

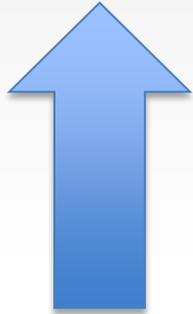
# Negotiation of State IT Contracts

ABA Public Contracts Law Section  
State & Local Procurement Division  
Webcast – September 28, 2012

ROGERS JOSEPH O'DONNELL  
EXPERIENCE TIPS THE BALANCE

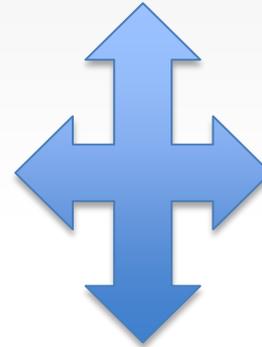
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# Crux of State Procurement Challenge



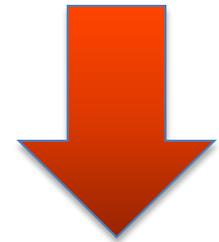
Needs

Dollars



Knowledge

Resources

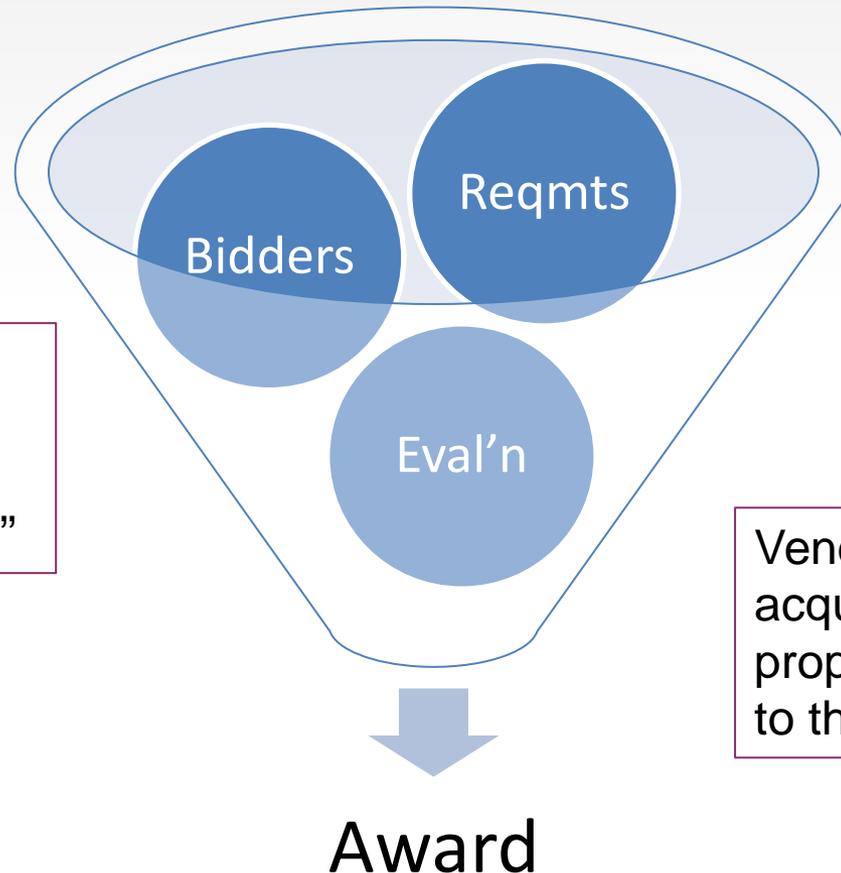


# Why State IT Procurement is Important

IT services and supplies are increasingly important to state and local government (“SLG”) delivery of services

- Certain legacy systems must be replaced
- Federal mandates (and \$\$) may require new systems
- States need operating efficiencies
- Leveraged solutions should replace “stovepipes”
- Client (beneficiaries) and citizen service expectations are increasing, e.g., as a function of "commercial" experience with web-driven applications

# The “Acquisition Process” as “Q&A”

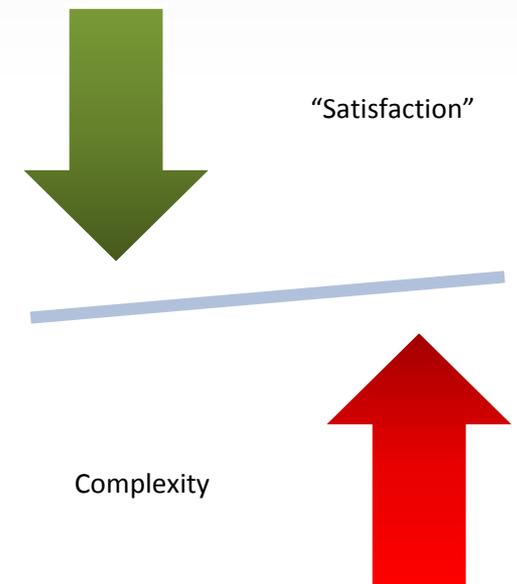


By the acquisition process the State presents its business needs – the “question”

Vendors, through the acquisition process, propose their “answers” to the State’s “question”

# Flaws in the Process

- Acquisition process is too rigid
- Poor communications between Buyer & Seller
  - Both objectives & capabilities imperfectly understood
- Proposals may “answer” the “wrong” question
- Potentially capable competitors excluded
- “No Bid” or “Few Bid” outcomes
- Process both slow and expensive
- Vendors discouraged by cost & inflexibility
- Pricing reflects (avoidable) risk premium
- Some acquisitions “fail” to produce award
- Unsatisfactory or disappointing to all



# Potential Solutions to Acquisition Problems

## Negotiations

Use a “negotiations process” to better define requirements, refine offers, encourage innovative and “best value solutions” and resolve obstacles to successful acquisition outcome.

## Terms & Conditions

“Reform” terms and conditions to reduce vendor risk and narrow differences between commercial expectations and state demands

# State-Specific Considerations

CONSTITUTION



STATUTE



REGULATION



POLICY



PRACTICE



PREFERENCE



HABIT



... INTERIA or "FOTU"

"NEGOTIATIONS" are not available to all states as there will be outcome-determinative differences in local state law, regulation, policy, practice etc.

Some states have legislation on the books that allows for negotiations; others may not.

# California – PCC § 6611

PCC § 6611 (enacted in 2003) grants the Department of General Services extremely broad authority to use a negotiation process to acquire “goods, services, information technology, and telecommunications.”

For new contracts, DGS may engage in negotiations when doing so would enable the State to

- (1) better define its business purpose or need,
- (2) identify different types of solutions to meet its business need,
- (3) ensure a “best value” or “most cost-effective” solution, or
- (4) when the State’s business purpose or need is complex and a bidder’s cost to respond is high.

The terms and conditions and/or scope of work of *existing* contracts may also be negotiated where doing so is “in the best interest of the state.” PCC § 6611(b).

**This authority exists “notwithstanding any other provision of law” and may be used for contracts for goods, services, information technology and telecommunications**

# California's Past Implementation of 6611

- **Unhelpful administrative guidance**
- **Uncertain administration**
- **Infrequent utilization**
- **Inconsistent application**
  - To achieve “innovative solutions”
  - To adjust scope to achieve necessary price reduction
  - To change critical terms and conditions
  - To solicit “alternative solutions”
  - To amend and extend current
- **Poorly Understood**
- **Poorly Reported**
- **Concern about fairness**

**Though used less than the Legislature intended, 6611 “negotiations process” generally produced successful acquisition outcomes**

America\_White\_Paper\_Use\_of\_Negotiations\_06202012.pdf - Adobe Acrobat Pro

New Window Help



**CALIFORNIA'S USE OF NEGOTIATIONS AUTHORITY  
FOR STATE TECHNOLOGY CONTRACTS**

**A WHITE PAPER PRODUCED  
FOR AND IN CONJUNCTION WITH TECHAMERICA'S  
CALIFORNIA PROCUREMENT COMMITTEE**

Update: June 20, 2012

This White Paper is a revision of an original paper prepared in 2010 and circulated then among various member companies and provided informally, as a draft, to the California Department of General Services and the California Technology Agency. Principal fact-finding was conducted in 2009-2010, by the author, and has been updated in 2012.

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# New Developments in California

- Legislature has extended 6611 negotiations authority to California Technology Agency (responsible for telecommunications procurement)
- New initiative announced by Department of General Services:
  - Increase the use of negotiations (all but 20%)
  - Extend negotiations beyond IT to supplies and services
  - Train workforce in negotiations & involve stakeholder depts/agencies
  - New Procedures & Guidelines proposed for industry comment
  - Initial implementation via State Contracting Manual; then by Reg
- Also in the works is a “refresh” to California’s standard terms and conditions [these are related]

# An assessment of the DGS Initiative

- Many “White Paper” Recommendations Adopted
  - State agrees negotiations will save costs and promote innovation
  - State will make greater use of negotiations
  - New policies and procedures are proposed
  - Agencies and departments are better informed
  - Vendor community input is sought
  - Improved transparency and accountability
- Some White Paper Recommendations Were Not Adopted
  - Negotiations only are used for “new” contracts
  - DGS has not answered concerns about absence of protest rights
  - Guidance falls short of assuring necessary fairness and consistency

# Critical Issues for Implementation

- State proposes to use negotiations in 3 situations
  - From the “outset” of a procurement
  - “During” a procurement
  - Where no responsive bids are received
- In each of these situations
  - The State needs to better define how it will determine which vendors are in the “competitive range”
  - Also yet to be answered is how the State will use a negotiations process to inform vendors of strengths and weaknesses
  - Assurance of no technical or competitive “transfusion” are needed
- Most critical is the State’s “reservation” of right to award on changed requirements and/or other than the disclosed evaluation criteria
  - This presents great risk of unfairness & damage to competitive process

# “Net Assessment” of the DGS Initiative

- Industry strongly urged to evaluate and provide comments
- Once issued as regulations, very difficult to change
- Other states likely will follow California’s lead (even if they have no counterpart to PCC § 6611)
- California should draw on federal experience
- **Absence of effective protest/grievance right is critical**
  - Alternatives include ombudsman, protest to award officer, etc.
  - (Present law does not allow conventional protest where 6611 used)
- Negotiations also should be used for existing contracts
  - To encourage innovation, “shared savings,” etc.
  - To address program performance problems
- **State needs to work harder to find the balance between flexibility and fairness**

# Propositions for other States

- Negotiations should be encouraged
- Result will improve acquisition process & bring more competitors and better solutions
- Savings should be realized and “best value” secured
- Industry will welcome flexibility
- Clarity in purpose, process and results are needed
- Fairness must be assured
- Effective remedies and redress must be provided
- Process holders should act with transparency and accountability
- States need trained and competent workforce

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