



**STATE OF NEW JERSEY
OFFICE OF THE STATE COMPTROLLER**

***BEST PRACTICES FOR AWARDING
SERVICE CONTRACTS***

**A. Matthew Boxer
COMPTROLLER**

**March 4, 2010
PR-2**

Table of Contents

INTRODUCTION	1
BEST PRACTICES FOR AWARDING SERVICE CONTRACTS.....	3
1. The Pool of Contractors Should Be as Expansive as Possible	3
2. Draft Clear and Unambiguous Statements of Work.....	5
3. Judge Proposals on the Basis of Predetermined, Merit- Based Evaluative Criteria Made Known to Vendors Before Proposals are Submitted.....	7
A. Use Predetermined, Merit-Based Evaluative Criteria	7
B. Disclose Evaluative Criteria Early in the Procurement Process.....	9
C. Weighing of Individual Evaluative Criteria	12
4. The Need for an Evaluation Committee.....	13
A. Evaluators Must be Qualified to Judge.....	14
B. Avoid Conflicts of Interest.....	15
5. Use a Scoring Process Understandable to Evaluators and Competing Vendors	16
6. The Scoring Process and Award Recommendation Should Be Well-Documented and Retained	19
CONCLUSION	22
APPENDIX – SUMMARY OF GUIDANCE.....	24

INTRODUCTION

The Office of the State Comptroller (“OSC”) is charged with, among other functions, “providing technical assistance and training” to government contracting units regarding best practices designed to prevent the misuse of public funds. N.J.S.A. 52:15C-15. In accordance with that mandate, OSC issues this report to give guidance to New Jersey government units concerning practices that will better ensure efficiency, transparency, and accountability in the award of contracts for services. Such service contracts, unlike contracts for goods, are oftentimes awarded on bases other than exclusively price, and as a result typically involve a less formulaic contract award process.

Historically, the absence of rigid procedures frequently associated with the government’s procurement of services has presented opportunity for abuse by unscrupulous public officials and government contractors. The litany of criminal convictions in New Jersey for unlawfully steering such contracts illustrates the point, and has included cases in areas as diverse as audit services, insurance services, and building inspection services.

Given this record, OSC herein identifies best practices to guide governing bodies in their efforts to competitively contract for services. This guidance is not intended to apply in those instances where service contracts are awarded solely on the basis of the lowest responsible bid. Derived from New Jersey, federal, and model procurement provisions, as well as policy papers, the best practices can be condensed into the following six principles:

- (1) The pool of contractors solicited should be as expansive as possible;**
- (2) Statements of work should be drafted in clear and unambiguous terms;**
- (3) Proposals should be judged on the basis of predetermined, merit-based evaluative criteria, made known to vendors before proposals are submitted;**
- (4) The evaluative criteria should be judged by a qualified evaluation committee;**

- (5) The evaluation process should be explainable to evaluators and competing vendors, and capable of withstanding scrutiny under a protest challenge; and**
- (6) The scoring process and award recommendations should be well-documented and retained.**

At a minimum, the use of these best practices, serving as a safeguard against fraud, collusion, bribery, and the like, will make it far more difficult for dishonest participants in the procurement process to achieve their unlawful goals. These practices are aimed at protecting the public by helping to ensure that government gets the best value for services it buys, and by guarding against unfair favoritism and inadvertent waste of taxpayer dollars. We recommend that the Legislature consider enacting legislation that would make these best practices mandatory for government entities in this state.

As part of this report, OSC reviewed contracts analyzed in previous OSC audits and investigations. We also made document requests of ten New Jersey public contracting units concerning procurement practices employed by each such unit from January to August 2008 in awarding contracts costing over \$17,500 where price was not the exclusive basis for award. Of these ten contracting units, nine units had entered into at least one contract responsive to OSC's request. Those nine contracting units, which were selected in a manner designed to include a variety of different government entities, included a municipality, a local housing authority, a board of education, two counties, a county college, two state universities, and a state agency.

In total, OSC reviewed forty procurements by those government units -- from advertisement, to requests for proposals and submission of proposals, through award recommendations and issuance of resolutions. OSC compared those forty procurement processes, as well as the other contracts referenced above, with the best practice principles

identified in this report. As illustrated herein, our findings revealed mixed results that demonstrate the need for contracting units to focus on these principles.

BEST PRACTICES FOR AWARDING SERVICE CONTRACTS

Competition, transparency, and accountability are maximized when a service contract is publicly advertised, with responsive proposals judged on the basis of predetermined, merit-based evaluative criteria, and awarded based on the recommendation of a qualified evaluation committee. Such procedures promote public confidence in the contracting process and ensure that the government is not overpaying for the services being procured.

1. THE POOL OF CONTRACTORS SOLICITED SHOULD BE AS EXPANSIVE AS POSSIBLE

Eligibility requirements for a vendor seeking to compete for a government service contract should be broad, limited only by concerns related to the vendor's responsibility. *See* Competition in Contracting Act of 1984 ("CICA"), 41 U.S.C. § 253(a)(1)(A); Federal Acquisition Regulation ("FAR") 2.101, 9.104-1. A responsible vendor is one "who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." American Bar Association ("ABA") Model Procurement Code ("MPC") § 3-101(6).

Various authorities agree that public procurement must "promote and provide for full and open competition in soliciting offers and awarding Government contracts," FAR 6.101(a), which "means that all responsible sources are permitted to compete." FAR 2.101; *see* MPC § 3-201 Commentary ¶ 3; ABA, Section of Public Contract Law, Principles of Competition in Public Procurements, Recommendations ("ABA Procurement Principles") ¶¶ 1-3, 10 (1998). A larger vendor pool typically increases the quality of competition, and also pushes competing vendors to

offer their services at lower costs. See National Association of Procurement Officials, *State and Local Government: A Practical Guide* 23 (2008); *Ervin and Associates, Inc.*, B-278849, 1998 *U.S. Comp. Gen. Lexis* 101, at *5 (Mar. 23, 1998); *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978). Some of New Jersey's own procurement laws similarly reflect a commitment to such open competition. See, e.g., N.J.S.A. 52:34-6, -12 (state contracts, unless exempted by statute, should be publicly advertised in newspapers or other media sufficiently in advance of award to promote competitive bidding); N.J.S.A. 18A:18A-4(a), 40A:11-4 (public advertising required for many local government and public school contracts for goods or services); N.J.S.A. 18A:64-55, -59 (state colleges' procurements of many goods, supplies, or materials must be publicly advertised on annual basis, or at lesser intervals fixed by the college).

There are impediments to such competition always being maximized. Those impediments include: the provisions of state law that exempt government units from advertising many professional service and similar contracts; the failure of current statutory law to impose advertising requirements on certain categories of government entities; the multitude of prequalification requirements oftentimes imposed upon vendors before they are eligible to compete for a government contract; and the inclination to procure services from a known entity that has provided services over previous procurement cycles to the exclusion of equally, or perhaps more, capable competitors. See, e.g., N.J.S.A. 18A:18A-5(a)(1); N.J.S.A. 40A:11-5(1); N.J.A.C. 19:38A-1.1 et seq. We have highlighted the state, federal, Model Procurement Code, and ABA guidance cited above to remind government contracting units that a broad and diverse vendor pool is an important goal and baseline principle in government contracting.

2. DRAFT CLEAR AND UNAMBIGUOUS STATEMENTS OF WORK

A request for proposals (“RFP”) or similar solicitation should contain a clear and detailed statement of the work to be undertaken, often referred to as a scope of work provision (“SOW”). Described as “the heart of the bid document . . . , [a] well-written scope of work can do more for the success of a contract than any other part of the contracting process.” Kelly LeRoux, *Service Contracting: A Local Government Guide* 53 (ICMA Press 2007). The SOW is the first and chief opportunity for a contracting unit to provide an explanatory guide of the services it seeks. A clearly drafted description of the tasks expected of the contractor is more likely to elicit proposals, particularly proposals directly responsive to the needs of the contracting unit. Such greater competition, in turn, frequently yields lower-cost proposals.

In addition to clarity, completeness and specificity are also important in drafting the SOW. Completeness and specificity of the SOW may be enhanced by input from the specific department that will work with the contractor as well as by input from the intended beneficiaries of the service at issue. *Id.* at 31-32, 58. A complete and specific SOW will provide the basis for appropriate contract management and billing practices.

Previous OSC audits and investigations have found SOW deficiencies in professional services procurements. For example, solicitations and contracts we reviewed failed to differentiate between the duties covered by retainers and separate duties billable through hourly rates. In one case, we examined a school board’s simultaneous issuance of two requests for qualifications, one for legal services of a general counsel and one for legal services of a labor attorney. The SOWs failed to adequately distinguish the matters each respective attorney would handle. Such indefinite and vague SOWs impair competition because they make it difficult for vendors to determine whether their qualifications will suffice. Indefinite SOWs likewise impair

evaluation of submitted qualifications because the deciding officials cannot compare the qualifications to the anticipated work requirements. The deficient SOW drafted by the school board in this case may result in provision of redundant services and may prevent adequate review of attorney billings.

In addition, when procuring services it is generally advisable that a government unit draft an SOW that emphasizes the result to be achieved, and is less focused on detailing the process for accomplishing that goal. The focus should be more on “what” the procuring unit wishes the vendor to perform and achieve, and less about “how” it requires those services to be performed. *See FAR 37.602(b)(1)* (stating that “[a]gencies, [when procuring services,] shall, to the maximum extent practicable . . . [d]escribe the work in terms of the required results rather than either ‘how’ the work is to be accomplished or the number of hours to be provided”). The contracting unit’s SOW should provide a clear understanding of what “end product and functions” the government unit expects from the contractor. *LeRoux, supra*, at 55. To meet this goal, OSC generally advises government units procuring services to write SOWs as performance specifications, as opposed to technical specifications. Undoubtedly, technical specifications are necessary in some instances, and almost always are necessary when procuring goods. But when a government unit sets out to procure professional services, or complex technology services, setting forth an SOW in terms of the general performance or function expected of a vendor can lead to greater creativity in how competing vendors propose to perform the services in question, which, in turn, may result in those services being provided at a lower cost.

3. JUDGE PROPOSALS ON THE BASIS OF PREDETERMINED, MERIT-BASED EVALUATIVE CRITERIA MADE KNOWN TO VENDORS BEFORE PROPOSALS ARE SUBMITTED

A government unit's award of a contract for services is oftentimes determined by judging what proposal best meets the government unit's overall needs, where price is just one of many factors. In a situation where quality of service is important, a single-minded focus on price may well be unwarranted. Thus, selection of a vendor through competitive proposals can involve many considerations besides price, such as "technical capability, management capability, prior experience, and past performance." 41 U.S.C. § 253a(c)(1)(A); *see* FAR 15.204-5(b); N.J.S.A. 18A:18A-4.4(b); N.J.S.A. 40A:11-4.4(b); N.J.A.C. 5:34-4.2.

When a government unit procures services through such competitive proposals, however, subjectivity and favoritism are more likely to enter the evaluative process than when price is the sole factor used. Thus, in procuring services, selection and application of criteria used to evaluate competing proposals takes on special significance. In order to promote genuine competition when price is not the sole factor for award, and to promote transparency and accountability in the evaluation of competing proposals, a government unit should: (1) use predetermined, merit-based evaluative criteria to measure the proposals; (2) disclose those criteria in the solicitation materials; and (3) consider whether some criteria are more important than others, which may require assigning different weights to each criterion, with the percentage assigned to each preferably made known to vendors before submission of the proposals.

A. Use Predetermined, Merit-Based Evaluative Criteria

Although frequently not required by New Jersey law, best practices dictate that merit-based evaluation criteria should be used to set the standards for judging competing proposals for the provision of services. *See* LeRoux, *supra*, at 49-51. The specific criteria to be used varies

because the attributes of prospective contractors that the procuring entity looks for will vary depending on the subject of the procurement. Evaluative criteria generally fall into four categories: (1) management criteria, (2) technical criteria, (3) cost, and (4) past experience and performance. Management criteria generally pertain to the contractor's personnel structure, such as its proposed staffing for the service to be procured. Technical criteria analyze the approach proposed by a contractor in providing the requested service. Past experience and performance relate to a contractor's history in performing services similar to those that are the subject of the current procurement, and how responsibly the contractor provided those services, including its adherence to performance deadlines. *See* Gregory A. Garrett and Gail A. Parrott, *Solicitations, Bids, Proposals and Source Selection: Building a Winning Contract* 157, 164-66 (CCH Publishers 2007); Carl J. Peckinpugh, *Government Contracts for Services: The Handbook for Acquisition Professionals* 119-23 (ABA 1997).

Regulations promulgated by the Department of Community Affairs, Division of Local Government Services ("DLGS"), set forth model evaluative criteria, divided into technical, management, and cost standards, that local government and public school contracting units should use when evaluating proposals solicited under a competitive contracting process. *See* N.J.A.C. 5:34-4.2. The criteria can be tailored to the specific procurement at issue. Each model criterion category promulgated by DLGS posits several considerations for evaluators to guide them in their decision-making. *See* N.J.A.C. 5:34-4.2(a)(1-3). For example, concerning the technical criteria, the contracting unit is asked to consider: (1) how well the vendor's proposal demonstrates an understanding of the scope of the work and related objectives; (2) the completeness and responsiveness of the proposal in relation to the specific RFP requirements; (3)

whether the past performance of the vendor's proposed methodology has been documented; and (4) innovative techniques proposed by the vendor. *See* N.J.A.C. 5:34-4.2(a)(1)(i)(1-4).

Additional questions are listed under the management and cost-related criteria to add substance to how proposals are evaluated under these categories as well. *See* N.J.A.C. 5:34-4.2(a)(2-3). For example, concerning the cost criteria, evaluators are asked to consider not just how the cost of a given proposal compares with other proposals' costs, but specifically how its cost compares to that of proposals with similar scores in the technical and management areas. *See* N.J.A.C. 5:34-4.2(a)(3)(i)(1). Regarding the management criteria, evaluators are directed to consider a vendor's record of providing services on-time, on-budget, and in compliance with contractual obligations, and whether a vendor has adequately documented those aspects of its performance record in its proposal. *See* N.J.A.C. 5:34-4.2(a)(2)(i)(1-2).

Despite the option of using the competitive contracting model, local governments and boards of education sometimes choose to use other methods to procure professional services. In doing so, those government units sometimes fail to use evaluative criteria in the award process, as reflected in the solicitation and award documents themselves. For example, one contract advertised by a local redevelopment agency specified only that the financial consultant to be retained be a certified public accountant with significant experience. The resolution authorizing the award of the contract recited only that the firm "has done and is doing business" with the agency as the reason for the award.

B. Disclose Evaluative Criteria Early in the Procurement Process

Almost as important as using merit-based evaluative criteria is disclosing those criteria to prospective vendors as early as possible in the procurement process, such as in the RFP or other solicitation document. New Jersey's procurement laws require such early disclosure of the

evaluative criteria in some, but not all, types of procurements. *See, e.g.*, N.J.S.A. 52:34-9.4; N.J.A.C. 5:34-4.3(c)(1); N.J.A.C. 17:12-2.7; N.J.A.C. 17:19-3.6(b), -3.7(b). For example, at the state level, any procurement of architectural, engineering, or land surveying services must include within the advertisement “a statement of the criteria by which the agency . . . shall evaluate the technical qualifications of professional firms” N.J.S.A. 52:34-9.4. Similarly, the Department of Community Affairs instructs local contracting units using a “fair and open process” under the state’s pay-to-play law that selection criteria must be “included in the document soliciting proposals.” Department of Community Affairs, *Guide to the New Jersey Local Unit Pay-to-Play Law* 8 (Nov. 2005).

Even when not required by law, such disclosure represents a best practice to be followed absent a compelling reason not to do so. If something more than price will drive the award decision, best practices counsel that a contractor should know precisely those other bases by which its proposal will be evaluated against the competition. *See* FAR 15.304(d); FAR 15.303(b)(4); MPC § 3-203(1), commentary 2; MPC § 3-203(5); ABA Procurement Principles ¶¶ 5-6.

A contracting unit may also disclose its evaluative criteria in its own procurement policies, or its ordinances or regulations. For example, at the State Department of Treasury’s Division of Property Management and Construction (“DPMC”), the agency’s procurement policies and regulations explain how certain consultants and vendors, including architects and engineers, are selected. *See* DPMC Policy 08-01 (2008); N.J.A.C. 17:19-3-6, -3.7. Those policies and regulations require the advertisement soliciting the service at issue to contain, among other things, a statement of the criteria the contracting unit will use in evaluating the proposals received. *See* DPMC Policy 08-01, §§ 5.5.2, 6.3.2; N.J.A.C. 17:19-3.6(b), -3.7(c).

Each of the six state-level procurements we examined used RFPs that provided vendors with the evaluative criteria that would be used to measure the competing proposals. The proposals were in turn evaluated and scored on the basis of these criteria.

New Jersey's independent state authorities are similarly required to provide up-front disclosure of the evaluative criteria that will serve as the bases for award of their professional or technical services contracts. Issued in September 2006, Executive Order #37 ("EO37") directed each such authority to "establish a fair and transparent process for awarding such contracts, including setting forth in writing the scoring factors and scoring procedures to be used." EO 37 ¶10. The Executive Order provides illustrative factors for such scoring that include: "the background, qualifications, skills, and experience of the firm and its staff; the firm's degree of experience concerning the area at issue; the rate or price to be charged by the firm; the authority's prior experience with the firm; the firm's familiarity with the work, requirements, and systems of the State authority; the firm's proposed approach to the issues raised in the project description or specifications; the firm's capacity to meet the requirements of the project at issue; the firm's references; interviews with prospective firms; and geographical location of the firm's offices." EO37 ¶ 11(a-j).

In contrast, OSC reviewed two procurements for legal services at the school board level in which evaluative criteria were not disclosed in the solicitation materials. These procurement materials reflected no evidence of an evaluative process having been used, beyond a statement in a Request for Qualifications that the award would be made to an attorney "who has demonstrated the ability to perform the required service in an acceptable manner, price notwithstanding."

C. Weighing of Individual Evaluative Criteria

Once evaluative criteria are determined, other considerations include (i) whether different weights should be assigned to particular criteria, and (ii) when to disclose to vendors the weight assigned to each criterion. Simply put, weighing should be used if some criteria are determined to be more important than others.

Procurement laws differ in their approaches as to when weighing methods must be developed by the contracting unit and when they should be revealed to prospective vendors. For example, under New Jersey's statutory competitive contracting process for local government units, if weighing of criteria is employed, the relative weights may be set forth as early as in the RFP, but no later than the time at which proposals are opened. *See* N.J.S.A. 18A:18A-4.4(b); N.J.S.A. 40A:11-4.4(b); N.J.A.C. 5:34-4.3(b). The state Treasury Department's Division of Purchase and Property ("DPP") requires that when weights are used, they be created prior to the opening date of proposals, but the weights do not have to be stated in the RFP. *See* N.J.A.C. 17:12-2.7(a)(1). In fact, when an evaluation committee is used, DPP regulations prohibit revealing the weights until after proposals are opened. *Id.*

While disclosure of the weight assigned to each evaluative criterion theoretically can occur before bid opening, at bid opening, or as late as after bid opening, best practices suggest disclosing in the RFP the weight assigned to each criterion. Disclosure of the weighing method before submission of proposals provides vendors with advanced insight as to which criteria are most important to the contracting unit, and thereby helps vendors refine their proposals. *See* MPC § 3-203, commentary to subsection (5). At a minimum, a solicitation for competitive proposals might, as Federal Acquisition Regulations require for federal agencies, state whether "all evaluation factors other than cost or price, when combined, are (1) Significantly more

important than cost or price; (2) Approximately equal to cost or price; or (3) Significantly less important than cost or price.” FAR 15-304(e)(1-3).

Of the four local government competitive contracting procedures OSC reviewed, two procurements -- a county’s solicitation for medical services for inmates at its correctional facilities and a township’s request for digital imaging and database indexing of documents -- issued RFPs that disclosed the weight assigned to each evaluative criterion. The weight assigned to each criterion in the other two instances was disclosed at the public opening of proposals. At the state level, all six RFPs reviewed included a sample scoring sheet that listed the weights that would be assigned to each evaluative criterion.

4. THE NEED FOR AN EVALUATION COMMITTEE

While evaluation of proposals theoretically can be performed by one person, best practices favor evaluation by a group of evaluators, often referred to as an evaluation or selection committee. *See* LeRoux, *supra*, at 109-11; N.J.A.C. 5:34-4.3(c)(2). A committee is helpful for multiple reasons. First, in conducting an evaluation, the subjective views of an evaluator will almost inevitably have some effect on the scoring process. Using a committee prevents one person’s subjective feelings about the strength or weakness of a proposal from single-handedly determining the award. In other words, there is generally greater objectivity in the award process when the power to award the contract is diffused among several persons. Use of a committee also makes it harder for persons looking to inject more blatantly inappropriate behavior into the process, such as making unlawful payments to obtain the contract or engaging in other forms of influence-peddling.

In New Jersey, state procurement laws applicable to various levels of government allow for the use of evaluation committees to award service contracts. *See* N.J.A.C. 5:34-4.3(c)(2);

N.J.S.A. 52:34-10.3; N.J.A.C. 17:12-2.7(a)(1); N.J.A.C. 17:19-3.6(b), -3.7(b). Moreover, all state authorities are legally required to establish an evaluation committee to review and score proposals for professional services or technical services contracts. EO 37, ¶13.

A contracting unit that uses an evaluation committee should attempt to have that committee in place before proposals are received. *See id.* Early selection of the members of the committee can allow members to help develop the evaluation criteria and gain greater familiarity with the procurement, including understanding the contracting unit’s goals and needs. The names of members of the evaluation committee should be documented and available to the public at the time of the contract award. *See* N.J.S.A.52:34-10.3(c); N.J.A.C. 5:34-4.3(c)(2)(i).

A. Evaluators Must be Qualified to Judge

Members of an evaluation committee must be sufficiently qualified to evaluate the strengths and weaknesses of the proposals submitted. For example, when a government unit is considering competing proposals to provide legal services, having a lawyer as a member of the evaluation team is prudent. Similarly, when procuring an audit firm, a person with an accounting or financial background should be part of the evaluation committee. Use of non-voting advisors to a selection committee may be appropriate as well. *See* N.J.A.C. 5:34-4.3(c)(iv).

New Jersey law recognizes the importance of committee members having appropriate qualifications. For example, state law requires for state agency procurements that persons appointed to the evaluation committee have “the relevant experience necessary to evaluate the project.” N.J.S.A. 52:34-10.3(c). Similarly, when an evaluation committee is used under the statutory competitive contracting system for local governments, committee members are to be “familiar with the need for . . . the services to be performed in the request for proposals.”

N.J.A.C. 5:34-4.3(c)(2)(i). When an evaluation committee is put in place for certain complex

state agency procurements, state law specifically requires that at least one committee member be technically proficient in the field that is the subject of the procurement. For example, if an evaluation committee is set up by a state agency to procure services that include “financing of a capital project,” at least one member of the evaluation committee must be “proficient in the financing of public projects.” N.J.S.A. 52:34-10.3(b). Similarly, any evaluation committee that considers a contract for “information technology goods or services” must include at least one member “proficient in such technology for public projects.” *Id.* Federal procurement law similarly makes clear that an evaluation team is to be “tailored for [each] particular acquisition,” by including persons with “appropriate contracting, legal, logistics, technical, and other expertise to ensure a comprehensive evaluation of offers.” FAR 15.303(b)(1).

Even in those instances where proficiency in a given field is not statutorily required of members of an evaluation committee, the governing unit should nonetheless ensure that those selected to sit on the evaluation committee have appropriate expertise concerning the subject of the procurement. This is especially true when a procurement is technologically complex, such as a procurement of telephone or internet services, or technically complex, such as contracts involving procurement of health insurance benefits.

B. Avoid Conflicts of Interest

In addition to having experience and familiarity with the subject matter of the procurement, evaluators must be truly impartial arbiters. This prohibition against any evaluation committee member having a conflict of interest is explicitly stated under some of New Jersey’s procurement laws. *See, e.g.*, N.J.S.A. 52:34-10.3(a) (“[T]he members of any evaluation committee shall have no personal interest, financial or familial, in any of the contract vendors, or

principals thereof, to be evaluated.”); N.J.S.A. 52:13D-23(e). Potential evaluation committee members and non-voting consultants should be screened meticulously for conflicts of interest.

One such screening method entails signing a certification attesting that the evaluator or consultant knows of no financial, familial, or other potential conflicts that would inappropriately influence his or her review of competing proposals. Such conflict-of-interest attestations are required of evaluators who participate in award decisions under New Jersey’s statutory competitive contracting process for local government units. *See* N.J.A.C. 5:34-4.3(f).

Specifically, prior to evaluating proposals, each evaluator is required to sign the following certification:

I hereby certify that I have reviewed the conflict of interest standards in the Local Government Ethics Law or the School Ethics Act, as appropriate, and that I do not have a conflict of interest with respect to the evaluation of this proposal. I further certify that I am not engaged in any negotiations or arrangements for prospective employment or association with any of those submitting proposals or their parent or subsidiary organization.

Id.

The ABA Model Procurement Regulations (“MPR”), which were promulgated pursuant to the Model Procurement Code, propose that a public contracting unit provide its personnel with a written policy outlining ethics in procurement, including what constitutes conflicts of interest, and that each employee sign a written statement attesting to familiarity with the ethics policy. *See* MPR 12-202.01.1-3. The Model Procurement Code itself envisions criminal sanctions for undertaking procurement action marred by conflicts of interest. *See* MPC § 12-203.

5. USE A SCORING PROCESS UNDERSTANDABLE TO EVALUATORS AND VENDORS

The process of actually scoring competing proposals should be understandable to those who evaluate the proposals, explainable to vendors before and after the award process, and

capable of withstanding scrutiny in the event of any bid protest. A scoring process that is not explainable by, or understandable to, those who evaluate competing proposals can prove embarrassing when a contracting unit finds itself having to defend its decision-making.

Such was the scenario that confronted the State Treasury's DPP in 2003 when it brought a breach of contract action against a professional services firm that was awarded a contract to provide advice and training concerning privacy of personal medical records and then subsequently withdrew its offer. After the firm withdrew from the agreement, the State returned to the remaining pool of bidders and selected a replacement vendor. In *State v. Ernst & Young*, 386 N.J. Super. 600 (App. Div. 2006), the court found the withdrawing firm liable, but imposed no damages against it because the State could not provide any reasonable rationale for its selection of the replacement vendor instead of a third capable vendor, which seemingly offered adequate services at half the winning bid price.

When called upon to explain how they evaluated the competing proposals, members of the DPP evaluation committee "could [not] explain the specific basis on which technical scores" were assigned to the various proposing firms. *Id.* at 621. One of the evaluators, upon being questioned by the court, specifically admitted that she could not justify her assignment of lower points to one vendor and higher points to another. *Id.* at 609, 621.

When a committee evaluates competing proposals, each member of the committee should score each proposal and provide comments that explain the score assigned to each criterion. Requiring that a comment accompany the score forces an evaluator to articulate his or her rationale in support of that score, and also provides a record for review should the eventual award decision become the subject of a protest.

Evaluators' inability to explain scoring decisions is less likely to occur if the meaning of each criterion and the reason each criterion is part of the evaluative analysis are sufficiently explained to evaluators before judging. Guidance from a procurement official as to the difference between criteria, and what to look for in a proposal to determine how well the proposal meets a given measurement standard, will allow for more informed and accountable decision-making. To help evaluators fully understand the significance of the criteria by which they are being asked to measure proposals, the contracting unit may wish to develop "detailed evaluation 'standards' or 'guidelines' [internal to the contracting unit] for use along with the announced evaluation criteria." Peckingpaugh, *supra*, at 71.

The National Association of State Procurement Officials suggests that "at the beginning of the evaluation process, the procurement officer ought to hand the committee members a short written description of the process to be used, including the general guidelines for any discussions with offerors, and scoring sheets or other forms." *State and Local Government: A Practical Guide* 136 (National Association of State Procurement Officials 2008). A brief training session for committee members may be helpful in this regard.

One way to amplify evaluative criteria for committee members is to provide a short written explanation alongside each criterion, instructing evaluators on what they are to look for when measuring proposals against that criterion. The scoring sheets for several procurements we reviewed provided such guidance, through either rhetorical questions or further explanation concerning what evaluators should focus on when evaluating each criterion. For example, in one procurement we reviewed, the evaluative criteria of technical strength, management strength, and cost were assigned relative weights of forty percent, forty percent, and twenty percent, respectively. The scoring sheets instructed evaluators that within the maximum of forty points

available to be assigned for a proposal's technical strength, a vendor's understanding of the scope of work was a sub-criterion that could count for as much as ten points, where a poor understanding should result in a score of between 0 and 3, an adequate understanding should be scored 4, 5, or 6, and a solid understanding should be reflected in a score of 7, 8, 9, or 10. Similar sub-criteria were broken down within the larger criteria of management and cost to help evaluators hone their scores to reflect tangible differences in the proposals.

When evaluative criteria are not sufficiently defined, it can be difficult for evaluators to distinguish between them. For example, our examination of the scoring sheets associated with procurement of services at the state level generally revealed vague and undefined criteria that were weighed heavily in favor of experience. The criteria for evaluating proposals fell into broad areas of: (1) experience of the firm, (2) experience of the firm's team members on projects similar in size and scope to the project at issue, (3) the firm's organization and proposed use of sub-consultants, (4) the firm's approach and understanding of the project, (5) the proposed schedule and management plan for performing the project, and, in some instances, (6) cost-related factors. The weights assigned to the criteria pertaining to the experience of the firm and proposed team members aggregated to as much as fifty-five to sixty percent in evaluation decisions. Such heavy weight assigned to experience, coupled with pre-qualification requirements, presents a substantial barrier to new firms or firms not experienced in New Jersey state projects.

6. THE SCORING PROCESS AND AWARD RECOMMENDATION SHOULD BE WELL-DOCUMENTED AND RETAINED

Another means to enhance competition, transparency, and accountability in the procurement of services is to ensure that all procurement decisions are documented and that

those documents are retained for an appropriate period of time. The less documentary evidence there is to explain each step of the award process, the more susceptible the process will be to claims that the contract was awarded without meaningful or appropriate deliberation.

A contracting unit should thus require that every step in the evaluative process be documented through (1) scoring sheets, (2) a written record of what transpired during any permitted negotiations between vendors and procurement officials, (3) a written comparative analysis of competing proposals, and (4) a written award recommendation. *See, e.g.*, FAR 15.305(a) (“The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file.”). Specifically, that written award recommendation should (a) explain the factors that led to the award decision, (b) offer qualitative discussion of the leading competing proposals, and (c) describe the specific characteristics of the winning vendor’s proposal that resulted in its selection over the others. *See, e.g.*, N.J.S.A. 40A:11-4.5(d); FAR 15.308. In short, an award memorandum should document how evaluative criteria were taken into consideration and explain the reasons for accepting the winning proposal.

In the documents OSC reviewed, we found a good example of such an award recommendation in the form of a narrative report concerning the award of a state university’s contract for pharmacy services. The report explained the strengths and weaknesses of the various vendor proposals when measured against the evaluative criteria. It further explained that the vendor ultimately selected was the top ranked, while its cost proposal of approximately \$6.3 million dollars was the second least expensive, exceeding by only \$32,000 the vendor with the lowest cost proposal, which had received the lowest technical score. Such documentation ensured that the procurement process in this instance was transparent, accountable in its method of vendor selection, and defensible should a bid protest have arisen.

Conversely, the written rationales for awarding many of the state's professional service contracts, which ranged in fees from approximately \$100,000 to more than \$1.5 million dollars, were opaque, resting on nothing more than the fact that the winning proposal received the highest score. Similarly, at the local government level, the rationale for selecting a professional service contractor was often evidenced by nothing more than a generic resolution that did not contain any detail or justification as to why a certain proposal was selected. This failing recurs despite the specific requirement of the Local Public Contracts Law and the Public School Contracts Law that every contracting unit's resolution awarding a professional service contract state the reasons for its award decision. *See* N.J.S.A. 18A:18A-5(a)(1); N.J.S.A. 40A:11-5(1)(a)(i). Absent such transparency, the award of professional service contracts will continue to be viewed with public skepticism, and with competing vendors left to wonder why their proposal was not selected.

In fact, some of the underlying procurement files OSC examined lacked any documentation to support the public entity's award decision. For example, for each of the nine contracts awarded by local government or public school contracting units for either audit or legal services, the contracting units had no documentation that they could provide to this office showing that any of the proposals were evaluated on the basis of evaluative criteria. This was the case even though four of the six RFPs for legal services and all three RFPs for audit services stated that competing proposals would be evaluated on the basis of specified criteria. Three of the deficient legal service procurements occurred within a township that had even enacted an ordinance to require competition for professional services contracts, and had codified the specified criteria for awarding such contracts. Similarly, one local government's file concerning its selection of a firm to provide an assessment of the unit's current government buildings and

future structural building needs contained so little documentation that it was not even possible to determine whether the contract was awarded pursuant to statutory competitive contracting or some other method.

Records of procurement decision-making should be maintained for a predetermined period of time. While, in some instances the law may exempt evaluative analyses and scoring materials from public disclosure requirements, New Jersey law, federal law, and model procurement statutes counsel that these types of documents be maintained by a contracting unit, chiefly because the information contained therein may be needed to explain to a reviewing tribunal the rationale behind the award decision. *See* N.J.S.A. 47:3-16; FAR 4.805(a), (b)(2); MPC § 1-201. That evaluative information may be revealed to a reviewing body charged with examining the propriety and reasonableness of the award decision should provide incentive for contracting units to ensure their award decisions are carefully arrived at, only after documenting comparisons between competing proposals. The period of time for preservation of procurement materials should be set by the contracting unit, with consideration given to records retention schedules promulgated by New Jersey's Division of Archives and Records Management.

CONCLUSION

Government units should be vigilant in their efforts to ensure that all contracts funded by public dollars are appropriately solicited, properly evaluated, and transparently awarded by procurement officials. A contracting unit that adheres to the best practices set forth in this report should find itself better able to procure quality, cost-efficient services from vendors consistent with the public trust. Those vendors, in turn, will more likely find themselves competing for the

award of public business on playing fields bounded by clear and understandable procurement rules, with qualified referees impartially judging the participants.

While many of the best practices set forth in this report may seem self-evident, in most contexts current state law presents these practices as options to be pursued as opposed to mandatory procedures to be followed. We recommend that the Legislature consider enacting legislation that would make these best practices mandatory for government entities in this state. Under such legislation, government units would be required, for example, to publicly advertise service contracts absent a truly bona fide basis for exemption, proposals would be judged by a qualified evaluation committee based on pre-determined, merit-based criteria, and contracts would be awarded following a documented scoring process.

Regardless of whether they are required by law, we recommend that government units adopt these best practices as soon as possible. The use of these practices will serve to ensure the public is receiving the best value for its tax dollars, and will limit opportunities for unscrupulous public officials and government contractors willing to engage in unlawful contract-related activity. OSC will continue to monitor and audit public procurement processes to promote compliance with these best practices.

APPENDIX - SUMMARY OF GUIDANCE

1. The pool of contractors solicited should be as expansive as possible.

- Eligibility requirements for a vendor seeking to compete for a government service contract should be broad, limited only by concerns related to the vendor's responsibility. All responsible vendors should be permitted to compete.
- A responsible vendor is one who has the capability to perform fully the contract requirements, and the integrity and reliability that will assure good faith performance.

2. Statements of work should be drafted in clear and unambiguous terms.

- A request for proposals ("RFP") or similar solicitation should contain a clear and detailed statement of the work ("SOW") to be undertaken.
- When a solicitation for any reason does not include or contemplate such an SOW, the contracting unit should include a clear, complete, and specific SOW in the final executed contract with the vendor.
- It is generally advisable that a government unit draft an SOW that emphasizes the result to be achieved, and is less focused on detailing the process for accomplishing that goal.

3. Proposals should be judged on the basis of predetermined, merit-based evaluative criteria, made known to vendors before proposals are submitted.

- Merit-based evaluation criteria should be used to set the standards for judging competing proposals for the provision of services. Evaluative criteria generally fall into four categories: (a) management criteria, (b) technical criteria, (c) cost, and (d) past experience and performance.
- Such criteria should be disclosed to prospective vendors as early as possible in the procurement process, such as in the RFP or other solicitation document.
- Weighing of criteria should be used if some criteria are determined to be more important than others. The weight assigned to each criterion generally should be disclosed in the RFP.

4. The evaluative criteria should be judged by a qualified evaluation committee.

- The committee should be in place before proposals are received.
- Members of an evaluation committee should be sufficiently qualified to evaluate the strengths and weaknesses of the proposals submitted.
- Potential evaluation committee members should be screened meticulously for conflicts of interest.

5. The evaluation process should be explainable to evaluators and competing vendors, and capable of withstanding scrutiny under a protest challenge.

- The meaning of each criterion and the reason each criterion is part of the evaluative analysis should be explained to evaluators before judging.
- Each member of the committee should score each proposal and provide comments that explain the score assigned to each criterion.

6. The scoring process and award recommendations should be well-documented and retained.

- Every step in the evaluative process should be documented through (a) scoring sheets, (b) a written record of what transpired during any permitted negotiations between vendors and procurement officials, (c) a written comparative analysis of competing proposals, and (d) a written award recommendation.
- The written award recommendation should (a) explain the factors that led to the award decision, (b) offer qualitative discussion of the leading competing proposals, and (c) describe the specific characteristics of the winning vendor's proposal that resulted in its selection over the others.
- The period of time for preservation of procurement materials should be set by the contracting unit.