

Policy Number 2012-001
Central Procurement Office
Contracting Communications and Negotiations Policy & Procedures
for Procurements and Amendments

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Prepared by: The Central Procurement Office of the State of Tennessee

Purpose

To establish a transparent, consistent and equitable process for communicating, clarifying and negotiating with responsive and responsible proposers during the procurement solicitation process, and negotiation with parties to whom a contract award has been made, including any amendments to such awarded contracts.

Scope

These policies and procedures apply to all procurements, contract awards and amendments to such awarded contracts when the solicitation and award are conducted by the Central Procurement Office.

Definitions

For purposes of this policy, the following terms shall have the meanings described below:

“Competitive Range” – means those proposals that have a reasonable chance for contract award based on criteria set forth in the written solicitation document. Only proposals within the Competitive Range shall be considered for additional discussions and negotiation.

“Contract Amendment” - means an amendment, renewal and/or extension of an Original Contract, which includes by example only, changes to term, scope of work, pricing and amount of compensation.

“CPO” – means the Central Procurement Office of the State of Tennessee acting by and through the Chief Procurement Officer or his or her designee as the context requires.

“Fair Pricing” – means pricing that is mutually acceptable to the parties after considering:

- the level of competition within the marketplace,
- time sensitivities,
- technical qualifications,
- the scope of work at issue,
- economies of scale benefits,
- the presence of proprietary, intangible, personal or real property rights at issue,
- the scarcity or abundance of manpower or resources, or
- other considerations.

The “Fair Pricing” shall be ascertained after benchmarking for time, labor, pricing, or deliverables when practical and available information exists. Benchmarking shall compare the individual or market basket of goods and services, as applicable, for the contract or amendment at issue in the relevant market place for the relevant period of time.

“Original Contract” - means any contract resulting from a procurement or solicitation process entered into between the State and any person or legal entity.

“Person” – expansively means a natural person, an association, a legal entity or such other entity with the legal capacity to enter into a contract.

“Procurement” - means buying, purchasing, renting, leasing, or otherwise acquiring any goods or services. It also includes all functions that pertain to the obtaining of any goods or services, including the description of requirements, selection and solicitation of sources, negotiation, preparation and award of a contract, and all phases of contract administration.

“Proposer” – expansively includes a “bidder” or “proposer” that is a person or legal entity that has properly registered as required by the State. The terms “bidder” and “proposer” may be used interchangeably for the term “proposer”.

“Responsible bidder” – means a person who has the capacity in all respects to perform fully the contract requirements, and the integrity and reliability necessary for good faith performance.

“Responsive bidder” – means a person who has submitted a bid (proposal) which conforms in all material respects to the invitation to bid (Request for Proposal).

“Scope of Work” – means a detailed, written description of the conceptual requirements for the goods or services that are the subject of the procurement. The scope of work should detail what is required of the party to whom a contract award is made.

“Special Procurement” – means a contract procurement without a solicitation, or an amendment to an Original Contract, where the Chief Procurement Officer has determined that the goods or services involve, by way of example only,:

- Equipment or service for which there is no comparably competitive product;
- Public utility services from natural or regulated monopolies;
- A component or replacement part or service for which there is no commercially available substitute and which can be obtained only directly from the manufacturer or provider;
- An item where compatibility is the overriding consideration (e.g., computer operating software or hardware enhancements for an existing system);
- The ability of a vendor to meet a necessary condition dictated by unique circumstances (e.g., the need for immediate delivery or repairs at a particular location or emergency situations); or

- Competitive alternatives that are impractical, unfeasible, or will be to the detriment of the State of Tennessee.

“State” – means the State of Tennessee and its agencies, boards and commissions as the context requires.

Policy and Procedure –Procurement Process

This Policy and Procedure shall act as a frame work for establishing a consistent, equitable process for communicating, clarifying and negotiating with responsive and responsible proposers during the procurement solicitation process. Negotiation with proposers to whom a contract award has been made, including any amendments to such awarded contracts, is discussed below.

As appropriate, solicitations of proposals shall state whether negotiations may be conducted with responsive and responsible proposers, who submit proposals determined to fall in the Competitive Range as set forth in the proposal, for award as determined by the CPO. All communications, clarifications and negotiations shall be conducted in a transparent and documented manner that is calculated to arrive at Fair Pricing on terms and conditions most advantageous to the State of Tennessee.

Pre-Award and Post-Award

All communications, clarifications and negotiations shall be conducted in a manner that maintains fairness and transparency in the disclosure of information. There shall be no disclosure of the proposal contents until after the intent to award notice is issued by the CPO. In conducting communications, clarifications or negotiations with a proposer, the CPO may use information derived from proposals submitted by competing proposers in discussions, only if the identity of the proposer providing the information is not disclosed to others. The CPO shall provide comparable information to all proposers with whom communications or negotiations are conducted. Proposer identity shall not be disclosed until after the intent to award notice is issued by the CPO. There shall be no public comment on the procurement process until after the intent to award notice is issued.

All communications, clarifications and negotiations shall be conducted in a manner that supports fairness in proposal improvement. All parties involved in the negotiation, performance, or administration of procurements and contracts for the CPO shall act in good faith. All proposers shall have a reasonable opportunity to address issues such as non-responsiveness, ambiguity, or suspected mistakes. Negotiations shall only be conducted with responsive and responsible proposers falling in the Competitive Range for award as determined by the CPO and as detailed in the written solicitation. All proposers shall be given fair treatment, therefore comparable information shall be provided in communications and negotiations and a consistent evaluation process and criteria shall be upheld throughout the procurement. Price negotiations, including target pricing, may be conducted as long as written equivalent information is provided to all proposers having a reasonable chance for award. Target pricing may be based on considerations such as current pricing, market considerations, benchmarks, budget considerations, or other method that does not reveal individual proposer pricing. During price

negotiations proposers are not obligated to meet or beat target prices, but will not be allowed to increase overall prices.

The Chief Procurement Officer shall assign and maintain a single point of contact for proposers throughout the procurement process, including with respect to communications and clarifications. Negotiations shall be conducted by the Chief Procurement Officer, his or her appointed lead negotiator or appointed negotiation team. Documentation of the procurement shall include, at a minimum, the following documents:

- A log of the date and times of each meeting with a proposer, including the identity of the proposer and their representative;
- A description of the nature or reason for all material communications with each proposer; and
- A copy of all written communications, including electronic communications, with each proposer.

Special Procurements

Special procurement of contracts, or amendments to such contracts, shall only be conducted after a determination by the Chief Procurement Officer that the goods or services involve, by way of example only,:

- Equipment or service for which there is no comparably competitive product;
- Public utility services from natural or regulated monopolies;
- A component or replacement part or service for which there is no commercially available substitute and which can be obtained only directly from the manufacturer or provider;
- An item where compatibility is the overriding consideration (e.g., computer operating software or hardware enhancements for an existing system);
- The ability of a vendor to meet a necessary condition dictated by unique circumstances (e.g., the need for immediate delivery or repairs at a particular location or emergency situations); or
- Competitive alternatives are impractical, unfeasible, or will be to the detriment of the State of Tennessee.

Additional State approvals may be required by statute or rules and regulations before such contracts or amendments can be fully executed.

The Chief Procurement Officer shall assign and maintain a single point of contact for proposers throughout the procurement process, including with respect to communications and clarifications. Negotiations shall be conducted by the Chief Procurement Officer, his or her appointed lead negotiator or appointed negotiation team. Documentation of the special procurement shall include, at a minimum, the following documents:

- An analysis of viable alternate options available and the benefits of pursuing direct negotiation instead of competitive alternatives;

- A determination that the contract or amendment procured pursuant to direct negotiation results in a contract or amendment at Fair Pricing on terms and conditions most advantageous to the State of Tennessee;
- A log of the date and times of each meeting with a proposer, including the identity of the proposer and their representative;
- A description of the nature or reason for all material communications with each proposer; and
- A copy of all written communications, including electronic communications, with each proposer.

Policy and Procedure – Existing Contracts

All existing contract negotiations for a Contract Amendment shall be conducted in good faith and in a manner that supports a transparent process. Negotiations for Contract Amendments or renewals or extensions or to provide additional goods or services must be for scope, (i) within the scope of work set forth in the Original Contract and within the intent and purpose of the Original Contract, or (ii) that is a logical extension of the scope of work in the Original Contract. Negotiations shall only be conducted with vendor representatives having authority to negotiate on behalf of their company.

In determining whether the State’s best interests are served by accepting the proposal of an existing vendor resulting from negotiations conducted relative to a Contract Amendment (a “Vendor Proposal”), the Chief Procurement Officer, or his or her designee, shall determine whether the pricing provided in the Vendor Proposal represents Fair Pricing and provides benefits to the State that outweigh the benefits to the State that could be obtained by procuring the scope of work through a solicitation to the marketplace. The determination of the Chief Procurement Officer that the benefits to the State from accepting the Vendor Proposal outweigh the benefits to the State that could be obtained through a solicitation to the marketplace must be articulated in writing and may be based on one or more of the following rationales (this list is intended to be exemplary and not exhaustive): (1) scope of work is too limited to elicit competitive bids that would provide cost savings; (2) time delays resulting from competitive procurement process would harm the State; (3) whether the resulting contract, as amended, reflects Fair Pricing on terms and conditions that are most advantageous to the State of Tennessee; and (4) whether the existing vendor is the most qualified or only vendor of such goods or services (as determined through initial bid responses or approval of a sole source contract). Following such a determination, a Contract Amendment executed by the parties shall clearly detail the additions, deletions, and modifications to the Original Contract.

SOURCES

State of Georgia Procurement Manual

The Virginia Public Procurement Act Guide for Local Government

The Virginia Public Procurement Act, Chapter 7, Competitive Negotiation

Comparative Review of State IT Procurement Practices, NASPO

New York State Science & Technology Law Center, Model Negotiation Policies

Illinois Administrative Code, Westlaw

Code of Maryland Regulations, Westlaw

Code of Massachusetts Regulations, Westlaw

Mississippi Administrative Code, Westlaw

Illinois Central Bureau of Land Acquisition, Negotiation Policies and Procedures

Regulations of Connecticut State Agencies

Oklahoma Department of Central Services, Central Purchasing Administrative Rules

State of South Carolina, Classifying Proposals and Conducting Discussions

Commonwealth of Pennsylvania, Bureau of Procurement, Procurement Handbook