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XI.16 Vendor Responsibility

OVERVIEW

This section reminds New York State contracting entities of their legal obligations with respect to determining the responsibility of a business entity (vendor, contractor or offerer) to which a contract may be awarded.

This section also serves to outline the State Comptroller's procurement record requirements regarding vendor responsibility. These procurement record requirements help ensure that:

- Public dollars are being spent appropriately with responsible contractors; and
- The procurement record on file with the Office of the State Comptroller (OSC) is complete.

STANDARDS, PROCEDURES, AND DOCUMENTATION REQUIREMENTS

Legal Requirements

State procurement laws require that state contracting entities award contracts only to responsible vendors. Additionally, the State Comptroller must be satisfied that the submitting business entity is responsible before approving a contract award under Section 112 of the State Finance Law.

Section 163 of the State Finance Law (SFL) requires that contracts for services and commodities be awarded on the basis of lowest price or best value "to a responsive and responsible offerer." Section 163 (9)(f) of the SFL requires that prior to making an award of a contract, each contracting entity shall make a determination of responsibility of the proposed contractor.

Section 8 of the Public Buildings Law provides that all contracts for amounts in excess of five thousand dollars for the work of construction, reconstruction, alteration, repair or improvement of any state building, whether constructed or to be constructed must be offered for public bidding and may be awarded to "the lowest responsible and reliable bidder," as will best promote the public interest, by the said department or other agency with the approval of the State Comptroller for the whole or any part of the work to be performed, and, in the discretion of the said department or other agency, such contracts may be sublet; provided, however, that no such contract shall be awarded to a bidder other than the lowest responsible and reliable bidder without the written approval of the State Comptroller.

As a result, once a state contracting entity, in accordance with the applicable procurement statute, has determined which business entity(ies) should be awarded a contract, the contracting entity must affirmatively determine that such business entity(ies) is responsible before it can award the contract to such business entity(ies) and execute any contract(s). Furthermore, the State Comptroller will not approve a contract unless he or she concurs that the business entity is responsible.

Factors Affecting a Vendor's Responsibility

Section 163(c) of the State Finance Law provides:

"Responsible" or "responsibility" shall have the same meaning as such terms have been interpreted prior to the effective date of this article.

The courts, in examining vendor "responsibility," have indicated that "responsibility" is "an elastic word," encompassing factors including financial ability to complete the contract, accountability, reliability, skill, sufficiency of capital resources, judgment, integrity and "moral worth."

Whether a business entity is "responsible" is a question of fact to be determined on a case-by-case basis. Based upon existing legal precedents, responsibility determinations can and should involve a review of the following four major categories:

1. Does the business entity possess the integrity to perform the contract? Factors to be considered include criminal indictments, criminal convictions, civil fines and injunctions imposed by government entities, anti-trust investigations, ethical violations, tax delinquencies, debarment or suspension by a government entity, prior determinations of integrity-related non-responsibility, etc.
2. Has the business entity performed at acceptable levels on other government contracts? Factors to be considered include reports of less than satisfactory performance, early contract termination for cause, contract abandonment, court determinations of breach of contract, etc.
3. Is the business entity legally capable of performing the contract? Factors to be considered include authority to do business in New York State, licensing (e.g. with the Education Department or Department of State), debarment by the State Labor Department due to a prevailing wage violation, etc.
4. Is the business entity financially and organizationally capable of performing the contract? Factors to be considered include assets, liabilities, recent bankruptcies, equipment, facilities, personnel resources and expertise, availability in consideration of other business commitments, existence of appropriate accounting and auditing procedures for control of property and funds, etc.

The courts have also recognized a protected constitutional due process liberty interest in connection with a determination of non-responsibility. Therefore, prior to finding a contractor non-responsible, the state contracting entity must offer the "safeguards of reasonable notice and timely opportunity to be heard." This does not require a full

evidentiary hearing. Rather, written notice, together with an opportunity to rebut the concerns over the vendor's responsibility, either in writing or at a meeting with the contracting entity, would appear to be sufficient (see suggested process to be followed below).

Process and Document Preparation:

CONTRACTING ENTITY OBLIGATIONS/OSC REQUIREMENTS

Review of Vendor Responsibility

State contracting entities are required to undertake an affirmative review of the responsibility of any business entity to which they propose to make a contract award. Such review shall be designed to provide reasonable assurances that the proposed contractor is responsible. In undertaking such review, agencies must comply with the following standards:

- In all cases, contracting entities must consider any information that has come to their attention from the proposed contractor or any other source that would raise issues concerning the proposed contractor's responsibility.
- In the case of any contract valued at \$100,000 or more, contracting entities must affirmatively require disclosure by the proposed contractor of all information that the state contracting entity reasonably deems relevant to a determination of responsibility. At a minimum, such disclosure must satisfy the tests detailed above in "Factors Affecting a Vendor's Responsibility". The [VendRep System](#) is a secure application that allows vendors to enter, maintain and certify their Vendor Responsibility Questionnaires via the Internet. Also, hardcopies of [OSC's recommended questionnaires can be found here](#).
- The state contracting entity should notify a business entity, in writing, of its preliminary determination that the business entity is non-responsible, detailing the exact reasons for such preliminary determination. The business entity should be given a reasonable time from the receipt of the notice to file a written appeal. If a dispute as to the facts arises from this process, the state contracting entity may, at its option, hold a hearing to fully air this dispute. If the business entity files an appeal, the contracting entity should promptly review it and make a final determination regarding the responsibility of the business entity.

Submitting Business Entity Associates, Owners and Officers

Tests applied in determining the responsibility of a submitting business entity may also be applied to that business' associated entities, as well as to any entity to which the proposed contractor is a subsidiary.

Tests applied in determining the integrity of a business entity should also be applied to the owners and/or officers of the entity.

Subcontractors

Submission of a Vendor Responsibility Questionnaire and a State contracting entity vendor responsibility review are required for a subcontractor where:

- The subcontractor is known at the time of the contract award; and
- The subcontract will equal or exceed \$100,000 over the life of the contract.

Note: A subcontractor includes any entity that receives funds from the vendor to perform work on a contract awarded by the State. For example, a vendor is awarded a contract worth \$250,000 for an IT project. The vendor pays another firm \$125,000 to write the software that will be used for the IT project. The firm is considered a subcontractor and must complete a questionnaire since their compensation is over \$100,000.

Such requirements apply to all subcontractors meeting the criteria above, including contracts where the contractor is normally exempt from VR, such as preferred source member agencies and corporate partners. Subcontractors are required to obtain a New York State Vendor Identification Number (Vendor ID) to complete a questionnaire whether using the New York State VendRep System or a paper form. The State contracting entity shall initiate the request for a Vendor ID on behalf of the subcontractor.

State Contracting Entity's Vendor Responsibility Determination and Documentation

For contract transactions requiring vendor responsibility documentation, the state contracting entity must:

- Provide a statement in the procurement record that it has undertaken an affirmative review and has reasonable assurance that the submitting business entity is responsible. Such statement of the state contracting entity's responsibility determination must be made by an authorized signatory (see [Section 2.K. – Authorized Signatures](#) of this Chapter for additional information). The procurement record should include a statement that:

"[The above named] contracting entity has undertaken an affirmative review of the proposed contractor's responsibility and, based upon such review, has reasonable assurance that the proposed contractor is: [responsible or non-responsible]."

- Document in the procurement record the basis for its determination, including any information compiled or used in arriving at the conclusion. If the state contracting entity has required the proposed contractor to complete a Vendor Responsibility Questionnaire, the contracting entity must include in the procurement record the paper questionnaire, if one was used, or an indication that the vendor's questionnaire has been electronically filed using the New York State VendRep System.

Procurement record documentation is most efficiently achieved through the [Vendor Responsibility Profile](#), which with applicable attachments is designed to provide OSC

with the required State Contracting Entity Responsibility Determination statement and documentation detailed above.

Additionally, if the original low bidder or best value offerer was determined by the state contracting entity to be non-responsible, resulting in the contracting entity submitting a contract with a contractor that was not the original low bidder/best value offerer, the contracting entity must document the basis for the determination of non-responsibility and the process that was followed in making such determination.

OSC REVIEW

As part of its review of the contract pursuant to Section 112 of the State Finance Law, the Comptroller's Office will review the procurement record prepared by the state contracting entity to verify that the contracting entity has affirmatively reviewed the vendor's responsibility. In addition, if OSC is not satisfied that there is adequate documentation of the proposed contractor's responsibility, OSC may either (i) return the contract non-approved to the state contracting entity for further consideration of the proposed contractor's responsibility; or (ii) undertake its own review of the proposed contractor's responsibility.

ADDITIONAL INFORMATION

For additional assistance:

- Your state contracting entity Counsel
- Your state contracting entity Finance Office
- OSC Help Desk – (518) 408-4OSC (4672) or 1-866-370-4OSC (4672)
- By Email: ITServiceDesk@osc.ny.gov

Helpful Links

- OSC's Vendor Responsibility website:
<http://www.osc.state.ny.us/vendrep/>