

THE PROCUREMENT STEWARDSHIP ACT
OPPORTUNITIES FOR REFORM

FOCUS GROUP REPORT

Prepared by the Government Law Center of Albany Law School
for the New York State Office of General Services

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EXECUTIVE SUMMARY

During the Fall of 2005, the New York State Office of General Services (OGS) retained the Government Law Center of Albany Law School (GLC) to conduct a series of statewide focus groups to assist OGS in obtaining detailed comments and suggestions from constituencies involved in the New York State procurement process. The New York State Office of the State Comptroller (OSC) also partnered with OGS and the GLC, but later requested that any references to OSC as a sponsor of this initiative be removed (**see Appendix F**). The goal of the focus group initiative was to identify areas within the Procurement Stewardship Act (PSA or “Act”) that are ripe for reform in light of the June 2006 sunset of the Act. To obtain the broadest possible representation from interested constituencies across the state, four focus groups were conducted: one in Harlem, NY, one in Syracuse, NY and two in Albany, NY.

The following six procurement topics were selected for discussion at the focus groups:

- Procurement Thresholds
- Preferred Sources, Minority and Women-Owned Business Enterprises, Small Businesses, and Recycled and Remanufactured Products
- State Contract Process
- Vendor Responsibility
- Debriefing and Dispute Resolution
- The Procurement Stewardship Act

The four focus groups yielded many substantive comments. Some opinions were common across the various focus groups, others were recorded at just one of the four sessions. For example, participants at all four focus groups suggested increasing the current monetary limits of procurement thresholds. Another reoccurring theme at all of the focus groups was the difficulty associated with going through the administrative process to become certified as a minority or women-owned business. Participants also agreed that the current state contract process is too time consuming, and opined that the cause is the pre-audit requirement of OSC. Two other areas were criticized: the current vendor responsibility form and requirements and the debriefing process. Participants from all four focus groups suggested that changes need to be made to the vendor responsibility form and filing requirements, and expressed concern that debriefing procedures are often unavailable (although invaluable) and differ among state agencies.

The GLC drafted this report at the conclusion of all four focus groups. None of the comments reflected in this report are specifically attributed to any one individual or organization, with one noted exception. All comments and suggestions contained in this report were made by those directly involved in the New York State procurement process at one or more of the statewide sessions.

I. Introduction

In 1995, the Procurement Stewardship Act (PSA or Act) was enacted by the State Legislature with the goals of bringing reform and consistency to the government procurement process in New York State. The Act was initially adopted with a five-year sunset clause, presumably to ensure that the new law would be evaluated for effectiveness prior to the sunset. No such study or analysis was conducted, and in 2000 the PSA was extended with some amendments and was scheduled to sunset on June 30, 2005. In the summer of 2004, the Government Law Center of Albany Law School (GLC), recognizing that the sunset was nearing in less than a year, embarked on a year-long study of the PSA, culminating with a statewide symposium in April 2005. The symposium attracted more than 200 people interested in discussing the benefits, challenges and opportunities for reform to the PSA. In April 2005, as part of the State budget negotiations, the PSA was again extended, but this time for just one year. The PSA is now set to sunset on June 30, 2006.

On September 27, 2005, the New York State Assembly held a public hearing to focus attention on potential reform issues related to the PSA during the 2006 Legislative Session. According to the hearing notice, “[w]hen the Stewardship Act was renewed in 2000, a number of significant changes were made to the State Finance Law.” The hearing was designed to obtain information for the Legislature to review the impact of those changes. The hearing notice specifically indicated that the Assembly was seeking comment on a number of issues that significantly affect the State procurement laws and bills that have been introduced to improve the State’s procurement process. Issues and related bills on which testimony was invited included:

- Accountability reform ([A.3454](#), [A.4564](#), [A.7575](#), [A.8231](#), [A.8397](#));
- Responsibility of bidders ([A.1080](#), [A.4562](#), [A.4568](#));
- Bid evaluation ([A.1081](#));
- Procurement challenges ([A.1082](#));
- Emergency procurement procedures ([A.1083](#));
- Remanufacturing ([A.2948](#));
- Green procurement ([A.7257](#));
- Preferences ([A.7310](#)); and
- Notice of opportunities ([A.8873](#)).

The hearing, sponsored by the Standing Committees on Governmental Operations, Local Governments, Small Business, Environmental Conservation, Oversight, Analysis and Investigation and Government Administration, and the Subcommittee on Oversight of the Department of Environmental Conservation, posed roughly one dozen questions that witnesses could address (**see**

Appendix A) as well as other items of interest to those who contributed to the hearing.

During the Fall of 2005, at the request of the New York State Office of General Services (OGS), the Government Law Center of Albany Law School (GLC) arranged for a series of statewide focus groups to assist OGS in obtaining more detailed comments from those constituencies involved most closely with the application and implementation of the PSA. A primary goal of the focus group initiative was to identify potential areas ripe for reform as potential amendments to the PSA are likely to be presented for consideration during the 2006 reauthorization of the Act.

A. About the Office of General Services

The Office of General Services (OGS) was created in 1960. Daniel D. Hogan, the Commissioner, is responsible for the management of OGS, an office that delivers diverse support services to all state agencies. The OGS mission is to facilitate the work of New York State agencies, the Legislature and Judiciary; support local governments and public authorities; and, provide services through the development and management of efficient, responsive and cost effective programs and activities. In addition, OGS procures more than \$3 billion worth of supplies, materials and equipment annually as well as service and technology contracts for all State agencies, participating local governments and others authorized by law.

B. About the Government Law Center

The Government Law Center (GLC) was established at Albany Law School in 1978 to assist state and local governments in meeting cutting edge legal and public policy challenges. The GLC is a non-partisan academic think-tank that focuses on legal aspects of public policy reform. The GLC conducts studies and reports on a wide range of subjects, organizes and hosts conferences and symposia, and develops training for the public sector workforce. The GLC provides a unique neutral forum for the open discussion and debate of often controversial legislative and regulatory reform issues, convening invitational roundtables and focus groups where stakeholders can work together to develop shared solutions to common challenges.

II. Methodology and Process

The GLC approached the challenge of developing effective focus group sessions consistent with the manner in which it has executed similar initiatives in the past. The GLC considered geographic diversity and potential diversity in stakeholder interests in developing the focus group process and methodology. Each of these is discussed below.

A. Location of the Focus Groups

To obtain the broadest possible representation from interested constituencies across the State, four focus groups were conducted in the following three geographic regions:

- Harlem, New York (October 14, 2005)
Held at the Adam Clayton Powell, Jr. State Office Building
- Syracuse, New York (October 21, 2005)
Held at the Senator John H. Hughes State Office Building
- Albany, New York (October 31, 2005)
Held at the Governor Nelson A. Rockefeller Empire State Plaza
- Albany, New York (November 7, 2005)
Held at the Governor Nelson A. Rockefeller Empire State Plaza

Initially, the GLC intended to conduct three focus group sessions, but due to the overwhelming interest in the Albany location, the GLC, together with OGS, determined that a fourth focus group session at this location was appropriate. Each of the host sites offered accessible facilities that met the recommended room specifications of the professional facilitator retained to conduct the focus groups.

At the conclusion of the focus group process, the GLC concluded that there were no discernable differences in reactions to the questions presented to the focus groups based on the geographic location of the session. Rather, the geographic diversity served to ensure more widespread participation across the State.

B. Focus Group Participants

1. Stakeholder Participants

The GLC, with limited input from OGS and OSC, generated a list of invitees for participation in the focus groups. Letters of invitation were sent to organizations and individuals based on the following three criteria:

- Participants active in the New York State procurement process;
- Participants reflective of diversity of the business community (e.g., minority and women-owned business enterprises, large and small businesses, state agencies, local governments, not-for-profit organizations and representatives from the executive and legislative branches of state government); and
- Participants who represent geographic diversity.

The GLC sought lists of names from OGS and OSC of potential individuals and/or companies and organizations that fit these criteria, since these

offices maintain this data in the normal course of business. Both agencies provided abundant names from which the GLC randomly selected potential participants.

The GLC prepared a personalized letter to each of the selected potential focus group members. The letter, attached as **Appendix B** to this report, provided brief background information about the sunset of the PSA, the purpose of the focus group sessions, and information about the location and time of the focus groups. Invitees were provided with a form that they were requested to complete and send back indicating their willingness to participate (or identifying a representative to attend). Due to a short time frame for response, letters were initially sent by facsimile with copies following via regular mail.

2. Stakeholder Observers

In addition to focus group participants, who were the active participants “at the table” in these sessions, a number of stakeholder interests were identified and invited to attend the focus group sessions as observers. The following criteria were used to identify potential observers:

- Individuals active in or who have knowledge of the New York State procurement process;
- Individuals invited to participate directly but who decline, may choose to attend as an observer;
- OGS and OSC employees (as well as GLC staff) should observe rather than participate; and
- Members of the New York State Procurement Council not representing their organization should observe rather than participate.

In total, 122 letters of invitation to focus group stakeholders yielded a desired 43 individual stakeholder participants (**see Appendix D for list**) and 66 observers (**see Appendix E for list**) in the focus group process. By their nature, focus groups are intended to be small groups of people who spend a period of time together discussing questions that are posed. What follows is a listing of the number of participants and observers at each of the four focus group locations:

Harlem	12 participants	10 observers
Syracuse	8 participants	15 observers
Albany (Oct. 31)	13 participants	26 observers
Albany (Nov. 7)	10 participants	14 observers

C. Focus Group Process

1. The Facilitator

The GLC retained the services of an experienced facilitator to assist with the design, execution and analysis of the focus group process. Sandy Schuman, President of Executive Decision Services, LLC, and a Research Associate of the Center for Policy Research, State University of New York at Albany, was selected. Mr. Schuman has an extensive background in this field, having helped organizations work more effectively to solve complex problems and make critical decisions for more than thirty years. He facilitates problem-solving and decision making processes for a wide variety of public management and policy issues and provides training in group facilitation, decision making, system thinking, conflict management systems, public involvement, information management and organizational storytelling. Mr. Schuman moderates the Electronic Discussion on Group Facilitation and is the Editor of *The IAF Handbook of Group Facilitation* and *Group Facilitation: A Research and Applications Journal*.

The GLC, along with OGS and OSC staff, worked with the facilitator to design an agenda that would provide the best opportunity to glean as much information as possible from stakeholder participants without unduly limiting or steering the conversation in any particular direction.

2. Focus Group Meetings

An identical agenda and information packet was used for each focus group. The agenda and information packet are attached to this report as **Appendix B**. Each session began with a brief introduction by the facilitator containing the following information:

- A brief statement about the upcoming 2006 sunset of the Procurement Stewardship Act;
- The purpose of the focus groups (e.g., to hear from individuals directly involved in the state procurement process and, in particular, what reforms are needed as well as any recommendations to improve the current process);
- The policy on note taking. Representatives from the GLC would be taking notes throughout the session; however, the comments made by the participants would not be specifically attributed to the participants unless an individual requested specific notation.

Because the purpose of the focus group was to gather information from multiple stakeholder perspectives, the following ground rules were suggested by the facilitator:

- Take turns: Provide each person an equal opportunity to speak.
- Listen: Listen to and understand each speaker.
- One conversation: Only one speaker at a time; no side conversations.

The facilitator then asked the participants to review the questions (**see Appendix C**) drafted by the GLC with input from OGS and OSC. Participants were then given a chance to respond to the questions. Participants were not required to provide an answer for each question, and were able to raise issues of interest not identified in the questions presented.

Each focus group was scheduled during the day, beginning at 10:00a.m. and ending at 3:00p.m. There was no financial remuneration for participation and attendance was purely voluntary.

C. Other Staff Input into the Process

In addition to the outside facilitator, the GLC project staff included the Director, Patricia E. Salkin, and Post-Graduate Fellow Michael Cassidy. Michael Donohue, another Post-Graduate Fellow with the GLC attended three of the focus groups to assist with note-taking. Michael Cassidy essentially served as both the staff coordinator and reporter for the focus groups. The Planning Committee also consisted of Anne G. Phillips and Lisa K. Fox from OGS and John Moriarty and Charlotte Breeyear from OSC.

D. The Report

The GLC prepared a draft report at the conclusion of all four focus group sessions. This draft report was distributed to focus group participants for their review to ensure that all views and suggestions made at the session were accurately and fairly represented in this report.

III. Focus Group Discussion

Focus group participants were asked to concentrate on six major issues within the PSA. Specifically, the issues included:

1. Procurement Thresholds: Discretionary, Pre-Audit and Advertising
2. Preferred Sources, Minority and Women-Owned Business Enterprises, Small Businesses, and Recycled and Remanufactured Products
3. State Contract Process
4. Vendor Responsibility
5. Debriefing and Dispute Resolution Process
6. Procurement Stewardship Act Sunset¹

Participants were given fifteen minutes to read over the six topics (**see Appendix C**) and were asked to think about questions or concerns regarding

¹ The handout containing the questions (**Appendix C**) lists the "Procurement Stewardship Act Sunset" first. The facilitator decided that a better approach would be to save that question until the end of the focus group. That way, participants could discuss all of the other issues first and use that category to make recommendations about the future of the PSA.

each topic. After the fifteen minute time period, the facilitator began posing the questions to the group.

A. Question 1—Procurement Thresholds: Discretionary, Pre-Audit and Advertising

Participants were provided with the following statements and questions regarding procurement thresholds:

The Procurement Stewardship Act sets three types of thresholds.

Discretionary thresholds are monetary levels below which state agencies can procure commodities, services and technology without formal competitive bid. The regular discretionary threshold is currently \$15,000. To encourage purchases from certified minority- or women-owned businesses (MWBE) and NYS small businesses (SB), and of recycled or remanufactured (RR) products, state law provides a higher discretionary threshold of \$50,000.

The pre-audit threshold is \$15,000. Purchases under \$15,000 do not have to be reviewed in advance by the Office of the State Comptroller (under the pre-audit requirements of State Finance Law §112).

The advertising threshold is \$15,000. Procurements below this amount do not have to be individually advertised in the NYS Contract Reporter.

- *Should the discretionary thresholds remain the same or be changed? If changed, what level would you recommend?*
- *Do the higher discretionary thresholds for procurements from MWBE, SB and of RR products serve their intended purpose?*
- *If the general discretionary threshold was increased, should the MWBE, SB and RR discretionary thresholds be increased to maintain this incentive? If so, how much?*

At all four focus groups the participants agreed that the current procurement thresholds are too low. The following suggestions were made regarding specific dollar amounts:

- Increase discretionary thresholds to \$20,000 for commodities and \$50,000 for services.
- Increase discretionary thresholds to \$50,000 and \$100,000 for minority- and women-owned businesses.
- Discretionary thresholds limits should be set somewhere between \$50,000 and \$150,000.

- Discretionary thresholds for municipalities under the General Municipal Law should be increased to \$25,000 for commodities and \$50,000 for public works.
- Increase discretionary thresholds to \$100,000 for commodities and \$250,000 for services.
- SUNY hospitals propose pre-approval thresholds higher than the current maximum pre-approval threshold of \$150,000, which is granted to SUNY under the Education Law and the University's agreement with OSC. The proposed higher thresholds reflect the larger dollar value contracts SUNY hospitals execute for goods, equipment, and services. Higher pre-approval thresholds are an efficient and effective procurement practice, which are necessary in that many hospital expenditure contracts are directly related to strategic revenue enhancement initiatives. SUNY hospitals are self-sufficient and their ability to pay debt service on facility and equipment bonds are dependent upon their revenue generation.²
- SUNY participants recommended that hospital thresholds increase to \$250,000 per year, aggregate to \$2.5 million over five years.

As reflected in the responses above, while there was no clear consensus regarding a specific dollar amount for the thresholds, there was consensus that the existing threshold limits should be increased. Some participants suggested that a “one size fits all” approach does not work, particularly when applying it to municipalities. Participants in favor of increasing the thresholds, but not committed to a fixed dollar amount, made the following additional suggestions:

- Use the current thresholds as a starting point and then increase them by the Consumer Price Index.
- Increase the thresholds to a certain amount now and review them annually to determine whether an increase or decrease is needed.
- Regarding services, determine the specific amount based on the type of service. For example, technology contracts are generally more expensive so grant them a higher threshold.
- Implement a risk/reward system—base the threshold amount on the vendor’s past performance and financial stability. Solid past performance and high financial stability would make a vendor eligible for a higher threshold.
- Study the costs associated with conducting procurements. For example, look at the personal service costs of preparing the solicitation document, the costs associated with the delay in receiving the commodities or services, etc.

² This comment was submitted by SUNY participants after the focus group meetings were held.

- The “SUNY Flexibility” system, where both OSC and the SUNY Central Administration establish purchase ceilings based on the experience both agencies have with individual procurement controls and practices, has worked fairly well. Most importantly, this process recognizes good contracting and purchasing behavior by giving the solid performing campuses higher thresholds. A similar performance indicator system could be used for New York State Agencies.

More participants suggested a fixed dollar amount than a risk/reward system or a system based on the Consumer Price Index. One argument against the latter was that it would make the procurement process much more complicated and would require agency oversight. A reoccurring theme throughout all of the focus groups was that the procurement process is complicated enough and often takes more time than it should; using a system other than fixed dollar amounts for procurement thresholds would require more regulations and could increase the state contract time line. All participants did agree, however, that procurement thresholds should be reviewed on a regular basis to account for inflation and to ensure the process is running smoothly. Finally, most participants stated that advertising thresholds should be increased to correspond with any increases in discretionary/pre-audit thresholds.

B. Question 2—Preferred Sources, Minority and Women-Owned Business Enterprises (MWBE), Small Businesses and Recycled and Remanufactured Products

Participants were provided with the following statements and questions regarding this topic:

Through the Procurement Stewardship Act, the State seeks to achieve certain socio-economic goals by requiring or encouraging procurement from designated groups. State Finance Law §162 provides an exemption from the competitive bidding requirements for the procurement of commodities and services provided by Preferred Sources³ when such commodities or services meet the agency’s stated “form, function or utility.” State Finance Law §163 specifies that priority be given to purchasing from (1) preferred sources, (2) centralized contracts, (3) agency or multi-agency contracts, and (4) other means of contracting, such as competitive or non-competitive purchasing. Also, it provides higher discretionary thresholds to encourage State agency purchasing from MWBE, SB and of RR products.

- *Should the law be amended to clarify these priorities?*
- *What changes would benefit participation by the Preferred Sources, MWBE, SB and RR sellers?*

³ Commodities produced by the Department of Correctional Services’ Correctional Industries Program (CORCRAFT) and commodities and services produced by approved agencies for blind, mentally ill, or severely disabled persons, or veterans.

- *What has been the experience with the MWBE certification and registration process administered by the Department of Economic Development?*
- *Does your business receive suitable notice of opportunities for MWBE/SB/RR product sales? If not, what improvements can be made to this process?*

The participant discussion on this topic was largely focused on the MWBE certification process, the failure of several state agencies to meet MWBE goals, and the lack of procurement training available to MWBEs and small businesses. The following comments and suggestions were made:

- MWBE certification is a nightmare. It takes over a year to complete. And, is it worth it? It is very costly and carries negative connotations. Also, certification differs from governmental unit to governmental unit. For example, there is separate certification processes and requirement for the Port Authority of New York/New Jersey, the City of New York and the State of New York. There should be reciprocity for certification between states, and between states and the federal government. However, a suggestion by OGS that firms be permitted to self certify their status for a one year period and be able to participate in procurements while completing a formal certification process was not viewed as acceptable.
- Many MWBEs obtain fewer state contracts because the current procurement system focuses too much on track record. MWBEs are left out of the process because they lack a history of doing business with the State.
- The goals currently in place for MWBE involvement in the procurement process are minimal. They are too low and are rarely met.
- The State should do more procurement participation training. Many small businesses and MWBEs do not know how to obtain procurement contracts.
- State agencies need training regarding small businesses. Some agencies are unaware of the fact that they can go out and contract with small businesses.
- There should be something in the procurement law that requires MWBE involvement. Once this happens, agencies should be audited to determine whether or not they are in compliance.
- Requiring involvement may work, but a formal fixed set aside should not be established.
- The remanufactured and recycled goods law is out of date. One major concern is whether a close loop remanufacture is better for the State than an open loop remanufacture.

- Regarding remanufacturing and recycled products, no major revision to the language contained in section 163(3) of the State Finance Law is necessary.
- In addition to preferred sources and MWBEs, there was a suggestion that a new special preference should be given to vendors that engage in “on shore” business. Vendors that guarantee to keep jobs “on shore” should receive special treatment.

All MWBE representative participants agreed that the certification process is extremely complicated. In all four sessions, minority- and women-owned businesses expressed frustration regarding the length of the certification process and the fact that different governmental units require their own certification. A stream lined application period and one certification for all governmental units was viewed as highly desirable as it would encourage more MWBEs to certify and take part in the state procurement process. In addition, many participants stated that New York State does very little to ensure that MWBEs are involved in the state procurement process. Goals are set but rarely achieved. Further, no action is taken to determine why the goals were not met. Many participants agreed that periodic auditing could rectify this problem. A few participants suggested amending the PSA and making MWBE involvement a requirement in the law. However, these participants were outnumbered by others who approved of a system of periodic auditing, but disapproved of a set aside required by the PSA.

C. Question 3—State Contract Process

Participants were provided with the following statements and questions regarding the state contract process:

State laws, executive orders, guidelines and bulletins set forth requirements for the state contract process. They specify advertising requirements, mandatory elements for a solicitation, factors to evaluate in awarding a contract, specific information to collect from vendors, mandatory contract terms and conditions, and a multi-tiered contract approval. Some requirements are more detailed than others. A frequent observation about State procurement is that it takes too long and is too complicated. What suggestions might you have for streamlining the following state procurement processes:

- *Advertising and solicitation*
- *Evaluation of bids and tentative award*
- *Negotiation with vendor and internal approval*
- *Approval by the Office of the State Comptroller*

The overall theme at all four focus groups regarding the State contract

process was that the current process is extremely slow. One of the reasons cited for increasing discretionary thresholds is to limit the number of contracts OSC pre-audits, which would result in a faster processing time. The following comments were made:

- The OSC approval time frame should be reduced; 90 days is too long, it slows down the state contract process.
- Pre-audit review by OSC can result in second guessing the agency's initial determination regarding a procurement contract and prolongs the state contract process.
- The pre-audit process takes too long. Vendors encounter deadlines after submitting a bid or an RFP. For example, a vendor may be awarded the contract and apply for a loan. The loan process places certain deadlines on the vendor and a prolonged pre-audit process can negatively affect the vendor's obligations to the lender in relation to deadlines set. Similar problems can occur when a vendor identifies a particular resource for performance of services, subcontracts some of the work or orders materials for a procurement contract.
- Local governments are frustrated with the amount of time OSC holds a grant award. Grant awards need to be processed in a timelier manner.
- Streamline the award; businesses have to wait too long to get the money. Small businesses suffer the most; they do not have the money to keep the contract open and also satisfy creditors.

Other reoccurring issues with the state contract process, commented on by participants at all four focus groups, involved Requests for Proposals (RFPs), submitting bids electronically, eliminating some of the boiler plate language in state contracts, aggregate buys and the need for better trained procurement officials. Specific comments made were:

- Agencies should be more specific regarding RFPs—this provides vendors with a clearer understanding of what agencies want and will help speed up the process. In addition, Requests for Information, pre-bid conferences, vendor round tables and draft RFPs should be used more often. All provide vendors with the opportunity to ask questions about technical RFPs and in turn will help streamline the process.
- Regarding negotiating with vendors and internal approval, some vendors would prefer prices and equipment (where appropriate) be available to all bidders immediately after the bid date. Some vendors have had difficulty reviewing other bidders' responses because of the overly generous definition of "proprietary information." In some cases, this allows the winning bidder to block-out much of the true proposal.
- Allow bids to be submitted electronically. Bids are voluminous and sometimes require updating. For example, a vendor may want to update a bid with new technology. Electronic submissions would allow a vendor to

update the bid and re-submit it faster, as opposed to having to update a hard copy, thus reducing the contract process.

- Terms and conditions, such as unlimited liability, need reworking. Some vendors may not be able to assume unlimited liability. Also, different agencies use different language. All state contracts should be structured in a uniform manner.
- Aggregate buying hurts all vendors (except the winning bidder), large and small. Aggregate buys occur when agencies join together to buy a commodity or service. This may be great for the State since buying in bulk may save the State and the taxpayers' money. However, since the agencies join together and buy from one source, all other vendors in that industry lose out.
- When aggregate buying is necessary, in addition to lowest price consideration, the State should apply the "best value" concept because it would take into consideration not only the price, but the benefits of total cost ownership.
- Procurement officers need more training. With a complicated RFP, some officers are buying the wrong materials for the job.

Finally, the Contract Reporter received mixed reviews from the participants at the focus groups. No single praise or criticism dominated group discussions, but suggestions were made regarding how to improve the Contract Reporter as well as whether it should be a free publication:

- Reduce the Contract Reporter publication schedule time frame. Currently, when an RFP or an Invitation for Bid (IFB) advertisement is submitted to the Contract Reporter, publication can take anywhere from seven to thirteen days. Agencies at the focus groups suggested that since the RFP and IFB advertisement can be submitted electronically and is subsequently published electronically, the time period between submission and publication should be reduced. In addition, once the advertisement is published, agencies are only required to keep the solicitation open for a minimum of fifteen business days. Participants stated that fifteen business days is too short if, for example, the vendor is required to put together a complex RFP.
- Since the Contract Reporter is published electronically, it was suggested that the cost could be reduced. Participants did not agree that it should be free. One concern raised was that if the Contract Reporter were free, all would have access to procurement information, perhaps compromising bidding by legitimate businesses.

D. Question 4—Vendor Responsibility

Participants were provided with the following statements and questions regarding vendor responsibility:

State Finance Law §163(9)(f) requires that, prior to contract award, State agencies make a “responsibility determination” that assesses the vendor’s legal authority, integrity, financial and organizational capacity, and past performance on government contracts. This determination becomes part of the procurement record. The Office of the State Comptroller has interpreted State Finance Law §112 to require that the Comptroller be satisfied that a proposed contractor is responsible before approving a contract award.

A project is underway to retain vendor responsibility information in an Internet-based system, operated by OSC and available to all contracting state entities and vendors. Vendors will be able to enter and maintain responses to a standardized set of vendor responsibility questions with access only to their records. Authorized contracting entity and OSC users will access vendor information to conduct vendor responsibility reviews.

- Since January 1, 2005, has your business submitted a vendor responsibility questionnaire for review to a State agency? If so, what was your experience?*
- What do you see as the benefits and drawbacks of a central database?*

Out of all six topics covered in each focus group, unanimity was most prevalent regarding vendor responsibility. Most, if not all, participants expressed their frustration with current vendor responsibility forms and procedures. These same comments were heard at all four focus groups:

- The questions on the current forms are extremely problematic. For example, participants from large companies stated that it is very difficult to list each and every member of the company and all administrative or legal liabilities. According to the participants, many times the information requested has nothing to do with the procurement at issue and has no effect on the company’s ability to perform that procurement. For example, it was offered that just because a director or an employee of a company has a criminal record, it does not mean the entire company is bad. Participants from small and large companies also stated that the questions are vague, very open-ended and difficult to answer.
- All vendors agreed that they should only be required to file once annually and then certify that the information is up-to-date during subsequent procurements via a centralized database. Currently, vendors are required to file a new vendor responsibility form each time they bid on a contract.
- Another major complaint by all vendors was that different agencies use different forms. The suggestion was made that all agencies should use the same form and it should be part of the centralized database, where vendors could fill out the form on-line.

While the idea of a centralized database was popular among vendors, one concern was the length of time the content would remain in the system before being updated. For example, how long will an unrelated arrest (not related to state procurement) of an employee of company remain in the system? Participants suggested that the agency in charge of the centralized database be aware of situations such as this and ensure accurate updating. There were also discussions about the public availability of the information submitted as part of the vendor responsibility process with concerns raised about the interplay with the Freedom of Information Law.

Finally, in two of the four focus groups participants commented on a requirement involving the ST 220 form.⁴ New York State Tax Law requires any person seeking to enter into a contract with state agencies or public authorities to fill out a ST 220 form and certify that they, their affiliates, their subcontractors and affiliates of their subcontractors have a valid certificate of authority to collect New York State and local sales and compensating use taxes. Participants suggested changing the law to require a vendor to fill out an ST 220 form annually rather than for each procurement. Also, the requirement that a vendor vouch for the tax practices of its subcontractors and their affiliates should be removed. Vendors stated that having to accurately report on the tax practices of another company is far too difficult and that the State Tax Department, not individual state agencies or vendors, should be responsible for ensuring subcontractors' taxes are in order.

E. Question 5—Debriefing and Dispute Resolution Process

Participants were provided with the following statements and questions regarding the debriefing and dispute resolution process:

The Procurement Guidelines issued by the State Procurement Council require State agencies to provide vendors with an opportunity for a debriefing regarding a submitted proposal. State Finance Law §163(9)(e) prohibits disclosure of the content of competing offers or clarifications (other than statistical tabulations) prior to award. The administrative process for vendor debriefing is established by the procuring agency

Similarly, the administrative process for dispute resolution is established by the individual agency. Civil Practice Law and Rules Article 78 set forth the judicial process for dispute resolution.

- *Do you consider vendor debriefings to be a beneficial and useful tool?*
- *Should there be a statutorily required vendor debriefing process? Why? If yes, what should the process entail?*
- *Are you in favor of releasing information on competitive bids prior to the award of the contract?*

⁴ The ST 220 issue was more prevalent at focus groups attended by large corporations.

- *Should the administrative resolution of disputes by the procuring agency be final, or should the vendor be provided with the opportunity to present their bid dispute to the Office of the State Comptroller?*
- *Should parties not directly involved in a procurement be permitted to dispute the award?*
- *Do you have recommendations for how to improve the administrative bid dispute processes currently used by state agencies?*

The following comments were made regarding debriefing:

- Debriefing, learning why you did or did not get the award, is unbelievably helpful.
- Debriefing is education on bidding. Very little bidding training exists, which makes debriefing essential.
- Currently, debriefing is inconsistent; sometimes vendors are debriefed, other times they are not.
- All agencies should adopt the same debriefing procedures.
- Some participants stated that debriefing should occur before a contract is submitted for OSC's approval, reasoning that after OSC approves a contract, the vendor has no real window for challenging the award.
- Other participants stated debriefing should be available for thirty days after OSC approves the contract. A time period of seven days after OSC approves the contract was also suggested.
- Only direct bidders should be allowed to protest.

Much like vendor responsibility, there was near unanimous agreement regarding debriefing changes to the PSA. All participants that commented on this issue believed that debriefing is invaluable in the procurement process. Many cited debriefing as educational, noting that it gives non-winning vendors the opportunity to see where they went wrong and it helps them to avoid the same pitfalls in the future. Participants also stated opportunities for debriefings differ between agencies and debriefing processes adopted by agencies are inconsistent. Much like vendor responsibility, participants suggested uniformity between agencies. All agencies should offer debriefings and agencies should follow the same debriefing procedures. One debriefing issue that sparked some debate was whether the vendor should be debriefed before or after OSC approves the contract and the number of days the vendor has to request a debriefing. Some participants suggested thirty days, others suggested only seven days. No clear consensus emerged on the exact number of days, but most participants agreed the timeline for requesting a debriefing should be limited.

F. Question 6—Procurement Stewardship Act Sunset

Participants were provided with the following statements and questions regarding the sunset of the Procurement Stewardship Act:

State Finance Law §163 of the 1995 Procurement Stewardship Act is due to expire on June 30, 2006. Absent legislative action, there would be no statutory competitive bidding requirements or other authorized methods to procure commodities, services and technology.

- *Have particular provisions of the Procurement Stewardship Act been beneficial? Problematic? If so, which one(s)?*
- *What are the three most important changes that your organization would like to see if the Procurement Stewardship Act was continued?*
- *Should the law be made permanent? Should the law be extended for 5 years? 1 year?*

All participants supported keeping the PSA in place, but suggestions were made for amendments and/or renewal as follows:

- Make the PSA permanent. If a problem arises, it can be amended through normal legislative processes.
- Renew the PSA every five years. Amendments could work too, but a sunset provision forces the legislature to look at the law every five years.
- Keep the PSA in place, but include a provision that would allow for future innovations in the procurement process. For example, the provision could permit vendors to finance their projects or to allow for the sharing of certain risks in a project or technology. The drafters of the PSA legislation cannot anticipate all the changes in the procurement process and therefore the statute needs to allow for some flexibility.
- Increase procurement thresholds.
- Agencies need to be more aware of MWBEs. Many MWBEs are capable of handling state contracts but are overlooked. The law should impose stricter penalties if an agency is found to be deliberately avoiding MWBEs.
- If a preferred source is awarded a contract, the preferred source should be required to get the materials or supplies from an MWBE.
- More training is needed regarding the procurement process. Training is important for vendors as well agency employees directly involved in the procurement process.
- State agencies should further consider the impact of how it structures its solicitation and the impact such structuring has on the field of vendors eligible for bidding. For example, structuring mini-bids for long periods of commitment may foreclose the possibility of a smaller business

participating in the mini-bid because of difficulty encountered in trying to commit resources for an extended period of time.

- The State should further explore the economic impact of the backdrop contract process and whether this contract model results in the State paying higher rates for the services received because small businesses that could not afford to do the work directly end up being brought on as sub-consultants.
- The vendor responsibility form should be changed. All agencies should use the same form with the same questions and the forms should be stored electronically in one centralized database. Also, rather than filling out a new form for each procurement, the form should be updated annually.
- Municipalities should be required to identify who is in charge of public purchasing.
- Municipalities should be allowed to purchase off of GSA contracts.
- Purchasing officers should be required to attend training and receive certification.
- Include Printing Laws in section 163 of the State Finance Law. Currently, the acquisition of printing is governed by the State Printing and Public Documents Law. State Printing Law sets forth different requirements and thresholds for printing. Participants suggested that printing should have the same statutory requirements as other commodities and services. Consolidation may eliminate a possible area for mistakes in acquisition to occur.
- Give the State Procurement Council more power. Many of the issues before the State Procurement Council involve preferred sources. The State Procurement Council should be used to address other aspects of the PSA as well. It is a great resource that is under utilized.

IV. Conclusion

The participants in the statewide focus groups provided significant feedback to help inform the policymaking and lawmaking processes with regard to the sunset of the PSA. There were many areas of consensus where the vast majority of participants agreed on reforms and modifications to help streamline the process and provide a more business-friendly system that would also protect and benefit the State agencies and taxpayers. Participants seemed satisfied with the opportunity for meaningful input into the reform process.

APPENDICES

Appendix A

New York State Assembly Hearing—Examination of the Procurement Stewardship Act and Procurement Issues, September 27, 2005

Questions Presented for Comment:

1. Should any amendments be made to the Act when reauthorizing the Procurement Stewardship Act, and if so, what should the changes be?
2. How have the incentive programs in the State's procurement laws that seek to encourage contracts with small and certified minority-and women-owned businesses and the purchase of recycled and remanufacturing products functioned? Are these incentives meeting the needs of their constituencies and that of the State? Should discretionary buying thresholds for these programs be adjusted?
3. Are small and minority-and-women owned businesses notified of procurement opportunities in an efficient and effective manner?
4. Should changes be made to the Contract Reporter and the Empire State Builder?
5. What changes, if any, should be made to ensure that New York State is doing business with responsible firms and to ensure the integrity of the procurement process?
6. To what extent should New York implement debarment as a penalty for non-responsible bidders?
7. Are there processes that can be streamlined to reduce the administrative burden on the State and on contractors?
8. Should centralized contracts be expanded to include more types of services or commodities? Should participation in centralized contracts be changed? Does the use of centralized contracts impede participation by small businesses? Should discretionary thresholds be adjusted?
9. How effective is the State in tracking and monitoring purchases made by all entities (State agencies, local governments, and not-for-profits) off of centralized state contracts? Is this purchasing experience considered when the State negotiates a new contract for the same purpose?
10. What steps should the State take with respect to "green procurement"?
11. Should changes be made to address award debriefings and procurement challenge procedures?⁵

⁵ See New York State Assembly, *Notice of Public Hearing – Examination of the Procurement Stewardship and Procurement Issues*, Aug. 16, 2005 at <http://assembly.state.ny.us/comm/GovOps/20050816/> (last visited Nov. 27, 2005).

Appendix B

Exploring Reauthorization of the Procurement Stewardship Act

Focus Group Agenda

9:30 *Coffee, Registration*

10:00 *Welcome, Purpose, Introductions*

-Michael Cassidy

Government Law Center, Albany Law School

10:20 *Agenda Overview*

-Sandy Schuman

Executive Decision Services

10:30 *Procurement Thresholds: Discretionary, Pre-Audit, Advertising*

11:00 *Preferred Sources, Minority and Women-Owned Business Enterprises, Small Businesses, and Recycled and Remanufactured Products*

11:30 *State Contract Process*

12:00 *Lunch*

12:45 *Vendor Responsibility*

1:15 *Debriefing and Dispute Resolution Processes*

1:45 *Procurement Stewardship Act Sunset*

2:15 *Other issues*

2:45 *Final comments; next steps*

3:00 *Adjourn*

PROCUREMENT FOCUS GROUP LOCATIONS

October 14, 2005

Adam Clayton Powell, Jr. State Office Building
163 West 125th Street
New York, NY 10027

Room: 1st Floor Conference Room

October 21, 2005

Senator John H. Hughes State Office Building
333 E. Washington Street
Syracuse, NY 13202

Room: 1st Floor Conference Room

October 31, 2005

Governor Nelson A. Rockefeller Empire State Plaza
Albany, NY 12202

Room: Meeting Room 7

November 7, 2005

Governor Nelson A. Rockefeller Empire State Plaza
Albany, NY 12202

Room: Meeting Room 7

Date

Name
Title
Agency/Organization/Business
Address
City, State Zip

Dear:

The Government Law Center at Albany Law School has been retained by the New York State Office of General Services, working in cooperation with the Office of the New York State Comptroller and the New York State Procurement Council, to host three statewide invitation-only focus groups to explore the reauthorization of the Procurement Stewardship Act. These focus groups will be led by a professional facilitator and will result in a written report.

In 1995, the Procurement Stewardship Act was enacted with the goal of consolidating and updating the procurement laws of New York State. Allowing for reevaluation, the Stewardship Act was assigned a sunset date of 2000. At that time, it was renewed for an additional five years. As you may know, in 2005 a one-year extender was enacted. The extension of the Stewardship Act provides an opportunity to examine the law the way it is currently written, and also to identify and discuss suggestions on how to improve the law in time for consideration during the 2006 Legislative session.

To better understand the effectiveness of the Act in its current state, **we are requesting your participation at the focus group scheduled for [insert date], 10:00a.m. to 3:00p.m., at the [insert location]**. Please complete the attached form and fax it to Michael Cassidy at the Government Law Center (518-445-2303). In the meantime, please do not hesitate to contact me if you have any questions or concerns (518-445-2301).

I look forward to meeting you.

Sincerely,

Michael Cassidy
Post-Graduate Fellow

Appendix C

Exploring Reauthorization of the Procurement Stewardship Act Focus Group Questions

A. Question 1—Procurement Thresholds: Discretionary, Pre-Audit and Advertising

The Procurement Stewardship Act sets three types of thresholds.

Discretionary thresholds are monetary levels below which state agencies can procure commodities, services and technology without formal competitive bid. The regular discretionary threshold is currently \$15,000. To encourage purchases from certified minority- or women-owned businesses (MWBE) and NYS small businesses (SB), and of recycled or remanufactured (RR) products, state law provides a higher discretionary threshold of \$50,000.

The pre-audit threshold is \$15,000. Purchases under \$15,000 do not have to be reviewed in advance by the Office of the State Comptroller (under the pre-audit requirements of State Finance Law §112).

The advertising threshold is \$15,000. Procurements below this amount do not have to be individually advertised in the NYS Contract Reporter.

- Should the discretionary thresholds remain the same or be changed? If changed, what level would you recommend?
- Do the higher discretionary thresholds for procurements from MWBE, SB and of RR products serve their intended purpose?
- If the general discretionary threshold was increased, should the MWBE, SB and RR discretionary thresholds be increased to maintain this incentive? If so, how much?

B. Question 2—Preferred Sources, Minority and Women-Owned Business Enterprises (MWBE), Small Businesses and Recycled and Remanufactured Products

Through the Procurement Stewardship Act, the State seeks to achieve certain socio-economic goals by requiring or encouraging procurement from designated groups. State Finance Law §162 provides an exemption from the competitive bidding requirements for the procurement of commodities and services provided by Preferred Sources⁶ when such commodities or services meet the agency's stated "form, function or utility." State Finance Law §163 specifies that priority be

⁶ Commodities produced by the Department of Correctional Services' Correctional Industries Program (CORCRAFT) and commodities and services produced by approved agencies for blind, mentally ill, or severely disabled persons, or veterans.

given to purchasing from (1) preferred sources, (2) centralized contracts, (3) agency or multi-agency contracts, and (4) other means of contracting, such as competitive or non-competitive purchasing. Also, it provides higher discretionary thresholds to encourage State agency purchasing from MWBE, SB and of RR products.

- Should the law be amended to clarify these priorities?
- What changes would benefit participation by the Preferred Sources, MWBE, SB and RR sellers?
- What has been the experience with the MWBE certification and registration process administered by the Department of Economic Development?
- Does your business receive suitable notice of opportunities for MWBE/SB/RR product sales? If not, what improvements can be made to this process?

C. Question 3—State Contract Process

State laws, executive orders, guidelines and bulletins set forth requirements for the state contract process. They specify advertising requirements, mandatory elements for a solicitation, factors to evaluate in awarding a contract, specific information to collect from vendors, mandatory contract terms and conditions, and a multi-tiered contract approval. Some requirements are more detailed than others. A frequent observation about State procurement is that it takes too long and is too complicated. What suggestions might you have for streamlining the following state procurement processes:

- Advertising and solicitation
- Evaluation of bids and tentative award
- Negotiation with vendor and internal approval
- Approval by the Office of the State Comptroller

D. Question 4—Vendor Responsibility

State Finance Law §163(9)(f) requires that, prior to contract award, State agencies make a “responsibility determination” that assesses the vendor’s legal authority, integrity, financial and organizational capacity, and past performance on government contracts. This determination becomes part of the procurement record. The Office of the State Comptroller has interpreted State Finance Law §112 to require that the Comptroller be satisfied that a proposed contractor is responsible before approving a contract award.

A project is underway to retain vendor responsibility information in an Internet-based system, operated by OSC and available to all contracting state entities

and vendors. Vendors will be able to enter and maintain responses to a standardized set of vendor responsibility questions with access only to their records. Authorized contracting entity and OSC users will access vendor information to conduct vendor responsibility reviews.

- Since January 1, 2005, has your business submitted a vendor responsibility questionnaire for review to a State agency? If so, what was your experience?
- What do you see as the benefits and drawbacks of a central database?

E. Question 5—Debriefing and Dispute Resolution Process

The Procurement Guidelines issued by the State Procurement Council require State agencies to provide vendors with an opportunity for a debriefing regarding a submitted proposal. State Finance Law §163(9)(e) prohibits disclosure of the content of competing offers or clarifications (other than statistical tabulations) prior to award. The administrative process for vendor debriefing is established by the procuring agency.

Similarly, the administrative process for dispute resolution is established by the individual agency. Civil Practice Law and Rules Article 78 set forth the judicial process for dispute resolution.

- Do you consider vendor debriefings to be a beneficial and useful tool?
- Should there be a statutorily required vendor debriefing process? Why? If yes, what should the process entail?
- Are you in favor of releasing information on competitive bids prior to the award of the contract?
- Should the administrative resolution of disputes by the procuring agency be final, or should the vendor be provided with the opportunity to present their bid dispute to the Office of the State Comptroller?
- Should parties not directly involved in a procurement be permitted to dispute the award?
- Do you have recommendations for how to improve the administrative bid dispute processes currently used by state agencies?

F. Question 6—Procurement Stewardship Act Sunset

State Finance Law §163 of the 1995 Procurement Stewardship Act is due to expire on June 30, 2006. Absent legislative action, there would be no statutory competitive bidding requirements or other authorized methods to procure commodities, services and technology.

- Have particular provisions of the Procurement Stewardship Act been beneficial? Problematic? If so, which one(s)?
- What are the three most important changes that your organization would like to see if the Procurement Stewardship Act was continued?
- Should the law be made permanent? Should the law be extended for 5 years? 1 year?

Appendix D

Procurement Focus Group Participants

October 14, 2005

Harlem Focus Group Participants

Art Brown, *Deloitte & Touche*
Daphna Mitchell, *City University of New York*
Jorge Vidro, *New York State Division of Minority & Women's Business Development*
Honorable Jim Brennan, *New York State Assembly*
MarySol Rodriguez, *Partnership for New York City*
Michael Simas, *Partnership for New York City*
Larry Waxman, *New York State Association of Municipal Purchasing Officials, Inc.*
Joseph Messina, *New York State Industries for the Disabled, Inc.*
James Heyligar, *Association of Minority Enterprises of New York*
Earle Walker, *Regional Alliance for Small Contractors*
Lorena Robinson-Saeed, *Lorshel Inc.*
Carolyn Sevos, *National Association of Women Business Owners/Intra Communities Inc.*

October 21, 2005

Syracuse Focus Group Participants

Kathy Tanea, *Director of Finance, Town of Webster*
Honorable RoAnn M. Destito, *New York State Assembly*
Robert Reed, *New York State Department of Health*
Peter Chynoweth, *CMA Consulting Services*
Kevin Crosley, *Herkimer County ARC*
Donald Lawless, *Onondaga County Purchasing*
Richard Litz, *State University of New York*
Ken Pokalsky, *The Business Council of New York State, Inc.*

October 31, 2005

Albany Focus Group Participants

Michael Genito, *Assistant City Manager/Comptroller, City of Rye*
Leon Aronowitz, *New York State Office of Mental Health*
Lisa Lavigna, *P&J Computers, Inc.*
Robert Domenici, *Amic Group Inc.*
Richard Rifkin, *Attorney General's Office*
Ruth Walters, *The Walters Group*

Richard Albertin, *New York State Department of Transportation*
Mike La Francis, *Gartner Inc.*
Larry Barker, *New York State Industries for the Disabled, Inc.*
Karen Storm, *New York State Association of Municipal Purchasing Officials, Inc.*
Roger Cruttendon, *State University of New York*
Don O'Hagan, *Industries for the Blind of New York State*
Celia Butler, *Xerox Corporation*

November 7, 2005

Albany Focus Group Participants

Eileen Germain, *Empire State Development*
David Ahl, *Empire State Development*
Richard Healy, *Industries for the Blind of New York State*
Steve Vanhoosen, *New York State Association of School Business Officials*
Damien Bruschi, *Genesys Consulting*
Todd Vandervort, *The Vandervort Group*
Fran Bouchard, *IBM Corporation*
Carlos Cardoso, *Hewlett Packard Company*
Sharon Gariepy, *New York State Division of Budget*
Peg Hylant, *Affinity Enterprises*

Appendix E

Procurement Focus Group Observers

October 14, 2005

Harlem Focus Group Observers

Honorable Daniel Hogan, *Commissioner, New York State Office of General Services*

Cheryl Couser, *New York State Assembly Program and Counsel*

Jerry Minot-Scheuermann, *New York State Division of Budget*

Anne Phillips, *New York State Office of General Services*

Lisa Fox, *New York State Office of General Services*

Barry Russell, *New York State Office of General Services*

John Moriarty, *New York State Office of the State Comptroller*

Charlotte Breeyear, *New York State Office of the State Comptroller*

Michael Cassidy, *Government Law Center at Albany Law School*

Michael Donohue, *Government Law Center at Albany Law School*

October 21, 2005

Syracuse Focus Group Observers

Cheryl Couser, *New York State Assembly Program and Counsel*

Joanne Barker, *New York State Assembly Program and Counsel*

Anne Phillips, *New York State Office of General Services*

Walter Bikowitz, *New York State Office of General Services*

Lisa Fox, *New York State Office of General Services*

John Moriarty, *New York State Office of the State Comptroller*

Charlotte Breeyear, *New York State Office of the State Comptroller*

Tim Eskeli, *New York State Division of Budget*

Mark Cole, *State University of New York*

Paul Tucci, *State University of New York*

Kelly Tiffany, *State University of New York*

Terry Woodfork, *State University of New York*

Elliot Shaw, *The Business Council of New York State, Inc.*

Michael Cassidy, *Government Law Center at Albany Law School*

Michael Donohue, *Government Law Center at Albany Law School*

October 31, 2005

Albany Focus Group Observers

Elliot Shaw, *The Business Council of New York State, Inc.*

Michelle Milot, *New York State Assembly Program and Counsel*

Nicole Hedglin, *New York State Assembly Program and Counsel*

Jean Amery, *New York State Assembly Program and Counsel*

Paul Tucci, *State University of New York*

RoseMarie Scrodanus, *State University of New York*

Peter Rufer, *State University of New York*
Tim Eskeli, *New York State Division of Budget*
Jerry Minot-Scheuermann, *New York State Division of Budget*
Scott Joralemon, *P&J Computers, Inc.*
Susan Zeronda, *New York State Office for Technology*
Dave Petite, *New York State Office for Technology*
Barry Russell, *New York State Office of General Services*
Honorable Daniel Hogan, *Commissioner, New York State Office of General Services*
Anne Phillips, *New York State Office of General Services*
Lisa Fox, *New York State Office of General Services*
Rich Reed, *New York State Office of General Services*
Franklin Hecht, *New York State Office of General Services*
Bob Fleury, *New York State Office of General Services*
John Moriarty, *New York State Office of the State Comptroller*
Charlotte Breeyear, *New York State Office of the State Comptroller*
Lynn Canton, *New York State Office of the State Comptroller*
Patty Salkin, *Government Law Center at Albany Law School*
Riele J. Morgiewicz, *New York Conference of Mayors*
Michael Cassidy, *Government Law Center at Albany Law School*
Michael Donohue, *Government Law Center at Albany Law School*

November 7, 2005

Albany Focus Group Observers

Diane Smith, *New York State Department of Agriculture and Markets*
Chris Cuddeback, *New York State Department of Agriculture and Markets*
Frank DiDomenico, *New York State Office of Mental Retardation and Developmental Disabilities*
Jim Walsh, *Governor's Counsels Office*
Damon Stewart, *Senate Majority Counsels Office*
Cheryl Couser, *New York State Assembly Program and Counsel*
Nicole Hedglin, *New York State Assembly Program and Counsel*
Ken Pokalsky, *The Business Council of New York State, Inc.*
Barry Russell, *New York State Office of General Services*
Anne Phillips, *New York State Office of General Services*
Lisa Fox, *New York State Office of General Services*
John Moriarty, *New York State Office of the State Comptroller*
Charlotte Breeyear, *New York State Office of the State Comptroller*
Michael Cassidy, *Government Law Center at Albany Law School*

Appendix F



STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
110 STATE STREET
ALBANY, NEW YORK 12236

ALAN G. HEVESI
COMPTROLLER

THOMAS SANZILLO
FIRST DEPUTY COMPTROLLER
Tel: 518-474-2909
Fax: 518-473-5220

December 8, 2005

Mr. Robert Fleury
First Deputy Commissioner
New York State Office of General Services
41st Floor, Corning Tower
Empire State Plaza
Albany, NY 12242

Patricia E. Salkin
Associate Dean and Director
Government Law Center of Albany Law School
80 New Scotland Avenue
Albany, NY 12208-3494

Dear Mr. Fleury and Dean Salkin:

I, along with members of my staff, have read the draft Focus Group Report entitled, *The Procurement Stewardship Act: Opportunities for Reform*. We are very disappointed with the document as it currently stands, as expressed below. We respectfully request that any references to the Office of the State Comptroller as a sponsor of this initiative be removed.

Our concerns are two-fold: this is not a document of the quality that the Office of the State Comptroller is accustomed to being associated with, and the process for soliciting input, and therefore its result, was flawed.

With regard to quality, there is no quantitative analysis or clear methodology that could provide a factual basis for action by decision makers. In April 2005, when the Office of the State Comptroller proposed a comprehensive procurement reform agenda, we published a 77-page report on the State's procurement process detailing roles and responsibilities of State agency staff as well as the Office of the State Comptroller. For the first time, this report provided extensive data on contract timeliness, the types, numbers and value of contracts entered into, the methods used to award contracts (i.e. competitive grants, best value, sole source, preferred source, piggyback), the top ten contracting agencies, average amount of time it takes for contract review by this Office, and the number of contracts returned unapproved.

The Focus Group Report offers opinions gleaned from discussions with no attempt to provide the reader with a sense of how many participants expressed the given opinion. We agree that it was important for participant comments to remain anonymous so as not to inhibit honesty. However, notes could have easily been kept to quantify the frequency with which comments were made or to provide some basis for weighing the statements. Absent such quantitative analysis or other discussion of methodology, the document's value is compromised by its susceptibility to subjective editorial judgment. Given the lack of quantitative analysis, transcripts of the sessions that did not attribute comments to any particular participant would be more valuable to decision makers.

Another aspect of the document that compromises its credibility is the lack of any discussion of comments made about the Office of General Services – the largest procurement agency in the State. If commentary about OGS was, in fact, non-existent, it raises questions as to whether the sessions were developed and handled properly. Bob, I know you share my belief that our respective agencies can always find room for improvement. OSC will consider some of the opportunities for improvement discussed by focus group participants; it is odd and unfortunate that this document lacks any comments about OGS that might allow for the same.

Although OSC participated in this project in good faith, most of our input was ignored. For example, despite this Office's attempt to provide input on how to maximize participation in the Focus Group sessions, the Report reflects the feedback of only 43 individuals. We remain unconvinced that the participant list represents a broad cross-section of the constituencies whose opinions are essential to consider when initiating reform.

In addition to the performance data noted above, the Comptroller's proposed Procurement Reform legislation (A.8397) benefited enormously from an extensive outreach effort seeking the input of a large audience over several months. Over the course of time, we held 14 meetings resulting in discussions with more than 350 people. The resulting legislation focused on improving the Procurement Stewardship Act and included revisions to both the General Municipal Law and Article 4-C of the Economic Development Law. Some of the comments contained in the draft report indicate support of the key points covered in our proposed legislation and validate the efforts conducted by this Office last year, but we do not believe the report offers a full picture.

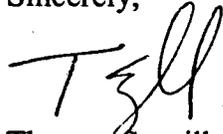
It was encouraging to note that the report indicates that "out of all six topics covered in each focus group, unanimity was most prevalent regarding vendor responsibility." It is my hope that this finding will encourage OGS to work cooperatively as we move forward with our efforts to standardize the questionnaires used to assist in making responsibility determinations, and with our efforts to develop a centralized database.

In an effort to use our involvement in this flawed process and its resulting product to add value, enclosed please find a mark-up of the draft report correcting specific errors in the representation of participant comments. Review by staff members observing the sessions identified 11 instances where sentiments expressed were mischaracterized, 11 examples of views or suggestions that were substantially incomplete, and 37 occurrences of issues raised but not addressed at all in the report, such as concern about the difficulties achieving small business

certification. In the mark-up, we have chosen not to address the appearance of editorial bias or tone.

I had hoped we might have used this process to develop a joint product. Unfortunately, that does not seem possible. We need to continue to work to find other areas where we can achieve this objective. If you chose to issue this report, I would appreciate inclusion of this letter in the final draft.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Sanzillo', written in a cursive style.

Thomas Sanzillo
First Deputy Comptroller

emm
Attachment



Government Law Center

Albany Law School | UNION UNIVERSITY

Prof. Patricia E. Salkin
Associate Dean and Director

December 29, 2005

Mr. Thomas Sanzillo
First Deputy Comptroller
Office of the State Comptroller
110 State Street
Albany, New York 12236

Dear Mr. Sanzillo:

I am writing in response to your letter of December 8, 2005 addressed both to Robert Fleury and me. The purpose of my letter is to respond directly only to those items in your letter that pertain to the work of the Government Law Center, and to correct the mischaracterizations it contains concerning the following: the background of the focus group study; the purpose and scope of the study; and the nature and process of developing the report.

Background of the Study

As you are aware, the Government Law Center of Albany Law School (GLC) was retained by the Office of General Services (OGS) to conduct a series of three (and later expanded to four) focus groups in different geographic locations across the State for the purpose of collecting attitudes and opinions about the Procurement Stewardship Act. After being asked to organize these focus group sessions, the GLC retained the services of an experienced professional facilitator to assist with the design and facilitation of each focus group session. Furthermore, the GLC was informed by OGS that the Office of the State Comptroller (OSC) desired to be a partner in this effort and that the GLC was to include OSC representatives in all meetings regarding the planning for the focus groups, the actual focus groups, and in review/input with the draft report of the focus group sessions. This involvement of OSC with the GLC began on September 26, 2005 at a meeting at the GLC that included OSC staff members John Moriarty, Director of the Bureau of Contracts and Charlotte Breeyear, Assistant Director of the Bureau of Contracts.

Process for Soliciting Input from OGS and OSC

From the GLC's perspective, the initial meeting (and all subsequent meetings and communications) on September 26, 2005 depicted a true partnership and all involved parties seemed satisfied with the process and decisions reached. Attending were OGS and OSC staff, GLC staff and our facilitator. At this meeting, all participants discussed the configuration of the focus groups, with five options discussed before the group ultimately agreed on one. Also at this meeting, the topical areas for discussion at the focus group sessions were discussed as was the timeframe for the focus group meetings. On September 27 we received an email from OSC staff, regarding handling the welcome and introduction for the focus groups, that stated, "Sounds like the best approach. OK with us." We also received an email from OGS on September 28, 2005 that forwarded an email from OSC staff that stated "Proposed agenda looks good." On September 29, 2005 OSC sent to OGS a list of active contractors who should be invited to the focus group sessions. OGS forwarded this information to the GLC and the GLC used this list (as well as others) to issue invitations. In addition, OSC provided us with a list of four not-for-profit organizations with a request that they be invited. All four were invited to participate. Also on September 29, everyone who attended the meeting on September 26, 2005 was sent via email proposed questions for the focus group meetings as a discussion item for our meeting on October 3, 2005. On October 3, 2005 there was a second organizational meeting at the GLC attended by staff from both OGS and OSC as well as the facilitator. The proposed questions were discussed with the group and proposed revisions from both OGS and OSC staff were made. Email correspondence (between and among OGS, OSC, GLC and the facilitator) on October 3 and 5, 2005 further amended the proposed questions and incorporated OSC's proposed modifications to the vendor responsibility issue (this revision was sent to OSC staff by the facilitator on October 5, 2005). A meeting prior to the first group was held on October 12, 2005 and again staff from OGS and OSC were present to work through final meeting details. At this meeting there was discussion and group agreement as to the roles of OGS and OSC staff at the focus group sessions as well as agreement on the wording of the questions to be posed at the focus group sessions. At no point was any input, feedback or recommendation ignored by the GLC as alleged in your letter of December 8, 2005.

OSC staff was present (as was OGS and GLC staff) at each of the four focus group sessions. Staff from the GLC, OGS and OSC engaged in conversation with the facilitator following the sessions to "debrief" and determine whether any modifications were appropriate for future sessions. It was agreed by the planning group, that the GLC would write the initial draft of the focus group report. This draft document was to explain the methodology and process (pages 7 to 9) and summarize the comments made by participants. The draft report contains no recommendations and no opinions of the GLC staff (nor staff from OGS or OSC). Further, the draft report discloses the entire process, and in furtherance of our goal of providing transparency in the process and report, the appendix contains, among other things, the agenda, a copy of the invitation letter to participants, the questions as posed to focus group participants, a list of focus group participants, and a list of observers who were present at the focus groups but who did not formally participate.

As agreed by OGS, OSC and the GLC, the draft report was circulated to OGS and OSC in November for input from staff who were also at the focus group sessions to make certain that nothing was inadvertently omitted or misstated. As initially agreed, after such input was collected from OGS and OSC, the draft report would be sent to each focus group participant for their review to further make certain that individual comments were recorded and reported appropriately. This step in the process was verbalized at each focus group session for the participants. It was also agreed by the OGS/OSC/GLC planning group (who reviewed and approved the agenda, questions and background information sent to each invitee) that specific comments would not be attributed to named individuals, and this was represented to focus group attendees. As of today's date, the November 2005 draft report has not been circulated to focus group attendees as we have initially been waiting for feedback/input from OSC that did not arrive until your letter of December 8, 2005. Your letter of December 8th asserts that OSC's input was ignored. The GLC staff is bewildered by this statement since, to our knowledge, whenever the GLC received verbal or written input from OSC it was well received, discussed and integrated into the process/products moving forward. The GLC was further surprised that your letter characterizes the process as "flawed" since at no time prior to receiving this letter was the GLC notified by your staff (either those who participated in the planning and/or attendance at the focus groups or any other OSC staff member) that there were any concerns about the focus group process, the questions posed, the method of recording comments, the invited participants nor the process for identifying participants.

With respect to the your concern that the process for soliciting input (e.g., the use of focus groups) did not produce quantitative results, we can only assume that all agency participants knew of the research purposes/results from focus groups. A focus group study is a qualitative data-collection effort that is aimed at providing insights rather than generalized findings. Focus groups are intended to complement and supplement other studies, and are generally not intended to serve as the sole basis for decisions. Richard Krueger, author of "Focus Groups: A Practical Guide for Applied Research" (Sage Publications) explains that, "Focus groups are useful in obtaining a particular kind of information - - information that would be difficult, if not impossible to obtain using other methodological procedures." He further explains that "Focus groups are not intended to develop consensus, to arrive at an agreeable plan, or to make decisions about which course of action to take...Focus groups produce qualitative data that provide insights into the attitudes, perceptions, and opinions of participants."

Your letter of December 8, 2005 also raises concerns about the size of the focus groups. Focus groups are, by their nature, small group sessions. The Kruger book, referenced above, states, "Focus groups are typically composed of 6 to 10 people..." The GLC has conducted focus groups in the past, most recently for the Feerick Commission on Restoring Public Confidence in the Elected Judiciary, an effort initiated to provide recommendations for Chief Judge Judith Kaye. In both instances, the number of focus group participants was roughly the same. The present initiative included 4 separate sessions where 41 people participated. The Feerick Commission initiative consisted of 9 sessions and a total of 90 focus group participants. The average number of participants

was 10 per session, with some groups being slightly smaller and some slightly larger. Your letter of December 8, 2005 describes the efforts of OSC to research and develop the April 2005 report of the Office of the State Comptroller, attempting to equate that effort with the Fall 2005 focus group effort. Both initiatives should be considered complementary efforts and recognized as valid research efforts for collecting and reporting data. Where the methodologies are different, each shares a common goal of providing alternative mechanisms to allow for stakeholder participation, one not being exclusive of the other.

Report

Lastly, I would like to address the next to last paragraph of your letter, coupled with your comment about quality in the second paragraph. Your letter indicates that OSC review of the draft report revealed a number of instances where your staff believed that statements should have been reported differently and your staff has provided a marked-up copy of the draft report, we assume reflecting all of their concerns and suggestions. The GLC thanks OSC for this input, as that was the intended purpose of sharing the preliminary draft report with both OGS and OSC prior to the draft being circulated to other participants. The version you received was a draft; after integrating comments from OGS and OSC we will circulate a revised draft to the focus group participants. We anticipate further adjustments after focus group participants have had an opportunity to review the draft and provide us with their comments.

While we have no major objections to most of the thoughtful comments provided by OSC, in some instances OSC staff suggested deleting specific comments made by participants that were identified as quotes in notes taken at the focus groups. One instance suggests a word change between "could" and "should." There is another instance where GLC staff do not recall the detail suggested by OSC staff. Nonetheless, these comments will be considered and discussed. Ultimately, we trust that these and perhaps other instances will be clarified by the participants themselves upon their review of the draft report. In addition, your letter asserts that OSC staff believes that there were 37 occurrences of issues raised but not reported in the draft. We are assuming that these are embodied in the 42 new bulleted items added to the draft report by OSC staff. Of these additions, 26 of them were already addressed in the report in different places. Had these comments been provided to us by OSC staff prior to your letter, the GLC would certainly have addressed each item of concern with staff, even if it meant arranging for an in-person meeting to finalize the draft report for the next round of comments.

This report of the focus group research will be a factual report that details how the project was commissioned, who participated in the design and implementation of the initiative, how the participants were identified and what was shared at the sessions. It will not be a comprehensive research report, nor will it contain analysis, implications, conclusions or recommendations. The report shared with OSC and OGS was with this goal in mind and the quality of the final report should be measured by its transparency in describing the research process and reporting the facts.

Your letter further indicates that OSC staff believe there may be tone or editorial bias in the report. While there are no intentional instances of such in the draft, we would certainly welcome OSC and OGS input in this regard.

Due to our contractual relationship with OGS, the GLC will await instructions from OGS regarding the remaining items in your letter. The GLC is certainly disappointed that OSC has decided to withdraw from this project as the GLC's efforts have always been and remain honest and in good faith. We have always had a very good working relationship with OSC and we have enjoyed a long and positive history of involvement in each others' programs and initiatives under the current and past Comptroller. We certainly hope that that the GLC and OSC will be able to continue to explore opportunities of mutual interest in the future.

Thank you again for providing input into the process and the draft report.

Sincerely,

A handwritten signature in black ink, appearing to read 'Patricia E. Salkin', written in a cursive style.

Patricia E. Salkin

cc: Robert Fleury



DANIEL D. HOGAN
COMMISSIONER

STATE OF NEW YORK
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ROBERT J. FLEURY
FIRST DEPUTY COMMISSIONER

January 3, 2006

Mr. Thomas Sanzillo
First Deputy Comptroller
NYS Office of the State Comptroller
110 State Street
Albany, New York 12236

Dear Mr. Sanzillo:

Regarding the draft Focus Group Report entitled, *The Procurement Stewardship Act: Opportunities for Reform*, the Office of the State Comptroller ("OSC") has requested that "any references to [OSC] as a sponsor of this initiative be removed."

We will not dispute the request, but it is necessary to place this request in the context of the initiative so that the record will be accurate and complete and, since OSC revised a motion before the Procurement Council asking recognition of its intent to be included in a partnership initiative, consideration should be given to informing OSC's co-members of the Council of this request.

OSC has stated that the process for soliciting input for this draft report was flawed and that such flaws predetermine a flawed result. OSC refers to their review of the State's procurement process and a 77 page report that set forth a comprehensive procurement reform agenda. It was stated that the report provided "extensive data" on many elements of the procurement process. Further, it was stated that the OSC report "benefited enormously from an extensive outreach seeking the input of a large audience over several months."

OSC's complaints about this draft report includes these statements: "We remain unconvinced that the participant list represents a broad cross-section of the constituencies whose opinions are essential to consider when initiating reform." "Another aspect of the document that compromises its credibility is the lack of any discussion of comments made about the Office of General Services (OGS) - the largest procurement agency in the state."

OSC appears to conclude that the two initiatives either must produce exactly the same findings or that in the presence of conflicting views, one of them must be flawed. As OSC's reasoning is further revealed, it concludes that the "extensive outreach" and "extensive data" conducted and collected by OSC verifies the work done by OSC and therefore proves the invalidity of work done by OSC, OGS and the Government Law Center.

The following facts are necessary to understand the background of this draft report which was never intended to be a duplication of OSC's examination of the procurement process.

As proposed by OGS and presented through the State Procurement Council, OSC executives were consulted and agreed to participate in an independent effort to collect comment on potential recommendations for changes in the state's procurement laws. In fact, OSC requested a change in a resolution before the State Procurement Council supporting the initiative to make clear that they would be partnering with OGS.

OSC staff directly participated in every aspect of the planning of this initiative or were consulted with respect thereto.

Despite assertions that they conducted an "extensive outreach" in the development of the report referred to above, OSC never contacted OGS in that outreach -- not at the staff level, not at the managerial level and not at the executive level. If OSC refers to OGS as "the largest procurement agency in the state", a legitimate question is posed why "extensive outreach" did not include OGS and whether that "extensive outreach" may have been flawed.

Some of the "extensive data" reported in OSC's legislative agenda is either plain wrong or intentionally distorted to present a favorable view of OSC. For example, OSC reports an average approval period for contracts submitted by state agencies to be seven (7) days. In fact, OGS keeps precise data on contract approval times, and for state commodity procurement contracts the approval time is 21.1 days and has more than doubled to 43 days in the last nine months.

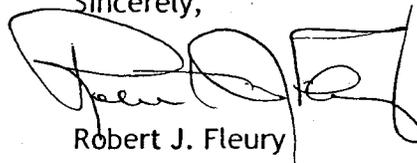
The observations and commentary collected in this initiative contradict positions advanced in the April 2005 OSC agenda.

One might reasonably ask why, in the face of the facts that (i) OSC undertook a non-inclusive initiative to produce a legislative agenda, (ii) OSC presented distorted data to support their legislative agenda, and (iii) an independent and soundly planned initiative produced information conflicting with OSC's legislative agenda, OSC should abruptly withdrawal from an independent initiative that was never intended to supplant the OSC legislative agenda.

We are, however, moving forward with the draft report and will not object to removal of references to OSC as a sponsor and partner with OGS. As the report is founded on a series of focus group meetings, the report will continue to show the presence of OSC staff among the attendees. To omit their participation would indeed present a false and distorted view of the proceedings which OGS will not endorse. In support of accuracy, a copy of your letter and my response will be appended to the report.

The initiative will continue and the next step is to seek comments on the draft report from the participants. The focus group approach was always seen as a different process to obtain feedback from the many stakeholders in the State's procurement process. The participants in these meetings identified many issues and advanced ideas that are part of the OSC procurement reform agenda and others that are more aligned with the direction that other members of the Procurement Council see for public procurement. Finally, some issues and ideas have not been viewed as favorable for State procurement process. From the OGS perspective, all of this input has value whether it is a point on which you agree or disagree with the stakeholder. As the initiative continues, OGS believes that the positive results will be made clear on its record.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Fleury". The signature is stylized with large, sweeping loops and a long horizontal stroke at the end.

Robert J. Fleury

cc: Commissioner Daniel D. Hogan

bcc: Rich Reed
Barry Russell
Anne Phillips
Patricia Salkin, Government Law Center

RECEIVED

JAN 3 - 2006

New York State Executive Department
Office of General Services- Legal Services