certain level of cost.

When accountability is 'built in' and driven from 'inside' the process, the taxpayer gets the information in a timely and less expensive manner. To implement this accountability mechanism would be easy: each agency would be required to complete a simple checklist as it proceeds through the process of finding a contractor. This checklist and the accompanying information would be identical to the information that an interested citizen could obtain under FOI. And when the contract has been awarded, the information would be released with all of the award information. This is a simple, low cost, totally transparent and easily understood procedure that would restore confidence in fair, open and transparent government contracting. In some jurisdictions, price is never confidential. In others, the recommendation memo, the winning proposal and the contract are public documents.

What should that checklist contain? How about a scoring system to ensure if the process was fair and open and transparent? Here are some critical questions. Give yourself one point for each 'yes'.

1. Who prepared the specifications? If the specifications were prepared by an outside firm or individual, was that firm/individual prohibited from submitting a bid or proposal? If 'yes', score '1'. Include name of person or company who prepared the specs. Include a statement as to whether they were permitted to submit a proposal.
2. How much time was provided for the vendors to prepare their offers? Too little time restricts competition and rewards those who have ongoing dealings with the agency. If the deliverable was a complex product or service, did the agency give the vendors at least three weeks to respond? If 'yes', score '1'. Explain how much time was allowed and why.
3. Was the list of firms/people who received the bid documents published while the competition was still open? If 'yes', score '1'. Include a copy of that list.
4. Was the list of vendors who submitted offers published as soon as the competition is closed? If 'yes', score '1'. Include a list of those vendors.
5. For a Request for Proposals, did the RFP identify the evaluation factors, the importance of each factor and the evaluation process? If 'yes', score '1'. Include a copy of the evaluation factors and their weights.
6. Was the evaluation performed by a Committee that had strict rules related to (i) confidentiality of information (ii) conflicts of interest related to vendors (iii) behavior during the time of the competition? If 'yes', score '1' Include a copy of those rules.
7. Are the evaluators' notes and scoring sheets preserved as a record of the deliberations? If 'yes', score '1'. Include all copies.
8. Was the contract as executed substantially the same as the Statement of Work contained in the invitation documents? If 'yes', score '1'. Include a statement addressing the issue.
9. Was the Recommendation Memo a public document? Did it identify the answers to questions 1 through 8? If 'yes', score '1'. Include a copy.

10. Can losing vendors receive a debriefing from the agency to discuss the merits of their offer and why it was not selected? If 'yes', score '1'. Include a copy of all vendors receiving a debriefing.

Agencies receiving 8 to 10 points are exemplary and support the objectives of fair, open and transparent competition. Those who receive less than 8 should be red flagged by the procurement manager. The requirement to publish these checklists would naturally lead to stricter compliance to good public policies already in place.

Who knew that being proactive and releasing the information **without an FOI request** would be such a bold act! At the very least it will instill public confidence in the process and in the agency. With all the public money being spent by governments and public entities, large and small, confidence that it is being well spent couldn't hurt the national morale.

An Ending Comment

In this chapter, we've identified some of the potential problems which can occur in issuing an RFP. We've also identified some best practices designed to mitigate these problems.

The remainder of this book deals with events after proposals have been received: performing the evaluations; planning debriefings; and handling supplier protests. For each topic we provide examples of excellence and current best practices.

End Notes

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1. See AS 36.30.265, Reference 25.
 2. Reference 28.
 3. Page 7, Reference 22.
 4. Reference 85. Coconino County (AZ), How to do Business with Coconino County, web site, <http://coconino.az.gov/index.aspx?NID=455>
 5. See, for example, University of Alaska, Statewide System Procurement Office, web site, <http://www.alaska.edu/swproc/bidders>

"Removal From Mailing List for Failure to Respond - Firms who fail to respond to University solicitations may be removed from the applicable mailing list after notice to the firm. Bidders removed from the list for this reason may be reinstated after payment of a \$25.00 re-application

fee. For purposes of retention on the mailing list, a written "no bid" is considered as a response to a solicitation and will not be counted for purposes of removal from the list."

6. Reference 86. Section 13-1-104 NM Statutes 1978 Annotated Chapter 13 Public Purchases and Property, 1 pg
<http://law.justia.com/codes/new-mexico/2013/chapter-13/article-1/section-13-1-104>
7. AS 36.30.050, Reference 25.
8. Section 36.30.050, Reference 25.
9. Reference 87. NASPO Report 2011-2012 Survey of State Procurement Practices, Summary Report, June 2012, 26 pgs,
http://naspo.org/survey/Documents/Zip/FINAL_SummaryReport_2011-2012_Survey_6-28-12.pdf
10. Reference 81.
11. Reference 88. North America Free Trade Agreement, Part Four, Government Procurement, Chapter 10, 72 pgs,
<https://www.nafta-sec-alena.org/Default.aspx?tabid=97&ctl=SectionView&mid=1588&sid=a550e516-c181-49fc-9176-76db29b2969b&language=en-US>
- 12, Reference 39.

Chapter Nine

ORGANISING THE EVALUATION PROCESS

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Chapter Nine

ORGANISING THE EVALUATION PROCESS

Some purchasers, often naive, want to provide suppliers with as little information as possible. They'll begrudgingly identify the major selection criteria (usually price, proposed solution, quality of the proposal). They do not want to give the suppliers a lot of detail. Their argument is that the suppliers should know how to prepare a proposal. In fact, for many of these people detailing the evaluation process or specific criteria is impractical - they don't know enough about the problem, the selection process, or the alternative solutions. Their logic is that they will somehow "know" the best solution when they see it. In fact, what they are saying is that provision of detailed selection criteria would restrict their choices or simply require too much effort on their part. They want to be arbitrary and able to select whomever they wish, notwithstanding laws and public policy dictating fair, open and transparent competition.

At the other extreme, some purchasers want to provide suppliers with all of the selection details. For example, "in evaluating your company's capabilities, we will assign one point for each year in business up to a maximum of seven." Provision of the detailed points ensures that each supplier understands the process, but invariably then, the process comes under severe attack.

The best practice is to define the evaluation process in the RFP, identify the major evaluation factors, and the weight assigned to each factor.

Unfortunately, some organizations do not publish the weights. They offer little guidance to suppliers. They believe that the suppliers should somehow know and propose the particular combination of their products, services, and solutions which fits the stated requirements best. They simply do not recognize that suppliers prepare very different proposals when the technical solution is worth 70% and cost 30% rather than cost being worth 70% and the technical solution the remaining 30%. Suppliers look to the RFP for guidance. If the requirements indicate that the organization wants a bare-bones solution, suppliers will propose a KIA or Hyundai solution rather than the Hummer solution.

It is a good practice to ensure that the RFP explains the specific conditions that can or will result in the rejection of an offer, states that the evaluation will include both

the purchase price and all one-time and ongoing costs that will be incurred, and states the relative importance of each major selection criterion.

It is important that each of the evaluators deals with the process, the RFPs and the suppliers in a consistent and defensible manner. Often evaluators are inexperienced and welcome advice and guidance from the Procurement Department on their role.

Some projects have a Procurement Officer or a Fairness Consultant who provides the Project Manager and Evaluators with on-going advice, information about the evaluation process and scoring mechanisms, worksheets for conducting the evaluation, and guidance concerning "best practices", policies and legal requirements, such as access to information statutes and policies.

Having a standard approach eliminates some of the personal bias and takes some of the arbitrariness out of scoring. A good working definition of when to assign a 5 versus an 8, for example, will ensure that evaluators can agree on a score rather than simply averaging the different scores. For example, "a score of 5 should be assigned only if the majority of the factors meet standards, the requirement is not overly difficult to meet, and the deficiencies are of a very minor nature."

Suppliers may complain that they do not understand how their offers will be evaluated and how the winner will be chosen.

In many organizations which frequently use the RFP process, there is an unending debate over the evaluation process. At one extreme are those who want to make a choice without having to justify it. (Often, the Information Technology people.) At the other extreme are those who want the decision to be an almost mechanical calculation of a score.

In this Chapter, we will discuss many of these evaluation issues and provide lots of examples of best practices. In the next Chapter, we will continue our discussion of the Evaluation Process in terms of best practices.

The Need for an Evaluation Process

While the need for an evaluation process is clearly established by public policy, it is worth stating the reasons. Here is the explanation offered by Nova Scotia: ¹

What is an Evaluation Process and Why is One Required?

The evaluation process begins with the setting of evaluation criteria. These criteria are a series of standards and measures used to determine how satisfactorily a proposal has addressed the requirements identified in a bidding opportunity. They also play a major role in identifying the best overall cost effective solution to the proposal requirement.

The complete evaluation process consists of:

- *establishing appropriate criteria,*
- *placing the criteria in the proposal document,*
- *selecting an evaluation jury,*
- *evaluating the proposal using the criteria, and*
- *preparing the evaluation report, including a recommendation for vendor of choice.*

The need for the evaluation process is two fold. First, it offers all potential bidders a fair and equitable method of having their proposal reviewed and considered as a potential solution in a consistent and fair manner. Second, it provides the evaluators with a clear and concise method of identifying the competent tenders and ultimately the best overall bid.

DEFINING THE EVALUATION PROCESS

Here are two approaches to describing the evaluation process. In the first, as answers to a series of questions. In the second, a longer narrative of the process.

The evaluation process can be defined by the answers to a series of questions

1. What is the composition and organization of the evaluation team?

How many people are on it? What are the skills required? What time and effort is required from each team member? What do we do about confidentiality issues or conflicts of interest? Does the team select the winner or only recommend the winner? Is the evaluation to be done by each person separately or based on consensus?

2. Are the technical and financial proposals evaluated by separate teams?

How is the team to obtain policy direction and guidance? Is there a procurement officer as a member of the team? Is legal represented on the team? Is there a fairness officer to ensure that the evaluation process is properly executed?

3. How is the technical evaluation to be performed?

Often the “technical” evaluation includes assessment of the corporate characteristics of the proponents. Are some requirements mandatory and, if so, will proponents failing to comply be eliminated from the competition? Can mandatory conditions be waived under certain circumstances? Is each mandatory requirement truly essential to the solution? Are the evaluation criteria appropriate? Will their application truly differentiate the Proposals? Are all important criteria stated in the RFP? Is there a process for determining the relative importance or weight of each criterion? Is there a procedure for evaluating each proposal using the stated criteria? (Measures can be either quantitative, based on a numerical scoring system, or qualitative, based on a narrative description of the quality of the proposal for that criterion.) Is there a procedure for applying the evaluation methodology uniformly to all proposals? Is the evaluation process to include presentations or interviews with Proponents? Is there a procedure for disqualifying proposals if one component (for example, the quality of the technical solution) fails to meet a minimum standard?

4. How is the financial evaluation to be performed?

How is the financial health of the proponent to be established? What level of information do you require in each proposal? Are there minimum standards to be met? How are costs to be established? Will life cycle costing be used? How will cost be converted to a score?

5. How are technical and financial evaluation results to be combined?

There are many different ways of combining these measures. Will you simply select the lowest responsible offer meeting the minimum technical requirements? Or will you select the best technical solution regardless of cost? Or the least cost solution that has attained a “very good” technical score? Will Best and Final Offers be permitted?

6. How will you ensure the quality of the process?

Does the project team contain a Procurement Officer and a Fairness Officer? Is the RFP based on similar RFPs developed by other agencies? Has the Project Team discussed the process with other agencies that have previously done similar work?

Has the RFP been reviewed by management before its release? Has the Statement of Work been developed in-house without input from industry? Has management agreed with the evaluation process? Has the evaluation process been tested using simulated data? Has a realistic budget been established for the project? Is the procurement timetable reasonable, taking into account the schedules of the evaluators and providing sufficient time for vendors to respond? Has the procurement process been formally planned and documented? Has an Evaluators Guide been prepared?

There are three critical components in any evaluation:

- The methodology used
- The structure of the Evaluation Committee
- The evaluation process

In the remainder of this chapter, we discuss each of these components, provide examples of actual procedures, and identify some of the problems that can occur.

A Narrative of the Evaluation Process

The Chartered Institute of Purchasing and Supply (CIPS) and the National Institute of Public Procurement (NIGP) have jointly developed a series of publications entitled Principles and Practices of Public Procurement. One of their publications provides a narrative of the evaluation process.²

This short narrative starts with a definition of the evaluation process. While only 5-pages in length, this document covers the key issues related to the evaluation process.

Definition

Evaluation Process is the process by which a qualified panel or responsible individual receives, opens and evaluates the requested documentation from potential suppliers. The evaluation process is a complete review of the received proposals based on pre-defined evaluation criteria. The criteria should be comprehensive enough to determine the best value solution for the public body so that a recommendation for award can be made. (See Practice: Developing Evaluation Criteria).

The document then explains each element of the process and identifies the most important activities.

Element 1.1: The Evaluation Panel

The evaluation panel must be competent and able to identify the most appropriate outcome, by using the pre-determined evaluation criteria and make a recommendation for award to the contracting authority.

This section then discussed Preparation and Planning, Operation of the Panel, and Impartiality and Non-Disclosure.

Element 1.2: Receipt/Opening and Compliance

Depending on the type of procurement, the evaluation process may involve several stages. The first stage usually includes the receipt, opening and compliance validation of the submitted documentation. Once this stage has been completed the evaluation panel will conduct the full evaluation in accordance with the established criteria. The completion of this stage will result in a recommendation for award by the evaluation panel to the contracting authority.

Where an e-procurement system or portal is being used for the receipt of tenders, the security built into the system only allows for opening after the final tender receipt time/date is reached. The central procurement team will open the tenders and send them along with the evaluation score sheet electronically to the panel to enable evaluation to begin. The following receipt and opening process details the traditional paper-based approach for receipt and opening:

This section then discusses Receipt, Opening, Compliance, and Non-Compliance.

Element 1.3: Evaluation

The evaluation panel or responsible individual must make sure that the received documentation is complete and that it complies with all of the requirements set by the contracting authority. The evaluation panel should then apply the previously announced evaluation criteria to evaluate the tenders (See Practice: Developing Award Criteria).

This document then discusses Choosing the Best Offeror/ Proposer

Element 1.4: Award

In discussing the Award, the document deals with Meeting of the Evaluation Panel, Award and Evaluation Report, Award Approval.

Award Notice

The document recommends delaying the actual signing of the contract to permit protests to be submitted.

Mandatory Standstill

Following written notice of award, a mandatory standstill period⁸ (3-15 calendar days depending on applicable law and practice) must elapse between the award notification and the signing of the contract. Once the standstill period has passed, the contracting authority may continue with the conclusion of the contract in

accordance with the conditions that were set forth in the contract notification/ solicitation documents.

An Explanation of 'Best Value'

In an RFP process, evaluations are determined by more factors than simply cost. Often, the merits of the technical solution or the characteristics of the vendor's project team are factors in the evaluation. "Best value" is the term used for a solution selected not solely on the basis of cost, but on other factors as well. Because cost is only one factor, sometimes a minor consideration, it is likely that the winner will not be the least cost solution.

Many elected officials have difficulty understanding that "least cost" is not "best value" and many procurement people spend much time educating their officials about this distinction. It is always easier to justify a lower cost solution if you neglect other considerations such as risk or the five year life cycle costs.

"Best value" is different for each RFP since it is defined by the particular combination of evaluation factors and weights used in the specific RFP. However, there are some general definitions of "best value". Here's how it's explained in Massachusetts:³

The Operational Services Division follows a best value procurement philosophy. This means it is in the best interest of the Commonwealth for solicitation evaluation criteria to measure factors beyond cost. No one wants to save money on unit cost while encountering higher costs due to factors such as inferior quality, poor reliability, or complex administrative processes.

A best value procurement should:

- *Support required performance outcomes through a procurement process that obtains desired results in the most efficient and effective manner.*
- *Generate the best quality and economic value by considering factors such as quality, options and incentives, or a longer life span. Even if the initial expenditure is higher, considering the total value over the life of the procurement may result in a better value and long-term investment of public funds.*
- *Be timely by achieving results within the required timeframe. Best value is defeated if the procurement process is cumbersome and inefficient.*
- *Minimize the burden on administrative resources of both procuring departments and contractors. A department should devote staff and administrative resources proportionate to the complexity, priority and cost of a procurement.*
- *Expedite simple purchases that present little systemic risk by following expedited procedures, and allow eligible departments with the appropriate delegation authority to process all completed solicitations and contracts up to a specified dollar level without secondary transaction approvals.*

- *Allow flexibility in developing alternative procurement and business relationships* such as the use of buying groups or longer-term relationships with contractors, as in multi-year contracting.
- *Encourage competition* and the positive benefits it achieves in pricing, quality, customer service and public benefit. Fostering healthy competition ensures that bidders will continue to strive for excellence in identifying and meeting department needs.
- *Encourage the participation of quality vendors* to do business with the Commonwealth, including small, minority and women-owned business (M/WBE) enterprises, firms owned by socially, physically or economically disadvantaged individuals, and contractors who provide environmentally preferable products and services (EPPs). If procurements are seen as too costly or too restrictive, vendors may be deterred from bidding and competition could be decreased, shrinking the pool of available quality vendors.
- *Support Commonwealth and department procurement planning* by seeking out the advice of OSD's Strategic Sourcing Services Teams to identify other departments with comparable needs or existing contracts.

John Adler, formerly the senior procurement official in the State of Arizona, developed some guidelines for attaining a Best Value Procurement:⁴ Here is an article John wrote when he was head of procurement for the State of Arizona:

What Is Best Value?

Too often we award contracts based on the lowest price or some point scoring formula, without seeking best value.

In 2002 a large technology company developed a huge financial management system for a Philadelphia school district. After award, the cost soared from \$15.6 million to \$36 million. That must be one heck of a system! Chances are the district did not negotiate a best value contract. Maybe they hardly negotiated at all. Probably every government can cite similar contract nightmares.

How does this happen? How did the price of a technology solution more than double? Better yet, how can we avoid such a disaster? Try thinking Best Value Procurement.

- *Be involved.* A purchasing clerk takes a customer's scope of work, fits it in the middle of a canned RFP (Solicitation Sandwich), receives the proposals and gives them to a committee to evaluate. A procurement officer is involved tactically and strategically in the entire procurement process from concept through award to contract close-out.
- *Request proposals rather than bids.* Complex purchases demand considerable procurement innovation. Technology cannot be bought low bid.

The heart and soul of any procurement is the scope of work or specifications. Too often we attempt to design the product or service with very detailed specifications. If we design it, we suffer the consequences if it doesn't work. Instead, state your goals and objectives and give detailed performance requirements in your scope of work. Let the contractor design the system to meet your stated needs and let the contractor assume the risks. You may pay a little more up front but you will pay much less in the end.

- *Pay for performance. Time and material technology contracts are prone to problems and failure. If the incentive is to work many hours, the contractor will work many hours. If the incentive is based on building a working system, the contractor will build a working system.*
- *Build performance measures and incentives into your solicitation. View profit as the cost of risk and base a portion of profit on meeting and exceeding performance factors. Some like to use liquidated damages, which amounts to taking government money back from the contractor. Think in terms of incentives, which is essentially paying the contractor for quality and cost savings.*
- *Don't get hung up on scoring proposals. An RFP is not an Invitation for Bids with a scoring system. You are seeking best value! State your evaluation criteria and its relative importance in the solicitation. If you are buying technology, give offerors a spreadsheet, with every required and desired feature, to complete and return. They either provide the feature or they don't. Use the spreadsheet for negotiations and rate them on the percentage of features offered.*
- *Pay attention to the contract details. We don't use "boilerplate". There is a purpose for every term, condition and instruction. Each contract should be tailored to the specific procurement.*
- *Evaluate the true cost, not the acquisition cost. With technology, the acquisition cost is but a small portion of the total cost. What about long term license and maintenance costs? What about upgrades? What is the cost of external and internal staff support? Will you need to buy hardware? How about a guaranteed maximum cost?*
- *Use relevant evaluation criteria. Should you value a PhD. over an MBA? Is 35 years of experience more valuable than 28 years? Do you give more points to a 100 year old firm than a new "up and comer"? In many cases, these factors should not be scored at all. Either they have experience or they don't. Either they are responsible or they aren't. Either they are capable or they are not. Set reasonable minimum requirements and assign evaluation values to the factors that matter.*

- *Develop a negotiation plan and go after the features or value that are important. Negotiations are one of our most overlooked procurement tools. Look for deficiencies and opportunities for cost savings and negotiate, face to face! Don't request the Best and Final Offer until you are reasonably certain that every issue is addressed.*
- *A contract is only a stack of paper unless it is properly administered. Don't wander outside the confines of the contract. Never, ever make oral modifications and always negotiate every detail before issuing a contract modification.*

Best value procurement is also known as competitive negotiations, competitive sealed proposals and RFP's.

There are many different and acceptable types of evaluation processes. The minimum standard for any process is defined by three elements:

1. The evaluation criteria and methodology must be completed and secured prior to the initial receipt of proposals;
2. The overall evaluation criteria must not be altered after opening the proposals.
3. The evaluation criteria must be applied equally and uniformly in the evaluation of proposals.

NEW YORK STATE

Smaller or less complex procurements can employ simple methods which may not work for larger projects. Here is New York State's view of the Evaluation Process:⁵

E. Evaluation of Proposals – Overview

The objective of the evaluation process is to develop and apply criteria that will ensure that proposals are evaluated objectively, fairly, equally and uniformly and that the agency selects the best value solution among the submitted proposals.

Typically, evaluations are an analysis of the technical proposals, a separate comparative analysis of the cost proposals, and a method for combining the results of the technical and cost proposal evaluations to arrive at the selection of the proposal deemed to be the best value to the state. Thus, there are up to three distinct parts to the evaluation process:

- *Administrative review of prequalification criteria (optional);*

- *Technical evaluation* – An examination of the non-cost elements that were not considered during the administrative review, such as the functional specifications (e.g., hardware requirements, scheduling); and
- *Cost evaluation* – A comparison of the price proposed (and, at the agency's option, other costs of the project) to the prices and costs of other competing proposals.

The Methodology Used

There are a lot of different ways that you can evaluate a group of proposals to decide which one provides “best value”. These different methodologies must produce results which are fair and can survive scrutiny by the public and the courts. Whichever method is used, it must clearly illuminate the strengths, differences, and risks of each proposal.

FUNDAMENTAL CHOICES

In designing an evaluation system, we have to make some decisions:

- Do we compare proposals directly or only compare proposals with the defined requirements?
- Which rating method do we use?

There are two major approaches to evaluating a group of proposals. In the first approach, each proposal is evaluated using a pre-defined set of requirements. In the second approach, the proposals are compared with each other.

The first approach: a comparison with requirements

Most purchasing texts will inform you that evaluation is the process of comparing each vendor's proposal to your requirements. Proposals are compared using the process and criteria identified prior to issuing the RFP. Each proposal is evaluated using the same criteria.

Most texts emphasize that proposals are *not directly compared* with each other. Each proposal is compared with the Agency's stated requirements. In this way, procurement people and public officials believe that it is easier to defend the process as being objective. Using this approach, we never say "We compared the two project plans, that of Company A and Company B and A's had more details about the specific tasks and was more realistic in the schedule and was therefore a lot more convincing." What we say is "We evaluated each Company's plans against

our requirements using the evaluation criteria and Company A scored higher because of the information they provided about the tasks and schedule." We never say "we selected A's proposal because it was better than B's - it had a better solution, at less risk".

Most RFPs employ this technique. It is relatively simple to use and it has proven to be effective for a wide range of proposals. However, for complex procurements it may not work well.

The Second Approach: Comparing Proposals Directly

The reality is that evaluators cannot help but compare proposals. We are all human and are influenced by our emotions. Suppose one particular proposal has the best project management section you have ever read. It deals with all the issues and all the problems you anticipate, and it's easy to read and understand. You are impressed! If this is the case, then when you read the next proposal, you will likely use this one as the standard, regardless of your specific pre-defined requirements. In your mind, you will compare the new proposal with the one that set the standard.

This second approach, often called a structured evaluation, recognizes the value in directly comparing proposals. However, if you only compare the proposals, a mediocre proposal can "win" since it will be the best of a bad lot. To eliminate this problem, this second approach also uses the pre-defined requirements. This gives you a comparative evaluation that reflects the merits of each proposal AND the pre-defined specifications.

This method is used in New Mexico – a leading light in procurement reform and RFPs:⁶

The solution is the use of the Structured Evaluation Methodology (SEM) which was developed and proven on information systems procurements for the State since late 1980's. . . It not only produces a uniform evaluation result identifying the most responsive proposal but also scores the proposal against the evaluation criteria in a way that identifies relative risk.

In this Structured Evaluation Methodology procedure each proposal is compared on each requirement and evaluated against the requirement itself.

WHICH RATING METHOD DO WE USE?

There are lots of different rating methods:

- Color coding a chart of proposal features (e.g., Construct a table in which the different proposals occupy the columns and each feature is a different row. Color-code each cell to visually identify the “best value”.)
- Adjectival ratings (e.g., Describe each feature in terms of “excellent”, “good” or “poor”.)⁷
- Ranking each factor in each proposal (e.g., For the project management plan, Proposals A, B, and C are ranked 3, 1, 2 respectively.)
- Numerical ratings and weights (e.g., Proposal A received a score of 8 out of 10 for Project Management Plan. This factor was worth 30% of the total points available.)

People like numbers. They are easy to understand. We all know that a score of 78 is better than a score of 65. Numbers seem to add legitimacy to what is sometimes a subjective evaluation. In an adjectival scheme, the 78 may be “very good” and the 65, “adequate”. These terms may not be as easy to defend or explain as their numerical equivalents.

Most RFPs employ numerical ratings and weights. This technique, while not without some inherent problems, has proven to be effective for a wide range of proposals and easier to “sell” to senior management and the public.

The Evaluation Committee

The composition and mandate of the evaluation committee is critical to an effective procurement process. Some RFPs (for example, for information technology) are often too sophisticated and too complex for one person to handle. A single person, no matter how experienced, does not possess all of the skills demanded: knowledge of the organization, the application, the law, the procurement process, and the in-house technology. Experience in each of these areas is often required to create an effective RFP and to understand and evaluate the proposals.

Typically, the committee is composed of three to six people depending on the organization, the mix of skills required and the number of departments involved.

During the RFP process, restrictions are often placed on the behavior of these members. When this is not done, evaluators may behave inappropriately. For example, they may meet a proponent at a conference and have dinner together. Or one of the evaluators might respond to the incumbent's questions about the RFP.

Committees work in a variety of ways. Some work by consensus; some by averaging scores from independent evaluators. It is increasingly common for specialists to be used. For example, a qualified financial analyst would work on the costs; a data base expert on the data base design; a manager with business experience on the corporate part of the proposal. On some committees, each member is independent and the chair only tallies the scores. On others, the evaluators are only empowered to advise the chair who determines the actual score. Some committees achieve consensus through discussion and analysis. Whatever method is used, it must be seen to be fair and easily justified.

In some organizations, the Evaluation Committee is formed after the RFP has been prepared. A better practice is to form the evaluation committee when the project is initiated and a project manager has been assigned. In this case, the evaluation committee can make a much greater contribution in assisting the project manager with critical activities:

- Develop the procurement plan.
- Review requirements and contribute to the creation of the RFP.
- Assist in establishing the evaluation criteria and the points structure.
- Evaluating proposals.

Briefing the evaluators on their roles and responsibilities is an important step in the RFP process. I have found several short yet solid publications that describe the evaluators' critical role. One is from Alaska; the other, from North Dakota. These are discussed in the section on this chapter entitled "Helping the Evaluators do Their Job".

In the remainder of this section, we examine how several organizations view the role of the evaluation committee. We examine the composition of the Evaluation Committee and the rules of engagement.

COMPOSITION OF THE EVALUATION COMMITTEE

Alaska defines the use of the committee in its Policy and Procedures manual:⁸

Proposal Evaluation Committee (PEC) Proposals may be evaluated by a PEC. The procurement officer does not have to be a voting member of the Proposal Evaluation Committee. Include State personnel who are knowledgeable in the subject area of the work to be accomplished on the committee. A nonresident of the state, other than State employees or officials, may not serve in a voting capacity on a PEC without prior written approval by the Commissioner. Explain the value of the nonresident evaluator's participation in the request. There is no limit to the number of persons on the committee as long as you have a workable number of members. Selecting an odd number of members may be helpful depending on the evaluation situation and method you are using. A representative from the Division of Information Services must be on every PEC involving software development which will interact with the State's mainframe computer. 2 AAC 12.260

The Evaluation Guidelines for British Columbia are not as formal as Alaska's (they are "guidelines" and not established by statute) but contain much valuable information:⁹

Government policy states that ministry staff must be part of the committee. The committee may be a combination of ministry staff and contractors but it may not be fully contracted out.

The committee may include: the program manager; a technical person; a financial person; a client representative; and a Procurement and Supply Services (PSS) representative. The number of people will depend on the complexity of the project. However, if the committee is too large it may complicate the process. A committee of three to six members usually works best.

All committee members should be present for the entire evaluation period and should be involved in reviewing all proposals. It is not unusual for the evaluation committee to ask for help from other areas of the ministry, such as asking the financial services group to run a spreadsheet to make pricing easier to assess and evaluate. However, the evaluation committee is still responsible for assigning a score to the proposals, which may consider the input received from other areas of the ministry.

Although the evaluation committee is not required to be involved until the evaluation process starts, the evaluation process will be much easier if the committee was involved in drafting the RFP and preparing the evaluation criteria.

The Rules of Engagement

Members of the evaluation committee are usually selected because of their knowledge or expertise related to the specifics of that procurement. In some

organizations, members of the evaluation committee may have pre-existing, informal relationships with contractors. It is important that each person on the evaluation committee understand their role and the critical nature of their activities and behavior during the process. In many jurisdictions, care is taken to ensure that there are no conflicts of interest and the proposals and deliberations are kept confidential. Committee members are often provided written instructions and are increasingly being required to sign agreements on how they will behave. In some jurisdictions, these matters are dealt with by statute:

In its 2012 Survey, National Association of State Procurement Officials dealt with Conflicts of Interest and Ethics. Here is what they said:¹⁰

In most states, the statute explicitly prohibits any kickbacks (36 states), bribes (38 states), contingent fees, (27 states) and anything of value to a state officer or employee (37 states). In some states provisions that explicitly prohibit unethical practices are also included in the standard contract terms. Most states provide sanctions by statute, rule, regulation, or standard contract terms for vendor payment of kickbacks, bribes, contingent fees, and anything of value to a state officer or employee. In thirty states it is standard for bidders for contracts with the state to be required to certify in writing that they have not engaged in some or all of the prohibited activities described above. Thirtyfour states have a statute, rule, regulation, or procedure prohibiting a contractor's ability to submit a bid or proposal where the contractor has assisted in preparing a solicitation, statement of work, or specification (sometimes known as an "organizational conflict of interest").

In Idaho there are numerous safeguards, including statutes and purchasing rules, designed to preserve integrity by helping to avoid improper actions or the appearance of improper actions by government personnel. Here is the form all evaluators are required to sign.¹¹

REQUEST FOR PROPOSALS ("RFP") EVALUATORS
CONFLICT OF INTEREST AND CONFIDENTIALITY OF INFORMATION
STATEMENT

Your willingness to participate as an RFP evaluator is an integral part of the procurement process. The Department of Administration, Division of Purchasing truly appreciates your assistance and expertise.

Your designation as an RFP evaluator for the Division of Purchasing, and as a public servant thereby, requires that you fully understand the policies regarding potential conflicts of interest and the confidential nature of the proposals and all that is contained therein.

Confidentiality. The competitive procurement process and the obligations imposed by Idaho law require the Department of Administration to ensure that the competitive process operates in a fair and equitable manner. As an RFP evaluator, you have access to information not generally available to the public and are charged with special professional and ethical responsibilities. You may have access to information about bidders that is to be used only during the evaluation process, and for discussion only with fellow evaluators and appropriate department personnel. You shall not discuss the evaluation, scoring, or status of any proposal or any action effecting any proposal with any person, firm, corporation, or other outside business entity at any time prior to, during, or after the procurement process. You shall not use such information obtained as an RFP evaluator for any personal benefit, pecuniary or otherwise, nor copy and/or disseminate any portion of any proposal at any time prior to, during, or after the procurement process.

Confidentiality of Evaluators. During the evaluation process, the Department of Administration makes every effort to keep the identity of evaluators confidential and will maintain that confidentiality to the fullest extent provided by law. As an evaluator, you shall not discuss or reveal the names of evaluators with or to bidders or other individuals.

Conflict of Interest and Ethical Considerations. A conflict of interest or the appearance of a conflict of interest may occur if you are directly or indirectly involved with an organization that has submitted a proposal for evaluation. Prior to reviewing any proposals, you must inform the Division of Purchasing of any potential conflicts of interest or the appearance thereof. If you become aware of any potential conflict of interest as you review a proposal, you must immediately notify the evaluation committee chair or the Administrator of the Division of Purchasing. You may be disqualified as an RFP evaluator if you conduct yourself in a way that could create the appearance of bias or unfair advantage with or on behalf of any competitive bidder, potential bidder, agent, subcontractor, or other business entity, whether through direct association with contractor representatives, indirect associations, through recreational activities or otherwise. Examples of potentially biasing affiliations or relationships are listed below:

1. Your solicitation, acceptance, or agreement to accept from anyone any benefit, pecuniary or otherwise, as consideration for your decision or recommendation as it pertains to your evaluation of any proposal.

2. Your affiliation with a bidding company or institution. For example, a conflict may exist when you:

(a) are employed by or are being considered for employment with the company or institution submitting any bid or hold a consulting, advisory, or other similar position with said company or institution;

(b) hold any current membership on a committee, board, or similar position with the company or institution;

(c) hold ownership of the company or institution, securities, or other evidences of debt;

(d) are currently a student or employee in the department or school submitting a proposal, such as the case.

3. Your relationship with someone who has a personal interest in the proposal. This includes any affiliation or relationship by marriage or through family membership, any business or professional partnership, close personal friendship, or any other relationship that you think might tend to affect your objectivity or judgment or may give an appearance of impropriety to someone viewing it from the outside the relationship.

I have read this document and understand my obligations as explained herein. I further understand that I must advise the Division of Purchasing if a conflict currently exists or arises during my term of service as an RFP evaluator. I further understand that I must sign and deliver this statement to the Division of Purchasing prior to participating in the evaluation process.

Date: _____

Signature _____

Name (Printed) _____

The Steps in an Evaluation

AN OVERVIEW

Most evaluation processes are similar. They use a committee to do the work. Often very specialized skills are needed to understand and evaluate specific technical issues. When the proposals are received, copies are produced, if required; then the proposals (or sections of the proposals) are distributed to the evaluators.

The most common evaluation methods employ weighted criteria and differ only in the handling of cost. Here is an example of how they work.

The first determination, by the project manager or RFP Officer is whether the proposal has complied with each of the mandatory terms and conditions. If it has not, it may be eliminated from further consideration. In some jurisdictions, proposals that do not comply with each of the mandatory terms and conditions stated in the RFP **must** be eliminated from further considerations; in other

jurisdictions, they **may** be eliminated at the discretion of the Procurement Officer. In a few jurisdictions, a mandatory condition may be waived if all proponents fail to comply with the specific term. In rare cases, proponents are advised of the deficiency and given time to correct it.

In some Agencies, the RFP officer has a great deal of discretionary power. He or she may have the authority to eliminate a proposal, accept a deficient proposal, or permit a proposal to be corrected. In these situations, great care must be exercised to ensure that (i) the Agency has the authority to do the act; (ii) a written determination is prepared; (iii) all suppliers and all proposals are treated fairly. Even then, vendors may protest the action.

If the organization is handling cost as a separate issue (and most do), then the cost proposal is separated from the technical proposal. If technical experts are being used to evaluate certain features, they are given only those sections of the proposals which deal with their issues.

The proposals are then evaluated and a score computed for each of the pre-defined criteria. In almost every jurisdiction, the RFP document must specify the evaluation criteria and only these criteria can be used in the evaluation. Proposals may be ranked and only those capable of providing an acceptable solution evaluated further.

Often, detailed evaluations incorporate demonstrations or presentations, site visits, and reference checks. Once the evaluators have determined the best proposal, contract negotiation is started. Failure to negotiate an acceptable contract within a predefined time is reason to reject a proposal and consider the next best. In some jurisdictions, "best and final offer" is used to permit those few suppliers judged capable of satisfying the requirements the opportunity to revise their original proposal. In this way, deficiencies can be corrected and better solutions provided.

The main objective of this often cumbersome process is to determine the winner, not to rank all the proposals in order. While careful attention must be given to the top two or three, it matters little whether a given proposal ends up fifth or seventh in ranking. Knowing this, some organizations only evaluate the most difficult areas of each proposal to see which suppliers' proposals are to be evaluated fully.

Methods of evaluating the proposals differ based on the goods and services involved, the number of proposals received, and the complexity of the project. Some organizations have standardized the evaluation process.

Each proposal is formally evaluated using selection criteria related to the users' specific business and technical requirements. The "best" proposal is determined. The final selection depends both on the evaluation criteria and the cost of the proposed solution.

Montana has defined a nine-step evaluation process.¹² The material which follows constitutes a simple, short answer to the question: What are the steps in an evaluation process?

REQUEST FOR PROPOSAL (RFP)

EVALUATION PROCESS – INSTRUCTIONS

Please refer to your copy of the RFP as a guide to the scoring process for each proposal.

NON-CONFLICT OF INTEREST AND CONFIDENTIAL INFORMATION: *Once the proposals have been received and it is clear which individuals and/or companies have responded to the RFP, each member of the evaluation committee will be provided with a Declaration Form by the evaluation committee chairperson or the procurement officer. This form contains information explaining what would constitute a potential conflict of interest and that certain documents received as part of an RFP may be protected from public view under the provisions of section 18-4-304, MCA. The procurement officer will inform evaluation committee members if any documents received are protected from public view under the statute. If such documents are present, the Declaration Form will explain the responsibility of the evaluation committee members to maintain the confidentiality of these documents during and after the RFP evaluation process. The procurement officer will collect the signed Declaration Forms for inclusion in the official procurement file.*

INDIVIDUAL SCORING: *Evaluation committee members are provided with copies of each RFP to begin their individual review of the proposals.*

Step One: *Review all proposals. Take notes, make comments or prepare questions for discussion. Do not score at this point.*

Step Two: *Determine status. Make an initial determination as to whether each proposal is "responsive" or "non-responsive." A "responsive" proposal conforms in all material respects to the RFP. A proposal may be deemed "non-responsive" if*

any of the required information is not provided, the submitted price is found to be excessive or inadequate as measured by criteria stated in the RFP, or the proposal is clearly not within the scope of the project described and required in the RFP. Extreme care should be used when making this decision because of the time and cost that an offeror has put into submitting a proposal. If a proposal is determined to be "non-responsive," it will not be considered further. The procurement officer will make the final determination of responsiveness. If a determination of non-responsiveness is made, written justification must be provided for this conclusion.

Step Three: Score proposals. Committee members should INDIVIDUALLY score the proposals based on the criteria established in the RFP. Proposals must be evaluated solely on the stated criteria listed in the RFP. Only material presented in the written proposals and vendor demonstrations can be considered in the evaluation. Prior documented experience and past performance history with the product and/or offeror may be considered as part of the reference checking process if it is available to the entire evaluation committee. Include a written justification for each scoring category. An approved scoring sheet/evaluation matrix will be provided to assist you in the process of awarding and totaling points. Evaluation committee members MAY NOT meet to discuss their scores, as a meeting of the committee must be publicly noticed. Advice may be sought from experts in the field, however, each committee member must take responsibility for his/her own score. If the evaluation committee wishes to meet to discuss the responses, and/or to arrive at a final score, the meeting must be adequately noticed pursuant to the paragraph below.

EVALUATION COMMITTEE MEETINGS: Once the proposals have been evaluated and scored by individual committee members, the entire committee may meet to discuss the proposals and arrive at the final scoring. All meetings involving the evaluation of RFPs are open to the public and subject to the open meeting laws. These meetings must be posted electronically on the General Services Division website, <http://svc.mt.gov/gsd/Onestop/meetingdefault.aspx>, 72 hours in advance.

The meetings must take place in an ADA accessible location and members of the public are welcome to attend. However, the public may not participate in the evaluation process or offer any comments. When sections of the proposals involving trade secrets or statutorily protected confidential materials are discussed, the meeting must be temporarily closed to the public. Pursuant to state law, 2-3-212, MCA, the committee chairperson, or assigned designee, must take minutes of each meeting. These minutes must include the date, time, place of meeting, a list of the evaluation committee members in attendance, as well as the substance of all matters discussed or decided and, at the request of any evaluation committee member, a record by individual members of any votes taken. These minutes will become part of the permanent procurement file. In addition, a quorum of the committee must be present to take any official action.

Step Four: Discuss proposals. The full evaluation committee should discuss all aspects of the proposals so that there is a “unified understanding” of the criteria and corresponding responses. Individual scores may be adjusted at this point based upon discussion. The committee may tally the final point assignments by the following methods: (1) consensus score, (2) a total of all of the points given by individual committee members, or (3) an average of the individual scores. Any method or combination thereof is acceptable.

Step Five: Interview. This step is optional. If interviews are deemed necessary, the procurement officer will issue a letter asking the offeror to attend the interview or give a presentation. This is an opportunity for both sides to explain their viewpoints. If an oral interview is pursued as an option, it must be so stated in the RFP and scored according to stated criteria.

Step Six: Discussion/Negotiation. This step is also optional. If the committee is unsure of certain items or issues included in an RFP response, it may request further clarification from the offeror. The procurement officer will distribute clarification questions. Responses will be returned to the procurement officer and submitted to the evaluation committee.

Step Seven: Best and Final Offer. This is optional. A letter asking the offeror to submit a “Best and Final Offer” may be issued by the procurement officer at the request of the evaluation committee. Once a “Best and Final Offer” is received, the committee will evaluate it in the same manner as the original proposal. Unless the RFP so states, a “Best and Final Offer” may not be requested from the offeror on price alone.

Step Eight: Recommendation. The full evaluation committee makes a written recommendation as to whom the contract should be awarded. This written recommendation should contain scores, justification and rationale for the decision, along with any other variables that may have been considered. If scoring methods (2) or (3) are used, as noted in above in Step 4, individual scoring sheets must be provided to the procurement officer at the end of the evaluation process. If consensus scoring is used, the consensus score sheets and any other material relating to the evaluation process must be turned in to the procurement officer.

Step Nine: Review. The procurement officer will review the committee scoring and justification. If in agreement with the committee decision, the procurement officer will: (1) issue a Request for Documents Notice to the highest scoring offeror and notify other offerors of the tentative contract award, (2) obtain the required insurance documents and contract security, and (3) issue a purchase order or contract, as appropriate. If a formal contract is required by the agency, a signed copy must be forwarded to the procurement officer for final review and signature. A copy of the fully executed contract will be returned to the agency and one copy will be retained for the procurement officer’s RFP file. This completes the RFP process.

In Alaska, the key constituents of the evaluation process are specified, not by policy, but by law:¹³

2 AAC 12.260. EVALUATION OF PROPOSALS

- (a) *The procurement officer, or a procurement evaluation committee consisting of at least three state employees or public officials, shall evaluate proposals. The procurement officer may be one of the members on a procurement evaluation committee.*

- (b) *The evaluation must be based only on the evaluation factors set out in the request for proposals. The relative importance or weighting value of each evaluation factor shall be set out in the request for proposals. Numerical rating systems may be used, but are not required. If a numerical rating system is not used, the procurement officer, or each member of the evaluation committee, as applicable, shall explain his or her ranking determination in writing.*
- (c) *Price must be an evaluation factor unless the services or supplies sought are selected in accordance with AS 36.30.270(a) and (b). The proposal with the lowest price must receive the highest available rating allocated to price. A proposal that has a higher price than the next lowest must receive a lower rating for price.*
- (d) *For the purposes of evaluating price, the proposed price of an offeror who qualifies as an Alaska bidder under AS 36.30.170(b) shall be reduced by five percent. All other applicable preferences must be applied.*
- (e) *If a numerical rating system is used, an Alaska offeror's preference of at least 10 percent of the total possible value of the rating system must be assigned to a proposal of an offeror who qualifies as an Alaska bidder under AS 36.30.170(b).*
- (f) *The following are some additional evaluation factors that may be considered:*
 - (1) *the offeror's experience in Alaska performing work similar to that sought in the request for proposals;*
 - (2) *the percentage of work that will be performed in Alaska;*
 - (3) *the location of the office of the offeror where the work will be performed;*
 - (4) *the offeror's past performance, including conformance to specifications and standards of good workmanship, forecasting and containment of costs or prices, history of reasonable and cooperative behavior and overall concern for the interests of the customer, and adherence to contract schedules.*
- (g) *A proposal from an offeror debarred or suspended under AS 36.30.635 – 36.30.655 must be rejected.*
- (h) *Meetings may be held by a procurement evaluation committee to discuss the request for proposals, the evaluation process, the weighting of evaluation factors, and proposals received.*
- (i) *If the evaluation is performed by a procurement evaluation committee, each member shall exercise independent judgment and the vote of one member may not be weighted more than the vote of any other member.*

(j) An evaluation may not be based on discrimination due to the race, religion, color, national origin, sex, age, marital status, pregnancy, parenthood, disability, or political affiliation of the offeror. A proposal shall be evaluated to determine whether the offeror responds to the provisions, including goals and financial incentives, established in the request for proposals in order to eliminate and prevent discrimination in state contracting because of race, religion, color, national origin, sex, age, marital status, pregnancy, parenthood, disability, or political affiliation of the offeror

Our final example of the ways in which organizations formally describe their evaluation process is from Massachusetts. They do a good job of defining the necessary process:¹⁴

7. Evaluate the Responses

Departments should review all responses to determine whether minimum submission requirements have been met. Only those responses meeting the minimum requirements should be considered for further evaluation. The evaluation process is a critical aspect of the RFR process. Departments have great flexibility to develop evaluation procedures that are most appropriate to the RFR being issued, taking into consideration the type of commodity or service, funding, service availability requirements, cross-agency and intra-agency participation and other factors that might determine whether a department conducts an abbreviated or more comprehensive evaluation process.

Note: Executive departments must update solicitations which have been posted on Comm-PASS with a closed status at a minimum of every 60 days until the contract award is posted or the solicitation is cancelled. Comm-PASS supports update functionality by providing several update statuses including: Closed-Pending Evaluation; Closed- guidance entitled Comm-PASS Policies for step-by-step Comm-PASS procedures (via Pending Award; Closed-Contract Awarded; and Closed-Cancelled. Please see the associated a link at the end of this document).

Internal evaluation procedures should include the following:

- The process to be used for determining compliance with minimum submission requirements.*
- The process to be used in scoring and evaluating responses.*
- The composition of the evaluation committee (single or multiple reviewers) based on the total dollar value, complexity, and type of commodities or services, among other things. Consider the roles and responsibilities and the training of the evaluators.*
- The PTL's process for ensuring that the individual(s) participating in the evaluation process are free from conflict of interest and have no financial or personal interest.*

- *Requirements for the documentation of the evaluation process, including scoring sheets, list of reviewers, written comments or written reports summarizing the evaluation process, rankings of responses and selection recommendations.*

All responses received by the deadline should be evaluated by the PMT. A sequence for review may be:

Determine if the response conforms to the threshold requirements of the RFR or requires disqualification.

Consider any requests for corrections of responses.

Conduct oral presentations or demonstrations if required by the RFR, or if desired, to evaluate bidders or clarify responses.

Evaluate responses pursuant to the evaluation criteria.

Confirm and verify references and conduct any additional reference or performance checks.

Consider whether the PMT will enter into competitive negotiations or if bidders should be afforded a Best and Final Offer (BAFO) option. Both competitive negotiations and the BAFO are discussed later in this document.

EVALUATION CRITERIA

Many issues impact on the selection and use of evaluation criteria. Here are three different views of some of these issues.

Massachusetts

Massachusetts emphasizes the critical role of evaluation criteria and the impact of these criteria on fairness.¹⁵ It incorporates many best practices; e.g., it cautions the reader that evaluation criteria be drafted “prior to reading bidder responses”, that the criteria not be “unduly restrictive”, and that only the criteria identified in the RFP can be used in the selection process and that the evaluation criteria used to disqualify a bidder must reflect requirements or consideration in the RFP..

DRAFT THE EVALUATION CRITERIA

The PMT must, at a minimum, develop evaluation criteria prior to reading or evaluating bidder responses. The criteria are used to evaluate responses, rank bidders and select qualified and cost-effective contractors. It is advisable to draft evaluation criteria prior to the distribution of an RFR. This is a good practice, since the RFR should clearly reflect the best value requirements to be evaluated. A PMT may include the evaluation criteria in the RFR if it determines that

additional guidance to prospective bidders is in the best interests of the procurement and could result in enhanced or higher quality responses.

Departments have significant flexibility regarding the type of criteria established for each RFR. Departments may choose to develop a comprehensive evaluation tool that details the specific areas to be evaluated, criteria to be used in scoring, and the relative importance or weight associated with each component. Departments may choose an alternative approach and develop general areas to evaluate such as oral presentation, quality assurance, accreditation status, warranty, references, years of experience, past and proposed performance or proposed cost. Either approach is acceptable as long as the areas that form the basis of the evaluation criteria are referenced in the RFR document itself.

The evaluation criteria should be drafted to enable the Procurement Management Team to fairly evaluate bidders and determine which bidder(s) should be selected based upon a best value determination. The PMT should also prioritize the key parts of an RFR response in order of importance, which may include, but are not limited to, cost, qualifications of bidders and responses to solution-based issues. The evaluation criteria may take a variety of sources of information into consideration such as the written response, the oral presentation, past performance of the bidder, references or recommendations, individual satisfaction surveys and departmental and monitoring reports.

In order to ensure fairness in evaluations, the evaluation criteria or considerations used to select or disqualify a bidder must reflect requirements or considerations that are specified in the RFR. The language of the RFR will determine the scope of the evaluation criteria and the flexibility the PMT will have when evaluating responses, so the PMT should be careful not to draft the RFR and evaluation criteria in such a way as to be unduly restrictive. Bidders must have notice in the RFR document of any requirements. The RFR should clearly state the consequences of failing to meet these requirements such as loss of points or disqualification.

Considerations that are not included in the RFR may not be used in the selection or ranking of a bidder. For example, if bidders will receive additional credit or will be ranked higher for offering a Boston regional office location, having certain national accreditation, or meeting the unique linguistic and cultural needs of the consumers, these criteria should be included as part of the RFR so that bidders know they have the opportunity for additional points or a higher rank if they offer these options. Conversely, if this information was not requested in the RFR, bidders who failed to offer these options may not be penalized.

A Procurement Management Team should use caution when basing consideration of prior performance strictly on government or previous contracts with another state department. This limitation should be used as a basis for selection only if government experience is necessary for contract performance. Similar experience

is a fairer basis for selection and gives qualified bidders an equal chance to compete for the Commonwealth's business.

Similar caution should be exercised when a department is conducting a procurement and one of the bidders is currently under contract for the same commodities or services. Familiarity with department operations and the lack of time needed for startup should only be one set of considerations and should not be used to effectively exclude new qualified bidders from competing for the contract.

If necessary, the evaluation criteria may be modified based upon amendments to the RFR as the procurement progresses through its various stages. However, any amendments should be completed prior to the date the responses are due for submission and must be finalized prior to the review of any responses. Reasons for amendments to an RFR and/or evaluation criteria should be documented and included in the procurement file.

Nova Scotia

The Nova Scotia Handbook also emphasizes the importance of including evaluation criteria in the RFP document, and the role of the Evaluation Jury in the process in the early procurement activities including developing the plan:¹⁶

Criteria in the RFP Document

At this point in the evaluation process, the evaluation criteria have been established with the appropriate requirements listed, ranked and weighted for selection purposes. The next step is to ensure that these criteria are included in the proposal call document. It is mandatory that all RFPs have appropriate documented evaluation criteria included and clearly explained. Evaluation criteria must relate to requirements identified in the body of the RFP. It is not reasonable or defensible to use criteria which do not clearly relate back to the requirements identified or the problem to be resolved by the proposal . . .

The preliminary selection of the Evaluation Jury should be done when the RFP is first prepared, and the Jury list finalized once the proponents' identities are known, but before the evaluation process begins. The final jury should consist of a group of three or more individuals assigned the responsibility in a competition to a) develop the procurement plan, b) review the requirements and RFP, c) set the evaluation criteria and points structure, d) evaluate bids against predefined criteria, e) document evaluations and recommend the award. Departments are responsible for ensuring that an evaluation jury is in place and that a report documenting the evaluation is prepared for each competition. A copy of each evaluation report is to be filed with Procurement Services and will be part of the permanent competition file. A representative from Procurement Services can participate in the evaluation process, as required, to facilitate an acquisition or to validate the evaluation process that has taken place.

Alaska

The final word on the view of the process from different jurisdictions goes to Alaska. Their policy and procedure manual emphasizes the independent judgment of each evaluator as a safeguard as well as identifying constraints on the process. ¹⁷

Proposal Evaluation

Proposals may be evaluated by either the procurement officer or a PEC (Proposal Evaluation Committee). It is recommended that responses to RFPs be evaluated by a PEC. All members of a PEC exercise independent judgment and no member's vote may be considered more favorably than another's. Evaluation meetings may be held between the PEC only to discuss the RFP, the evaluation process, the weighting of evaluation factors, and proposals received before evaluation.

All proposals must be evaluated only on the evaluation factors set out in the RFP. Evaluation factors not specified in the RFP may not be considered. If a proposal does not meet the minimum requirements set out in the RFP or the procurement regulations, the proposal must be rejected as nonresponsive. The PEC or the procurement officer should outline the evaluation criteria and the corresponding point assignment as stated in the RFP. If a numerical rating system is not used to evaluate the proposals, the procurement officer or each member of the PEC must explain in writing their ranking.

Unless otherwise provided in the RFP, a proposal, correction, modification, or notice of withdrawal of a proposal may not be accepted if received after the date set for receipt of proposals, unless the delay is due to an error of the contracting agency.

A proposal received from a debarred or suspended offeror must be rejected. Evaluations may not be based on discrimination.

If only one responsive and responsible proposal is received, the procurement officer may either make an award, reject the proposal, or reject the proposal and re-solicit proposals.

Chapter Ten of this book provides an in-depth discussion of each step in an evaluation procedure.

Examples of Actual Evaluation Procedures

There is much benefit in reviewing the work of others, in reading the actual words that organizations have used in their RFPs. Most RFPs contain the cumulative experience of the organization. Each time an RFP is issued, deficiencies are noted

and used to influence the design or wording of a subsequent RFP. In this way, RFPs evolve to reflect current practices, laws, regulations, and the policies of the organization.

There are many different ways of evaluating proposals and each way can, potentially, lead to a different 'winner'. So, the selection and design of the evaluation procedure is critical. As is the amount of information that is contained in the RFP. Those documents with little information about the evaluation procedure present difficulties for suppliers. They must make assumptions about the process and the criteria. RFPs with little information cause uncertainty in a supplier's mind and often result in the supplier building in additional contingency factors related to the risks associated with the uncertainties. The more specific an RFP can be, the more confidence the supplier will have in its assumptions and the more realistic will be the proposal and the pricing. When a vendor is forced to make assumptions, the price is usually increased as well.

Providing the supplier with no information about the evaluation process reduces the supplier's confidence in the process and its objectivity. However, providing no information is better than providing the supplier with information that is offensive. A number of years ago, I came across an RFP from a local government that contained the following description of the process. The RFP stated that the organization 'intends to treat all potential Vendors fairly and equitably throughout this process'. Having said this, the RFP stated that 'an Evaluation Team will screen each proposal to ensure the Bidder's compliance with the requirements of the RFP'. It then asserted that **'the Evaluation Team will utilize specific Evaluation Criteria to rate various other requirements for evaluation purposes. The rating will be confidential and no totals or scores will be released to any Bidder'**. The RFP document contained no additional information about the evaluation process or the criteria.

I expect that after reading this RFP many suppliers simply assumed that the decision would be arbitrary, or that, even worse, the decision had already been made and that the RFP process was simply a sham. Times have changed! Today, this RFP would not be issued. It would not survive any form of public scrutiny.

The remainder of this section contains a representative sample of the evaluation process as described in a number of different RFPs. Some of these RFPs are old and have appeared in earlier editions of this book. They are included here because they are still solid examples of current best practices. They illustrate the different

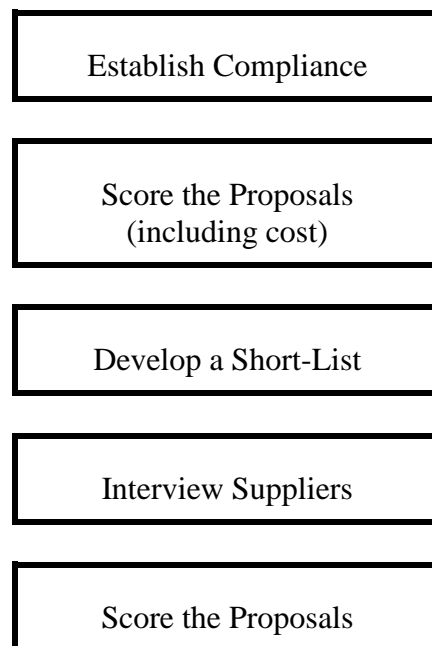
approaches and the importance of language in structuring an effective evaluation process.

We have included a variety of examples to illustrate the wide variation in these procedures

SAMPLE EVALUATION PROCEDURE 1
A COMMON APPROACH

One of the most common evaluation methodologies involves only five steps or "building blocks": Establish Compliance, Score the Proposals, Develop a Short-List, Interview Suppliers, and Score the Proposals. These are illustrated below. Following supplier interviews, scoring is completed and the winner selected.

Prior to issuing the RFP, the Project Team established the evaluation criteria and the corresponding weights. Once the proposals were received, the evaluation was begun. For those proposals judged as compliant, the evaluation team scored each using a scale of 1 to 10. Total scores were calculated by multiplying the criterion score by the weight. The highest ranking proposals were short-listed and those suppliers were then interviewed. Following this, additional scoring was done and the winner selected.



This method has been found to be practical in many situations. A description of each step is set out below.

Step 1 - Establish Compliance. First, we ensure that the proposal complies with each of the mandatory requirements. For example, suppose the RFP stated that a solution must run "on a Unix platform", or that the firm must provide 24-hour service and the proposal did not comply. In these cases, the proposal must be classified as "non-compliant" and disqualified.

The first thing that must be done is to examine each proposal to determine if it meets the mandatory requirements. Any proposal not meeting the mandatory requirements will be rejected immediately with no further consideration.

Step 2 - Score the Proposals. We now evaluate each proposal and establish a score using the pre-defined evaluation criteria and weights. For example, suppose that the RFP required the provision of classroom training. We might assign 10 points if the supplier ran regularly scheduled classes on a monthly basis in the same city but only 5 points if the classes were scheduled less frequently.

Step 3 - Develop a Short-list. If a large number of proposals is received, it is appropriate to determine a shortlist of a few proponents for in-depth evaluation.

The Agency's procedure required that each proposal be evaluated independently by comparing it with the established evaluation criteria. Direct comparisons with other proposals were not permitted. Each member of the evaluation committee evaluated all the proposals. The committee as a whole then met to review each proposal and to achieve a consensus on its advantages and disadvantages. They identified the group of suppliers scoring highest and performed a more detailed investigation of those proposals.

Step 4 - Interview Suppliers. The Team interviewed the short-listed suppliers to clarify the information in their proposals and meet their representatives. These interviews were used to evaluate the inter-personal skills of the project manager and to clarify critical aspects of the proposal. (This step could also be used to designate demonstrations and presentations.)

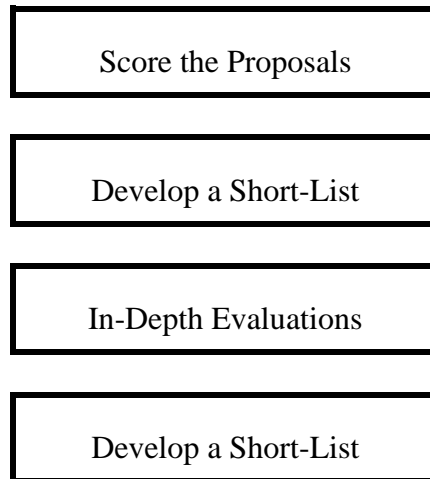
Step 5 - Score the Proposals. Finally, the scoring was completed and the winner selected. A typical evaluation form follows.

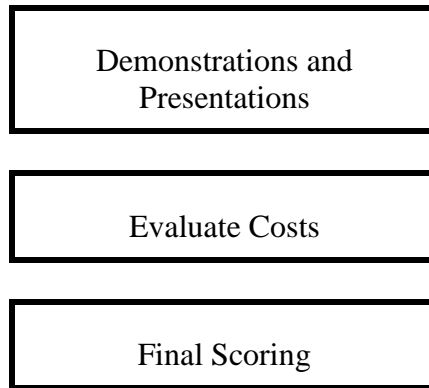
Sample Scoring Spreadsheet¹⁸

	WEIGHT	YES/NO	PROPONENT A	PROPONENT B
Mandatory Criteria	0	0		
a) project team must include an engineer (PEng)		Yes/No		
b) must accommodate at least six clients at all times		Yes/No		
c) tracking tool compatible with Ministry software		Yes/No		
FOR EACH PROPONENT, IF ANSWER IS "YES" TO ALL OF THE MANDATORY CRITERIA, MOVE ON TO EVALUATE THE DESIRABLE CRITERIA				
Desirable Criteria				
a) suitability of the proposed solution	40%	80		
i. extent to which solution meets Ministry goals		40		
ii. creativity of proposed program		10		
iii. ease of access for clients		10		
iv. implementation plan		10		
v. interaction with related programs		10		
b) price score = (lowest priced proposal ÷ price on this proposal) x total marks available for price)	35%	70		
c) company background	25%	50		
i. proponent's experience on similar projects		15		
ii. skills of proposed project team		10		
iii. soundness and relevance of references		5		
TOTALS	100%	200		

SAMPLE EVALUATION PROCEDURE 2

GIS SYSTEM





There are several distinct ways of evaluating proposals. This one, developed by a municipality, is based on a seven-step process and incorporates demonstrations. Presentations are becoming more popular as an integral part of any evaluation process. With many information technology products, including Geographic Information Systems, a picture is truly "worth a thousand words". Products are often differentiated by factors such as ease of use which can only be evaluated first hand.

A description of both the process and some of the major evaluation criteria follows:

PROPOSAL SELECTION

1.1 Selection Committee

The Selection Committee will measure each vendor using the evaluation process described below.

However, the Selection Committee reserves the right to reject proposals which, in its opinion are clearly non-viable. In such a case, if the vendor has demonstrated a valid understanding of the requirement and is otherwise qualified, the municipality will inform the vendor of the reason for rejection and may allow an opportunity to rectify the problem.

1.2 Evaluation Process

The first stage in the evaluation process is intended to filter out those vendors considered not to have a viable corporate presence in our region (where local support is deemed necessary) or considered to be incapable of providing the necessary function in the identified environments or the necessary hardware and/or software maintenance. This is an assessment of the vendor's ability to meet the implementation, operational and maintenance requirements and the extent of compliance with the implementation schedule described previously.

The intent is to use the vendor as an expert and to encourage creative proposals. However, the Selection Committee reserves the right to reject proposals which in its opinion are clearly non-viable from an implementation, operational, environmental, scheduling, technological or other point of view. In such a case, if the vendor has demonstrated a valid understanding of the requirement and is otherwise qualified, the municipality will inform the vendor of the reason for rejection and may allow an opportunity to rectify the problem.

The second stage is a straightforward acceptable/unacceptable analysis of the vendors' responses to the mandatory requirements. A numerical score will be assigned based on how well these requirements were met. All qualified proposals will then be evaluated for completeness and suitability to the requirements. Suppliers will be contacted, if necessary, to clarify an item in question. A short-list will be prepared of suppliers considered most appropriate for the municipality, based on proposal responses.

During the third stage, short listed vendors will be asked to perform demonstrations and/or presentations. References for systems similar to the municipality's, supporting the performance claimed by the vendor, will be checked. In addition, the mandate and capability of the vendor to undertake the necessary commitments will be checked and assessed. This may include an inspection of the facilities of the vendor or vendor references prior to award of the contract, to verify claims made in the proposal. Interviews with key personnel would be conducted during the inspection. Shortlisted GIS vendors may be asked to demonstrate their capabilities with a sample of the municipality's mapping data.

The municipality will place a great deal of emphasis on the quality of the references and their similarity to the municipality's target environment.

A five year effective operating cost will be calculated. The effective operating costs will include all one-time and continuing costs associated with meeting the mandatory and desirable requirements described the Appendices.

The order of priority of the areas addressed by this RFP are:

*The core components
Processing Infrastructure
Application Environment, including GIS*

*The network components
Network Infrastructure
LAN Operating System*

Other Products and Services

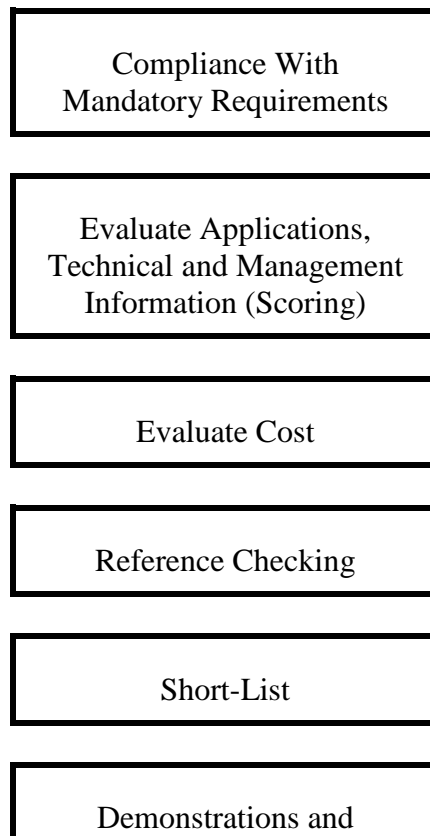
Contract negotiations with the preferred supplier(s) will begin in priority order. The selected vendors will be required to negotiate a contract in a format acceptable to the municipality, and based on the municipality's standard Corporate Systems contract.

SAMPLE EVALUATION PROCEDURE 3

SYSTEMS INTEGRATOR

Request For Proposal¹⁹
UCC and Corporations
Filing and Imaging System
Nebraska Secretary of State's Office
SCA-0102

The evaluation process used in this RFP can be represented as a series of building blocks:



Interviews

Award Contract

This 256-page RFP was intended to select a systems integrator, “a qualified contractor to implement a new UCC and Corporations Imaging System.≡ The document provides 4 pages of valuable information about the evaluation procedures, and a list of 14 major evaluation factors. While it goes to some length to explain the process, it does not provide any information about the relative weights of the evaluation factors.

Here is the description of the evaluation from the RFP:

5. Proposal Evaluation Procedures

This section presents the procedures that will be used to evaluate all proposals presented in response to this RFP, and the processes used to determine which vendor will receive the contract award to deliver the system described in this RFP.

5.1. State’s Rights

The State of Nebraska reserves the right to accept or reject any or all proposals, or any part of any proposal, and to waive any defect or technicality, and to advertise for new proposals where the acceptance, rejection, waiver or advertisement would be in the best interest of the State. The State also reserves the right to award in whole or in part, by item, group of items, or by section where such action services the State’s best interest.

5.2 Evaluation Process

The State will conduct a fair, impartial and comprehensive evaluation of all proposals in according with the criteria set forth below. The evaluation process must comply with the terms and conditions set forth in Section 81-161 Neb. Rev. Stat. (Reissue 1994), for competitive proposals. Awards will be made based on the highest quality of service that meets the State’s requirements at the most economical cost.

Evaluation and selection of a vendor will be based on the information submitted in the proposals plus any required oral presentations and demonstrations. There may be further information required for clarification purposes after the proposals are submitted.

The general factors for evaluating each contractor are:

- *compliance with the procurement processes, and the proposal format requirements;*
- *the ability, capacity and skill of the contractor to deliver and implement a filing and imaging system that meets the requirements of this RFP;*
- *the quality of the products, equipment and services offered;*
- *the contractor's understanding of the project requirements;*
- *the professionalism, character, integrity, reputation, judgment, experience and efficiency of the contractor;*
- *the financial responsibility of the bidder, the vendor's financial ability to meet the long-term goals and objectives of the project;*
- *whether the contractor can perform the installation within the time frame reasonably close to that defined for the project in the Schedule of Events, Section 2;*
- *the quality of contractor performance on prior contracts;*
- *the quality of the key personnel that the contractor dedicates to the project;*
- *the project management plan proposed;*
- *a confident and assured demonstration of the ability to deliver and achieve the solution proposed through the system demonstration;*
- *demonstration of an innovative approach and ideas or services beyond the minimum requirements; excellence in designing a solution that efficiently fulfills the requirements;*
- *the perceived commitment of the vendor to the project and the long-term relationship that will be necessary for a successful project;*
- *fair pricing of the proposal relative to other proposals received.*

5.3. Procurement Procedure compliance

All vendors will be evaluated for compliance with the Procurement Procedures set forth in this RFP in section 2.

5.5. Proposal Formal compliance

All proposals will be evaluated against the proposal format requirements defined in Section 4 of this RFP.

5.5. Application, Technical and Management requirements response evaluation

The sections of the proposal that respond to the application requirements, the technical requirements and the management requirements including all company information and project plans requested will be evaluated to ensure that they meet all application, technical, management and information requirements stated in this RFP. Deviations will be defined as material, which means that a proposal will be disqualified in its entirety, or immaterial, which means the deviation may, at our option, be accepted.

The Nebraska Secretary of State's Office reserves the right to waive minor deficiencies in a proposal. The decision as to whether a deficiency will be waived or will require rejection of a proposal will be solely within the discretion of the Nebraska Secretary of State's Office.

5.7. Evaluation of Cost Proposals

All Cost Schedules presented will be evaluated against the format stated in the Cost Proposal instructions in Section 4 of this RFP. Pricing will be checked for completeness and mathematical accuracy. Errors and inconsistencies will be handled according to the severity of the error. Minor mathematical errors will be called to the attention of the vendor and corrections will be made by the Nebraska Secretary of State's Office. Errors of substance will be reviewed with the vendor or, at our option, the proposal may be disqualified.

The Nebraska Secretary of State's Office will make every effort to substantiate prices for products and services to ensure that those prices are considered fair and reasonable.

The State reserves the right to acquire any hardware equipment through existing State contracts which have previously been awarded through competitive bidding processes. All hardware components quoted by the vendor will be reviewed to determine if equipment of equal or comparable value can be acquired at a better price through existing equipment contracts.

5.7. Reference checks

A vendor's references will be contacted and interviewed with a standard questionnaire. Areas of discussion will include:

- quality and performance of installed equipment*
- installation of hardware and software*
- quality of training and training programs*
- responsiveness to support and maintenance requirements*
- problems (poor quality deliverables, contract disputes, work stoppages)*
- problem handling, and problem resolution*
- functional and technical abilities*
- timeliness in meeting project deadlines*
- the performance of the vendor's project team staff*
- the overall opinion of the vendor's performance*
- whether or not the reference would rehire the firm*

Responses to reference checks will be evaluated individually and as a whole. Negative comments may be reviewed with the vendor at our option. Consistent unfavorable responses may cause disqualification of the proposal.

The State reserves the right to check any other reference(s) that might be indicated through the explicitly specified contacts or that result from communication with other entities involved with similar projects.

5.8. *System demonstration*

Selected finalists will be required to present a functional demonstration of the system solution. The conditions of this demonstration are defined in Section 2, Procurement Procedures.

Detailed notes of system demonstrations and oral presentations will be recorded and supplemental information (such as briefing charts, etcetera) shall be accepted. Additional written information gathered in this manner shall not constitute replacement of proposal contents.

Any interviews with proposed key personnel may be taped. Taping interviews will allow the Selection Committee members to listen thoroughly without the distraction of taking notes.

5.9. *Selection Committee*

All proposals submitted in response to this RFP will be evaluated by the State of Nebraska, Secretary of State's Office. This project team will make the final decision of the selection of the vendor.

The members of the evaluation team are members of senior management and analysts who participated in writing the RFP and developing the requirements.

5.10. *Scoring*

Requirements will be evaluated against a numerical scale reflecting the range of compliance, and the quality of the solution offered. The various vendors' scores will influence who wins the contract. Award will be made based on scoring and price.

Sections of the RFP will be weighted with different total possible scores for each section. The scoring of each individual requirement will contribute to a total score for each section. The overall proposal score will be a total of the section scores.

SAMPLE EVALUATION PROCEDURE 4
OUTSOURCING ALL IT SERVICES

Connecticut Department of Administrative Services
Request For Proposals

Page 360

ORGANISING THE EVALUATION PROCESS

For Information Technology Services

This 90-page RFP was intended to outsource all IT services of the state.

Connecticut, through the Department of Administrative Services, seeks to build a relationship with a world-class provider of IT services and enter into an IT services agreement with such entity. Connecticut expects that such provider shall provide all IT services necessary to fulfill the IT requirements of the departments, boards, councils, commissions, institutions, and other agencies of the executive branch of the state government (collectively AAgenies≡) so that such Agencies can completely exit the business of providing IT services and focus on their core function - the business of government.

The RFP was designed to attract only large viable firms. To do so, it stated that:

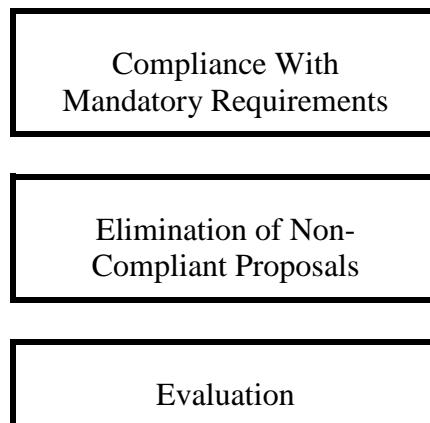
Your organization is discouraged from submitting a Proposal unless it meets each of the following criteria:

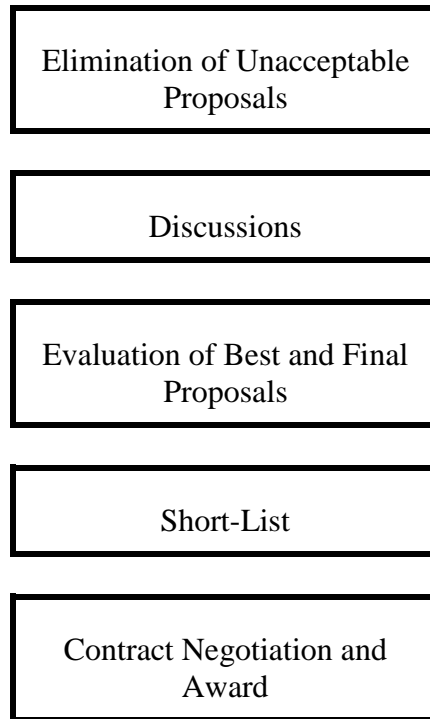
(a) Your organization, either alone or teaming with other entities, has entered into at least one IT services contract for the provision of IT services where the annual contract value exceeded \$50,000,000.

(b) Your organization, either alone or teaming with other entities, has provided services in at least six of the eight services categories described in Section 4.5 of the RFP; and

(c) Your organization has had average gross annual revenues in excess of \$1 billion over its three latest fiscal years.

The evaluation process used in this RFP can be represented as a series of building blocks:





While many RFPs describe the evaluation process in a separate section, this RFP embedded the evaluation events in the Event Calendar:

DATE	EVENT
Feb. 21, 1997	<u>Issuance of RFP.</u> Connecticut issues this RFP.
March 7, 1997	<u>Notice of Intent to Propose.</u> Organizations who intend to submit a Proposal shall submit a Notice of Intent to Propose by 4:30 pm on this date at Connecticut's office. Access to the data room will only be permitted to those organizations submitting a Notice of Intent to Propose. More details are included in Section 1.5 below.
March 14, 1997	<u>Connecticut Informs Proposers of Data Room Rules.</u> By this date, Connecticut will inform each proposer submitting a Notice of Intent to Propose of the data room rules. More details are included in Section 1.6 below.
March 24, 1997 through May 2, 1997 (excluding Connecticut holidays)	<u>Access to Data Room.</u> During this period, proposers submitting a Notice of Intent to Propose will have access to Connecticut's data room to permit certain due diligence activities. More details are included in Section 1.6 below.
March 7, 1997 through April 11, 1997	<u>Submission of Written Questions.</u> During this period, proposers are permitted to submit to Connecticut written questions, but only for purposes of clarifying this RFP. All submissions shall be delivered or faxed to Rock Regan at Connecticut's offices as set forth in Section 1.7 and shall include the name of a contact person to receive Connecticut's answers.

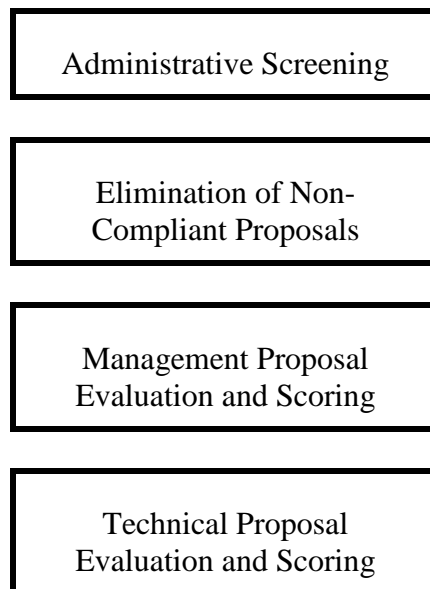
April 25, 1997	<p><u>Connecticut Response to Written Questions.</u> By this date, Connecticut will provide its response to the written questions submitted by proposers. Connecticut will have the option to answer selected questions earlier than this date if it determines that doing so would be in the best interest of Connecticut and would be helpful to proposers. All questions and responses will be provided to each proposer.</p>
May 9, 1997	<p><u>Proposals Due.</u> Proposals are due by 4:30 pm on this date, at Connecticut=s office, along with a signed CHRO Contract Compliance Regulations Notification to Bidders. All proposals will be time-stamped upon receipt and held in a secure place until this date. Proposals submitted after this date will not be opened. More details are included in Sections 1.7 and 2.2 below.</p>
May 12, 1997	<p><u>Proposal Opening.</u> All Proposals received by May 9, 1997 will be opened in the presence of two or more procurement officials. A register of Proposals will be established and opened for public inspection only after the award of the contract.</p>
May 12, 1997 through May 23, 1997	<p><u>Compliance with RFP Requirements.</u> During this period, the Evaluation Committee formed by the Commissioner of DAS will review the Proposals for compliance with the RFP requirements. The Evaluation Committee will determine if the proposers comply with the following: Provides complete Proposal; Agrees to Proposal conditions and process; Complies with RFP format. Any Proposals that is not in compliance with the foregoing requirements shall be eliminated from consideration and such proposers will be notified promptly.</p>
May 26, 1997 through June 20, 1997	<p><u>Evaluation.</u> During this period, the Evaluation Committee will conduct a full detailed evaluation of proposals that have complied with the RFP requirements. The evaluations will be based on the evaluation criteria set forth in the RFP. For purposes of conducting discussions under Section 4a-51-17 of the Regulations of Connecticut State Agencies, proposals will be classified as: Acceptable; Potentially Acceptable; Unacceptable. Proposers whose Proposals are unacceptable will be notified promptly. Proposers whose Proposals are either acceptable or potentially acceptable will continue through the evaluation process.</p>
June 1997 and thereafter	<p><u>Commence Discussions with Acceptable and Potentially Acceptable Proposers.</u> During this period, the Evaluation Committee can engage in discussions with any proposer. Discussions might be held with individual proposers to: promote understanding of Connecticut=s requirements and the content of the Proposals; determine in greater detail the proposer=s qualifications; explore with the proposer the scope and nature of the required contractual services, the proposer=s proposed method of performance, and the relative utility of alternate methods of approach; and, facilitate arriving at a contract that will be most advantageous to Connecticut taking into consideration the evaluation factors set forth in this RFP. If, during the course of discussions, Connecticut determines that the proposers require more detailed information regarding the scope and nature of the required contractual services, Connecticut shall have the option to provide such information to all of the acceptable and potentially acceptable proposers and to allow such proposers to perform limited diligence activities.</p>
August, 1997	<p><u>Best and Final Proposals.</u> During this period, the Commissioner will establish a common date and time for the submission of the best and final proposals. The best and final proposals will be submitted only once, provided, however, the Commissioner may make a written determination that it is in Connecticut=s best interest to conduct additional discussions or change Connecticut=s requirements and require another submission of the best and final proposals. Otherwise, no discussion of or changes in the best and final proposals will be allowed prior to award.</p>

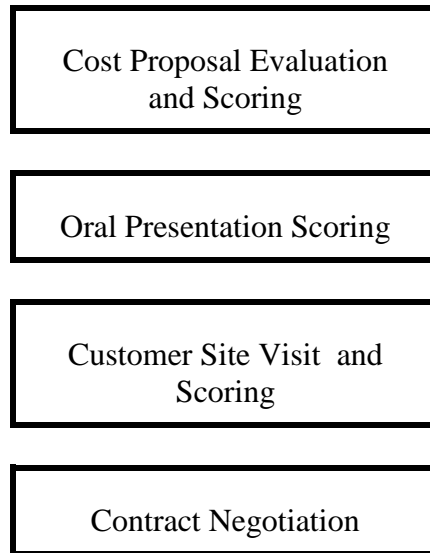
Sept. 1997 and thereafter	<p><u>Evaluation of Best and Final Proposals.</u> After the conclusion of discussions, the Evaluation Committee will evaluate the best and final proposal based on the evaluation criteria set forth in this RFP. The Evaluation Committee will make a final recommendation to the Commissioner. The Commissioner will select, in the order of their respective qualification rankings, no fewer than three acceptable proposers (or such lesser number if less than three acceptable proposals were received) deemed by the Commissioner to be the most advantageous to Connecticut for providing the contractual services. The Commissioner will then present a contract to the proposer whose Proposal is deemed by the Commissioner to be the most advantageous to Connecticut for the IT services and will attempt to negotiate a contract with such proposer in accordance with the applicable Regulations. Upon failure to negotiate a contract with such proposer, the Commissioner may continue the negotiation process and award such contract to the proposer next most advantageous to Connecticut, and so on until the contract is awarded and accepted. Should the Commissioner be unable to negotiate a contract with any of the acceptable proposers initially selected, proposals may be resolicited or additional proposers may be selected based on the original, acceptable proposals in order of the respective qualification rankings, and negotiations may continue.</p>
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SAMPLE EVALUATION PROCEDURE 5
DOCUMENT IMAGING SYSTEMS AND SERVICES

Washington State Health Care Authority Request For Proposals
Electronic Document Image Processing System

The evaluation process used in this RFP can be represented as a series of building blocks:





Here is the description of the evaluation from the RFP:

PROPOSAL EVALUATION

The Management, Technical, and Cost proposals will be evaluated separately. The evaluation will be performed by the RFP Coordinator and three evaluation committees comprised of state staff: Selection Committee for review of Management Proposals; Technical Committee for review of Technical Proposals; and RFP Financial Committee for review of Cost Proposals. HCA evaluation committees may contact a bidder for clarification of any portion of the bidder's proposal.

The initial evaluation of each proposal (i.e. Management, Technical, and Cost) will progress independently of each other. The point distribution for evaluation scoring is as indicated below.

<i>Management Proposal</i>	<i>250 points</i>
<i>Technical Proposal</i>	<i>500 points</i>
<i>Cost Proposal</i>	<i>200 points</i>

(A maximum of four vendors with the highest combined points totals from the Management, Technical and Cost proposal will be considered semi-finalists and scheduled to make an oral presentation.)

<i>Oral Presentation</i>	<i>200 points</i>
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(A maximum of two vendors with the highest combined point totals from the Management, Technical, Cost Proposal, and Oral presentation will be considered finalists and scheduled for a customer site visit.)

<i>Customer Site Visit</i>	<i>200 points</i>
<i>Total</i>	<i>1,350 points</i>

2.8.1 EVALUATION PROCESS

The evaluation process is designed to award the contract not necessarily to the bidder of least cost, but rather to the bidder with the best combination of attributes based on HCA evaluation criteria.

The evaluation process consists of five review levels:

- *Administrative screening for compliance with proposal content requirements*
- *Mandatory requirements screening*
- *Qualitative review and scoring*
- *Oral presentation*
- *Customer site visit.*

These levels of review are described below.

2.8.2 ADMINISTRATIVE SCREENING

All proposals will be reviewed by the RFP Coordinator to determine compliance with all content requirements. Only proposals meeting all of the content requirements will be evaluated further.

2.8.3 MANDATORY SCREENING

Proposals meeting all the content requirements will be reviewed to determine if they meet mandatory requirements. Proposals found not to be in compliance will be rejected from further consideration. If all proposals fail to meet any single mandatory item, HCA reserves the right to select one of the following options:

- *Cancel the procurement.*
- *Delete the mandatory item.*
- *Proposals meeting the mandatory requirements will progress to the next level of review.*

2.8.4 QUALITATIVE REVIEW AND SCORING

Proposals which pass content screening and review for compliance with mandatory requirements will be evaluated and scored based on responses to all requirements in the RFP.

HCA evaluators will consider how well the bidder's proposed solution meets the needs of the HCA, as described in the bidder's response to each requirement. It is

important that the response be clear and complete, so that the evaluators can adequately understand all aspects of the proposal.

2.8.5.1 MANAGEMENT PROPOSAL EVALUATION AND SCORING

Management Proposals that pass the initial screening will be evaluated by the HCA Selection Committee and scored based on the information presented in the bidder's response to requirements of RFP.

Point assignment for this evaluation and the total points possible for the Management Proposal are as follows:

<i>0-4 Points</i>	<i>=</i>	<i>Unsatisfactory</i>
<i>5 Points</i>	<i>=</i>	<i>Meets minimum requirements</i>
<i>6-10 Points</i>	<i>=</i>	<i>Exceeds minimum requirements</i>

There are 250 possible points assigned to the Management Proposal.

2.8.5.2 TECHNICAL PROPOSAL EVALUATION AND SCORING

Technical Proposals that pass the initial screening will be evaluated by the Technical Committee and scored based on the bidders' response to scored requirements and specifications contained in RFP.

Each scored item in Section 5 will be assigned a score by each evaluator. Points will be assigned based on the documented approach to supporting each of the technical items being rated. Point assignment for the evaluation of the Technical Proposal is the same as shown above for the Management Proposal evaluation.

There are 500 maximum possible points assigned to the Technical Proposal.

2.8.5.3 COST PROPOSAL EVALUATION AND SCORING

Cost Proposals that pass the initial screening will be evaluated by the RFP Financial Committee. These staff will summarize the total cost of each vendor's proposal to HCA on a cost basis with all other proposals for comparison purposes.

For comparative purposes, the actual cost quotation will be multiplied by .95, if the bidder is a certified MWBE vendor.

The total cost score will be calculated by dividing the lowest-cost proposal by the bidder's total cost and multiplying the result by 300 then subtracting 100 points to calculate the maximum points possible, 200 with a minimum of 0.

2.8.5.4 ORAL PRESENTATION SCORING

The oral presentation, not to exceed 90 minutes, including product demonstration and Q & A session, by each finalist bidder will be scored by members of the HCA Selection, Technical, and Finance Committees.

There are 200 maximum possible points assigned to the oral presentation.

2.8.5.5 CUSTOMER SITE VISIT

The customer site visit, not to exceed 4 hours will be scored by members of the HCA Selection, Technical, and Finance Committees. Customer sites should be located within 150 miles of the HCA Lacey offices. The HCA expects to be able to observe the proposed system in operation and discuss the system with knowledgeable customer staff. The HCA will expect at least 30 minutes of site visit time to be dedicated to discussions between customer and HCA staff with vendor representatives not present.

There are 200 maximum possible points assigned to the customer site visit.

2.8.6 SELECTION OF THE APPARENT SUCCESSFUL BIDDER

The customer site visit score will be added to the bidder's total proposal score. The bidder with the highest final score will become the apparent successful bidder.

An Ending Comment

Part One has discussed the evaluation process from a number of different perspectives: why it is needed; different ways of evaluating a group of proposals; the structure of an evaluation committee. It has also provided some examples of evaluation procedures and defined five documents which can promote excellence.

Part Two illustrates some best practices, including a step-by-step description of an actual evaluation. It also discusses the Evaluators' Work Book and how it can be used to keep your RFP on track.

End Notes

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1. Reference 89. Province of Nova Scotia, Office of Economic Development, Procurement Branch, "Guide to the Request for Proposal Process", May, 2004, 21 pages. This document is no longer available on the web.

In reading the quote, the word "jury" is used rather than "evaluation committee". (This is the only jurisdiction I know that employs this term.).

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2. Reference 90. NIGP and CIPS, Evaluation Process, 2012, 5 pgs,
<http://www.globalpublicprocurement.org/Documents/Resources/public-procurement-practices/TheEvaluationProcess.pdf>
 3. Reference 91. State of Massachusetts, Executive Office for Administration and Finance, Guidelines for Ensuring Best Value Procurement, 1 pg,
<http://www.mass.gov/anf/budget-taxes-and-procurement/procurement-info-and-res/conduct-a-procurement/procurement-considerations/guidelines-for-ensuring-best-value-procurement.html>
 4. Adler, John, "What is best value?" This article was originally published on the State of Arizona's web site; however it is no longer available on the web.
 5. Page 32, Reference 53.
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<http://doa.louisiana.gov/osp/agencycenter/RFP/rfpdocs/rfpmanual.pdf>
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 9. Reference 93. Province of British Columbia, Purchasing Services, "Preparing RFPs: A Ministry Guide to the Request for Proposals Process", pg 35, Jan. 2010, 55 pgs,
<http://www.pss.gov.bc.ca/psb/pdfs/ministryrfpguide.pdf>
 10. Page 13, Reference 87.
 11. Reference 94. State of Idaho, Division of Purchasing, Evaluator's Handbook, 2010, 11 pgs,
http://purchasing.idaho.gov/pdf/publications/evaluators_handbook.pdf
 12. Reference 95. Montana Dept. of Administration, General Services Div., State Procurement Bureau, Request for Proposal Evaluation Process – Instructions, July 2009, 3 pgs,
http://gsd.mt.gov/content/procurement/RFP_Process/RFP_Evaluation.pdf
 13. Reference 39.
 14. Pages 95-96, Reference 79.
 15. Page 88, Reference 79.
 16. Pages 14-15, Reference 89.
 17. "Proposal Evaluation," Page 34, Reference 41.
 18. Page 40, Reference 93.
 19. Additional information about this RFP can be obtained from Dept. Of Administrative Services, Materiel Division, P.O. Box 94847, Lincoln, Nebraska 68509-4847.

Chapter Ten

SAFEGUARDING THE EVALUATION PROCESS

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Chapter Ten

SAFEGUARDING THE EVALUATION PROCESS

This Chapter describes some best practices and includes a step-by-step description of an actual evaluation. It also discusses the Evaluators' Work Book and how it can be used to keep your RFP on track.

The next chapter provides a more detailed examination of each major component of an evaluation. It examines the problems, pitfalls and best practices for each of the building blocks.

When Bad Things Happen to Good Evaluations

Not all evaluation processes work well. Some don't work at all. They sometimes result in the obvious choice being overlooked, or an inferior proposal receiving a higher score. Sometimes, they result in scandals or in litigation. In this section, we will briefly examine some of the major flaws in the evaluation process and then see how they have been dealt with through the development of specific standardized documents.

Let's examine how the evaluation process works.

First, we define our needs, as best we can. In fact, we are abstracting a "model" of what we think we need. (Often, we don't find out until later that our basic statement of requirements was incomplete, or inadequate.) Once we write down these requirements they take on a life of their own. For it is the requirements, as stated in the RFP, that are used in the evaluation process.

In a sense, we've created a model of reality - we've used the RFP document to define the characteristics of the solution we want. We then take each proposal, compare the proposed solution with the requirements as specified, and use the defined evaluation process to produce a score. The fundamental assumption we make is that the model reflects our requirements accurately and that the highest scoring proposal will lead to the best solution. This is not always true!

The evaluation process is a way of assessing each proposal. In fact, we are looking for a simple way of taking each supplier's information and translating it into a

score. By translating each proposal into a score, we make the process more objective, or at least we think so. The evaluation process can be thought of as a machine. In one end, we feed the proposals. At the other end, we obtain a score for each. We then simply compare the scores and the highest one is the winner.

Even a cursory examination reveals the fact that there is a lot of room for error in this process. In the extreme, the proposal obtaining the highest score may not be a valid solution. In this case, either the requirements were not adequately defined or the evaluation process was flawed. There are several weaknesses, omissions or flaws which can lead us to withdrawing or modifying the RFP, changing our requirements, changing the evaluation process, or selecting an inappropriate proposal.

DEFICIENT REQUIREMENTS

The foundation for all of this work - the RFP, the Proposals, and the Evaluation - is the Requirements Document. If this document is deficient, incomplete, or ambiguous, then the proposals will miss the mark. They will not offer viable solutions.

Even complete and clear RFP documents can mislead the vendors and create major problems. Sometimes, organizations "over design" their requirements – they are unduly restrictive. To use an automobile analogy, they identify the characteristics of the high performance car they would like, not the mid-range car they can afford. "Over Design" can lead to all proposals exceeding the budget.

An extensive discussion of issues related to developing a Statement of Work is contained in Chapter 6.

INAPPROPRIATE EVALUATION PROCESS

Another assumption is that the evaluation process and the scoring mechanism we have created will work as we intend them to. They will identify the "best" proposal. Sometimes, scoring mechanisms, the weights used, or the factors themselves are not appropriate. For example, we may have neglected an important factor such as our assessment of the risk associated with each solution. In this case, the proposal with the highest score could, in theory at least, also carry with it the highest risk.

Another example may help illustrate this point. Suppose that cost is worth 40% of the score and technical merit of the proposed solution is worth 10%. In this case, a proposal having a poor technical solution but not costing much could score higher than one having a brilliant solution but costing somewhat more. This may not have been the intention of the Project Manager or Executive Director when the evaluation process was created.

Many organizations first establish the evaluation process and then the scoring mechanisms. When these have been defined, they create scenarios to reflect different types of proposals they might get. They investigate how different types of proposals would be scored: a proposal with a brilliant technical solution but a high risk; a proposal from an established vendor with a mediocre solution but costing only 50% as much as the competitors'. In this way, the evaluators test and modify the process and the scoring mechanism *prior* to issuing the RFP.

OTHER FLAWS IN THE PROCESS

There are many other potential problem areas and deficiencies that can degrade the evaluation process. Cost is always an important issue. There are many different ways of handling cost. For example, some organizations give it a point rating; others identify those proposals which satisfy the technical requirements and then select the "winner" using least cost. It is important that the RFP reflect a costing approach acceptable to senior management. Some project teams interview senior management when developing the RFP to understand their decision-making process. What if the recommended proposal costs \$100,000 more than the one in second place? Will it be accepted? Failure to deal properly with cost is a significant risk in developing the RFP and the evaluation process.

The selection and training of the evaluators can present risks. Some evaluators are inappropriate - they have a conflict of interest or don't have enough time to do a good job. Evaluators require training to understand their responsibilities but this is lacking in many organizations.

The selection and training of the project manager can also present risks. A major RFP requires knowledge of the process and best practices, and planning skills. Some Project Managers are simply not suited to the task and endanger the overall success of the project.

A Trail of Great Documents Intimidates Their Lawyers

Issues related to developing the requirements or planning and executing the evaluation process challenge the skills of even the most experienced procurement officers, fairness consultants, and evaluators. Organizations attempt to reduce the risk of errors and litigation by standardizing the process. To do this, they produce manuals, templates, training courses, and guidance on 'best practices'. While millions of pages of documentation exist, much of it is mediocre or simply out of date.

In the remainder of this section, we present thumb-nail sketches of several excellent documents. Each of these can be easily adapted for use other jurisdictions including your Agency. Each will help to reduce the flaws and deficiencies in the RFP process and the evaluation of proposals.

Over the last twenty years, I've spent a lot of time discussing legal issues with public sector procurement executives. We've discussed laws and regulations, best practices, and litigation. We've discussed "avoiding litigation" as a significant yet unwritten part of the procurement function.

These discussions often deal with "best practices" – things that we can do which will reduce the probability of being sued. Or, if we are sued, increase the probability that it will never get to trial because we did no wrong and could demonstrate the soundness of our process.

This section of this chapter deals with things you can do as part of the competitive process to ensure that your actions can survive scrutiny by the vendors' lawyers and the courts. Now, as we all know, litigation cannot be totally avoided. Anyone can sue you, for any reason. And sometimes, organizations get sued, not because they have erred, but because one particular vendor was truly angry, or the vendor wanted to ensure that next time, the procurement people would be very careful in how they treated that vendor.

There are lots of activities which improve the RFP process; for example, issuing a draft RFP, using outside experts, or employing Best and Final Offers.

Here are some of the document-driven activities which, if done properly, make it extremely difficult for the vendors' lawyers to be enthusiastic about their chances of winning in court. These activities when completed as part of the RFP process help ensure that the competition is "fair and open". And just as importantly, the documents which are part of these activities, when viewed by a lawyer after the award has been made, demonstrate that the process was well-planned and micro-managed to ensure that each vendor was treated fairly.

There are six documents which can be easily created by a procurement department and which will help ensure that the evaluation process can survive scrutiny by a disgruntled vendor's lawyers. These documents help structure the RFP process and guide the actions of the Project Team. Here are the documents organized chronologically to correspond to the RFP process:

1. Follow an RFP Road-Map
2. Specify the Activities of the Evaluation Committee.
3. Develop a Fairness Plan.
4. Publish an Evaluation Guide.
5. Publicize an Effective Debriefing Procedure.
6. Make Vendors Aware of Your Protest Procedure.

DOCUMENT 1: FOLLOW AN RFP ROAD-MAP

Use this document to demonstrate that the entire process was properly planned.

Developing and issuing an RFP, and selecting the "best value" proposal is a common process based on "fair and open competition". Many jurisdictions base their process on the Model Procurement Code developed by the American Bar Association in the 1980s and revised in 2000. The State Procurement Bureau, State of Montana provides Montana Agencies with a good road map based on a 22-step RFP process and a 50-page RFP Manual.¹ Montana's road map is contained in Chapter Three.

Develop a similar document when planning your next RFP.

DOCUMENT 2: SPECIFY THE ACTIVITIES OF THE EVALUATION COMMITTEE

Use this document to demonstrate that the Evaluation Committee was properly organized and directed to ensure fairness.

This document is discussed in the next section of this Chapter.

DOCUMENT 3: DEVELOP A FAIRNESS PLAN

Use this document to demonstrate that you have taken steps to ensure that your process is equitable, justifiable and sound and provides equal opportunity for all proposers.

The Victoria Government Purchasing Board (Australia) has produced some excellent documentation related to the entire procurement process. Probity, defined as “unimpeachable honesty and virtue” or “complete and confirmed integrity”, is a critical issue. They have developed and published a policy and best practices guide which is accompanied by a Probity Plan Template. This 28-page document contains a list of 40 tasks which, when executed, helps ensure compliance with public policy.²

DOCUMENT 4: PUBLISH AN EVALUATION GUIDE

Use this document to describe all of the steps in the evaluation process and to prove that the process was defined prior to the closing date for proposals.

This document is discussed in the next section of this Chapter.

DOCUMENT 5: PUBLICIZE AN EFFECTIVE DEBRIEFING PROCEDURE

Use this document to demonstrate your sense of fairness, and your organization’s willingness to deal with suppliers’ concerns (without litigation).

The existence of a well-written reasonable debriefing procedure will re-enforce the idea that the entire RFP process was done properly. It will also convince some disgruntled vendors to seek more information before talking to their lawyers. And finally, a publicized and open debriefing process permits you to find out which vendors are really, really angry and gives you an opportunity to defuse the situation.

Debriefing is often looked upon as the crumbs given to losers to offset, at least in the purchaser's mind, the cost of submitting a losing proposal. It is an attempt by the Purchasing Organization to provide some value to the suppliers. It is also a means by which the Purchaser can determine which suppliers are really mad and intend to challenge the results, either through senior management, the political process or the courts.

Most jurisdictions provide an opportunity for suppliers to obtain details about their proposals and why they didn't win. The suppliers are offered some information as a 'thank you' for the cost and effort of preparing a proposal.

Under many different access to information laws in many jurisdictions, a large amount of information is available about an RFP and the proposals. In some jurisdictions the proposals themselves become public documents. Typically, this information includes the following:

- Project authorization
- The RFP document
- The Evaluation Process
- The Evaluators' notes
- Memo recommending the winner
- Suppliers' proposals, except for competitive information
- Evaluation summary sheets.

While there are lots of examples of documents dealing with the debriefing sessions, I've selected two for inclusion here. Each of these demonstrates some element of excellence. Each reflects a serious commitment to a transparent process. And each, in its own way, argues against initiating a legal action until the debriefing is completed.

Example #1 - The Federal Transit Administration (FTA)

FTA's Best Practices Procurement Manual contains two pages on this topic.³ It defines the value of a debriefing and its role in discouraging offerors from taking legal action:

Debriefing of unsuccessful offerors can be valuable to both the offerors and the procuring agency. A debriefing can be helpful for a number of reasons:

- It communicates a sense of fairness and appreciation to offerors who have made sizeable investments of time and resources in preparing bids or proposals for your program.
- It may avoid a protest by convincing a disappointed offeror that your agency's decision was carefully made, factually well supported, and the best one for your agency.
- Of most importance, it can help offerors improve their future proposals, which is a definite advantage to them and to your agency.

Example #2 - The Office of Government Commerce (OGS) in the United Kingdom

OGS has published a 21-page Supplier Debriefing memo.⁴ This text is easy to read and deals with many facets of this topic.

Contents	
One	Introduction
Two	Benefits of effective debriefing
Three	When to debrief
Four	Where debriefing takes place
Five	Approach to debriefing
Six	Who should attend?
Seven	The debriefing meeting
Eight	After the debrief
Nine	Further advice and tips

It also contains a Supplier Questionnaire dealing with the solicitation package, interaction with the Government Department, the Advertisement, the Workload in preparing a response, and the debriefing itself.

DOCUMENT 6: MAKE VENDORS AWARE OF YOUR PROTEST PROCEDURE

Use this document to inform vendors that you will attempt to resolve their issues through discussions and negotiations, rather than litigation.

A written complaints procedure can direct (and control) the vendors' activities, promote confidence in the process, promote the resolution of grievances, and restrict or discourage frivolous protests. There are many examples of protest

policies and procedures. Some are statutes; others, policies or guidelines. They all deal with the same set of issues: Who can protest? When? What is the procedure? Who decides if the claim has merit? What are the remedies?

The City of Miami has a 3-page procedure.⁵ Protests must be initiated within two days of the notice of award of a contract. Only proposers can protest. Protests may not challenge the evaluation criteria or weights. And protests are first dealt with by the Chief Procurement Officer.

The State of Nebraska⁶ has a one-page protest procedure that identifies the timing (within ten days of Intent to Award), the official in charge (Materiel Division Administrator), and the tasks.

The City of Orlando⁷ has a two-page Bid Award Disputes procedure. Protests often cause the contract award to be suspended until the protest is resolved.

In the event of a timely protest and/or appeal, the City shall not proceed further with the solicitation or with the award of the bid/contract unless the Director, after consultation with the Department Manager of the using agency, forwards to the Chief Administrative Officer a written request to award the bid/contract without delay in order to protect the public health, welfare or safety.

Tools to Help the Evaluators Keep on Track

Evaluators need help. The more help they get, the fewer problems they cause and the better job they do! The earlier they are involved in the process, the more they understand and the better job they do!

The evaluation process often becomes the center of controversy and intense scrutiny. It is the usual practice to define the details of the evaluation process while the RFP is being developed. In most organizations, the Project Manager or Procurement Officer reviews the evaluation procedure with the Evaluation Committee just before the proposals are distributed. They want to ensure that each evaluator understands the process and performs accordingly.

Most Evaluators have never done it before; many don't understand their critical role in the process and few have enough time to fully understand their critical role and still do their regular job.

Some organizations provide the evaluators with score sheets; others, with a description of their responsibilities. Some organizations provide each evaluator with a Guide, a detailed description of the evaluation process based on the RFP itself. While these Guides take time and effort to prepare, they are worth it! These Guides help the evaluators understand the process and their responsibilities. They simplify the work of the evaluators and they are a great tool in defending the process from criticism.

Evaluators need to be educated and trained for this new role and guided throughout the entire RFP process. Most agencies provide some form of help for the evaluators, but in many agencies more help and training are needed.

BEFORE THE RFP IS ISSUED

There are many activities which can help assist Evaluators to understand the importance of their roles, the standard of behavior required, and teach them how to perform the evaluation:

- Often, evaluators start off as members of a project team formed to define a problem and investigate potential solutions. This group develops the Statement of Work and assists in the preparation of the RFP itself. This is great training for being an evaluator for this particular project.
- The active participation of a Procurement Officer in the development of the Statement of Work provides the Project Team with an opportunity to learn about and understand the RFP process.
- The use of a Fairness Commissioner provides the Project Team with an objective, experienced person to ensure that the Project Team's work products are fair and that the Project Team understands the best practices related to RFPs.

TOOLS TO HELP THE EVALUATORS

There is a hierarchy of documents which are designed to help the Evaluators understand their responsibilities and perform their jobs in a fair, and transparent manner.

As the documents become more sophisticated, the risks of complaints, scandals and litigation decrease. Here are examples of the best of these documents:

- Confidentiality and Non-Conflict of Interest Forms: These forms formalize two important issues related to every RFP.
- Generic Evaluation Guide: This guide applies to all evaluators and every evaluation. It describes the Evaluator's role and responsibilities on every RFP.
- Evaluators' Work Book: This guide applies to the specific RFP and the proposals being considered.

Let's examine each of these tools in a little more depth.

Confidentiality and Non-Conflict of Interest Forms

These forms formalize two important issues related to every RFP.

Members of the evaluation committee are usually selected because of their knowledge or expertise related to the procurement. In some organizations, members of the evaluation committee may have pre-existing, informal relationships with contractors. It is important that each person on the evaluation committee understand their role, the critical nature of their activities and the appropriate behavior of the Evaluators during the process. In many jurisdictions, care is taken to ensure that there are no conflicts of interest and the proposals and deliberations are kept confidential. Committee members are provided written instructions and are often required to sign agreements on how they will behave.

The states of Alaska, Arizona and Idaho provide strong, specific directions to members of any Evaluation Committee in terms of conflicts of interest and the need for confidentiality.

In Alaska, each evaluator must complete and sign a Non-Conflict of Interest Form. Here is their form. It is short but adequately deals with the issue:⁸

NON-CONFLICT OF INTEREST FORM

Once the proposals have been received and it is clear which companies are involved in the RFP, the procurement officer and each member of the proposal evaluation committee must sign a "Non-Conflict of Interest" form. This form

must be signed before any PEC member, including the procurement officer, begins their evaluation of the proposals. The signed forms must be maintained in the procurement file. The form and other procurement documents are available at DGS' web site: <http://doa.alaska.gov/dgs/policy.html>

NON-CONFLICT OF INTEREST STATEMENT

I certify that neither I nor any member of my immediate family has a material personal or financial relationship with any offeror, or to a direct competitor of any offeror under consideration by this proposal evaluation committee. I further certify that no other relationship, bias or ethical conflict exists which will prevent me from evaluating any proposal solely on its merits and in accordance with the Request for Proposal's evaluation criteria.

Furthermore, I agree to notify the Procurement Officer if my personal or financial relationship with one of the offerors is altered at any time during the evaluation process. If I am serving as the Procurement Officer of record I agree to advise my supervisor of any changes that could appear to represent a conflict of interest.

In Arizona, the issue is dealt with in the Procurement Code.⁹ The State has established a law to restrict the activities of members on an evaluation committee.

A person who serves on an evaluation committee for a procurement shall sign a statement before reviewing bids or proposals that the person has no interest in the procurement other than that disclosed and will have no contact with any representative of a competing vendor related to the particular procurement during the course of evaluation of bids or proposals, except those contacts specifically authorized by sections 41-2534, 41-2537, 41-2538 and 41-2578. The person shall disclose on the statement any contact unrelated to the pending procurement that the person may need to have with a representative of a competing vendor and any contact with a representative of a competing vendor during evaluation of bids or proposals except those contacts specifically authorized by sections 41-2534, 41-2537, 41-2538 and 41-2578. A person who serves on an evaluation committee and who fails to disclose contact with a representative of a competing vendor or who fails to provide accurate information on the statement is subject to a civil penalty of at least one thousand dollars but not more than ten thousand dollars.

Idaho has a two-page form which provides explanations and examples. It first explains that Evaluators must 'fully understand the policies regarding conflicts of interest and the confidential nature of the proposals'. It then goes on and explains the meaning of 'confidentiality', and explains and provides examples of 'Conflict of Interest'. This form has been reproduced in its entirety earlier in Chapter Nine.

Generic Evaluation Guide

Both Alaska and North Dakota have publications entitled “RFP Evaluators Guide” and they are similar. In fact, many sections are identical. Now this is not uncommon as good documents are often adopted by many different agencies. It is not clear, which document, if either, was the original. Both documents provide a briefing for the Evaluators. Each tells them about their roles, responsibilities and provides basic information about the Evaluation Process. Both of these short publications deal with significant issues and emphasize the required behavior of an evaluator. Both deal with many common issues including ethical considerations, procurement code considerations, protests, and conflicts of interest.

Alaska’s 8-page Evaluators Guide¹⁰ is designed to provide overall direction. This Guide applies to any RFP as it deals with basic issues and concerns of a first-time Evaluator. In the text which follows, the Guide’s Table of Contents is reproduced. Selected extracts from the Guide itself have been included under several important topics.

Table of Contents and Selected Extracts for Alaska’s Evaluators Guide

PEC INTRODUCTION

WHO SERVES ON THE PEC?

WHAT DOES A PEC MEMBER DO?

HOW MUCH TIME IS REQUIRED?

. . . Evaluating complex proposals is intense, time-consuming work, which must be accomplished on a limited time schedule. You should expect to spend full workdays in evaluation meetings, and you should arrange your regular work to avoid interruptions during the committee’s work sessions

The amount of time needed for the PEC to evaluate proposals will depend on the number of proposals received and the quality of each proposal.

WHERE WILL WE MEET?

THE PROCUREMENT OFFICER’S ROLE

The procurement officer has the overall responsibility for all matters involving the procurement. They will function as the chairman of the PEC and will guide the PEC members through their duties. They may or may not score the proposals.

The procurement officer is bound to follow the procedures laid out in the RFP and is limited to the evaluation topics and considerations that were published in the

RFP. Neither the procurement officer nor the PEC members are allowed to deviate from the procedures and evaluation requirements of the RFP.

NUMERICAL SCORING SYSTEMS

NON-NUMERICAL SCORING SYSTEMS

INDEPENDENT JUDGMENT

Procurement regulations require that “each committee member shall exercise independent judgment” (2 AAC 12.260 (h)).

What does that mean? In part it means that you have been entrusted with an essential part of an important public decision. The emphasis is on “you” in this regard. The role was not given to your friend, your colleague, your supervisor, or anyone else but you. It is yours and yours alone and it is to be exercised only by you.

Does this mean you can’t seek to increase your knowledge before you award points by asking questions and seeking appropriate information? Certainly not; the prime requirement is that you exercise your judgment in a manner that is not dependent on anyone else’s judgment or wishes. . .

The exercise of independent judgment applies not only to possible influences from outside the evaluation committee, but also to influences from within the PEC. It is normal and acceptable for there to be debate, even passionate debate, within the committee about how well a proposal meets the evaluation criteria. As an independent evaluator you may be swayed by debate in making your judgment about how many points you wish to award, and that is perfectly OK.

However, evaluators may not act in a concerted way to either favor or disfavor a particular proposal or group of proposals, as this would be in opposition to the requirement that evaluators act using independent judgment.

Attempts by anyone, including colleagues, subordinates, and superiors, to influence you to improperly favor or disfavor a particular proposer, such as awarding or withholding points in a manner that might affect the outcome of the committee results, must be reported to the procurement officer immediately.

EVALUATION PROCESS

WHAT ABOUT THE COST PROPOSAL

PROTESTS, APPEALS, AND LAWSUITS

Protests, Appeals, and Lawsuits are a part of procurement life. It is likely that one or more of these actions could occur over the procurement for which you serve as an evaluator. Such actions may or may not center on your activities as an evaluator, but generally they are not.

Most actions are related to procedural issues and involve only the decision of the procurement officer. However, it is not uncommon for a protester to review the scoring of individual evaluators. That is why it is essential that you work hard to score the proposals in a consistent and explainable manner.

COMMUNICATING WITH OFFERORS

When it comes to this procurement, your world begins and ends in the PEC. If the procurement officer has provided for the offerors to have communication with the PEC, it will be done while the PEC is in session so that all the members can benefit for the communication at the same time. . .

NON-DISCRIMINATION

ETHICAL CONSIDERATIONS

. . . On the other hand, if you stay throughout the process either knowing or suspecting you have an ethical conflict in participating, you could be jeopardizing an important state project and the hundreds of hours of time invested in it by both the state and the offerors.

The consequences of sticking it out could very well result in adverse publicity, personal embarrassment, embarrassment to the Governor's administration, possible court action, or worse. It is far better to disclose problems at the earliest possible time, and allow the opportunity to make any adjustments to keep the process fair to all competitors.

NON-CONFLICT OF INTEREST FORM

Once the proposals have been received and it is clear which companies are involved in the RFP, the procurement officer and each member of the proposal evaluation committee must sign a "Non-Conflict of Interest" form. This form must be signed before any PEC member, including the procurement officer, begins their evaluation of the proposals. The signed forms must be maintained in the procurement file. The form and other procurement documents are available at DGS' web site: <http://doa.alaska.gov/dgs/policy.html>

PROCUREMENT CODE CONSIDERATIONS

PENALTIES

The state spends hundreds of millions of dollars per year through the procurement process. The procurement process is one of the main ways money is transferred from the government to private hands. With that much money involved, it is not surprising that the government wants to minimize any possibility for corruption.

Because procurement is an activity that involves the spending of very large sums of public money, it is a Class C felony to willfully circumvent the Procurement Code.

REPLACING PEC MEMBERS

TIMELINESS AND ATTENDANCE FOR PEC DELIBERATIONS

Idaho's Evaluator's Handbook¹¹

Idaho's Evaluator's Handbook is 11 pages long and covers many of the same topics as the Guides from Alaska and other jurisdictions.

Table of Contents

1. *Evaluation and Award Procedure*
2. *Evaluation team Makeup*
3. *Duties of the Evaluation team Proctor*
4. *Instructions for Evaluators*
- Do's and Don'ts*
- Conflict of Interest*
5. *Evaluation Tabulation*
6. *Discussions and Best & Final Offer*
- Purpose of Discussions*
- Conduct of Discussions*
7. *Negotiations*
8. *Contract Award*
9. *Conflict of Interest and Confidentiality of Information Statement*

The Idaho document emphasizes the need for accurate and complete records:

Your designation as an RFP evaluator for the Division of Purchasing, and as a public servant thereby, requires that you fully understand the policies regarding potential conflicts of interest and the confidential nature of the proposals and all that is contained therein. The following information provides a general overview of evaluations and outlines how the evaluation process is conducted.

It also provides some helpful Do's and Don'ts:

Do's	Don'ts
Do evaluate each proposal independently, then as a team.	Don't confer with other team members concerning a particular proposal until after you have first evaluated it independently.
Do record the detailed rationale for scoring each proposal.	Don't use vague or contradictory statements in your evaluation rationale.
Do ask the evaluation proctor or the Division of Purchasing for guidance or any question you may have.	Don't discuss the evaluation scores with non-team persons or offerors prior to award. If you get an inquiry from an offeror, your response should only indicate that you are in "the evaluation process." Any

	<p>direct questions should be directed to the Division of Purchasing.</p> <p>Don't assume. If you have a question, ask.</p>
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Evaluators' Work Book

The Evaluators are provided a detailed work book describing their responsibilities and providing a step by step description of the entire evaluation process.

The Work Book used in this section as an exemplary document began at the Atlantic Lottery Corporation in Canada around 2003. Shortly after I found it in a web search in early 2003, I contacted their Procurement Manager, Phil Elliott, to learn more about this Evaluation Charter.

Later in 2003, I published an article about it and declared that it 'is one of the best guides I've seen'. It's well organized. It's synchronized with the RFP. It deals with critical issues including Project Strategy, Responsibilities, and Risk Management.¹²

Since then, I have used it as a template on several high-risk RFPs.

Recently, Terry Davenport, an independent consultant specializing in public procurement revised his book dealing with RFPs. His latest book includes an Evaluators' Work Book based heavily on the original Atlantic Lottery publication.

In my consulting practice, when I act as a Fairness Officer on a high-risk, high-visibility RFP, I've taken this document and used it as a template. I then create an Evaluators' Work Book for the specific RFP.

Typically, once the RFP has been finalized, I cut and paste material from the actual RFP into the appropriate sections of this template. For example, I cut and paste the description of the evaluation process, the scoring mechanism and the weights. I also add scoring sheets that identify each of the major evaluation factors and the subfactors that are used. When I'm finished, we have a document that explains the rules to each evaluator and then provides worksheets for doing each evaluation.

Sometimes, this Evaluation Guide is used to brief senior management on the process. Once the award has been made, the Guide provides convincing evidence that (i) the evaluation process was formalized before the proposals were received and (ii) the evaluation process was properly structured and fair.

Here is the Table of Contents from the latest iteration of this valuable Evaluation Guide¹³ followed by the section on Project Strategy and Project Flow.

Table of Contents

Objective

Evaluation Guide Deliverables

Project Strategy and Process Flow

Roles and Responsibilities

Evaluation Committee

Proposal Evaluation Process Summary

Evaluation Committee Document and Worksheets

The Guide also includes templates for No Conflict of Interest, Mandatory Requirements Checklist, Past Performance Questionnaire, Proposal Evaluation Worksheet and Proposal Presentation Agenda.

One of the strengths of this document is that it describes each of the tasks that involve each of the Evaluators. It identifies the purpose of each task and the anticipated outcomes.

Here is the entire section on Project Strategy and Process Flow.

Project Strategy and Process Flow

The Overall Evaluation Process

Phase 1

The shall be a two-step selection process. First, the Evaluation Committee shall score and rank the proposals submitted using the Evaluation Methodology adopted by the Chief Procurement Officer. The methodology combines the “best value” evaluation process with the evaluation against a predetermined yardstick for weighted evaluation factors and subfactors in accordance the contents of the RFP document. This is unquestionably the best practice evaluation methodology to use for this competitive solicitation.

Phase 2

The finalist, short listed Offerors, will be provide a notification letter inviting the finalist Offerors to present and demonstrate their solutions to the Evaluation Committee and to submit a Best and Final Offer that may amend selected portions of their proposals.

The Evaluation Committee will complete its scoring and the Evaluation Report will be presented to the Executive Sponsor. One or more of the highest scoring proposals will be selected for negotiation of appropriate contract.

Strategy

The evaluation will consist of the follow steps:

Each proposal will be reviewed to ensure that all mandatory requirements have been met. Proposals failing to meet one or more mandatory requirements will be eliminated from further consideration. The mandatory proposal requirements are listed in the Mandatory Requirements Checklist.

The Past Performance Questionnaire will be distributed to the selected references in each Offeror's proposal.

The Evaluation Committee will review each proposal and determine if any clarifications are required. If so, Offerors will be contacted and clarifications shall be obtained by the Procurement Manager. During this time, the Procurement Manager may, at his/her option, initiate discussion with Offerors who submit responsive or potentially responsive proposals for the purpose of clarifying aspects of the proposals, but proposals may be accepted and evaluated without such discussion. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing Offerors.

The Evaluation Committee will receive the completed Past Performance Questionnaire and score them and every evaluation factor by subfactor as prescribed by the Evaluation Methodology and in accordance with the evaluation factor and relative weights found in Section V of the RFP.

Based on the scoring of the proposals submitted, the Evaluation Committee shall prepare a short-list of those proposals which are judged as being capable of providing an acceptable solution.

The Offerors on the short-list will be required to give a presentation and demonstrate their proposed systems to the Evaluation Committee and scored accordingly.

Amended proposals submitted in response to Best and Final Offer will be re-assessed using the same evaluation criteria and scoring mechanisms that were used to score the original proposals. The scores will then be finalized.

The Evaluation Committee or portions thereof may make an optional site visit to validate Offeror claims for system performance and functionality.

Project Process Flow

RFP Evaluation Planning/Training Session

Date

This is the initial planning session with all Committee members expected to attend. The objective of this planning session will be to ensure that all Committee members are aware of what is expected of them (their roles and responsibilities) and the schedule that must be adhered to for successful completion of this project. Of special interest will be the criteria that have been developed to assist Committee members in evaluating the proposals which shall be reviewed and adopted by the Evaluation Committee. Each Evaluation Committee member will be required to read and sign the Evaluation Committee Member's Declaration.

Proposal Opening

Date

RFP responses that have been received by the proper closing date will be opened.

Mandatory Compliance Review

Date

Each proposal will be reviewed to ensure that all mandatory requirements have been met. Proposals failing to meet one or more mandatory requirements will be eliminated from further consideration. The mandatory proposal requirements are listed in the Mandatory Requirements Checklist.

Distribution of Past Performance Questionnaire

Date

Past Performance Questionnaires will be distributed to the references for responsive Offeror's proposal.

Terms and Conditions Review

Date

The Offeror terms and conditions shall be extracted from each responsive proposal and delivered to the General Counsel for review.

Proposal Cost Review

Date

The Offeror cost response forms with explanations shall be extracted from each responsive proposal and reviewed by an individual or individuals assigned by the Procurement Manager.

Proposals Review

Date

Room _____ at the office building located at _____ has been reserved for proposal evaluation. Offeror proposals and any related materials shall not be removed from this room without the prior consent of Procurement Manager or Deputy Procurement Manager. The Evaluation Committee shall review each proposal and determine if any clarifications are required. Requests for clarification shall be submitted to the Procurement Manager.

Proposal Scoring Sessions

Date

All Evaluation Committee scoring will be conducted in a group setting in accordance with the Evaluation Methodology. Scoring will be conducted horizontally by subfactor and evaluation factor as set forth in the RFP the Evaluation Worksheet. Evaluation Committee members shall be required to attend all scoring sessions.

The following evaluation factors will be scored during this scoring session:

Receive Past Performance Questionnaires

Date

The Procurement Manager shall receive past performance questionnaires and prepare them for review by the Evaluation Committee.

Second and Final Scoring Sessions

Date

The Evaluation Committee will complete the scoring of all factors including costs and draft its recommendations for the selection of finalists. The following evaluation factors will be scored during this scoring session:

Evaluation Results and Recommendations

Date

The Procurement Manager will prepare the evaluation results and recommendations for presentation to the Executive Sponsor and the Chief Procurement Officer.

Selection of Finalists

Date

The Executive Sponsor shall select and the Procurement Manager will notify the finalist Offerors of their selection. The schedule and location of finalist Offeror presentations and demonstrations will be determined by lottery at this time.

Terms and Conditions Review Results

Date

The Procurement Manager will take the review results from the General Counsel and begin incorporating those results in the Finalist Notification Letters

Finalist Notification Letters

Date

The Procurement Manager will prepare and distribute individual Finalist notification letters. Each letter will contain all of the appropriate following paragraphs:

- *The date, time and location of the proposal presentation or system demonstration, along with instructions as may be appropriate for the conduct of the session including an agenda.*
- *Specific areas of the Offeror's proposal that the Evaluation Committee may **request** to be addressed as part of the submission of best and final offers. For example, the Evaluation Committee may request that the Offeror readdress important aspects of the proposal such as the implementation schedule, level of support, type or amount of resources proposed, or contract terms and conditions.*
- *Specific areas of the Offeror's proposal that the Evaluation Committee may **require** to be addressed as part of the submission of best and final offers. For example, unacceptable terms and conditions may have to be amended or withdrawn as part of a best and final offer. Confidential or proprietary designations on non-proprietary portions of an Offeror's proposal must be removed. Unacceptable licensing or other restrictions on the use of the product must be eliminated through a best and final offer amendment.*
- *The due date and time for submission of best and final offers.*
- *The final paragraph shall emphasize the fact that the best and final offer is an opportunity for the Offeror to improve the proposal by submitting revised proposed costs as well as other amendments.*

Accept Best and Final Offeror

Date

The Procurement Manager will accept best and final Offeror and prepare them for the Evaluation Committee.

Presentation and Demonstrations

Date

The finalist Offerors shall present their proposal and demonstrate [Tools/ Techniques/ Proposed Systems, if appropriate] to the Evaluation Committee. The sessions will be conducted in accordance with the Presentation and Demonstration Agenda. The individual presentations and demonstrations shall be scored at the conclusion of each presentation and demonstration. Additional presentation and demonstration sessions may be scheduled depending upon the number of finalists selected.

Finalize Scores

Date

The Evaluation Committee shall score all best and final Offerors, finalize all scores and recommendations concerning the selection of the best value proposal.

Selection of Contractor

Date

The Procurement Manager shall present the Evaluation Report to the Executive Sponsor and Chief Procurement Officer for the selection of the Apparent Successful Offeror who shall be notified of the apparent selection by the Procurement Manager. The Procurement Manager shall schedule contract finalization at this time.

Finalize Contract

Date

The contract will be finalized with the apparent successful Offeror.

To Chief Procurement Officer

Date

After review and approval by the Chief Information Manager, if appropriate, the Award Recommendation Letter, Evaluation Report and approved contracts shall be delivered to the State Purchasing Agent of award.

Award

Date

The contract shall be awarded by the Chief Procurement Officer.

Award Notification Letters

Date

The Procurement Manager will prepare and distribute the award notification letters to all Offerors triggering the protest period.

Protest Period Expires

Date

An Actual Evaluation: Step by Step

This is a narrative of an actual evaluation process for proposals received in response to an RFP for software, training, implementation assistance and on-going support. The process consisted of twelve steps. In the remainder of this section, each of these steps is described.

1. BRIEF THE EVALUATION COMMITTEE

The first meeting of the evaluation committee dealt with the process and not with specific proposals.

To begin, the Procurement Officer (P.O.) provided each Evaluator with three documents:

- Non-Disclosure Agreement
- Conflict of Interest Declaration
- Evaluators Guide

The P.O. then proceeded to discuss each in turn.

Non-Disclosure Agreement

The P.O. explained that the Non-Disclosure Agreement is intended to keep all of the deliberations and documents confidential. Evaluators can only discuss this project with people who have signed a similar form. That means that an Evaluator cannot discuss the project with his or her boss or the Executive Director without verifying that each has signed this form. The signing of this form added another level of formality to the process and supported the independence of the evaluators

from influence by executives within their organization. It also reminded the executives that all deliberations are confidential.

So, if someone outside the Evaluation Committee asks a member about this Project, he or she can only discuss this project when they know this person has signed the agreement. Often these projects are strategic and expensive. Senior management has a legitimate need to be informed about progress. However, these discussions should be arranged through the Project Manager or Procurement Officer. This will shield the individual Evaluators from pressure from their executives. One-on-one meetings between individual Evaluators and their bosses should be avoided for two reasons. First, it may place undue and inappropriate pressure on the Evaluator. And, secondly, it has the appearance of an Executive attempting to influence the results by intimidating an employee.

On one project, the entire Executive Committee signed the form so that they could be briefed by the Project Manager on a regular basis.

Once a Project Manager, an engineer with an Agency, questioned why he and the others had to sign this form. The P.O. stated that his Agency's policy concerning confidentiality was weak and if he, the engineer, did disclose information without signing this form then the P.O. would have little recourse. The P.O. explained that Legal had informed him that when the engineer signed the form, the confidentiality agreement became part of the engineer's job description and the P.O. could then get him fired or at least reprimanded for disclosing information.

The P.O. discussed the need to ensure that the proposals and their working papers were safeguarded. Usually, for high-value, high-risk, strategic projects, the Evaluation Committee meets in a secure room reserved for their use only. The room is locked unless occupied by one or more Evaluators.

Evaluators were told that they can take the proposals and their working papers with them but they must secure them in a keyed on-site filing cabinet. Evaluators were discouraged from taking the documents off-site. However, given the demands on people's time, it is reasonable to take these documents home to review. In this case, the Evaluators were instructed that documents are not to be left unattended in a car but must be carried with them (just like a two-year old child).

In fifteen years, I have only experienced one breach of confidentiality. An Evaluator, contrary to instructions, left a proposal in her car. The car was stolen

and when it was recovered, the proposal was missing. This caused great embarrassment for the Agency when it informed the vendor that its proposal containing proprietary information had been stolen.

The existence of this form helps reassure vendors that the confidential information they provided in their proposals will be safeguarded by the Evaluation Team.

Conflict of Interest Declaration

This declaration is a way of demonstrating that each Evaluator has no pre-existing incentive to favor one vendor. Each person was asked to declare any reason that they believe would represent a conflict of interest. Had they worked with or for any of these vendors in the past? Were any of their close relatives employees or major shareholders in any of the vendor firms? Each person was informed that they should re-visit this issue once the names of the vendors requesting RFPs were known.

Over the last fifteen years, I've had very few Evaluators declare a conflict of interest. In one case, the nominated Evaluator had worked for another agency. In her capacity as Procurement Agent, she had been involved in a dispute with this vendor. Consequently, she declined to become an evaluator and nominated another person from her department.

Evaluators Guide

The Evaluators Guide is not commonly used. Most Agencies provide the Evaluators with scoring sheets and copies of the RFP. The Evaluators Guide goes much further in providing direction to each Evaluator.

The P.O. met with the Evaluators and reviewed the Guide on a page-by-page basis. He summarized the content and reviewed the process described in the Guide. This Guide provides lots of 'how to' information and promotes discussion of important issues related to the evaluation which will follow shortly. He also provided a copy to every person who signed the Confidentiality Agreement since the Guide reinforces the importance of confidentiality and helps to ensure that the RFP process is not compromised.

The Guide describes the details of the evaluation process and the mechanics of evaluation. More importantly, it puts all of the needed information in one place.

The Evaluators cannot receive proposals until they have been briefed on the Evaluation Process and have received a copy of the Evaluation Guide.

2. VALIDATE THAT EACH PROPOSAL IS COMPLIANT

As each proposal is received, it was date-stamped (using an official clock) and noted in a log. Late proposals are immediately brought to the attention of the Procurement Officer. In this case, no proposals were received after the closing deadline. In almost all jurisdictions, late proposals are considered non-compliant and not evaluated. Vendors object vehemently to having their proposals disqualified for the sake of five or ten minutes or an hour. But those are the rules and only rarely is a late proposal declared 'on time'. This might be the result of a snow storm that cancelled mail services, or failure to clearly identify the location of the receiving office. In some jurisdictions, the Procurement Director has the authority to accept a late proposal; in others, the regulations, policy or statute requires that late proposals be disqualified from the competition.

Following the closing of the competition, the Procurement Officer retrieved all of the proposals and opened each package. In some organizations, this is done by two people so that the opening is witnessed and both people can then attest as to the contents of each package.

Sometimes, the package turns out to be a letter declining to submit a proposal. Sometimes, the package can be a marketing document that may resemble a proposal but omits major components; sometimes, it is an alternative proposal. Each of these documents should be treated as a proposal until the Procurement Officer declares it non-compliant and prepares a determination for the Project File. These types of non-compliant proposals are not submitted to the Evaluation Committee.

Determination that a proposal satisfies the mandatory requirements should be an easy task. The best practice is that the mandatory requirements are precisely stated, that they are few in number, easy to establish and that they are essential – so that failure to comply warrants rejecting the proposal. Mandatory requirements are more than simply very important or highly desirable features – they must be critical to the acceptance of the proposal.

There are three different ways in which a proposal can fail to comply with mandatory requirements:

- The proposal fails to satisfy some administrative requirement in the process; for example, the proposal was received late or sent to the wrong address by the courier. This is the big one. The vendor simply failed to take a required action. In most jurisdictions, this failure cannot be waived by the Agency.
- The proposal fails to include a mandatory form; for example, a performance bond is missing or the transmittal letter lacks the vendor's signature. The lack of a performance bond would be grounds for disqualification in almost all Agencies. However, the lack of a signature may be a 'fixable' problem. Some Agencies permit vendors to correct minor omissions in their submission if in doing so, the vendor does not receive any advantage and the other proponents are not harmed. So, getting a vendor's signature on a form may be acceptable; whereas, permitting the vendor to submit missing cost information may be not (since the vendor would have had more time than the others to prepare its costing proposal).
- The proposal fails to satisfy one or more of the stated mandatory requirements; for example, the system was required to have an existing interface to Oracle. There are many requirements that are mandatory but cannot be evaluated or even identified until the proposal has been reviewed by the Evaluation Committee. The same logic applies to missing or incomplete data provided to satisfy a mandatory requirement. In these cases, the deficiency is identified by the Evaluators and documented by the Procurement Officer.

The actual determination that a proposal has failed to satisfy one or more mandatory requirements is made by the Procurement Officer, often in conjunction with the Evaluators. This determination is written down and becomes part of the Project File.

Expect to have your ruling challenged:

- By a vendor whose proposal has been declared 'non-compliant' and eliminated from the competition. Vendors often spend tens of thousands of dollars developing a proposal and are rightly concerned when that proposal is eliminated on what the vendor may see as a minor

technicality. An IT proposal can easily cost the vendor more than one hundred thousand dollars when you take into account staff time, and travel costs. They will challenge your determination, your definitions, and the reasonableness of the requirement;

- By one of the losing vendors, if the winner's proposal failed to satisfy one or more mandatory requirements yet was not eliminated from the competition. In some jurisdictions you cannot award a contract to a vendor who submitted a proposal that failed to satisfy one or more mandatory requirements.

When mandatory requirements are stated imprecisely, they can be successfully challenged. Often, when a group of Evaluators discovers that one particular Mandatory Requirement is vague, the Evaluation Team ends up declaring all of the proposals compliant. This seems fair. However, you cannot do this too many times without raising questions about the integrity of the overall evaluation process and the professionalism and competence, not of the Project Manager, but of the Procurement Department.

In this case, all of the proposals received were compliant.

3. MAIN EVALUATION (NOT COST)

Morning of Day 1

Over the course of the morning, the first proposal was reviewed and independently scored by each Evaluator.

The Evaluation Committee met to get down to work. A sign-in sheet was completed by each person present to record their attendance at this meeting. (This is repeated for all meetings of the Evaluation Committee.) The Procurement Officer confirmed that everyone had signed the required forms. The Project Manager reviewed the process to be followed. Each person would be given a proposal to read that morning. The costing sections had been removed from all the proposals except those provided to the Project Manager and the Financial Analyst.

The P.O. explained that in the afternoon, the Committee will meet as a group, discuss the first proposal, identify required clarifications and do a preliminary scoring.

The Procurement Officer then stated that five proposals have been received. One of them was simply an elaborate 'no bid' and did not contain all of the required material. Consequently, it was declared non-compliant and eliminated from the competition by the Procurement Officer who then prepared a 'finding' for the Project File identifying the reasons this proposal was non-compliant.

The Procurement Officer then indicated the names of the vendors submitting the other proposals. He wrote each name on a slip of paper, placed it in a hat and then had the Project Manager withdraw the names one at a time. The proposals would then be evaluated in the sequence established by the draw.

The Procurement Officer then distributed copies of the first proposal to each member of the Evaluation Team.

The Finance person attended these sessions since many of the discussions have financial implications. In so doing, she can ensure that the financial analysis mirrors the proposed solution and that her analysis is based on a correct understanding of the proposal.

For the balance of the morning, the Evaluators reviewed the first proposal. Occasionally, they discussed an issue or posed a question for the others but generally, the session was dedicated to solitary activity - reading and understanding the proposal. The Evaluators were instructed to complete the scoring sheets in sequence by writing a comment or question or inserting a preliminary score.

The Evaluation Guide

The Evaluation Guide contained a list of the Evaluation Factors and sub-factors in a table. For example Project Plan was a major factor. One of its twenty sub-factors was:

Describe the process for problem management including: problem logging, problem resolution, tracking of unresolved problems, problem escalation procedures, and problem closeout and reporting practices.

Another one of the major factors was Functionality. There were more than two hundred subfactors for this one. Each feature was included in a table which indicated the class of the feature as Mandatory, Highly Desirable or Desirable and provided a space for the vendor's response and explanation.

The response form, Exhibit A, is presented below.

EXHIBIT A

TECHNICAL SPECIFICATIONS REPOSE FORM

VENDOR NAME: _____

Response Codes—Place the appropriate letter designation in the “Availability” column according to the following codes and their description. For each requirement or function identified in Exhibit A, vendor must indicate how the capability is provided in the BPM product using the following codes as specified in Section VI “Proposal Content” subsection 3.2:

- A. “NOW” Feature or capability is ‘out of the box’ now: currently available with the base system as proposed.
- B. “NOW BUT NOT YET RELEASED” Feature or capability is ‘out of the box’ later: will be available with the standard system in a future release. Specify the release number and release date as published.
- C. “CUSTOMIZATION AT NO CHARGE” Feature or capability is not part of the base system but available at no charge through customization (scripting, external coding needed, no product code changes). Specify the implementation date.
- D. “CUSTOMIZATION AT AN ADDITIONAL COST” Feature or capability is not part of the base system but available at an additional cost through customization (scripting, external coding needed, no product code changes). Specify the implementation date and estimated cost.
- E. “PA” PARTIALLY AVAILABLE. Provide an explanation.
- F. “N/A” NOT AVAILABLE.

If the function is provided through scripting or external code (no product code change required), vendor must provide the time and cost required to implement this through its professional service customization effort (man-hours, hourly rate, and total cost for each customization effort).

If “PA (partial availability)” is indicated, describe what is available and what is lacking in functionality.

Customization is providing the functionality via external code or scripting without changing the product code. The customization code should be supported and maintained by the vendor until the functionality is provided in a general-released version of the BPM product.

Please provide detail description of the functionality provided in your proposal and use additional space if necessary.

The costs for customization shall be detailed on an attached sheet of paper by item and cost for each base system modification.

Reference—Write the location (Binder/Section/Page Number) of the discussion of the specification in the offeror’s proposal. Technical materials may be submitted as part of the proposal.

The RFP contained tables identifying the required functionality. Here is an extract from the actual RFP:

BPM product functionality requirements

1. Process Design

A. Mandatory requirements

Item No.	Requirement Description	Availability	Comments
1	Shall have the usability features in your process modeler, such as the ‘drag and drop’ feature, that facilitate the designing of the business process workflow. Please describe.		
2	Shall support parallel (branching), conditional and loop process patterns in workflow. Please describe.		
3	Ability to identify and report infinite loops and redundant steps in workflow. Please describe.		

The Evaluation Guide also contained a Scoring Guide to help the Evaluators establish their scores in a consistent manner. Gone are the days when a ‘10’ was given for ‘excellent’ and a ‘5’ for ‘mediocre’ and everyone had their own definition of ‘excellent’ and ‘mediocre’. The best practice these days calls for a much more precise, legalistic definition of the rules for scoring. For example:

Exceptional (90 to 100) –

- *The approach will yield a result that exceeds the Objectives qualitatively.*
 - *The proposal offers an approach or features with little or no risk.*
 - *The response covers areas not originally addressed within the RFP category and includes additional information and recommendations that would prove both valuable and beneficial to the Assessor’s Office.*
 - *This response is considered an excellent approach demonstrating the Supplier’s authoritative knowledge and understanding of the project.*
-

Now, if two evaluators differ on their scores, one giving a subfactor a '5' and another giving the same subfactor an '8', they can examine the definitions and discuss the ability of the information provided for that subfactor to satisfy the definition. In this way, major differences among Evaluators can be eliminated.

During the course of the evaluation for the first vendor's proposal, the Evaluators developed some rules for dealing with other details not covered in the Evaluation Guide. For example, consider how you rank features not currently available in the released product. Here are the rules that the Evaluation Committee developed and applied to all proposals:

1. *If the proposal states that a feature will be released within 90 days, the subfactor will receive 50% of the points available. If this feature is 'mandatory', we will consider it as satisfied.*
2. *If the proposal states that a feature will be implemented through customization work (at no charge or with additional cost), then the subfactor will receive 50% of the available points. If this feature is 'mandatory', we will consider it as satisfied.*
3. *If the proposal states that this feature is partially available, depending on the scope of coverage, we will give partial point proportional to the coverage.*

By the end of the morning, each Evaluator had completed a scoring sheet that contained a score for each subfactor or one or more questions concerning that subfactor. These scoring sheets were completed without consulting other Evaluators.

Afternoon of Day 1

Over the course of the afternoon, the Evaluators collectively assessed the first proposal and identified issues requiring clarification from the vendor.

The Evaluation Committee met again. Two people captured information during the meeting. One of the Evaluators had loaded the Scoring Sheets onto his laptop computer as an Excel spreadsheet. This permitted the preliminary scores to be recorded for each Evaluator as the evaluation proceeded. For those sub-factors that required clarification, the clarification questions were to be recorded by another Evaluator on her laptop.

There were ten people present:

- Five 'content experts', representatives of user departments
- Two people from IT, software experts
- Project Manager
- Procurement Officer
- Financial analyst

The five 'content experts' and the Project Manager were responsible for scoring the proposals using all of the evaluation factors identified in the RFP except cost. Scoring was to be done on a consensus basis. In some jurisdictions, each person scores independently and the scores are then averaged. With consensus scoring, evaluators discuss differences in their views and attempt to come to a consensus score for each subfactor.

The two people from IT were experts in software and extremely knowledgeable about the Agency's technology, software and systems. They were responsible for (i) scoring the technical factors and (ii) providing the other evaluators with their input when there was a technical issue associated with a sub-factor. They did not comment on a sub-factor or an issue unless there were IT elements involved in understanding that issue.

The Financial Analyst did not score any factors. She was there to ensure that the financial proposal was 'in step' with the proposed solution and that all five year costs had been identified. She, in consultation with the Project Manager, prepared the five-year cost analysis for each proposal.

The Project Manager was an Evaluator and participated fully in the scoring. In addition, he chaired the meeting. In this role, he sought consensus from the other Evaluators. He would invite comments on every issue and promote discussions focused on the reasons for differing opinions. He would not offer his own view but rather seek reconciliation of differing views. An effective chair can make this difficult task, that of getting consensus, seemingly easy.

The Procurement Officer did not participate in the scoring. His role was to ensure that the evaluation was done fairly and that all vendors were treated equally; more specifically, his role was to (i) provide guidance on completing each task in the evaluation to ensure that it was fair to all vendors (ii) to document critical events such as the disqualification of a proposal for non-compliance and (iii) to assist the

team in developing its list of clarification questions. His comments were generally restricted to issues of law, policy, fairness and the evaluation process. His major contribution was to ensure that each vendor was treated in a consistent manner and that the evaluation process did not evolve so that the last proposal evaluated was treated differently than the first. (In fact, this often occurs. During the process, the evaluators discuss various factors and learn more about features. Based on this, they may change the evaluation process from vendor to vendor, as the process proceeds. It is the role of the Procurement Officer to point this out and to force the Evaluators to re-visit their earlier evaluations and apply the same rules to the first proposal as they applied to the last one. For example, in reviewing the first proposal, the Evaluators may have declared that a certain level of explanation for one particular feature warranted a '6'. In subsequent evaluations, they may have concluded that the same level of explanation only warranted a '4'. Once this has been determined, they have to revisit the earlier proposals and re-score to establish a consistent approach.)

Scoring Sub-Factor by Sub-Factor

The scoring began with the first factor, sub factor #1. The Chair polled each of the Evaluators in order (as they were seated around the table) and asked them to either declare a score or to comment or question this sub-factor and the proposal. Questions and discussions followed.

If the sub-factor involved a technical issue, then IT would offer its view. If the sub-factor dealt with training, for example, and there was a training expert in the room, then that person would be heard. Similarly, if the sub-factor related to a project management issue and the PM was the expert, then the Evaluation Committee would defer to the PM.

Once the discussion had concluded, and this could take up to 15 or 20 minutes for some sub-factors, the Chair proposed that either the group score the sub-factor or that a clarification was required.

If the sub-factor was scored and all the scores were similar, then the recorded score would be the average. The Evaluators decided that if the difference between the highest and lowest scores was more than 4, then they would have a discussion lead by the people who proposed the two extreme scores. The discussion resulted in either a consensus score or a clarification question.

If the group was unable to reach consensus, the PM after hearing all the viewpoints and the scores, declares what he thinks is the consensus and seeks agreement.

Clarifications

When a clarification is required, the group discusses the exact wording of the clarification question to be sent to the vendor and records it. The Evaluators decided that any sub-factors with a clarification would receive a score of zero as the placeholder.

This ensured that proposals with a lot of ambiguities, lots of clarifications, would receive lower scores than proposals that provided the required information.

If the proposal required a significant number of clarifications, then the Evaluators decided that they would consider declaring the proposal non-responsive; however, this would not be done until all of the proposals had been evaluated.

End of Day

At end of day, having reviewed the first proposal in depth, the Evaluation Team had developed the following:

- a list of draft clarification questions to be sent to the proponent;
- preliminary scoring of the proposal;
- an overall opinion about the proposal and whether it should be considered non-responsive
- a list of issues that the Procurement Officer should consider to ensure compliance and 'due diligence'.

Following the established procedure, no clarification emails would be sent to the vendors until all the evaluations had been completed. This is a sensible step since some issues may emerge in reviewing proposals that you want each of the proponents to discuss or clarify.

4. SUBMITTING CLARIFICATIONS TO THE VENDORS

By the end of the week, the Evaluation Committee had analyzed, discussed and scored each proposal as directed by the Evaluators Guide. During the discussions, the Evaluation Committee identified specific issues requiring clarification and a provisional score for each factor and sub-factor.

Some proposals may require only one or two clarifications; others, dozens. For a proposal that has a large number of clarifications, the Evaluation Committee may want to consider declaring it non-responsive and eliminate it from further consideration. This should only be done if the proposal is truly incapable of providing an acceptable solution. If this is the case, the Procurement Officer should document the reasons in a memo to be included in the Project File.

Often, Evaluators do not eliminate any proposals from the competition until clarifications have been received and the proposals scored. It is easier to justify the elimination of a proposal based on a low score than for requiring a large number of clarifications.

Clarification emails were not sent out until all of the clarifications for all vendors had been identified. Some common issues may emerge during the evaluation or the Evaluators may identify an issue in one proposal that they want each vendor to clarify.

The Clarification emails were prepared by the Project Manager, reviewed by the Procurement Officer and the Evaluators and emailed to the respective vendors. Each vendor was given a few days, not more than a week, to respond to the questions via email. This is not an opportunity for the proponents to submit new material; only to clarify specific issues identified by the Evaluators.

5. RESCORING EACH PROPOSAL AND DETERMINING THE SHORT-LIST

The clarifications were sent by each vendor via email to the Procurement Officer who distributed them to the Evaluators. A few days later, meetings were scheduled to discuss the clarifications and re-score each proposal.

The Evaluators proceeded in the same order as before, discussing each clarification and, as a group, re-scoring the subfactors. A total for each proposal was recalculated.

Based on the preliminary scores, the Evaluation Committee may decide to eliminate one or more proposals. Typically, at this stage, only those proposals which the Committee believes cannot provide an acceptable solution are eliminated. For example, if there are five proposals with total scores of 750, 680,

660, 640 and 500, the proposal scoring 500 would be eliminated. The others would proceed to the Proof of Concept step.

At this stage in the process, the Evaluation Committee may eliminate from further consideration any proposal scoring less than 70% of the available points for any evaluation criterion or any proposal which it considers deficient and, therefore, non-responsive. (This term was specified in the RFP.)

In this particular evaluation process, cost was not considered until after the Proof of Concept step. (Other evaluation processes introduce cost earlier.)

6. COMPLETING THE PROOF OF CONCEPT

We now invited the short-listed vendors to a) present their proposals; b) demonstrate the use of their software by presenting them with a representative scenario, work flow, and sample data. They were to show us how this information would be input and handled by their system.

Demonstrations totally controlled by the Vendor are always perfect. The Vendors avoid problem areas and ensure that they show the Agency excellent results. This is not the case with a proof of concept exercise since the Vendors must demonstrate their software in real time.

The Project Manager, working with IT and the Evaluators, constructed a procedure for exercising the software. This procedure required the vendor to load its software on a test bed at the Agency and then load agency data. Once this was done, the Vendor was instructed to demonstrate its software. More importantly, the Evaluators would then provide the Vendor with a test scenario, a real process that they wanted the Vendor to model. In doing this, the Evaluators gained an appreciation of the functionality of the software, its ease of use, the amount of training required and the skills of the Vendor's staff.

The set-up of the software at the Agency may require a day. The actual test may require two or three days and the presence of the entire Evaluation Committee. It will also require the full cooperation of IT to provide a test environment.

The Proof of Concept can demonstrate the effort required to learn how to use this software, the ability of the software to complete certain tasks, and the skills of the Vendor's staff. (You should assume that the vendor has provided its 'A' team and

that the skills of the support staff provided by the vendor will be, at most, equal to this team.)

This exercise sometimes causes Evaluators to question the responses provided in the proposals. Vendors' claims of 'ease of use', 'excellent support staff', 'close fit with your stated requirements' often prove to be difficult to demonstrate. Some information describing software's characteristics that was provided in the proposals proves to be illusory, free 'vaporware'!¹⁴

In this case, the Proof of Concept exercise demonstrated the strengths and weaknesses of each vendor's software. In addition, one of the vendor's was unable to solve several technical issues that arose during the test, even with the senior support person in attendance.

7. RESCORING THE PROPOSALS

Often, the proof of concept exercise changes the Evaluators' assessment of critical factors such as functionality and ease of use.

Having observed and exercised the software, the Evaluators now have the opportunity to modify their scores – scores that were based on the proposals not on any observations of the actual software in use.

Often, at this stage, the Evaluators do not revert to assessing each evaluation criterion at the sub-factor level, rather they compare and contrast the scores. Typically, they would put up a chart on a white board. The chart would list the evaluation factors in the first column and each of the vendors in other columns. The columns would contain the vendors' scores for each factor, prior to the Proof of Concept. They would then discuss each vendor's performance at the Proof of Concept and how it demonstrated or failed to demonstrate the features and capabilities in its proposal. Often, the vendor's staff fail to demonstrate how specific functions or capabilities could be utilized with the Agency's data. Sometimes, they fail to show that they are experts and could assist the agency in implementing the application.

The process is quite simple. The Evaluators re-score each of the vendors in each of the major criteria. Cost is then added in and the results are totaled.

8. COSTING

Before the Evaluation

Costing is difficult and complex, especially when it involves enterprise software, licenses, implementation assistance and, possibly, custom programming.

First, there is the issue of the real budget. How much is the organization prepared to spend? And how much will the executives tell you about their budget? Often, executives indicate that the overall budget is \$X. But they won't commit to it. During the process, the Project Manager or Sponsor has discussions with the executive committee about the real cost of the project. What if it costs \$5 million during the first year? What if it cost \$2 million per year to sustain? You cannot shop for complex software without executive support and without a budget. It simply can't be done. You end up begging for funds or pleading for more staff when it is not your problem. It's those pesky executives who want you to implement this strategic piece of software but don't want to commit to the budget.

Often, during the evaluation process, it comes down to a discussion of dollars versus value. What if the winner gets 750 points and costs \$2 million but the second place vendor has 400 points and only costs \$1.5 million. What do you do? The time to determine how cost is integrated into the evaluation process is before the scoring. You need to know that, for example, the budget is \$5 million for the first 4 years rather than the budget is \$3 million and the senior executives will settle for a second best solution so long as it can do a basic job and is cheaper.

So, there are lots of discussions between the financial person, the Project Manager and the Executive Committee to determine the weight and the significance of cost before the RFP is finalized.

The cost that is usually discussed is not the initial cost but rather, the five-year total cost of ownership. Cost will include additional modules that may be acquired during the course of implementation. This cost includes all of the identified costs; not simply those payable to the vendor. So if you IT group is creating some of the interface programs, these costs (which may be different for different vendors) are included in the total five year cost. And it is quite reasonable that vendor's costs for similar items may differ substantially. For example, some software is much easier to learn than others. So it is reasonable that training costs for some software could be tens of thousands of dollars less than for other software.

Based on the earlier discussions with the executive committee, the basis for determining cost was established and incorporated into the Evaluation Guide. Discussion of how cost would be handled was completed prior to receiving the proposals.

Evaluating Cost

The financial person is required to ensure that the cost analysis is in step with the proposal, as it is understood by the Evaluation Team. So, the financial person sat in on all the meetings. Some systems may require different approaches and, consequently, different costs. For example, vendors can differ radically on how they price the licenses for their software. Some charge based on users; others, on size of the network or network software. Some vendors only provide live, on-site training; others have web based training. Different systems will require varying amounts of support.

The finance person had to determine the anticipated life cycle cost of each proposal. Once this was done, it was translated in points, using the approach described in the Evaluation Guide.

9. COMBINING THE SCORES

Once the evaluation committee had rescored the proposals (Item 7 above), the cost scores were added as a row in the table; the columns were totaled and the winner or leaders were identified.

10. BEST AND FINAL OFFERS

Many RFPs indicate that the organization 'may' invite vendors to submit best and final offers. So it is an option of the Agency arrived at, typically, in discussions among the Project Manager, Financial Person and Procurement Officer.

If the evaluation process incorporates the use of Best and Final Offers (BAFO), the Evaluation Committee may conduct confidential discussions with each Proposer. At that time, they will identify the deficiencies, shortcomings and concerns associated with each proposal. They will ensure that the Proposer understands their concerns. Proposers will then be given the opportunity to submit a revised proposal. Proposers can elect not to submit a revised proposal. In this case, its original proposal will be considered.

Some agencies do not meet with each Vendor to identify the shortcomings but rather send the vendor a letter. Other Agencies meet with each Vendor and negotiate and resolve these weaknesses, concerns or outstanding issues. They then invite the vendor to modify its proposal so that it reflects the revised understanding of both parties.

11. FINALIZING THE SCORES

Upon receipt of the revised proposals, the scoring is reviewed and revised to reflect the new information. Scores are totaled and the winner is declared. In most organizations, at this point the Project Manager and Procurement Officer seek formal permission to enter into contract negotiations with the apparent winner. Other organizations, using a different process, obtain signed contracts from the short-listed vendors as part of BAFO.

12. FINALIZING THE CONTRACT

An entire book could be written about different strategies for finalizing a contract as part of an RFP process. The approach described below has each of the short-listed vendors submit the finalized contract with its BAFO. In this way, the Agency has signed contracts from each of the short-listed vendors prior to making the award. There are other strategies.

The Draft contract is included in the RFP. The RFP contained a complete draft contract prepared by the Procurement Officer in consultation with the Project Manager and Legal. In fact, the contract was a combination of the terms and conditions from a recent RFP, an RFP template purchased from a private sector company dealing specifically with BPM Software, and the model contract contained in an RFP found on the web.

The draft contract in the RFP dealt with all the elements of this project: software licensing, maintenance, training, implementation assistance and on-going support.

Each vendor's proposal contained its analysis of the contract. The Agency had adopted the approach of publishing a complete contract in the RFP and asking each Vendor to identify those clauses or terms that it found unacceptable. The vendor was then asked to provide an alternative for each term or clause that it found unacceptable. (There are other approaches to contracting but starting with a draft contract in the RFP is an emerging best practice.)

The contracts proposed by the short-listed vendors were analyzed. The Agency did not analyze the Vendors' responses to the Draft Contract until Step 5 (Short-List) had been completed. Once it had, the Procurement Officer reviewed the responses to the draft contract of each of the short-listed vendors.

The Procurement Officer analyzed each response separately. He identified those clauses that the vendor stated presented difficulties, were unacceptable, or required clarification. Many of the difficulties hinged on a few definitions which the procurement officer expected could be easily resolved. Several of the problems were based on the vendor's claims to proprietary rights in its products and its unwillingness to limit these rights. The Procurement Officer knew that this clause would not be acceptable to the Vendor in any circumstance and would be changed by the Agency to comply with the Vendor's standard software license. Several of the problems arose because the Agency and the Vendor did not agree on roles or responsibilities or financial liability issues. These clauses would be negotiated.

Ongoing discussions were held with short-listed vendors. While the Project Team was completing the Proof of Concept, the Procurement Officer and Legal held discussions with each of the short-listed vendors to identify and resolve issues. The goal was to have an agreed-upon contract from each of the short-listed vendors submitted as part of the vendor's Best and Final Offer before the evaluation had been completed.

Vendors submit signed contracts as part of BAFO before the award is announced. While dealing with two or three Vendors concurrently is a lot of work, you do have the Vendor's attention! Each knows that they are on the short-list and they really do not want the contract to become a stumbling block. If all goes well, by the time the Evaluation Team has finished its work, you will have, for example, three signed contracts or three letters of understanding. These modified terms can be included with the Vendors Best and Final Offers so that the entire deal is in each proposal.

Sometimes, rarely, there will be a deal breaker – a clause or term that one of the parties refuses to accept and cannot find an alternative. In this case, the Agency would ask the Vendor to change the clause as part of BAFO. Refusal by the Vendor would make its proposal unacceptable.

Other approaches to finalizing the contract permit the vendor to continue the negotiation and potentially renegotiate important contractual provisions after the award.

RFPs are a complex and difficult process. We are essentially looking for a partner that has great product and skills; a partner that we can trust. But the process is adversarial. Contract negotiations, even when we eliminate the deal breakers, are adversarial. It takes a committed, experienced vendor and an informed Agency to develop a successful relationship based on selection and installation of complex software using an RFP process.

An Ending Comment

This Chapter has discussed the evaluation process from a number of different perspectives: why it is needed; different ways of evaluating a group of proposals; the structure of an evaluation committee. It has also provided some examples of evaluation procedures and defined six documents which can promote excellence.

The next chapter provides a more detailed examination of each major component of an evaluation. It examines the problems, pitfalls and best practices for each of the building blocks.

End Notes

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1. Montana has provided direction in a series of documents each dealing with a different element of the RFP process. The roadmap described above is "RFP Flowchart". All of the documents can be found at:
<http://gsd.mt.gov/ProcurementServices/rfpprocess.mcp>
 2. Reference 56.
 3. Chapter 5, Page 22, Reference 76.
 4. Reference 47.
 5. Reference 97. City of Miami, Bid Protest, 1 pg,
<http://www.ci.miami.fl.us/Procurement/docs/BidProtest.pdf>
 6. Reference 98. Nebraska Administrative Services, Materiel Div., State Purchasing Bureau, Standard Protest/Grievance Procedures for Vendors, 1 pg,
http://das.nebraska.gov/materiel/purchase_bureau/docs/vendors/protest/ProtestGrievanceProcedureForVendors.pdf

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7. Reference 99. City of Orlando, Sec. 7.14 -Appeal of Chief Procurement Officer of Procurement and Contracts Decision,
<http://www.cityoforlando.net/procurement/wp-content/uploads/sites/15/2014/03/AppealofCPO.pdf>
 8. Reference 100. State of Alaska, Non-Conflict of Interest Form, 1 page,
<http://doa.alaska.gov/dgs/pdf/non-conflict.pdf>
 9. Reference 27.
 10. Reference 101. State of Alaska, RFP Evaluators Guide, 2011, 11 pages,
<http://doa.alaska.gov/dgs/pdf/pecmemo.pdf>
 11. Reference 95.
 12. Michael Asner Consulting, The RFP Report, Issue 42, August 2003, pgs 11-14, 16 pgs. This publication is no longer available on the web.
 13. Davenport, Terry, RFP Template, Evaluation Guide, 2013, 25 pgs,
<http://www.rfpmentor.com/sites/default/files/A%20Great%20Evaluation%20Guide%20Template.doc>
 14. **Vaporware** is a software or hardware product which is announced by a developer well in advance of release, but which then fails to emerge, either with or without a protracted development cycle. The term implies unwarranted optimism, or sometimes even deception; that is, it may imply that the *announcer* knows that product development is in too early a stage to support responsible statements about its completion date, feature set, or even feasibility.

Chapter Eleven

THE BUILDING BLOCKS OF THE EVALUATION PROCESS

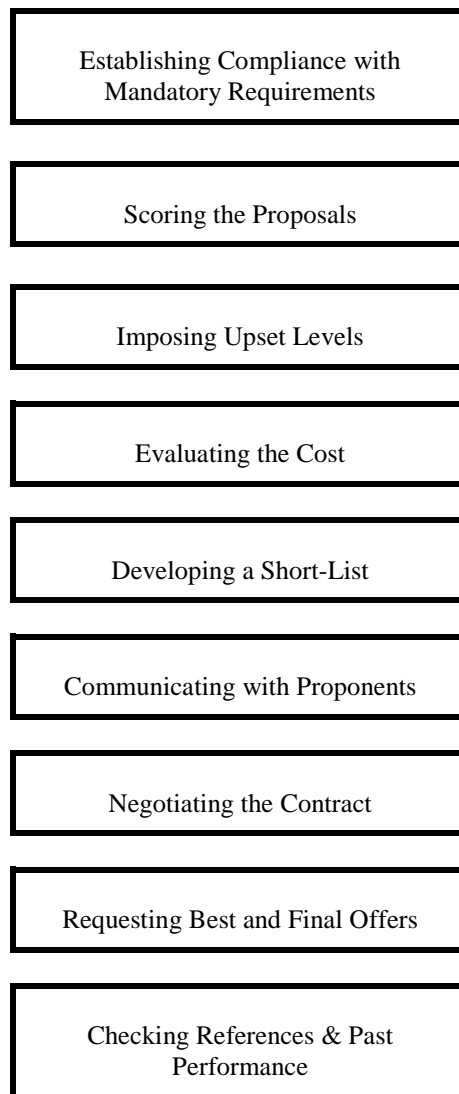
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Chapter Eleven

THE BUILDING BLOCKS OF THE EVALUATION PROCESS

In this chapter, we examine the details of the evaluation process. In reviewing a large number of RFPs, we identified nine different components of the process, such as reviewing a proposal for compliance with mandatory requirements, or interviewing the suppliers. We refer to each of these components as a building block:



Many different evaluation processes, in fact most of them, can be constructed by combining some or all of these building blocks in different sequences. Some procedures use only three or four of these. More complex examples can use all nine and repeat some of them two or three times. For example, one evaluation process commonly used is based on a three-step short-listing process. After each major type of analysis, the list of suppliers still being considered is reduced. This is repeated three times; once, for each type of analysis.

Different processes formed by using different building blocks and different evaluation criteria and weights will yield different results. Purchasers should test their evaluation process before using it on real proposals. Some organizations create hypothetical proposals and "walk through" or "game" the evaluation process. These purchasers are investigating the ability of their intended process to yield an acceptable result. They are seeing how small differences in process or weight can influence the results. For example, if "technical merit" receives 10% more weight, will the results change? Is this acceptable? If cost is included as an evaluation criterion, could a company win the competition but be \$200,000 higher than a close competitor? Is this acceptable?

Often organizations discover that the evaluation process will readily identify those firms capable of doing an acceptable job. The process will identify a group of companies that scores high, say in the 70 to 80 per cent range. The process may not, however, be very good at identifying which of the companies in this group is "the best". Often additional thought, more specific criteria, and additional steps have to be included to establish and confirm the winner.

For many proposals, a face-to-face presentation by the proponents can add value to the process. It is very difficult to determine by reading the proposal "the ability of the project manager to communicate effectively with a wide range of users". This attribute is readily determined in a two hour presentation by the project manager. Presentations provide a quality control check on the selection process. They often reveal issues which have been overlooked or under-valued. While a firm cannot go from last place to first place on the basis of a presentation, the presentation can be useful in differentiating the claimed skills of the top three proponents.

Establishing Compliance

Establishing Compliance with Mandatory Requirements

Most organizations establish a set of mandatory requirements in the RFP. These requirements can be administrative, such as "Proposals are due by August 15 and must be received not later than 5:00 p.m. at the specified location." The requirements can also be technical in nature, identifying a critical feature or functional capability. For RFPs with mandatory requirements, the evaluation process is at least a two-step process. First, the evaluators examine each supplier's ability to satisfy the mandatory requirements. Suppliers not able to do this are eliminated from further consideration. Second, the evaluators assign a score to each proposal based on the evaluation criteria (similar to the examples presented earlier).

Typically, evaluators establish compliance before doing the more detailed analysis. During this step, one or more evaluators review each proposal to ensure that all of the mandatory conditions have been met. A mandatory condition is a requirement that must be met without alteration. One example is the submission of the proposal by a specified time. If it is late, it is usually returned to the supplier unopened. Another example is a requirement that the supplier must provide 24-hour emergency service.

Many evaluators are uncomfortable eliminating a supplier from further consideration for failure to satisfy a mandatory condition - especially when the evaluator believes that the requirement is, in fact, only "highly desirable" and not really mandatory. This issue should be discussed by the evaluators prior to releasing the RFP. Mandatory requirements must be precisely defined and must be essential elements in the success of the project. For example, consider the following mandatory requirement: "Suppliers must have a local service office." Now, I presume that the concern of the purchasing organization was prompt service and travel time. As stated, this requirement is poorly defined and could cause a number of problems for the evaluators.

First, the RFP didn't state the type of service required. Was it for equipment repairs, software support, or network support? Second, no service levels were

given. Did they need 8-hour per day support? Or 24 hour support? Third, no mention was made of the level of expertise required locally. Did they require a very expensive, technical expert who might only be found at the supplier's head office or development facility?

It is awkward, risky, and sometimes embarrassing to declare a proposal non-compliant when the mandatory requirement was not stated precisely and could be interpreted several ways. In these cases, evaluators often declare all proposals compliant, examine the actual requirement more closely, and seek clarification from the suppliers. Evaluators often ignore ambiguous mandatory requirements and evaluate each proposal on its merits. (Yes, these actions can compromise the integrity of the evaluation process.)

Some RFPs declare that “proposals not meeting all mandatory requirements will be rejected”; others are less clear and state that “proposals may be rejected”. The use of the word “may” rather than “must” permits the evaluators some latitude. They can waive mandatory conditions which all suppliers failed to meet. They can also waive mandatory conditions which on close examination during the evaluation process have proven to be ambiguous. (These seemingly arbitrary activities may cause a protest from vendors who decided not to submit a proposal.)

In California, I know of one organization that permits the evaluators to give proponents an additional 72 hours to meet mandatory requirements when “. . .(i) the Proposer gains no advantage from the opportunity to correct the deficiency; and (ii) other Proposers suffer no disadvantage.”

When “may” is used, the principle of treating each supplier fairly must prevail. Evaluators should expect complaints and protests from suppliers eliminated for failure to comply with a mandatory condition that was ambiguous, or not an essential part of the solution.

As a result of this process, each proposal is declared to be either compliant or non-complaint. Compliant proposals are evaluated further. Non-compliant proposals are eliminated from the competition after preparing a memo, a determination, for the project file, and for senior management (in anticipation of a protest). Often, discussions are held with legal counsel before eliminating a proposal.

DEFINITIONS ARE IMPORTANT

To ensure that suppliers understand the significance of key words such as “mandatory” many RFPs define the term and indicate that it will be identified by use of the word "must". Here is some information from three different sources.

Nevada

Here are the definitions used by the State of Nevada:¹

Definition of Key Words Used in the RFP

Shall/Must: *Indicates a mandatory requirement. Failure to meet a mandatory requirement may result in the rejection of a proposal as non-responsive.*

Should: *Indicates something that is recommended but not mandatory. If the vendor fails to provide recommended information, the State may, at its sole option, ask the vendor to provide the information or evaluate the proposal without the information.*

May: *Indicates something that is not mandatory but permissible.*

NIGP²

Mandatory Requirements (Conditions): May apply to RFP's and IFB's and are conditions set out in the specifications/statement of work that must be met without alteration. Mandatory requirements should be clearly identified. Not meeting mandatory requirements may be grounds for disqualification.

British Columbia (Canada)³

The discussion which follows reflects the current thinking related to mandatory requirements

Mandatory criteria are requirements that a proposal must meet in order for it to be considered. They are objective, project-related or administrative criteria that, when evaluated, will be answered with a 'yes' or a 'no.' If a mandatory criterion is not met, the proposal will not receive any further consideration.

If mandatory criteria are too restrictive or too difficult to meet, there is a risk that good proposals may be rejected. Therefore, it is important that mandatory criteria be critical to the success of the project and that the number of mandatory requirements be kept to a minimum. All mandatory requirements should be clearly listed in the RFP. The following are examples of mandatory criteria:

•*Proposal must include evidence that at least one member of the project team is a registered Professional Engineer.*

•*The proposed mode of transportation must be able to accommodate at least six adult clients. Proposal must clearly state how many adult clients can be carried in the vehicle at one time.*

•*The proposal must be received at the closing location by the specified closing date and time.*

Examples of mandatory criteria not to use might include the following:

The qualifications of personnel on the proponent's project team must be suitable for the role(s) proposed.

Proponent must be knowledgeable about government policies and practices.

Ministries should also avoid using performance expectations as a mandatory criterion, as they can result in the unexpected rejection of proposals. For example, consider an RFP with the following mandatory criterion: "The Proponent must agree to meet the reporting standards detailed in Appendix D." If a proposal does not specifically assert that it will meet the reporting standards in Appendix D, it will be rejected. It is better to include the performance expectation as a statement, rather than as an evaluation criterion, such as "The successful proponent will meet the reporting standards as detailed in Appendix D."

Ministries should also take particular care with the word must. As this is a defined term, it should be used only when describing a mandatory requirement that must be met in order for the proposal to be evaluated. If subjectivity is required in determining whether or not a mandatory criterion is met, it may not be enforceable and should be treated as desirable criteria.

HELPING THE VENDORS KEEP TRACK OF MANDATORY REQUIREMENTS

Often, mandatory requirements are distributed throughout the RFP. Some may be obvious but others may be buried in the middle of a page. These ones can be missed, even when the RFP is read several times. It is unfortunate when a vendor simply fails to identify a particular mandatory requirement and is eliminated from the competition.

It is a "best practice" to summarize all of the mandatory terms on one page in the RFP and reference the pages which describe each of the requirements in more

detail. This summary, often in the form of a table, can be used by vendors to ensure that they have dealt with each mandatory requirement.

SOME REQUIREMENTS ARE ONLY HIGHLY DESIRABLE, NOT MANDATORY

The 'best practice' is to keep the list of mandatory requirements short and to take great care to define each requirement precisely and unambiguously. Many stakeholders view their most important requirements as mandatory when these requirements may be only highly desirable. Often, the decision to define a requirement as mandatory contains an element of discretion. Do we define a mandatory requirement that the vendor is a large company or do we evaluate the capacity of the firm to do this work? Do we insist that the company have an office within five miles of our building or do we evaluate the ability of the firm to get to us quickly in case of an emergency?

For example, many years ago, the State of Connecticut issued an RFP to outsource "all IT services . . . so that such Agencies can completely exit the business of providing IT services and focus on their core function - the business of government." It only wanted large, world-class corporations to bid. Rather than imposing a mandatory condition such as "revenue of more than \$1 billion per year", a condition that could be seen as restricting competition, they simply told their story in the RFP and defined the characteristics of the winner as "highly desirable":⁴

. . . While Connecticut will take receipt of and evaluate all Proposals complying with the RFP requirements, it is unlikely that a Proposal from other than a world-class IT services provider will be considered Acceptable or Potentially Acceptable, as described in Section 1.4. Your organization is discouraged from submitting a Proposal unless it meets each of the following criteria:

(a) Your organization, either alone or teaming with other entities, has entered into at least one IT services contract for the provision of IT services where the annual contract value exceeded \$50,000,000;

(b) Your organization, either alone or teaming with other entities, has provided services in at least six of the eight services categories described in Section 4.5 of the RFP; and

(c) Your organization has had average gross annual revenues in excess of \$1 billion over its three latest fiscal years.

The foregoing criteria are only guidelines provided for your consideration, and Proposals will be formally evaluated as otherwise stated in this RFP . . .

Scoring the Proposals

Scoring the Proposals

In most evaluation processes, scoring is performed as the second task, immediately following the determination of compliance.

Most proposals require that the financial information be provided separately. This is to ensure that the technical evaluators have no knowledge of the pricing proposal. This avoids the debate over whether knowledge of the pricing proposal influenced an evaluator's assessment of technical factors.

It is a best practice that, upon receipt of the proposals, the financial section is removed and given to the analyst for evaluation. This person receives the information, establishes the costs to be used in the evaluation, and determines the score (if required). Costing is discussed later in this chapter.

Copies of the technical/management proposal are distributed to the Evaluation Team as required. For small proposals, each member of the Evaluation Team may read the entire proposal (except for cost) and perform the evaluation. On larger or more complex proposals, specific sections are usually assigned to individuals. For example, the communications expert on the Evaluation Team and the Project Manager might be the only people who evaluate the proposed network design

The Evaluators then meet to review each other's evaluations, to resolve differences, and to ensure that they share the same understanding of each proposal. This process results in scores for each evaluation criterion. The purpose of the meeting, and the team effort for that matter, is to discuss, to understand and to resolve differences - not simply to average the scores. If two evaluators, both experts in the same area, score the same response as a '2' and a '6' respectively, there is some fundamental difference in each evaluator's interpretation. It is not good enough to assign a '4', the average of the two scores. Fairness dictates that the two evaluators discuss the issue, identify the differences in interpretation, and agree upon a score. (However, in some jurisdictions, evaluators do their scoring independent of one

another and scores are then averaged. It is arguable as to whether this practice is fair.)

Three components are required to establish a numerical score for a proposal:

- a detailed set of evaluation criteria;
- an assignment of weights to reflect the importance of each factor;
- a method for establishing a score.

Each of these components is discussed in the remainder of this section.

EVALUATION CRITERIA⁵

Evaluation criteria are guidelines that aid procuring organizations in assessing responses to an RFP.

These criteria serve two primary purposes:

They enable project participants to standardize the project criteria to be considered during each reviewer's evaluation of a proposal; and,

They provide potential responders with an understanding of how proposals will be reviewed, both individually and in comparison with other proposals.

Evaluation criteria are as different as people. Some are very specific and easy to assess. Others are vague and highly subjective; and, some would argue, arbitrary.

There are three major families of criteria: Technical, Management and Cost.

Technical criteria usually include the following: understanding of the problem, soundness of the approach and solution, ability to satisfy the stated requirements, service and support capabilities, analysis of risks, and testing methodology.

Management criteria usually include the following: project plans, management approach, qualifications of key people, project timetable, and corporate experience.

Cost is often evaluated in terms of the following criteria: total life cycle costs, cost controls, and consistency with technical and management plans.

As the RFP is developed, the evaluation criteria are identified. There are many sources of details about evaluation factors: similar RFPs from other jurisdictions,

your organization’s old RFPs and templates, and RFP handbooks and guides. The specific evaluation criteria to be employed are based on the specific requirements of the RFP. It is important that the RFP demand the information required to perform the evaluation. For this reason, the evaluation process must be finalized prior to issuing the RFP. You want to ensure that you have asked for all of the required data to perform the evaluation.

The quote which follows, from Nova Scotia, is one of the best which I have found that deals with the effectiveness of evaluation criteria:⁶

For evaluation criteria to be effective, they should ideally have the following characteristics:	
Objective:-	not subject to diverging interpretation;
Relate to the requirements definition	all key elements of the project requirements must be covered by evaluation criteria;
Discriminating:	separate best, average and weaker proposals;
Non-discriminatory:	fair and reasonable - mandatory and heavily weighted criteria must be justified;
Realistic:	given the contract nature and/or value;
Measurable:	use measurable standards and have sub-criteria if necessary to simplify evaluation;
Economical to use:	do not consume an unreasonable amount of time or resources;
Justifiable:	makes sense, can be justified on common sense, technical and legal basis.

In developing this book, hundreds of pages of documentation were reviewed. The best description of the critical role of evaluation criteria in the process was provided by Utah. It is an excellent discussion and is reproduced in full:⁷

Evaluation Criteria

Evaluation criteria are the factors an agency uses to determine which of several competing proposals submitted in response to an RFP will best meet the agency's needs. In establishing effective evaluation criteria, an agency must clearly identify the factors relevant to its selection of a contractor and then prioritize or weight these factors according to their importance in satisfying the agency's needs in the procurement. Together, the proper identification and weighing of the evaluation criteria will form an evaluation plan which will provide the agency with a common standard by which to judge the merit of competing proposals. This allows the agency to rank the proposals received while simultaneously providing offerors with a fair basis for comparison. As importantly, when evaluation criteria are properly selected and weighted, the proposals received will accurately reflect the offeror's understanding of the solicitation and the offeror's ability to deliver what the agency needs.

The process of evaluating offers is unique to the RFP method of procurement. This method allows an agency to consider factors other than price in deciding to whom a contract should be awarded. Whenever the RFP method of procurement is used, evaluation criteria should be selected which will provide offerors with a clear idea of the factors that will be important in making award. By properly identifying and weighing evaluation criteria at the outset of the procurement process, an agency can later rely on the evaluation criteria to do the work of selecting and judging the proposals submitted.

Evaluation criteria should be individually tailored to each RFP. While the choice of criteria is within the agency's sound discretion, only those factors relevant to the acquisition should be included. Further, evaluation criteria should reflect the agency's minimum needs, and should not be so restrictive as to limit competition. Evaluation criteria often encompass such factors as price or cost, technical excellence, management capability, personnel qualifications, experience and past performance. While price or cost must be included in every procurement and will be the deciding factor in most, price or cost need not be the deciding factor in all acquisitions. This is especially true for cost-reimbursement contracts, in which the contractor's ability to understand the procurement and produce a quality product may well override narrow cost concerns.

The establishment of meaningful evaluation criteria is a critical step in choosing the best contractor for a particular procurement. Since the goal of an effective evaluation scheme is to reflect an agency's program needs, an agency must determine what evaluation factors are relevant to the procurement before choosing an evaluation plan.

For example, an agency should select different evaluation criteria for a single task, data entry job than for a long term facilities management contract. In choosing the criteria for a data entry job, an agency would select factors reflecting its need for an experienced contractor with sufficient labor and equipment to complete timely

performance. Management factors would not be stressed for this type of one shot job. In contrast, for a facilities management contract, an agency would identify factors stressing the management contract, an agency would identify factors stressing the management capabilities of prospective offerors, as well as their technical competence, since the differing circumstances of a long term management contract require proven managerial expertise.

The precise evaluation criteria chosen must reflect the particular requirements of the contract. For example, an agency may quickly realize that a contractor's technical capability will be decisive in meeting an agency's need to switch from mainframe to distributed computer processing. As part of technical capability, the agency might further identify a contractor's ability to convert the agency's current programs and data files in a timely manner as critical to filling the agency's mission. Thus, "technical approach" and "conversion plan" might then be broken down into subcriteria such as "delivery schedule," "prior conversion experience," and "conversion facilities."

As noted above, in addition to clearly stating what evaluation criteria will be considered in selecting an offeror, the RFP must identify the relative importance or weight of the criteria. Using the above example, an agency might then decide that "Technical approach" is twice as important as the "conversion plan" and thus should be assigned twice the weight in the evaluation plan. To establish the relative importance of evaluation criteria, the RFP may simply state that the evaluation criteria are listed in order of relative importance. Or, the RFP may state that the evaluation criteria listed are all of equal weight. If listed in order of importance, an agency must be sure that the first or second criterion is not assigned predominant importance, since this would not provide offerors with a realistic picture of the procurement. An agency may also assign numerical weight to each of the evaluation criteria listed.

Once evaluation criteria are issued, an agency must adhere to its evaluation plan. If the agency realizes in mid-procurement that the evaluation plan does not accurately reflect the agency's needs, then the Purchasing Agent must issue a written amendment to all offerors stating the changed evaluation plan and requesting a new round of proposals.

The process of selecting and weighing the evaluation criteria will assist the agency in understanding and defining its own needs. Similarly, the proper choice of an evaluation plan will greatly assist contractors in understanding the agency needs. This will result in the receipt of better proposals from offerors. Moreover, by clearly identifying the evaluation criteria to be used together with the relative weight assigned to each factor, an agency will be able to ward off potential protests from disgruntled offerors who could otherwise claim that the evaluation plan was not properly disclosed.

The percentage weighting for the price criteria should not be less than 30%. Any lower percentage to be given for price must be justified in writing and will require prior approval by the Director of Purchasing.

Evaluation criteria are an integral and fundamental part of an RFP package and crucial to an orderly procurement. The evaluation plan must closely reflect the RFP Statement of Work and Specifications. When properly selected, weighted and drafted, evaluation criteria can tremendously assist an agency in its procurement of goods and services.

A FEW EXAMPLES OF THE AMOUNT OF INFORMATION PROVIDED IN AN RFP

Some RFPs provide the minimum amount of information about the evaluation criteria. They satisfy the law, their policies and their own practices but don't go out of their way to provide additional information. Other RFPs provide extensive descriptions of each evaluation factor. Throughout this text, we have endorsed the belief that "more is better" – the more information you provide in the RFP, the better the resulting proposals. Alternatively, based on detailed information, some vendors may decide not to submit a proposal. This self-selection process saves both the vendors and the evaluators time and money.

The Chartered Institute of Purchasing and Supply (CIPS) and the National Institute of Public Procurement (NIGP) have jointly developed a series of publications entitled Principles and Practices of Public Procurement. One of their publications provides information about Developing Evaluation Criteria. Here is what they recommend publishing in the RFP.⁸

Element 1.3: Notification of Criteria

Proper publication and notification of intended evaluation criteria, to potential proposers/ offerors will help the proposers/ offerors to meet the needs of the contracting authority. Furthermore, proper publication and notification protect the authority from challenges on the grounds that the criteria were chosen post notification to favor a particular proposer/ offeror. Evaluation criteria and their associated weightings must:

Be agreed to before the solicitation process begins.

Be published in the notice for the contract, or within the solicitation documentation, or both.

Not be changed once they have been advertised and notification has been sent to the bidders. If changes become necessary, all bidders must be notified of the changes.

Here are some examples of published evaluation criteria from actual RFPs that range from poor, providing little useful information, to very good, providing vendors with specific questions.

Example 1

This information about the evaluation criteria is inadequate. This 28-word description only provides broad categories with few details.

The evaluation criteria for this RFP are as follows:

<i>Understanding of project and requirements</i>	<i>25%</i>
<i>Ability to meet time frames</i>	<i>15%</i>
<i>Skills and experience with required technology</i>	<i>20%</i>
<i>Support ability</i>	<i>15%</i>
<i>Pricing</i>	<i>25%</i>

Example 2

This statement of evaluation criteria provides some direction but lacks important details in several areas.

<p>Vendor selection will be based on the following criteria:</p> <p>Understanding of the objectives (20%)</p> <p>Appropriateness of approach (20%)</p> <p>Pricing/Contract (20%)</p> <p>Suitability of hardware/software/ Expendability/Flexibility (20%)</p> <p>Suitability of firm and clarity of</p>	<p>an assessment of the vendor’s understanding of the objectives of this project;</p> <p>an assessment of the vendor’s proposed approach to providing the required services;</p> <p>an evaluation based on the prices as bid in the vendor’s proposal; acceptance of the standard contract;</p> <p>an assessment of how easily the systems hardware and software will integrate with the current and future environment; an assessment of how easy it is to add or delete components to the system;</p> <p>an assessment of the vendor’s suitability; an assessment of the clarity of the vendor’s submission;</p> <p>an assessment of the qualifications and experience level of</p>
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submission (10%)	the vendors; an evaluation of the vendor's references.
Personnel/Experience/References (10%)	

Example 3

This example provides some direction to the proponents in crafting their proposals.

A. Proposal Evaluation Criteria⁹

The Commissioner of DAS will establish an Evaluation Committee to evaluate the Proposals. The evaluation Committee will review the Proposals for format to ensure conformance with the requirements of this RFP. Failure to meet these requirements might result in rejection of your organization's Proposal. The Evaluation Committee can waive minor irregularities if, in its judgment, to do so would be in the best interests of Connecticut.

Evaluations will be based on the Proposals, and additional information requested by Connecticut, applying the following criteria as to each Proposal:

- (a) Proposer's understanding of the project, its purpose and scope, and proposer's plan for performing the IT services, as evidenced by the proposed solution*
- (b) Proposer's ability to perform the scope of the IT services, as reflected by its experience in performing such services and by the qualifications and abilities of the key individuals proposed as proposer's team*
- (c) Proposer's demonstrated ability to make available the key personnel and facilities to perform the IT services at the time of contracting and to keep them on the project thereafter*
- (d) Proposer's specific record of past performance of similar IT services*
- (e) Price competitiveness of proposed solution and cost savings demonstrated*
- (f) Proposer's ability to provide IT services from off-site facilities in Connecticut and to foster job retention and job creation in Connecticut*
- (g) Demonstration of commitment to affirmative action by full compliance with regulations of the Connecticut Commission on Human Rights and Opportunities*
- (h) Previous experience and customer references in government-sector IT services*
- (i) Expertise in managing complex integrated systems and services and implementing and maintaining evolving leading-edge technologies*
- (j) Expertise in business process reengineering, for purposes of developing new system architectures and developing plans for changes in computing environments*
- (k) Expertise in consolidating mainframe environments and in migrating systems (in whole or in part) from mainframe environments to distributed-computing environments.*

- (l) Financial strength and depth necessary to sustain a long-term relationship and long-term growth as Connecticut's IT services requirements change*
- (m) Readiness to assume full accountability to Connecticut, its Agencies and its citizens for performance including commitments to perform IT services at levels that meet acceptable performance criteria, and commitments to an open-book approach and financial-reporting requirements*
- (n) Proposer's demonstrated ability to protect highly sensitive and confidential information of its customers*
- (o) A focus on delivering value-added services*

Example 4

This approach from Alaska is simple to use and thorough.¹⁰ Only a portion of the text is reproduced below.

7.01 Understanding of the Project (5 Percent)

Proposals will be evaluated against the questions set out below:

- i. How well has the offeror demonstrated a thorough understanding of the purpose and scope of the project?*
- ii. How well has the offeror identified pertinent issues and potential problems related to the project?*
- iii. To what degree has the offeror demonstrated an understanding of the deliverables the state expects it to provide?*
- iv. Has the offeror demonstrated an understanding of the state's time schedule and can meet it?*

7.02 Methodology Used for the Project (5 Percent)

Proposals will be evaluated against the questions set out below:

- i. How comprehensive is the methodology and does it depict a logical approach to fulfilling the requirements of the RFP?*
- ii. How well does the methodology match and achieve the objectives set out in the RFP?*
- iii. Does the methodology interface with the time schedule in the RFP?*

7.03 Management Plan for the Project (5 Percent)

Proposals will be evaluated against the questions set out below:

- i. *How well does the management plan support all of the project requirements and logically lead to the deliverables required in the RFP?*
- ii. *How well is accountability completely and clearly defined?*
- iii. *Is the organization of the project team clear?*
- iv. *How well does the management plan illustrate the lines of authority and communication?*
- v. *To what extent does the offeror already have the hardware, software, equipment, and licenses necessary to perform the contract?*
- vi. *Does it appear that the offeror can meet the schedule set out in the RFP?*
- vii. *Has the offeror gone beyond the minimum tasks necessary to meet the objectives of the RFP?*
- viii. *To what degree is the proposal practical and feasible?*
- ix. *To what extent has the offeror identified potential problems?*

WEIGHTS

Weights reflect the relative importance of each of the evaluation criteria. The use of weights grew out of the provisions and commentary of the Model Procurement Code¹¹ which states “The Request for Proposals shall state the relative importance of price and other factors and subfactors, if any.” Their Commentary provides some understanding and insight into the importance of this component of every RFP:

... the Request for Proposals (RFP) set forth the relative importance of the factors and any subfactors, in addition to price, that will be considered in awarding the contract. A statement in the RFP of the specific weighting to be used by the jurisdiction for each factor and subfactor, while not required, is recommended so that all offerors will have sufficient guidance to prepare their proposals. This Subsection serves two purposes. First, a fair competition necessitates an understanding on the part of all competitors of the basis upon which award will be made. Second, a statement of the basis for award is also essential to assure that the proposals will be as responsive as possible so that the jurisdiction can obtain the optimum benefits of the competitive solicitation. The requirement for disclosure of the relative importance of all evaluation factors and subfactors applies to the areas or items that will be separately evaluated and scored, e.g., the items listed on evaluation core sheets. The requirement does not extend to advance disclosure of

the separate items or emphasis that are considered in the mental process of the evaluators in formulating their scores for the factors and subfactors that are described in the solicitation.

Well, it's clear from this Commentary that the MPC was written by and for lawyers. I believe this example provides evidence that while you don't have to publish the weights, it would be helpful to vendors if you did. And it also states that you only publish the factors that are measurable, not the items that you think about such as "my career", or "approval of my boss".

Determining the Weights

How do we establish the weights for a specific factor? Is Project Plan worth 10% or 20% of the available points? And who has the final word on it?

After having reviewed the weights used in hundreds of evaluations, I've concluded the obvious: the weights for a specific factor are surprisingly similar at the gross level for many agencies, but seemingly arbitrary when examined closely. For example, Project Plan may be 10% in one jurisdiction and 20% in another, but rarely 50%. Similarly, the merits of the technical solution may range between 10% and 25% but rarely get to 70%. There is no agreed-upon standard for the weight of a particular factor. For example, cost can vary from between 10% and 90%!

Many jurisdictions have standardized the weights for each factor. The Procurement people have developed a standard RFP or a standardized evaluation process in which the weights are fixed. To modify the weights, the Evaluation Committee must justify the change.

There is no underlying scientific or economic theory that establishes the weights for each evaluation factor. Simply stated, these weights reflect the importance of the factors in that particular agency and in that specific procurement. The weights reflect the best business judgment of the agency as to how to attain 'best value'.

While most RFP publications deal extensively with the evaluation process, surprisingly little has been written about the weights. There is no formula to determine the weight for a specific factor. Some jurisdictions like Idaho and New Mexico provide their evaluators with a little bit of guidance.

For example, in Idaho¹², evaluators are presented with weights and factors in the Model RFP and given a little bit of guidance on adjusting the weights to suite the particular situation:

. . . Generally, weights are assigned based on a 60/40 split, with cost equaling 40% and technical/managerial requirements equaling 60% of the evaluation. The percentages can be adjusted (70/30 or 80/20 or other) to reflect the relative importance of cost to the agency. The purpose of adjusting cost factors downward is to assure that the offeror with the best technical response and reasonable costs is awarded the contract and prevent an offeror from "buying" the business by simply having the lowest cost. Generally, weighting factors are not included in the RFP.

Evaluation Criteria	Points
Technical Capability and Solution Approach Understanding of project requirements Ability to meet timelines Other	300
Managerial and Staff Capability Past performance (experience) Key personnel References Other	300
Cost	400
Maximum Total Points 1000	1000

The New Mexico Handbook¹³ devotes eight pages to a discussion of evaluation factors. They provide weights for different types of RFPs and discuss the importance of specific evaluation factors and their reasons for increasing or decreasing certain weights. Here is one example:

Balancing the Base Evaluation Factors

The evaluation factors and their weights vary depending upon the type of the procurement. The following are the established base factors and their weights which have produced the best result. These recommended base factors and weights are the result of several hundred RFP based procurements:

<i>Professional Services - Firm Fixed Price Contract</i>	
<i>Experience</i>	
<i>- Corporate</i>	<i>175</i>
<i>- Key Personnel</i>	<i>125</i>
<i>Methodology/Tools Employed</i>	<i>50</i>
<i>Technical Merit of Proposed Solution</i>	<i>50</i>
<i>References</i>	
<i>- Corporate</i>	<i>50</i>
<i>- Key Personnel</i>	<i>50</i>
<i>Project Plan</i>	<i>100</i>
<i>Cost</i>	<i>300</i>
<i>Oral Presentation</i>	<i>100</i>

The base factors for this type of procurement strike a balance between quality, knowledge and experience of the offeror and key personnel versus cost and proposal work products. The base factors of Methodology and Technical Merit are established for the assessment of “best value” for the procuring agency. For contracts for amounts in excess of \$500,000 a performance bond is recommended for this type of procurement instead of an evaluation of financial stability or retainage as the primary performance protection. The cost factor may be increased to 350 points with a corresponding 50 point total reduction to the other factors. Higher cost factors have produced undesirable results. Compensation is based upon receipt and approval of deliverables in accordance with the approved project plan. The oral presentation should cover all aspects of the offeror’s proposal.

To disclose or not to disclose?

The answer to this question of whether to publish or not is “yes, we must disclose the weights”, “no, we are prohibited from publishing” or “maybe – we can publish if we want” depending on the jurisdiction. The Model Procurement Code requires that the RFP disclose the relative importance of each factor. This is a generally accepted practice. Typically, the factors are ranked in decreasing order or the importance of each is described in words. For example, “Cost is more important than the technical solution.”

It is a ‘best practice’ to simply publish the actual weights for the major factors. This provides direction to the vendors in understanding the requirements and supports “fair and open competition”.

SCORING SYSTEMS

Scoring systems are used to establish a numerical value indicating how well the proposal satisfies each selection criterion. Numerical scoring systems are easier to understand and explain than those based on only descriptive phrases. However, there are many different ways to evaluate proposals and establish the best value. These methods include color coding, adjectival ratings, and rankings. None of these methods is without problems and each method has its proponents and its critics. There is no requirement in many jurisdictions to use a numerical scoring system. Whatever method is used, including the common approach described in this text, the method is successful if it leads to an understanding of the deficiencies, weaknesses, strengths and risks of each proposal.

Adjectival Systems

The Louisiana RFP manual¹⁴ provides a good example of adjectival scoring:

12. Evaluating Risk: evaluates how risky a proposer's approach is in relation to cost and schedule.

Risk Scale:

Serious - Expected to cause serious disruption of schedule or increase in cost. Will require a significant level of contractor emphasis and government monitoring to overcome difficulties

Moderate - Expected to cause moderate disruption of schedule or increase in cost. Will require average level of contractor emphasis and government monitoring to overcome difficulties.

Minor - Expected to cause minor disruption of schedule or increase in cost. Will require a low level of contractor emphasis and government monitoring to overcome difficulties.

Minimal - Expected to cause minimal disruption of schedule or increase in cost. Will require little or no contractor emphasis and government monitoring to overcome difficulties.

Numerical Systems

One method that has been found satisfactory in many jurisdictions is a weighted point system in which points are awarded for each proposal's ability to meet predetermined criteria. Many organizations have found, through bitter experience, that it is harder to defend an evaluation based solely on words than on numbers.

Scores seem easier to justify and to defend as being objective. Part of this is reality - often the detailed process for assigning scores is based on well-defined measurable factors. For example: "The proposal will receive one point (to a maximum of 4) for each full-time member of the project team with more than 5 years of directly related experience on similar projects." Part of the attraction of a numerical score is fiction: saying that a proposal received 230 points out of a maximum score of 400 is, to many people, much more concrete than saying that the proposal was "poor". Numbers imply objectivity and fairness, sometimes more than warranted.

Evaluators sometimes have a difficult time deciding on the specific score of a factor. Suppose you were evaluating the plan for a project, or the project manager's experience. When is it worth 5 out of 10? Why isn't it worth a score of 6? Or 4?

The more general question is how do we eliminate personal bias and take some of the arbitrariness out of scoring? Can we ensure that each of the evaluators is using the same scheme? There are two major types of scoring systems. The first is generic; it's the system used for the last 100 years in public schools to grade students' compositions. Ten out of 10 is excellent. Five is acceptable. Most evaluations use some variation of this method.

The second type of system is based on the specific characteristics of the procurement and requires a lot more work to be done prior to issuing the RFP. In this system, positive and negative indicators are developed for each factor. For example, in evaluating the strength of the project team, a positive factor would be the proposed manager's experience with a similar system. A negative factor would be the use of a part-time project manager. After reviewing the proposals and these indicators, the evaluators would assign a score, usually using the zero-to-ten scale. The use of these indicators is a powerful tool in performing an objective evaluation, and one that is easy to justify should it come under public scrutiny. If these indicators are not formally developed and written down when the RFP is being constructed, they always emerge when evaluators are discussing their score for a specific proposal. These indicators simply reflect the concerns that an informed person would have related to each evaluation criterion. For example: Is the project manager experienced? Is the project manager full-time?

The remainder of this section contains three examples of scoring systems. A scoring system when published in an RFP should help the supplier understand the process and create a better proposal. Scoring systems are intended to assist the

evaluators to identify the merits or the deficiencies in a proposal in an unbiased, objective way. They should be easily understood and simple to use.

Example #1

This first example is poor. It fails to promote an objective evaluation. It doesn't provide any assistance in differentiating a "good" from a "satisfactory". Unfortunately, schemes such as this are still used in many jurisdictions.

10	Excellent - meets all requirements/very desirable
7	Good - most requirements met, it is good enough
4	Satisfactory - some requirements met, not sufficient
1	Unsatisfactory - requirements essentially not met

Example #2

This second example is excellent. It helps the evaluators by providing precise definitions and boundaries on the scoring. It sets the agenda for discussions among the evaluators. The following rules were taken from a U.S. government publication dealing with procurement policy in the U.S. Air Force (Air Force Regulation 70-15). They go a long way towards standardizing the rules for assigning scores. I certainly recommend inclusion of your scoring system in your RFP.

1. If a requirement (objective) is particularly difficult to meet and the proposal offers an approach which, with little or no risk, will yield a result which exceeds requirements qualitatively, the item should score "8," "9," or "10," dependent upon the level of exceptional features offered.

2. If the requirement (objective) is relatively difficult to meet, the majority of the factors are acceptable, no major deficiencies or risks exist therein, and the collective approach yields a qualitative benefit beyond that which is minimal, a score of "6" or "7" should be assigned, dependent upon the benefits to be attained.

3. If the majority of the factors meet standards, the requirement is not overly difficult to meet, and the factors which are deficient are of a very minor nature or are susceptible to easy correction, the item should be scored "5".

4. If the major number of important factors are acceptable but one or more factors is deficient and some minor risk is involved in the correction thereof, the score for the item should be "4".

5. If a majority of the factors for the item are deficient and their correction, either collectively or individually, poses a serious problem in correction or has a "domino" effect on the other design features, or the approach poses a high risk

without means for correction, or if the approach fails, a score of "3", "2," or "1" should be assigned, with the lower score indicating a serious or severe condition.

6. If the major factors of the item are deficient to the extent that a major reorientation of the proposal is necessary, of if the approach taken is undesirable and correction would require a major and material change in the proposal, the item should be scored "0".

Example #3

This final example was developed for a specific RFP. While, at first glance, it seems to require a lot of up-front work, this might be a solid investment. The first time this type of scheme is used, it requires the evaluators to identify their specific requirements. However, in subsequent RFPs, this scheme can simply be revised to suit the particulars. For example, the characteristics of the Project Team in subsequent RFPs can be readily established by beginning with these definitions and then editing the text.

Many years ago, the Ontario Government used the guidelines described in this section to identify the winner in an RFP¹⁵ for re-engineering the procurement function. Each of ten different factors was to be scored by each evaluator. The scores were then multiplied by the corresponding weights to determine the overall total score for each proposal.

The evaluation guidelines contained both positive and negative indicators for each factor. This material was included in the RFP. Many organizations do not specifically identify these negative factors. Here are two of the factors:

Positive Indicators	Negative Indicators
<p>Factor 2: Project Team (Weight = 40)</p> <ol style="list-style-type: none"> 1. Project Manager is experienced in all 3 key areas 2. Project Manager has managed large, similar projects 3. Key assistants (2 or 3) are experience in 3 key areas 4. Extra (contingency) resources are available 5. Two or more specialist to assist team 6. Experience with a similar system 7. Commitment/dedication of resources 	<ol style="list-style-type: none"> 1.Limited experience of the Project Manager 2. Poor reference checks 3. Marginal projects to illustrate qualifications 4. "Bare bones" team 5. Part-time project manager

<p>Factor 3: Project Plan (Weight = 15)</p> <ol style="list-style-type: none"> 1. Clarity and rationality 2. Deliverables related to project steps 3. Quality checks/reviews 4. Workload data 5. Key issues for each Deliverable are identified 6. Effective use of government personnel 	<ol style="list-style-type: none"> 1. Apparent anomalies 2. Illogical flow
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Using Risk as an Evaluation Factor

Simply introducing a paragraph into your RFP demanding Risk Management information will markedly improve the quality of information you receive and your ability to evaluate the vendors and their proposals.

RFPs could benefit from a LARGE dose of Risk Management. RFPs are the greatest risk for procurement people. Let me suggest that your next difficult RFP will attract better proposals if it deals with risk. Don't ask vendors to describe "their understanding of the project". Rather, ask them to provide a three page analysis of risks. Let them identify each risk, its source, and the steps that can be taken by each stakeholder to eliminate or reduce the risk. Then instruct them to include these tasks in their project plan (and cost). And finally, award some points for your evaluation of the probability of success with this proposal. Make risk one of the evaluation factors or part of each major evaluation factor.

The management of risk is a standard business practice. Risk analysis is the process of assessing, managing and communicating risks. It is an established profession with books about the subject, several journals, and associations. Because of the ubiquitous nature of risk, risk analysis is inherently an interdisciplinary subject with many content-specific applications in engineering, finance, health, transportation and military systems.

Risk analysis and knowledge about this discipline is all around us. If you do a search on the web using "risk analysis" or "risk management", you'll get hundreds of thousands of "hits": books, associations, courses, consulting firms, software, articles, regulations, and scholarly papers.

In recent years, risk analysis has emerged from the back room of insurance companies, and disaster planners. It is now a popular and accepted business tool. The military has always included risk analyses in its RFPs. However, few non-

military RFPs mention risk, and even fewer have Risk Management as an evaluation factor.

The remainder of this section contains examples of risk management language used in RFPs as well as a description of several risk management tools.

THE FEDERAL PERSPECTIVE

The Federal Acquisition Regulations state that the risks associated with each proposal shall be documented in the project file:¹⁶

15.304 Evaluation factors and significant subfactors.

(a) The award decision is based on evaluation factors and significant subfactors that are tailored to the acquisition.

(b) Evaluation factors and significant subfactors must—

(1) Represent the key areas of importance and emphasis to be considered in the source selection decision; and

(2) Support meaningful comparison and discrimination between and among competing proposals.

15.305 Proposal evaluation.

(a) Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully. An agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation. Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file.

Census Bureau

The Census Bureau includes risk in its determination of Best Value:¹⁷

M.1 BASIS FOR AWARD

The Census Bureau's source evaluation will be based on best-value principles. Accordingly, award will be made to the responsible and technically acceptable Offeror whose proposal provides the greatest overall value to the Government, price and other factors considered. This best-value determination will be accomplished by comparing the value of the differences in the technical factors for competing offers, based on their strengths, weaknesses, and risks, with differences in their price to the Government. In making this comparison, the Government is more concerned with obtaining superior technical, and management capabilities than with making an award at the lowest overall cost to the Government.

However, the Government will not make an award at a significantly higher overall price to achieve slightly superior technical approach.

U.S. Air Force

As a second and final example, the US Air Force uses Proposal Risk as an Evaluation Factor:¹⁸

In accordance with the RFP, award will be made to the offeror proposing the combination most advantageous to the Government based upon an integrated assessment of the evaluation factors and subfactors. The evaluation factors are Past Performance, Proposal Risk, Mission Capability, and Cost/Price. Past Performance and Proposal Risk are equal and each is significantly more important than Mission Capability, which in turn, is significantly more important than Cost/Price. Within the Mission Capability Factor. The Subfactors are of equal importance. All evaluation factors other than Cost/Price, when combined, are significantly more important than Cost/Price. The four subfactors under Mission Capability Include (1) Operation & Maintenance (O&M), Repair, Launch/Power Plan Support (2) Contractor Computerized Management System (CCMS) (3) Reliability Centered Maintenance (ReM), and (4) Phase-In.

The Government assessed the offeror's proposal risks inherent in the proposed approach, the impacts on cost and schedule associated with the approach, the subcontractor relationships and arrangements to the approach, and the propose personnel's ability to Implement the approach; plus the approach for minimizing the impact of said risks on the overall success of the requirements defined in the SOW.

STATE & LOCAL GOVERNMENTS

In contrast to federal RFPs, the RFPs issued by state and local governments and their agencies are often woefully ignorant of risk analysis. Risk is simply ignored as an evaluation factor in almost all RFPs.

For those few public sector RFPs from state and local governments and their agencies that actually identify risk as an evaluation factor, there are two approaches.

First, you can use Risk as a totally separate evaluation factor with separate scoring and its own points. Here is some language used to obtain the information from the vendor:

Identify the major risks associated with this project. For each risk, identify those activities which can be undertaken to reduce, mitigate or eliminate the risk.

Identify the associated responsibilities. Ensure that these activities are reflected in your project and management plans.

This approach certainly provides much more information than not having risk as an evaluation factor. By establishing a minimum score for this factor, high risk proposals can be eliminated from further consideration.

The second approach is to use risk, not as an Evaluation Factor, but as a subfactor under each major factor. In this approach the RFP would state that:

For each major evaluation factor stated above (Cost, Technical Solution, Project Management), identify the major associated risks. For each risk, identify those activities which can be undertaken to reduce, mitigate or eliminate the risk.

The most sophisticated approach that I have come across is a two-stage evaluation process. The RFP indicated that during Stage 1, each proposal would be evaluated using the specified factors one of which was risk. It then stated:

We will determine a short-list based on the scores from Stage 1. For those proposals that exceeded the minimum required score, a second evaluation will be performed based on only three critical factors:

	<i>Factor</i>	<i>Weight</i>
1	<i>Risk</i>	40
2	<i>Cost</i>	40
3	<i>Environmental Impact</i>	20

Louisiana

The State of Louisiana's Request For Proposal Manual¹⁹ deals with risk. As part of the Evaluation Process, the members of the Evaluation Committee must consider risk:

5. Members meet in a closed session to discuss their individual review findings and to form consensus scoring of all proposals. OSP will attend as required to ensure adequate documentation of the file and to facilitate the efforts of the evaluation committee as necessary. The committee is encouraged to select someone to document meeting results including methodology of review, scoring, facilitate meetings, etc. during these meetings, members must do the following:

- (a) identify strengths and weaknesses of each proposal reviewed*
- (b) review responsiveness to the RFP and associated risks with proposal, if any*
- (c) identify clarifications and deficiencies of each proposal, if any.*

The Guide instructs the members that risk is considered when evaluating and scoring proposals. It then provides members with some guidance on the seriousness of a particular risk:

12. Evaluating Risk: evaluates how risky a proposer's approach is in relation to cost and schedule.

Risk Scale:

Serious - Expected to cause serious disruption of schedule or increase in cost. Will require a significant level of contractor emphasis and government monitoring to overcome difficulties

Moderate - Expected to cause moderate disruption of schedule or increase in cost. Will require average level of contractor emphasis and government monitoring to overcome difficulties.

Minor - Expected to cause minor disruption of schedule or increase in cost. Will require a low level of contractor emphasis and government monitoring to overcome difficulties.

Minimal - Expected to cause minimal disruption of schedule or increase in cost. Will require little or no contractor emphasis and government monitoring to overcome difficulties.

State of Minnesota

This state's Office of Enterprise Technology has created four Risk Management Tools:

- Risk Management Work Breakdown Structure Template
- Risk Management Plan Template
- Risk Assessment Questionnaire Template
- Risk Response Plan Template

The Risk Management Plan template²⁰ could be easily incorporated into an RFP and direct the Proponents to prepare a Risk Management Plan.

This template defines the risk management methodology to be used on a given project, including: risk assumptions, risk roles and responsibilities, timeframes, risk rating/scoring techniques, risk thresholds, risk communications, and a risk tracking system.

The Risk Assessment Questionnaire²¹ could be used by the Evaluation Team or the Project Manager to increase their understanding of risks. This 13-page document identifies ten specific categories of risks and defines when the risk should be declared as 'Low Risk', "Medium Risk' or 'High Risk'. It then defines a series of responses to mitigate each high risk factor.

Here is how they deal with Schedule.

First, they identify some characteristics, a question about the Schedule:

Are the project's major milestones and operational dates . . . Flexible - may be established by the project team and recipient personnel

Then they state that the project is low risk when these milestones and dates are "Flexible - may be established by the project team and recipient personnel". The project is medium risk when these milestones and dates are "Firm - pre-established and missed dates may affect the business". The project is high risk when these milestones and dates are "Fixed - pre-established by a specific operational commitment or legal requirements beyond the team's control".

The document then identifies Potential Problems and the Risk Response. Continuing the example of Schedule. Here is an extract from the Response Table:

<p align="center">High Risk factors/ Potential Problems</p> <p align="center">Schedule</p>	<p align="center">Risk Response Actions</p>
<p>The projects major milestones and/or operational dates are fixed. They were pre-established by an operational commitment or legal requirements beyond control of the project team.</p> <ul style="list-style-type: none"> • Work must be scheduled to fit within this schedule constraint • Given schedule window may be impossible to accommodate required activities • Most likely the schedule requirements will be impossible to meet • Hurried activity and schedule pressures are likely to cause inadvertent errors in work 	<ul style="list-style-type: none"> • Re-negotiate schedule requirement to fit required activities. • Re-negotiate scope to limit to activities deemed doable in allotted time. • Establish new agreements with Customer/Owner/Sponsor based upon realistic estimates • Put aggressive project tracking and monitoring plans in place • Communicate status reports on regular basis

Imposing Upset Levels

Imposing Upset Levels

An upset level is a minimum score that is required to remain in the competition. It is also known as a threshold score. The RFP announces that an upset level will be used and identifies those factors that will be affected. Many RFPs identify the specific value required. "Proposals receiving less than five out of ten on Project Plan will be eliminated from further consideration."

Upset levels may be applied to one evaluation criterion, a group of factors, or the total score.

ONE EVALUATION FACTOR

Upset levels are used to eliminate the possibility of a proposal obtaining the most points overall when it has serious deficiencies in one or more categories. Without this technique, a proposal could receive very high marks in several categories and few in a critical area and still win the competition.

Suppose that 40 evaluation points are available for the technical response. An upset level of 20 would indicate that regardless of the scores in other categories, no proposal will be accepted with a score of only 20 in this area.

Sometimes, a critical component, such as Project Plan, is only assigned a few points, say 10 out of 100. Applying an upset level of 7 out of 10 to this factor will ensure that proponents understand its importance.

A GROUP OF FACTORS

Upset levels ensure that a proposal with an unacceptably low score in one category, such as Project Management, consisting of Experience, Staff, Training, etc., cannot win the competition. The best practice is to announce in the RFP that, for example, "Proposals must obtain 50 out of 75 points for Project Management to be considered acceptable. Proposals with fewer points will be eliminated from further consideration."

Care must be taken in setting upset levels. If you assign an upset level to each evaluation criterion or group, review these levels carefully before issuing the RFP. Otherwise, you may find that you have published the upset levels (and therefore cannot change them) and every proposal has failed to meet at least one minimum score.

THE ENTIRE SCORE

Upset levels can be applied to the entire score. “Proposals obtaining less than 75% of the total available points will be eliminated from further consideration.” This strategy ensures that only proposals judged as being “very good” will be considered. (Best and Final Offers can also be used to ensure that proposals are “very good”.)

Evaluating the Cost

Evaluating the Cost

Cost is a significant, critical, and sensitive issue. In RFPs, the award is made on the basis of best score that is, best fit with all the requirements including cost. It is never made solely on the basis of cost. So, the winner is often not the least cost proposal. Hence, the value of the contract is an easy target for the disgruntled. The least-cost proponent sometimes makes a claim to senior management that if you had only selected us, your Agency would have saved \$1 million. This firm often neglects to tell senior management that it proposed the highest risk solution, one which would likely fail. In these times of budget constraint and cutbacks, it’s easy to politicize the process. In developing the RFP, always assume that your decision will be challenged, and prepare to answer questions such as: “Why did you select that proposal when the second place one was almost as good and cost \$200,000 less?”

There are several different approaches for incorporating cost into an evaluation. Whichever approach is used must reflect the priorities and the business case related to the project. Cost is almost always isolated from the technical and management parts of the proposal and submitted as a separate document. In many jurisdictions, the inclusion of any cost figures in the technical/management proposal is grounds for declaring the proposal non-compliant and eliminating it from further consideration. In this way, the Evaluation Team, which has been

formed to deal with functionality and other issues, is not tainted by knowing the costs of various proposals.

While cost is usually analyzed separately, there is communication between the Evaluation Team and the Financial Team to ensure that the tasks underlying the costs are reasonable. It is a best practices for the Financial Officer to attend meetings of the Evaluation Team to obtain a better understanding of each proposal's approach and to ensure that all cost items have been identified.

Cost usually means cumulative cost, a total cost of all related activities, goods and services. In some jurisdictions, they use life cycle costing based on a nominal period of five years. Life cycle costs may include the start-up costs associated with a particular approach as well as the "off-ramp" costs (the costs of leaving) at the end of the contract. In other jurisdictions, they determine the costs over the contract period. In still others, they use an 'evaluated cost' based on features and requirements. Cost is often more than simply the costs identified in a proposal. For example, two different solutions may require different amounts of training or different amounts of additional computer processing capacity and these costs might not have been asked for or identified in the proposals.

Usually, RFPs provide detailed directions in terms of the cost proposal. Increasingly, they provide forms or spread sheets to be completed and submitted both in hard copy and in an electronic form (disk, CD or USB memory stick).

Many organizations do not even open the cost proposal until an analysis of the corresponding technical/management proposal has been completed. It is becoming a common practice to review the cost proposals only for those suppliers whose technical/management proposals have been reviewed and found capable of potentially providing an acceptable solution. Here is the wording for this practice from Alaska's RFP Evaluators Guide:²²

In most cases cost or cost scores will not be revealed to the PEC (Proposal Evaluation Committee) until after the PEC has completed its deliberation. In general this is done to avoid the possibility of price influencing the scoring when non-cost criteria are being considered. Define PEC

Some organizations first ensure that the Technical/Management proposal has satisfied the mandatory requirements of the RFP. In other organizations, they evaluate the proposals and eliminate those which failed to achieve a pre-defined minimum technical/management score. "There are 700 points for

technical/management factors. Those proposals scoring less than 500 will be deemed unable to satisfy our minimum requirements and will be eliminated from further consideration. For those proposals, the cost proposal will be returned to the supplier unopened. For those proposals scoring at least 500 points, the cost proposal will be opened and evaluated."

DIFFERENT WAYS OF HANDLING COSTS

There are many different approaches to handling costs. Cost, as used in this section, means life-cycle costs: the total value of all costs associated with a proposal over the life of the contract or the life of the solution. Each different approach could theoretically yield a different "winner" from the same set of proposals. (Some organizations, including the federal government, have a non-numerical technique in which cost is not assigned a score. Only the technical and management factors are scored.)

The same proposal can "win" in one process, and not even be a serious finalist in another.

Approach 1: The Best Solution Within Budget

If you are looking for the proposal which provides the "best solution" within budget, determine the score for all the non-cost factors. Then select the proposal with the highest point score that doesn't exceed the budget.

Approach 2: Cost is Just Another Evaluation Criterion

In this method, cost is simply another factor which is included in the scoring scheme. For example, cost could be assigned 20 points. Based on the particular scoring scheme, points would be assigned to cost for each proposal.

There is a significant argument raised by many jurisdictions against assigning points to cost. These entities argue that it is inappropriate and misleading to rely on a mathematical formula dealing with costs rather than a well-reasoned analysis. This issue is dealt with as a separate topic, Adopting a Non-Numerical Evaluation of Cost, immediately following this section.

The calculation of a proposal's points for cost requires two components: an assigned weight to reflect the importance of cost, and an approach for calculating the points assigned to cost.

Assigning Weights. The importance of cost is reflected in the number of points or percentage of the total points assigned to cost. Clearly, the larger the percentage of points given to cost, the more it influences the decision. (When all of the requirements are mandatory, and cost is 100%, the RFP becomes an Invitation to Quote.) There is no agreed-upon weight or range of weights for cost. Cost seems to range from 25% to 60% in most RFPs. In some jurisdictions, the minimum weight is determined by Regulation. In others, it is determined by the Project Team. In Alaska, contract costs are permitted to range between 40% and 70%.²³

Agencies are required to give a minimum weight of 40% for professional and non-professional services contracts, 60% for supply contracts, and between 60% and 75% for procurements involving a combination of both.

Determining the Score. There are several ways of determining the points or the score based on the costs of each proposal. If cost is included as one of the evaluation criteria, then we require some way of translating the dollar amount into a score. Suppose cost has been assigned 50 evaluation points out of a total possible score of 200. How many points does each proposal get? How are they calculated?

Here are five techniques that are commonly used. The first is based on the ratio of costs of each proposal to the least expensive one. The second is based on the relative differences in costs among the proposals; the third, on an interval scale. In establishing a costing procedure care must be taken to ensure that an artificially low price can be accommodated as some bona fide suppliers may submit a low bid to obtain the work.

For each of these examples, let's assume we have three proposals each with a different cost: A costs \$300,000; B costs \$250,000; and C costs \$275,000. Let us also assume that cost is worth 100 points.

Approach #1 - Ratio of Costs

Using the first method, the vendor with the lowest cost proposal receives all 100 available points. All other vendors would receive a smaller number of points as determined by the ratio of their costs to the least expensive proposal.

Proposal	Cost	Calculation of Points	Points
A	\$300,000	$(250,000/300,000) \times 100$	83
B	\$250,000	$(250,000/250,000) \times 100$	100
C	\$275,000	$(250,000/275,000) \times 100$	91

Approach #2 – Differences in Costs

The points are based on the differences in costs. Using the same data, we first determine the difference in cost between the least cost proposal and the one under consideration. We then express this difference as a percentage of the lowest cost proposal.

Proposal	Cost	Calculation of Points	Points
A	\$300,000	$100 - (300,000-250,000)/250,000 \times 100$ $= 100 - 20$	80
B	\$250,000	$100 - (250,000-250,000)/250,000 \times 100$ $= 100 - 0$	100
C	\$275,000	$100 - (275,000-250,000)/250,000 \times 100$ $= 100 - 10$	90

Approach #3 - Points per Interval

In this method, all proposals within the same range of costs receive the same number of points. For example, those within 10% of the lowest price, receive 100% of the points. Those proposals whose costs are between 10% and 15% greater than the lowest cost receive 80% of the points. Between 16% and 30% greater, 60% of the points.

Proposal	Cost	Calculation of Points	Points
A	\$300,000	Difference: \$50,000 Percentage Premium: 50,000/250,000 (20%)	60
B	\$250,000	Lowest cost receives all the points.	100
C	\$275,000	Difference: \$25,000 Percentage Premium: 25,000/250,000 (10%)	80

Approach 4 - 'Bang for the Buck'

In this approach, we use the concept of value – points per dollars. Each proposal is evaluated and a score established for it. The score excludes any considerations of cost. Once this has been completed, the Total Score for each proposal is divided by the Total Cost to obtain a "points per dollar" measurement of the proposal. The Proposal with the greatest "points per dollar" represents the greatest value and is selected. Cost is usually the life-cycle or total contract cost.

Let's assume that for Proposals A, B, and C, the scores for the technical/management parts were 650, 730, and 800 respectively. Now let's look at the calculation:

Proposal	Cost	Technical/ Management Points	"Value" Points/\$
A	\$300,000	650	$650/300 = 2.17$
B	\$250,000	730	$730/250 = 2.92$
C	\$275,000	800	$800/275 = 2.91$

Using this approach, proposal B would be selected as it provides the greatest value.

Approach 5: Two Steps - First Merit, Then Cost

This approach represents a workable trade-off between the often divided members of the Evaluation Committee. Typically, the technical people want to select the proposal with the strongest technical appeal, regardless of the cost. The finance people, on the other hand, are not terribly concerned with the technical issues and simply want to spend as little as possible. They often think “least cost” and forget that this is an RFP process.

Also, senior management often focuses on budget. They question selecting the most expensive proposal. It is awkward and difficult to explain to a senior manager or a politician why you didn’t select Proposal D over proposal A. Proposal A got 86 points and costs \$250,000. Proposal D got 82 points and costs \$200,000. What did you get for the extra 4 points? Is it worth \$50,000 which could be applied to a currently unfunded high visibility project?

Identify Acceptable Proposals

In this two-step approach, we first evaluate the merits of each proposal (but not cost). The Evaluators eliminate any proposals which do not satisfy the organization's mandatory requirements. A mandatory requirement may be the ability to service 500 user terminals concurrently, or the ability to provide a particular set of applications programs. Each of the remaining proposals is evaluated and a score established for the technical and management parts. We now have a table of proposals and their technical and management scores:

Proponent	Technical & Management Score
Company A	86
Company B	75
Company C	70
Company D	82
Company E	65

In discussions with the technical and management stakeholders, they agreed that any proposal scoring more than 72 points was capable of satisfying their requirements. Now they all agreed that a 90-point proposal would be superior to a 75-point proposal, but they were prepared to accept anything above a 72. This agreement was reflected in the RFP which stated that any proposals scoring less than 72 points would be judged as not capable of providing an acceptable solution and eliminated from further consideration.

On this basis, Company C and E were eliminated from further consideration. The remaining three proposals were deemed as potentially acceptable.

Select the Least Cost Proposal

The cost for each of the remaining proposals was then established.

Proponent	Technical & Management Score	Cost
Company A	86	\$250,000
Company B	75	\$225,000
Company C	70	xxx
Company D	82	\$200,000
Company E	65	xxx

The selection is made on the basis of least cost. That is, select the proposal which was acceptable based on the technical & management score and costs less than the others as determined by the life-cycle cost.

In this analysis, D is the winner. It was acceptable based on the evaluation of the technical and management factors. And it costs the least of all those that were acceptable.

Adopting a Non-Numerical Evaluation of Cost

Cost is always an issue, whether you use life-cycle costs or five-year costs. It's always on the radar. Do not ignore the importance of cost and how it is evaluated and scored.

Suppose your recommendation is to award the contract to Vendor A who received a score of 90 and quoted a cost of \$400,000. It is a certainty that management will be interested in the second place vendor, its score and its price. If it was Vendor C who received 88 points and quoted a cost of \$300,000, then questions will be asked of you:

- Why did Vendor A get the contract?
- Why did we pay \$100,000 more for a proposal that scored only two points higher?
- Are two points worth \$100,000 in these times of budget shortfalls, program cuts and staff layoffs and furloughs?
- Can't we revisit this decision?

There are many ways of evaluating cost. The most popular is arithmetic, assigning all of the cost points to the lowest priced proposal and then assigning points to the other proposals on a pro-rata basis. People like numbers. They are easy to understand and we know about scores from our early education. We all know that a grade of 85% is better than a grade of 80%. Numbers add legitimacy to what can sometimes be a somewhat arbitrary process. While the conversion of dollars to points is an arithmetic process, the weight assigned to this factor is arbitrary. There is no theory of costing, or model of how cost contributes to success that requires an Agency to assign 10% of the available points to cost, or 60% to cost. It's just that simple. The weight that an Agency puts on Cost is determined, not by a theory or by an agreed upon standard established by ISO, but by the culture of the organization and the dynamics among the different stakeholders.

Cost can always receive a weight of 23% in an Agency and a weight of 64% in another. Neither weight is 'wrong' or 'misleading' or 'determined by the facts'. It is, simply stated, arbitrary or reflecting the importance one particular agency puts on cost.

I recently conducted an informal survey of public agencies in North America on the weight they put on cost in evaluating proposals. The range was from 20% to 80% of the available points. Some scoring mechanisms had restrictions such as 'cost can never be less than 30%' or 'permission of the Director is required if cost is weighted less than 40%'. The only substantial conclusion from this survey was that for Agencies that assigned a numerical score to cost, there was no consensus about the weight to be assigned.

There is another approach that combines assigning scores and the judgement of the Evaluation Committee. In this approach, the Non-Numerical Evaluation of Cost, we first do some scoring and then assess the relative merits of the costs of each proposal. Here is how it works:

1. Determine the score for each proposal for the Technical and Management Factors.
2. Calculate the cost of each proposal.
3. Analyze the difference in points and the difference in price to see which proposal is 'best value'.
4. Write a narrative discussing the strengths and weaknesses of each proposal, 'best value' and why the recommended proposal represents 'best value'.

Assigning points to cost is almost the universal approach. Because of this, some agencies insist that each Evaluator explain and document his or her decision, 'for the sake of fairness'. This is simply because we all understand that 80 is larger than 70, so a score of 80 wins. It is more difficult to understand why an Evaluator thought that Proposal B was worth the extra \$100,000 over proposal A.

Here is the advice the State of North Dakota (and other states) gives its Evaluators:²⁴

NON- NUMERICAL SCORING SYSTEMS REQUIRE EXPLANATION

Non-numerical rating systems are sometimes chosen because evaluation criteria are difficult to categorize or are too uncertain or too subjective to determine a reasonable numerical rating system. If the Procurement Officer has chosen a non-numerical rating system, the decision as an evaluator must be explained and documented. With a non-numerical rating system it is necessary, for the sake of fairness to the competitors, for you to explain in writing how you came to rank the individual offers the way you did. Your explanation must be rational and consistently applied from competitor to competitor. The Procurement Officer will tell you how to exercise your independent judgment, but will make sure your

written description of how you ranked the offers is rational, understandable, consistent with your ratings, and is not in conflict with the terms of the or requirement of the RFP. The Procurement Officer will not write or re-write your explanation on your behalf; it must be in your own words.

There are few articles and studies dealing with this approach. I do like the information published by the Federal Transit Administration²⁵. It discusses the futility of assigning points to cost and other related issues. Read this extract to discover why FTA believes that **“The difficulties in trying to assign a predetermined weight to price and then scoring price proposals is that no one is smart enough to predict in advance how much more should be paid for certain incremental improvements in technical scores”**.

It's reproduced below.

When the agency decides that its requirements are not defined with sufficient precision, or where there are performance risks, so that selection of the lowest priced proposal is not in the best interests of the agency, then a tradeoff process should be used to select the best value proposal. In this case the importance of the non-price evaluation factors that will affect the contract award must be stated in the solicitation. The Federal approach in the solicitation is to state whether all evaluation factors other than price, when combined, are significantly more important than, approximately equal to, or significantly less important than price. This permits the agency to make tradeoffs between price and technical merit. It also permits the offerors to know what is important to the agency - whether to focus on higher quality at the expense of cost, or lower cost at the expense of quality.

It is not necessary to publish the specific weights (numerically) of the individual evaluation factors, only their relative importance (i.e., conceptually or adjectivally). Some Federal agencies have found through practice that the approach which gives the greatest degree of flexibility in selecting the best value proposal is to place equal weight on the price and technical factors. This then allows a choice in either direction as circumstances warrant.

It is important to note that the perceived benefits of the higher priced proposal must merit the additional cost, and the rationale for tradeoffs must be documented in the file. It is not sufficient to say in the file that company X received a higher total score than company Y, and therefore deserves the award. Scores, without substantive explanations of the relative strengths and weaknesses of the competitive proposals, including the perceived benefits to the agency, are an insufficient basis for paying a higher price. The file must explain why company X represents the best value to the agency. The necessity of documenting the specific reasons why proposal A offers a better value to the

grantee than proposal B is why a mathematically driven selection decision is not appropriate.

Proposal Evaluation Mechanics

There are many different methods of conducting proposal evaluations to determine best value, and many opinions as to which is the best approach. Grantees may employ any rating method or combination of methods, including: color or adjectival ratings, numerical weights and ordinal rankings. Whatever the method, the important thing is that a statement of the relative strengths, deficiencies, significant weaknesses, and risks supporting the evaluation ratings be documented in the contract file.

Some agencies have employed a quantitative approach of assigning scores to both technical and cost proposals, thereby compelling a source selection that is basically mathematically derived. Proponents of this method usually argue it is the most "objective," and therefore the fairest, approach to determining a winner. On closer examination, however, all approaches are to one degree or another, subjective. The decision regarding what score to assign any given factor is subjective, and any formulas employed after the initial scoring cannot make the process an "objective" one. Further, grantees must be allowed the flexibility of making sound, factually based decisions that are in their agency's best interests. Any approach that assigns a predetermined numerical weight to price, and then seeks to "score" price proposals and factor that score into a final overall numerical grade to automatically determine contract award, is a mistake. Rather, agencies should evaluate the prices offered but not score the price proposals. Prices should be evaluated and brought alongside the technical proposal scores in order to make the necessary tradeoff decisions as to which proposal represents the best overall value to the agency. Agencies should carefully consider the technical merits of the competitors and the price differentials to see if a higher price proposal warrants the award based on the benefits it offers to the agency as compared to a lower price proposal. This is a subjective decision-making, tradeoff process.

The difficulties in trying to assign a predetermined weight to price and then scoring price proposals is that no one is smart enough to predict in advance how much more should be paid for certain incremental improvements in technical scores or rankings (depending on what scoring method is used). For example, no one can predict the nature of what will be offered in the technical proposals until those proposals are opened and evaluated. Only then can the nature of what is offered be ascertained and the value of the different approaches proposed be measured. It is against the actual technical offers made that the prices must be compared in a tradeoff process. Agencies cannot predict in advance whether a rating of "Excellent" for a technical proposal will be worth X\$ more than a rating of "Good," or whether a score of 95 is worth considerably more or only marginally more than a score of 87. It is what is underneath the "Excellent" and the "Good" ratings, or what has caused

a score of 95 vs. a score of 87, that is critical. The goal is to determine if more dollars should be paid to buy the improvement, and equally important, how many more dollars those improvements are perceived to be worth. It could well be that the improvements reflected in the higher ratings are worth little in terms of perceived benefits to the agency. In this case the grantee does not want to get “locked in” to a mathematically derived source selection decision. This may very well happen when price has been assigned a numerical score and the selection is based on a mathematical formula instead of a well-reasoned analysis of the relative benefits of the competing proposals.

Some agencies have recognized the pitfalls of using arithmetic schemes to make source selection decisions. They have opted to not use numerical scores to evaluate technical proposals and they have gone to adjective ratings instead; e.g., “Acceptable,” “Very Good,” and “Excellent.” They have also heavily emphasized the need for substantive narrative explanations of the reasons for the adjective ratings, and the Source Selection Official then focuses on the narrative explanations in determining if it is in the agency’s best interest to pay a higher price for the technical improvements being offered. In this scenario price is evaluated and considered alongside technical merit in a tradeoff fashion using good business judgment to choose the proposal that represents the best value to the agency.

Here are the instructions on how to actually carry out this evaluation:²⁶

- 2. The individual evaluators will rank each of the proposals reviewed in descending order and provide a supporting narrative, addressing the specific elements of the proposal that are the determining factors (consistent with step 1 findings) for their position within the ranking.*
- 3. Committee members will review and discuss the individual findings and develop a consensus ranking consistent with the evaluation criteria. The committee ranking must also be supported by a narrative that provides the rationale (specific strengths and weaknesses) for their determination.*
- 4. The rank ordered list of proposals will be arrayed in descending order together with the price evaluation figure for each proposal. As the list is reviewed in descending order, any increase in price as technical merit decreases will cause the elimination of the proposal from the list. If more than one proposal remains, the committee will review the trade-offs between descending technical merit and descending price. The committee will then make a decision regarding which of the proposals is the most advantageous to the Procuring Agency, price and other factors considered.*

Let’s see how these rules work in practice.

Suppose we have four proposals, A, B, C and D. Each of these proposals has obtained a combined technical score of 80, 75, 70 and 65 points respectively. And the Costs of each proposal is given in the table below.

First, we have ordered the table as instructed: “The rank ordered list of proposals will be arrayed in descending order together with the price evaluation figure for each proposal.”

Proposal	Technical & Management Score	Cost
A	80	\$400,000
B	75	\$500,000
C	70	\$375,000
D	65	\$425,000

We start at line 1 for Proposal A that costs \$400,000.

We now examine line 2 for Proposal B at a cost of \$500,000. Since \$500,000 is greater than \$400,000 we eliminate Proposal B. We have applied the instruction: “. . . any increase in price as technical merit decreases will cause the elimination of the proposal from the list.”

We now examine line 3 for Proposal C at a cost of \$375,000. Since \$375,000 is less than \$400,000, we retain line 3.

We now examine line 4 for Proposal D at a cost of \$425,000. Since \$425,000 is greater than \$375,000, we eliminate Proposal D.

We are now left with two Proposals, A costing \$400,000 and C costing \$375,000. We then apply the instructions given above: “If more than one proposal remains, the committee will review the trade-offs between descending technical merit and descending price. The committee will then make a decision regarding which of the proposals is the most advantageous to the Procuring Agency, price and other factors considered.

Developing a Short List

Developing a Short-List

After an evaluation score has been determined for each proposal, this step is used to reduce the number of proposals to be evaluated in subsequent steps.

Consider the following illustrative example. Eight proposals were evaluated and the following scores were assigned: 82, 80, 78, 72, 65, 63, 50, and 48.

We now wish to develop a short list. Let's first divide the scores into groups. A group consists of proposals with similar scores. The first group could be 82, 80, and 78. There is some question as to which group the proposal scoring 72 should be in. It is always easier to justify keeping a proposal in the competition than disqualifying it. Since 72 is mid-way between 78 and 65, let's put the proposal with 72 in the first group. The next two groups are easier: one being 65 and 63; the other, 50 and 48.

If we want to keep lots of proposals in the competition, we could eliminate only the lowest group: 50 and 48. If we want fewer proposals, we could eliminate the middle group as well: 65 and 63.

It is neither fair nor defensible to eliminate a proposal that scored better than one that has been kept in. For example, we cannot drop the proposal with the score of 72 if we keep the one with the score of 65. If the proposal with the score of 72 was clearly inferior to the proposal with the score of 65, then our evaluation process was flawed. The proposal with the score of 65 is in fifth place and, most likely, there is little chance that it will emerge as the winner. If it becomes necessary to disqualify this proposal, we have to find some other way of doing it. In some jurisdictions, each major criterion has a lowest acceptable score that must be exceeded to remain in the competition. (See Upset Levels.)

In some jurisdictions, the Evaluators are not strictly bound by the point scores. The Project Manager has the discretionary power to declare whether a one or two point difference in scores represents a significant difference in quality of the proposed solutions. Avoid making important decisions based on small differences in scores.

This short-listing process produces a reduced number of proposals to be evaluated further.

Some agencies avoid all of the problems which can occur when they are asked to justify why a specific proposal was not on the short-list. Their approach is to score all proposals, even the terrible ones. It is often easier to explain why a score of 48 out of 100 was rejected than to explain why a specific proposal was judged as being incomplete and lacking information and was, therefore, eliminated from further consideration.

Communicating with Proponents

Communicating with Proponents

Between the time an RFP is issued and the closing date, there are a number of times an Agency can communicate with one or all of the Proponents. These include Clarifications, Presentations, Demonstrations and, for software, Proof of Concept. Each of these is discussed in this section of the book.

CLARIFICATIONS

During these sessions, information is obtained to clarify the supplier's proposal but not to modify the proposal. These sessions are not an opportunity for the purchaser to change the requirements or the RFP terms, or for the supplier to submit major modifications. They are not a negotiation session. (Negotiation is often part of Best and Final Offers discussed later in this chapter.)

Massachusetts

Massachusetts' procedures manual discusses several key aspects of clarification meetings:²⁷

A clarification is defined as an explanation of what is stated in a response. A clarification may not be used as an opportunity for a bidder to submit supplemental information or to change a response unless a department specifically requests these submissions or changes as part of a clarification process made available to all bidders that submitted responses.

New How to do a competitive procurement from mass

If a procuring department requires a clarification of a particular section of a response from one bidder, it must provide the same opportunity for clarification to all bidders. Notification of this opportunity to clarify a particular section must be provided in writing to all bidders in a manner that is fair and consistent. A department may elect to provide this opportunity to all bidders as part of oral presentations, provided that all bidders participate in the oral presentation process and are provided with the notice of an opportunity to clarify the identified section in the RFR. A department is not required to go through the extra work to clarify the RFR if only one bidder misunderstood the RFR or if the ambiguity was not a material element of the procurement.

The need for clarification may also arise when a review of responses reveals that a section of the RFR was unclear and that several bidders misunderstood what was intended. Ambiguities are usually identified during the RFR inquiry period (for example, the question and answer period and/or the bidders' online forum on Comm-PASS), but if there was no inquiry period, or if the ambiguity was not identified during the inquiry period, the PMT may choose to provide an opportunity to clarify the section to all bidders who submitted responses and all bidders should be given the opportunity and sufficient time to revise their responses on that section of the RFR.

If the PMT determines that the amount of clarification required is significant or has concerns that the clarifications would result in a substantially different RFR from the original, it may decide to cancel and re-issue the procurement to resolve any ambiguity or confusion.

No correction or clarification of response prices, terms and conditions or the submission of supplemental information prejudicial to the interests of other bidders or to fair competition shall be permitted. Departments and PMTs must be careful to protect the integrity of the competitive procurement process by treating all bidders fairly and equally during the procurement process.

PRESENTATIONS

Presentations provide an opportunity to meet the supplier personnel, to assess their professional and inter-personal skills, and to clarify the proposal. Often, face-to-face presentations add an important dimension to the evaluation process. Sometimes, the presentations provide critical information not readily available or easily determined from a written proposal. For example, the project manager from one of the vendors may, in discussing the details of the proposal, demonstrate a depth of knowledge and experience that far exceeds the description in the proposal. Alternatively, presentations provide some suppliers the opportunity to show how little they know about certain specific aspects of the project.

The Procurement Officer should prepare an agenda for the presentation outlining the objectives of the presentation and any specific requirements. All shortlisted proponents should be given a copy of the agenda far enough in advance to allow them to prepare properly. A set of evaluation criteria should be prepared (prior to issuing the RFP) in order to evaluate the presentations (if a score is assigned to them).

Some jurisdictions revise or finalize the scores based on the information and clarifications provided during the vendor presentations. In some jurisdictions, the presentation itself is given a score. Other jurisdictions only score the presentation when presentation skills are an important factor in the work; for example, if you are selecting a communications firm to present a new project to the public.

Notes should be taken during the presentations, and/or written responses obtained from the proponents. The notes may become part of the documentation supporting the final selection decision. In some jurisdictions, the sessions are recorded.

Here's how these face-to-face encounters are structured in several different jurisdictions.

British Columbia (B.C.)

Here is the advice offered in Guidelines from B.C.:²⁸

The intent is to create a short-list and invite proponents who make the list to deliver a presentation this should be clearly explained in the Evaluation and Selection section of the RFP. The RFP should specify the process for selecting proponents for the presentation phase and it should explain how presentations will be evaluated and scored. The most common approaches to evaluating presentations include:

- *awarding an additional set of points for the presentations;*
- *including the points for the presentation as part of the original 100%; or*
- *not awarding points but using the presentations to support the evaluation of the information contained in the proposal.*

Utah

Utah's guidelines for structuring presentations help to ensure that all suppliers are treated fairly:²⁹

Schedule oral presentations. To properly evaluate proposals, oral presentations may be scheduled to answer questions by evaluation committee members. After consultation with the State Purchasing agent, all firms that are acceptable or potentially acceptable are invited to participate in oral presentations. If you want to limit the number of firms invited to the oral presentation, you must specifically identify this restriction in the RFP. The offeror's original proposal cannot be changed in any aspect at the oral presentation. The oral presentation is only to allow offerors to clarify portions of their proposal. During oral presentations, if it becomes evident that offerors may need to amend their proposal, a Best and Final process may be initiated.

Massachusetts

Once again, the discussion from Massachusetts is easy-to-understand and provides some insight into the value of these sessions:³⁰

Oral Presentations or Demonstrations

Oral presentations, which are optional for PMTs, provide an opportunity for bidders to highlight the strengths and unique aspects of their responses and provide answers to questions regarding their responses. Departments should state their intention to conduct such presentations in the RFP. Generally, oral presentations are scheduled after departments have determined which responses have met the minimum submission requirements. Departments may limit the invitation to the top ranked bidders.

Oral presentations must be conducted in a fair manner with consistency in time allotments and format. However, the location and dates and times for presentations are at the department's discretion. These presentations are not opportunities to submit new information or modify a response; rather, the purpose is to clarify issues that would enable departments to better understand and evaluate responses. Such presentations are particularly helpful when the RFP is for complex services.

The Procurement Team Leader may waive the location and other requirements of an oral presentation upon the written request of a bidder due to special hardships, such as a bidder with disabilities or limited resources. In these circumstances, the PMT may conduct oral presentations through an alternative written or electronic medium, i.e., telephone, video conference, TTY or the Internet.

A bidder's failure to agree to an oral presentation may result in disqualification from further consideration. Oral presentations may be recorded manually or electronically (with notice to the presenting bidders) by the department as a matter of public record.

DEMONSTRATIONS AND PROOF OF CONCEPT

Demonstrations, events in which proponents show how their products work, can provide value. For example, if a vendor claims that its computer system is easy to use, a demonstration can sometimes convey this information more easily than a 5-page written narrative contained in a proposal. However, because demonstrations are controlled by the vendor and the vendor knows the strengths and weaknesses of its product, demonstrations often omit features that do not work or work poorly. A better approach to a demonstration is to turn it into a 'proof of concept', an opportunity for your users to participate in the selection of transactions to be demonstrated. In this way, users can confirm that the product will function as described in the vendor's proposal.

There is no universal acceptance of the need for a Proof of Concept or agreement on when it is inserted in the procurement process.

Many software procurement processes incorporate presentations by the proponents. Invariably, these presentations are flawless. They are well rehearsed and carefully avoid known shortcomings.

In recent times, users increasingly demand more than presentations. They demand some form of 'test drive' in which they can view the software processing their own data, or in which they can enter their own data and exercise the software.

These sessions, in which the proposed software is made available to a group of users who, in turn, enter transactions and process user-provided data, are extremely valuable. They can 'make' or 'break' a vendor's proposal. These sessions often highlight problems and expose lies or exaggerations by sales people about functionality and ease of use.

Most procurement processes for complex software contain some form of live test, sometimes called a 'boardroom pilot', or a 'prototype' or a 'proof of concept'.

Richard White, president of Wood River Technologies has got it right when he says:

The only way to evaluate complex software is to actually exercise the software. There are too many features and benefits with complex interrelationships to rely on only the vendor's proposal and its well-rehearsed perfect demonstration of features and functionality.

There is agreement among consultants and experienced buyers that some test of the actual software should be incorporated into the evaluation process. These people differ on the timing. Some believe it should be part of the evaluation process; others, part of confirming the winner. Regardless of the placement of this test, it adds essential information about the software's capabilities, its functionality and the skills of the vendor.

The text which follows is an excellent example of a description of the demonstration phase, a Proof of Concept of a system, as contained in an RFP:³¹

Demonstration

At the conclusion of the oral interviews a time and location will be arranged for the live system demonstration(s). The offerors with the highest ratings after the oral interviews will advance to the third and final phase of the evaluation process. This demonstration must take place in Anchorage within 10 working days after the interview data.

The selected finalist(s) will present a two (2) day demonstration of their system in action. The demonstration will consist of three steps:

The points to be awarded for each section based on the following evaluation criteria:

A. Day one. 300 points

Structured examples of system transactions will be performed. The specific steps to be performed will be provided by SEF. The vendor will be required to perform a set of transactions. Batch processing will be run, and a bill produced. No deviation from the structured performance will be allowed at this time. Questions from state observers will be held to a minimum. The points will be awarded based on the following criteria:

- can the software perform the assigned tasks 100 points*
- how well the task is performed by the software 100 points*
- subjective assessment of general overall system; ease of use, logic in formats and design. 100 points*

B. Day two. 100 points

Prepared Demonstration by the Vendor. The vendor will be given 90 minutes to demonstrate key features of their applications in any format they desire. No questions from state observers will be allowed during this phase.

Points to be awarded on the basis of how well demonstrated features apply to this RFP's requirements and the state's need in facilities and equipment management.

C. Day two.

300 points

Question and Answer period, with hands on use of system by state observers. State personnel may address questions to the vendor at this time relating to function of specific application features. The availability of multiple terminals during this phase is desirable.

In order to minimally impact the on-going work of DOT&PF employees, the demonstration shall take place in an environment outside the DOT&PF facilities. The vendor shall schedule the demonstration in Anchorage. The vendor shall make all necessary preparations in advance. The vendor should plan on up to 30 observers and should ensure adequate seating and viewing capabilities.

Negotiating the Contract

Negotiating the Contract

Procurement people, especially inexperienced ones, find negotiations difficult, seemingly complex and often intimidating. However, negotiations are an integral part of the RFP process. The simple act of adding a negotiations step to your evaluation process will reduce the risks of failure, improve the quality of the proposals, improve your understanding of the proposals, and, in many situations, lower the price. This step invariably costs little yet provides much value.

With all these benefits, you'd expect negotiations to be greeted with enthusiasm. This is often not the case. Many agencies have only recently discovered the power of using RFPs instead of bids. Even fewer agencies build competitive negotiations or best and final offers into their processes

Most publications about RFPs deal only briefly with competitive negotiations, often in the context of Best and Final Offers. Sometimes, this step is omitted in a description of the RFP process.

There are several seemingly valid reasons for this oversight:

- Few people understand the role of competitive negotiations in the RFP process.

- This process is ignored by many agencies.
- Many procurement people are unaware of this tool.
- Little training is provided for this skill.
- A majority of procurement people do not like to negotiate.
- In some jurisdictions, the laws do not permit or are interpreted not to permit negotiations.

When competitive negotiations are used, they produce revised proposals. Often these revised proposals are submitted as “best and final offers”. In some jurisdictions, such as Idaho, negotiations are conducted as the final step in the procurement process and lead not to a revised proposal but to a contract.

Negotiating is a powerful tool. Yet, it is the neglected child of public procurement. In many jurisdictions it is often ignored, poorly understood and dismissed as inappropriate. (By way of contrast, in other jurisdictions, it is an important tool which produces millions in savings each year! Negotiations, when properly implemented as a standard practice, enhance the worth and prestige of the procurement function.)

Negotiations do more than simply reduce price. Even if you decide to accept a vendor’s price, you can often negotiate improvements in other areas such as training, or technical support or type of software license issued.

While there is little data on the impact of negotiations, anecdotal evidence suggests that negotiations can reduce price or add value of between 10% and 15% to a contract. For many Agencies, the represents tens of millions of dollars each year!!

The issue, as I see it, is not always related to knowledge of the negotiation process as most procurement people have had at least some training in this skill. The issue is, rather, the organization’s approach to negotiations and the experience and confidence of the procurement staff in the process. There are many reasons for procurement staff being uncomfortable with this process, lacking confidence in their own skills, or simply avoiding negotiations:

- Some staff have little or no training;
- Other staff simply do not like negotiations; they are uncomfortable with the process;

- Many organizations do not negotiate as a matter of policy or practice – they just don't build it into their procedures; consequently, no staff are available.
- Vendors, having much more knowledge of their own products and services and much more experience in negotiating complex contracts related to their goods and services, are intimidating.

Building negotiations into your RFP process increases its flexibility dramatically. There are three different levels and types of negotiations.

As little involvement as possible: Organizations who don't want to do 'face-to-face' negotiations should simply collect the comments and concerns of the Evaluation Committee and write each vendor a letter. This letter will identify the areas to be improved and invite the vendor to revise its proposal and submit it as its Best and Final Offer.

A higher level of involvement: Invite each vendor in to discuss its proposals and the shortcomings identified by the Evaluation Committee. Incorporate the agreed upon changes into your contract (or ask for a Best and Final Offer).

The most involvement: full-fledged negotiations resulting in either Best and Final Offers or finalized contracts.

Negotiations is a large topic. Detailed treatment is certainly beyond the scope of this chapter. There are many courses, books, workshops and consultants specializing in this topic. In the remainder of this section, we provide some basic information and several views of this important procurement skill:

- Why negotiations are important in the RFP process
- Some of the legal and policy considerations and the Model Procurement Code
- The negotiation process
- Two exemplary documents related to Negotiations.

LEGAL AND POLICY CONSIDERATIONS

In the beginning, there was the Model Procurement Code.

Public sector procurement is subject to many different, often confusing, statutes, regulations, policies and guidelines. The fundamental purpose of this body of rules and expertise is to ensure that competition thrives in a fair and equitable environment - to provide a level playing field and ensure that value is received for taxpayer dollars.

Unfortunately, negotiations are also subject to confusing rules, policies and laws. It is one of the most poorly understood elements of public procurement. In 1979, the American Bar Association introduced its Model Procurement Code. At the time, this was a ground breaking document. Since then, the MPC has had a profound influence on public sector procurement. Unfortunately, the original MPC spent little time on negotiations. It only provided a few words of direction on the subject. Recently, a revised MPC was issued. However, the negotiation section was virtually unchanged. Here is what it said:³²

Discussions with Responsible Offerors and Revisions to Proposals. As provided in the Request for Proposals, and under regulations, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

The Commentary section also remained unchanged:

- (1) *Subsection (6) provides the procurement official an opportunity to make certain that offerors fully understand the solicitation requirements and provides offerors and opportunity to clarify proposals where necessary so as to assure responsiveness to the solicitation. Price discussions can best be conducted when there is a mutual understanding of the contractual requirements. Clarifications are intended to promote exchanges between the [State] and an offeror that may occur when an award is contemplated without discussions, for example, to resolve minor or clerical errors or ambiguities in proposals.*
- (2) *When discussions or negotiations are contemplated after the receipt of proposals which are expected to lead to the revision of proposal or to best and final offers, fair and equitable treatment of competitors dictates that negotiations be conducted in accordance with ethical business standards. Auction techniques shall be prohibited in discussions with offerors under the competitive seal proposal method. There must be a cut-off for the*

submission of revised proposals and final offers.. Both Subsection (4) and Subsection (6) are intended to provide that prices; technical solutions; unique technologies; innovative use of commercial items, design construction, or operating techniques; or other aspects of proposals submitted by one offeror must not be disclosed to competing offerors. Safeguards against abuse in the conduct of negotiations must be strictly observed to maintain the essential integrity of the process. Procedures should be specific in regulations in order to achieve these objectives.

The private sector is not subject to the same policies, laws, and regulations. Their negotiation strategies can incorporate auction techniques, unequal treatment, and disclosure of information about competing offers - all prohibited in the public sector.

The 1979 Model Procurement Code set the direction for public sector negotiations. Since then, some of the concepts have evolved and new procedures have been tried

DEFINING THE TERMS OF REFERENCE

Before we can even discuss this topic, we have to agree on some definitions. Now most people understand the meaning of “negotiate”, “clarify” and “discuss”. However, these terms have specific meanings related to procurement. These meanings are more legalistic and somewhat different than the day-to-day usage.

In most jurisdictions, “Clarify” is used to indicate that the offeror will have the opportunity to remove minor errors or provide additional information to resolve ambiguities. A clarification is not a major revision to the proposal. So, when you clarify, you fix the small stuff. This fundamental aspect seems clear and has been adopted in many jurisdictions.

In writing the commentary on this issue in the Model Procurement Code, the lawyers do their best to make this simple concept difficult to understand. If you carefully analyze the words, you will conclude that they intended that “clarifications” be an exchange of information between the buyer and offeror to resolve minor or clerical errors or ambiguities in proposals. And that “clarifications” are *not* “negotiations”.

Alaska has found some words which explain this concept in a simple and straightforward manner:³³

During the evaluation process, the procurement officer or the PEC may communicate with an offeror to clarify uncertainties or eliminate confusion. This communication may not result in a material or substantial change to the proposal, but it may result in an adjustment to the procurement officer or PEC's evaluation.

The NIGP Dictionary defines this term:³⁴

Clarification: A communication with an offeror for the sole purpose of eliminating minor irregularities or apparent clerical mistakes in a proposal; may be initiated by either offeror or purchaser; does not give offeror an opportunity to revise or modify its proposal, except to the extent the correction of apparent clerical mistakes results in revision.

Massachusetts has provided some direction in their Procurement Handbook to ensure that departments will permit corrections and clarifications, to ensure that all the suppliers are treated fairly and equally, and to ensure that a "clarification" does not become a material revision to the proposal:³⁵

... a procuring department has full discretion to determine whether to allow a response correction or clarification . . .

... the procuring department must provide the same opportunity for clarification of the identified response section to all bidders that submitted responses..

...No correction or clarification of response prices, terms and conditions or the submission of supplemental information prejudicial to the interests of other bidders or to fair competition shall be permitted....

Corrections or Clarifications to a Submitted Response(s)

Pursuant to 801 CMR 21.06(8) a procuring department has full discretion to determine whether to allow a response correction or clarification.

A correction is defined as a minor informality or obvious error in a response submission. A correction may include matters of form rather than substance, including clerical, transpositional or mathematical errors or insignificant mistakes that, in the opinion of the PMT, can be corrected without prejudice to other bidders or without changing the substantive elements of the bidder's submission. Provided that all bidders are accorded fair and equal treatment, a PMT may review submissions from any bidder to correct a minor mistake in their response. Mistakes in responses may be corrected either at the PMT or the bidder's request. Departments must be careful that a bidder is not correcting a response that would result in an unfair advantage or result in a lower cost in order to win the award.

A clarification is defined as an explanation of what is stated in a response. A clarification may not be used as an opportunity for a bidder to submit

supplemental information or to change a response unless a department specifically requests these submissions or changes as part of a clarification process made available to all bidders that submitted responses.

If a procuring department requires a clarification of a particular section of a response from one bidder, it must provide the same opportunity for clarification to all bidders. Notification of this opportunity to clarify a particular section must be provided in writing to all bidders in a manner that is fair and consistent. A department may elect to provide this opportunity to all bidders as part of oral presentations, provided that all bidders participate in the oral presentation process and are provided with the notice of an opportunity to clarify the identified section in the RFR. A department is not required to go through the extra work to clarify the RFR if only one bidder misunderstood the RFR or if the ambiguity was not a material element of the procurement.

The need for clarification may also arise when a review of responses reveals that a section of the RFR was unclear and that several bidders misunderstood what was intended. Ambiguities are usually identified during the RFR inquiry period (for example, the question and answer period and/or the bidders' online forum on Comm-PASS), but if there was no inquiry period, or if the ambiguity was not identified during the inquiry period, the PMT may choose to provide an opportunity to clarify the section to all bidders who submitted responses and all bidders should be given the opportunity and sufficient time to revise their responses on that section of the RFR.

If the PMT determines that the amount of clarification required is significant or has concerns that the clarifications would result in a substantially different RFR from the original, it may decide to cancel and re-issue the procurement to resolve any ambiguity or confusion.

No correction or clarification of response prices, terms and conditions or the submission of supplemental information prejudicial to the interests of other bidders or to fair competition shall be permitted. Departments and PMTs must be careful to protect the integrity of the competitive procurement process by treating all bidders fairly and equally during the procurement process.

“Discuss” is often used in procurement documents instead of “negotiate”. This confusing use of “discuss” can be traced to the Model Procurement Code’s phrase “discussions or negotiations”. In many places, “discuss” means “negotiate”.

“Negotiate” is used to describe the bargaining process when the buyers and offerors sit down and review the proposal. Usually, these discussion lead to a better understanding by both parties and the submission of a revised proposal.

There are several concepts embedded in “negotiations”.

First, it is bargaining. Here is the NIGP definition:³⁶

Negotiation: Conferring, discussing, or bargaining to reach agreement in business transactions. A bargaining process between two or more parties, each with its own agenda and objectives, seeking to reach a mutually satisfactory agreement on, or settlement of, a matter of common concern. A process of planning, reviewing, and analyzing used by a buyer and a seller to reach acceptable agreements or compromises.

Second, the bargaining is not done with all offerors but with those likely to be selected for award:³⁷

Offerors submitting proposals may be afforded an opportunity for discussion and revision of proposals. Revisions may be permitted after submissions of proposals and prior to award for the purpose of obtaining best and final offers. Negotiations may be conducted with responsible offerors who submit proposals found to be reasonably likely to be selected for award.

Third, all offerors must receive fair and equal treatments. So, if you negotiate with one, or “hold discussions”, you must do it with all who are similar:³⁸

The procurement officer or PEC may give offerors whose proposals are reasonably susceptible for award the opportunity to meet with the procurement officer or PEC, as set out in 2 AAC 12.290. If you hold discussions under 2 AAC 12.290 you must offer an opportunity to participate in the discussions to all those deemed reasonably susceptible for award.

Negotiations can be far-reaching. In many jurisdictions, you can negotiate anything in the RFP or proposal that improves the value to the State. Typically, you cannot negotiate changes to prescribed contract terms and conditions, or expand the scope of the RFP.³⁹

NEGOTIATIONS CAN BE SCARY

In some organizations, negotiation is regarded as the poor, neglected step-child of the RFP process. The reasons for this are related more to psychology than RFPs or procurement:

1. Many procurement people receive little if any training.

They aren't taught how to negotiate; they don't know about tactics; they don't structure an effective process; they lose control of the meetings. Lack of training usually carries with it lack of confidence and, therefore, avoidance of the process.

2. The supplier is better prepared.

Most procurement people "own" the process. They aren't the subject experts. The supplier is the expert about the product and service, and has an inherent advantage. Also, suppliers are extremely knowledgeable about contract issues related to their products, service and industry. Many procurement officers have sat in a meeting and concluded that the supplier's team is much more knowledgeable about the details of the implementation, the risks, the negotiation process and contract issues than the buyers. Lack of a knowledgeable negotiation team is a barrier to effective negotiations and erodes the confidence of the procurement person managing the process.

3. Roles and responsibilities are poorly defined.

Often the buyers' team is unsure of its role. How much authority do they really have? Can they end negotiations due to an impasse and will their senior management support them? Or will senior management override their process and decisions? Are they acting within the law? Often, the negotiation team doesn't know how to treat the suppliers, as an adversary or as a potential partner?

4. Many people find negotiations awkward.

As individuals, many of us regard face-to-face discussions to resolve differences as difficult and awkward. Many people simply do not like to negotiate, whether it's a major contract or purchase of a new car. They find the process intimidating, and somewhat unseemly or demeaning. They don't see negotiations as an import part of a process - one designed to acquire "best value" in a fair and open manner.

All of these shortcomings related to lack of training, lack of confidence and lack of an effective process can be overcome.

Negotiations are valuable

They do much more than provide lower prices. The Victoria Government Purchasing Agency has a great perspective on negotiations:⁴⁰

Post tender competitive parallel negotiations with two or more short listed tenderers is a purchasing strategy that provides substantial benefits to both buyer and seller and is usually used for high value and/or complex acquisitions. The objective is to seek the optimal solution and commercial arrangements, and not merely accept the lowest priced technically complying offer made at the time of tendering. This technique also maintains a competitive market situation throughout the evaluation process which sustains purchasing leverage . . .

There are many solid reasons for negotiating changes to suppliers' proposals:⁴¹

- increase the number of complying offers (providing greater competition)
- reduce risk to both parties
- eliminate unnecessary costs
- reduce costs
- improve benefits (better quality, performance, delivery etc.)
- identify alternative solutions
- clarify requirements and proposals
- create better understanding and relationships between the parties
- improve the contract
- improve the tender bid
- to discuss opportunities for partnership

THE NEGOTIATION PROCESS

By this point in the RFP process, most of the work has been done. You've worked with the user group to develop specifications; you've written a procurement plan; the RFP has been issued and proposals received. You've done most of the evaluation and all that remains is to negotiate the final details with, at most, a few suppliers.

The negotiation process is similar in many different jurisdictions. Typically, as part of the evaluation, the strengths and weaknesses of each proposal are identified. Clarifications of ambiguous or omitted terms have been received. Based on this information, the offers are divided into two groups: those within the competitive range and those outside the competitive range. All those inside have been judged as capable of providing an acceptable solution.

Now it's time to negotiate. You prepare a negotiation plan, and identify the negotiating team and each person's role in the process. You then meet with the offeror to discuss their proposal, to seek a common understanding of the problems

and issues, and to resolve disagreements. Usually the discussions are documented and to formalize the results, you call for a best and final offer. This permits each of the suppliers with whom you have been negotiating to submit a revised proposal. In some organizations, the request for best and final offers follows a written notice from the buyers about deficiencies and concerns in the original proposal.

Albemarle County (VA) has developed an 8-page guide for its procurement people describing the procedure for conducting negotiations:⁴²

The following are general guidelines for conducting negotiations, during which the selection committee should:

Control: Control all discussions.

Identify deficiencies: Advise the vendor of deficiencies in its proposal so it has the opportunity to satisfy the RFP's requirements. (See section 16-8 below)

Resolve uncertainties: Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal. (See section 16-8 below)

Resolve mistakes: Resolve any suspected mistakes by calling them to the vendor's attention as specifically as possible, without disclosing information concerning other vendors' proposals or the evaluation process. (See section 16-8 below)

Opportunity to revise: Provide the vendor a reasonable opportunity to submit any cost, price, technical or other revisions to its proposal that may result from the interviews (goods or nonprofessional services only).

Cost or price: Inform a vendor that its cost or price is considered to be too high or unrealistic (goods or nonprofessional services only).

Negotiation is a four step process:⁴³

1. Preparation
2. Fact Finding
3. Bargaining
4. Agreement

In many jurisdictions, negotiations are not restricted. Any element of the procurement can be negotiated so long as in doing the review, all offerors are treated in a fair and equal manner. However, radical changes in scope can end in litigation initiated by aggrieved suppliers.

In California, their Acquisition Manual sets the scope of negotiations:⁴⁴

Negotiations are conducted on all procurement transactions as permitted by law and when practical, as determined by the Buyer (and the Buyer's management). . . Negotiations may address all aspects of the anticipated contractual arrangement (or change) including technical requirements, contract terms and conditions and/or price. . .

Only people with training and experience in negotiations should lead these efforts.

1. Preparation

Preparation involves assembling a negotiation team, knowing the details of the proposal being considered, and establishing the boundaries of an acceptable agreement. The team, in turn, identifies a negotiation strategy and objectives, and develops a negotiation plan.

Usually, negotiations are conducted by a team consisting of user representatives, technical specialists, sometimes a lawyer, and a procurement officer.

As part of the pre-negotiation preparation, before meeting with any offeror, the team has to do its homework. It has to develop a complete understanding of the contractual requirements and the offeror's response in its proposal, a unified team approach to various topics, and a position from which to negotiate. The team usually identifies its negotiating objectives and a minimum and maximum limit for each objective.

All of this information is often incorporated into a Negotiation Plan - a written document prepared by the chief negotiator describing the objectives for the negotiations and the corresponding rationale.

In developing a Negotiation Plan, the following questions should be answered:⁴⁵

- *With whom am I negotiating?*
- *What are the key issues?*
- *What am I trying to accomplish?*
- *What are the strengths, weaknesses and deficiencies of the proposal?*
- *What is the negotiating environment?*
- *What is the negotiating process?*
- *What information do I need?*
- *What is my negotiating strategy?*

- *How will the agreement be reached?*
- *How will the agreement be implemented?*

2. Fact finding

Fact finding is when each side asks questions to ensure that they share a common understanding of the requirements, RFP, and the offer. It is to obtain both clarifications and additional information on issues of concern to either party. At the end of this phase, both parties should agree on the specifications, requirements or statement of work.

3. Bargaining

This is the difficult step. It is during the bargaining phase that each party puts forward its negotiating positions and seeks resolution of disagreements. Usually, the agenda is set by the chief negotiator and often deals with the most important issues first.

There are many different tactics which can be employed during this process. Some are ethical, others are borderline. Some are dangerous and can jeopardize the process. These tactics are available to both sides and astute negotiators quickly recognize their use and diffuse their effectiveness. Tactics include the classical “good guy/bad guy” routine; intentionally delaying the process; claiming a lack of negotiation authority, and bluffing.

Price is always an issue in negotiations. Often it is the most important issue and sometimes it is the only issue. Many procurement officials, especially in smaller agencies, are at a disadvantage when they negotiate. They think it is somehow wrong to challenge prices, or for a supplier to set prices to generate large profits. These buyers are not effective as negotiators. Here is the advice that Victoria Government Purchasing Board gives to all procurement officers in their government:⁴⁶

Price is an obvious focus for tender negotiations. However, it should not be regarded as unethical for a buyer to challenge the prices quoted. It is not immoral or wrong for a supplier to price a bid to the highest level which the market or purchaser can withstand. The seller has a responsibility to maximise company profits and departments have a corresponding duty to minimise cost/expenditure to an extent compatible with the purchase of a reliable product and/or service. Price negotiation should be done in a professional, objective and forthright manner.

Conducting negotiations is a vast topic addressed by books, articles, training courses, professional associations. Treatment of this topic in more than a cursory manner is beyond a text dealing with RFPs. As an illustration of some of the factors and issues that may arise in conducting negotiations, consider the following list of good negotiating tactics:

*Conducting Negotiations*⁴⁷

- *Aim for a good result for buyer and supplier.*
- *Agree on the issues and the way to proceed.*
- *Maintain confidentiality and treat suppliers fairly.*
- *Be careful about using tactics which may undermine your own negotiating position.*
- *Ensure the bidder is fully aware of, and understands, the real requirements.*
- *Ensure that the competitive element is maintained whenever possible, e.g. that inappropriate information regarding the contract or order is not revealed to other competing parties.*
- *Do not give the supplier the impression that the contract/order is a certainty.*
- *Maintain an ethical approach according to the standards of conduct both expected by and required of you.*
- *Ensure your overall strategy is flexible and adaptable to changing circumstances, but seek to settle differences within your team outside the negotiation venue.*
- *Behave so that ways exist for both sides to reach agreement without loss of face.*
- *Aim to use negotiating techniques which better enable you to find common ground with the other party, e.g. discuss the argument/rationale both for and against the views adopted by either party on a particular issue. This approach can help in more easily obtaining all the relevant facts, considering all available points of view, and providing a summary of views.*
- *Recess to caucus when the team needs to confer privately.*
- *Be open-minded and make concessions when good reason exists to do so.*
- *Look for long-term consequences.*
- *Use standard forms of agreement whenever possible. Where they are modified or new clauses written, legal advice may be necessary to ensure the changes achieve the intended results. Ensure changes are considered in the light of the whole document.*
- *Be careful not to reject offers which you may wish to accept later.*
- *Make clear that negotiations are 'subject to contract' until you are ready to commit your organisation.*
- *Ensure that the essential terms have been actually agreed to and entered into the contract document.*

4. AGREEMENT

Once the major issues have been negotiated and resolved, the details usually fall into place. And once there is agreement on all the items, the negotiations are concluded and the contract signed.

Upon completion of negotiations, the chief negotiator writes a Negotiation Memorandum which often contains the following:

- Identification of the proposal and the players
- Summary of the negotiation objective, results, and the proposal
- Important details for each negotiated item

In some jurisdictions, the final step after completing negotiations is for the offeror to modify its proposal – in essence, to submit a Best and Final Offer. This revised proposal is then given to the evaluators so they can prepare their final report.

A STRATEGY FOR NEGOTIATIONS

Consider this example - you receive three proposals for the county enterprise financial system:

- Proposal A meets or exceeds all of the stated requirements and has most of the desired optional features but is \$250,000 over budget.
- Proposal B meets all of the stated requirements, a few of the desired optional features and is within the program budget.
- Proposal C meets most of the stated requirements, a few of the desired optional features and is half the price of its nearest competitor.

What do you do? Score the proposals, using your handy-dandy price formula and award the contract? Big mistake! Proposal A is obviously the best alternative but it is too expensive. Proposal B is probably OK but it represents old technology. Proposal C misses the mark but it will leave money in the budget for consultants to fix it.

Many procurements officers ignore one of the most important features of the RFP process, NEGOTIATION! If you are not negotiating, you are not taking advantage of the RFP process.

The American Bar Association Model Procurement Code for State and Local Governments is the foundation for many state and local government procurement codes. Model Procurement Code RFP process permits discussions and best and final offers. The NIGP Dictionary of Terms defines “discussions” as “an oral or written exchange of information, other than simple clarifications, for the purpose of obtaining information essential for determining the acceptability of a proposal, or to provide the offeror an opportunity to revise its proposal. Discussions are negotiations and negotiating is bargaining to reach mutual agreement.

There are some important rules for negotiating. Negotiations must be fair, allowing all offerors who are in the competitive range or reasonably susceptible for award to participate. Avoid revealing details from competing offers. Point out all significant weaknesses to each offeror and encourage improving the offer. Avoid auctioning techniques to make all offers equal.

Negotiations are not easy. They require planning and patience. Let’s set up a negotiating strategy for our three proposals:

Proposal A meets or exceeds all of the stated requirements and has most of the desired optional features but is \$250,000 over budget. Although it exceeds our budget, it appears to be our best proposal. The purpose of the RFP process is to award the contract to the most advantageous offer. This could very well be it! When negotiating, we should inform the offeror that its proposal exceeds budget and discuss methods for reducing the price, without sacrificing any required or highly desired features. If all else fails we might seek more money.

Proposal B meets all of the stated requirements, a few of the desired optional features and is within the program budget. This proposal meets our current requirements but represents old technology that may be obsolete in a few years. We may want to seek some assurance that the contractor will provide maintenance and upgrades for ten years and customization, additional options and other features and price concessions.

Proposal C meets most of the stated requirements, a few of the desired optional features and is half the price of its nearest competitor. This offer may be well be not susceptible for award. It does not meet our minimum requirements and has few desired options. Chances are, the offer cannot be improved enough to win the contract. If we choose to negotiate, we have a lot of work to do. We need to point

out all significant weaknesses and recommend improvements. We should also encourage additional desired options.

Best and final offers or final proposal revisions come after negotiations. This is the formal process for obtaining written confirmation of the discussions. This is our “meeting of the minds”. Once we receive the best and final offers, we can return the proposals to our evaluation committee and let them recommend the most advantageous offer.

DO’S AND DON’TS

There are some do’s and don’ts to competitive negotiations:

Don’t negotiate with just one offeror, unless you have no reasonable choice. Competitive negotiations require competition. To be fair, we should negotiate with all offerors who are susceptible for award or are in the competitive range.

Don’t negotiate with offerors who are not susceptible for award. Negotiations should be efficient. Don’t waste the valuable time of your negotiators and evaluators. Release the unacceptable offerors to seek other business opportunities.

Do negotiate to improve weaknesses but don’t compare details from each proposal. The goal is to help each offeror meet your requirements, not to match up with a competitor.

Do appoint a negotiation team. Evaluators evaluate and negotiators negotiate. Assemble a competent negotiation team with technical advisors. The team leader should be a skilled and competent procurement negotiator.

Do plan the negotiation strategy. Identify weaknesses and desired characteristics. Study your offerors and identify their needs. Hint: Money is not the only motivator for prospective contractors. Understand the environment. The more you know, the better you will do.

Don’t try to negotiate the same things with each offeror. Each proposal is different and demands a different negotiation strategy. Discuss price only when price is a weakness. In many situations, we can expect price to climb as we negotiate to improve weaknesses.

Do keep good notes. It is acceptable to request the contractor take notes, for approval by the government negotiators.

Don't lose control of negotiations. Appoint a competent and skilled negotiation team leader. Negotiate in government offices. Regulate team dialog. Don't join prospective contractors for lunch or drinks. This is business.

Do negotiate for mutual understanding and "win-win" solutions.

Don't negotiate if you don't need to. If your number one offer meets government requirements and does not require improvements, leave it alone and award the contract.

Don't issue "Surprise BAFO's". The Best and Final Offer should only be requested after negotiations are done.

We are just scratching the surface. This article is not the consummate guide to government negotiating. If anything, this article should make you curious and encourage you to become a good negotiator. There are many good negotiation books and workshops.

Please remember, if you are just evaluating proposals and awarding contracts, without negotiation, you are only doing half the procurement. Negotiations bridge the gap between what the government requires and what the offeror proposes.

Exemplary Documents

This section describes two solid documents produced by public sector organizations that deal exclusively with negotiations.

The Albemarle County (VA)

Their Purchasing Guide⁴⁸ is great and one of its chapters deals with negotiations. This chapter contains insights into the process to assist negotiators. It begins with "essential information", a summary of the key points in the guide:

Essential Information in this Chapter
<ul style="list-style-type: none">• Before negotiations begin with the selected vendors, the selection committee should request any additional information from the vendors, provide advance information to vendors, arrange a tour of the site or the facility, if appropriate, schedule the negotiations, identify who should attend, and

- visit each vendor's office and recent projects, if appropriate.
- Negotiations must be confined to the vendor's proposal and its identified deficiencies in relation to the requirements of the RFP, and the requirements and format of the proposed written contract.
 - The vendor may elaborate on its qualifications during negotiations and may revise, modify or alter its proposal. The evaluation criteria established by the selection committee guide the negotiations.
 - Negotiations should be conducted in a way to arrive at a complete agreement on all basic issues, and not leave any issues for later negotiation.
 - If there is a concern about cost or price being too high or too low in the procurement of goods or nonprofessional services, the selection committee should advise the vendor during the negotiations so that the vendor may submit a revised cost proposal.
 - The evaluation criteria established by the selection committee guide the negotiations.
 - Negotiations should be conducted in a way to arrive at a complete agreement on all basic issues, and not leave any issues for later negotiation.
 - If there is a concern about cost or price being too high or too low in the procurement of goods or nonprofessional services, the selection committee should advise the vendor during the negotiations so that the vendor may submit a revised cost proposal.

The guide provides a clear, comprehensive definition of 'negotiations':

For simplicity, negotiations, discussions and interviews and presentations are referred to as "negotiations."

The guide defines the scope of negotiations by restricting the activities of the negotiators:

Negotiations must be confined exclusively to the vendor's proposal and its identified deficiencies in relation to the requirements of the RFP, and the requirements and format of the proposed written contract. During negotiations, the vendor may elaborate on its qualifications and may revise, modify or alter its proposal so that the County can obtain the best and final offer.

For the procurement of goods and nonprofessional services, the County may discuss nonbinding estimates of total project costs, including, but not limited to, life-cycle costing, and where appropriate, nonbinding estimates of the price for services.

The selection committee shall not:

- *Help a vendor bring its proposal up to the level of other proposals through successive rounds of discussion.*

- *Disclose technical information to a vendor that results in improvement of its proposal.*
- *Indicate to a vendor a cost or price that it must meet to obtain further consideration.*
- *Disclose proprietary information, technical information or ideas, or cost information of another vendor.*
- *Advise a vendor of its price standing relative to another vendor.*
- *Disclose the relative strengths and weaknesses of competing vendors.*
- *Ask for nonbinding estimates of costs for professional services at this stage of the procedure.*

During the negotiation process, the selection committee must be sensitive not to disclose any unauthorized information that may provide an unfair advantage to one vendor over other vendors.

The guide provides a framework for the negotiation process:

Conducting Negotiations: Addressing Deficiencies, Uncertainties and Mistakes in a Proposal

Negotiations should address deficiencies, uncertainties and mistakes in a proposal, and provide the vendor the opportunity to revise its proposal. The selection committee should be specific when identifying deficiencies, uncertainties and mistakes, but must do so without advising the vendor of the corrections required. The selection committee should strive to assure that it has reasonably communicated the specific deficiency, uncertainty or mistake to the vendor.

Deficiencies: *A deficiency is any part of a proposal that does not satisfy a minimum requirement of the RFP, rather than a weakness of the proposal based on a comparative evaluation of the relative strengths and weaknesses of competing proposals. Disclosure of a deficiency should be made so that the vendor may correct the deficiency, thereby resulting in a better proposal and better competition. All deficiencies that may be proposals. The selection committee is not required to disclose deficiencies that cannot be corrected. Examples of deficiencies in a proposal include, but are not limited to, the vendor's proposed personnel being considered to be unqualified; the vendor's proposed costs being unrealistically low; and the vendor's estimated level of effort and proposed price being considered unreasonably high.*

Uncertainties: Uncertainties in a proposal may arise from a proposal not providing adequate information, and the selection committee being unable to determine the extent of the vendor's compliance with the requirements of the RFP. Discussions should be thorough to address uncertainties. An example of an uncertainty in a proposal includes, but is not limited to, the selection committee being unable to determine the extent of a proposal's indirect costs.

Mistakes: A mistake is an error in a proposal. Discussions should resolve suspected mistakes by bringing them to the attention of the vendor as specifically as possible without disclosing information about other vendors' proposals.

The selection committee shall not instruct a vendor how to correct a deficiency, uncertainty or a mistake.

One of the guide's most valuable entries deals with the negotiation of price – what to tell a proponent, and what not to tell and proponent

If there is a concern about cost or price being too high or too low in the procurement of goods or nonprofessional services, the selection committee should advise the vendor during negotiations so that the vendor may submit a revised cost proposal.

It is proper for the selection committee to reveal the County's estimate or price goal, to disclose the amount of funds available for the project, or to inform a vendor that its proposed cost greatly exceeds the County's budget limits.

It is improper for the selection committee or any County officer or employee to indicate to a vendor that it must meet a certain cost or price in order to receive further consideration, to advise a vendor of its price standing relative to other vendors, to reveal the identity of the low vendor or that all vendors are in the same price range, or to otherwise furnish information about other vendors' prices.

The Negotiation Process Guide⁴⁹ (CA)

The State of California's procurement group has published a 14-page guide, the Negotiation Process Guide (for IT Goods & Services), to explain "the issue of negotiations in a clear and concise manner". And this guide does just that. More importantly, the Guide is accompanied by a 16-page Contract Negotiation Plan for a hypothetical company.

First, let me tell you about the Guide.

It establishes three different negotiation scenarios. First, when you negotiate from the outset of a procurement; second, when you negotiate during a procurement;

and, finally, when you receive no responsive bids. The second, the most common use of negotiations occurs when you receive at least one responsive, responsible bid:

Procedure when conducting negotiations during a procurement and at least one responsive, responsible bid is received.

When at least one responsive, responsible bid is received, only bidders that have submitted such bids may be allowed to negotiate. It is possible to negotiate with only a sub-set of responsive, responsible bidders only if the bid document (as otherwise amended) outlined a procedure for doing so prior to opening bids.

By way of example, if the acquiring agency believed that it was likely to receive many responsive, responsible bids and that it would be necessary to negotiate to obtain best value for the State, that agency could set forth a rule in the bid indicating that the state may opt to only negotiate with bidders in one of the following configurations,

Only bidders within 3% of the low bid

Only the 3 highest ranking bidders

Only the lowest priced bidder and then, if unsuccessful, with successive bidders in order of rank until an agreement could be reached.

It then describes the Roles and Responsibilities of each of the participants from the State as well as the overall process.

Negotiation

Reaching an agreement is the overall goal of contract negotiations. There are two aspects of reaching an agreement. It is essential for the State to speak with one voice. Prior to the beginning of contract negotiations, the State will reach internal agreement on as many issues as possible and those will be included in the Negotiations Briefing Binder. . . .

The negotiation process is a dialogue which may include persuasion, alteration of assumptions and positions as necessary, and may apply to several areas including but not limited to:

Price

Schedule

Requirements

Pay points

Definition of deliverables

Development methodology

Period of Maintenance

The State may discuss other aspects of the Bidder's proposal that could, in the opinion of the State, be altered or explained to enhance materially the proposal's potential for award. However, the State is not required to discuss every area where the Bidder's proposal could be improved.

In the course of the negotiation process, the State will be asked to reexamine its position regarding particular issues in response to the vendor's position. It is important to allow either party to leave the room to go "caucus" privately in another room, where they can speak freely before returning . . .

Negotiations may be completed after a single round, or may be done in several rounds. Negotiations may be conducted face-to-face and/or in writing. Face-to-face negotiations are generally the most effective but conference calls, or the use of video or web conferencing are acceptable alternatives.

The process of reaching an agreement with the vendor should proceed in a methodical fashion. The Chief Negotiator may list all "open" or unresolved issues on the agenda. If an agreement is not reached on language or more drafting is needed, that item should fall to the bottom of the agenda to be re-examined at a later time in the negotiations process. Each item will be examined in this fashion until agreement is reached on all outstanding issues. Issues may also be elevated in accordance with issue escalation instructions from the Executive Management Team.

At any point in the negotiation process the State may terminate negotiations and/or the solicitation at any time. Also, an unsuccessful bidder does not have the right to protest the results of the negotiating process.

Sample Contract Negotiation Plan⁵⁰

The Guide emphasizes the need for a Negotiation Plan and provides a sample Negotiation Planner as well as a detailed example of a negotiation plan. The sample negotiation plan is 16-pages in length and deals with Software Maintenance Renewal for Generic Computer Company Inc.

This sample plan is valuable as it illustrates the level of detail required when planning and organizing a negotiation effort in a large organization with many stakeholders. The scope of this plan is ambitious:

The scope of this plan is managing seven (7) basic activities:

- *preparation for contract negotiations*
- *drafting the contract terms, conditions and attachments*

- participation in contract negotiations
- negotiation of the terms, conditions and attachments
- contract negotiation document control
- reaching an agreement on the price, terms, conditions, and attachments between the State and Generic Computer Company Inc.
- approval of the terms, conditions and attachments

The last page of this plan provides information about their rules of conduct for the negotiators as well as a valuable reference publication:

Rules of Conduct

An important strategy in effective contract negotiations is for members of the same team to “speak with one voice” when addressing the opposing side. Perceived fissures in the State’s position make the State vulnerable to the Generic Computer Company Inc. taking on a “divide and conquer” offense. While reasonable minds often differ and discussion is important, it is essential that State’s representatives agree to follow the rules of conduct set forth below:

Rule No. 1 - All differences of position shall be discussed and escalated outside the presence of the Generic Computer Company Inc.

Rule No 2 - If members of the Negotiation Team identify a situation where a difference of opinion is arising, a short recess should be called and members of the Negotiation Team should caucus.

Rule No. 3 - If the Negotiation Team is unable to resolve the issue during the caucus, the issue should be tabled and further discussion discontinued until the Negotiation Team can resolve or escalate the issue in private or with members of the Executive Management Team.

Rule No. 4 – Members of the State Negotiation Team who repeatedly violate the rules of conduct will be asked to excuse themselves and designate a substitute.

In his text on Cutting Edge Negotiation Strategy for Lawyers, David G. Gold lists the traits shared by effective negotiators:

1. *Prepared*
2. *Honest/Ethical*
3. *Adheres to customs and courtesies*
4. *Perceptive and skillful at reading cues*
5. *Rational*
6. *Realistic*
7. *Reasonable*
8. *Analytical*
9. *Convincing*
10. *Self-controlled*

Exercising these traits as much as possible is probably the best advice any of us will ever find with regard to conducting ourselves in contract negotiations and perhaps beyond.

Requesting Best and Final Offers

Requesting Best and Final Offers

According to the procurement people in New Mexico, “The best and final offer step has produced some truly amazing results over the years saving the State literally millions of dollars.”

The RFP process is highly flawed. Buyers issue documents that often provide a distorted, incomplete, or inaccurate description of the problem. This is not their intention but often results from (i) many different people trying to describe a complex requirement or a difficult problem, or (ii) lack of knowledge by the users related to the information required in a Statement of Work. Suppliers then take this information and interpret it in the light of their own knowledge and product offerings and develop their proposals.

Our evaluation processes attempt to compensate for these systemic problems by basing the award on a number of factors: not simply the least cost, nor only the best project management plan, nor just the best technical solution. We combine all of these factors so that we often award the contract on the basis of *least apparent risk*. The winning proposal often does not represent the best value but rather the proposal with the fewest “holes”, the fewest ambiguities, the fewest weak sections. In short, the proposal that seems to solve the problem and is most credible.

The systemic problem is easy to define. Many of the critical details of a solution cannot be articulated by buyers until they have reviewed the suppliers’ proposals. Until this time, the buyers do not have sufficient insight or knowledge of potential solutions to make an informed decision. But it is fundamental to one type of RFP process that suppliers can’t revise their proposals; evaluators can only evaluate the submitted material. And evaluators hate it! For example, you issue an RFP and get six proposals. Only three are anywhere close to the mark. They are o.k. but not great. One of the proposals lacks the depth of technical information which would inspire confidence in the solution. The second lacks project management depth. The third is simply too expensive.

Best and Final Offers (BAFO) is often used when the Evaluation Team believes that the price could or should be better, when some elements of a proposal are confusing and need further definition. It is also used to obtain additional

information which will provide a larger point different between competitive proposals with similar scores.

Wisconsin has a 4-page description of its BAFO procedure in which it identifies uses for BAFO:⁵¹

The best and final offer (BAFO) process represents an optional step in the selection process in the request for proposal (RFP) process and is not part of the contract negotiation process.

The BAFO process may be useful when:

- A. No single response addresses all the specifications.*
- B. The cost submitted by all proposers is too high.*
- C. The scores of two or more proposers are very close after the evaluation process.*
- D. All proposers submitted responses that are unclear or deficient in one or more areas.*

Vendors hate the traditional RFP process – the one without BAFO. Losing a major contract because one section of their proposal was rated a ‘6’ rather than an ‘8’ is difficult to understand. Vendors often complain that “If we had only known more details and understood the buyers’ reasons, then we would have proposed a different solution.”

There is a process - Best and Final Offer (known as “BAFO”) - designed to solve this problem. This procurement strategy permits buyers to get revised proposals from vendors. In the U.S., this process is defined in the procurement statutes of many states and in the ordinances for many cities. In Canada, BAFO has been underutilized in the past. It is only in recent times that public bodies have begun including BAFO as part of the RFP process. It is now used by several provinces, cities and public entities for high-risk, high-value or high-visibility RFPs.

When BAFO is used, it is used with a well-defined procedure. The concern is that all suppliers be treated fairly, and that no information be transmitted from one supplier about the other suppliers’ offers.

Here’s how it works. First, the RFP contains language that properly defines the rules and the process. Typically, the evaluators identify those proposals capable of delivering the required results. This evaluation is the same as would normally be done to develop the short-list of finalists. These finalists are then provided detailed questions related to their proposals, informed of those parts of the proposals that

are deficient, or invited to discuss (negotiate) the proposal with the agency. The suppliers are then given the opportunity to redo their proposals. They are provided with the opportunity to improve their offering and to eliminate unacceptable conditions contained in their original proposal. The amended sections are then re-evaluated and re-scored according to the evaluation process defined in the RFP.

It is a best practice to formalize the invitation to a vendor to submit a BAFO. North Dakota has developed a 3-page template for this request.⁵² This template provides instructions to the Project Manager/Procurement Officer on how and when to use BAFO. The template also states that the Agency must:

PROVIDE SPECIFIC INFORMATION ON WHAT IS BEING REQUESTED. OFFERORS MAY BE ASKED TO REDUCE COST OR PROVIDE ADDITIONAL CLARIFICATION TO SPECIFIC SECTIONS OF THE RFP (I.E. TECHNICAL PROPOSAL, COST PROPOSAL, EXPERIENCE AND QUALIFICATION) INDICATE RFP SECTION NUMBERS, IF APPLICABLE.

There are several different ways in which BAFO is employed:

- In some jurisdictions, such as Arizona, competitive negotiations precede BAFO. In this way, the revised proposals reflect the agreed upon changes resulting from the negotiation process.
- In some jurisdictions, such as New Mexico, competitive negotiations are not used. Rather, vendors are sent a letter indicating the weaknesses in their proposals and invited to submit a BAFO.

New Mexico's RFP Guide⁵³ provides some insight into the use of BAFO:

The best and final offer is the only step in the process where the proposal can be amended. If the offeror's proposal contains unacceptable contract terms and conditions, this is the step in the process where that problem is resolved. If an offeror stamped every page of the proposal "proprietary" or "confidential", this is the step in the process where that problem is corrected. If costs were not proposed on exactly the same basis as the other offerors, this is the step in the process to correct that problem.

New Mexico uses BAFO to ensure that the winning proposal receives at least 90% of the available points – they simply do not accept mediocre proposals. Here are the rules that they have published:

A. NOTIFY FINALISTS

This step is an extremely important part of the procurement process as this is the only place in the process where offerors can amend their proposals. They may amend their proposed costs as well as other portions of their proposals. Offerors should be encouraged to improve their proposals. The recommended technique is to collect questions about the offeror's proposal from the Evaluation Committee. The Procurement Manager divides the questions into two groups: 1) questions to be addressed in the best and final offer; and 2) questions for the oral presentation. If the Procurement Manager took good notes during the evaluation, the notes may suffice as the basis for the notification letters.

The Procurement Manager must provide each finalist a written notification letter that contains the following:

The date, time and location of the oral presentation or system demonstration, along with instructions as may be appropriate for the conduct of the session including an agenda.

Specific areas of the offeror's proposal that the Evaluation Committee may request to be addressed as part of the submission of best and final offers. For example, the Evaluation Committee may request that the offeror readdress important aspects of the proposal such as the implementation schedule, level of support, type or amount of resources proposed, or contract terms and conditions.

Specific areas of the offeror's proposal that the Evaluation Committee may require to be addressed as part of the submission of best and final offers. For example, unacceptable terms and conditions may have to be amended or withdrawn as part of a best and final offer. Confidential or proprietary designations on non-proprietary portions of an offeror's proposal must be removed. Unacceptable licensing or other restrictions on the use of the product must be eliminated through a best and final offer amendment.

The due date and time for submission of best and final offers.

The final paragraph should emphasize the fact that the best and final offer is an opportunity for the offeror to improve the proposal by submitting revised proposed costs as well as other amendments.

If the best and final offer contains meaningful revisions to the original proposal, then all of the revised portions of the proposal must be reevaluated and points reassigned accordingly. The best and final offer step has produced some truly amazing results over the years saving the State literally millions of dollars. The step works best on single source awards. However, it is valuable every procurement as it is the only step in the process where the offeror is given an opportunity to amend the proposal. The RFP document encourages the offerors to

respond to the contract with specific wording changes and additions. Some of these changes and additions could preclude the signing of a contract. That is why they are required to be submitted up front as part of the proposal as opposed to the more traditional negotiation process that corporate attorneys thrive upon. For example, offerors have required that the contract be governed under laws of some other state than New Mexico. That requirement is not acceptable. The offerors were given the opportunity to amend their proposals eliminating the requirement. In some cases the proposals were amended, in others they were not and the offeror was eliminated from the process, deemed non-responsive. In other cases offerors have required payments in advance, which is prohibited by statute. There have been almost endless variations. That is why the Procurement Manager is responsible for reviewing the offeror's changes and additions with in-house counsel before this step in the process. Another area that causes serious problems is workmanship or other warranties that impact the offeror's proposed costs. For example, the contract may require that the contractor be bound and honor a six-month workmanship warranty where errors will be fixed during the warranty period at no additional cost to the agency. If one finalist agrees to the requirement and another does not, what does that do to the points awarded for cost by the formula? Obviously, the cost formula works only when the costs are proposed on an identical basis. Since, in this case, proposed costs are not on the same basis, the Procurement Manager has an obligation to get the inequity fixed as part of the best and final process. The Procurement Manager may demand that the second offeror resubmit costs and a written amendment eliminating objections to the six-month contractual workmanship warranty. The Procurement Manager may ask both offerors to propose costs on a new basis, e.g. a three-month workmanship warranty.

The key point of this discussion is that the model RFP best and final paragraph uses the phrase "offerors may be required to submit revisions...", and this step in the process is where proposal inequities and unacceptable conditions are eliminated.

DON'T ACCEPT RESPONSES SUCH AS "SUBJECT TO NEGOTIATIONS" AS AN ANSWER.

If the best and final offer request contains instructions for reproposing the offeror cost on a basis other than what was contained in the RFP document, then the change should be treated as an RFP amendment and identified as such.

After the award the Procurement Manager is responsible for preparing the proposals for public inspection. This simply means that one or more of the competing offerors may request copies of one or more of the proposals submitted by the other offerors. Of course, the winning proposal is the one most often requested. Public disclosure has to be timely. The problem arises when the offeror has designated all or sections of the proposal as "proprietary" or "confidential" when they do not meet the requirements for such designations. The best and final offer step in the process should be used to correct this type of problem. The Procurement

Manager should require that the extraneous designations be removed from the proposal as a condition of award. After the award it is generally difficult to get even the winning offeror to cooperate with the public disclosure requirements. This situation can extend the protest period and delay contract initiation. Finalist notification letters should be sent via facsimile or e-mail and U.S. Mail.

B. NOTIFY NON-FINALISTS

Non-finalists need to be notified too. They probably have a procurement response team on standby awaiting notification of the selection. Therefore, prompt notification of the non-finalist is required so that the procurement teams may be released for other duties.

The recommended notification procedure is a telephone call from the Procurement Manager followed by a written letter of notification. "This letter is notification that your company's proposal in response to RFP # was not selected as a finalist. On behalf of Secretary and the members of the Evaluation Committee, I want to express our sincere appreciation for the time and effort you and your staff have taken to respond to our Request for Proposals."

If the company representative requests a critique of the proposal, schedule the critique after the expiration of the protest period. The notification letter should be sent via facsimile and U.S. Mail.

C. COLLECT BEST AND FINAL OFFERS

The model RFP language states that the best and final offer must be submitted on a given date and time. This deadline is treated exactly like the proposal submission. Best and final offers submitted after the deadline are not accepted. There is no reason to hear an oral presentation from an offeror who is going to be deemed non-responsive for failure to adequately address required "best and final" offer requirements. The best and final offers must be verified for compliance with the requirements.

Disqualification decisions are made by the Evaluation Committee and disqualification letters must be promptly sent as well.

Best and final offers may need to be clarified which is another good reason for having them early for review prior to the oral presentation. The Procurement Manager may request a written clarification or the offer may be amended via hand written notes which are dated and signed by a qualified representative of the offeror's organization. Since the amended offer is binding, it must be signed by someone who has the power to contractually obligate the organization.

Best and final offers, as amended, are accepted only once. They are discussed and clarified at the oral presentation which concludes the contact with the offerors' organizations. For some unknown reason, some jurisdictions require a sealed best

and final offer that is opened sometime after the oral presentation has been concluded. That is not the way this process is conducted. The best and final offer must be submitted by the specified due date and time. The best and final offer should be discussed and clarified, if necessary, before the oral presentation/demonstration has been concluded.

The University of Texas at El Paso's Purchasing Department has published an easy-to-understand description of its BAFO procedure:⁵⁴

1. *A Best and Final Offer (BAFO) may be used on following negotiations, clarifications, oral presentations, site visits, etc. to clarify UTEP's requirements and/or the Proposer(s) proposal and pricing. BAFOs may be restricted to only those Proposers in the competitive range of scores after the initial evaluation of all proposals. The BAFO must allow the Proposer to:*

- *Modify the initial offer*
- *Update pricing*
- *Include any added value*

2. *The BAFO may be in the form of a letter with attachments. Regardless of format, the BAFO must address all pertinent changes and all submittal instructions.*

3. *The Buyer may include in the BAFO a list of modifications to the requirements of the RFP agreed to by UTEP. While the BAFO may, in some cases, be tailored to individual Proposers, care must be taken that all Proposers remain on the same competitive level and are proposing to substantially and materially the same conditions and requirements.*

4. *All discussions, negotiations, and clarifications cease upon issuance of BAFOs. Changes are not allowed in proposals or prices after BAFOs are received unless the Purchasing Agent makes a written finding that re-submission would be in UTEP's best interest.*

5. *After receipt of the BAFO, all Proposers submitting a BAFO shall be evaluated by the evaluation team based on the evaluation criteria.*

6. *Upon completion of the scoring by the evaluation team, the Buyer will tabulate the results and identify the top rated respondent(s) for award consideration. The results will be tabulated by taking the average of the evaluation team scores for each evaluation criteria.*

Checking References & Past Performance

Checking References and
Past Performance

There are tremendous variations in how past performance information is used in evaluating vendors and their proposals. Some procurement people don't use this information at all in determining the winner of a competition; others use it only to

confirm the winner. Some use this data as a pass/fail criterion; others score the information.

Here are five different people's views of past performance:

Past performance is the best indicator of future performance (usually).

...the results are often not useful. People are often unwilling to provide completely honest appraisals...

We don't score past performance but always ask 'what worked well and what didn't?'

I have never seen the case where the past performance has changed the course of a contract award...

(past performance) could be a game changer....

This Section deals with these sometimes opposing views of the use of and approach to past performance information.

This Section is divided into two parts. In the first part, John Adler, an acknowledged expert in public procurement, provides a high level view of past performance and the current debate underway about how this information should be used. The second section provides more detailed information about current practices related to past performance.

THE GREAT PAST PERFORMANCE DEBATE

BY JOHN ADLER⁵⁵, CPPO

To check references or not to check references - Is there a boiling debate over past performance in government contracting? It seems like every few years, this issue rises up in arguments among procurement professionals. In reality, past performance and reference checks are centuries old best practices. Past performance is the most reliable measure for forecasting future performance. Past performance is gauged through reference checks. Reference checks are commonly used for determining the character of potential employees or students. References are used to determine the number of stars for a restaurant or hotel. It is even rumored the Banks family checked references for Mary Poppins before they offered a contract and I have it on good authority that royalty checked professional references for the pyramid designers. Most of us check online for comments on car

dealers or realtors before we make a big purchase or sale. There is no question that past performance and reference checks are important in contracting.

So what is all this fuss about references? There was a hot debate over how past performance was applied in federal procurement. For many years, past performance only applied to determining responsibility. FAR Part 9 continues to require consideration of past performance in determining responsibility of bidders or proposers. It is pass or fail. For efficiency, the reference check was done only for the lowest bidder or most qualified or advantageous proposer.

This all changed with Federal Acquisition Streamlining Act (FASA) in 1994. While FAR Part 9 continues to apply, FASA now requires consideration of past performance as an evaluation factor in all negotiated procurements. This means, reference checks should be scored and compared when evaluating proposals. Does this mean the beleaguered contracting officer needs two reference checks for every procurement? No, but it does mean that past performance is applied in two different ways.

Past Performance and Responsibility - A responsible contractor is one that has the capability to perform the contract, including resources, personnel, facilities, capacity and INTEGRITY. We check references to discover how the contractor performed on other recent and similar contracts. If the contractor amassed a record of poor performance on multiple contracts, it will probably perform poorly again. Therefore the contractor is not responsible and we are compelled to reject the bid. This is not subjective. It is pass or fail and we are obligated to reject the failing contractor.

Past Performance in RFP's - Generally, the information we receive in a proposal is the proposer's representation of what it will do if awarded a contract. The proposal is filled with claims and statements attesting to the quality of the product or service, capabilities of the proposer and qualifications of key personnel. Evaluating past performance helps us validate the proposal claims and statements. When using past performance as an evaluation factor, we gain access to all sorts of valuable information that we can use in our discussions and evaluation. We can ask about the quality and timeliness of performance, if and why work was rejected, the nature, value and validity of claims, number of scope changes and price increases. We can even check past performance of subcontractors and key personnel.

Past Performance Myths - There is really no doubt as to the importance and utility of checking past performance. Unfortunately, there are a number of myths relating to past performance that need to be explored:

One bad reference will ruin an otherwise good record. False! Any business is capable of earning a bad reference. We should look for a pattern when reference checking. One bad reference, when the others are satisfactory should not result in a negative finding. References should also be recent and relevant. References older than three years are of marginal value, especially when compared to more recent references. A reference for window washing service may be relevant for a custodial contract but not so much for a fleet maintenance contract.

We can only check the references provided in the proposal. False! Any reference is fair game. We can check with any source who has recent and relevant contracting experience, including our own internal staff.

References are not likely to share information on poor experiences. False! Unlike with personal references, businesses and governments are usually more than willing to share good and bad experiences with contractors.

A new firm is at a clear disadvantage without references. Maybe! No references means we need to check elsewhere for our responsibility determination. We cannot use a lack of references as a basis for a not responsible determination. However, a proposer must have some basis for supporting its qualifications to perform a contract. This experience might have come as a subcontractor or employee on another contract. Claiming experience without providing a reference raises a red flag in any procurement.

We can always use past performance when evaluating proposals. False! While past performance is always fair game when checking for responsibility, we can only use past performance as an evaluation factor when it is stated as an evaluation factor in the RFP. Just to be safe, we should include a statement in every solicitation that we reserve the right to check references.

Past performance is used only when evaluating proposals. False! As previously discussed, past performance is one tool we use to determine responsibility. We also have an obligation to check responsibility when negotiating emergency or sole source contracts. If anything, information discovered in a reference check may be valuable leverage in negotiations.

Summary – When applied appropriately, past performance is a valuable tool to aid in determining a contractor’s responsibility and for evaluating proposals.

CURRENT PRACTICES

The Gold Standard

Imagine if one of the proponents responding to your most recent RFP had successfully completed an almost identical project using the same people, the same technology for a similar organization. Clearly, many of the risks related to completing this project on time, within budget and having the anticipated deliverables would be reduced significantly. Imagine if you were certain that this proponent had successfully completed a similar project! This is why past performance is the gold standard in evaluating proposals.

Past performance information can be extremely valuable when it is accurate, complete, timely and applicable to the proposal being evaluated. This standard, while easily described, is extremely difficult to achieve. Few organizations, including the U.S. federal government, have put in place the infrastructure which can deliver this assessment.

The award of contracts in the private sector is heavily influenced by a vendor’s strong performance record.

Let’s start with a description of past performance, what it is and how is it used. Here is one view from the perspective of the US Federal Government:⁵⁶

How to use past performance information

When used in the source selection evaluation process, past performance evaluation criteria must provide information that allows the source selection official to compare the “quality” of offerors against the agency requirement and assess the risk and likelihood of success of the proposed solution and success of contractor performance. This requires the information to be relevant, current and accurate. For example, the information requested of the contractor and evaluated by the integrated project team should be designed to determine how well, in contracts of similar size, scope and complexity, the contractor—

- *Conformed to the contract requirements and standards of good workmanship.*
- *Adhered to contract schedules.*

- *Forecasted and controlled costs.*
- *Managed risk.*
- *Provided reasonable and cooperative behavior and commitment to customer satisfaction.*
- *Demonstrated business-like concern for the interest of the customer.*

Sources of Past Performance Data

Past performance information can come from multiple sources. The two most familiar methods are asking the offerors to provide references and seeking information from past performance information databases. . .

There are other means of obtaining past performance information for evaluation. One very important means is through market research. Call counterparts in other agencies with similar work and ask them for the names of the best contractors they've worked with. Are there industry awards in the field of work? Who has won them? In fact, ask offerors to identify their awards and events of special recognition. Look for industry quality standards and certifications, such as ISO 9001:200 and SEI CMMI® (discussed in Step Five). Ask offerors what they do to track customer satisfaction and to resolve performance issues. Is there an established and institutionalized approach? In short, the integrated project team must take past performance more seriously than just calling a few references. Make the answers to these questions part of the request for proposals. Rather than have a separate past performance team, integrate this evaluation into the technical and management proposal evaluation effort.

In the remainder of this section, we will describe how reference information and past performance assessments are used in a variety of governments and agencies.

In the US Federal Government

The Federal Government has established infrastructure, policies and procedures to capture and utilize Past Performance data in evaluating proposals. While a detailed discussion of this topic is beyond the scope of this publication, it is important to understand the role of Past Performance in federal procurement.

Recently, the Congressional Research Service published a report on Legal Requirements and Issues related to Past Performance. Here are some of the highlights:⁵⁷

- *Congress enacted the Federal Acquisition Streamlining Act (FASA) of 1994, which established a statutory basis for agency evaluation of past performance.*
- *The requirement that agencies evaluate contractor performance was imposed, in part, because "performance assessment is a basic 'best*

*practice' for good contract administration, and is one of the most important tools available for ensuring good contract performance."*⁹ Additionally, Congress and the executive branch hoped that written evaluations of contractor performance would "improve the amount and quality of performance information available to source selection teams," which would, in turn, "enable agencies to better predict the quality of, and customer satisfaction with, future work."

- *A copy of the evaluation should be provided to the contractor "as soon as practicable after [its] completion,"²¹ with the contractor then having "a minimum of 30 days to submit comments, rebutting statements, or additional information." Disagreements between the contractor and the contracting officer are reviewed "at a level above the contracting officer," although "[t]he ultimate conclusion on the performance evaluation is a decision of the contracting agency."*
- *Because of the potential use of agency performance evaluations in source selection decisions, contractors are generally concerned about the contents of their evaluations and want to ensure that these evaluations are accurate and unbiased.*
- *Congress and the executive branch required agencies to consider past performance in source selection decisions in the hope that the government would obtain better performance under its contracts—and better value for its procurement dollars—by shifting the basis of its source selection decisions. Previously, agencies conducting negotiated procurements had relied heavily on what some commentators described as "complex technical and cost proposals," which these commentators asserted had "no correlation to the contractor's ability to perform the job."*
- *Consideration of past performance in source selection decisions was seen as an alternative to reliance on such proposals, especially by those who characterized past performance information as the best indicator of a contractor's ability to provide quality goods and services at a reasonable cost.*
- *Agencies sometimes also consider contractors' past performance in source selection decisions in ways that do not entail use of the past performance evaluation factor. For example, agencies may consider past performance as a component of other evaluation factors (e.g., experience, mission capability), as well as its own factor.*
- *If the proposed amendments are adopted, agencies would be required to evaluate contractors' performance on the following factors as "exceptional," "very good," "satisfactory," "marginal," or "unsatisfactory":*
 - I. *Technical (quality of product or service.)*

- II. *Cost control (not applicable to firm-fixed-price or fixed-price with economic price adjustment arrangements.)*
- III. *Schedule/Timeliness.*
- IV. *Management or Business Relations.*

There are significant problems associated with the current systems related to the collection and use of past performance data. For example:

- **Grade Inflation:** In order to avoid conflicts with Contractors, an agency awards higher scores than warranted by the Contractor's performance.
- **Stale Dated Information:** Evaluators consider information that is greater than three years old and may not be accurate or relevant.
- **Failure to Identify Source of Information:** Evaluators obtain information informally and fail to identify the source of the information or whether the information is reasonable and fair.
- **Failure to Select Appropriate Information:** Evaluators do not use performance information that applies to 'same or similar projects'.
- **Use of Untrue or Unsupported Information:** Evaluators use performance data provided by a disgruntled reference or one with a personal grudge against the contractor.
- **Failure to Discuss Information with Contractor:** Contractors are entitled to be informed of and provide input about negative performance issues.

What do I say in the RFP?

The State of Idaho's RFP Guidelines represent the most common approach. They require each offeror to submit a specified number of references and provide the offerors with a questionnaire for each reference.⁵⁸

References: Industry references may be required and used as an evaluation tool if identified as such in the RFP. A minimum of three references where the offeror has provided similar products or services should be used

Suggested Wording: The offeror shall provide a minimum of three (3) trade references including names of persons who may be contacted, position of person, addresses, and phone numbers where similar products or services similar in scope to the requirements of this RFP have been provided.

Optional Wording: Included with this RFP is a questionnaire that must be sent to any references cited in your proposal response. The questionnaire instructs references to fill out and return the document directly to the Division of Purchasing office. The offeror shall send this questionnaire to a minimum of three (3) trade references where similar products or services similar in scope to the requirements of this RFP have been provided. The offeror shall provide a listing of references where the questionnaires were sent, including names of persons, position of person, addresses, and phone numbers

Here's another approach used by Santa Clara County (CA):

PAST PERFORMANCES / REFERENCES

The Offeror's proposal shall include three different external references from clients who have completed their projects in the last three years, who are willing to validate the Offeror's past performance on similar projects of size and scope. The minimum information that shall be provided for each client reference follows:

- 1. Name of the contact person;*
- 2. Name of the company or governmental entity;*
- 3. Address of the contact person;*
- 4. Telephone number of contact person;*
- 5. Email address of the contact person;*
- 6. Description of the services provided and dates the services were provided*

What are the rules?

The state of Massachusetts has developed some specific rules for obtaining and using past performance information:⁵⁹

References

Pursuant to 801 CMR 21.06(9), a PMT may verify any references included in a bidder's response and conduct any other reference or credit checks it deems appropriate. Further, it may consider any documented references, including documented performance records of a bidder on file at the procuring department or solicited from other departments or entities. The PMT may conduct reference checks in a manner that it deems most appropriate and efficient. However, all such reference checks must be documented. Departments should use the same script or format of questions when conducting reference checks so that the results are consistent and fair to all bidders. A Sample Reference Review Form is available on the OSD Forms page and can be modified as needed. The team may also decide to accept unsolicited references. Reference checks may be made at any time during the procurement or contract.

Using the information – the process

Invariably, someone from the selection team makes the calls. If this is your job, what do you say? What questions do you ask? What is the purpose of the exercise? Clearly, you want to verify that the supplier did, in fact, do a very good job at that company.

Only the most naive evaluator would assume that a supplier will submit the name of a bad reference. The existence of a few solid references only demonstrates that the bidder has the potential for excellent work. It seems obvious that vendors will only submit the names of companies which they know will provide them with wonderful references. This is not always true. Occasionally, you will contact a reference that endorses the competition or doesn't remember the vendor at all.

There is another, more aggressive tactic. Phone the reference accounts, not only to learn about the vendor, but to learn the names of other purchasers. (Alternatively, ask for an extensive list of customers in the RFP.) Once this has been accomplished, call all of the purchasers who weren't listed as references.

The purpose of these calls to "non reference" accounts is to learn about the supplier from a broader range of customers. These customers will relate both good and bad stories about the bidder, and its products or services.

The purpose in contacting "non reference" accounts is not simply to identify problem situations (which may have been caused by the supplier or its products, the purchaser, third parties, etc.). The purpose is to learn what the supplier did when difficulties were encountered? What did the supplier do when its project leader left? What happened when the key user became ill? What did the supplier do when the customer required more support on short-notice? Did the supplier act in the customer's best interest? Did the supplier simply disavow responsibility? Did the supplier and purchaser solve the problem by working as partners?

If these conversations cause you to be concerned about the risks in dealing with a particular supplier, then discuss the information with the supplier. You may want to listen to the supplier's side before accepting the information.

If you do decide to incorporate this approach to reference checking into your evaluation procedure, you should modify your RFP so that the vendors are aware of the process.

Here's how one RFP informed the bidders that the reference checking would include a broad range of customers, not just the names they provided: "Our evaluation will be made primarily via checks with the bidder provided references and other industry sources and users known to the evaluation team."

Different Approaches to Past Performance Data

There are at least four different approaches to Past Performance data and numerous variations on each:

- Do nothing.
- Use references to confirm the winner.
- Evaluate references as a Pass or Fail analysis.
- Assign a score to references and past performance.

Each of these is discussed in the remainder of this Section.

Do nothing.

Some organizations don't bother asking for references in the RFP. Others, ask for references but don't use them. These organizations believe that their evaluation, without using any reference material, is sufficient to determine the best value proposal.

(Asking for references but not using this information can raise questions of fairness. Why ask for data from Proponents if it is not to be used?)

The use of reference information is not usually required by an agency's procurement policies or procedures. However, a disgruntled vendor could easily politicize an intended award by claiming that had references been checked, then the contract would not have been awarded to the recommended vendor. Also, should the selected Contractor fail to perform, management of the agency could challenge the competency of the Procurement Officer for not having checked references.

Use references to confirm the winner.

Some organizations complete the evaluation, identify the apparent winner and then check the references submitted by the apparent winner. And they only do this so that they can say that they did check references. Since they only do a cursory examination of the references provided by the vendor, it is reasonable to assume

that they never get bad news and the references do confirm that the vendor did a good job for them.

This naïve approach adds no value to the process and, in fact, is a sham.

Evaluate references as a pass or fail factor.

Some organizations evaluate Past Performance and either pass or fail vendors.

The State of Montana⁶⁰ has an RFP template that gives the author the option of evaluating references on a pass/fail basis:

Use this section if you want references to be evaluated on a pass/fail basis.

4.2.1 References. Offeror shall provide a minimum of (insert number) references that are currently using or have previously used supplies and/or services of the type proposed in this RFP. The references may include state governments or universities for whom the offeror, preferably within the last (insert number) years, has successfully completed (insert language pertaining to this type of contract). At a minimum, the offeror shall provide the company name, location where the supplies and/or services were provided, contact person(s), contact telephone number, e-mail address, and a complete description of the supplies and/or services provided, and dates of service. These references may be contacted to verify offeror's ability to perform the contract. The State reserves the right to use any information or additional references deemed necessary to establish the ability of the offeror to perform the contract. Negative references may be grounds for proposal disqualification.

The State of Mississippi's Dept. of Information Technology Services has adopted this approach. Here are the key features and the specific language they use in their RFPs:⁶¹

Vendors must provide at least five references.

The Seller must provide at least five (5) references consisting of Seller accounts that the State may contact. Required information includes customer contact name, address, telephone number, email address, and engagement starting and ending dates. Forms for providing reference information are included later in this RFP section. The Seller must make arrangements in advance with the account references so that they may be contacted at the Project team's convenience without further clearance or Seller intercession.

An unfavorable rating from one of the references can cause their proposal to be 'removed from further consideration'.

Any of the following may subject the Seller's proposal to being rated unfavorably relative to these criteria or removed from further consideration, at the State's sole discretion:

- *Unfavorable references that raise serious Failure to provide reference information in the manner described;*
- *Inability of the State to substantiate minimum experience or other requirements from the references provided;*
- *Non-responsiveness of references to the State's attempts to contact them; or*
- *concerns about material risks to the State in contracting with the Seller for the proposed products or services.*

References must be current and for a project 'similar in scope'.

References should be based on the following profiles and be able to substantiate the following information from both management and technical viewpoints:

- *The reference installation must be for a project similar in scope and size to the project for which this RFP is issued;*
- *The reference installation must have been operational for at least one (1) year.*
- *Sellers seeking "Value-Add" status must include Mississippi references. If there are no Mississippi references, then Seller must submit those that are within the 200-mile "Value-add" area.*

The State can request information from any previous customer.

The State reserves the right to request information about the Seller from any previous customer of the Seller of whom the State is aware, including the procuring agency and/or other agencies or institutions of the State, even if that customer is not included in the Seller's list of references, and to utilize such information in the evaluation of the Seller's proposal.

Assign a score to references and past performance.

Some organizations assign a score to the references and include the points in the overall evaluation. Sometimes, there is a minimum acceptable score, say 12 out of 20. Firms receiving 12 or fewer points would be eliminated from further consideration.

Typically, references are worth between 5% and 25% of the total points. The references are contacted for the “winner” or the “finalists”, the information is often obtained using a checklist or questionnaire, and a score is assigned.

This section contains two examples of how different organizations determine a score for past performance. The first example, from Idaho, is simple and straightforward; the second, from Washington State, is more complex.

State of Idaho⁶²

The state requires that each Vendor contact three references and have each complete a Reference Questionnaire that was included in the RFP. The References email or fax the form back to the Procurement RFP Lead from the State.

Their 2-page Reference Questionnaire asks the reference to rate the vendor on a scale of 0 to 10 (where 10 is excellent) on 9 different factors: quality of the vendor’s services, response time, meeting the schedule on time, providing deliverables on time, customer service, quality of the vendor’s staff, accuracy of the bills, ability to resolve problems, flexibility in meeting business requirements, and the likelihood of recommending this company to others.

Washington State

Here is how a Washington State agency described the process in its RFP:⁶³ The good news is that they provided the bidders with details of the reference information sought and the weight or score that was being assigned to references. The bad news is that this section is legalistic and difficult to understand. I expect that more than one of the vendors read this section two or three times and still didn’t understand it fully.

References

Points for References (700 sub category points, 560 minimum sub category points required to be considered responsive) Proposer(s) must provide 5 references with experience under existing and prior contracts of a scope similar to this RFP. The scoring is based off the 5 references provided, a maximum value of 140 points per reference.

Qualified bidders will be evaluated on performance under existing and prior contracts of a scope similar to this RFP. Performance information will be used for both responsibility determinations and as an evaluation factor against which

bidder's relative rankings will be compared to assure best value to the state. The state will focus on information that demonstrates the bidder's performance relative to the size and complexity of the procurement under consideration. References other than those identified by the bidder may be contacted by the state with the information received used to replace any of the 5 references provided by the bidder, in the evaluation of the bidder's past performance.

Past performance will receive relative consideration as designated in each segment. All subfactors are of equal importance. The bidder is responsible for providing a copy of Attachment "C" "Past Performance Questionnaire" to no less than 5 references for completion and delivery of completed sealed surveys with their RFP proposal response, and with a signed copy of Attachment "B" for each reference. The references will be evaluated and scored on the following categories. If bidder fails to provide references at the time the RFP is submitted the RFP may be deemed non-responsive.

The state will make additional copies of the completed sealed evaluations.

Product and Service – compliance with contract requirements

Timeliness of Performance – met interim milestones, responsive to technical direction, completed on time, including wrap-up and contract administration, met repair response times, etc.

Cost Control – within budget – current accurate and complete billings – relationship of bid costs to actual costs – cost efficiencies...

Business Relations – effective management, reasonable/cooperative behavior – flexible effective contractor recommended solutions – business like concern for customer's interests.

Community Relations – Citizen like concern for community safety.

Performance for non-cost factor (past performance) will be scored as raw points from 1(lowest) to 7 (highest) using the following definitions: (N/A responses = 0) The points will be totaled.

Performance Level 7: Performance indicates excellent capability and support of the contract. Performance stands above all others. There are no critical shortfalls.

Performance Level 6: Performance is above expectation, far exceeds desired quality, and stands out. May have shortfalls in a few non-critical areas.

Performance Level 5: Performance is slightly above expectations and for the most areas exceeds desired quality. Has exhibited some shortfalls in a few non-critical areas.

Performance Level 4: Performance meets minimum expectations and is generally adequate. Has exhibited shortfalls in performance in non-critical areas and does not stand out.

Performance Level 3: Performance is seldom complete, deficiencies exist in critical areas and limited shortfalls exist in non-critical areas.

Performance Level 2: Performance is not complete and serious shortfalls in capability exist.

Performance Level 1: Performance is non-existent in critical and non-critical areas.

Assessment of the bidder's past performance will be one means of evaluating the credibility of the bidder's proposal, and relative capability to meet performance requirements.

Information utilized may be obtained from the references listed in the proposal, other customers known to the state, consumer protection organizations, and other who may have useful and relevant information. Information may also be considered regarding any significant subcontractors, and key personnel records.

Evaluation of past performance will be based on consideration of all relevant facts and circumstances including litigation and investigation history. It will include a determination of the bidder's commitment to customer satisfaction and will include conclusions of informed judgment. Litigation and investigation 10-year history concerns may reduce reference scores, or may cause proposals to be considered non-responsive.

Award may be made from the initial offers without discussions. However, if discussions are held, bidders will be given an opportunity to address unfavorable reports of past performance. Recent contracts will be examined to ensure that corrective measures have been implemented. Prompt corrective action in isolated instances may not outweigh overall negative trends.

Bidder shall send their listed references (with a copy included with proposer(s) to the state) a letter to the following effect, authorizing the reference to provide past performance information to the state. The letter shall be given to each reference at the time they are given the survey (refer to Attachment B).

The Past Performance Questionnaire contained 5 categories of questions and required the reference to assign a performance score of between 1 ("non-existent") to 7 ("excellent capability; there are no critical shortfalls") for each. Here are the five categories of questions:

- Product and Service – 11 questions
- Timeliness of Performance – 2 questions
- Cost Control – 2 questions

- Business Relations – 3 questions
- Community Relations – 2 questions.

An Ending Comment

In this chapter, we've examined each of the nine different components of the evaluation process from the perspective of best practices. By adopting these best practices, you can reduce the risk that your process is flawed, or doesn't work properly, or is not "fair and open".

End Notes

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1. Reference 102. State of Nevada, Department of Administration, Purchasing Division, RFP Template, July 2012, pg 5, 41 pgs,
<http://purchasing.state.nv.us/Contracting/agtemp.doc>
 2. See NIPG Online Dictionary of Procurement Terms,
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Chapter Twelve

ENDING THE PROCESS

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Chapter Twelve

ENDING THE PROCESS

By the time you actually get to these tasks, the end issues, much has already been accomplished: the Statement of Work was developed; the RFP document was created and issued; proposals were received and evaluated; and, supplier presentations were held. In some jurisdictions, a second set of proposals was evaluated as the "best and final" offers. Your organization may have spent years of effort up to this point over a period of six to twelve months. All that remains is the relatively simple process of confirming the winner, finalizing the contract, dealing with the losers and closing the project file. These seemingly straightforward tasks are often completed in weeks rather than months. At this point, the end of the selection process is close at hand - only five tasks remain.

- *Confirming the Winner.* This chapter begins, for all organizations, when they have selected the "winner", the supplier and proposal judged best able to satisfy the organization's requirements. The specific set of tasks that remains depends on your organization's policies and procedures. In most jurisdictions a report is prepared by the Evaluation Committee for senior management. In it, the Chair recommends that a contract be awarded to the winner.
- *Finalizing the Contract.* Before starting the project, the contract specifying the goods and services must be completed. If your organization included its standard contract as part of the RFP, then there is little contract negotiation as only minor issues remain unstated.
- *Releasing the Results.* The winner, the losers, and the public all must be informed of the results of the selection process.
- *Dealing with the Losers.* Dealing with the losers involves paperwork and politics: sending out the official notice of the winner or the Notice of Intent to Contract, returning bid bonds and, in many jurisdictions, meeting with vendors to review the selection process and the reasons why they didn't win.

- *Completing the RFP File.* Completing the RFP file involves not only additional paperwork but also reviewing or auditing the just-completed selection process.

In the remainder of this chapter, these and other end issues are discussed. Not all of these issues apply to every RFP.

Confirming the Winner

When the evaluation team has completed its work, the project leader usually constructs a memorandum identifying the winner, its score, the proposed cost, and the most important features of its proposal. The memo seeks approval of the selection, approval of the expenditures, and authority to enter into contract discussions or negotiations. It is rare for the Procurement Officer or the Director of Procurement to have the authority to actually sign the contract rather than simply recommend that a contract be signed.

The recommendation is normally in the form of a memorandum – a report from the Evaluation Team to senior management. The supplier with the highest score may not always be declared the winner. In some jurisdictions, evaluators are permitted to declare that small differences in scores are not material. In these cases, the selection is based on the proposal "providing the most benefits" or "in the best interests of the State". (Some agencies use BAFO when scores are close in order to obtain more detailed information that will widen the point spread.)

In some jurisdictions, a Notice of Intent to Contract is published or distributed to all of the proponents. This notice provides a formal mechanism for any of the proponents to protest the award prior to a contract being signed. In Alaska, the Procurement Code provides that each bidder be informed of the intent at least ten days before the formal award of a contract. During the notice period, suppliers who believe they have been aggrieved can initiate a formal protest. Protest procedures are dealt with in the next chapter.

Only rarely will senior management reject the recommended winner. In this situation, it can either cancel the process or override the recommendation and award the contract to another vendor. Doing this, awarding a contract to any vendor other than the one recommended by the Evaluation Committee, invariably causes a flurry of activities by the vendor, its lawyers, in-house counsel and the media.

Sometimes, awards are challenged by a disgruntled vendor publicly, at Council meetings. This too generates a flurry of activities on behalf of Counsel and its staff. Usually, the recommendation is upheld but the award is often delayed while staff reassures Council that the process was 'fair, open and transparent'.

THE EVALUATION COMMITTEE REPORT

This report is a key element in the RFP process:

- It communicates with management and provides the rationale for award recommendations. The report is the basis of the final approval by senior management to proceed with the contracting process or to cancel the solicitation. 'No award' is often the correct management decision – not a good match to requirements, too high risk, too far over budget, or procedural errors.
- It can be the final quality assurance checkpoint prior to the award. The Evaluation Committee report can be independently validated against the proposals to insure it accurately reflects the proposals submitted.
- It can be the official communication to all offerors concerning the evaluation of proposals.
- It can be the foundation document for the resolution of any protests or lawsuits concerning the procurement.
- In some jurisdictions, such as New Mexico, the report is one of the four required documents maintained in the public record (contracting file) along with the RFP document, winning offeror's proposal, and the executed contract.

The Evaluation Committee Report should, at a minimum, contain the following:

- The names of the companies that submitted proposals
- The names and reasons for proposal disqualifications
- The names of companies selected for "Best and Final Offers"

- A brief narrative describing the evaluation findings by offeror for each evaluation factor highlighting offeror strengths and weaknesses that resulted in the number of points awarded.
- A spreadsheet showing all points awarded by evaluation subfactor of each offeror
- Evaluation Committee recommendations to management
- Names and signatures of the Evaluation Committee

The Evaluation Committee Report is often made public only after the contract has been finalized and executed by the contractor and the department management. The release of the Evaluation Committee Report can signify the initiation of the protest period. In some jurisdictions, some of this information is withheld as it is protected under the Access to Information Act. Furthermore, in some jurisdictions the names of the Evaluators are kept secret and only released with a Court Order.

This is an important document. It should be self-contained and include a description of the process, your analysis and scoring of the various proposals, your conclusions, any concerns you have about the recommendation, and the recommendation itself. It is judicious to assume that this document will be read by many of the suppliers who submitted proposals. In fact, this document could serve as the debriefing notes or could be (edited and) provided to each supplier after the contract has been signed.

New Mexico's RFP Procurement Guide contains two sample Evaluation Committee Reports. One of them is reproduced below¹ and can be easily adapted for use in other jurisdictions.

Evaluation Committee Report, Sample #2

*SUBJECT: Community Provider Payment System Needs Analysis
Evaluation Committee Report, RFP#60-665-11-04979*

In accordance with the Request for Proposals for the Needs Analysis for a Community Provider Payment System, three responses were received prior to the November 7, 1995, 2:00 p.m. Mountain Standard Time deadline. The responses were received from ADIA Information Technologies; BDM, Federal; and Fox Systems Inc.

The evaluation committee consists of Leroy Martinez, Information Systems Bureau; Leo Kahn, Financial Accounting Bureau; Yolanda Martin, Community Provider Payment Section; Gene Lujan, Information Systems Bureau; (all from

Administrative Services Division) and Laura McAllister, Program Manager, Long Term Care and Restorative Services Division. The Evaluation Committee met on November 16, 1995 to score the proposals using the criteria developed and included in the Request for Proposal. Specific evaluation instruments had been developed by the Committee prior to the referenced meeting date. (A copy of the evaluation instrument is attached.)

Based on the initial evaluation, and in accordance with appropriate guidelines, it was determined that the point spread was such that all offerors were considered finalists and would be invited to participate in oral presentations. The offerors were informed on November 17, 1995 of their status. Letters were sent on November 20, 1995 informing the offerors of the date, time and location for the oral presentations. Additional clarification for particular areas of the proposals were requested, along with a request for all proposed project team members to attend and participate in the orals agenda, which was described in the letters sent. All proposals were determined to be responsive to the RFP requirements.

The oral presentations were conducted in Room N3400 of the Harold Runnels Building on November 28, 1995; and in Room A1008 of the Harold Runnels Building on November 29, 1995. Following completion of the oral presentations, the Evaluation Committee met to score the oral presentations, to determine the impact of the best and final offers presented by the offerors on November 27, 1995, and to recalculate the cost evaluation sub-category.

Attached is a copy of the combined offerors evaluation summary. The report details the evaluation components, the sub-components, the point value, and the scoring for each offeror. Overall, Fox Systems, Inc. scored the highest point value for all evaluation components totalling 759 with BDM, Federal scoring 727 and ADIA Information Technologies scoring 628.

Project Approach

With regard to Project Approach, Fox Systems, Inc. scored 42 points out of a possible 50. The Fox Systems, Inc. proposal was the most applicable and thorough approach to the project, and included a case tool. BDM, Federal and ADIA Information Technologies tied in the scoring for thoroughness and applicability as well as for project management. BDM, Federal was scored one point less than Fox Systems, Incorporated in case/productivity tool sub-component ADIA Information Technologies lost points in this sub-component as their approach did not specify particular productivity tools. ADIA Information Technologies presented additional clarification regarding the project approach as part of the Best and Final Offer as well as detailed information flows related to the process for compilation of the Detailed Study Report and the Draft Requirements Statement; the Evaluation Committee considered this information during the evaluation process.

Methodology

With regard to Methodology, Fox Systems, Inc. scored 44 points out of a possible 50. This proposal was deemed the strongest particularly as a result of Information Engineering concepts, Business Process Reengineering, customization of the questionnaire, and Joint Application Design facilitation techniques approach for defining business requirements. This approach was particularly deemed valid as the Department of Health business needs encompass many varied programs, customers and business functions. BDM, Federal proposed the use of a "DOH CPPS" working group as a form of steering committee yet their proposed role was not really described, and appeared as a substitute deliverables committee. ADIA Information Technologies was awarded points for the description of their understanding of the STRADIS methodology and experience with the application of the constructs of this methodology.

Project P1an

Regarding the Project Plan, the offerors presented the following summary of hours by major task as identified in the Request for Proposals:

<i>Task</i>	<i>ADIA</i>	<i>BDM</i>	<i>Fox</i>
<i>1</i>	<i>272</i>	<i>214</i>	<i>56</i>
<i>2</i>	<i>1,296</i>	<i>526</i>	<i>1,006</i>
<i>3</i>	<i>32</i>	<i>15</i>	<i>84</i>
<i>4</i>	<i>0</i>	<i>5</i>	<i>0</i>
<i>5</i>	<i>600</i>	<i>486</i>	<i>1,090</i>
<i>6</i>	<i>646</i>	<i>28</i>	<i>104</i>
<i>Total</i>			
<i>Hours</i>	<i>2,264</i>	<i>1,274</i>	<i>2,340</i>

Fox Systems, Incorporated received 59 points out of a possible 75 because the overall project plan was perceived to be very strong particularly in the development of the draft requirements statement. BDM, Federal received the least number of points in the sub-category for feasibility. The project plan approach as described by BDM, Federal did not account for the many data bases and programs operated by the Department. BDM, Federal also lost points in the sub-category for the thoroughness and efficiency of the plan. ADIA Information Technologies tied with Fox Systems, Incorporated for the feasibility of the project plan. Particular strengths were reflected in the application of effort to the development of summaries demonstrating overall organization/function relationship and the current processes performed in each organization.

Offeror Experience

Regarding Offeror Experience, Fox Systems received 90 out of a possible 100 points. The combined experience of Fox Systems, Quadrant Consulting, and Corporate Resource Associates, Inc. (Quadrant and Corporate Resource Associates as subcontractors to Fox Systems, Incorporated) in the areas of health care, business process reengineering, JAD and IV&V services was indisputable.

Staff Experience

Staff Experience represents a total of 175 points with Fox Systems, Inc. receiving the highest number of points, 118. Health care experience was the determinant sub-category in this category of points. The Evaluation Committee recognized and rewarded Fox Systems, Inc. for bringing that health care staff experience to their offer. In other subcategories, BDM was deemed as offering more GUI Experience and Data communication/networking experience. However, Fox Systems, Incorporated was also recognized as bringing extensive staff experience in providing IV&V services.

Corporate References

Regarding the Corporate References category, minimal differences exist between Fox Systems, Incorporated and ADIA Information Technologies. References contacted for these offerors included additional contacts for the sub-contractors proposed. No negative or qualified references were offered by the contacts. In the case of BDM, Federal, two corporate references qualified their recommendations. Simon Padilla performed both the corporate and individual contacts on behalf of the Evaluation Committee. The results were discussed with the Evaluation Committee.

Individual References

There were minimal differences in the scores for the individual references category. References contacted provided no items of concern.

Cost

BDM, Federal submitted the lowest overall offer at \$118,949 and were awarded the maximum points in this category at 300. The Evaluation Committee expressed considerable concern at the oral presentation over the low number of hours submitted by BDM, Federal in their offer. Client Executive, Fred Mondragon stated that the deliverables would be provided to the satisfaction of the Department of Health without regard to the actual hours applied by BDM, Federal within the Firm, Fixed Price offered. Points to all offerors were awarded based on the cost formula contained in the RFP.

Cost	\$229,075	\$118,949	\$214,740
Hourly	\$101.18	\$93.37	\$91.77

IV&V rates submitted were not considered in the awarding of points for cost in accordance with the Request for Proposals. These rates are to be considered during contract negotiations.

Oral Presentations

As a result of the oral presentations, Fox Systems, Inc. scored highest with the Evaluation Committee. Of 100 points, they were awarded 93 points with the presentation quality and staff knowledgeable and experienced sub-categories reflecting the key point advantages.

Concerns

Concern is noted by the Committee regarding the Fox Systems, Inc. combination of the same individual being project manager and lead analyst. Concern is expressed by the Committee regarding the low number of hours the ADIA project manager would spend on the project as the overall quality of the analysis appears to revolve around this individual's overall expertise. BDM, Federal lost significant points because of the lack of staff knowledge and experience. This was accentuated by the fact that there was only one analyst represented by the offer.

Summary Table

<i>Evaluation Category</i>	<i>ADIA</i>	<i>BDM</i>	<i>Fox</i>
<i>Project Approach</i>	33	38	42
<i>Methodology</i>	39	38	44
<i>Project Plan</i>	49	30	59
<i>Offeror Experience</i>	53	42	90
<i>Staff Experience</i>	75	91	118
<i>Corporate References</i>	99	84	100
<i>Key Personnel</i>			
<i>References</i>	45	45	47
<i>Oral Presentation</i>	79	59	93
<i>Sub Total</i>	472	427	593
<i>Cost</i>	156	300	166
<i>Total</i>	628	727	759

As the Summary Table reflects, Fox Systems Inc. received the highest number of points in each category except cost.

ADIA Information Technologies received the second highest number of points in five categories and tied in one category.

BDM, Federal received the second highest number of points in three categories, tied in one category and received the maximum for cost.

Committee Recommendation

Based on the evaluation performed, the committee recommends selection of Fox Systems Inc. to perform the scope of work outlined in the Request for Proposal for the Needs Analysis for a Community Provider Payment System. Overall, the Fox Systems Inc. proposal is considered to be superior by the committee. Particularly impressive were the corporate and staff healthcare experience, business process reengineering expertise and thoroughness of the oral presentation. The committee further recommends that during contract negotiations appropriate wording be inserted in the contract to allow for temporary interruption of work. The need to

interrupt work would only result if federal or state program definitions relating to block grants significantly influence direction of the project.

Thank you for your consideration of this recommendation.

Finalizing the Contract

This section has a limited scope. It is not intended to be a guide to negotiation strategy or tactics. These issues are, in turn, highly influenced by different laws and permissible practices in different jurisdictions. Some jurisdictions permit "best and final" offers; others, do not. The amount of negotiation varies radically from none to all issues in the RFP and proposal being negotiated.

There are many books and courses focusing on contracts and the negotiation process. The remainder of this section contains some specific issues which frequently arise in discussions related to RFPs and contracts. These issues can be characterized as questions.

SHOULD WE INCLUDE CONTRACT TERMS IN THE RFP?

The more information contained in the RFP, the better the proposal. If there are mandatory contractual requirements, these should be stated in the RFP. If your organization has a certain set of terms and conditions that must be used, then state this in the RFP. It is very frustrating and unproductive to have the "winner" declared unresponsive for failure to agree to contractual terms that were not contained in the RFP, and not identified until the negotiations began.

There are many different approaches to contracts and RFPs. At one extreme, the RFP includes the purchasing organization's standard contract and it is a condition of the RFP that the supplier accept this contract if selected as the winner. This approach is both simple and rigid. There is little room for negotiations and in fact, negotiations occur only to clarify minor issues not dealt with in the draft contract. This is the case in South Dakota:²

The State generally does not sign standard contract forms submitted by vendors. The bid with the vendor's Signature affixed thereto, or submitted through the electronic procurement system shall constitute an offer to sell to the State under the terms and conditions contained therein . . .

At the other extreme, some organizations do not deal with the specifics of the contract in the RFP. They first select the "winner" and then begin contract

negotiations. This approach often takes much time and energy since there can be many significant issues not dealt with in the RFP or the proposal. For example, issues related to warranty, performance bonds, progress payments, and rules for accepting deliverables.

A few organizations leave contract issues totally out of the RFP. This gives the suppliers too much power during negotiations. New Mexico's advice on this issues is simple: "Finalize the contract before the award." Here's what New Mexico's RFP Guide³ states:

D. FINALIZE THE CONTRACT

The traditional approach to RFP based procurements used by many jurisdictions consists of the following steps:

- *Prepare and issue the RFP*
- *Receive and Evaluate Proposals*
- *Award a contract or price agreement*
- *Negotiate the contract or price agreement*

That approach places the procuring at the mercy of the selected contractor. There is an old adage "What the contractor gives in the proposal is taken away in the contract negotiation". The procuring agency has absolutely no leverage after the award. After the selection is public, the leverage shifts to the side of the contractor. After the public announcement governing bodies, or executives reporting to governing bodies, will frequently agree to almost any contractor term or condition to save face. Is it any wonder that public bodies find themselves with one-sided, unenforceable contracts? Is it any wonder that public funds are squandered on failed projects?

If you followed this guide, the traditional contract negotiations has been overlapped with the evaluation and there is generally very little required to finalize the contract. If you have not followed this guide, stop the procurement process. Finalize the contract before the award.

Between these two extremes, that of (i) not dealing with the contract in the RFP or (ii) making acceptance of a complete contract mandatory, are a number of commonly used approaches:

- The RFP contains the purchasing organization's standard terms and conditions which form the basis for contract negotiation; or
- The RFP contains a checklist of issues to be dealt with by each supplier in its proposal; or

- The RFP identifies those few key contractual terms that the purchasing organization deems as mandatory; or
- The RFP contains a draft contract but acceptance of all of its terms is not mandatory. The supplier is instructed in the RFP to review the draft contract and to identify in its proposal those clauses which are unacceptable, the reasons or problems, and to propose alternatives. In this way, the proposals identify those few contractual issues that must be resolved during contract negotiations.

LIMITING NEGOTIATIONS

If an organization does not put all of its contractual requirements in the RFP, then putting a time limit on negotiations can give the purchaser some needed leverage. If the contract language in the RFP is weak or vague, then announcing to a supplier that it has won creates problems. The supplier knows that you want its solution, that a contract must be executed and that the project has stringent deadlines. In this case, you have given the supplier a negotiating advantage. By simply delaying, the supplier can increase its pressure on you to sign the supplier's standard contract.

To counteract this situation, many organizations include a clause in the RFP that states that if negotiations cannot be concluded with the "winner" within 14 days, then the next highest supplier will be contacted and negotiations begun anew. This puts pressure on the "winner" to maintain a certain level of flexibility during negotiations.

THE CALIFORNIA APPROACH

In California, the state has adopted an approach in which a finalized contract must be fixed prior to the submission of final bids. In fact, then, the state negotiates a contract with each supplier submitting a proposal prior to the closing date for the final proposal (or uses previously approved contract language). Here is the specific language which establishes this process:⁴

In traditional competitive bidding, the contract to be awarded is included in the solicitation document in its final form, and any alteration by a bidder will result in rejection of its bid. The State recognizes, however, that the various suppliers of EDP goods and services have developed pricing structures and procedures that differ from each other, and that, if the State were to specify the exact language of the contract to be executed, it could result in firms being unwilling to do business with the State of California because of contract statements which are incompatible with their business methods. In recognition of the above, the form of the contract(s) contained in the attached appendices permit, where appropriate, the

substitution and/or insertion of vendor-specified language by the bidder. All such substitutions and insertions must be approved by the Department of General Services . . .

The State will prenegotiate repetitively used terms and conditions with suppliers at their request. These prenegotiated terms and conditions will be kept on file and bidders may refer to them as their proposed contract language for individual solicitations. . .

To comply with the requirements of competitive bidding procedures, the contract must be fixed prior to the submission of the Final Bids; no negotiation is permissible after that time . . .

SHOULD WE INCLUDE THE PROPOSAL AS PART OF THE CONTRACT?

The simple answer is 'yes'. Most contracts state that the contract describes the entire deal. So if there are special features or services offered in the proposal, they should be included in the contract. Many organizations do not want to take each and every proposal feature and transcribe it into the contract document. There are, therefore, two choices. Transcribe the most important features from the proposal into the contract, or include the proposal as part of the contract. Many organizations, as a normal practice, include both the supplier's proposal and the RFP document as part of the contract. The contract also includes a statement regarding the precedence arrangements. Typically, the contract takes precedence over the proposal and then the RFP. If the contract doesn't deal with an issue, then the terms in the proposal (or RFP) are used. The contract states that the attached proposal is a part of the contract and that the contract terms take precedence over the attached proposal. In this way, all of the vendor's proposed features, terms, and deliverables not dealt with in the contract itself are made part of the contract via the attached proposal.

IF NEGOTIATIONS ARE NOT PERMITTED, CAN WE CHANGE THE PROPOSAL?

Some jurisdictions do not permit negotiations, only minor clarifications of the proposal or RFP information. (This is the most common approach used by public sector entities in Canada.) Having declared in the RFP that the selection will be on the basis of the stated criteria, you must stick with it. It is not "visibly fair" to use the negotiation process as a method of obtaining major changes to the vendor's proposal based on new conditions or requirements. Quite possibly, one of the other vendors would be willing to provide an even better deal on your modified requirements.

If there is no flexibility in negotiating major changes to the winning vendor's proposal, there is not much left to do during this step. Typically, items and timings are clarified. Issues not previously dealt with in either the RFP or the Proposal are resolved. These are usually small items involving logistics, minor contract terms, or timings. They are not usually major cost items or substantive issues. For example, the proposal may have identified a training program. The details of this program in terms of when, where, etc. may be part of the negotiation/clarification process.

CAN WE SIMPLIFY CONTRACT NEGOTIATIONS?

Contracts are complex and require special skills to understand and negotiate. However, many procurement activities are being decentralized these days. To assist diverse groups in developing acceptable contracts and to assist these groups to deal with suppliers effectively, many organizations have developed tools. These tools take several forms: a contract expert available from a central group to support the Procurement Officer, standardized terms and conditions, standardized checklists of features, compulsory terms and conditions, and contract handbooks.

In an ideal world, lawyers working for an organization or retained by it would be accessible on short notice and readily available to the Procurement Officer. It would then be a simple matter, one of a meeting or two between the Procurement Officer and the Lawyer, to ensure that a detailed contract was included in the RFP. The lawyer would also then be a member of the team to ensure that the RFP incorporated best legal practices.

However, this is rarely the case. More often, lawyers working for public sector bodies are busy with policy and major legal initiatives; they are difficult to access; their time is at a premium; and, in some cases, they know little about procurement law. It is rare that the Procurement Officer has easy access to a lawyer knowledgeable about public procurement law. But procurements must still be done expeditiously. And Procurement Officers have to get on with their work. To compensate, in part, for the difficulties in getting on-going advice and assistance from lawyers before and during the RFP process, many organizations have developed standard terms and conditions, checklists, and handbooks to support the preparation of a contract by the Procurement Officer rather than a lawyer.

In many organizations, lawyers are simply not available. Other methods must be used to protect the organization's interests and to develop reasonable contracts. Checklists are the simplest tools; handbooks, the most complex.

WHAT IS THE ROLE OF MODEL CONTRACTS IN THE PROCUREMENT PROCESS?

Model contracts are valuable tools. Their use can reduce the risks associated with complex contracts, identify issues for consideration and resolution during the negotiation process, and serve as models for similar procurements in other jurisdictions.

This section contains a sampling of their use and examples from several jurisdictions. We start with New Mexico. We then highlight Montana and North Dakota, two states having developed both model contracts and guidelines. The final entry, the best we've found, is from the Government of Australia which has a web-based "build a contract" feature.

Contract negotiation is an important and critical element in dealing with suppliers. It is part of the procurement process. There is little point in including an incomplete or poorly drafted contract in the RFP, or introducing it into the negotiation process. It is the contract that formalizes the intent and agreement of the parties and must therefore accurately document all the terms and conditions. The contract must be enforceable in court. It must also reflect the understanding and expectations of both parties.

In many RFP processes, it is the procurement people who are responsible for ensuring that the contract protects the agency, and reflects a shared understanding of the entire business deal. Procurement people have traditionally been at a disadvantage when dealing with suppliers. Few procurement people are lawyers; but suppliers are very knowledgeable about protecting their rights and the nuances of the law. Increasingly, procurement people are dealing more and more with unfamiliar technology. To make matters worse, many procurement teams have little access to legal help during the contract development phase of procurement.

Model contracts are an attempt by organizations to ensure that their rights are protected, without relying heavily on expert legal help for each new contract. A model contract serves as a template for developing a specific contract. There is a high initial cost associated with developing a model contract for use throughout an

organization. Ideally, the model contract is accompanied by some training, a set of instructions, and possibly a web-based fill-in template. It is more than simply a list of contract clauses.

Model contracts are only developed for commonly re-occurring complex purchases; e.g., the acquisition of new computer systems, or software, or a systems integrator. Almost all model contracts are for information systems and technology because of the volume and frequency of technology-based RFPs, the high value of the procurement, and the inherent complexity of information technology acquisitions.

These contracts serve as a starting point for development of the specific and complete contract to be included in the RFP.

Because most procurement people are neither lawyers nor subject experts (in areas such as network protocols, systems integration, or bridge construction), they often rely on model contracts. Over the years, many organizations have expended great amounts of time and energy to develop these contracts. The use of these contracts reduces the risks to the buyers by identifying issues, risks and remedies. "Home grown" contracts developed by inexperienced staff are simply too risky, prolong negotiations, increase prices, and often abandon legal remedies which would be available to the agency.

In many jurisdictions the procurement authority has prepared a set of model contracts designed to meet the majority of the needs of their agencies and departments. These issues are not unique to procurement in the U.S. but exist in many other places including Australia, Canada and the United Kingdom. In Australia, the Victoria State Government has developed a set of principles for their model contracts. These principles can be applied in other jurisdictions. They believe that contracts should be based on the following principles:

- terms and conditions that are fair to all parties - the contract should incorporate a spirit of mutual trust
- schedules and annexes that allow users flexibility in customising contracts to suit their individual requirements
- a format that is user friendly, and in 'plain' English style
- a style and language suited to the end user of the product and services
- consistency in terminology, definitions and style

- inclusion of:
 - a dispute resolution mechanism
 - performance incentives
 - allocation of risks

The last word on this topic also goes to the State of Victoria, Australia where their Purchasing Board cautions agency procurement people about using standard or model contracts. They state that the use of the model contracts is not a substitute for proper planning, thinking about what you actually require, negotiating terms to fit particular requirements, or developing a good working relationship with a supplier.

A model contract is much more than a standardized set of terms and conditions which is the basis for a purchase of goods. These contracts are complete contracts, fully describing specific types of procurements such as computer applications software. Models differ in their level of detail, the amount of instruction and tutorial material provided, and the topics covered.

Many jurisdictions provide good examples of these model contracts and can be major sources of information. For example, in Victoria State (Australia), they have developed model contracts, a checklist of contract clauses and a 35-page user guide. All of these resources can help you in planning RFP process and in negotiations.

In the remainder of this section, we will provide a brief survey of how model contracts are dealt with in several representative jurisdictions. All of these contracts deal with different aspects of information technology, reflecting the frequency, volume and complexity of procurement acquisitions. Each of these examples is web-based so that the information can be centrally managed, and, at the same time, easily accessible by people throughout the organization.

- State of New Mexico
- State of Montana
- State of North Dakota
- Government of Australia

We'll begin with the State of New Mexico which has a contract template. This is followed by Montana and North Dakota. The survey ends with an example from

Australia where they have implemented a web-based intelligent system for creating contracts.

1. State of New Mexico

This is our starting point in the development of a complete, robust, easy-to-use model contract facility.

This state has developed an excellent RFP Procurement Guide, consisting of more than 200 pages. In addition to the Guide, the state has published a Model RFPs Template. This 48-page RFP⁵ references the State's Contract Template for large technology acquisitions. This 28 page template consists of 33 clauses and can be used as a checklist in developing contracts in other jurisdictions:

Contract Clause Checklist

- | | |
|---|---|
| 1. Definitions | 18. Liability |
| 2. Scope of Work | 19. Assignment |
| 3. Compensation | 20. Subcontracting |
| 4. Acceptance | 21. Release |
| 5. Term | 22. Confidentiality |
| 6. Termination | 23. Conflict of Interest |
| 7. Termination Management | 24. Records and Audit |
| 8. Indemnification | 25. Amendment |
| 9. Intellectual Property | 26. New Mexico Employees Health Coverage |
| 10. Intellectual Property Indemnification | 27. New Mexico Employees Pay Equity Reporting |
| 11. Warranties | 28. Merger; Scope, Order of Precedence |
| 12. Contractor Personnel | 29. Notices |
| 13. Status of Contractor | 30. General Provisions |
| 14. Change Management | 31. Survival |
| 15. Independent Verification and Validation | 32. Time |
| 16. Default/Breach | 33. Force Majeure |
| 17. Equitable Remedies | |

2. State of Montana

Their web site contains much useful data:

- An RFP Template
- Standard Terms and Conditions
- A Standard Contract (template)

The RFP Template⁶ is 26 pages in length. It contains links to the State’s IT strategic plans, current environment, policies and standards. It has a Scoring Guide that is more precise than similar guides found in other jurisdictions. For example, here is their description of a Superior Response:

Superior Response (95-100%): A superior response is an exceptional reply that completely and comprehensively meets all of the requirements of the RFP. In addition, the response may cover areas not originally addressed within the RFP and/or include additional information and recommendations that would prove both valuable and beneficial to the agency.

Appendix A of this RFP Template contains a link to Standard Terms and Conditions. Appendix B contains a link to the most recent Standard Contract.

Standard Terms and Conditions is a 4-page list of all required statements. This list must be tailored to the type of solicitation being considered.

A Standard Contract (template) that contains a contract template. Montana has developed an RFP Template which includes a Sample Contract. They do not have a set of model contracts for different types of IT acquisitions. The Sample Contract is eleven pages long and represents the minimum acceptable set of terms and conditions. The Sample Contract has 37 clauses and deals with issues such as: Parties, Effective Date, Payment, Insurance and Contract Performance Assurance.

Here are the clauses from their IT Contract template:

- | | |
|--|--|
| 1. Effective Date, Duration, and Renewal | 13. Required Insurance |
| 2. Cost Adjustments | 14. Compliance with Workers’ Compensation Act |
| 3. Services and/or Supplies | 15. Compliance with Laws |
| 4. Warranties | 16. Disability Accommodations |
| 5. Consideration/Payment | 17. Technology Access for Blind or Visually Impaired |
| 6. Cooperative Purchasing | 18. Registration with the Secretary of State |
| 7. Exclusive Contract | 19. Intellectual Property/Ownership |
| 8. Prevailing Wage Requirements | 20. Patent and Copyright Protection |
| 9. Access and Retention of Records | 21. Contract Performance Assurance |
| 10. Assignment, Transfer, and Subcontracting | 22. Contract Oversight |
| 11. Hold Harmless/Indemnification | |
| 12. Limitation of Liability | |

23. Contract Termination	31. Choice of Law and Venue
24. Event of Breach – Remedies	32. Tax Exemption
25. Force Majeure	33. Authority
26. Waiver of Breach	34. Severability Clause
27. Conformance with Contract	35. Scope, Entire Agreement, and Amendment
28. Liaisons and Service of Notices	36. Waiver
20. State Personnel	37. Execution
29. Meetings	
30. Transition Assistance	

3. North Dakota

This State does an excellent job of providing information to assist its Agencies in developing effective IT contracts. The state provides information via 4 documents on its web site:

- ND Information Technology Department (ITD) IT Procurement Web Page
- Contract Drafting and Review Manual
- ND RFP Template for IT Products/Services
- ND ITD Contract Guidelines
- Technology Contract Template

ND Information Technology Department (ITD) IT Procurement Web Page⁷ contains a list of IT Procurement Templates and Resources, Procurement Standards and Exception Requests as well as Featured State Contracts.

Contract Drafting and Review Manual⁸ is produced by the Office of Attorney General and is a 'guide for drafting and reviewing contracts entered into by an agency of the State of North Dakota'. It was written so that a preliminary draft contract could be prepared by a non-attorney for review by the Agency's legal counsel. This 73-page manual is a tutorial containing information about a wide variety of contracts, including IT. It contains information which would be very helpful to procurement people who have not received training in contracts.

It begins with a brief note about the complexity of IT contracts and ND law. It then describes Contract Formation. The Chapter on Contract Clauses describes the purpose of each Clause and provides Recommended Language.

ND RFP Template for IT Products/Services⁹ is a 65-page document with extensive information to assist the procurement person who is creating an RFP. This Template

closely resembles the Alaska Template described in Chapter 6 but modified to apply specifically to IT.

This Template contains many ‘best practices’ related to the procurement of IT goods and services. For example, it makes the following recommendations to the person preparing the RFP:

- That the vendors be given at least 21 days from the release of the RFP until the proposal due date.
- That the RFP contain the most recent copy of the State Technical Architecture Overview document, the State’s IT Standards document,
- That the author “consider disclosing the budget if funds are limited or it is difficult to estimate the project cost.”
- That the author provide detailed information for technical specifications, requirements and functionality.
- That the vendor propose the licensing options available and discuss advantages of each option.
- That the Vendor describe its Open Source Software strategy.
- That the vendors be aware of STD009-05 Project Management of Large Information Technology Projects.
- That the vendor describe its software maintenance and upgrade policies.
- That a “Proof of Concept” demonstration may be required.

Now that we’ve discussed the general organization of this IT RFP Template, let’s examine what it says about Contracts. Contracts are dealt with in Section Four of the RFP, 12 pages in length. Here are the topics covered:

GENERAL CONTRACT INFORMATION

4.01 Contract Term, Extension and Renewal Options

4.02 Contract Type

- 4.03 Standard Contract Provisions
- 4.04 Proposal as a Part of the Contract
- 4.05 Additional Terms and Conditions
- 4.06 Supplemental Terms and Conditions
- 4.07 Contract Approval
- 4.08 Contract Changes - Unanticipated Amendments
- 4.09 Indemnification and Insurance Requirements
- 4.10 Taxes and Taxpayer Identification
- 4.11 F.O.B. Point and Freight
- 4.12 Proposed Payment Procedures
- 4.14 Payment Terms
- 4.15 Right to Inspect Place of Business
- 4.16 Inspection & Modification - Reimbursement for Unacceptable Deliverables
- 4.17 Termination of Contract
- 4.18 (missing)
- 4.19 Bid Bond – Bid Security - Performance Bond - Surety Deposit
- 4.20 Liquidated Damages

The contract information in the body of the RFP is simply a discussion and a re-statement of the information contained in the complete contract which is included in Attachment 2 of the RFP. The author is informed in Attachment 2 to include a complete contract and that in developing the contract the author should consult the sample IT Service Contract, the Contract Review Manual and consult with the Agency's legal counsel.

The Contract Section of the RFP Template provides advice, assistance, direction and examples for the clauses being discussed. Not all contract clauses published in Attachment 2 are discussed.

Here are two representative sections. The text in the boxes contains instructions to the procurement person preparing this RFP.

Standard Contract Provisions

NOTE: THIS SECTION MUST NOT BE REVISED OR DELETED.

ATTACH THE CONTRACT YOU INTEND THE AWARDEE/OFFEROR TO SIGN AS ATTACHMENT 2. A LINK TO THE SAMPLE IT SERVICES CONTRACT IS PROVIDED IN ATTACHMENT 2. FOR ADDITIONAL INFORMATION, SEE THE ATTORNEY GENERAL CONTRACT DRAFTING AND REVIEW MANUAL. CUSTOMIZE THE SAMPLE IT SERVICE CONTRACT FOR THE PROCUREMENT YOU ARE CONTEMPLATING.

THE OFFICE OF THE ATTORNEY GENERAL RECOMMENDS YOU HAVE YOUR ASSISTANT ATTORNEY GENERAL OR YOUR AGENCY'S SPECIAL ASSISTANT ATTORNEY GENERAL REVIEW ANY CONTRACT OBLIGATING MORE THAN \$250,000 .

The Awardee will be required to sign and submit a contract substantially similar to the contract attached to this RFP (Attachment 2). The CONTRACTOR must comply with the contract provisions set out in this attachment. Any objections to the contract provisions must be set out in the Offeror's proposal. The STATE will not permit alteration of these provisions without prior written approval.

The STATE instructs Offerors to contact the procurement officer in writing by the deadline set for questions with any concerns regarding the contract provisions.

4.12 Proposed Payment Procedures

NOTE: CHOOSE APPROPRIATE PARAGRAPH, REVISE AS NEEDED.

PREPARERS SHOULD BE AS SPECIFIC AS POSSIBLE REGARDING PAYMENT PROVISIONS. FOR IT SERVICES CONTRACTS WHERE THE VENDOR IS RESPONSIBLE FOR DELIVERING A FINAL SOLUTION/PRODUCT, WE STRONGLY RECOMMEND PAYMENTS BASED UPON ACCEPTANCE OF DELIVERABLES. AGENCIES MAY WANT TO CONSIDER RETAINING A PERCENTAGE OF THE CONTRACT AMOUNT UNTIL THE CONTRACT IS SUCCESSFULLY COMPLETED.

THE EQUAL PAYMENTS OPTION IS LEAST DESIRABLE AS COMPARED WITH DELIVERABLES-BASED PAYMENTS. RISK TO THE STATE INCREASES IF PAYMENTS ARE NOT TIED TO ACCEPTANCE OF DELIVERABLES.

Single Payment upon Acceptance of Deliverables

The STATE will make a single payment when the STATE's project manager accepts all of the deliverables and the contract is completed.

OR

Negotiated Payment Schedule with Progress Payments

The STATE will make payments based on a negotiated payment schedule that is associated with progress toward mutually agreed deliverables and milestones.

OR

Negotiated Payment Schedule with Progress Payments and Retention

The STATE will make payments based on a negotiated payment schedule that is associated with progress toward mutually agreed deliverables and milestones. These progress and milestone payments will be subject to retention of PERCENTAGE. The STATE will pay the cumulative retention upon final acceptance of all contract deliverables and completion of the warranty period.

OR

Equal Payments

The STATE will pay the entire contract amount in NUMBER equal payments. The STATE will make each incremental payment upon submission of a progress report by the vendor subject to approval by the STATE's project manager. The STATE will not make the final payment until the entire contract, including NAME SPECIFIC TASKS OR REPORTS, are completed and approved by the STATE's project manager.

NOTE: REVISE OR DELETE AS NEEDED.

YOU MAY OMIT THIS CLAUSE IF THE AGENCY INTENDS TO ALLOW PREPAYMENT.

THE ATTORNEY GENERAL'S OFFICE AND STATE AUDITOR DISCOURAGE THE USE OF PREPAYMENT PROVISIONS. AN AGENCY SHOULD STRONGLY CONSIDER REQUIRING THE CONTRACTOR TO POST A PERFORMANCE BOND IF THE CONTRACTOR REQUIRES PREPAYMENT.

Advance Payments

The STATE will not make any advanced payments before performance by the contractor under this contract.

ND ITD Contract Guidelines¹⁰ is a 4-page document which provides government entities with a high level view of the issues they should consider in developing an IT contract.

Scope of Guideline

The scope of this guideline is to provide government entities with items for consideration in the preparation of information technology related contracts by providing the necessary management tools in the form of authorities and responsibilities, change management, invoking remedies, problem detection and resolutions and acceptance and validation of deliverables.

This document discusses the critical elements of an IT contract and identifies available ND resources including guidelines, example and templates.

Technology Contract Template¹¹ is a 28-page document that is the prescribed template for drafting Information Technology Contracts. It prescribes the specific language for 49 clauses. For most of these clauses, the document simply provides the legal language. For a few of them, it provides some guidance and direction about the meaning and impact

of including that specific clause. For example, Clause 6 deals with Time Is of the Essence. Here is the discussion provided in this document:

TIME IS OF THE ESSENCE

Note: Generally, if time is not of the essence, reasonable delay in performance does not constitute a material breach; unreasonable delay constitutes a material breach.

Time is of the essence when a CONTRACTOR's service(s) must be performed within a specified time and that performance is essential to require performance on the part of STATE (CONTRACTOR needs to do their part in order to require STATE to do its part). CONTRACTOR is not generally afforded any opportunity to cure a delay in performance and any delay may be a material breach of the contractual terms and conditions. In a contract in which time is of the essence, STATE must be prepared to terminate a contract if a material breach occurs. Waiving "Time is of the Essence" for a CONTRACTOR's delay in performance at any time during the contract term could result in a waiver of all "Time is of the Essence" milestones unless otherwise agreed upon in writing by STATE and CONTRACTOR.

If time is not of the essence, delete section 6.

CONTRACTOR hereby acknowledges that time is of the essence for performance under this Contract unless otherwise agreed to in writing by the parties.

Government of Australia

Australia has set the standard for model contracts.¹² They have developed a 'smart system' that can be used to generate different types of information technology contracts. The system assists a user to build a contract by presenting contract clauses which the user can select and modify in a working document. The accompanying 'hot links' generate information and examples about each contract as it is being developed.

The Government Information Technology and Communication contracting framework (GITC) website contains:

- extensive information to help in developing IT contracts
- the model contracts themselves
- a comprehensive user guide
- a 'build your own' contract facility.

What is GITC?

This version was developed to achieve the following outcomes:

- *Simplifying the contracting process for the purchase of IT related products and services*
- *Introducing Terms and Conditions that are written in plain English*
- *Encouraging a more equitable distribution of risk between a customer and a contractor*
- *Fostering consistency and predictability in contractual terms*
- *Providing a web site that allows for dynamic creation of contracts for particular types of IT products and services.*
- *GITC can be used for a range of procurement types. These include:*
 - *simple procurement of IT products such as PCs, servers and licensed software*
 - *complex procurement of IT services (and the provision of related products) such as business consultancy, systems integration and facilities management.*

The remainder of this section contains information about the framework of the contract, the types of goods and services that are covered as well as the user guide and the on-line 'build a contract' facility. This material is a quote from their website.

Framework

The Framework offers:

Terms and Conditions

Contract Details

Appendices and Attachments to the Contract Details

Categories of products and services

A User Guide.

1. Terms and Conditions

The Terms and Conditions are designed to be standard for the majority of contracts put in place under this framework. They can assist buyers and suppliers to achieve consistency regarding the obligations of each party in any contract. Using the Terms and Conditions in their standard form can also minimise transaction time and reduce the level of resources required to approve new contracts. The Terms and Conditions can help to identify many common areas of concern for both parties, such as:

- *procedures for dispute resolution*
- *indemnities*
- *conflicts of interest*
- *confidentiality of information*
- *resources and facilities offered by either party*
- *liability*
- *intellectual property of information or products*
- *access to premises*
- *monitoring of performance.*

The Terms and Conditions can be adapted for the specific needs of the contracting parties. However, the Contract Details should be used in the first instance to state the requirements.

2. Contract Details

The link between the Terms and Conditions and the Contract Details has been developed with considerable care and this relationship should not be altered without seeking professional legal advice. It is important to bear these issues in mind when working with the GITC.

The Contract Details specify the requirements for the provision of products or services. Against each heading in the document, you are prompted to specify your particular requirements of the other party to the contract. For example, against the field Warranty Period, the user inserts the amount of time for a warranty period. The Contract Details also contains references to clauses in the standard Terms and Conditions. This prompts the user to refer to these conditions while filling out the details.

3. Appendices and Attachments to the Contract Details

GITC contains a number of Appendices and Attachments used to further define the requirements for a transaction. When the Contract Details are generated, the documents of most relevance are provided for downloading and printing. For example, a contract for Software Development will contain Appendix 5 and its Attachments for an Escrow Agreement.

4. Categories of services and products

The Build a Contract facility allows you to tailor the Contract Details to include only relevant information for a contract. This tailoring is achieved by choosing the specific category (or categories) of products and services you wish to purchase or provide. The site offers you the following broad categories to choose from:

- *Consultancy services*
- *Managed services*
- *Software*
- *Hardware*

Each of the above categories contains particular references to clauses in the Terms and Conditions. These references in turn are provided in the Contract Details. Therefore, when you build a contract, the Contract Details is generated to contain only the clauses that are particular to the requirements of the contract.

5. The User Guide

The User Guide provides an explanation of how to use the Terms and Conditions and, to some extent, how to apply the Head Agreement and fill out the Contract Details.

Please note that the information in the User Guide is merely for the benefit of users writing a contract and should not be used in any circumstances to interpret the contract or be considered as any form of representation to a contractor.

Categories of Products and Services

When building a contract under the GITC, it will be necessary to select one or more categories of products or services in the Build a Contract section of the web site. The categories selected will determine the types of clauses in the Terms and Conditions that will constitute a contract.

Below is a listing of the major categories in GITC 4.1.

Software

- Licensed software
- Software development
- Multimedia development

Hardware

- Hardware purchase
- Hardware maintenance
- Photocopier and fax purchase

Build a Contract

GITC's web site contains an interactive program which anyone can use to develop a contract. You simply access the 'Build a Contract' page, select the contract type and input data. At the end, you save your contract. The program provides significant content and functionality:

- Creating a new contract
- Editing the contract details
- Saving the contract
- Printing the contract
- Adding or removing categories from the contract
- Opening an existing contract.

Suppose you want to create a contract for systems integration services. Click on 'Build a Contract' and select 'Systems Integration'. You are then presented with a 16-page template containing all of the required clauses for this type of contract and space for entry of your data. Each of these clauses has a hotlink to the corresponding section of the user guide. For this contract, there are more than 30 clauses. You are also provided with a list of required Appendices such as Acceptance Testing and a hotlink to the corresponding document or template.

Releasing the Results

In a world where timing is everything, there is some debate and disagreement among public procurement officials as to when RFP results should be released. Public procurement agencies must take care in ensuring consistency in the application of general rules about the release of results. Any real or perceived inconsistency in the process can create an atmosphere of distrust by both management and the vendor community. Purchasing officials must ensure that the integrity and credibility of the RFP process and the resulting award are not compromised by the untimely or inconsistent release of results.

There are three steps in a typical RFP process when decisions are made and suppliers can be eliminated from further consideration:

- **Pre-Evaluation Step.** When a proposal will not be accepted because it is late, or not evaluated because it is incomplete, or failed to comply with a mandatory condition.
- **Initial Evaluation Step.** Proposals are initially evaluated and a short-list established. Proposals not on the short-list are eliminated from further consideration.
- **Final Evaluation Step.** Short-listed proposals are evaluated further and the winner is determined.

In some jurisdictions, suppliers eliminated from further consideration are informed of their status at the end of that step. Others wait until after the award has been announced.

This section considers the relative merits of informing proponents of their status at each step in the process.

PRE-EVALUATION STEP

Some proposals will not make it to the actual evaluation. The primary reasons for eliminating suppliers from further consideration at this step are non-compliance with terms and conditions stated in the RFP:

- proposal was received late
- proposal was not signed
- mandatory requirements were not met
- information provided in the proposal was woefully lacking and the proposal could not be evaluated
- the proponent is currently disqualified from doing business with the purchaser.

When a proposal is rejected because it is late, it should be returned to the vendor. Proposals delivered late by hand should not be accepted. If received late through the mail or by courier, the envelope should be returned unopened with an explanatory note.

Many organizations will inform the proponents by telephone, followed by written notice, and offer an in-person briefing. I recommend that those suppliers be informed as soon as possible. If a late or rejected proposal is retained by the Purchasing Organization, the proponent may erroneously expect that its proposal will be evaluated.

In some procurements, the buyers intentionally delay informing a vendor that its proposal has been eliminated. They simply don't want to deal with that vendor until the process has been completed. Or there were only a few vendors, the list of firms that acquired the RFP is public, and the buyers wish to maintain the appearance that the group of competitors still being considered is larger than it actually is.

INITIAL EVALUATION STEP

Informing proponents that they did not make the short-list (before the contract is awarded) causes problems and adds no value to the process. Vendors often look on this as an opportunity to provide more and better information, and an opportunity to correct deficiencies in their original proposal. In fact, if this is permitted, the vendor is receiving a second chance.

In some jurisdictions, the Purchasing Officials will actually provide the proponents an opportunity to challenge this decision about their qualifying for the short-list. They will permit the proponent to submit additional information. This practice is justified by them on the basis of obtaining better proposals.

Proposals can only be short-listed based on the information provided in each proposal using the pre-defined evaluation criteria. New information cannot be introduced after a

decision is reached to eliminate a proposal from further consideration. If the information was important, it should have been included in the original proposal.

Permitting suppliers to augment their original proposal in this way leaves the Procurement Officials open to claims of incompetence: they did not perform an adequate review and analysis before issuing the RFP or they are changing the rules as the process progresses to suit their own needs, or to favor a particular supplier.

The results of a short-listing process should be kept confidential. Advising a proponent that it was unsuccessful at this stage should be delayed until a final selection and award has been made. If the award is then challenged by a disgruntled supplier, the challenge will not delay the commencement of work.

If you inform a proponent that its proposal did not make the short-list, you must live with that decision. You cannot go back to the proposals that were not on the short-list and subsequently chose one. Otherwise, you will most certainly be seen as "playing games". Your credibility within the supplier community will suffer.

The Evaluators must be confident in their assessment of the proposals at each stage and be prepared to explain and defend their reasons to each proponent and their management.

Proposals failing to make the short-list should not be re-considered in subsequent evaluation steps. If no proposal is found to be acceptable, a revised RFP should be issued or an alternative method of procurement used.

Sometimes all of the proposals are short-listed and scored. Obviously, poor proposals will receive low scores. And it can be easier to explain a low score than to explain why a proposal didn't make the short-list.

FINAL EVALUATION STEP

All short-listed proposals and suppliers should be evaluated in an identical manner. Once the award has been announced to the winner, then all proponents should be informed.

Proponents should be offered a formal debriefing to discuss their proposals shortcomings. Debriefings should be presented as an opportunity to learn and thereby

improve future proposals, rather than an opportunity to challenge the award. This topic is discussed in the next chapter.

Dealing with the Losers

CONFIDENTIALITY AND DISCLOSURE

The global approach, or at least the best practice, is that procurement information is public except for proprietary information or information which could harm the proponent's ability to compete if made public.

Procurement information is public except as otherwise provided by law.

State of Alaska 36.30.530

... Subject to the Access to Information Act, bidders and proponents must, upon request, be given access to information about their own bids ...

Yukon Government Contracting Directive

The head of a public body must refuse to disclose . . . information that would harm significantly the competitive position . . . of the third party.

Province of British Columbia

Section 21 FOIPPA

The Illinois Procurement Statute deals with both Freedom of Information Act and the procurement file. Here is the language related to disclosure of proposal information from Illinois:

Sec. 20-155. Solicitation and contract documents¹³

(a) After award of a contract and subject to provisions of the Freedom of Information Act, the procuring agency shall make available for public inspection and copying all pre-award, post-award, administration, and close-out documents relating to that particular contract.

(b) A procurement file shall be maintained for all contracts, regardless of the method of procurement. The procurement file shall contain the basis on which the award is made, all submitted bids and proposals, all evaluation materials, score sheets and all other documentation related to or prepared in conjunction with evaluation, negotiation, and the award process. The procurement file shall contain a written determination, signed by the chief procurement officer or State purchasing officer, setting forth the reasoning for the contract award decision. The procurement file shall not include trade secrets or other competitively sensitive, confidential, or proprietary information. The procurement file shall be open to public inspection within 7 business days following award of the contract.

DEBRIEFING PROPONENTS

Many jurisdictions instruct their procurement people via laws, regulations and policies about debriefing and providing information to suppliers after the contract has been awarded. An entire book could be written about this topic. Detailed examination of these laws and practices is beyond the scope of this publication. However, in most jurisdictions the public is entitled (usually by law) to examine much of the information about a particular procurement.

Debriefing is often looked upon as the crumbs given to losers to offset, at least in the evaluator's mind, the cost of submitting a losing proposal. It is an attempt by the Purchasing Organization to provide some value to the suppliers. (Vendor can spend more than \$100,000 on a proposal for information technology goods and services.) It is also a means by which the Purchaser can determine which suppliers are really mad and intend to challenge the results, either through senior management, the political process or the courts.

Some jurisdictions simply ignore the losers. They don't provide debriefings. They anticipate that vendors who believe they have a legitimate complaint will send in their lawyers.

Most jurisdictions provide an opportunity for suppliers to obtain details about their proposals and why they didn't win. The suppliers are offered some information as a 'thank you' for the cost and effort of preparing a proposal. Many jurisdictions have written policies related to supplier debriefings.

In many jurisdictions, once the award is announced, proponents may contact the Procurement Officer to find out why they lost and for details of the winning proposal. The Procurement Officer in charge of the RFP will, if requested, schedule a formal debriefing with the supplier. Sometimes these meetings are held via a conference call.

Debriefings are viewed by most agencies as an exchange of information which can help both the proponents and the agency. It is important that the debriefing is not seen by the proponents as an opportunity to challenge the decision.

The intent of a debriefing is to aid the supplier in presenting a better proposal in subsequent RFPs. Usually, each proponent will be given a list of the major evaluation

criteria with the maximum weightings and the vendor will be given an indication of how it scored or be given its actual score.

Most agencies have something about supplier debriefing on their web site and in their policies and procedures manual. Usually, it is not much. Just a statement that proponents can request a debriefing after a competition has closed and that the purpose of the debriefing is not to challenge the award but to help the vendor do better next time. Sometimes, the debriefing process is dealt with in an Agency's procurement statute or ordinance.

Many procurement people do not like debriefings. It puts them in the same room as a vendor who has just lost after spending thousands on its proposal. And sometimes the vendors are openly skeptical about the evaluation process.

But vendors are entitled to a debriefing as part of the open and fair requirement for public procurement.

Let's examine how three different agencies deal with debriefings:

- New York State
- Province of Alberta
- UK Office of Government Commerce

NEW YORK STATE¹⁴

NY State makes debriefing information readily available to its Agencies and to the vendor community. It has a statute dealing with debriefing; it's Procurement Guidelines discuss this issue and, in addition, there is a Procurement Bulletin on their web site.

Here is the statute establishing the rules for a debriefing. State Finance Law §163(9)(c) requires that:

A state agency shall, upon request, provide a debriefing to any unsuccessful offerer that responded to a request for proposal or an invitation for bids, regarding the reasons that the proposal or bid submitted by the unsuccessful offerer was not selected for an award. The opportunity for an unsuccessful offerer to seek a debriefing shall be stated in the solicitation, which shall provide a reasonable time for requesting a debriefing.

Their Procurement Guidelines also deal with this issue:

Bidder Debriefings

The solicitation must include information advising bidders that a debriefing may be requested by any unsuccessful offerer, within a reasonable time frame after the contract award, regarding the reasons that the proposal or bid submitted by the unsuccessful offerer was not selected for an award. While a debriefing is typically conducted in person, it may be conducted by video conference, over the phone, or through written summaries, if agreed to by the bidder.

During the debriefing, the state agency may do one or more of the following:

Limit the discussion to the reasons why the bid was not successful;

Discuss the reasons why the winning bid was selected; and

Offer advice and guidance to the bidder to improve future bids

And, finally, there is a Procurement Bulletin dealing with this issue that describes the essential features of debriefing in only one page. Here are some of the highlights:

It is clear under this statute that an Agency must inform an unsuccessful proposer/bidder of the deficiencies in its own proposal/bid. It is not clear whether an agency is required to provide information at a debriefing concerning the winning proposal. However, an agency is not generally prohibited from doing so. Therefore, as part of a debriefing an Agency may release any information concerning the winning proposal, except where the release of such information is prohibited by other laws (for example an Agency may not disclose personal information, such as personal tax returns).

Caution should be used when releasing information that may be withheld under FOIL, such as trade secrets or information which will impede contract negotiations.

Where an Agency has found a proposal/bid non-responsive, it is best practice to provide notice of such determination (and an opportunity for a debriefing) to the vendor early in the process in order to allow the vendor an opportunity to attempt to refute such a finding. This may avoid any delays that may otherwise occur further along in the procurement process.

Debriefings are intended to make the procurement process open and transparent and to help the vendor community become more viable competitors for New York State goods and services. When conducting a debriefing, agencies should be prepared to review, at a minimum, the strengths and weaknesses of a vendor's proposal and to provide information as to the relative ranking of that vendor's proposal in each of the major evaluation categories as provided for in the solicitation document. Typically such a debriefing would include information as to the ranking of the vendor's proposal in both the technical and cost components of the evaluation and an identification of any areas in the proposal which the agency found to be deficient.

Procuring agencies are advised, if a debriefing was requested by an unsuccessful proposer/bidder but the procuring Agency has not yet provided it, OSC will withhold its approval of the contract until the debriefing request has been responded to.

Sample Language for Solicitation Notice:

A debriefing is available to any entity that submitted a proposal or bid in response to a solicitation ("Bidder"). A Bidder will be accorded fair and equal treatment with respect to its opportunity for debriefing.

Debriefing shall be requested in writing by the unsuccessful Bidder within [designate number of days] business days of the [ADD STATE AGENCY NAME] [Choose appropriate option:]

[notifying the unsuccessful Bidders that another vendor was selected]

[publicly releasing the identity of the purported winner of the competition (such as through posting on the internet at a specific web address disclosed below)].

An unsuccessful Bidder's written request for a debriefing shall be submitted to: [ADD AGENCY-SPECIFIC INFORMATION]

The debriefing shall be scheduled within [designate number of days] business days of receipt of written request by the [ADD STATE AGENCY NAME] or as soon after that time as practicable under the circumstances.

PROVINCE OF ALBERTA¹⁵

The Province provides its agencies with a 5-page document, Debriefing Guidelines. While it covers much of the same ground as the information from New York State, it does deal with three new topics:

5. Attendees for the Debriefing

The following people shall attend the debriefing:

- *Procurement representative responsible for the evaluation process;*
- *Project Manager responsible for the Project;*
- *Technical Representative, if necessary; and*
- *One or more key personnel from the firm, as identified in the submission.*
- *Other Departmental staff may also attend the debriefing, if required.*

6. Information That Will Not Be Divulged During a Debriefing

- *The Respondent's / Proponent's individual item scoring, overall scoring or ranking within the evaluation process.*
- *Any information about another Respondent's / Proponent's scoring, ranking or submission, including the fee information.*

7. Information That Will Be Divulged During a Debriefing

- *The names of the shortlisted Respondents or successful Proponent.*
- *The respective Respondent's / Proponent's own submission.*

UK OFFICE OF GOVERNMENT COMMERCE¹⁶

This agency that has done a great job in providing their procurement people with guidance about debriefings – it's the UK group that was founded decades ago and published this 17-page document in 2003.

Here are the topics dealt with in this document:

One	Introduction
Two	Benefits of effective debriefing
Three	When to debrief
Four	Where debriefing takes place
Five	Approach to debriefing
Six	Who should attend?
Seven	The debriefing meeting
Eight	After the debrief
Nine	Further advice and tips

Much care has been taken in writing this document. The following extracts represent some of the issues dealt with:

However, debriefing – or providing and obtaining helpful feedback – is regarded as general good practice and should therefore be seen as an integral part of a quality approach to procurement, one firmly based on continuous improvement principles and closely linked with establishing sound communications throughout.

Many suppliers do not take up their right to request debriefing and some departments seem reluctant to encourage suppliers to exercise this right.

Departments should therefore seek to be constructive and open, rather than defensive in providing their views.

Potential benefits for the buyer department or agency:

- *identifies ways of improving the process for next time*
- *suggests ways of improving communications*
- *makes sure best practice and guidance is updated to reflect any relevant issues that have been highlighted*
- *encourages better bids from those suppliers in future*
- *gets closer to how that segment of the market is thinking (enhancing the intelligent customer role)*
- *helps establish a reputation as a fair, open and ethical buyer with whom suppliers will want to do business in future.*
- *Potential benefits for government and the wider public sector:*
- *demonstrates commitment to good practice and openness*
- *can contribute to intelligence gathering about the market and its segments*
- *educates the market that the public sector is value-driven and not cost-driven.*
- *Potential benefits for the supplier:*
- *may help companies to rethink their approach so that future bids are more successful*
- *offers targeted guidance to new or smaller companies to improve their chances of doing business in the public sector*
- *can provide reassurance about the process and their contribution or role (if not the actual result)*
- *can provide a better understanding of what differentiates public sector procurement from the private.*

Procurement staff can be concerned that as a result of the debriefing infraction proceedings against the government could be invoked or that legal proceeding against the contracting authorities themselves might be taken in the High Court. The fear is that a disappointed candidate or tenderer might try to take the information revealed in the debriefing session out of context, especially where the criteria underpinning the decision might seem subjective. However, effective debriefing should always reduce the likelihood of legal challenge because it will prove to suppliers that the process has been carried out correctly and according to the rules of procurement and propriety.

If the procurement is carried out in accordance with the rules for government procurement and departmental guidance, the risk of legal challenge should not arise, the key principle being that if the correct decision was made and properly documented you should be able to explain it or even defend it, if necessary, during debriefing. Essentially, if all decisions taken are sound and well documented, and if there has been the proper

emphasis on good communications channels throughout the procurement process, then debriefing should be reasonably straightforward.

It is vital to plan and structure the session properly. For larger procurements, a formal debriefing plan should be drawn up by procurement staff and approved in advance by senior management.

When debriefing, the needs of small or niche players may be quite different from large consortia or multinationals. Larger suppliers may have considerable experience of different procurement techniques and policies and may be able to offer useful observations based on this experience. Conversely, small companies new to public sector procurement may have fresh insights or ask searching questions. You should adapt your approach to reflect the interests and needs of the individual(s) you are meeting, so far as is reasonable and of course always within the constraints of commercial confidentiality and the Data Protection Act.

Suppliers should be informed that only their own submissions or bids will be discussed and that an opportunity will be given for them to air their views.

At all stages you must avoid revealing anything about other bids where the information is commercially sensitive or has been supplied in confidence. Where a bid is price – competitive, this should be openly acknowledged, but it must be explained that this was outweighed by other factors in the selection/award decision.

Legal Issues

All commercial dealings are covered by a wide variety of laws related to commercial practices, discrimination, protection of trade secrets and proprietary information. In some jurisdictions, there are additional laws dealing with access to information, or protection of privacy - laws which often expand the information given to suppliers about RFPs and evaluations.

Where an Access to Information Law Exists

In jurisdictions where there is an access to information laws, there is also a wide variety of common approaches. Some organizations give out little information and simply wait for the suppliers to use the procedure established under the access law. Other organizations are more pro-active. They identify the information which would be available under the information access law and they make it available to suppliers either when asked, or as a pre-emptive measure to avoid supplier complaints.

Under many different access to information laws in many jurisdictions, a large amount of information is available about an RFP and the proposals:

- Project authorization

- The RFP document
- The evaluation process
- The evaluators notes
- Memo recommending the winner
- Suppliers' proposals, except for competitive information or trade secrets
- Evaluation summary sheets
- Contract

Where there is No Access to Information Law

In jurisdictions **without** an access to information law, there is a wide variety of practices dictated by policy or 'common sense'. Some jurisdictions give out as little information as possible; others provide reasonable levels through briefing sessions. Still others, provide as much information as they can about the supplier's own proposal and its strengths and weaknesses.

Completing the RFP File

Almost all the work has now been completed. What's left is the paperwork. This is usually thought of as a necessary evil. In fact, there is some value that can be gleaned from these few remaining activities. An organization can make the lessons and information obtained during the process readily available to others; it can ensure that the lessons learned are integrated into future activities. To do so, requires some energy and time, but the payback can be large. There are four tasks remaining - none of these is large, complex, or expensive.

TASK #1: ORGANIZING THE PROJECT FILE

By now, the project file is bursting. It may in fact be several files kept by several different people. These files must be sorted, to get rid of those early drafts, the telephone notes that were transcribed, and other non-essential documents. Sufficient information must be retained to satisfy the organization's retention practices, and to support the validity of the process and the contract if challenged in the courts. (In one jurisdiction, these records are kept in a filing cabinet on wheels. It is referred to as the 'discovery file' and can be easily moved to the lawyers' offices upon initiation of a legal challenge!)

These files must be indexed. While it is not necessary to keep all of the files associated with each RFP process in the same physical location, it is very helpful to know what they are and where they are located.

Computer files residing on a network, or a central computer, or a personal computer can be archived. They can be copied onto CDs or tape and stored either with the hardcopy or in a central location.

Some organizations prepare an index of the files associated with each RFP. This index is available to other authorized people. Access to the actual files is controlled. In some organizations, the index is on a computer network. The index includes both hardcopy files and computer files.

These files are now accessible and can provide much valuable information to others performing similar activities in the future. Here is an example of an excellent document checklist used to ensure that procurement files are complete and easy to access.

From Kent County, VA:¹⁷

RFP SOLICITATION AND FILE CHECKLIST

√	RFP Solicitation Checklist	√	FILE CHECKLIST
	Written Determination: There must be a written determination made in advance and placed in the solicitation file justifying the use of competitive negotiation signed by the County Administrator if for goods or non-professional services		Written Determination for use of competitive negotiation for goods or non-professional services procurement
	Approval: Required Approvals should be obtained and placed in the file		Special Approval
	Approved Request: Written approval to expend funds		Purchase Requisition
	Statement of Needs: What is to be procured		
	Pre-proposal Conference / Site Visit: Date, time, place, optional or mandatory		Pre-proposal Sign-In Sheet
	General Terms and Conditions: These terms and conditions must be included in every solicitation		
	Special Terms and Conditions:		
	Evaluation Criteria: Must be in the solicitation as well as the weights		Evaluation Criteria weights
	Method of Payment		
	Reference		Request of Reference Checks

√	Pre-award, Receipt, Evaluation and Post Award	√	
	Evaluation Committee: Proposal Evaluation Committee is identified		Names of Evaluation Committee
	Offerors List:		Name, Address of Offerors
	Public Notice: Required at least 10 days prior to due date for proposals, posted on web and newspaper		Copies of Ad for newspaper and print out of the web advertisement
	Solicitation: The original RFP		Original Solicitation
	Addenda: Any and all changes to the original solicitation which must be published		Addenda
	Questions / Responses: Answers to questions from potential offerors; all should be shared with all offerors		Copy of the questions, answers and the publication thereof
	Proposal Receipt: Proposals are closed at the date and time specified in the solicitation		
	Review Proposals: Provide detailed written instructions to evaluation committee		Copy of each evaluation committee member's score sheet
	Review Member Evaluations: Schedule		Copy of each evaluation
	conferences as appropriate or necessary, conduct reference checks and inspections if necessary		
	Oral Presentations: Schedule if necessary		
	Proposal Evaluation: Individual evaluations are prepared and proposals are evaluated based on the criteria and published weights		Copy of each
	Select Offerors and Determine Issues to Negotiate: The committee will decide who to negotiate with and what issues can be negotiated		Notes
	Schedule and Conduct Negotiation: A record is maintained of the negotiations with each selected offeror		Documentation of negotiations
	Review Requirements: request any insurance certificates etc. prior to commencement of work		Copies of Certificates of Insurance

	Notice of Award or Intent to Award: Post for 10 days on websites if a protest is anticipated otherwise issue Notice of Award	Award documentation
	Bonds: Obtain Performance & payment bonds prior to commencement of work	Copies
	Successful proposal: A copy of the successful proposal is retained	Successful Proposal
	Contract: A standard two-party contract should include by reference all of the terms and conditions of the solicitation and any changes made	Copy of the contract
	Contract Administration: Assign any responsibilities in writing	Contract Administrator Assignment
	Licenses/References:	Licenses, References
	Unsuccessful Proposals: Must be retained	Unsuccessful proposals
	Post-Award Correspondence: All post-award correspondence should be maintained	

TASK #2: COMPLETING THE OFFICIAL RECORDS

Some organizations require that certain contract information be recorded and made available to the public. Often, this information is reported to a governing body - a council, assembly, or legislature - on a periodic basis.

In Alaska, publicly accessible contract files must be kept by the commissioner and the contracting agency:¹⁸

A contract file open for public inspection shall be kept by the commissioner and the contracting agency for each contract awarded under competitive sealed proposals. The file kept by the commissioner must contain a summary of the information in the file of the contracting agency. The file kept by the contracting agency must contain:

- (1) a copy of the contract;*
- (2) the register of proposals prepared . . . and a copy of each proposal submitted;*
- and*
- (3) the written determination to award the contract . . .*

TASK #3: CATALOGING KEY DOCUMENTS

There is much value to be obtained by making RFPs easily available.

Many organizations, in an attempt to obtain additional value from their collection of documents, organize an RFP library. This library can be an actual room with shelves. It can also be a virtual library - simply an index of RFPs which is made available on the organization's computer network. The index can be used by interested people to determine the location of different types of RFPs. These RFPs, in turn, can exist as computer files on the network, or as hardcopy or disks kept in an actual filing cabinet or area.

TASK #4: AUDITING THE PROCESS

An audit of the RFP process when it has been completed can yield valuable information. Also, having an audit as a standard activity ensures that the Procurement Officer has adhered to the organization's policies, guidelines and standards.

Every RFP project can yield important lessons. For example, the Evaluators learn more about specifying mandatory requirements precisely; a deficiency in the contract terms is identified; a new question is asked about supplier experience; a better way of analyzing costs is created. There is much value in documenting these lessons so they are readily available for the next RFP process.

There are several different ways to audit this process. First, the Procurement Officer can do it. This, to some people, represents a potential conflict. The individual responsible for running the process is now required to identify deficiencies in the process and lessons learned. While this is not the ideal situation, it is better to have the Procurement Officer review the process at the end than not at all.

Some organizations have the RFP process reviewed by an internal auditor - a staff member who has functioned as a Procurement Officer. This audit tends to be more thorough and more formal than the first type.

Other organizations bring in an external auditor. They provide this person with all of the project files and access to the project team. Based on a review of these files,

the auditor offers an opinion about the soundness of the process and potential improvements.

All of these audits identify improvements to be considered in the process and the documents used. All that is required is a process for evaluating these recommendations and introducing them as changes in policy, regulations, or best practices.

An Ending Comment

These final tasks are often poorly executed. Lack of formal procedures for confirming the winner, finalizing the contract, or dealing with the losers can create large problems. It is easier, more efficient, and less risky to adopt appropriate procedures than to explain their absence in court.

End Notes

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1. Reference 43.
 2. Page 15, Reference 22.
 3. Reference 43.
 4. Reference 125. California, Dept. of General Services, Procurement Division, "Template" for Bid (IFB) and Request For Proposal (RFP), 78 pgs,
<http://www.documents.dgs.ca.gov/pd/poliproc/Chapter03ModelIFB-RFPSolicitation.doc>
 5. Reference 126. New Mexico, State Purchasing, Request for Proposals Template, March 2014, 48 pgs,
 6. Links to all of the documents described in this section can be found on Montana's RFP Process web page:
<http://gsd.mt.gov/procurement/rfpprocess.asp>
 7. Reference 127. North Dakota Information Technology Dept., Services web page,
<http://www.nd.gov/itd/services/it-procurement>
 8. Reference 128. North Dakota, Contract Drafting and Review Manual, Office of Attorney General, 73 pgs,
<http://www.ag.nd.gov/Manuals/ContractManual/Contractmanual.rtf>
 9. Reference 129. North Dakota, IT Products/Services Template, 70 pgs,
<http://www.nd.gov/itd/files/services/procure/nd-rfp-template-it-2012-03-22.rtf>
 10. Reference 130. North Dakota, Information Technology Dept., Information Technology Contract Guidelines,
<http://www.nd.gov/itd/standards/it-procurement/information-technology-contract-guidelines>

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11. Reference 131. North Dakota, Information Technology Dept., Technology Contract Template, April 2014, 28 pgs,
http://www.nd.gov/spo/agency/forms_templates/Docs/Technology%20Contract%20Template%20April%202014.docx
 12. Reference 132. Australia, Dept. of Finance, Government Information Technology and Communications (GITC) contractual framework home page, <https://www.gitc.finance.gov.au>
 13. Illinois Procurement Code Section 20-155.
 14. Pg 18, Reference 53.
 15. Reference 133. Alberta Infrastructure, Debriefing Guidelines, Sept. 2013, 5 pgs,
http://www.infrastructure.alberta.ca/Content/docType486/Production/Debriefing_Guidelines.pdf
 16. Reference 47.
 17. Reference 134, Kent County (VA), RFP Solicitation and File Checklist, 2 pgs,
<http://www.co.new-kent.va.us/DocumentCenter/Home/View/570>
 18. Section 36.30.510, Reference 25.

Chapter Thirteen

SUPPLIER COMPLAINTS AND PROTESTS

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Chapter Thirteen

SUPPLIER COMPLAINTS AND PROTESTS

This chapter provides some fundamental information about supplier complaints and protests and different systems for seeking recourse. It is organized into five major topics:

- A Framework for Handling Complaints
- How to Discourage Protests
- Providing an Effective Dispute Resolution Mechanism
- Grounds for Relief
- Examples of Policies and Procedures

A Framework for Handling Complaints

Supplier complaints, protests and appeals are a fact of life. There are always more losers than winners and some of the losers will feel aggrieved. They may believe that the requirements were too vague, that the time to complete the proposal too short, that the selection process was arbitrary or, even worse, that the winner was selected before the RFP was issued. They may believe that the incumbent was favored by "insider information". There are hundreds of reasons why suppliers can feel aggrieved. In some situations, complaints do have merit.

There are serious implications of supplier protests. The evaluator's decision can be challenged by both senior management and the politicians. The process itself can be subjected to public scrutiny and found lacking. Often, the competence and objectivity of the purchasing officers are questioned. In addition, the RFP process and the contract award can become the focus of a court action.

Supplier complaints can be dealt with in many different ways. Some organizations recognize this situation and take steps to ensure that suppliers' concerns are dealt with in a fair and open manner. Some organizations fail to provide suppliers with any process for resolving concerns other than the political or legal processes. Some organizations go even further - they, seemingly, appear to dare the suppliers to question their decision: Imagine that you were a supplier, and you had just submitted your first proposal (which cost you \$10,000 in staff time). You lost to a

firm which you believed was inferior. In re-reading the RFP, you once again realized that the Purchasers maintained the position that the entire evaluation process was confidential. The RFP stated: **“The evaluation team will utilize specific evaluation criteria to rate various requirements for evaluation purposes. Such a rating will be confidential and no totals or scores will be released to any vendor.”**

How would you feel? Would you think that the process was fair? Or would you think that the Purchasing Officer was hiding behind the language of the RFP? Would you, as a responsible member of the community, think that this statement was good policy? Since the RFP precluded any debriefing, the protests could only be directed to senior management, political masters, or the courts. None of these provide for quiet resolution of the issue. This is an extreme example. While the quotation is real, it's more than fifteen year's old. Thankfully the landscape has changed and this approach has been abandoned.

Some senior officials and politicians do not want any formalized approach. They prefer retaining the power to deal with supplier complaints as they see fit. Often, their actions are seemingly arbitrary and possibly contrary to public policy. However, these actions do deter all but the most resolute of suppliers from getting enough good information to understand the issue, resolve the complaint, call their lawyers or to warrant "going public".

What are the requirements for a policy dealing with supplier protests? Before you need a policy, you have to recognize that complaints have some legitimacy. The basic element is to realize that some suppliers' complaints will have merit and substance and, therefore, suppliers should have some form of recourse. In considering this question further, we identified three major requirements. First, the competition must be fair and open, and therefore easily defended. Your fundamental approach must be based on accepted public policy and best practices. Second, the policy should include features designed to avoid or discourage supplier protests. And, finally, there should be an effective dispute resolution mechanism. Ideally, the process should solve the problem quickly and, most importantly, quietly.

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)

In Chapter 1, fair, open and transparent were identified as worldwide principles in public procurement. In a similar vein, there is a worldwide recognition that the

vendor complaint process is a key element of fairness. Having a recourse system for challenging awards promotes integrity and compliance with procurement laws and regulations.

The Organisation for Economic Co-operation and Development (OECD), a leading international body, has recognized that lack of transparency and accountability is a threat to public procurement and promotes corruption.

In 2007, OECD published 'Integrity in Public Procurement; Good Practice from A to Z'.¹ This text provides a framework for recourse systems for challenging procurement decisions. Their 8-page discussion establishes principles and provides examples. Here are some of the highlights:

First, the summary of their findings:

*Recourse systems for challenging government decisions have become a central mechanism for bidders and other stakeholders to verify the fairness and integrity of the public procurement process, both in the public and private sectors. Several countries have established **alternative resolution systems** to judicial decisions dedicated to procurement in order to promote an effective and timely resolution of bid protests and avoid the cost of litigation. In addition to bidders, procurement officials and other stakeholders have been involved in the control of public procurement through the establishment of administrative complaint systems. ...*

The major conclusion from this study was:

There is common recognition that effective recourse systems for challenging procurement decisions should provide timely access, independent review, efficient and timely resolution of complaints and adequate remedies. ...

Here are some thumbnail sketches of the required characteristics for recourse systems:

Timely access to recourse mechanisms

*Both the procurement and the recourse system itself must be organised in a manner that permits bidders to initiate recourse before the contract starts. ...several countries have recently introduced a **mandatory standstill period** between the contract award and the beginning of the contract to provide the bidder with a reasonable opportunity for the award to be set aside. . .*

While countries generally provide a recourse mechanism after the award, bidders are also able in some countries to challenge procurement decisions at other stages of procurement, and even sometimes after the end of the contract. ...

Independence of complaint and review systems

*In order to avoid litigation and provide an opportunity for contracting authorities to make the necessary adjustments, a vast majority of countries encourage and in some cases, for instance in Germany, make it mandatory for bidders to submit their complaints directly to the **procuring authority**.*

*A complaint to the contracting authority may offer clear advantages, especially in cases when a genuine or obvious mistake rather than a deliberate breach of public procurement law is the reason for the dispute or when the case involved “delicate” interpretations of the law. Furthermore, the bidder can **avoid confrontation** with the contracting authority as well as the costs involved when using quasi-judicial or judicial review.*

*On the other hand, time-consuming complaint proceedings can **prolong the overall review procedure** if it only prelude to quasi-judicial or judicial review. Another concern is to ensure that the decision is not **biased** by the public official or the procuring agency’s interests. . .*

Efficient resolution of complaints

*Several countries introduced a **specific public procurement mechanism** to improve the efficiency of the resolution of complaints . . . This contributes to reinforcing the legitimacy of decisions that are grounded on specific professional knowledge and reducing the time for resolving complaints. . .*

*In a growing number of countries . . . there is a body for dispute resolution to encourage **informal problem solving**. . .*

Adequate remedies

A core element of the integrity of a procurement system is the availability of remedies that can be awarded when an unsuccessful bidder considers that the process was conducted in an inappropriate manner or raises the possibility of violation of the procurement regulations. The recourse system must have the authority to define and enforce interim measures, as well as final remedies that correct inappropriate procuring agency actions and compensate bidders . . .

Here are the findings (in an edited format) of the study that identified the categories of remedies used in the EU:

*Setting aside of public procurement decisions, including the award decision
This remedy is generally available in the EU as a decision prior to the conclusion of a specific contract. Individual award decisions to be set aside can concern an unlawful contract notice, discriminatory specifications or bid documents, an illegal qualification decision, illegal short listing decisions, and even the contract award decision itself. . .*

Interim measures

In a limited number of Member States, filing a lawsuit has an automatic suspensive effect, interrupting the procurement procedure. In most countries

bidders have to specifically request the review body to apply interim measures, for example the discontinuation of the procedure. The review body can then apply interim measures pending a final decision, taking into account the probable consequences of interim measures for all interests likely to be harmed

Annulment of a concluded contract

This remedy takes effect after the conclusion of the procurement contract and affirms its cessation. Without the possibility of annulment of an already concluded contract the only remedy remains the damages, so this remedy has particular importance. The annulment of a concluded contract is a widely available remedy in the majority of the EU Member States. However, in practice it is difficult to obtain the annulment of a concluded contract, if it is possible at all. ...

Damages

The requirements for the award of compensation for damages are usually the following: loss (pecuniary or otherwise) suffered by the claimant, a breach of the law by the contracting authority or entity, causality (that is that the loss must be caused by the breach of law). The bid costs are reimbursed in all EU Member States. Regarding damages for lost profits, it is very difficult in most Member States to provide the evidence required for damages for lost profits.....

Pecuniary penalties and periodic penalty payments

Payments are not available remedies for unsuccessful bidders, but form part of the public procurement remedy systems. They are applied in order to force contracting authorities and entities to comply with their judgments. Without acquitting the pecuniary penalties or the periodic penalty payments, the contracting authority cannot continue with the award procedure.

THE NEW SOUTH WALES PROCUREMENT BOARD (AUSTRALIA)

This Agency has identified the significant issues² to be considered when developing a complaints management process:

Developing an effective complaints management process for procurement

Chief Procurement Officers should ensure that the following elements are incorporated into complaints management systems for procurement.

- *Complaints management should be incorporated into an agency's governance framework.*
- *Responsibility for managing complaints should be clearly designated to an officer or officers with sufficient skills and seniority to undertake the task effectively, with training provided where necessary.*
- *Investigation of complaints is to be fair and transparent. Ideally, a designated complaints officer will operate independently of an agency's purchasing area, so as to reduce the risk of conflicts.*
- *Complaints should be investigated in a timely and effective manner. Where a prolonged investigation is necessary, regular feedback should be provided to the complainant.*

- *Agency dealings with complainants are to be clearly documented (eg maintaining signed and dated file notes of telephone conversations).*
- *Information on the complaints handling process, including avenues for escalating complaints for further review, should be readily available to suppliers and the community. Agencies should refer to such information in tender and quotation documentation.*
- *The complaints process should be accessible (eg complainants should be able to present their complaints in person, over the telephone, in writing etc).*
- *Agencies should keep records of all complaints, including outcomes, reasons for such outcomes, and response times.*
- *Agencies should use complaints processes to identify general or recurring problems in procurement processes, and undertake corrective action.*

The remainder of this chapter discusses different approaches to supplier complaints, protests and appeals. It identifies ways to ensure that your process is publicly defensible, and that supplier protests do not become public issues. It provides examples of how some organizations handle these issues in terms of policy and practices.

How to Discourage Supplier Protests

Your policy and procedures should incorporate features designed to convince suppliers of the fairness of the process and thereby discourage them from a public protest. There are many ways of discouraging supplier protests since purchasers, in general, and most certainly public buyers have great power to affect a supplier's economic well-being. This section identifies pro-active, positive tasks which will, by their very nature, provide suppliers with convincing evidence of the quality of the organization's RFP practices. None of these measures are punitive or designed to "win through intimidation" - a tactic still employed by some purchasing executives. Rather, they seek to promote an environment of openness and fairness around the process.

The New South Wales (Australia) Procurement Board provides some guidance to its agencies on the characteristics of a solid complaints management strategy:³

Preventing complaints

An obvious complaints management strategy is prevention because it saves time and resources. Agencies can help to prevent complaints by –

- Ensuring that officers dealing with suppliers have a sound knowledge of procurement policies and procedures, and possess high level interpersonal skills (including verbal and written communications skills) and conflict resolution skills.

- Building effective relationships with suppliers and providing regular feedback on performance.
- Ensuring that clear specifications are developed.
- Ensuring that suppliers are treated in an ethical and impartial manner.
- Ensuring that negotiations with suppliers are well planned and executed.
- Making debriefing sessions available for suppliers who have been unsuccessful in tendering for Government business.

Here are some other issues to consider in developing a strategy for discouraging supplier protests.

PROVIDE INFORMATION TO SUPPLIERS

The provision of up-to-date, accurate information helps suppliers understand how to compete effectively, and reduces the demands on purchasers for explanations, and presentations. There are three documents which, when available, benefit the suppliers in terms of information, and the Purchasing Organization in terms of its credibility and professionalism:

- RFP Policy - a concise, statement of your organization's principles and major policy items related to RFPs.
- RFP Handbook - a 50 to 150 page book identifying your major procedures and practices. This Handbook typically has sample RFPs, and the forms used in the process.
- Doing Business With Us - a booklet containing essential information about the organization's purchasing practices. There are many good examples easily obtained from the Web. These publications typically include the following topics: Role of the Purchasing Dept., What We Buy, Purchasing Policies, How To Be On Our Suppliers List, Preparing Your Bid or Proposal, Awarding Contracts, Payment, Supplier Assistance, and a Telephone Directory for Purchasing Staff. They often include the supplier registration forms.

All of this information can be made available in many different forms: books, via the world wide web, workshops, and using electronic mail for Questions and Answers.

PREPARE AN EVALUATORS GUIDE⁴

An Evaluators Guide is a handbook which contains key policy items, evaluation procedures, weights, criteria, and scoring mechanisms. It also contains the actual worksheets which will be used by the Evaluators for the RFP under consideration and the detailed scoring instructions. While sections of this handbook are generic and apply to all RFPs, other sections are specific. Obviously, the evaluation criteria and weights change from RFP to RFP. (This topic is discussed in Chapter Nine, Part Two.)

INCLUDE A FAIRNESS OFFICER IN THE PROCESS⁵

This person plays two major roles: to protect the integrity of the process and to assure suppliers of a fair and open competition. This person can have a significant impact in reducing supplier complaints.

The Fairness Officer protects the integrity of the process by the following actions: (i) by editing and reviewing the entire RFP document, particularly the terms and conditions section; (ii) by briefing the project team on the process; (iii) by answering questions; (iv) by monitoring the process; (v) by attending the evaluation meetings; and (vi) by producing an audit report once the contract has been signed.

The Fairness Officer ensures that issues, as they arise, are addressed from the suppliers' perspective as well as the purchasers'. The Fairness Officer maintains a log of key events, produces an audit report and attends debriefing meetings with suppliers.

Typically, this person's role is identified in the RFP; this person is introduced at the suppliers meeting and responds to questions about process. Finally, the terms of reference for this work are stated at the suppliers meeting and noted in the minutes.

PROVIDE DEBRIEFING INFORMATION TO SUPPLIERS⁶

Purchasers should identify both the information and documents which will be available after an award is made. Since much of this information is available under access to information legislation, the purchasing organization should be pro-active and release this information automatically.

Typically, the following information is available under the legislation after an award:

- evaluation criteria, weights, scoring mechanism
- evaluators handbook
- names of bidders
- winners total score
- each bidder's own scores
- each bidder's own evaluation
- RFP Officer's terms, events log, final report

PUBLISH THE PROTEST POLICY IN THE RFP AND OTHER SUPPLIER DOCUMENTS

The RFP should identify the existence of a policy and how a supplier can obtain a copy. In many jurisdictions the supplier has a specific legal right to protest actions related to public procurement. These rights are often identified in both the RFP and in other documents provided to the supplier community by the organization.

New Mexico

The State of New Mexico includes protest information in its Procurement Statute, Procurement Regulations, Procurement Guide and the Model RFP. All of this information is available on its web site:

Here is the information from its model RFP:⁷

(page 2)

Protests of the solicitation or award must be delivered by mail to the Protest Manager. As A Protest Manager has been named in this Request for Proposals, pursuant to NMSA 1978, § 13-1-172, ONLY protests delivered directly to the Protest Manager in writing and in a timely fashion will be considered to have been submitted properly and in accordance with statute, rule and this Request for Proposals. Emailed protests will not be considered.

(Page 8)

Protest Deadline

Any protest by an Offeror must be timely and in conformance with Section 13-1-172 NMSA 1978 and applicable procurement regulations. As a Protest Manager has been named in this Request for Proposals, pursuant to NMSA 1978, § 13-1-172, ONLY protests delivered directly to the Protest Manager in writing and in a timely fashion will be considered to have been submitted properly and in

accordance with statute, rule and this Request for Proposals. The 15 calendar day protest period shall begin on the day following the award of contracts and will end at 5:00 pm Mountain Standard Time/Daylight Time on the 15th day. Protests must be written and must include the name and address of the protestor and the request for proposal number. It must also contain a statement of the grounds for protest including appropriate supporting exhibits and it must specify the ruling requested from the party listed below. The protest must be delivered to:

- *Protest Manager or State Purchasing Agent*
- *Protest Manager or State Purchasing Agent's address*

Protests received after the deadline will not be accepted.

Florida

In Florida, they publish information about the protest procedure in the RFP. Suppliers not filing on time are deemed to have given up this right.⁸

6.1 Posting of Recommended Award

The notice of intended award will be posted on or about the date shown in the "Calendar of Events"

(Section 4.2) and will remain posted for a period of seventy-two (72) hours. Saturdays, Sundays, and state holidays shall be excluded in the computation of the 72 hour time period. Posting will be made available on the Florida Vendor Bid System at www.myflorida.com (see additional instructions listed in Subsection 5.5.1).

6.1.1 Any bidder who desires to protest the recommended award must file the following documents with the Agency Clerk in the Department's Office of General Counsel, 2601 Blair Stone Road, Tallahassee, Florida 32399-2500, (telephone 850-488-2328) and provide copies to the Contact Person listed in Section 4.1 of this ITB:

6.1.1.2 A written notice of intent to protest within seventy-two (72) hours after posting of the recommended award. Saturdays, Sundays, and state holidays shall be excluded in the computation of the 72 hour time period.

6.1.1.3 A formal written protest by petition within ten (10) calendar days after the date on which the notice of protest is filed.

6.1.1.4 A protest bond within ten (10) calendar days after the date on which the notice of protest is filed.

6.1.2 Failure to file a protest within the time prescribed in Chapter 120.57(3), Florida Statutes or failure to post the bond or other security required by law

within the time allowed for filing a bond shall constitute a waiver of proceedings under Chapter 120, Florida Statutes.

6.1.3 Pursuant to Section 287.042(2)(c), Florida Statutes, a formal written protest must be accompanied by a bond payable to the Department in an amount equal to one percent (1%) of the estimated total value of the proposed contract amount submitted by the protestor. The amount of the bond will be provided by the Department's Office of General Counsel/Contracts Section and can be obtained by contacting the appropriate staff at (telephone number 850-488-2328, facsimile number 850-410-4133). In lieu of a bond, the Department may accept a cashier's check, official bank check, or money order in the amount of the bond.

St. Johns River Water Management District (FL)

At St. Johns River Water Management District (FL), they publish the Protest Procedure in their Procurement Manual which is available to vendors from the web site:⁹

XI Protest Procedure

1. Protests:

a. The procedures for an adversely affected person to protest a contract solicitation or award, and for the resolution of such protests, are specified in section 120.57(3), Florida Statutes, and chapter 28-110, Fla. Admin. Code.

b. Each competitive solicitation shall include a statement informing respondents of their right to file a protest, including the requirement of posting a protest bond.

c. Upon receipt, the Office of General Counsel shall be notified of a Notice of Protest and shall be responsible for further legal action.

2. Suspension of competitive process:

a. Upon receipt of the formal written protest that has been timely filed, the procurement solicitation or contract award shall be stayed until the protest is resolved by final agency action, unless the Executive Director sets forth in writing particular facts and circumstances that require continuance of such process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare. Notice thereof shall be provided in the same manner as notices of intended agency action.

Providing an Effective Dispute Resolution Mechanism

So far, this chapter has dealt with ways of avoiding protests through 'best practices' or by introducing barriers to discourage suppliers from protesting. Regardless of

how solid your policies are and how thorough your procedures, there will still be a few disgruntled suppliers. The reasons are straightforward:

First, there are always more losers than winners, so the odds favor protests being initiated.

Second, mistakes will occur. No matter how knowledgeable or well-trained a procurement officer is, mistakes will occur. Suppliers will be aggrieved and some of them will launch protests.

Third, sometimes contracts are awarded for political reasons or on seemingly arbitrary criteria. Such awards breach many policies and generate protests.

While suppliers can always seek relief in the courts, there should be some simple administrative process for resolving these differences. This remedy should not involve the courts; it should be fast, inexpensive, and defensible. Furthermore, the administrative approach should be able to solve the problem quietly, without attracting the harsh glare of publicity. (In several states, the existing complaint process is slow, expensive and subject to abuse. With procurement reform, several states no longer provide a statutory right of a supplier to initiate a protest.)

Procurement officials can do much to mitigate complaints. They can offer explanations or clarifications to suppliers. They can remove ambiguities and resolve conflicts and errors in the RFP documents.

A supplier's first recourse should be a discussion with the Procurement Officer. Procurement Officers must be accessible. They must be willing to at least listen to suppliers. They must exhibit some sensitivity to the supplier who feels aggrieved. Remember, it can cost a supplier tens of thousands of dollars to prepare a formal proposal. Suppliers do this because they believe that the business is potentially theirs. If they suspect that they have been treated unfairly, and they cannot get any level of information, empathy, explanation, or resolution from the Procurement Official, they may decide to protest. Suppliers do not protest an award without much thought and deliberation. Protests consume large amounts of corporate time and energy. And, in some jurisdictions, suppliers know that to protest is to forego future business. Procurement officials, both in the public and private sectors, are "only human" and are often influenced by past dealings with suppliers.

A protest can be formally defined as a written objection by an interested party to a solicitation for the acquisition of supplies or services, or a written objection by an interested party to a proposed award or to the actual award of the related contract.

There are many reasons cited for protesting an award:

1. The Purchasing Official fails to comply with rules or regulations.
2. The Purchasing Officials' actions unfairly limit a supplier's opportunity to win. For example, an arbitrary requirement to have an office in Omaha, or eight years of experience.
3. The RFP's requirements were unduly restrictive and failed to promote fair and open competition. For example, features were identified but were not necessary to achieve reasonable functionality and were available from only one supplier.
4. One supplier was favored by the requirements, evaluation process or criteria.

In harsh economic times, protests will arise as suppliers compete more vigorously for fewer dollars. Shrinking budgets, more complex organizations, and changing paradigms all contribute to the difficult environment in which Procurement Officers must work.

EXTREMES

There are many different ways that both public bodies and vendors can handle supplier complaints. At one extreme, the purchasing organization does little: it actively attempts to ignore complaints. And, at this same extreme, the vendors launch vexatious, frivolous protests.

Some organizations try to ignore complaints. Some purchasing organizations appear to be arrogant, or insular or insensitive to anything said by a proponent. They do not really want to deal with suppliers' concerns. Their attitude is basically "We're always right! You can talk to us, but we won't listen or do very much!" Organizations adopting this tactic usually have no published policy about RFPs or protests. They often offer suppliers a debriefing but then indicate that almost all of the information is confidential or protected by access to information legislation. They do not willingly provide evidence of their own shortcomings to suppliers feeling aggrieved.

Some Proponents take advantage of formal procurement processes. The State of California was trapped by its own policies, laws and regulations.¹⁰ Their protest procedure permitted vendors to challenge even minor issues in a procurement process. Frivolous and vexatious protests appeared to be common. In 2002-2003, Dept. of General Services received one protest per week. Of these, only three or four per year were found valid. Furthermore, when a protest was filed, the award process was halted. So a business that had a state contract which was soon be ending could stop the award of a new contract to a winning proponent simply by filing a protest.

There are, however, lots of examples and models of protest procedures which work and which are relatively fair to both parties. Here is an extract of the discussion from the California Performance Review completed in 2004:

The American Bar Association model provides for a relatively simple and straightforward administrative protest process. Disputes or procurement protests and contract controversies must be submitted in writing to an appropriate procurement officer. The procurement officer must promptly render a decision within a relatively short period—normally between seven to 10 days. The decision can be appealed to the state's highest procurement official or, in a few cases, to a procurement review panel which must render a final decision within a week or a week-and-a-half. Any further action to protest the final decision can be taken to a court of law.

Bill Joplin, assistant director for procurement for the State of Washington, reported that Washington state law provides that written protests must be filed, and an administrative decision must be made, within ten days of receipt of a claim. Written appeals of the decisions can be filed and a final administrative decision must be rendered within ten days. Further recourse relating to a protest can only be taken through the court system. Mr. Joplin reported that the State of Washington received 16 protests during 2003.

The State of Massachusetts reported that prior to 1996, procurement protests in that state were almost automatic. Philmore Anderson estimated that Massachusetts was experiencing a 95 percent protests-to-procurement bid ratio prior to the 1996 reform. Massachusetts recognized that even with the state's administrative system for handling protests, legal action could still be filed in the state's court system, as currently is the case in California. Consequently, the State of Massachusetts eliminated much of their administrative process for handling protests, providing only an administrative debriefing process to allow the protesting vendor to express their opinion. To date, no cases have been filed in court protesting the Massachusetts program.

Several anecdotal examples are presented below to illustrate some practices which do offer benefits to both public bodies and proponents:

Large City Government

A local government ensures that all suppliers who submitted a proposal are informed of an award prior to its public announcement. Suppliers are advised to direct all complaints to the Purchasing Department in writing. Each complaint is answered in writing.

If the supplier is still not satisfied, the complaint will be dealt with first by a Commissioner and then by the elected Council.

The Purchasing Manager believes that this approach is very effective. Each supplier's concerns are dealt with in a forthright manner.

Awards and contracts are held in abeyance if a protest has been lodged pending resolution of the complaint.

Large, Urban School Board

This organization uses a multi-step complaint procedure.

Disgruntled suppliers first deal with the Purchasing Department. If the supplier is still not satisfied with the explanations given, then the supplier can request the opportunity to present its case to an internal Administration Committee. If the supplier complaint is still unresolved, then the supplier can present its case to the Board.

I have been informed that in the last four years, only one grievance has reached the Administration Committee or the Board. The manager of the Purchasing Department attributes this to two factors: clear, concise RFP or Bid documents, and open communication with the suppliers.

Where major contracts are involved, the Purchasing Department takes the time to contact each unsuccessful bidder and provide opportunities for feedback. In most cases, verbal communication is sufficient. When requested, they do not hesitate to provide unsuccessful suppliers with all the information they can within the parameters of the applicable Freedom of Information and Privacy Protection Act. Part of their success is that they never play "hard to get" in providing information unless release of the information is prohibited by the Act.

Centralized Multi-Agency Purchasing Group

This organization is required to ensure that its procedures conform to the published rules. Their policy places great emphasis on the principle of fair and open competition.

If unsuccessful suppliers raise questions or express concerns about the award or the process, they are offered a debriefing session. If the briefing is deemed by the supplier as being unsatisfactory, then the supplier is advised to refer the matter to an administrative tribunal to a request a review, or use the court system.

This group contends that the vast majority of questions and concerns are resolved to the satisfaction of the suppliers during the debriefing process. They state that a few complaints have been escalated to either the tribunal or the court system but the decisions have never resulted in a change to any award or damages being paid to any supplier.

This organization is constantly defending its actions in the press and through the political process.

Grounds for Relief

Indiana is one of many states that publishes information about the grounds for relief as part of its Procurement Protest Policy:¹¹

A. Bid Specifications

After the request for proposals or invitation for bids is released, but prior to the bid due date, a bidder or offeror may submit a written letter of protest on the grounds that the bid specifications are:

- 1. Inadequate*
- 2. Unduly restrictive; or*
- 3. Ambiguous*

B. Award

After the award recommendation letter has been issued, a bidder may submit a written letter of protest, as provided below, regarding the procurement process based on the following:

- 1. The award was arbitrary, capricious or an abuse of discretion;*
- 2. Any aspect of the procurement process was conducted contrary to a constitutional, statutory or regulatory provision;*
- 3. The award was made without observance of a procedure required by the request for proposals or invitation for bids.*

4. *A technical or mathematical mistake or error occurred during the evaluation process;*
5. *There is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, or may have been submitted in bad faith;*
6. *An offeror was not accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals.*

Albemarle County (VA) has published a description of the typical grounds for a protest:¹²

25-3 Competitive Negotiation: Typical Grounds for Protest and Strategies to Prevent Protests
Endnotes 12

A protest in the competitive negotiation procedure typically will be based on one of the following grounds: (1) arbitrariness in the process or in a substantive decision, such as the finding required in order to use the competitive negotiation process for the procurement of goods or nonprofessional services; (2) failure to follow the request for proposals or its evaluation criteria; (3) misleading discussions; (4) failure to avoid the appearance of impropriety; (5) failure to obtain high quality goods and services at reasonable costs; (6) failure to include qualified vendors; or (7) failure to conduct the process in a fair and impartial manner.

Following are some grounds for protesting a competitive negotiation award that are questionable and should be considered with skepticism: (1) the County's decision was erroneous; (2) the County arbitrarily appointed people without technical knowledge to the selection committee; (3) the County failed to retain certain documents; (4) the County failed to timely reply to a Freedom of Information Act request; (5) the selected vendor's proposal infringes on some other vendor's copyrighted work; (6) the requirements of the request for proposals were such that the vendor selected had a major advantage; and (7) the County did not negotiate enough with a particular vendor.

No protest shall lie for a claim that the selected vendor is not responsible. Thus, vendor qualifications including, but not limited to, minimum prior experience, expertise, or minimum bonding capacity, are not the proper subject of a protest because these issues pertain to vendor responsibility. No protest shall lie which challenges the terms and conditions of the request for proposals.

Examples of Policies and Procedures

There are lots of examples of formal supplier complaint procedures. The Model Procurement Code provides some guidance on the pre-litigation resolution of

controversies. Many jurisdictions have used the Model Procurement Code as the model for their own procedure.

Most complaint procedures deal with a core set of topics:

- A vendor's right to protest
- Who can protest
- The timing of the protest
- The contents of the protest
- Who is authorized to resolve the protest
- The protest procedure in terms of notice, hearing, results
- Stay of procurement

County of Albemarle, Virginia has published a 5-page procedure¹³ which is better than most. It contains three elements that differentiate it from other published procedures:

- The essential elements of a protest.
- The typical grounds for a protest and some prevention strategies.
- The available remedies.

The Essential Elements of a protest:

Essential Information in this Chapter

- *The protest procedure provides a possible remedy in any procurement when a prospective vendor desires to challenge the award of a contract to another vendor.*
- *A protest must be received in the purchasing office within ten (10) calendar days of the public posting of the notice of intent to award or the notice of award.*
- *The purchasing agent may award a contract during the period allowed to protest under certain circumstances.*
- *A protest must be in writing and shall include the basis for the protest and the relief sought.*
- *The purchasing agent must issue a written response to the protest within ten (10) calendar days of the receipt of the protest. The response must state the reasons for either denying or upholding the protest.*

- *No protest lies for a claim that the selected vendor is not responsible, or that challenges the terms and conditions of the invitation for bids or request for proposals.*
- *If the protest is upheld, the purchasing agent shall grant appropriate relief.*
- *Following are some strategies to prevent protests when a competitive negotiation procedure is used:*
- *Confirm that the selection was based only upon the factors in the request for proposals.*
- *Confirm that neither the process nor the decision was arbitrary.*
- *Assure that no verbal statements were made during the process that may have misled vendors.*
- *Confirm that the successful vendor satisfies all requirements of the request for proposals.*
- *Assure that the requirements do not change without fair notice to all vendors.*
- *Assure that complex methods for evaluating proposals are accurately and objectively performed.*

Some of the available remedies:

25-7 Remedies if Protest Upheld

If the protest is upheld and the decision to award the contract was, therefore, arbitrary or capricious, the purchasing agent shall grant the following relief:

- *Prior to contract award: The award shall be canceled or revised to comply with the law.*
- *After contract award, prior to contract performance: The performance of the contract by the vendor may be enjoined.*
- *Contract performance begun: The contract may be declared void upon finding that the action is in the best interest of the public.*

If, after a hearing held by the purchasing agent following reasonable notice to all vendors who submitted bids or proposals, there is probable cause to believe that a

decision to award the contract was based on fraud, corruption or an act in violation of the ethics provisions of the Virginia Public Procurement Act, the purchasing agent shall enjoin the award of the contract to the particular vendor.

City of Mississauga, Ontario has published a 13-page Bid Awards and Bid Protests¹⁴ policy. Bidders are entitled to a debriefing. Bidder objections to the intended award require a formal response by the Manager, Procurement. If the bidder is not satisfied with the response, then the bidder can make a formal bid protest. These protests are heard by General Committee and may be heard by Council.

The details and timing for each of these steps are provided in the policy.

An Ending Comment

Supplier complaints cannot be avoided. A disgruntled supplier can always generate a reason to challenge an award. Ensure that your agency's protest mechanisms are capable of resolving these issues. Furthermore, the use of a Fairness Officer will ensure that most complaints are unsuccessful. This expensive step is often warranted for high-visibility, high-risk, highly politicized procurements.

End Notes

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1. Reference 10.
 2. Reference 135. New South Wales (Australia), NSW Procurement Board, Complaints Management Guidelines, 3 pgs,
<https://www.procurepoint.nsw.gov.au/documents/guidelines-managing-procurement-complaints>
 3. Reference 135.
 4. This topic is dealt with in Chapter Ten.
 5. More information about a Fairness Officer can be found at: <http://www.rfpmentor.com/fairness-officer>
 6. This topic, Debriefing, is dealt with in Chapter Twelve.
 7. Reference 126. New Mexico, State Purchasing, Request for Proposals Template, March 2014, 48 pgs,
<http://www.generalservices.state.nm.us/uploads/files/SPD/User%20Guides/RFP%20Template%203-14-14.docx>
 8. Reference 136. Florida Dept. of Corrections, Contract 09-DC-8116R, 26 pgs,
<http://www.dc.state.fl.us/business/contracts/09-DC-8116R.pdf>

9. Reference 23.

10. Reference 137. California Performance Review, 2007, 4 pgs,
http://cpr.ca.gov/CPR_Report/Issues_and_Recommendations/Chapter_7_Statewide_Operations/Procurement/SO64.html

11. Reference 138. Indiana Dept. of Administration Procurement Div., Procurement Protest Policy, 3pgs,
http://www.in.gov/idoa/files/Protest_Policy_11.1.2013_FINAL.pdf

12. Reference 139. Albemarle County (VA), County Attorney, Purchasing Manual, Chapter 25, 5 pgs,
http://www.albemarle.org/upload/images/Forms_Center/Departments/County_Attorney/Forms/Purchasing_Manual_Chapter25_Protests.pdf

13. Reference 139

14. Reference 140. City of Mississauga, Corporate Administration, Bid Awards and Bid Protests, June, 2008, 13 pgs,
http://www.mississauga.ca/file/COM/03-06-08Awards_Protests.pdf

REFERENCES

Each of these reference publications is an exemplary book, report, guide, template, actual RFP, policy & procedure, law, or regulation discussed in the text.

You can download all 140 References.

Cited References are sometimes difficult to find on the web. Addresses change and sometimes documents simply disappear from the web.

These web address were accurate as of Sept. 2014.

To ensure that readers have access to these cited documents, we have created a file, 'RFPHandbook – References' containing all 140 documents. These cited documents include web pages, guides, checklist, and manuals and all of the exemplary texts identified in the Handbook.

Also, some of the References contained in this file are no longer available on the web but have been obtained from the author's files.

This file, 'RFPHandbook – References' is available from the publisher. Future printings of this book will contain a link to the web site dealing with these References. In the meantime, if you want more information about this file or want to obtain a copy of this file, please send an email to the publisher, Michael Asner (michael@rfpmentor.com).

Chapter One

Reference 1. This list presents thumbnail sketches. Please consult Chapter 1 of the full text for the details. International Handbook of Public Procurement, Khi V. Thai Editor, 2009, 836 pgs, <http://sate.gr/nea/international%20handbook%20of%20Public%20Procurement.pdf>

Reference 2. World Bank Procurement Home Page, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,pagePK:84271~theSitePK84266,00.html>

Reference 3. World Bank, Procurement Innovation Challenge, Background Note, 3 pgs, http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/Procurement%20Innovation%20Challenge_Background%20Note.pdf 4. Reference 4. UN Procurement Division Home Page, <http://www.un.org/depts/ptd/>

Reference 4. UN Procurement Division Home Page, <http://222.un.org/dpts/ptd/>

Reference 5. UN Procurement Manual, Revision 7, July 2013, 287 pgs, <http://www.un.org/depts/ptd/pdf/pm.pdf>

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