



DANIEL D. HOGAN
COMMISSIONER

ROBERT J. FLEURY
FIRST DEPUTY COMMISSIONER

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
OFFICE OF GENERAL SERVICES
MAYOR ERASTUS CORNING 2ND TOWER
THE GOVERNOR NELSON A. ROCKEFELLER EMPIRE STATE PLAZA
ALBANY, NEW YORK 12242

BARRETT RUSSELL
DEPUTY COMMISSIONER
INFORMATION TECHNOLOGY
AND PROCUREMENT SERVICES

MEMORANDUM

October 18, 2005

TO: Procurement Council Members

FROM: Barrett Russell

SUBJECT: Minutes of the Meeting for September 29, 2005

Enclosed for your review are draft Minutes of the Procurement Council meeting of September 29.

If you have comments or suggested changes, or would like to propose agenda items for the next meeting, please contact Ginny Lazzaro at (518) 486-7323 or e-mail virginia.lazzaro@ogs.state.ny.us.

Enclosures

cc: D. Hogan
R. Fleury
R. Reed
A. Phillips
W. Bikowitz

**Minutes of the Meeting
NYS Procurement Council
September 29, 2005 - 9:30 am
Meeting Room 5
Convention Center, Empire State Plaza
Albany, NY**

- I. Call to Order.** Barrett Russell convened the meeting.
- II. Minutes of the Meeting June 9, 2005.** Mr. Russell called for a motion to adopt the draft minutes of the meeting held on June 9, 2005. Meeting minutes were accepted unanimously.
- III. Old Business**

Adoption of revision to Appendix A to include Sales Tax Certification language

Anne Phillips presented a revised Appendix A ([attachment # 1](#)) to include Sales Tax Certification language. A motion was made by John Moriarty to table the Council vote until OSC's Counsel had an opportunity to review the proposed language. Dave Pettit seconded the motion which was passed unanimously. Ms. Phillips requested that any proposed changes be forwarded to her. She agreed to share the revised draft with Council members in advance of the next meeting.

Best Practices – Determining Vendor Responsibility

Noreen Van Doren presented the draft Procurement Bulletin – Best Practices – Determining Vendor Responsibility ([attachment # 2](#)) to the Council. Mr. Russell stated that OSC proposed a change to the draft previously distributed to Council members. OSC proposed adding organizational capacity as an additional consideration when assessing vendor responsibility. Ms. Phillips presented OGS position on this proposed change, stating that organizational capacity should be considered as a matter of responsiveness in the bidding process rather than a responsibility determination factor in that the need to focus on it is dependent upon the specific requirements of a bid. Mr. Moriarty expressed OSC's opinion that organizational capacity is a responsibility factor. OSC will include reference to consideration of organizational capacity in its training and expects agencies to make organizational capacity a factor in their review, therefore, for consistency OSC proposed the change to the draft bulletin. Diane Taylor explained that the organizational capacity adequacy of a company must be determined in order that agencies will have the information in the event that an issue arises later in the process.

Sharon Gariepy stated that organizational capacity is a responsiveness issue. RFP or IFB documents identify the organizational capacity required and making it a factor on the questionnaire is redundant.

Mr. Russell stated that establishing organizational capacity as a responsibility issue could be detrimental to small, minority or woman owned businesses, if the information collected could be a factor in disqualification or be used to assign a value of lesser weight during a best value evaluation. Ms. Phillips added that such businesses should not be deemed non-responsible simply because they are a new company with a few employees, and that would be the result of this assessment if organizational capacity is a vendor responsibility (vs. responsiveness) issue.

Robert Reed offered the opinion that adding organizational capacity to the questionnaire could result in unfair adverse determinations. An agency determination that a firm lacked the organizational capacity to be awarded a specific contract is not a responsibility matter. The non-responsible designation would be viewed by other contracting entities as a strong factor to eliminate them from consideration for other awards.

Larry Barker also voiced concern about discrimination based on a responder being too small.

Mr. Russell stated concern that if more questions are added to the responsibility questionnaire OSC may raise more questions further delaying an already lengthy approval process.

Elliott Shaw asked if there was any history of contracts let where default resulted from the lack of sufficient organizational capacity. Ms. Phillips recalled that on 2 or 3 occasions, vendors were removed from contracts where organizational capacity was a factor, but not necessarily the only factor. Ms. Phillips cited the example of an apparent low bidder on a commodity contract where delivery capability was a requirement of the contract. The bidder was considered for award in 8 counties but only possessed one delivery truck. In this case the bid was rejected and the bidder was determined to be non-responsive.

Walter Bikowitz said that in the case of OGS multiple award contracts, small and MWB companies are awarded contracts based on the recognition that they could not handle the statewide aspect of the contract but could provide service to a smaller area of the state. A consideration of organizational capacity taken to its extreme would eliminate the opportunity for small and MWB businesses on such contracts.

John Moriarty reiterated that the guidelines are an attempt to force contracting agencies to consider organizational capacity. Mr. Bikowitz stated that the issue becomes how to qualify the consideration. Mr. Moriarty countered that OSC is

working on ways to quantify consideration of organizational capacity but insisted that agencies must consider organizational capacity as a factor in their review.

Ms. Phillips stated that a finding of non-responsibility is stigmatizing for a company.

Mr. Reed suggested that financial capacity is actually another way of looking at organizational capacity.

A motion was made by Lucy Roberson to adopt the proposed guidelines without reference to organizational capacity. The motion was seconded by Stewart Kidder and passed by a vote of 12 in favor, 1 opposed with 4 members absent.

Procurement Review

Ms. Phillips explained that OGS has partnered with Albany Law School to conduct focus groups throughout the state. The schedule established is as follows:

October 14 – Harlem State Office Building

October 21 – Syracuse State Office Building

October 31 – Albany Convention Center, Empire State Plaza

November 7 – Albany Convention Center, Empire State Plaza

All meetings will be held from 10:00 am until 3:00 pm.

Procurement Council members are invited and encouraged to attend sessions. Ms. Phillips informed the Council that the meetings will be facilitated sessions with OGS and OSC listening and not commenting. However, other Council members are invited to attend and offer comments. The desired result of these sessions is a greater understanding of the issues involved in the government procurement process. All results will be reported back to the Council. Michael Cassidy of Albany Law School was introduced to the Council. Mr. Barker commented that it seemed that in seeking input a good balance is being considered. Ms. Phillips acknowledged that in the process there are competing interests and achieving balance is the goal.

IV. New Business

Legislative Activity

Assembly Hearing – Multi-Committee Hearing on the Examination of the Procurement Stewardship Act (PSA). Ms. Phillips reported that several topics were touched on at this hearing including: the ability of small and MWB businesses to obtain State contracts, discretionary threshold limits, green purchasing, vendor responsibility, debarment and disqualification of vendors, and improvements to the PSA. Testimony was heard from OGS, OSC, NYSID, environmental advocacy groups, SAMPO, and PEF.

Mr. Russell expressed concern about apparent misunderstanding and lack of information on the part of the Assembly with regard to public procurement. He felt that there was an attitude of negativity toward centralized contracts. An apparent lack of understanding of the IT services contracting process is an example. If the benefits of the process are not articulated and understood then the IT services backdrop contract program could be in jeopardy. He also stated that there seems to be a sense that there is some abuse of centralized contracts resulting in cost overruns, based on purchases in excess of the estimated quantities. Classifying this a cost overruns clearly evidences a misunderstanding of the use of centralized contracts. At the hearing, Commissioner Hogan brought forth the message that the PSA has been very successful legislation and the role of the Procurement Council was praised.

Mr. Bikowitz informed the Council that Comptroller Hevesi's testimony was available on the OSC website and that he would arrange to make Commissioner Hogan's testimony available to Council members.

Mr. Moriarty stated that there is an opportunity to work together to achieve a positive result. He explained that through agreement, advantageous legislation can be advanced.

Mr. Russell spoke about a concern that OSC is not strictly reviewing contracts for adherence to form or process but is imposing its judgment about the necessity of a contract. He stated that the decision about the necessity of a contract resides with the contracting agency. Mr. Moriarty asked if there was an example of a contract denied on this basis. Mr. Russell cited the case of DOT's contract for treated salt. Frank DiDomenico followed up this discussion with concern that although ultimately contracts may be approved it is a long and winding road. Questions related to the necessity of the contract further delay the approval process.

EO 134 Green Cleaning

A bill has passed both the Senate and Assembly but has not yet been chaptered establishing green cleaning standards for schools.

OGS is working with a consulting firm (INFORM) to assist in the development of centralized contracts for green cleaning products and maintenance equipment. INFORM is a group funded by the federal government and will be providing the consulting service free of charge.

Mr. Barker asked what impact the development of centralized contracts for green cleaning products would have on the Preferred Sources offerings of similar products. Mr. Bikowitz agreed to work with NYSID before issuing an IFB.

OSC Report to NYS Procurement Council

A summary of the Comptroller's report to the Council was provided to members ([attachment 3](#)) as well as a CD with the entire report. Mr. Moriarty asked Council members if there were ways the report could be improved. He stated that future reports will focus more on Article 11 procurements. Ms. Garipey asked if future reports could include information about the average length of time required for OSC contract approval. Her specific concern was about approval of new contracts. Mr. Moriarty agreed that such information could be included in future reports.

Robert Pape commented that there seemed to be a very high dollar volume for negotiated contracts. Mr. Moriarty clarified that all architectural, engineering and real estate contracts are negotiated which would inflate the numbers. Future reports will focus on Article 11 procurement contracts.

Mr. Reed asked, how much of the over \$16 billion total value of all contracts, were spent on grants. Mr. Moriarty stated that approximately 40% of the number of sole source designated contracts are not-for-profit grant contracts but he did not have the figures for the dollar value that represented.

Procurement Council Meeting Minutes on the OGS website

Mr. Russell informed Council members that NYS Procurement Council Minutes are now accessible from the OGS website. See [attachment #4](#).

Report of Preferred Source Recommendations under OGS Standing Authority

Jerry Gerard informed the Council of applications that were approved by OGS under its standing authority since the Council meeting of June 9 ([attachment 5](#)). OGS has approved applications for sweatshirts, helmet lamps and correction officer's shirts.

Council Discussion

Mr. Barker shared copies of the New York State Industries for the Disabled Outstanding Performance Awards Yearbook with Council members.

Mr. Reed asked if OGS is planning a centralized contract for the procurement of energy. Mr. Russell explained OGS has issued an IFB to procure 10% of the electric power from renewable resources for specific participating agencies. Requirements were aggregated for this bid and advantageous pricing was offered. OGS is purchasing renewable energy credits. Purchasers interested in participating in the renewable energy procurement are invited to contact Walt Bikowitz or Ed Lucier of the OGS Procurement Services Group. OGS accepted bids recently for heating fuel oil, diesel engine fuel and gasoline. No offers for gasoline were received from 9 counties in the State. OGS is working to identify

other vendors who may be able to provide service in areas without coverage. Ms. Phillips stated that OGS fuel contracts continue to weather market conditions due to the price adjustment provisions included in these contracts.

Diane Taylor from the Comptroller's Office informed the Council about activities related to the Vendor Responsibility Database. OSC is working with agencies to establish questions for the database. Issues under discussion include such topics as for profit vs. not-for-profit contractors and international corporations. She anticipates a few more workgroup sessions before OSC will seek input from the vendor community. Ms. Taylor asked Council members to provide information about potential vendors to be invited to comment. Database functionality is expected early in 2006. Work will be done to automate the Vendor Responsibility Questionnaire for vendors. Contracting entities will have access to the database. Under consideration are interfaces with other agencies such as Tax and the Attorney General. Mr. Bikowitz asked if there would be an office responsible for investigating information provided by vendors to verify accuracy. Ms. Taylor stated that the expectation is that agencies will verify information through the cumulative provision of information. A question was raised about how the information will be secured. Ms. Taylor stated that firewalls and other security measures are being developed. Mr. Russell asked how long adverse information would be maintained. Ms. Taylor said that archival factors have not yet been decided. Ms. Garipey asked how often vendors will be expected to certify. Ms. Taylor said the certification frequency is yet to be determined. Timothy Holt asked if local government agencies would be granted access to the database. Ms. Taylor stated that the matter is under discussion. Mr. Russell expressed concern about the collection of information that may not necessarily be related to responsibility such as the number of bid withdrawals. He asked how such information would be designated. Ms. Taylor responded that the information is not different from the current paper based system. OSC is developing tools such as definitions and help text. She emphasized that OSC is only asking for relevant information and encouraging agencies to use the information in context.

Mr. Russell asked how to avoid using personal information such as criminal records in a prejudicial way. Ms. Taylor said that the questionnaires ask only about business related dealings. She added that the look-back period will only be 5 years. She emphasized that vendor responsibility information must be considered in context. In some cases, it will be in the best interest of the state to do business with a company that would otherwise be rejected, especially in instances where there may be only one responder. The purpose of the vendor responsibility review is to protect the interests of the agency and the State of New York.

Lucy Roberson asked how many non-responsible vendors have been identified since the process began. Ms. Taylor said that a great deal of effort is being expended to ensure that responsibility is achieved but she did not have an answer to Ms. Roberson's question.

Mr. Holt asked what contracting agencies should do in the case where bidders, who would otherwise be awarded a contract, are found to be non-responsible by the strict interpretation of the guidelines. Mr. Russell asked about situations such as unpaid taxes which may be disputed by the company offering the bid. Ms. Taylor suggested that agencies work with vendors to determine what remediation is being sought. John Dalton offered the clarification that unpaid taxes may be disputed by companies. However, if a lien has been established the tax matter has been resolved and the company is liable for the payment therefore should be considered non-responsible.

Correction: John Dalton did not say that the company “should” be found non-responsible. The discussion concerned the rights of the vendor to due process and his point was simply that where there is a lien, the vendor has had due process. Clearly, we wouldn’t want to say that the vendor is automatically non-responsible, since that has to be determined on a case-by-case basis.

Mr. Russell stated that there have been instances where an SEC inquiry, which may be minor and may not be resolved quickly, was a factor in delaying the award of a contract. He expressed concern that monitoring of vendor responsibility would result in inordinate delays in the awarding of contracts.

There being no further business, the meeting was adjourned.

Attachments

In attendance:	Stewart Kidder	Robert Reed
Larry Barker	Timothy Holt	Lucy Roberson
Frank DiDomenico	Barbara Miller	Barrett Russell
Sharon Gariepy	John Moriarty	Elliott Shaw
Eileen Germain	Robert Pape	Paul Tucci
Joseph Girven	David Pettit	

Members absent: Lester Cornelius, Steven Ennis, and John Pfeifer.

NYS PROCUREMENT COUNCIL - VOTING RECORD

Date: September 29, 2005

QUESTION, MOTION OR ISSUE: Minutes of Meeting June 9, 2005

<u>MEMBER</u>	<u>VOTE</u>			
	<u>AYE</u>	<u>NAY</u>	<u>ABSTAIN</u>	<u>ABSENT</u>
COMMISSIONER OF GENERAL SERVICES Barrett Russell	X			
OFFICE OF THE STATE COMPTROLLER Lynn Canton (John Moriarty)	X			
DIRECTOR OF THE BUDGET Sharon Gariepy	X			
COMMISSIONER OF ECONOMIC DEVELOPMENT David Ahl (Eileen Germain)	X			
AGENCY REPRESENTATIVES:				
Thomas Lindberg – Ag. & Mkts. (Lucy Roberson)	X			
Stewart Kidder – Corrections	X			
Paul Tucci – SUNY	X			
Frank DiDomenico – OMR/DD	X			
Robert Reed – Health	X			
Susan Zeronda-OFT (David Pettit)	X			
Barbara Miller – OMH	X			
AT LARGE MEMBERS:				
Lester Cornelius				X
Steven Ennis				X
Joseph Girven (arrived after vote)				X
Robert Pape	X			
John Pfeifer				X
Elliot Shaw	X			
Non-Voting Larry Barker Timothy Holt				

NYS PROCUREMENT COUNCIL - VOTING RECORD

Date: September 29, 2005

QUESTION, MOTION OR ISSUE: Motion to table discussion of revision to Clause 23 of Appendix A

<u>MEMBER</u>	<u>VOTE</u>			
	<u>AYE</u>	<u>NAY</u>	<u>ABSTAIN</u>	<u>ABSENT</u>
COMMISSIONER OF GENERAL SERVICES Barrett Russell	X			
OFFICE OF THE STATE COMPTROLLER Lynn Canton (John Moriarty)	X			
DIRECTOR OF THE BUDGET Sharon Gariepy	X			
COMMISSIONER OF ECONOMIC DEVELOPMENT David Ahl (Eileen Germain)	X			
AGENCY REPRESENTATIVES:				
Thomas Lindberg – Ag. & Mkts. (Lucy Roberson)	X			
Stewart Kidder – Corrections	X			
Paul Tucci – SUNY	X			
Frank DiDomenico – OMR/DD	X			
Robert Reed – Health	X			
Susan Zeronda-OFT (David Pettit)	X			
Barbara Miller – OMH	X			
AT LARGE MEMBERS:				
Lester Cornelius				X
Steven Ennis				X
Joseph Girven (arrived after vote)				X
Robert Pape	X			
John Pfeifer				X
Elliot Shaw	X			
Non-Voting Larry Barker Timothy Holt				

NYS PROCUREMENT COUNCIL - VOTING RECORD

Date: September 29, 2005

QUESTION, MOTION OR ISSUE: Motion to adopt Vendor Responsibility Guidelines without reference to organizational capacity

<u>MEMBER</u>	<u>VOTE</u>			
	<u>AYE</u>	<u>NAY</u>	<u>ABSTAIN</u>	<u>ABSENT</u>
COMMISSIONER OF GENERAL SERVICES Barrett Russell	X			
OFFICE OF THE STATE COMPTROLLER Lynn Canton (John Moriarty)		X		
DIRECTOR OF THE BUDGET Sharon Gariepy	X			
COMMISSIONER OF ECONOMIC DEVELOPMENT David Ahl (Eileen Germain)	X			
AGENCY REPRESENTATIVES:				
Thomas Lindberg – Ag. & Mkts. (Lucy Roberson)	X			
Stewart Kidder – Corrections	X			
Paul Tucci – SUNY	X			
Frank DiDomenico – OMR/DD	X			
Robert Reed – Health	X			
Susan Zeronda-OFT (David Pettit)	X			
Barbara Miller – OMH	X			
AT LARGE MEMBERS:				
Lester Cornelius				X
Steven Ennis				X
Joseph Girven (arrived after vote)				X
Robert Pape	X			
John Pfeifer				X
Elliot Shaw	X			
Non-Voting Larry Barker Timothy Holt				