

RJO Update: State and Local Procurement

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A Better Way: Negotiation of State and Local IT Contracts

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State and local governments rely on information technology to carry out the business of governance. All too often, their procurement mechanisms suffer from rigidity and unresponsiveness. Competition is frustrated and best value solutions are excluded.

There is a better way. Use of a negotiations process to procure goods and services has the ability to change the face of public contracting, especially at the state and local level. It can offer flexibility into a system typified by rigidity, and bring about superior results for public agencies and contractors alike.

Some states, like California, have statutory authority to use negotiations but have done so only occasionally, with inconsistent results, and without sufficient process or transparency to assure both respect for the public trust and fairness to all bidders. Other state and local governments have the inherent power to negotiate their IT contracts, but still adhere to “lockstep” methods in the mistaken belief they are better protecting the public’s interests.

Almost every technology company active in the public sector has its own story to tell about state and local procurements that have frustrated and failed. Too often, conventional procurements fail or disappoint because the public purchaser insists on terms and conditions that impose excess risks on vendors, put enterprise-critical IP at risk, or are otherwise “out of market” and unacceptable to vendors. There are numerous examples where top tier companies have declined or participate, or been disqualified for taking exception to “mandated” terms, with the result that competition fails to produce the outcome sought by a state or local government. These problems are soluble when the purchaser engages in good faith, arms’ length negotiations with eligible bidders.

California serves as an example of the importance of responsive procurement practices. State officials acknowledge that many state systems are 25 years old and must be replaced. Deltek’s Input unit, in 2011, forecast more than \$4 billion in State IT project opportunities and another \$1.5 billion at the city and county level.

TechAmerica has just released a [White Paper](#) – authored by Robert Metzger of RJO – which examines the use of negotiations authority in California. (TechAmerica, a trade association, includes 1,000 member companies and is considered a leading voice for the IT industry.) The White Paper looks at California’s experience with negotiations and concludes that the State would bring more vendors to competition and improve the outcome of its procurements through greater use of negotiations. Reflecting several years of investigation, the White Paper looks at examples of where negotiations were used to good effect, and also where negotiations should

have been used but were not. Recommendations are included to improve administrative guidelines and transparency.

In California, a provision of the Public Contract Code, PCC § 6611 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).

The only statutory limitation on the State’s negotiation authority is the requirement that DGS establish procedures and guidelines for the negotiation process for new contracts. PCC § 6611(c). DGS has perfunctorily fulfilled this obligation through incorporation of PCC § 6611 into the State Contracting Manual with only short, illustrative examples. The White Paper advocates new guidelines, to address important questions such as *when* negotiations are appropriate, *how* negotiations should be structured, *why* negotiations are the best option, etc. Today, state departments and agencies have very little guidance as to the appropriate application of PCC § 6611, and that may explain some of the perceived reluctance to utilize it.

The California law divests bidders of any administrative right to protest a contract awarded through a negotiations process. Instead, unsuccessful bidders have no recourse other than to go to court through the expensive and complex “writ of mandate” proceeding. Because negotiations inherently mean that the State is using more discretion in the solicitation and award process, the White Paper concludes it is *more* important, not less, that bidders have an efficient and cost-effective means to raise protest grievances without having to go to court.

The White Paper expresses disappointment at the relative infrequency that DGS has used negotiations in California procurements, even though there is broad statutory authority and legislative encouragement. After a careful examination of examples where a negotiations process was utilized, the Paper concludes the results of negotiations are very positive: innovative solutions, price reductions through reduced scope requirements, changes to the terms & conditions, alternative solutions, and/or necessary amendments and extensions to critical current contracts. Where used successfully, such as on the rebid of the State’s payroll project (now called “MyCalPAYS”), the use of a negotiations process brought “world class” competitor teams to the table and produced award with tailored terms and conditions and a specially crafted contract for this complex requirement.

Therefore, TechAmerica recommends improved guidelines for the use of a negotiation process and greater input from the vendor community. TechAmerica also urges agencies to employ a formal “determination and finding” (D&F) to document justification for the use of a negotiation process as this would provide clarification for agencies and vendors alike, increase transparency and help assure integrity. Also recommended are greater efforts to assess and report on the use of negotiations and the benefits realized.

Whether in California or elsewhere, among state governments, cities and counties, public agencies should be encouraged to make greater use of a “negotiations process” because improved competition will result and companies will be encouraged and enabled to offer truly innovative, “best value” solutions. The [White Paper](#) is an expert assessment of what should be “best practices” for use of negotiations, in public sector IT contracts.

How We Can Help Your Company

We can assist companies in their advocacy of improved acquisition practices. RJO is nationally recognized for its leadership in state and local contracting. We’ve been involved in procurement reform efforts in California, Oregon, Arizona, Oklahoma, Texas, Missouri and other states. Our attorneys have advised IT, telecom, professional service and public construction companies in state and local matters arising in many states across the U.S. We can assist out of our base in San Francisco or from our new office in Washington, D.C.