

 NEW YORK <small>STATE OF OPPORTUNITY.</small> Parks, Recreation and Historic Preservation Section: Finance	Procedure Title: Vendor Responsibility Review Process Directive: FIN-PCD-014 Effective Date: 05/20/2015
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Summary

The New York State Office of Parks, Recreation and Historic Preservation (OPRHP) is required to conduct a vendor responsibility review of any contractor to whom it proposes to award a contract. The review and determination is performed prior to executing the contract. This procedure describes the criteria, evaluation steps, and alternatives in determining the responsibility of a potential vendor.

Overview

State Finance Law (“SFL”) §163 requires that contracts for services and commodities be awarded on the basis of lowest price or best value to a “responsive and responsible offeror.” SFL§163(9)(f) provides that “Prior to making an award of contract, each state agency shall make a determination of responsibility of the proposed contractor.” With regard to public works projects, Public Buildings Law Section 8(6) provides that all “contracts in excess of \$5,000 for the work of construction, reconstruction, alteration repair or improvements of any state building, whether constructed or to be constructed must be offered for public bidding to the lowest responsible and reliable bidder.” Finally, under SFL Section 112(2)(a), before any state contract in excess of \$50,000, “shall be executed or become effective...it shall first be approved by the comptroller..” The Office of the State Comptroller (OSC) requires OPRHP to certify that a contractor has been deemed responsible before it will approve a contract award.

It is important to note the difference between responsibility and responsiveness. Responsibility generally applies to the contractor and responsiveness applies to the extent to which the contractor has complied with the specifications or requirements of the solicitation document.

Contractors or vendors (contractors) are required to complete the Standard Vendor Responsibility Questionnaire (VRQ) either electronically, through the “VendRep System,” or by filling out a paper copy as part of the procurement process. The contractor’s use of the VendRep System does not diminish OPRHP’s duty to affirmatively review vendor

responsibility each time a contract award is to be made; only the source or location of the questionnaire changes.

I. Applicability

In addition to a prime contractor, vendor responsibility reviews must be conducted on the following entities:

Contractor's Affiliates and Associated Entities

OPRHP should consider the responsibility of a proposed contractor's affiliates and associated entities (affiliates). Affiliates generally include any business entity that controls or owns more than 50% of the contractor, or any business entity of which the contractor owns or controls more than 50%. The VRQ includes questions soliciting information on the contractor as well as its affiliates, requiring a contractor to certify that it has made a full and complete response.

Where an affiliate is a critical component of a contractor's capacity to perform the contract (e.g., the contractor relies on an affiliate for financial support or for relevant experience), OPRHP should review the responsibility of that affiliate. OPRHP reserves the right to conduct a full responsibility review on all affiliates.

Subcontractors

Subcontractors are required to submit a VRQ, and OPRHP will conduct a vendor responsibility review of a subcontractor where:

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

Subcontractors must obtain a New York State Vendor Identification Number (Vendor ID) to complete a questionnaire whether using the New York State VendRep System or a paper form. OPRHP will initiate the request for a Vendor ID on behalf of the subcontractor.

Contract Transactions Requiring Vendor Responsibility Review

Vendor responsibility and related procurement record requirements apply to all contract transactions (contracts, purchase orders, and amendments) by OPRHP that are required to be submitted to OSC for approval.

State contracting entity piggy-backing

Piggy-back contracts are considered new, separate contracts subject to vendor responsibility requirements.

State centralized or "Backdrop Contracts"

A vendor responsibility review is required at the time of initial contract award, and therefore a new responsibility determination is not required when purchasing off a centralized contract or backdrop (mini-bid) contract, unless OPRHP becomes aware of information that may negatively impact the vendor's responsibility.

If OPRHP becomes aware of potentially adverse information, such information should be communicated to the entity administering the contract. OPRHP must then document its Vendor Responsibility Profile and Agency Responsibility Certification when the mini-bid contract is submitted for OSC approval.

Purchase orders

Purchase orders require responsibility determinations. Unless they are purchases off a pre-existing contract (such as a State centralized contract), purchase orders are considered new contract transactions subject to vendor responsibility requirements.

"Quick" contracts

"Quick" contracts are subject to vendor responsibility requirements. Furthermore, if OSC finds any issues with the vendor responsibility information required to be included in the procurement record, the contract may be removed from "Quick" status, and reassigned to standard processing status.

Revenue contracts

Responsibility determinations are required for revenue contracts. Also, where revenues are anticipated to equal or exceed \$100,000, a vendor disclosure is required.

Responsibility factors which might be emphasized in this type of responsibility review include financial and organizational capacity, integrity and internal controls.

II. Responsibility Review

Once a contractor submits all necessary forms and documentation in its entirety, OPRHP's vendor responsibility review shall be conducted using the following criteria:

- adequacy of financial resources;
- satisfactory technical qualifications;
- satisfactory experience;

- satisfactory record of performance;
- adequacy of the organization, material, equipment, facilities, and personnel resources;
- expertise necessary to carry out the work and meet required delivery or performance schedules;
- necessary licenses, insurance, and bonds;
- satisfactory record of business integrity; and
- compliance with public policy issues and statutory requirements.

In evaluating these criteria, and any additional relevant criteria, OPRHP should conduct what is commonly referred to as a “FLIP” analysis.

1. “F” is for Financial Capacity
(http://osc.state.ny.us/vendrep/webresources_financial.htm)

In determining the contractor’s financial capacity, OPRHP may review, but is not limited to reviewing, the following relating to the contractor, any subcontractors, and any affiliates subject to review:

- credit rating;
- SEC 10K;
- bankruptcy/reorganization filings;
- liens, judgments;
- delinquent taxes;
- bonding capacity;
- insurance coverages; and
- audited financial statements, etc.

2. “L” is for Legal Authority for Business Related Conduct
(http://osc.state.ny.us/vendrep/webresources_legal.htm)

In determining satisfactory compliance with legal entities, OPRHP may review, but is not limited to, the following:

- sanctions imposed as a result of judicial or administrative proceedings vis-à-vis licenses/certifications;
- willful violation of any public works or labor laws or regulations;
- Consent Order involving environmental laws;
- citations and notification of penalty concerning serious or willful violations of OSHA;
- a documented failure to comply with tax laws, filing returns or paying taxes; and
- any other citations, violations orders, or pending administrative proceeding regarding violations of any applicable laws.

3. "I" is for Integrity In Business Related Conduct
(http://osc.state.ny.us/vendrep/webresources_integrity.htm)

In determining satisfactory record of business integrity, OPRHP may review, but is not limited to, reviewing the following:

- criminal judgments/convictions;
- criminal investigations or indictments;
- unsatisfied judgment, injunction, or lien;
- investigation for civil or criminal violation;
- contract suspension or termination for cause;
- denial of a lease or contract award for non-responsibility;
- M/WBE, Disadvantaged Business denial, decertification, revocation, forfeiture of status;
- Executive Order 127 finding of non-responsibility; and
- State Finance Law §139-j finding of non-responsibility.

4. "P" is for Past Performance
(http://osc.state.ny.us/vendrep/webresources_performance.htm)

In determining satisfactory record of performance, OPRHP may review, but is not limited to, the following:

- firm history/experience;
- type of business (corporation, partnership, etc.);
- ownership/major stockholders/affiliates;
- directors/principals/key personnel;
- primary place of business;
- M/WBE, Small Business status, Disadvantaged Business status;
- previous contract terminations/breach of contract/debarments;
- references (listed and not listed);
- personnel resources and expertise; and
- previous state contracts.

III. Determination of Responsible/Non-Responsible Vendor

Whether a contractor is "responsible" is a question of fact to be determined on a case-by-case basis after a comprehensive weighing of all factors. An unfavorable rating in one or more areas of evaluation does not necessarily result in a non-responsibility determination; however, it does require OPRHP to make a determination that it has reasonable assurance that the contractor is indeed responsible or non-responsible, as applicable.

OPRHP will affirmatively review all information available to determine a vendor's responsibility. At a minimum, the applicable Vendor Responsibility Questionnaire (VRQ), based on the particular vendor's business type (Non-Construction, Construction, Non-Profit), must be received from the vendor and reviewed.

The applicable VRQ may be submitted on paper or on-line through the Office of State Comptroller's "VendRep" System. Other sources for information include, but are not limited to, OSHA, NYS Department of Labor, NYS Education Department, NYS Department of State, financial rating services (e.g., Dun & Bradstreet) and a simple Google or similar online search.

Utilizing the FLIP analysis outlined in Section II of this procedure, analyze the information obtained from the VRQ and other investigations and searches made with respect to the vendor.

Any information revealed by the VRQ or obtained through OPRHP's investigation that may have a negative impact on the vendor's responsibility must be addressed with the vendor (see Section IV below). The potentially negative disclosure is reviewed on a case-by-case basis based on the relevance to the scope of the particular contract.

After consideration of all information and discussion with the vendor, a determination of responsibility or non-responsibility will be made. In making the determination, OPRHP will validate and assess the information obtained through its investigation and arrive at a reasonable conclusion regarding the vendor's responsibility. This conclusion, along with supporting information and reference, will be included in the procurement record submitted to OSC for contract approval.

IV. Process Upon Finding of Negative Information

Before finding a bidder non-responsible, the agency must ensure that the bidder was afforded due process (meaning notice of what factors were included in a potential non-responsibility finding and an opportunity to be heard) and provided with the opportunity to explain its position in writing and, in some instances, in person, at a responsibility meeting. Any finding of non-responsibility must be in writing. A copy of any such finding must be forwarded to OSC in the contract package or if OSC approval is not required, maintained in the procurement record.

If a contractor discloses adverse information, or if OPRHP's investigation reveals such information, the OPRHP staff performing the responsibility review should:

1. Consult OPRHP Counsel for advice on how to proceed with the vendor responsibility review.
2. Contact the vendor and request additional information or clarification where

necessary.

3. Have the contractor remedy a specific problem that, when adequately addressed, may result in a “responsible” determination.
4. If not adequately addressed, work collaboratively with Counsel to assess the information and contracting options.
 - a. This may result in requiring the contractor to agree to early termination language, surety bonds, contract monitoring provisions, partial awards, etc.
 - b. If such risk mitigation is not sufficient or feasible, OPRHP may seek to find a vendor “non-responsible.” OPRHP must provide due process and notify the vendor in writing of the issues that may result in a non-responsibility determination. The contractor should be provided the opportunity to submit additional information, clarification, or explanation, and may also be invited to a meeting prior to award.
 - c. If the contractor is invited to a meeting, it may be held in person, by conference call or by web conferencing. When inviting a contractor to a meeting for the purpose of addressing potential non-responsibility, be certain to do the following:
 - Advise the contractor that OPRHP has an obligation to make a responsibility determination under SFL.
 - The contractor must be advised if an attorney representing OPRHP will be present at the meeting and the contractor may bring his/her own attorney.
 - In addition to the date, time, and location, the invitation must advise the contractor that failure to confirm and attend will be deemed “non-responsive.”
 - Identify the issues to be discussed so the contractor is prepared with the necessary documents or people to respond to questions.

Be sure to document the discussion of the meeting in minutes kept in the procurement record. The meeting should also be summarized in a letter to contractor.

Based upon the facts and responses of the Vendor provided during the investigation and due process meeting(s), OPRHP must make a final determination of the vendor’s responsibility or non-responsibility (see Section III above).

V. Post Award Responsibilities of OPRHP

Monitoring vendor performance is critical in fulfilling OPRHP’s mission. OPRHP staff must monitor the progress, compliance, and adequacy of the vendor’s performance. The monitoring and documentation of a vendor’s current performance is an essential component in **future** determinations of vendor past performance in the course of a Responsibility Review.

If there is a deficiency regarding the quality of goods or services provided under the contract, the facility manager, Counsel’s Office and the respective Albany bureau (e.g., Capital Construction, Business Office, and Concessions) should be notified. It is critical to

provide notice of the deficiency to the vendor as soon as possible and to document the communications between the parties about the deficiency related to the goods or services. If it is necessary to conduct a meeting with the vendor to address issues that may affect non-responsibility, staff should take the following steps:

- Advise the vendor that OPRHP has an obligation to make a responsibility determination under State Finance Law.
- The vendor must be advised if an attorney representing OPRHP will be present at the meeting and the Vendor may bring his/her own attorney.
- In addition to the date, time, and location, the invitation must advise the Vendor that failure to confirm and attend the meeting will be reason to be found “non-responsive” and may result in termination of the contract, or other remedies for default until the issues are resolved.
- Identify the issues to be discussed so the vendor is prepared with the necessary documents or people to respond to questions.

Be sure to document the discussion of the meeting in minutes maintained in the contract file. The meeting should also be summarized in a letter to the vendor.

The information obtained through the investigation of the deficiency, including that obtained from the meeting with the vendor if any, is to be analyzed using the FLIP analysis and a determination of responsibility or non-responsibility must then be made.

Finding a Vendor non-responsible is a complicated matter that takes a significant amount of staff time and resources. Although Counsel’s Office will oversee the legal process of finding of vendor non-responsibility, the burden of documenting the vendor’s poor performance or inability to meet specifications falls mainly on the contract manager and program staff involved. Any ultimate finding of non-responsibility can be had only after the careful analysis outlined above, providing the vendor with notice of the deficiencies and an opportunity to be heard, and involving the appropriate Regional or Albany management in reaching an appropriate conclusion.

Forms

Vendor Responsibility Profile (http://osc.state.ny.us/vendrep/forms_agency_vresp.htm)

Vendor Responsibility Questionnaire

(http://osc.state.ny.us/vendrep/forms_agency_vresp.htm)

Alternative Vendor Responsibility Questionnaire

(http://osc.state.ny.us/vendrep/forms_agency_vresp.htm)

Other Related Information

History

05/20/2015 This newly created procedure formalizes the process OPRHP uses to determine vendor responsibility.