

**2008 GTC East**  
**“Procurement –**  
**In the Hot Seat”**  
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# Overview

- **OGS Contracting Strategy**
- **Major Contractual Terms and Conditions (Ts & Cs)**
- **GSA Schedule 70 Program**
- **Executive Order 4**
- **Aggregate Purchase Initiatives**



# OGS's Contracting Strategy

What is OGS trying to accomplish?

Ongoing procurement activities to meet the needs and requirements of agencies and authorized users via award of statewide centralized or agency-specific contracts

- Open and Fair Competition
- Broad range of commodity and service offerings
- Recognition of vendor proprietary rights
- Compliance with laws and control agency requirements
- Openness & fairness through standard Ts & Cs
- Balance of protections and risks



# Procurement Stewardship Act

- Establishes the rules for state contracts, including OGS centralized contract
- Levels the playing field for bidders
- Calls for wise and prudent use of public funds
- Requires creation of procurement record for each contract



# Key Ways that Contracts are Established

## ■ Competitive Process

- **IFB** – Invitation for Bid- low cost, meeting specifications (i.e. Commodities, Communications equipment)
  - **Detailed Specifications**- sets criteria, terms, conditions for all bidders
  - **Brand Bids** - bid either lists brand as a reference, with “or equal”; or, lists **ONLY** brand that is acceptable
- **RFP** – Request for Proposal- factors in addition to cost considered & weighted (Fuel Cards, P-Cards)



# Key Ways that Contracts are Established

- **Non-Competitive Process**
  - **Negotiated Contracts** – contract established via agreement reached by parties, in lieu of issuing bid, or, following competition
  - **Backdrop Contracts** – multiple award meeting general requirements of users
  - **Single, Sole Source** – only 1 or limited number of suppliers
  - **Piggyback Contracts** (§163.10.e &f) (GSA, other state contracts incorporating Appendix A and B)
  - **Emergency Procurements** – process expedited
- **Continuous Recruitment** – contractors can be added during term of original contract (communications, software, radio, allowing new technologies to be incorporated)

# The Process (Non-Competitive)

1. Identifying Need
2. Establish qualifying criteria
3. Requirements and Specifications
4. Pre-contracting conference
5. Finalize contract document
6. Multiple Awards or Backdrop Contracts
7. Customers do a best and final process or negotiate additional discounts for larger orders

# Major Contractual Issues

- Limitation of Liability
- Acceptance
- Intellectual Property Rights (License) & Indemnity
- Most Favored Nations
- Warranty and Indemnity



# Limitation of Liability

- A financial cap or maximum dollar amount established for contractor liability for breach of contract.
- NYS Attorney General requires unlimited liability for personal injury.

# Intellectual Property Rights & Indemnity

Ownership rights in all contract deliverables  
(generally referred to in technology contracts as  
“patent, title or copyrights”)



# Warranty & Indemnity

Requirement on the contractor to **ensure conformance of the contract** deliverables to the written technical specifications, performance standards, or general suitability or fitness for use assurances set forth in the contract, and the associated responsibility of the contractor to take such corrective actions as will ensure conformance with those promises.

Appendix B clause 72



# Product Acceptance

- Contractors want to recognize revenue when the entity receives the product. OGS contracts provide for an up to 60 day period to test and acceptance the product before payment becomes due. The state then has 30 days to make the payment.

– Appendix B clause 79



# Most Favored Nations

**Definition:** A legal requirement that the state be offered the most advantageous terms and conditions, including pricing, offered by the vendor to any other **similarly situated** purchaser.

Appendix B clause 24



# Additional Appendix B Issues

- Performance Bond (58) Centralized contract provides Authorized User with ability to request bond at time of transaction and contractor can't calculate cost at time of contract.
- Termination for Cause (60)
  - Contractors want a mutual ability to terminate for cause for breach by an Authorized User.
- Default by Authorized User (63)
  - Contractors believe clause does not give them sufficient additional recourse other than to cancel. They want stronger “collection” language.



# Additional Appendix B Issues

- Remedies for Breach (65)
  - Contractors object to the stopping of payments without due process
- Security/ Confidentiality (14 and 78(h))
  - Contractors want mutual confidentiality without the process required by Clause 14
- Software License Grant (72)
  - Occasional issues arise regarding intellectual property rights and conflict with confidentiality (e.g.: HIPAA)



# GSA Schedule 70

## OGS PSG Legal Position

- Issues and Concerns
- Reciprocal legislation still required  
(for both NY SFL and GML)
- Optional Vendor Delivery and Fulfillment
- Interest, involvement, approval of OFT,  
OSC, CIO, Procurement Council



# Constraints – State & Local Law

- States not permitted to add terms and conditions to satisfy statutory requirements
- Governing Law – Appendix A
  - Prevailing wage provisions
- Liability, insurance, remedies
- Inclusion of arbitration clauses
- Transactional access to Schedule 70
- Industrial Funding Fees

# Executive Order 4

## Governor Paterson's Executive Order 4 – signed April 2008 New York State's Green Procurement and Agency Sustainability Program

### Co-chaired by the Commissioners of OGS & DEC

- Directs state agencies, public authorities and public benefit corporations to green their procurements and to implement sustainability initiatives
- Established an Interagency Committee on Sustainability and Green Procurement

### Charged with:

- identifying an annual list of categories and products for which specifications can be developed and issued for greener procurements.
- establishment of goals for reductions in the amount of solid waste generated
- development and performance of training relative to sustainability efforts

<http://www.ogs.state.ny.us/ExecutiveOrder4.html>



# Aggregate Purchasing

## 2008 Aggregate Purchase Initiative

Fulfills OGS's mission under **Executive Order 4** and **prudent use of state resources**,

- All Business Class Desktop PC, Notebook and Unbundled Display configurations are, at a minimum, registered silver in the EPEAT registry and meet or exceed industry standards for energy efficiency and environmental concerns.
- Potential **energy savings** equate to:
  - energy to power 15,637 US households in one year
  - Greenhouse Gas reduction = to removing 10,440 passenger cars from the road for one year.
- Robust energy-efficient configurations offered at highly competitive prices.
- >\$200+M saved from state contract price over the last 2 years
- Open to all authorized users of NYS contracts.