



RE-EXAMINING ISSUES IN
PROCUREMENT

November 2013

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This report was produced by
The Public Policy Institute of New York State, Inc.
November 2013

Executive Summary

Governor Andrew M. Cuomo's regional councils and START-UP NY program will transform the state by developing a bottom-up approach, where locals create strategic plans that reflect the distinct characteristics of the community and align innovative companies with the academic missions of New York's great colleges and universities. However, antiquated state procurement laws and regulations prohibit many of these companies from competing to do work with the state and local governments. The lack of innovative ideas in procurement forces these companies to jump through hoops to find a partner willing to resell their products and services instead of competing on their own. Furthermore, the recent structural changes in state procurement, including a strategic sourcing initiative undertaken by the Administration to analyze spending and centralize more contracts through the Office of General Services (OGS), have caused confusion in the business community and warrant a review of the impact.

The Public Policy Institute (PPI), through outreach to procurement experts representing small-businesses, Fortune 500 companies, local government purchasing officers and others, has identified issues in procurement at the state and local level, and offers recommendations on how to help increase competition, streamline the procurement process, and open avenues of communication between the vendor community and the state.

The Public Policy Institute has identified the following priority issues of concern:

Education/training of purchasing officers is an issue on the state and municipal level, particularly on the municipal level, where purchasing officers might be performing multiple job functions. Professional development in procurement is integral to ensure adherence to guidelines, fair and open competition and prudent use of taxpayer dollars. In its 2012 benchmark survey, the National Institute of Government Purchasing (NIGP) recommended increasing the percentage of full time equivalent (FTE) employees with appropriate certification to over 25 percent, and found that the average number of procurement training hours per FTE was only 7.3 hours, annually. The NIGP recommends at least 20 hours of training each year for FTEs.¹

Performance guarantees, while necessary in some instances to protect the interests of the state and taxpayers, can be onerous for businesses of all sizes. Letters of credit are particularly cumbersome. Smaller businesses are often unable to redirect such funds, and one large firm interviewed by PPI noted that they would not bid on any contracts requiring letters of credit.

The strategic sourcing initiative has focused on the state's needs and has not adequately considered the unique procurement needs of local governments. The importance of including municipalities' needs in this effort was a theme that arose multiple times during PPI's discussions with procurement professionals.

There is no consistent, continuous communication among the state, local governments and the vendor community regarding strategic sourcing and other centralized efforts. Many vendors and local procurement officers have essentially been left out of discussions regarding what type of contract is "worthy" of being strategically sourced or centralized. Uncertainties surrounding the timeline for deciding which contracts are to be held while the strategic sourcing initiative is underway is especially detrimental to small businesses that are in the process of crafting budgets or business plans for the next fiscal year's bidding efforts.

As it currently stands, the "restricted period" on communication between vendors and procurement officials is a source of confusion and frustration among vendors, and is considered by many as overly rigid. It was noted that some agencies post on their website which contracts are currently in a blackout period and/or use the New York State Contract Reporter, while others do not.

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Modern technology is not utilized to its fullest potential in the state procurement process. Advancements in the form of e-submission, webinars and teleconferences have not yet been made available as a permanent option for vendors on the state level.

The state lacks an innovative procurement vehicle for the very companies it attracts through regional councils and START-UP NY. Entrepreneurial companies across all industries have no clear path to do business with the state. Many are forced to sub-contract or partner with existing firms on a state contract, which costs money and reduces already tight profit margins.

Public Policy Institute recommendations

Based on the comments from vendors and local government officials — which are detailed later in this report — and a review of commonly accepted best practices in procurement, PPI has formulated the following series of recommendations:

Increase training/certification opportunities for local and state government procurement officers. This could result in long-term savings for both the state and local government, by ensuring that best practices and ethics are followed, administrative burdens are reduced and contracts are written in the most cost-effective manner. It will also promote consistent program implementation as staff changes occur, as a large portion of the state workforce will reach retirement age over the next several years, leaving vacancies currently filled by experienced professionals. This will leave a void of organizational and procedural knowledge among the new wave of purchasing officers. The Public Policy Institute recommends enhanced opportunities to ensure that individuals are up-to-date on current law governing procurement. Increasing professional development among procurement staff would result in a cost to the state; however, the expertise gained by staff would far outweigh the price tag.

Include performance guarantee clauses in all agency contracts that would provide vendors the ability to select their preferred method of performance guarantee; offer performance benchmarks that would release a percentage of the bond upon achievement of a certain level of deliverables; and cap performance guarantees, especially letters of credit, in lower-risk contracts (commodities and non-emergency services). Allowing business, especially small business, the election to use bonds instead of letters of credit will reduce their costs, free up capital, and encourage broader participation in the state contract bidding process. This would allow for more open, fair competition among vendors, and would allow businesses of all sizes, particularly small-businesses, to reinvest funds while simultaneously protecting the state's interests.

Create an electronic central registry of local procurement laws. This would provide clarity and guidance for bidders as they navigate city, town and village purchasing regulations. Local governments are already required to file new laws and ordinances within 20 days of final adoption or approval with the Department of State.

Ease the law governing local governments' ability to purchase cooperatively. While current law enables municipalities and school districts to do cooperative purchases on lowest price commodity contracts, amendments are needed to allow them to take advantage of cooperative "best value" contracts used for IT and other services.² Removing the requirement that the municipality has to pass a separate law allowing purchasing off of other government contracts let by best value is also recommended.

Enhance communication between vendors, local governments and the state, particularly regarding the centralization of contracts and the strategic sourcing initiative. Routine updates on the status of centralized contracts (including what contracts are going to be centralized and a timeline of when contracts are scheduled to be renegotiated) would be highly beneficial to the business community and municipalities.

Clarify the start of the “restricted period” for communication between vendors and state officials and require agencies to update responsive bidders throughout the contract procurement process on awardees and vendor scores. The state should create uniform procedures governing how agencies inform the vendor community about contracts that have entered the restricted phase and giving bidders or offerers updates on contracts for which they are competing. Agencies should also be required to email responsive vendors when a decision/award has been made, including the factors behind the decision.

Another step that would be beneficial in opening up the industry-government lines of communication and reducing ambiguity would be to create a

technology that allows agencies, local governments and universities to reach a broader potential vendor pool for increased competition.

Offer innovative companies an opportunity to compete under a continuous recruitment program. Continuous recruitment is currently suspended while the procurement transformation effort is underway.

Introduction and History

According to State Finance Law Article 11, the objective of state procurement is to facilitate each state agency’s mission while protecting the interests of the state and its taxpayers and promoting fairness in contracting with the business community.

The Procurement Stewardship Act went into effect in 1995 to bring about needed reforms to the procurement process. The Act was extended several times with amendments and has a current sunset date of June 30, 2016; it was last extended in the 2012-13 budget.

In 2005, the Government Law Center of Albany Law School conducted focus groups to discuss issues within the Procurement Stewardship Act.

“New York should follow Virginia’s lead, and utilize modern technology that allows agencies, local governments and universities to reach a broader potential vendor pool for increased competition.”

document similar to the federal government’s “myth-busters” report³ to address misconceptions surrounding the restricted period. The report should include a section on the phrase “determination of need,” which is included under the definition of “government procurement” in state finance law. According to those interviewed by PPI, this clause has been used by agencies as justification for prematurely entering into the restricted period.

Allow prospective vendors the option to participate in bid conferences (and similar forums) through video teleconferencing or webinars, and undertake major updates to New York’s e-procurement system. New York should follow Virginia’s lead, and utilize modern

Topics of interest included: procurement; minority and women-owned business enterprise (MWBE) certification; the state contract process; vendor responsibility; and the debriefing process.

Another important point in New York’s procurement history was in August 2005, when then-Governor George Pataki signed legislation to regulate procurement lobbying. State Finance Law sections 138-J and 138-K outline the restrictions on contact between bidders and most state officials during the procurement process and the disclosure of regulated contacts. (Chapter 4 [Laws of 2010] included an amendment to State Finance Law section 139-J that included “the public announcement, public notice, or public

communication to any potential vendor of a determination of need for a procurement..." under the definition of "governmental procurement." The phrase "determination of need" has been a source of frustration among vendors. This topic is discussed in further detail later in the report.)

Over the past few years under the Cuomo Administration, the state has begun a major overhaul to the current procurement system. In 2010, consulting firm Accenture was retained by the Division of Budget to perform cost analysis and assist the state in adopting best practices when making purchases. A report by Accenture stated that New York had "extremely limited procurement vision and strategy," and "no long-term roadmap for procurement."⁴ Instead of individual agencies letting contracts or negotiating final prices with vendors, the state has recently moved toward an approach that focuses on shared services and capitalizing on the state's aggregate buying power. This strategic sourcing initiative went into effect in July 2011, and is described as "a procurement approach that utilizes a structured, market-based process to gather data, conduct quantitative analysis and apply expert qualitative judgments to secure the best value in purchasing."⁵

The first wave of contracts subject to review by Accenture included: food; road salt; telecommunication services and equipment; payment processing; IT services; building management services; hardware; software; auto services and parts; administrative services; automobiles; office equipment; office supplies; security guards; and fleet cards. Contracts under review are subject to holds, meaning that agencies are prohibited from renegotiating or negotiating new contracts while the state is in the process of letting new ones using an enterprise approach.

Despite an initial timeline provided by Accenture that included approximate dates for waves of contracts that would go into holding periods, the state has provided no updates to the vendor community, local governments, or the public on the progress of the strategic sourcing initiative.

The 2012 enacted budget continued to amend existing procurement law, most notably by expanding centralized contracting, which continued the focus on the enterprise approach utilized by the strategic sourcing initiative. Under these changes, agencies whose chief executive was appointed by the governor would be required to utilize centralized contracts for services if not available through a preferred source. Prior to this new law, if services were not available through a preferred source, it was optional for agencies to purchase off an OGS centralized contract. Commodity contracts were also centralized, but optional if the agency could receive a lower price.

Education and Training of Procurement Professionals

A recurring theme in PPI's conversations with individuals involved in procurement was the need for enhanced education and/or training for those involved with procurement on the state and local level, particularly those on the local level where procurement officials often perform multiple job duties. This is illustrated by the New York State Comptroller's (OSC) audits of purchasing practices in local government which document that some municipalities have not

complied with competitive bidding requirements, General Municipal Law or the municipality's own procurement regulations.

The benefits of enhanced training were illustrated through a PPI interview with a purchasing officer for a local government, who noted that after participating in training, the entity joined the Empire State Purchasing Group, an e-procurement system that allows local agencies to inform vendors of bidding opportunities, and saved thousands of dollars on postage and paper and increased the number of vendors participating in bids.

There are publications available on the State Comptroller's website. For example, a local government management guide offering a review of select procurement topics⁶ — and the state OGS allows for easy access to training videos and materials from the 2013 Purchasing Forum.⁷ However, more training should be made available to local purchasing officers, and state-level purchasing officers should be required to attend periodic training.

The following is a collection of comments from vendors, consultants and local government officials:

"A general issue for most local governments is that they have people that are wearing multiple hats. There should be a certification process for local government procurements. General Municipal Law is well behind state [law]. For example, they just allowed electronic bidding five years ago, and just tried to make changes in best value this year, while this has been the law in New York State. It is costly and prescriptive, and it varies from locality to locality."

"Smaller municipalities... do not have the staff to get to where they need to [in terms of training]." (Note: There is no statutory requirement regarding education/certification on the local level.)

"One issue that you always find in procurement is that it is one of the few areas of law where people have no legal training; what is the law, what exists on paper often does not conform at all with reality. People do not know what they are supposed to be doing [pursuant to law], instead [they say] this is the way my predecessor did it. There is a lot of dust and cobwebs in the system." (Note: This commenter made mention of the federal "myth-busters" site on procurement law, which could be beneficial in

several facets of state procurement.)

"We have invested in training for procurement officers. It saves the taxpayers money, and helps ensure that officers are well-qualified."

"There are procurement people at the state level who probably say, 'I need that training.' A lot of people are retiring now who have been there forever, who are bastions of knowledge, and they are leaving." (Note: The Department of Civil Service estimated that 16 percent of the state workforce, including 49 percent of senior career managers, will retire within five years.⁸)

Based on these comments from procurement experts, PPI recommends enhanced training opportunities through OSC and OGS. This is particularly critical as a high volume of professionals will soon reach retirement age and as the procurement process continues to evolve.

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Performance Guarantees

In New York's procurement system, letters of credit, as well as performance bonds or insurance coverage, are sometimes required by agencies in order to mitigate risk. State Finance Law Section 163 states that "It shall be in the discretion of the commissioner or state agency to require a bond or other guarantee of performance, and to approve the amount, form and sufficiency thereof." Many vendors and consultants felt that some forms of performance guarantees — particularly letters of credit — are onerous for companies of all sizes. This is especially true for MWBEs that might not have established credit needed for bonds, or are unable to set aside the amount required for a letter of credit.

The National Association of State and Local Government Procurement notes that bond enforcement can be costly and litigious and unnecessary impediments to competition, and

recommends that the best practice regarding this issue is to not require bonds in non-construction procurement unless there are “unique circumstances”.⁹ A document on contract performance security prepared by Montana’s Department of Administration notes that surety bonds are preferable to letters of credit, and that contract security was not always necessary except in construction contracts.¹⁰

Below are comments collected by PPI pertaining to performance guarantees:

“It is a huge issue for small and big businesses. A letter of credit is better for the state, you take it and you fight later, but it’s a lot more money for the vendor, and if the vendor has a lot of projects out there they can only commit so much. Maybe you could do performance bonds for certain dollar amounts, or you could look at the type of procurement; the first reaction for state agencies is a letter of credit.”

“[An] agency lays out terms and conditions in the Request for Proposals; for example, liquidated damages and letter of credit needed. Those, in turn, can be too onerous for a smaller company, and there is no negotiating that at all.”

“On bonding, indemnification, there could be greater flexibility; [currently] this is a bit draconian.”

“Most states use performance bonds, but after the recession, it was difficult to find firms able to get performance bonds because a lot of sureties became tighter. A letter of credit is easier for a smaller firm to obtain because it is between them and the bank. It’s not something that larger firms or companies want to get involved in.”

“The difference with letters of credit is that it is your money, not a bond, which is like insurance. With a letter of credit, the state can basically come in and take the letter of credit if they do not like what you are doing. And it is a major hindrance for smaller companies. Almost no other states use letters of credit.”

“There has to be a consistent measure of liability and mitigation with respect to performance... there should not be a requirement for a letter of credit to protect performance because it has to be damage-based.”

Allowing for greater flexibility in performance guarantees (i.e. allowing vendors to choose between a bond or a letter of credit) would increase competition and allow businesses to invest capital that would otherwise be tied up. The Public Policy Institute also recommends setting a maximum cap on any performance guarantees, especially letters of credit, which small businesses and MWBEs are more likely to use. The amount required is at the discretion of the contracting entity, but there is no cap.

Centralized Contracting

Prior to the 2012 expansion of OGS’s role in centralized contracting, agencies could procure services independently (commodities had to be procured through OGS). The “enterprise” approach recommended by Accenture has left both purchasing officers and vendors without a clear

understanding of how they should approach such procurements.

There are currently more than 1,500 centralized OGS contracts in place for goods and services.¹¹ Individuals interviewed by PPI expressed concern over the centralization of contracts, particularly concerning how such contracts did not consider the needs of local governments. The following comments were obtained from the procurement experts interviewed by PPI:

“We need municipal government interest reincorporated into centralized contracting. [Presently] centralized contracts do not have to include their needs, even though municipal governments can utilize such contracts.”

“One of the problems is that nobody thinks about [local governments]. OGS is preoccupied with the state transformation, and the local governments do not have the capacity to do these procurements. Either they are paying a lot more or not getting what they need.”

“We want to work with other counties; OGS has cut back on contracts, which has affected us — it forces us to take a harder look. We do a lot of our own contracts — the OGS centralized contracts are not the best price for us. The [centralized contracts] are a starting point. They don’t take into account local needs. For example, we are better off buying oil locally.” (Note: This comment was obtained from an individual involved in procurement at the county level).

“Local government has been left out...after some of the contracts expired, we take on the administrative burden. OGS is no longer issuing many of these contracts, especially ones that involve the use of trucks, cars, etc. The state no longer bids on gasoline cars, now they have to be multi-fuel.” Now local governments are required to go out and bid on cars, one, two, three at a time. (Note: At the time this local government purchasing officer was interviewed, there was no centralized contract in place for this item.)

“New legislation was passed that allows local governments to purchase from other U.S. government contracts; local government wanted to use cooperatives, but the Comptroller’s office does not like the wording, so we cannot use anything done by best value.” (Note: This comment was obtained from an individual involved in procurement at the county level. At the time this PPI report went

to print, legislation allowing for the “best value” piggybacking was awaiting approval from the Governor.)

“OGS needs to revisit the suspensions [of contracts] and contracting approach that they now have planned strategically; they do not need to continue the suspension, they used to have continuous recruitment provisions. Technology (hardware, software, telecommunications) used to enjoy continuous recruitment provisions. [But] New York has stopped the development and advancement of new technologies. At the very least, this needs to be revisited and there does not seem to be a great deal of transparency. Not everything the state needs to purchase is going to be a candidate of strategic sourcing. There is no ‘one size fits all.’”

“What is really hurting local governments is that they need to get back centralized contracts that local governments and school districts can take advantage of, to focus OGS in on that.”

While vendors interviewed by PPI agree that a centralized approach does have a cost-saving benefit to the state, they stated that better communication was necessary to restore predictability to the process. PPI recommends a continued open dialogue with the business community and local governments on the strategic sourcing initiative and plans for centralized contracts.

PPI also recommends easing “best value” restrictions on local governments and issuing a myth-busters report that clarifies opportunities and limitations on centralized contracting. Municipalities should also be kept up to date on the progress of the state’s procurement transformation effort, and be included in discussions on which upcoming waves of contracts will be strategically sourced.

Communication and Consistency

One vendor noted, “When it comes to procurement, there are different impulses and different rules. On top of all the formal rules, there is a whole set of informal rules that are created by precedent and tradition, and simple misunderstanding.” Lack of consistency in bid evaluations and communication issues — particularly surrounding the restricted period — was a common complaint among vendors.

In 2006, the Procurement Lobbying Law took effect in New York that imposed a restricted period (otherwise known as a quiet period or blackout)

that begins with the earliest written notice of an agency solicitation of bids and ends upon the Comptroller's approval of the contract. State Finance Law Section 139-j, which is scheduled to sunset on July 31, 2014, prohibits offerers or others acting on their behalf from communicating with the state with regard to any act of procurement other than through a Designated Agency Contact. Any attempts by vendors to influence government employees during the restricted period must be recorded.

The law regarding the restrictions on contacts and how it is implemented and practiced seem to differ and cause consternation for the vendor community. The law states that the restricted period "shall mean the period of time commencing with the earliest written notice, advertisement or solicitation of a RFP, invitation for bids, or solicitation of proposals, or any other method for soliciting a response from offerers

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intending to result in a procurement contract with a governmental entity and ending with the final contract award and approval by the governmental entity and, where applicable, the state comptroller.”¹² However, commentators told PPI that it is not always done this way. Many vendors interviewed noted that agencies will begin the restricted period before a public announcement was made, erring on the side of caution, while others will initiate the restricted period as a way to prevent communication with vendors.

State agencies are required to offer a debrief under the State Finance Law 169 (9)(C), as amended by Section 3 of Chapter 127 of the Laws of 2008. State agencies must provide a debrief to any “unsuccessful offer that responded to an RFP or an invitation for bids, regarding the reasons that the proposal or bid submitted by the unsuccessful offerer was not selected for an award.” In 2005, in the focus groups conducted by the Government Law Center, all participants acknowledged that the debriefing issue was “invaluable” to the procurement process; however, participants criticized the disparities in inter-agency debriefing procedures.

The following comments related to communication and consistency issues in the procurement process:

“New York is extremely rigid with respect to the [restricted] period. You want the process to have integrity, you want to reduce influences, but you have got to consider if there is another way for facilitating above-board transparency.”

"We would prefer a process [whereby] if questions are asked of a procurement officer or the program that those questions would be in a public forum. We want to avoid giving one group a leg up because they have a relationship with the procurement entity."

"[The restricted period] is completely arbitrary. The communication is bad. An agency calls it a 'determination of need' when the period begins."

"One recent problem is in the interpretation of these prohibitions on the restricted contact period. Many agencies say, 'we are thinking of doing something so I cannot talk to you.' You need to encourage dialogue. There has to be a way to have conversation with the vendor community. No business will procure software without talking to software companies."

"When small businesses do not know where to turn, it is easy for a state agency to put a wall up and say there is a restricted period."

"There is confusion over when there is and is not a restricted period. There are a few agencies that put up [on their web site] what is in a restricted period and what is not. The other challenge is, even when it is up, it is minimal information and it's cryptic. You don't know when you are in and out of bounds. Another issue is, at times, agencies use restricted period proactively to close down. They can close off all communications."

"There needs to be a forum where there is input into what is happening in the industry and that input is given by industry experts before they put an RFP on the street, because I still think that RFPs are written with certain companies in mind. This is not because they want to circumvent the procurement system; it is because they do not know anything else except for what a particular company tells them."

"The overall issue is a lack of communication and lack of consistency in how an RFP is distributed and evaluated. What we are looking for in RFP jargon is consistency and similar formats."

"You have an Request for Information (RFI) process, then an RFP process, then you have a bidder's conference, and you have two rounds of questions, because you ask one round of questions and they get answered, then that causes more questions, but they don't allow

that to continue."

"The length of time they give you to respond needs to be extended — it's sometimes only two or three weeks. They are only giving vendors [a few] weeks, and it sometimes takes them three or four days to get the questions back to you."

"When you write an RFP, the big IT procurements are like the Manhattan phone book, and by the time it is finished its obsolete, and with the public conferences no one wants to ask questions."

"When you go through the bid evaluation, there are often four criteria that make up 100 percent. They can be skewed. One entity can do 80-percent technical and 20-percent price. The state wants to save money, and a very easy way for them to do that is not to go through all these machinations — just put a higher percentage on the price...if you want to control cost, make it truly competitive; at worst do it 50/50."

"There is no official debrief process after a bid is done. A potential bidder can do a protest, or ask for a debriefing...what would help is if it was part of the process." (Note: Agencies are required to offer a debrief under State Finance Law Section 163 (9)c which states that "A state agency shall, upon request, provide a debriefing to any unsuccessful offerer that responded to a request for proposal or an invitation for bids, regarding the reasons that the proposal or bid submitted by the unsuccessful offerer was not selected for an award. The opportunity for an unsuccessful offerer to seek a debriefing shall be stated in the solicitation, which shall provide a reasonable time for requesting a debriefing." A Debriefing Language Bulletin from OGS noted that it was "not clear" as to whether an agency had to provide information on the winning proposal.)

"Sometimes it is hard to get a debrief, and it seems to get forgotten about. [Debriefs] have been pretty helpful."

"If you have an RFP with 50 responses and only four were considered at the top of the list, to give responses to all 50 RFPs would be a full-time job. We should be more selective in who we allow to bid to give each RFP justice. The best way for us to have debriefs is to talk about award criteria to give them an understanding of where we are lacking."

“We do not think that bidders’ conferences should be mandatory... sometimes, something happens out of your control and you can’t be there. They should allow you to call in.” (Note: The commenter noted that utilizing webinars would also be helpful as an alternative to attending the bidders’ conference. Whether or not participation in bidders’ conferences is mandatory is currently at the discretion of the agency.)

PPI recommends requiring agencies to send email alerts/notifications to all responsive vendors updating them on the status at bid evaluations and determinations; emailing responsive vendors when a decision/award has been made and the factors behind the decision; and amending the state finance law to require more information be included in announcements that vendors might only otherwise get through a more formal (and time-consuming) debrief process (such as vendor scores).

PPI also recommends that the state utilize webinars and or video conferences for bidders; make permanent the provision that allows for documents to be submitted online; and foster overall uniformity in the process.

Clarifying when the restricted period starts, and requiring agencies to post, in a central location, which contracts have entered the restricted period on their websites, would also be beneficial to vendors.

“Those interviewed by PPI who are involved in procurement within local governments also stressed the importance and cost-savings benefit of well-trained purchasing officers.”

Conclusion

Based on discussions with procurement industry experts regarding challenges on the state and local level, PPI recommends the following:

Increase training/certification opportunities for local and state government procurement officers. This could result in long-term savings for both the state and local government by ensuring that best practices and ethics are followed, administrative burdens are reduced and contracts are written in the most cost-effective manner. It will also promote consistent program implementation as staff changes occur — a large portion of the state workforce will reach retirement age over the next several years, leaving open spots that were previously filled by experienced professionals. This will leave a void of organizational and procedural knowledge among the new wave of purchasing officers. PPI recommends enhanced opportunities to ensure that individuals are up-to-date on current law governing procurement.

Those interviewed by PPI who are involved in procurement within local governments also stressed the importance and cost-savings benefit of

well-trained purchasing officers.

Utilizing opportunities for professional development and training is particularly critical on the local level — examining the New York State Comptroller's audits of local governments reveals procurement problems that typically revolve around the failure to follow the General Municipal Law or the municipality's own purchasing policy, a problem that could be alleviated by continuing to provide resources and assistance to local government entities.

Include performance guarantee clauses in all agency contracts that would provide vendors the ability to select their preferred method of performance guarantee; offer performance benchmarks that would release a percentage of the bond upon achievement of a certain level of deliverables; and cap performance guarantees, especially letters of credit, in lower-risk contracts (commodities and non-emergency services). This would allow for more open, fair competition among vendors, and would allow businesses of all sizes, particularly small businesses, to reinvest funds while simultaneously protecting the state's interests.

Create an electronic central registry of local procurement laws. This would provide clarity and guidance for bidders as they navigate city, town and village purchasing regulations. Local governments are already required to file new laws and ordinances with the Department of State.

Ease the law governing local governments' ability to purchase cooperatively. While current law enables municipalities and school districts to purchase cooperatively, amendments are needed to allow them to take advantage of cooperative contracts let by best value without passing any additional laws or resolutions. Through the U.S. Communities Government Purchasing Alliance, for example, participating public agencies — cities, counties, school districts, colleges and universities, and state and nonprofit agencies — saved approximately \$214 million in 2009.¹³ Removing the requirement that the municipality has to pass a separate law allowing purchasing off of other government-let contracts by best value is also recommended.

Enhance communication between vendors, local governments and the state, particularly regarding the centralization of contracts and the strategic sourcing initiative. Routine updates on the status of centralized contracts (including a timeline of when contracts are scheduled to go into a holding period) would be

highly beneficial to the business community and municipalities.

Clarify the start of the "restricted period" for communication between vendors and state officials and require agencies to update bidders throughout the contract procurement process on awardees and vendor scores. Create uniform procedures governing how agencies inform the vendor community about contracts that have entered the restricted period and give bidders or offerers updates on contracts for which they are competing. Agencies should also be required to email vendors when a decision/award has been made and the factors behind the decision, including how vendors scored.

Another step that would be beneficial in opening up the industry-government lines of communication and reducing ambiguity would be to create a document similar to the federal government's myth-busters report to address misconceptions surrounding the restricted period.

Allow prospective vendors the option to participate in bid conferences (and similar forums) through video teleconferencing or webinars, and undertake major updates to New York's e-procurement system. The Empire State should follow Virginia's lead: The Commonwealth has realized more than \$338 million in savings since the implementation of eVA, its e-procurement system. It has even unveiled an application for mobile devices that allows suppliers remote access to business opportunities.¹⁴ In response to a recent NASPO survey, 30 states indicated that they utilize an e-procurement system; 14 indicated that they do not have a system in place.¹⁵ New York State currently has a pilot program in place. However, instituting a permanent e-system on the state level is vitally important.

Offer innovative companies an opportunity to compete under a continuous recruitment program. Continuous recruitment is currently suspended while the procurement transformation effort is underway.

Based on PPI's research and discussions with various individuals involved in procurement, ambiguity in both the rules of engagement and the strategic sourcing initiative must be addressed by the state.

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End Notes

- ¹ NIGP's benchmark survey asked participants, "Using this definition of a Procurement Officer, 'Procurement staff who spend more than 50 percent of their time on procurement related work,' how many Procurement Officers (FTEs) hold an appropriate (in your judgment) procurement certification for their current duties?"
- ² At the time this report went to print, legislation passed by the Senate and Assembly was awaiting approval by the Governor.
- ³ The Office of Federal Procurement Policy issues "myth-buster" reports for acquisition officers. *Myth-Busting 2: Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process*. (May 2012).
- ⁴ P. 16, Accenture's draft report (report was obtained by the Times Union, and printed on its Capitol Confidential blog).
- ⁵ Letter from Howard Glaser, director of state operations and senior policy advisor and Robert Megna, director of the budget, to agency commissioners on June 2, 2011.
- ⁶ The OSC publishes "Seeking Competition in Procurement," a management guide for local governments.
- ⁷ Available at <http://purchasingforum.ogs.ny.gov/>.
- ⁸ Spending and Government Efficiency Commission's 2013 report (p.4).
- ⁹ NASPO State & Local Government Procurement, A Practical Guide (Chapter 7: Competition: Solicitations and Methods, p. 97).
- ¹⁰ Montana's General Services Division of the Department of Administration made note of this in a Q&A document on Contract Performance Security (p.2).
- ¹¹ OGS website, document titled *Doing Business with New York: A Guide to Understanding the State's Procurement Practices* (p.5).
- ¹² State Finance Law Section 139-j.
- ¹³ Statistic on savings through the U.S. Communities Government Purchasing Alliance, as cited on the Idaho Association of Counties website.
- ¹⁴ NASPO, June 2013 briefing paper ("State Procurement Adds Value and Jobs"), section titled "Through e-procurement solutions."

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