

INTRODUCTION TO PROCUREMENT FOR NYS AGENCIES

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PURPOSE

- Facilitate agency's mission
- Promote fairness in contracting
- Guard against favoritism, improvidence, extravagance, fraud, and corruption

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BEFORE CONDUCTING A NEW PROCUREMENT

- Order of Precedence for method
- Procurement Guidelines that agencies must follow

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BEFORE CONDUCTING A NEW PROCUREMENT

- Preferred Sources
 - Corcraft, etc.
- May complain to Procurement Council if not used by agency

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BEFORE CONDUCTING A NEW PROCUREMENT

- Over one thousand centralized contract awards
- Agencies can negotiate a lower price
- P.O.s not subject to OSC pre-audit approval

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CONDUCTING A NEW PROCUREMENT

- Formal competitive procurement not required for purchases under \$50,000.00
- Cannot split contracts to fit beneath threshold
- Discretionary threshold up to \$200,000.00 for purchases from MWBEs, SDVOBs, NYS Small Business, for recycled commodities/tech, agricultural products produced or harvested in NY

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CONDUCTING A NEW PROCUREMENT

- Competitive Procurements for:
 - Commodities= lowest price, Invitation for Bids
 - Services= best value, Request for Proposals

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CONDUCTING A NEW PROCUREMENT

- Contracts over \$50,000.00 must be listed in contract reporter at least 15 days before bid is due
 - OSC Bid Protest
 - Contract Reporter Exemption Request

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CONDUCTING A NEW PROCUREMENT

- If receive advertising exemption approval, agency must still publish notice of award and reasons for exemption.
- Non-competitive awards also include recipient, value, purpose

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CONDUCTING A NEW PROCUREMENT

- Single source: although two or more offerors can meet agency need, agency documents written findings setting forth reasons for award to one
- Sole source: only one offeror is capable of supplying needed services or commodities
- Subject to OSC approval

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CONDUCTING A NEW PROCUREMENT

- Single source- factors
 - Circumstances for leading to selection of vendor
 - Alternatives considered
 - Rationale for selecting specific vendor
 - Cost reasonableness

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CONDUCTING A NEW PROCUREMENT

- Single source-in CRER
 - Description of goods/services
 - Circumstances and material and substantial reasons why competitive procurement not feasible
 - Vendor selection justification
 - Why the period of time requested is the minimum necessary to ameliorate the circumstances which created the material and substantial reasons for this request
 - If a future competitive process is anticipated, provide key dates such as CR publication, bid due dates, bid opening dates, evaluation, and notice of award
 - Justification of price

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CONDUCTING A NEW PROCUREMENT

- sole source
 - Is the procurement unmotivated by arbitrary restrictions?
 - Is the product/service unique?
 - Is the benefit unique?
 - Is the price reasonable?

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CONTRACT TERMS

- Appendix A
 - Order of precedence
 - MWBE, SDVOB, funding requirements

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CONTRACT TERMS

- Master Contract for Grants
 - Req'd over \$10,000.00
- Article 11-B, competitive procurement, and approval environment

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CONTRACT TERMS

- Indemnification
 - Identify whether needed for this procurement
 - Broad indemnification may cause issues after award at time of contract execution

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CONTRACT TERMS

- Publicity/confidentiality
 - Promotional signs for site based projects
 - Procedure by which contractor can identify trade secrets
 - Consider constraints of FOIL

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CONTRACT TERMS

- ITS Technology policies
 - Date and time conversion language
 - Cyber incident response
 - Procedure by which to request waiver from policy

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VENDOR RESPONSIBILITY

- Agency determines responsibility prior to award
- Elastic term
- FLIP analysis

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VENDOR RESPONSIBILITY

- Financial and organizational capacity
 - Audits
 - Contractor experience

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VENDOR RESPONSIBILITY

- Legal Authority
 - Licenses
 - Charities registration
 - Debarment

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VENDOR RESPONSIBILITY

- Integrity
 - Indictments and convictions
 - Investigations
 - Responsiveness and hostility

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VENDOR RESPONSIBILITY

- Past Performance
 - Prior monitoring
 - Failure to complete projects
 - Inability to follow directions
 - Litigation

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VENDOR RESPONSIBILITY

- What is isn't:
 - Disregarding procurement criteria to award to a different contractor who is "more responsible"

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VENDOR RESPONSIBILITY

- OSC may return a contract unapproved because of its own vendor responsibility determination

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VENDOR RESPONSIBILITY

- Resources and tools
 - Vendor Responsibility Questionnaire for contracts, and subcontractors known at time of award, over \$100,000.00.
 - Some entities exempt from VRQ, but OSC reserves right to request one

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VENDOR RESPONSIBILITY

- Resources and tools
 - E-courts/PACER
 - Charities Bureau
 - OpenBookNY
 - Your preferred search engine

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VENDOR RESPONSIBILITY

- Flags, findings, and follow up
 - Reach out, request documents
 - If issue is unresolved, determine who will monitor
 - Identify corrective action taken

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VENDOR RESPONSIBILITY

- Non-Responsibility Determination
 - Liberty interest → Due process
 - Written notice, more than a mere gesture

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VENDOR RESPONSIBILITY

- Non-Responsibility Determination
 - Authority to determine responsibility
 - Statement of preliminary finding of non-responsibility
 - Conduct that gave rise to preliminary finding
 - Opportunity to provide additional information and evidence
 - Deadline

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VENDOR RESPONSIBILITY

- Non-Responsibility Determination
 - Opportunity to be heard does not need to be formal hearing on the record
 - Can be by letter
 - If meet, take minutes and provide chance to agree on accuracy

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VENDOR RESPONSIBILITY

- Determination of non-responsibility should not operate as debarment for all future contracting, absent statutory authority.

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VENDOR RESPONSIBILITY

- Executive Order No. 192
 - Attention to vendor responsibility should not end with the contract award
 - Must rely on responsibility determinations made by other state entities
 - Waiver procedure
 - Selection absent waiver is breach of duty as public officer

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VENDOR RESPONSIBILITY

- Contract terms for continued review
 - Master Grant Contract(IV)(N)
 - Appendix A, Records
 - Consider your own reporting language
 - Rock Stars, Candy, and Contracts

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Introduction to New York State Agency Procurement

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Purpose of Competitive Procurement

1. Facilitate agency's mission while protecting the interests of the state and taxpayers, and promote fairness in contracting with the business community. State Finance Law § 163(2).
2. Guard against favoritism, improvidence, extravagance, fraud and corruption. *Jered Contracting Corp. v New York City Transit Authority*, 22 N.Y.2d 187 (1968); *Matter of Transactive Corp. v New York State Dept. of Social Servs.*, 236 A.D.2d 48 (3rd 1997).

Before Conducting Your Own Procurement

1. State Agency means: "all state departments, boards, commissions, offices or institutions but excludes, however, for the purposes of subdivision five of section three hundred fifty-five of the education law, the state university of New York and excludes, for the purposes of subdivision a of section sixty-two hundred eighteen of the education law, the city university of New York; provided, however, that the state university of New York and the city university of New York shall be subject to the provisions of section one hundred sixty-five-a of this article. Furthermore, such term shall not include the legislature or the judiciary." State Finance Law § 160(9).
2. State Finance Law § 163 sets forth an order of precedence that agencies must follow.
3. Procurement Guidelines.²
 - a. State agencies are to purchase services or commodities "consistent with" or "pursuant" to guidelines issued by the state procurement council. State Finance Law § 163(3)(a)(v), (vi).
4. Can agency's need be met through a Preferred Source?
 - a. State Finance Law § 163(3)(a)(i).
 - b. OGS Preferred Source Guidelines.³
 - i. Provides step by step instructions for Preferred Source procurement.
 - ii. Preferred Source may allege before the Procurement Council that an agency has failure to purchase from Preferred Sources. Procurement

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² <https://ogs.ny.gov/system/files/documents/2018/08/psnys-procurement-guidelines.pdf>

³ <https://www.ogs.state.ny.us/procurecounc/pdfdoc/psguide.pdf>

Council may review agency's procurement record and send copy of decision to Comptroller.

iii. OGS List of Preferred Sources⁴

1. Corcraft.
2. NYS Preferred Source Program for People who are Blind.
3. New York State Industries for the Disabled, Inc.

5. Can agency's need be met through a Centralized Contract?

- a. "any contract for the purchase of commodities or services, established or approved by the commissioner of general services as meeting the state's requirements including, but not limited to, any contract let by the federal government, other state or local governments or purchasing consortia." State Finance Law § 160(1).
- b. Over one thousand Centralized Contract awards.⁵
- c. Agencies obligated to purchase services and commodities from Centralized Contracts that meet the agency's needs.
- d. Agencies can seek to negotiate a lower price.
- e. Purchase Orders issued through a centralized contract are not subject to OSC pre-audit approval.
- f. SED, OSC, OAG not obligated to use centralized contracts for services and technology.⁶
- g. Agencies may conduct competitive procurement where commodities can be secured at lower price than listed in centralized contract. State Finance Law § 163(3)(a)(v).

6. Can an already established agency contract meet the agency's needs?

Agency Procurement

1. How much will this cost?

- a. Agencies are not required to conduct a formal competitive procurement for services and commodities that do not exceed \$50,000.00. State Finance Law § 163(6).

⁴ <https://www.ogs.state.ny.us/procurecounc/pdfdoc/pslist.pdf>

⁵ <https://ogs.ny.gov/procurement/ogs-centralized-awards-list>

⁶ New York State Procurement Guidelines, pg 5.

- b. Competitive procurements for commodities shall be awarded on the basis of lowest price. Competitive procurements for services shall be awarded on the basis of best value. State Finance Law § 163(10).
 - i. Procurement Guidelines contain specific guidance for different competitive procurement vehicles. Requests for Proposals are typically used for procuring services and technology where best value is the criterion. Invitations for Bids are typically used for commodities where lowest price is the criterion.
 - c. Agencies should conduct discretionary procurement in accordance with Discretionary Purchasing Guidelines, and their own internal policies.
 - d. Agencies are not required to conduct a formal competitive procurement for commodities or services up to \$200,000.00 from MWBEs, SDVOBs, or New York State Small Business, recycled commodities or technology, and food grown, produced or harvested in New York.
 - e. Must consider the annual aggregate amount anticipated within the next twelve month period. Dividing procurements to fit beneath the discretionary threshold is explicitly prohibited. State Finance Law § 163(6-b).
 - f. Contracts greater than \$50,000.00 must be approved by OSC prior to becoming effective. Contracts through OGS require approval for those greater than \$85,000.00. Centralized contracts and purchase orders issued under centralized contracts are exempt. State Finance Law § 112(2)(a).
 - i. Purpose of OSC approval prior to execution of contract is to protect against government misconduct and improvidence. *City of New York v State of New York*, 87 N.Y.2d 982 (1996).
2. Procurements over \$50,000.00 must be advertised in the Contract Reporter.⁷ State Finance Law § 163(8).
3. OSC is prohibited from approving a contract over \$50,000.00 unless the opportunity was published at least fifteen days prior to the date the bids were due. Economic Development Law § 146.
- a. Advertising procurement after selection of MWBE, where cost exceeded \$50,000.00 but was below \$200,000.00, where substantial work was already performed by contractor and facts indicated there was no actual procurement opportunity as reflected in the advertisement resulted in OSC's non-approval of contract. OSC opined the appropriate avenue would have been to seek a contract reporter exemption request. OSC Matter of Bid Protest filed by Technology Innovation & Strategy, Inc., SF-20160095.

⁷ <https://www.nyscr.ny.gov/>

4. If an agency receives an exemption from publication, the agency must still publish notice of the award of the contract and reasons for the exemption in the contract reporter as soon as practicable, unless OSC determines publication would affect law enforcement investigations or negatively impact an agency's ability to protect security operations. Exemptions from publication of non-competitive awards shall also state the recipient, term, estimated value, and include a brief description of the procurement's purpose. Economic Development Law § 144(2)(e).
5. Single and Sole Source.
 - a. Is the agency's need best met by conducting a competitive procurement? If not, then agency may seek an exemption from competitive procurement and contract reporter requirement through either a single source or sole source.
 - b. Single and sole source procurements may be made without a formal competitive process, subject to review by OSC, and should be made only under unusual circumstances, when a formal competitive process is not feasible, and specifications should be fairly created. State Finance Law § 163(10)(b)(i).
 - c. Single Source: "A procurement in which although two or more offerors can supply the required commodities or services, the commissioner or state agency, upon written findings setting forth the material and substantial reasons therefor, may award a contract or non-technical amendment to a contract to one offeror over the other. The commissioner or state agency shall document in the procurement record the circumstances leading to the selection of the vendor, including the alternatives considered, the rationale for selecting the specific vendor and the basis upon which it determined the cost was reasonable." State Finance Law § 163(1)(h).
 - i. In addition to these factors, OSC's Electronic Documents Submission System will also ask agencies to provide:
 1. A description of the goods or service being procured.
 2. The circumstances and material and substantial reasons why a formal competitive process is not feasible.
 3. The vendor selection justification.
 4. Why the period of time requested is the minimum necessary to ameliorate the circumstances which created the material and substantial reasons for this request.
 5. If a future competitive process is anticipated, provide key dates such as publication in the Contract Reporter, bid due dates, bid opening dates, evaluation and notice of award dates.
 6. The price justification for the request.

- ii. Consider issuing a Request for Information to gather feedback from potential contractors and gauge interest, or lack thereof.⁸
- d. Sole Source: “a procurement in which only one offeror is capable of supplying the required commodities or services.” State Finance Law § 163(1)(g).
 - i. In OSC’s Determination of Bid Protest SG-0898-057, citing to *Gerzof v Sweeney*, 16 N.Y.2d 206 (1965), considered:
 - 1. Was the procuring agency acting in good faith, motivated with intent to arbitrarily restrict competition, and motivated without intent to reward one particular manufacturer?
 - 2. Is the product or service unique? Is there a generic equivalent?
 - 3. Are the benefits from the product or service unique? Does any other product or service has substantially similar benefits?
 - 4. Is the price reasonable in comparison with other products when the particular benefits are considered?
 - ii. Does the contractor have a patent?
 - iii. Is there a statutory restriction on who can receive the funds?
 - iv. Proposed contract for exercise equipment returned unapproved where the sole source justification did not evince any intent to arbitrarily restrict competition and the product was unique, but the benefits provided by the product and terms upon which it was offered was not unique, and slight advantage of product did not provide an adequate basis for a higher price. OSC Matter of Bid Protest filed with respect to acquisition of exercise equipment, SF-0898/057.

Contract Language Considerations

- 1. Appendix A.⁹
 - a. Required for all agency contracts.
 - b. Appendix A terms control if there is a conflict with other contractual provisions.
 - c. Additional language may be required for the contract.
 - i. MWBE

⁸ Is There a Procurement Opportunity? Best practices for advertising Single and Sole Source contracts. Office of the State Comptroller. Fall Conference, 2018. Available at: https://www.osc.state.ny.us/agencies/outreach/fallconfer2018/presentations/2018_boc_is_there_a_procurement_opportunity_final.pdf

⁹ <https://ogs.ny.gov/procurement/appendix>

- ii. SDVOB
 - iii. Programmatic, appropriation, or federal requirements.
- 2. Master Contract for Grants.¹⁰
 - a. Required for grants over \$10,000.00.
 - b. Agency's A-1 should include programmatic needs, A-2 can be drafted to take precedence over other terms where federal requirements control.
 - c. Applicability of Master Contract for Grants:
 - i. The definition of services omits contracts approved under Article 11-B. State Finance Law § 160(7).
 - ii. OSC's Guide to Financial Operations, Chpt. XI, § 4.B directs agencies to the Division of Budget for questions on applicability.
 - iii. Discussing grant contracts, OSC approval, and federal funds. *Church Avenue Merchants Block Association, Inc. v State*, 35 Misc.3d 1231(A) (Ct Cl 2011).
 - iv. OSC's Matter of Bid Protest filed by Green Jobs Training Center, SF-20170207, states:

“While Article 11-B does not require competitive bidding, the Comptroller, in fulfilling his statutory duty of assuring that state contracts are awarded in the best interest of the State, requires that agencies undertake a competitive process for grant awards or, alternatively, document why competition is not appropriate or feasible. Thus, notwithstanding the inapplicability of SFL § 163, this Office generally requires that grant contracts be awarded after a fair and impartial competitive procurement process which provides a level playing field for all potential award recipients, except where the agency can document sole source, single source or emergency justification for a non-competitive award (consistent with the documentation for such awards under SFL § 163).”
- 3. Publicity and confidentiality.
 - a. Prior notice, or notice and permission, before media or academic release.
 - i. Ex. Master Grants Contract IV(G).
 - b. Signage requirements for site-based projects.
 - c. Will confidentiality extend beyond term of contract?

¹⁰ <https://grantsmanagement.ny.gov/system/files/documents/2018/09/sample-complete-nys-mcg.pdf>

- d. Does the agency wish to provide the contractor with a procedure to identify confidential materials?
 - e. In drafting confidentiality and publicity clauses, consider constraints of FOIL.
 - i. Confidentiality clause in village's severance agreement with official could not act as bar to FOIL request, and was void as against public policy. *Village of Brockport v Calandra*, 191 Misc.2d 718 (Sup Ct Monroe County 2002) *aff'd* 305 A.D.2d 1030 (4th Dept 2003).
 - f. Ex. OGS Appendix B.
4. Indemnification.
- a. Consider whether indemnification is needed for the procurement.
 - b. Opportunity to limit agency exposure from contractor's bad acts.
 - c. Consider whether to place a limit on the contractor's liability under an indemnification provision.
 - d. A contract that includes an agency's indemnification of a contractor will likely experience questions from control agencies.
 - e. Expansive indemnification provisions may discourage potential bidders and contractors.
 - i. Indemnification was material requirement within the RFP and bidder's refusal to agree to indemnification provided good faith reason to end negotiations and award the procurement to another bidder. OSC Determination of Appeal filed by The Peebles Corporation, SF-20140322.
5. ITS Technology Policies.¹¹
- a. State Technology Law § 103(10) provides authority to ITS to promulgate technology policies; Executive Order No. 117.
 - b. Contracts required to include warranty language that software can perform date and time conversions. ITS Policy NYS-P98-003.
 - c. Cyber Incident Response Policy, NYS-S13-005.
 - i. General Business Law § 899-aa has notification requirements for security breaches involving personal information and is contained in Appendix A.
 - d. Information Security Exception Policy, NYS-P13-001, provides a procedure to request a waiver from applicable ITS policies.

¹¹ <https://its.ny.gov/tables/technologypolicyindex>

Vendor Responsibility

1. Prior to the award of a contract an agency shall make a determination of responsibility of the proposed contractor. State Finance Law § 163(9)(f); Highway Law § 38; Public Buildings Law § 8; General Municipal Law § 103.
2. Responsible means “financial ability, legal capacity, integrity, and past performance of a business entity and as such terms have been interpreted relative to public procurements.” State Finance Law § 163(1)(c). It is an “elastic” term. *Matter of P & C Giampilis Constr. Corp. v Diamond*, 210 A.D.2d 64 (1st Dept 1994); OSC Guide to Financial Operations, Chpt. 11, § 16.¹²
3. FLIP analysis.
 - a. Financial and organizational capacity.
 - i. Rational basis existed to reject lowest bidder as not responsible where company had recently filed for bankruptcy and financial records raised questions of solvency. *Matter of Adelaide Env'tl. Health Assoc. v New York State Off. of Gen. Servs.*, 248 A.D.2d 861 (3d Dept 1998).
 - b. Legal authority.
 - i. Search Department of State’s business entity database.¹³
 - ii. OAG Charities Registration.¹⁴
 - iii. Debarments.
 - iv. Required licensure.
 1. Municipality had rational basis to determine electrician non-responsible where, on seven prior occasions, it had failed to have electrical work supervised by licensed electrician and concealed those events on questionnaires. *Matter of Deol Elec. Contr. V Barrios-Paoli*, 258 A.D.2d 327 (1st Dept 1999).
 - c. Integrity.
 - i. Rational basis existed to determine bidder was non-responsible because of lack of integrity where bidder was subject of multiple concurrent investigations into bidder’s connections with organized crime. *Matter of Interstate Indus. Corp. v Murphy*, 1 A.D.3d 751 (3d Dept 2003).

¹² <https://www.osc.state.ny.us/agencies/guide/MyWebHelp/Content/XI/16.htm>

¹³ https://www.dos.ny.gov/corps/bus_entity_search.html

¹⁴ https://www.charitiesnys.com/RegistrySearch/search_charities.jsp

- ii. Criminal indictment or investigation, prior felony convictions, and willful labor law violations can provide a rational basis for finding a bidder is not responsible. *Matter of LaCorte Elec. Constr. & Maintenance v County of Rensselaer*, 195 A.D.2d 923 (3d Dept 1993).
 - iii. County properly determined bidder was not lowest responsible bidder pursuant to General Municipal Law § 103 where the county's attempts to secure information related to bidder's skill and qualification were met with unresponsiveness and hostility, which court found related to bidder's reliability, accountability and judgment. *Matter of Bay Harbour Elec. v County of Chautauqua*, 210 A.D.2d 919 (4th Dept 1994).
- d. Past Performance.
- i. Poor service on prior contract and high fees charged to the public provided agency with rational basis to reject lowest bid. *Matter of Bortle v Tofany*, 42 A.D.2d 1007 (3d Dept 1973).
 - ii. Subcontractor's numerous failures to make timely deliveries on purchase orders and substantial nonconformance to contractual requirements provided rational basis to reject proposed subcontractor. *Matter of Franbilt Inc. v New York State Thruway Auth.* 282 A.D.2d 963 (3d Dept 2001).
 - iii. Where successful completion of project of similar size was proposal prerequisite, bidder had submitted prior project with public benefits corporation that was subject of breach of contract suit, and authority had found bidder had failed to perform on time, complete work, follow directions, obtain adequate permits, disrupted occupants, received stop work orders, and damaged property. Rationale basis existed to reject proposal because of poor past performance. *Matter of Framan Mech., Inc. v State Univ. Constr. Fund*, 151 A.D.3d 1429 (3d Dept 2017).
 - iv. Town properly rejected lowest bid where bidder failed to submit documentation, despite follow up requests, demonstrating experience with handling project of size and complexity of the subject procurement. *Matter of Eldor Contracting Corp. v Town of Islip*, 277 A.D.2d 233 (2d Dept 2000).
 - v. Rational basis existed not to award contract to lowest bidder on basis of poor past performance, lack of cooperation, and failure to list prior penalty assessments on experience questionnaire. *Matter of J.N. Futia Co. v Office of Gen. Servs. of State of N.Y.*, 39 A.D.2d 136 (3d Dept 1972).
- e. Successfully Challenged Responsibility Determination.

- i. Town rejected lowest bid on qualitative factors not identified in procurement, in effect determined second lowest bidder to be “more responsible” than lowest bidder, rather than finding lowest bidder non-responsible. *Matter of AAA Carting & Rubbish Removal, Inc. v Town of Southeast*, 17 N.Y.3d 136 (2011).

4. OSC Vendor Responsibility Determinations.

- a. While State Finance Law § 163 requires the agency to make responsibility determination, OSC’s decision not approve a contract after receiving a grand jury subpoena involving an investigation into public corruption in the award of contracts was not arbitrary or capricious. *Konski Engineers PC v Levitt*, 69 A.D.2d 940 (3d Dept 1980) *aff’d* 49 N.Y.2d 850 (1980).
- b. When acting in response to a request from a public corporation to review a proposed contract, OSC did not exceed its mandate in finding proposed contractor non-responsible. Ultimate determination rested with the authority, and Court did not reach determination as to whether OSC could reject a contract absent the authority’s request. *Matter of Worth Constr. Co., Inc. v Hevesi*, 32 AD3d 629 (2007).

5. Procedure.

a. Vendor Responsibility Questionnaire.

- i. Required for contracts greater than \$100,000.00, and for subcontracts greater than \$100,000.00 that are known at the time of award.
- ii. If less than \$100,000.00, agency is still required to make a determination regarding the vendor’s responsibility.
- iii. OSC’s Vendor Responsibility Profile AC 3273-S contains checklist for agency actions on vendor responsibility determinations and issues.
- iv. Some entities are exempt from OSC’s documentation requirements.¹⁵
 1. Ex.: municipalities, federal government, public benefit corporations, public colleges and universities, Indian Nations, preferred sources, and purchase orders on statewide contracts.
 2. But, OSC states it reserves the right to request a Vendor Responsibility Profile, even if otherwise exempt.

b. Resources.

- i. Your preferred search engine.

¹⁵ https://www.osc.state.ny.us/vendrep/resources_docreq_agency.htm

1. Create alerts, if able.
- ii. OSC Vendor Responsibility Resource Guide.¹⁶
 1. SAM.gov for federal debarment actions.
 2. E-Courts and PACER.
 3. For not for profits: AG Charities Bureau and Federal Audit Clearinghouse.¹⁷
- iii. OSC's Open Book New York for prior contracts and to assess past performance.¹⁸
- iv. Past performance on agency's own contracts.
- c. Investigating flags on the Vendor Responsibility Questionnaire.
 - i. Don't hesitate to ask questions.
 - ii. If the issue remains unresolved (litigation, investigation), establish a plan for how the issues will be monitored, and who will do so.
 - iii. Verify statements about the status of monitoring or corrective action with other agencies.
6. Determining that a vendor is not responsible.
 - a. A determination of non-responsibility negatively impacts a contractor's ability to carry on business, and thus contractors have a cognizable liberty interest that requires an agency to provide them with due process. Written notice must give contractor enough information such that it is aware of the concerns. *Matter of Schiavone Constr. Co. v Larocca*, 117 A.D.2d 440 (3d Dept 1986).
 - b. The opportunity to be heard does not need to be a hearing on the record. *New York State Asphalt Pavement Assn. v White*, 131 Misc.2d 28 (Sup Ct, Albany County 1988).
 - c. Notice should include:
 - i. Authority to determine responsibility.
 - ii. Statement of preliminary finding of non-responsibility.
 - iii. Contractor conduct giving rise to preliminary determination of non-responsibility.

¹⁶ https://www.osc.state.ny.us/vendrep/documents/vendrep/resource_guide.pdf

¹⁷ <https://harvester.census.gov/facweb/>

¹⁸ <http://www.openbooknewyork.com/>

- iv. Opportunity for contractor to present additional information and evidence by writing, meeting, or both.
 - v. A deadline to respond.
 - vi. Time and place of meeting or address where to provide information.
 - vii. Failure to provide adequate information or respond may result in a final determination of non-responsibility, rejection of bid or termination of contract, as appropriate.
- d. Municipalities non-responsibility determination due to prior bid rigging, made after contractor and counsel was permitted to present arguments in person and in writing, which was reviewed through three levels of agency, was rationally based. *Romano Enters. of N.Y. v New York City Dept. of Transp.*, 254 A.D.2d 233 (1st Dept 1998).

7. Debarment.

- a. Determination of non-responsibility should not act as debarment from all future contracting opportunities, rather an agency should consider responsibility and whether the bidder has remedied the causes of prior non-responsibility determinations. *Matter of Callanan Indus. V White*, 118 A.D.2d 167 (3d Dept 1986).
- b. Agency could not use list of federally debarred contractors to automatically debar contractors on fully state funded contracts absent legislative authority to do so. *Matter of Liquid Asphalt Distribs. Assn. v White*, 137 A.D.2d 913 (3d Dept 1988).
- c. Statutory authority for debarment includes:
 - i. Two final determinations within a consecutive six year period that contractor has willfully failed to pay prevailing wage, or one final determination that contractor has falsified payroll records or engaged in wage kickbacks operates as bar to public works contracts for five years. New York Labor Law Art. 8 and 9. Searchable website.¹⁹
 - ii. Debarment from public works contracts for five years if contractor is subject of a civil fine, stop work order, or conviction Workers' Compensation Law § 141-b.
 - iii. Restrictions on contacts during the procurement process. A finding that an offeror has knowingly and willfully violated statute shall result in a determination of non-responsibility. Another finding that offeror has violated statute within four years shall result in debarment for four years. State Finance Law § 139-j.

¹⁹ <https://applications.labor.ny.gov/EDList/searchPage.do>

8. Executive Order No. 192- Continuing Vendor Integrity Requirements in State Contracts.

- a. “the State’s attention to vendor responsibility should not end with the contract award.”
- b. List of non-responsible entities.²⁰
- c. Must rely on determinations made by other state entities when determining responsibility, ineligibility, debarment of contractor in current or future procurement.
- d. Selection of a contractor deemed non-responsible, debarred or otherwise ineligible, absent an approved waiver, shall be breaching their duty as a public officer.

9. Contract language that can assist with continuing vendor responsibility reviews:

- a. Master Contract for Grants (IV)(N) requires a contractor to update the Vendor Responsibility Questionnaire as new information material to such Questionnaire becomes available.
 - i. Contractor is obligated to promptly report the initiation of an investigation or audit by a government entity with respect to any alleged violation of federal or state law within five days.
 - ii. Agency reserved rights to:
 1. Require updates or clarifications to Questionnaire.
 2. Inquire about information within, or omitted from, Questionnaire.
 3. Require contractor to provide such information to state within reasonable timeframe.
 4. Require as a condition precedent to entering into the contract that contractor agree to conditions that are necessary to satisfy the agency that the contractor is, and will remain, a responsible vendor.
 5. Suspend activities under the contract when it discovers information that calls into question the responsibility of the contract.
- b. Appendix A
 - i. Does not directly address vendor responsibility.

²⁰ <https://ogs.ny.gov/non-responsible-entities>

- ii. Paragraph 10, Records, does require the contract to create and maintain records relevant to its performance under the contract, and permit access to its records by the agency, OSC, and OAG during normal business hours.
- c. May wish to consider including contract language that:
 - i. Obligates a contractor to update the vendor responsibility questionnaire throughout the contract.
 - ii. Set timeframes under which a contractor must report material changes to questions in the vendor responsibility questionnaire.
 - iii. Includes required notice from the contractor on issues specific to the procurement that would impact financial and organizational capacity, legal authority, integrity, and past performance.
 - 1. If the procurement is for a service by a licensed professional, the contract may include a requirement that the professional remain licensed, and to notify the agency if the license is threatened.
 - 2. If the agency is a pass-through for federal funds, require the contractor to share the results of any federal awarding agency monitoring. Requirements of pass-through entities, 2 C.F.R. 200.331(b)
- d. Consider how agency will assess whether the contractor has operationalized the terms of the contract.²¹

²¹ Jacob Ganz, *The Truth About Van Halen and Those Brown M&Ms*, National Public Radio, February 14, 2012, available at <https://www.npr.org/sections/therecord/2012/02/14/146880432/the-truth-about-van-halen-and-those-brown-m-ms>.



State of New York

Executive Chamber

No. 192

EXECUTIVE ORDER

EXECUTIVE ORDER IMPOSING CONTINUING VENDOR INTEGRITY REQUIREMENTS IN STATE CONTRACTS

WHEREAS, New York State, through its agencies and authorities, contracts with a wide variety of vendors, suppliers, service firms, and other contractors to construct public works and obtain goods, services, and technology in various capacities;

WHEREAS, it is imperative that the State conduct business only with responsible entities to ensure that taxpayer dollars are not paid to entities or individuals that lack integrity, are incapable of providing satisfactory performance, or fail to comply with existing laws;

WHEREAS, New York law and public policy have long required that entities wishing to bid for State contracts be found to be responsible at the time of contract award by demonstrating that they have the requisite financial and organizational capacity, legal authority, and integrity (of both the entity and its principals), and, where appropriate, have shown satisfactory performance on prior government contracts;

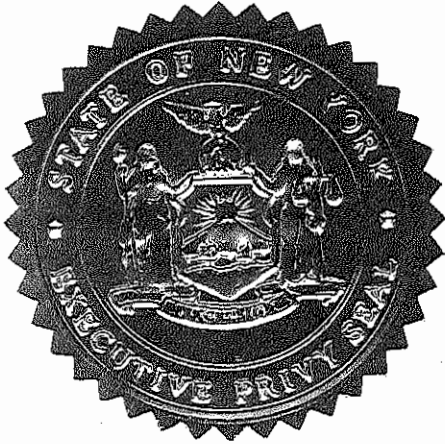
WHEREAS, State agencies and authorities currently have the ability to debar or deem ineligible for future bidding any contractors, vendors, or grantees that have violated certain statutory provisions, which include, but are not limited to, violations of Labor Law Article 8 and 9 for the willful and intentional failure to pay the prevailing rate of wages; violations of Labor Law Article 25-B (Construction Industry Fair Play Act) and Labor Law Article 25-C (Commercial Goods Transportation Industry Fair Play Act); being listed by the federal government as excluded from receiving federal contracts and certain subcontracts, assistance or benefits, pursuant to 48 C.F.R. Subpart 9-4; being convicted of a crime defined in Penal Law Article 200 (Bribery Involving Public Servants and Related Offenses), Article 496 (Corrupting the Government), or § 195.20 (Defrauding the Government); being subject to a final assessment of civil fines or penalties or a stop-work order, or being convicted of a misdemeanor for violation of Workers Compensation Law §§ 26, 52, or 131; being the subject of a finding of fraudulent or intentional misrepresentation or willful and intentional disregard of the minority- and women-owned participation requirements on a project; and more; and

WHEREAS, the State's attention to vendor responsibility should not end with the contract award process, and State agencies and authorities should ensure that contractors, vendors, and grantees remain responsible throughout the term of the contracts and that such contractors, vendors, and grantees who are the subject of debarment or are found to be non-responsible are not able to bid on public procurements.

NOW, THEREFORE, I, ANDREW M. CUOMO, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and laws of the State of New York, do hereby order and direct as follows:

1. "State Entities" shall mean (i) all agencies and departments over which the Governor has executive authority and as defined in subdivision 3, section 2-a of the State Finance Law; and (ii) all public benefit corporations, public authorities, boards, and commissions for which the Governor appoints the Chair, the Chief Executive, or at least 50% of the Board Members.
2. "Contract" shall mean any contract, lease, grant or equivalent legal instrument.
3. State Entities are directed to evaluate – utilizing the existing vendor responsibility determination process – whether bidders are responsible, based in pertinent part upon the following factors: (i) financial and organization capacity; (ii) legal authority; (iii) integrity; and (iv) past performance. Moreover, State Entities are required to determine whether a contractor, vendor, or grantee has failed to comply with any statutory provisions relating to debarment.
4. If a State Entity discovers information that indicates a contractor, vendor, or grantee may not be responsible, may no longer be responsible during the term of the contract, or be subject to debarment for violation of a statutory provision or provisions, the State Entity is directed, as applicable, (i) to conduct an analysis, review, hearing, or investigation, which may include, but is not limited to, conducting a document review supplemented by interviews involving the questioning of the contractor, vendor, or grantee and their representatives; and (ii) to make a determination following such review, hearing or investigation.
5. All State Entities are required to maintain information on contractors, vendors, or grantees that have been deemed non-responsible or ineligible to bid on future contracts or grants and are directed to submit a list of such contractors, vendors, or grantees to the Office of General Services ("OGS") for posting on the OGS website within 5 days. This list should include the name of such contractor, vendor, or grantee, the date, and the basis of the determination, and shall be provided in a manner to be determined by OGS.
6. OGS is directed to post a list of the non-responsibility and debarment determinations on the OGS public website. Such names of debarred contractors, vendors, or grantees shall remain posted on the OGS website for the period designated in the relevant statutory provision allowing for such debarment. In all other cases, determinations shall remain on the list until OGS receives notice of a finding by a court of competent jurisdiction that the non-responsibility or debarment determination was in error or until such time as a waiver has been approved by the Counsel to the Governor, in a manner to be determined by OGS.

7. All State Entities and their state-approved directors must rely on the determination made by other State Entities in ascertaining the responsibility, ineligibility, or debarment of a contractor, vendor, or grantee in current and future procurements.
8. Any commissioner, agency or department head, or member of a board of directors of a State Entity who selects, absent an approved waiver, a contractor, vendor, or grantee, who has been deemed non-responsible, debarred, or otherwise ineligible shall be breaching their duty as a public officer and/or fiduciary duty as a board member.



G I V E N under my hand and the Privy Seal of the
State in the City of Albany this fifteenth
day of January in the year two thousand
nineteen.

BY THE GOVERNOR

A handwritten signature in black ink, appearing to be "Mr. C" followed by a long, sweeping horizontal stroke.

Secretary to the Governor

A handwritten signature in black ink, appearing to be "Ad. Cuomo" in a cursive style.