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Getting What You Need on the Way to the Win-Win! Leveraging the RFP in State Technology Procurements

Section I--Background:

From portal development to systems integration services to complex Enterprise Resource Planning (ERP) systems that form the backbone of a state agency's business processes, state governments purchase an array of technology solutions each year. States can use a Request for Proposal (RFP) process to solicit proposals from private-sector offerors and select the proposal that maximizes the value that the state will receive from each dollar spent on a technology purchase. The RFP process can involve a wide-range of stakeholders including the state CIO, state procurement officials, state procurement attorneys, members of the private sector community and beyond. *As a testament to the collaborative nature of IT procurement through an RFP, this Brief is a collaborative effort by NASCIO (the National Association of State Chief Information Officers) and NASPO (the National Association of State Procurement Officials). It provides a broad view of how the variety of stakeholders can use the RFP process to the state's and the citizens' benefit.*

The reader should note that the RFP process is not the only mechanism for IT procurements. See Appendix C for more information about alternative procurement models.

And the Winner Is—The Offeror with the Best Value: The RFP process for public contracts has its inception in the Armed Forces Procurement Act of 1948.¹ It evolved from contracting methods developed during World War II to procure weapons and war materials. Formalized for state and local governments in the American Bar Association's Model Procurement Code for State and Local Governments (MPC), which was published in August 1980,² *the RFP process strives to obtain the best value for every state dollar*

¹ "Formation of Government Contracts," 3rd Edition, Cibinic and Nash, George Washington University Law School, 1998 (for Armed Forces Procurement Act of 1948); "Personal History of Model Procurement Code," F. Trowbridge Von Baur, Public Contract Law Journal, Volume 25, Number 2, Winter 1996.

² "State and Local Government Model Procurement Code," American Bar Association, Section of Urban, State and Local Government Law and Section of Public Contract Law (August 1980, revised 2000).

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spent on a technology procurement. “Best value” is a term of art in procurement circles that is different from “best or lowest price.” While “best price” is simply that—the best or lowest price for which a product or service may be purchased, “best value” encompasses the benefits in total that a state receives from a procurement and typically means “the expected outcome of an acquisition that, in the Government’s estimation, provides the greatest overall benefit in response to the requirement.”³ Best value can include many factors, such as the long-term project benefits, cost avoidance, cost versus technical superiority tradeoffs and increased productivity. In some cases, the proposal offering the best value may entail a higher price, but superior quality and benefits for the state. In recent years, state procurements have transitioned away from seeking the lowest price for technology to trying to find the best value for the funds expended. This has been particularly true for state IT procurements, because they often involve complex and varied technical and design aspects that can be more difficult to compare among offerors.

Varying from state-to-state, the RFP process possesses many built-in flexibilities to maximize value for the state. These flexibilities have the potential to yield an assortment of solutions from the offerors that submit proposals. In fact, the American Bar Association revised the MPC in 2000 to include technology procurements and emphasize the importance of the RFP process in procuring technologies. ***The challenge for states, as well as local governments, is using the flexibility of the RFP process to a greater degree in order to heighten the value a procurement provides and ultimately improve the way a state or local government conducts business.***

Issues Abound About RFPs: Using an RFP to purchase technology raises a world of potential issues. These include:

- Defining “best value” (including the criteria used to determine “best value”)
- Including requirements in the RFP for IT accessibility and Section 508 accessibility requirements
- Determining any constraints on RFP flexibility as a result of full or partial federal funding
- Including IT security requirements in the RFP
- The impact of the RFP process on small or disadvantaged businesses
- Forming a consortium of smaller offerors to submit one proposal in response to an RFP
- Potential state legal exposure when using multiple offerors (including sub and prime offerors)
- Amending the RFP
- Establishing objective evaluation criteria
- Defining the scope of work
- Negotiating and executing the contract between the state and offeror
- Implementing the project, and

³ Federal Acquisition Regulation (FAR) 2.000.

- Creating clear metrics to assess a project's success.

Given the breadth and depth of these and other issues, this Brief cannot address in full the totality of issues associated with RFPs. However, we point them out so that the reader will be aware that there is a broad spectrum of issues that can arise when using an RFP to purchase technology.

Calling All Stakeholders: Starting the RFP process for a technology purchase can be complex and involve stakeholders and experts from many corners of state government. Stakeholders can include the state CIO, state procurement official, state attorney general, budget and fiscal officials, and even the end users of the technology, including those with accessibility needs. Including all stakeholders early in the process is imperative to ensuring that everyone feels that they have made a contribution to the process. Of particular note, states must take care to include a state's procurement and other attorneys up-front so that all involved understand the legal and ethical parameters in which the RFP process will take place.

Our Recommendation on Leveraging the RFP: NASCIO and NASPO encourage states to take advantage of the flexibility that the RFP process can provide. Why should states do this? To obtain the best value possible! After all, states are creating a relationship with the successful offeror. The RFP process can be a way of maximizing the value states will receive from those relationships and ensuring that the relationships are successful. This Brief is intended to show how the RFP process can help to ensure that taxpayer dollars are invested wisely in state technology projects. Moreover, local governments, which tend to have a wide-range of variation in the area of IT procurement, may find this Brief useful as well.

Structure of the Brief:

- **Section II:** Planning the RFP.
- **Section III:** Writing the RFP.
- **Section IV:** After the Release of the RFP.
- **Section V:** What State CIOs and Procurement Officials Need to Know.
- **Appendix A:** A Note on Other NASCIO and NASPO Resources.
- **Appendix B:** Additional Resources.
- **Appendix C:** Do I Have an Alternative? A Word about Alternative Procurement Models.

Section II--Planning the RFP:

Perhaps the most important phase of the RFP process is the planning phase. During this process, a state determines what it needs, investigates what the market offers, and ultimately makes a decision about the solution's needed functions, performance features and technical requirements. The state's success in drawing upon various state stakeholders' expertise to arrive at these determinations and the way in which the RFP is

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drafted will in turn determine the size and quality of the pool of offerors who are willing to submit a proposal. The more accurately an RFP portrays the state's vision of what it needs and the more reasonable the RFP appears to be in light of the current market conditions, the better the procurement's ultimate outcome will be.

State CIO and Procurement Official Coordination: State CIOs and procurement officials should communicate with each other prior to and during the procurement. However, since IT procurement authority is handled differently by each state, both the state CIO and state procurement official should thoroughly understand each other's role within the procurement process and work within those established parameters.

It's a Group Effort: Bringing together the right stakeholders is imperative to an RFP's success. The state CIO offers the technical and IT policy expertise to ensure that the proposed procurement is consistent with the state's IT direction and fits within the state's IT architecture and to determine whether the IT procurement might leverage other agencies' IT procurements to create additional efficiencies and cost-savings. The state's lead procurement official can bring a broad expertise to understanding how aspects of the state's procurement process can be leveraged or tailored to the procurement of technology. Other stakeholders may include:

- **Agency Program and Other Officials:** To elucidate issues related to how the new technology will impact or change the agency's current business processes.
- **End Users:** To provide a perspective on what performance features and functionalities they will need from the new technology in order to improve the current way of taking care of the state's business.
- **State Procurement Attorneys:** To help provide the legal parameters of the procurement and RFP process. Depending upon a state's structure, the office of the Attorney General may be included here.
- **State Fiscal and Budget Officials:** To assist in ensuring that the payment and reimbursement terms in the contract are consistent with and/or acceptable under state law and policy and that the state will be able to pay an offeror's invoices as they come due.

Also important to include in the mix is a person who can help to translate the functional needs of the end users into the technical requirements that may be needed to accomplish the project's intended outcome. Stakeholders must ensure early in the procurement that the state and the offeror are using the same terminology.

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A Cautionary Note on State Procurement Laws: Each state has a procurement process that was drafted into law by its legislators, interpreted by judicial branch judges, and carried out by executive branch leaders and their staff members. Though there may be general trends in the way that state laws handle certain aspects of the RFP process for technology procurements, it is difficult to generalize on state RFP processes due to the variations in state procurement laws. You should view any recommendations or suggestions in this Brief with that in mind. ***Consult your legal counsel if you are considering the implementation of any of these recommendations or suggestions.*** The state CIO also may be able to help educate state procurement legal counsel on the business motivations of the state and the offerors, which is valuable in understanding each party's position.

Understanding What You Want: A state must determine early in the RFP planning process its business needs and ultimate outcome desired, such as what state agency users need to do their jobs better. In contrast to a sealed bidding type-process in which a state may decide on detailed specifications of the desired IT solution, the RFP process may entail the development of less-detailed specifications that focus more on the desired outcome than on the technical requirements that will achieve the outcome.

At this stage of the RFP process, understanding the end users' needs is the key. One way to gain a sense of users' needs is to survey state agencies regarding their business needs and IT plans. Once state officials involved in the RFP process understand the needs of the end users, they can begin to formulate the types of performance features that will fulfill those needs. This will help the state to provide offerors with a clear vision in the RFP. If an RFP reflects a well-conceived state vision regarding the procurement's outcome, not only will offerors be able to respond with a better proposal, they will feel that the competitive playing field is level. In formulating its vision for the IT solution's outcome, a state may consider viewing its intended outcomes from a short-term and long-term perspective. Short-term goals might include whether the project deliverables are completed on time and within budget. Long-term goals may include how the new IT system melds with the state's existing business processes and IT infrastructure plans and how it serves the state over time. Realism and practicality are needed ingredients here. Business process flexibilities that are created or enhanced during this phase can result in dividends for an agency later on when the IT system is tweaked or adapted to adjust to conditions that arise.

At this stage, it also is important to define possible criteria upon which the state will base its acceptance of the chosen offeror's performance. The earlier that such criteria can be developed, the better, in order to ensure that the state and offeror have the same expectations. A state should also be cognizant that the RFP requirements will inevitably affect the size of the potential offeror pool. As a result, states should carefully review the following types of factors while preparing an RFP:

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- **Complexity, Scope and Risk:** The complexity and scope of an RFP often serve to drive the performance and financial risk of an RFP. The higher the risk due to a complex project or a broad or long-term RFP scope, the greater the potential need for offerors to have certain qualifications or an ability to demonstrate past experience with similar projects.
- **Firm Qualifications:** These should be matched to risk, complexity and scope. Qualifications unrelated to actual needs should not be required as they may unnecessarily restrict the offeror pool.
- **Licenses, Certifications or Permits:** Certain licenses or permits may be legally necessary for the work contemplated by the RFP. You should consult with your legal counsel regarding these requirements. Licenses or permits should be included only where mandated by law. Otherwise, by making a license or permit a predicate for bidding, a state restricts the offeror pool to only those firms that possess the license or permit. Also, certain offerors may require that an integrator of their product, e.g., a software product, must have completed the offeror's certification process. A state should evaluate the impact that designating the use of a certain product may have on a procurement for integration services, such as whether most potential bidders possess any needed certifications.
- **Brands, Specifications or Standards:** Requiring offerors to supply brand name technology or employing specifications or standards that favor a particular technology or solution may also restrict the pool of potential offerors.

The guiding principle should be to balance the fundamental requirements of the state in terms of scope, complexity and risk with the public policy of allowing as many offerors as appropriately possible to compete for work through a fair and open process.

Leveraging Offeror Expertise: States should consider all appropriate and legally permissible ways of leveraging offerors' expertise in the RFP process. A common perception in the private sector community is that the RFP process appears to be very internal to a state with few avenues for offeror participation, aside from the submission of a proposal. However, in some instances, offerors may be able to assist the state in understanding one or all of the following: (1) what the end users really need to achieve their desired business processes, (2) what the commercial and government best practices are, and (3) who the experts in the technical solutions are. Using flexibilities within the RFP process to garner offeror insight into such matters can benefit states by allowing the parties to progress towards a state-offeror "meeting of the minds" and by potentially eliminating some back-end negotiations. Moreover, the judicious and skilled leveraging of offerors' expertise can be accomplished without compromising the all-important fair and level playing field that will yield a "best value" solution for the state or placing a damper on offerors' creativity.

If a state plans to pursue increased offeror participation in the RFP development process, the state must recognize that certain types of offeror participation could result in an “organizational conflict of interest” in which one prospective offeror gains an unfair advantage over other potential offerors. An example would be where a contractor during a consulting engagement assists a state in developing an RFP and then submits a proposal for that RFP. States must be careful to avoid or mitigate the circumstances that would create conflicts of interest.

States may have specific laws that limit or discourage offeror participation in drafting the RFP, if the offeror also plans to submit a proposal. Such involvement should, therefore, be sought with caution.

Another area of concern is that there is a movement of professionals from the private sector to the public sector and vice versa. Hence, professionals should be careful to manage potential conflicts of interest. With very competitive procurements, even an appearance of a conflict can cause problems. To avoid this, state procurement professionals must be sensitive to even the appearance of a conflict and should be as transparent as possible.

To Use an RFI or Not Use an RFI? That is the Question: The RFI (Request for Information) is a process that a state may use to solicit information and ideas from the offeror community prior to issuing an RFP. The RFI can be helpful in obtaining expertise from offerors that can be used to help a state determine how to move forward in the procurement process. RFIs also can provide offerors with information about a state procurement, including the tentative timeline, and thereby enhance the evenness of the playing field for both large and small offerors. The RFI also may act as a catalyst for early discussions between end users and the procurement staff. A state may consider using an RFI if it does not have the in-house expertise or resources to determine what type of solution might achieve its goals and what types of solutions or best practices are available in the marketplace.

The main concern with using an RFI to educate the state on potential solutions is that, if improperly used, it could create an unfair playing field for offerors or even lead an agency to select one offeror to the exclusion of others based upon the RFI. If a state chooses to use an RFI, the state must be careful to tailor the RFI so that it solicits the needed information without requesting extensive information that might taint the procurement process later on, such as asking for pricing information. The state must use the information solicited for the RFI’s intended purpose—educating the state as to the available market solutions—and not as a precursor to selecting one offeror to the exclusion of others based upon the RFI. Generally, the more offerors that participate in an RFI, the better the chances of not creating a conflict of interest.

Additionally, a danger of discouraging other offerors exists if one offeror's information is reflected too heavily in the RFP. Moreover, if a state chooses to use an RFI, some offerors may be discouraged from responding to it or responding with enough information that would be helpful to the state because of the investment of time and resources that a very complete response may entail. Still other offerors may use the RFI as a chance to do a sales presentation, when the state is really just looking for helpful information on available solutions in the market and specific potential risks or issues that the state should address when bidding the requirement. In drafting an RFI, a state may consider limiting the information solicited to information bearing on which direction the state should take regarding a procurement. That is, offerors should appreciate that a properly drafted RFI can be an effective way for the offeror community to provide assistance to the state to help it determine what it really needs. A final concern offerors may have with responding to an RFI is the potential for the response to be available to others under state open records laws. States must be careful to address the open records issue prior to releasing an RFI. Developing detailed instructions can be one way states can help to avoid receiving sales materials and enhance the quality of the information they receive via an RFI.

A related mechanism of leveraging offeror expertise is for a state to allow offerors to review and comment on a draft RFP. Offerors may benefit from seeing the draft RFP and particularly benefit from reviewing any terms and conditions that are included in it. For states, this may be a resource-intensive effort that can result in dealing with issues regarding terms and conditions earlier in the process. States should weigh the risks and benefits of allowing for comments on draft RFPs.

States may also consider retaining a research and advisory firm during the planning and/or writing stages of the RFP process. Independent, third-party reviewers from these services can help states understand the marketplace trends and avoid procurement pitfalls.

Looking Across the State Enterprise: States have large numbers of agencies and other entities that procure technology on a regular basis. Although many of these agencies may have similar technology-related needs and systems, they may not be aware of what other state agencies are purchasing. State officials, including the State CIO and State Procurement Official must look across the broad state enterprise to understand how to harness the collective experience of state agencies' technology purchasing. This can reduce the purchasing of redundant systems for multiple agencies and take advantage of economies of scale that can be created through using one type of IT solution to fulfill multiple agencies' business needs.

The Role of the State CIO: Depending upon the specific state procurement, the state CIO may be able to bring diverse stakeholders together during the RFP planning phase and unite them under a common vision or direction. The state CIO also may be able to provide an understanding of existing state resources and how those resources, such as

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similar IT systems in other agencies, may be leveraged. For example, Pennsylvania is creating a “communities of practice” approach through which the state CIO reviews all IT procurements with an eye for leveraging existing IT resources within the state.

The Role of the State Procurement Official: State procurement officials possess a broad understanding of how procurements work across many state sectors. Hence, their background is valuable in understanding how IT procurements differ or are similar to other procurements and which procurement options will or will not work well for an IT procurement. They also can help to ensure that IT procurements fulfill state legal requirements and ultimately get the end users what they need, while maximizing the total value the state receives from the procurement.

Section III--Writing the RFP:

Some Preliminary Considerations: In beginning to draft an RFP, a state should consider the following over-arching questions:

- How much detail should be included in an RFP? What would the cost and other impacts be of including too much detail regarding either performance or technical requirements?
- What assumptions is the state making in its RFP? How might the RFP convey those assumptions to the offerors?
- What are reasonable RFP terms that will encourage a high-quality, vibrant offeror pool? How rigorous should a state’s RFP requirements be to balance a sufficient number of potential offerors with avoiding a strain on state resources during the RFP response evaluation phase?
- How can the state build flexibility into the RFP?

Performance & Functional Specifications vs. Technical & Design Specifications: In drafting RFPs, states must balance the technical specifications included in the RFP with performance or functional specifications. *A successful balance of these specifications will focus on telling the offeror what the desired outcome of the procurement is and how the IT system must perform once implemented in order to satisfy the state’s expectations.* An example might be providing information about what kinds of reports an IT system should produce.

For every technical specification a state requires, there likely is an associated cost. For example, if a state specifies in an RFP that it would like a specific brand of search engine, that requirement might translate into a higher cost for the state. States must balance their desired outcomes with the costs associated with specifying technical requirements to achieve those outcomes.

Too much detail, particularly related to the technical specifications, can discourage offerors from proposing new, cutting-edge technologies. Excessive detail also can shift design responsibility to the state, which could allow an offeror to avoid liability for

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successful implementation of a state's faulty design requirements. However, the state must strike an appropriate balance in order to provide offerors with enough information, whether performance or design-related. States should disclose a sufficient amount of information in their RFPs in order to avoid creating readily available excuses for offeror failures or disputes. In order to provide enough information without cluttering an RFP, states may consider referencing information sources in the RFP when possible.

An understanding of the available marketplace solutions and the end users' needs can be of great assistance in finding the right balance regarding the amount of detail and emphasis on performance specifications. Bringing together the stakeholders who collectively have both functional and technical expertise can be of assistance as well.

T & Cs in RFPs: One question that a state will face in the RFP process is which terms and conditions to include in the RFP. Terms and conditions that a state may consider including are: liability limitations, intellectual property (IP), liquidated damages, warranties, source code escrow and maintenance. The state has a choice on each of these points. Including the terms and conditions in the RFP can help the offerors understand up-front the state's expectations and avoid providing an offeror leverage on negotiating certain terms after an award. However, a state may find that there are terms that they would like to negotiate during the contract negotiation phase. One approach is to attach the entire contract to the RFP. If a state takes a "no exceptions" policy even on terms that are not mandated under state law, that could potentially result in reduced competition or compromised "best value."

If a state includes its terms and conditions in the RFP, the state may provide the offerors with a process for taking exception to any or all of the terms and conditions. If a state chooses to do this, the state must ensure that the process is consistent. A state should consider the following options:

- Whether an exception will result in outright rejection of a proposal, which may be more likely with terms that are required by state law.
- Whether the state will consider any exceptions.
- Whether points will be taken off for exceptions contained in a proposal, which may be more common with terms that are required by state law.

Exceptions can be minimized by good state-offeror communications earlier in the procurement process, such as through an RFI or accepting and responding to offeror questions in written form before the proposal submission period closes. States should keep in mind that, as with discussions on technical solutions and price, good faith discussions on terms and conditions, to the extent permitted by law, can also help achieve a meeting of the minds and a clarity of common purpose that will further project success.

To ensure that offerors know that the exceptions process is fair and encourage them to provide quality proposals, a state should tell offerors in the RFP what the rules for

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exceptions are and stick to applying those rules fairly across the field of offerors. It should also tell the offeror which terms are not subject to negotiation.

If a state cannot negotiate some or all of its terms and conditions by legal mandate, the state should consider how it will handle any comments or requests for clarification regarding terms and conditions. For more information about this, please see Section IV of this Brief.

Trade Secrets, Other Protected IP, and Proprietary or Confidential Information: In submitting a response to an RFP (or RFI), an offeror may have trade secrets or proprietary or confidential information that may be helpful to the state. However, a potential danger to an offeror is the risk of its proposal being within the purview of the state's public records laws, making the offeror's submission open public record.

Whether the state has means of ensuring the protection of such information or makes it a public record as a matter of legal mandate or policy, states should make clear to the offerors via the RFP (or RFI) how such issues will be handled. If the state public records law provides an exemption for proprietary or trade secret information, that fact should be indicated to the offerors.

Other RFP Considerations: States should consider whether to include the following in the RFP document. Note, state legal requirements may govern whether some of these items may be included.

- **State Resources:** If a state will be dedicating a substantial amount of human or other resources to a project, aside from project oversight, then the state may consider placing that information in the RFP to assist the offeror in developing a Statement of Work.
- **An Offeror's Level of Experience:** States usually ask in their RFPs about the level of offeror experience. States should ask about the experience level of both the people who would actually be working on the project and the offeror as a collective of its past and present employees. A corporation may have years of experience on a certain type of project, but may not have retained all of the employees who worked on those projects. Conversely, new companies may be made up of individuals with substantial experience.
- **Clarifications for Offerors:** Once an RFP has been released, offerors may have questions about the RFP. The RFP should specify a process by which an offeror may ask for clarification, while still maintaining an even playing field.
- **Standard Contract Terms:** Developing standard IT contract terms that can be attached to the RFP can help provide offerors with a level of consistency with the state's contract terms. In addition, routine exposure to standard state IT contract terms can help familiarize the state's stakeholders with the default contract terms that the state typically expects to use. Standard contract terms also can help those drafting an RFP gain a deeper understanding of the state's procurement processes.

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A Note on Training for State Employees Writing an RFP: Since state procurement laws and practices may be complex, state employees tasked with writing an RFP need to have an understanding of these complexities. Standard templates for IT RFPs and additional training from state IT procurement experts can go a long way in ensuring that RFP drafters have an adequate background on the pertinent issues and understand what can and cannot be altered regarding a state's standard RFP, if it has one.

Section IV--After the Release of the RFP:

The Process for Handling Clarifications and Discussions Prior to Submission of Proposals: The state should consider at the beginning of the procurement whether and how it will provide a process for offerors to ask for clarifications regarding an RFP. The danger in state-offeror communications after the release of the RFP is that communications could give one offeror an unfair advantage or disadvantage among its competitors. State laws vary on the extent to which such communications may occur. The benefit of providing for communications, with the appropriate safeguards in place to preserve fairness for all offerors, is that it allows an offeror to obtain clarification in order to submit a better, more well-informed response and allows the state to address flaws in an otherwise good proposal submission. Variations of communications that could be available under a state's laws may include:

- Allowing the state to hold a "question and answer" session or a pre-proposal bidder's conference that is open to all offerors.
- Routing offeror questions through one state contact person and permitting the state to answer offeror questions as long as the state provides all of the offerors with the inquiring offeror's question and the state's answer.

Before submitting questions, an offeror should be thoroughly familiar with the RFP document so as to avoid asking questions that could be answered by a more detailed look at the RFP. A fear of appearing unequal (a low risk when answers to questions are released to all bidders) should not discourage candid and thorough responses to questions which can be an important tool in educating offerors as to the state's true requirements and expectations.

The Process for Handling Clarifications and Discussions After Submission of Proposals: States also may have the option to allow for communications after proposals have been submitted and evaluated. The ABA's Model Procurement Code permits "discussions" between a state and an offeror. Depending upon a state's laws and regulations, discussions may be in the nature of clarification to "promote understanding of the State's requirements and the offeror's proposal" and/or in the nature of negotiations to "facilitate arriving at a contract that will be most advantageous to the State."

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Discussions should not disclose information derived from proposals submitted by other offerors. In some states, discussions may occur with multiple offerors that are “in the competitive range” or are “reasonably susceptible for award.” If a state’s process is well-defined, it will include safeguards for ensuring the fair treatment of offerors.

After the communications, a state then asks for a “best and final offer” from offerors that are in contention for the contract award. In such a case, the “best and final offer” replaces or modifies the original offer. The original offer is re-evaluated in light of the changes to the “best and final offer.” The award would be made on the basis of the evaluations, including the “best and final offer.” If a state pursues the approach of a “best and final offer,” the state should clearly specify whether the offeror’s proposal will constitute a “best and final offer,” avoid multiple rounds of such offers, and be transparent about pricing issues, such as the evaluation criteria for pricing.

Discussions help ensure that the accepted offer and resulting contract provide the best value. While some states may not be able to legally pursue the avenue of a “best and final offer” or even hold “discussions” with offerors, such states may consider whether these or other similar avenues of state-offeror communications should be recommended to the state’s legislature for enactment into law.

In any case, due to the sensitive nature of state-offeror communications after the release of an RFP, the reader is advised to consult with legal counsel on such matters.

Organizations that have training resources include:

- *NIGP (the National Institute of Government Purchasing):* <http://www.nigp.org/>.
- *NCMA (the National Contract Management Association):* <http://www.ncmahq.org/>.
- *ISM (the Institute for Supply Management):* <http://www.ism.ws/>.

A Word About a “Meeting of the Minds”: A state and offeror need to reach a “meeting of the minds” in order to ensure that they understand one another and have a common vision of the IT procurement’s ultimate outcome. Thus, once an RFP is drafted, there still will be more communications that will need to take place to ensure there is a “meeting of the minds.” These communications may take place before the contract award, if permitted by law and otherwise reasonable under the circumstances, or via negotiations after the contract has been awarded. Since communications may occur throughout the procurement process, the key is to control and document any state-offeror communications so that the wrong information does not find its way into the hands of offerors and result in either an unfair competitive advantage or disadvantage. Appointing one point of contact for communications, such as a procurement official, can be a good starting point to control the flow of information to offerors.

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Section V--Conclusion: What State CIOs and Procurement Officials Need to Know

- States should use the flexibility of the RFP process at higher levels to ensure that a procured technology is providing the government purchaser with the maximum level of benefits, including the degree to which the solution improves a state's business processes.
- In a time of rapid state CIO turnover, new state CIOs should place on their task list time to learn about the state's IT procurement process, if he or she is not familiar with it. Once the state CIO becomes familiar with the process, he or she will be better able to leverage existing state IT solutions and move the entire state IT enterprise closer to a standard for specific types of IT systems and processes.
- States should consider including at the beginning the following officials in the RFP process: the state CIO, the lead state procurement official, state procurement attorneys (which, depending on a state's structure, may include the Attorney General's office), budget and fiscal officials, agency program officials, including those versed in the agency's business processes, and the end users of the technology.
- State CIOs and procurement officials should communicate with each other prior to and during a procurement.
- A state must determine early in the RFP planning process its business needs and ultimate outcome desired.
- States may consider leveraging the expertise of the private sector community through an RFI if the state is lacking in expertise on the type of technology needed.
- The state should consider at the beginning of the procurement whether and how it will provide a process for offerors to ask for clarifications regarding an RFP.
- A state and offeror need to reach a "meeting of the minds" in order to ensure that they understand one another and have a common vision of the IT procurement's ultimate outcome.
- A successful balance of performance versus technical specifications will focus on telling the offeror what the desired outcome of the procurement is and how the IT solution must perform once implemented in order to satisfy the state's expectations.
- To ensure that offerors know that the exceptions process is fair and encourage them to provide quality proposals, a state should tell offerors in the RFP what the rules for exceptions are and stick to applying those rules fairly across the field of offerors.
- Whether the state has means of ensuring the protection of confidential, proprietary or legally protected information or IP or makes it of public record as a matter of legal mandate or policy, states should make clear to the offerors via the RFP how such issues will be handled.
- Consult your state's legal counsel to draw the parameters of what actions are legally permissible within in your state with respect to IT procurements.

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Appendix A—A Note on Other NASCIO and NASPO Resources

A Note on a Recurring Theme in Previous Publications: While both IT and non-IT-related procurements involve issues dealing with liability limitations, indemnification, warranties, liquidated damages, maintenance and intellectual property (IP), IT procurements may add levels of complexity to these issues. Terms that are too restrictive may reduce the size and quality of the pool of IT solution offerors that are willing to submit proposals on an RFP or result in excessive prices or inferior products and services. Issues that tend to be specific to IT procurements are those related to source code escrows, electronic security, information privacy and most favored nation clauses.

Related NASCIO & NASPO Resources:

[“Negotiating IP on the Way to the Win-Win: NASCIO’s Intellectual Property Recommendations.”](#) A set of recommendations produced by the NASCIO IT Procurement Reform Committee in cooperation with NASPO, which seeks to identify state and offeror interests regarding the ownership of IP and suggest realistic considerations to help make the negotiation of IP rights easier and more successful for all involved. (March 2005) **(Produced in cooperation with and endorsed by NASPO)**

[“Walking the Road to the Win-Win: NASCIO Procurement Subcommittee’s Recommendations on Liability Limitations for State IT Contracting.”](#)

The Committee’s first set of recommendations, which seeks to (1) elucidate the various state and contractor interests that are involved in negotiating liability limitations and (2) help states and contractors negotiate better IT contract liability limitations that are “win-win” for both sides. (September 2004)

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Appendix B—Additional Resources:

- U.S. General Services Administration, Cooperative Purchasing Website for State and Local Governments:
<http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8199&channelPage=%252Fep%252Fchannel%252FgsaOverview.jsp&channelId=-13528>
- Acquisition Solutions, Inc., U.S. Department of Commerce, U.S. Department of Defense, U.S. Department of Treasury, U.S. Department of Agriculture, and U.S. General Services Administration, “Seven Steps to Performance-Based Services Acquisition,”
<http://www.acqnet.gov/Library/OFPP/BestPractices/pbsc/home.html>
- MasterCard Procurement Opportunities Guide:
<http://www.mastercardbusiness.com/mcbizdocs/smallbiz/procguide/procoppguide.html>
- Department of Justice, Office of Justice Programs, IT Initiatives Procurement Standards: http://it.ojp.gov/topic.jsp?topic_id=36
- Department of Justice, Office of Justice Programs, Procurement Databases: http://it.ojp.gov/topic.jsp?topic_id=7&doc_id=37&expand=yes#37
- Department of Justice, Office of Justice Programs, RFPs: http://it.ojp.gov/topic.jsp?topic_id=7&doc_id=35&expand=yes#35
- Govexec Procurement Webpage: <http://www.govexec.com/procurement/>
- Selling to the Government.net, Checklist on RFPs, Request for Proposal: http://www.sellingtothegovernment.net/form_rfp.asp
- AcqNet: <http://www.arnet.gov/>
- National Center for State Courts (NCSC), Model RFP Index: <http://www.ncscsurveys.org/courts/modelrfp/general/rfpindex.shtml>
- National Conference of State Building Codes and Standards (NCSBCS), Model Procurement Requirements for State & Local IT for Building Codes: http://www.ncsbc.org/newsite/national%20alliance/model_procurement_guide.htm.

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Appendix C--Do I Have An Alternative? A Word About Alternative Procurement Models:

A Word about Alternative Procurement Models: In certain circumstances, a state may consider using an alternative contract model, such as performance-based contracting. This alternative has gained popularity since the mid-1990s. With this model, the state defines its business problem for the potential offerors and allows the offerors to use their creativity to propose solutions for the problem. The state then pays the offeror it selects when the offeror shows the state the solution's intended results. In this way, the performance-based contract model is more of a risk-partnership between the state and offeror. It may require a deeper understanding between the two parties in order to achieve a workable solution. Establishing very clear, tangible, and fair metrics is vital to gauge when the offeror has achieved success and trigger the state's obligation to pay for performance. The metrics should be evaluated on a regular basis so that the offeror can recognize the economic benefit of performance on a timely basis. Note that, because the state must only define the problem up-front and does not provide detailed design specifications, this process can move more quickly than the traditional RFP process.

A subset of the performance-based contract model is the benefits funding model in which the benefits derived from savings created by a new IT solution are used to pay the offeror. In this case, the offeror may take a percentage of the new savings or revenue derived up to a pre-set cap.

As with any procurement method, the performance-based contracting model includes some issues that should be recognized and resolved, including that:

- It has the potential to require more negotiation, including on service levels.
- Offerors could experience revenue recognition issues while waiting for the state's milestone acceptance and agreement on success.
- The risk level can be more substantial than necessary if the responsibilities of the state and offeror are not identified with exceptional clarity and if a credible, verifiable baseline does not exist against which to measure anticipated savings.

However, in order to maximize value, a state may consider alternatives to the RFP where such is legally permissible and warranted by the circumstances. Under the right circumstances, this model can provide a win-win for both the state and the state's private sector partner. Finally, note that other alternative contracting and procurement approaches may be helpful to states. These include pay-by-the-item contracts that have been used in other procurement areas, such as emissions testing, photo licensing and lottery contractors.

NASCIO is the **National Association of State Chief Information Officers** and represents the state chief information officers from the 50 states, five U.S. territories and the District of Columbia. Other IT officials participate as associate members and private sector representatives may become corporate members.

NASPO is the **National Association of State Procurement Officials** and represents the directors of the central purchasing offices in each of the 50 states, the District of Columbia, and the territories of the United States.

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