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**Negotiation**

**Process Guide**

***for IT Goods & Services***

April 2013

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**\*Disclaimer\*** This Guide does not supersede current DGS policy stated in the State Contracting Manuals. All samples and examples are to be used as educational material; any question and concern regarding policy should be resolved using the State Contracting Manuals or by contacting the Procurement Division. Please review the updated policy and negotiation process procedures under PCC 6611 found in [SCM Volume 3](http://www.dgs.ca.gov/pd/Resources/publications/SCM3.aspx) (Page 49).

1. **Introduction**

This document, the *Negotiation Process Guide*, is a user’s guide for State department and agency staff for the purpose of explaining the use of negotiations in a clear and concise manner. It explains procedures and provides examples for understanding the use of negotiations as well as the procedures departments or agencies may follow when requesting negotiations under Public Contract Code Section 6611 (PCC 6611).

It is important to remember throughout this process that utilizing PCC 6611 is an opportunity for you as a fiduciary of the State to save the taxpayers money and get the best deal possible. If you have any questions before entering or during this process please contact Procurement Division.

**Definitions**

To assist with the reader’s understanding of this guide, certain definitions of words and terms are helpful. They are as follows:

Negotiations Briefing Binder – the confidential strategy document used to brief the State Negotiation Team and Executive Management Team in preparation for and during contract negotiations.

Negotiations Support Team – those individuals assigned to provide research, analysis, clerical, and liaison support to the State Negotiation Team.

Contract – this is the final document that will be sent forward for approval.

Executive Management Team –management and executive level representatives of the DGS, contracting agency, and the CTA overseeing the procurement.

Final Draft Contract – the contract that represents the agreed-upon statement(s) of work (SOW), terms and conditions and attachments between the State and the contractor. This document will be used during final executive review period.

Gap Analysis – the analysis of the difference between the State’s desired terms and those proposed by the contractors.

State Negotiation Team – those individuals representing the State who participate in negotiations with the Contractor.

Sub Teams – the subject matter experts (SME) and Contractor Representatives who develop and draft subject matter specific information.

Working Draft Contract – the version of the contract being used during the contract negotiations and updated on a regular basis.

1. **Request**

Please use the following [template](https://www.dgs.ca.gov/-/media/AB899CC33EBF4ED78FD5BB3FD9761C84.ashx) in order to request negotiations pursuant to PCC Section 6611, as needed. Agencies and departments should submit additional attachments to support the decision to undergo negotiations. The justifications and examples to request negotiations under PCC 6611 are located on the hyperlinked template above and examples are below.

Make sure your request to the DGS contains the following information:

* Description of the procurement including estimated cost and term of the contract.
* How the procurement meets the State’s needs.
* Explanation of how the procurement meets one or more of the four conditions listed on the second page of the template titled, “Reasons for negotiations per PCC 6611.”
* Desired outcome.

The request shall be signed by the State Agency Secretary, Department Director, or their designee and sent to the Deputy Director Procurement Division, DGS.

The DGS will respond to the requesting department, in writing, with a determination on the request to use a negotiation process. If approved, the DGS may stipulate any additional conditions on the use of a negotiation process.

CTA may utilize the negotiation process for the purpose of procuring information technology and telecommunications goods and services on behalf of State departments and information technology projects.

Below are examples of a request to commence negotiations per PCC 6611:

* Request form and letter for [6611(a)(1)](https://www.dgs.ca.gov/-/media/C6FA172F3B46488CB322D0FAD3E021FF.ashx), [6611 (a)(2)(4)](https://www.dgs.ca.gov/-/media/7B584C926D6F4C38A52CA4E82AA5CA92.ashx), [6611 (a)(3)](https://www.dgs.ca.gov/-/media/5E3E6688A0AA4C59B8EEAE74A37807E9.ashx)
* Request form without letter for [6611 (a)(4)](https://www.dgs.ca.gov/-/media/0C0333C5C6F84F9CB3792C092F93BFEC.ashx)
* Request form and letter for [6611 (b)](https://www.dgs.ca.gov/-/media/64AA28F59FDD480EB0984FB56796BDAA.ashx)
1. **Conditions Using the Negotiation Process**

In general, bidding rules should be up-front and transparent. The State of California reserves the right to negotiate with all bidders if it is in the best interest of the State. It is important to acknowledge the receipt of informal objections or questions, provide a written response or explanation, and inform all bidders of any actions that are taken in response to such objections or questions. Evaluation criteria must be set forth in the solicitation document or an addendum. Below is information on how to originate a negotiation during the three different phases/opportunities to negotiate under PCC 6611.

* 1. **Procedure when conducting negotiations from the outset of a procurement**

Once a request to conduct negotiations has been approved, the procurement will be conducted under the authority of approving the agency (DGS or CTA). The solicitation document should include administrative and technical requirements, a cost proposal, evaluation criteria, a SOW and the State’s general provisions.

The solicitation document should identify the requirements for bidders to be included in negotiations. This may include, but is not limited to: establishment of objective prerequisites based on capabilities, experience, expertise, or capacity, resources, readiness, and financial stability. Bids may also include an additional stage or stages of prequalification based on evaluation of bid documents submitted over the course of a procurement (see SCM Volume 3 Chapter 4.B6.3).

Determine the negotiation sequence, which may include the order of steps such as pre-qualification, bid submission, evaluation, confidential discussions, supplemental bid submission, negotiations and contract award. For example, if you have a pool of 4 suppliers, rank the suppliers based on their prequalification to meet administrative and technical requirements. The solicitation document should state how and when the State intends to negotiate with some or all of the bidders.

Evaluate all bids to determine compliance with all of the solicitation requirements in order to qualify for negotiations.

* 1. **Procedure when conducting negotiations during a procurement and at least one responsive, responsible bid is received.**

When at least one responsive, responsible bid is received, only bidders that have submitted such bids may be allowed to negotiate. It is possible to negotiate with only a sub-set of responsive, responsible bidders only if the bid document (as otherwise amended) outlined a procedure for doing so prior to opening bids.

By way of example, if the acquiring agency believed that it was likely to receive many responsive, responsible bids and that it would be necessary to negotiate to obtain best value for the State, that agency could set forth a rule in the bid indicating that the state may opt to only negotiate with bidders in one of the following configurations,

* Only bidders within 3% of the low bid
* Only the 3 highest ranking bidders
* Only the lowest priced bidder and then, if unsuccessful, with successive bidders in order of rank until an agreement could be reached.
	1. **Procedure when no responsive bids are received when the solicitation has been conducted under PCC 12100.**

In rare cases, it may be necessary to negotiate with bidders participating in a competitive procurement even when no responsive, responsible bid has been received. This occurs when all bidders have material deviations. This can happen when repeated solicitations yield no bidders or when the complexity of the administrative, technical or cost requirements results in all bids failing to meet the requirements.

The contracting department must determine the grounds for invoking PCC 6611. In many circumstances, it may be likely that PCC 6611(a) (3) “the complexity of the purpose or need suggests a bidder’s costs to prepare and develop a solicitation response are extremely high” or PCC 6611(a) (4) “negotiation is necessary to ensure the department is receiving the best value” is the best basis to request negotiation authority.

Criteria for ranking bidders must be set forth in the bid document as amended prior to opening proposals. Ranking the Bidders enables the buyer to draw distinctions based on merit between the different Bidders. However, buyers may further limit the number of bidders eligible for negotiation using objective criteria such as setting minimum thresholds for administrative, technical, and/or cost proposals, or a threshold that combines all three. Examples include:

* Bidders that receive a minimum of 80% of the technical points will proceed to negotiations.
* Bidders within 15% of the lowest bid will be eligible to negotiate.
* The top 3 bidders based on combined points will proceed to negotiations.
1. **Pre-Negotiation Preparation**
	1. **General Roles and Responsibilities**

Participation in contract negotiations usually consists of three teams: (1) the State Negotiation Team; (2) the Executive Management Team; and (3) the Negotiations Support Team. All these teams should receive orientation prior to their participation in contract negotiations.

State Participants (Not all participants listed in the table below are required in all situations)

|  |  |
| --- | --- |
| **Participant** | **Roles** |
| Chief Negotiator:Procurement Official(DGS or CTA) | * Conducts the procurement in accordance with the laws of the State of California;
* Coordinates contract negotiations sessions;
* Coordinates the DGS Legal participation in negotiations, if required;
* Oversees negotiation sessions;
* Co-approval of final negotiated agreement;
* Keeps the State Negotiation Team on schedule and on task;
* Briefs Executive Management Team as necessary.
 |
| Buying Agency/Department Representatives | * Participates in negotiation sessions to ensure outcomes meet program needs;
* Co-approval of final negotiated agreement.
 |
| State Negotiation Team | DGS and/or CTA, and sponsoring agency/department* Provides negotiation facilities;
* Prepares negotiation points;
* Participates in negotiation sessions;
* Tracks status of outstanding items and completed agreements;
* Provides Subject Matter Experts (SME)
 |
| Project Representative | * Provides project related input to contract;
* Back-up Chief Negotiator.
 |
| State EvaluationTeam Members | * SMEs tasked with evaluating bid submissions;

 participates in negotiations sessions, as required; May be same individuals as negotiation team. |
| Legal RepresentativeFrom DGS and/or Department(not required to attend all meetings) | * Drafts terms and conditions (if needed);
* Provide legal advice;
* Reviews and comments on proposed Terms & Conditions.
 |
| Executive Management Team | * Attend executive briefing sessions.
* Resolve escalated issues.
* Review terms and conditions as needed.
* Provide direction at go/no/go decision points.
 |
| Subject Matter Experts (SMEs) | * Provides subject matter expertise and support to the State Negotiation Team and State Evaluation Team, as requested.
 |
| Negotiations Support Team | * Individuals assigned to provide research, analysis, clerical and liaison support to the State Negotiation Team
 |
| CTA (where DGS is the procurement official) | * Ensures negotiations meet all applicable IT architecture, technical, and project standards.
 |
| Scribe (from the contracting department) | * Provides a record of reference for the major decision points and allows others in the room to focus on the negotiation process rather than note taking.
 |

Bidder/Supplier Participants

|  |  |
| --- | --- |
| **Participant** | **Role** |
| Bidder Negotiation Team | At a minimum, the supplier team:* Prepares negotiation materials in response to negotiations points;
* Participates in negotiations sessions;
* Develops and provides revised proposal materials for State review and agreement during the negotiation sessions; and
* Provides Best and Final Offer (BAFO) that incorporates all negotiated changes.
 |

The Negotiations Support Team will begin preparing the Negotiations Briefing Binder for the members of the State’s Negotiation Team and Executive Management to use during contract negotiations to understand strategy and negotiation positions. This is necessary since not all of Executive Management Team or members of the State Negotiation Team will have the same level of expertise over the disparate subject matter that will be discussed in contract negotiations.

The contract negotiations will be handled by the selected State Negotiation Team. Members of the team should include individuals from department program staff in addition to the DGS and CTA personnel. Team members must also have adequate and clear parameters of authority to negotiate terms and clear instruction of when issues need to be escalated. At the beginning of contract negotiations, the State Negotiation Team will assign specific individuals to complete the initial drafting of:

* Statement of Work
* Review of Deliverables
* Review of the Products

Due to the limited timeframe of contract negotiations, the Negotiation Briefing Binder is updated if a specific need is identified, but it is unlikely that it will be extensively updated during negotiations. Therefore, prior to the onset of contract negotiations it is essential that the Executive Management Team and the State Negotiation Team understand and agree on what will and won’t be negotiated; however, this may be a fluid process.

In preparation for contract negotiations, a Draft Contract will be prepared by the State for use as the starting point for contract negotiations. The vendor’s comments to the State’s Terms and Conditions also will be distributed. During contract negotiations, a Working Contract will be updated on a regular basis to reflect the progress of the contract negotiations for use by the State Negotiation Team and information, review and comment for the Executive Management Team. It will be subject to a disciplined version control process under the management of the State’s Negotiation Team. During negotiations, additional subject matter specific attachments may be integrated into the Working Draft Contract.

It is vital to the negotiation process to designate a Scribe possibly two in the room that takes detailed notes of the negotiation for the State while others in the room can focus on negotiations.

* 1. **Negotiation Plan**

The negotiation plan should explain the general purpose and scope of the negotiations, the proposed outcome of the negotiations (e.g. reduce cost by 25% compared to typical procurement methods), the anticipated schedule for the negotiations; and the procedures to be followed for those negotiations. Developing the factors and threshold are essential to successfully negotiating when you have not received a responsive bid. The categories may include, but are not limited to: Project Management Plan, Project Reporting, Organizational Change Management, Hardware and Software Change Management, Quality Management, Data Conversion, Interfaces, Testing, Help Desk Services, Reporting, Project Staffing and Organization, Training, and Customer Reference. Meeting the business needs of the State is paramount.

A sample negotiation planner is shown below. This planner is a recommended exercise to help aid you in this negotiation process. When filling out the negotiation planner, try to address the topics shown in the sample negotiation planner below, which will help you develop a more detailed plan.

SAMPLE NEGOTIATION PLANNER

|  |
| --- |
| Our Fundamental Needs (considering overall buying strategy, future purchase, budget situation, strategic opportunities, etc.)* Introduce the participants involved and a brief description of the negotiation.
* Purpose
* Address the business and technical drivers for the need to negotiate.
 |
| Favorable Factors* The desired results from outcomes.
	+ Training for software, support, etc.
 | Unfavorable Factors* Potential pitfalls.
 |
| Anticipated Issues* Look ahead and plan accordingly.
 | Possible Solutions / Approaches* The details and mechanics on how to address anticipated issues.
 |
| Current Agreements* List prior and current agreements with vendor dating back at least two years (the spend pattern).
* Past purchase orders, including relevant dates and a summary of what was purchased.
* What is the fiscal quarter/year end for the vendor?
 | State Negotiation Team* Who are the lead, support, and functional line of business support?
 |
| Difficult Questions to Expect* From the vendor community
 | Our Responses* Possibly reference the current fiscal climate or staffing issues.
 |
| Questions to Ask * What can we bring to the table for negotiation to maximize the return for the State?
	+ Terms & Conditions.
	+ Statement of Work.
	+ Pricing/costs.
	+ Training.
 |
| Scope* What is the scope of the potential contract?
	+ Limited to time.
	+ Products and services.
	+ Licensing
 | Out of Scope* Clearly define what is not included in the contract.
 |
| Other Parties’ Needs in the Negotiation* Other departments.
 | Other Parties’ Relevant Costs* Their costs associated with their needs.
 |
| “Negotiables” We Give* Tradeoffs
 | “Negotiables” We Get* Opportunities
 |

[Here](https://www.dgs.ca.gov/-/media/1580DBD8B12D43EE9D1A7271CDA4A19F.ashx) is blank template of the negotiation planner document.

[Here](https://www.dgs.ca.gov/-/media/91959550B7B341909EF24B52A76842E4.ashx) is an example of a filled out negotiation planner document.

[Here](https://www.dgs.ca.gov/-/media/40E094EE008F44258D5B48529CC1183F.ashx) is a detailed example of a negotiation plan.

1. **Negotiation Process**
	1. **Timing**

The duration of negotiations depends on the situation. Negotiations may last a single day or many months depending on the proposed solution. Computer hardware or software maintenance negotiations may take very little time, while systems integration negotiations may take much longer.

* 1. **Facilities/Layout**

The room layout should be informal, but with the State representatives grouped together facing the suppliers. It is strongly recommended that the number of participants be limited to those that are essential to the process. There should be no more than five to seven people representing the State. A breakout room should be made available for single party caucuses.

* 1. **Kick-Off Meeting Agenda**

 Below is a sample agenda for the kick-off meeting:

* + 1. Attendees
			1. Department representatives
				1. Program Manager
				2. Department Procurement Official
				3. Technical SME
			2. DGS-two representatives (including legal if needed)
			3. CTA-one representative (if needed)
			4. Bidder three to four representatives
		2. Introductions
		3. Rules of Engagement
			1. Ground Rules
				1. The parties will strive for agreement on a point by point basis.
				2. Both parties will be open and candid on any points of disagreement; however, a problem solving approach will be used in an effort to research a mutual agreement on each point.
				3. The parties will avoid irrelevant discussions that do not contribute toward the goal of reaching mutual agreement on the issues under discussion.
				4. An issue will be tabled if agreement cannot be reached during discussion or if either side's personnel do not have authority to firmly commit the party on any such issue.
				5. The State Negotiation Team has authority to act on behalf of the State and Bidders are admonished not to circumvent the chain of command.
				6. If applicable, any unresolved items will be discussed first at the next meeting before other issues are considered.
				7. In the event mutual agreement is not reached on an issue deemed important to one side, the State reserves the right to break off negotiations and enter into, or continue, discussions with alternative sources being considered.
		4. Goals of Negotiation
		5. State Terms and Conditions
		6. Approval Timeline for Contract Execution
		7. Next Steps

[Here](https://www.dgs.ca.gov/-/media/7B4BA5C60CBB470F806F866D68B1C5C8.ashx) is an example agenda from a negotiation meeting.

* 1. **Negotiation**

Reaching an agreement is the overall goal of contract negotiations. There are two aspects of reaching an agreement. It is essential for the State to speak with one voice. Prior to the beginning of contract negotiations, the State will reach internal agreement on as many issues as possible and those will be included in the Negotiations Briefing Binder.

During negotiations, the Executive Management Team will be briefed by the State Negotiation Team on as needed basis. As issues arise during contract negotiations, there may be times that may require the Chief Negotiator to inform the Executive Management Team of the contractual issues in order to reach full agreement and achieve resolution of the issue. In addition, the Executive Management Team will have an opportunity to communicate issues or concerns to the State Negotiation Team.

The negotiation process is a dialogue which may include persuasion, alteration of assumptions and positions as necessary, and may apply to several areas including but not limited to:

* + - Price
		- Schedule
		- Requirements
		- Pay points
		- Definition of deliverables
		- Development methodology
		- Period of Maintenance

The State may discuss other aspects of the Bidder’s proposal that could, in the opinion of the State, be altered or explained to enhance materially the proposal’s potential for award. However, the State is not required to discuss every area where the Bidder’s proposal could be improved.

In the course of the negotiation process, the State will be asked to reexamine its position regarding particular issues in response to the vendor’s position. It is important to allow either party to leave the room to go “caucus” privately in another room, where they can speak freely before returning. It is recommended to give frequent breaks and ensure easy access to restrooms and private meeting rooms.

Negotiations may be completed after a single round, or may be done in several rounds. Negotiations may be conducted face-to-face and/or in writing. Face-to-face negotiations are generally the most effective but conference calls, or the use of video or web conferencing are acceptable alternatives.

The process of reaching an agreement with the vendor should proceed in a methodical fashion. The Chief Negotiator may list all “open” or unresolved issues on the agenda. If an agreement is not reached on language or more drafting is needed, that item should fall to the bottom of the agenda to be re-examined at a later time in the negotiations process. Each item will be examined in this fashion until agreement is reached on all outstanding issues. Issues may also be elevated in accordance with issue escalation instructions from the Executive Management Team.

At any point in the negotiation process the State may terminate negotiations and/or the solicitation at any time. Also, an unsuccessful bidder does not have the right to protest the results of the negotiating process.

Once negotiations have concluded, the revised Contract will be reviewed by the State and the Contractor for consistency with the outcome of negotiations. This is the document that will be signed by the Contractor and, upon award, by the procuring agency, and then submitted to the DGS Procurement Division for approval.

The procuring agency along with DGS PD is responsible for the development of the evaluation selection report. This will include any solicitation scoring methodology used to determine who will be considered for a negotiation along with a summary of the negotiation points discussed with any or potential suppliers.

1. **Issue a Contract**

A SPR Special Project Report may be required by CTA and may also require notification of the legislature pursuant to Section 11 of the Budget Act. Section 11 notification requires Department of Finance review and approval. The Section 11 process may take several months before a contract can be approved by the State.