CALIFORNIA'S USE OF NEGOTIATIONS AUTHORITY FOR STATE TECHNOLOGY CONTRACTS

A WHITE PAPER PRODUCED FOR AND IN CONJUNCTION WITH TECHAMERICA'S CALIFORNIA PROCUREMENT COMMITTEE

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This White Paper is a revision of an original paper prepared in 2010 and circulated then among various member companies and provided informally, as a draft, to the California Department of General Services and the California Technology Agency. Principal fact-finding was conducted in 2009-2010, by the author, and has been updated in 2012.

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FORWARD

The State of California has a unique statutory power to use a negotiations process when procuring information technology goods s and services. First enacted in 2003, Section 6611 of California's Public Contract Code allows use of flexible procurement techniques to better define the State's needs, identify different types of solutions, accommodate constraints of bidders and realize "best value" for the State.

Responding to the experience (and frustration) of its member companies, and disappointment that so few California procurements are negotiated, TechAmerica commissioned Robert Metzger of the law firm of Rogers Joseph O'Donnell to examine how California has employed negotiations in IT contracting and to recommend ways to increase and improve the use of negotiations for the State's critical IT and telecommunications needs.

Based on Mr. Metzger's research, it is TechAmerica's contention that the State of California has not made optimum use of this special negotiations authority. The State has been reluctant to use negotiations and has done so without consistency and, usually, for narrow purposes and at the end of procurements started under conventional, rigid rules. Only in a handful of instances has the authority been used, as the Legislature intended, to address complex needs through innovative procurement methods.

Mr. Metzger has prepared a White Paper which shows how negotiations can be used to complete procurements that otherwise might not succeed, expedite the contracting process and bring more competitors to bid on the State's requirements. Through negotiations, the State can avoid deadlock that too often frustrates the contracting process and get better value for less expenditure. The State has to do a better job, however, in planning for and using the negotiations authority.

The most pressing need, in our view, is for new guidelines on when, how and for what purpose to use negotiations. Improved reporting also is called for. Further, TechAmerica recommends that this important statutory authority be extended to the California Technology Agency. Among its many roles and duties, the Technology Agency is now responsible for telecommunications procurements. Finally, TechAmerica believes that the State should be more creative in how it utilizes its negotiating authority, under Section 6611, in order to best address the State's needs and realize the full potential of negotiations.

In sum, TechAmerica believes that the State of California, as well as the vendor community, will benefit from greater use of negotiations in the public contract process and that other states and local governments can follow from California's example. In the challenging fiscal environment facing many state and local governments, a "business as usual" approach to procurement isn't good enough. Use of negotiations will enable California to get the best solutions and "best value" on its IT contracts – exactly as the Legislature intended when it passed the law nearly a decade ago.

I. Introduction & Summary

Public Contract Code ("PCC") § 6611, first enacted in 2003, authorizes the State's Department of General Services ("DGS") to use a "negotiation process" for "goods, services, information technology, and telecommunications" – in new procurements as well as to amend existing procurements. (The full text of § 6611 is provided at Appendix I, hereto.)

The negotiations authority is broad, ranging from incidental hard goods purchases to complex design/implementation of advanced IT systems agreements. Negotiation authority can be used by DGS "[n]otwithstanding any other provision of law," if certain prerequisites are met. The statute gives DGS a potent tool to approach acquisition with flexibility, even innovation, in contrast to ordinary procurement mechanics characterized by rigidity and unresponsiveness.

TechAmerica has advocated that states need robust competition and will benefit from removing process barriers that discourage "best in breed" vendors from proposing to satisfy public needs. TechAmerica members respect that the State of California needs aggressive pricing from its vendors, to answer budget deficits, and that vendors should be encouraged to take risk and share in the "rewards" of work done well. TechAmerica concludes that greater use of negotiations in state procurements will assist the State in at least the following ways:

- Reduce IT and other acquisition expenditures;
- Improve competition (and avoid "no bid" and "one bid" outcomes);
- Enable the State to keep within approved program budgets;
- Clarify and expedite the acquisition process and avoid amendments, long delays and disputes; and
- Facilitate acquisition of innovative solutions to improve services to relevant state constituencies.

TechAmerica further recommends that the California Legislature act to extend to the California Technology Agency the authority to employ negotiations, under PCC § 6611, for telecommunications contracts. This is appropriate because the Technology Agency is now charged with the responsibility for administering for telecommunications procurements.[1]

California's experience also points to the benefits other states can realize by increased use of negotiations in the process of public acquisition.

[1] AB 2408, enacted in 2010, amended Government Code § 11541 to state that the Office of Technology Services, within the Technology Agency, was made responsible for telecommunications acquisition. The Technology Agency, however. does not presently have statutory authority to use PCC § 6611, except as DGS may authorize. Government Code § 11541 provides that the Technology Agency is to conduct procurements pursuant to Section 12100 of the Public Contract Code. As of this writing, the Legislature is considering a measure that would extend the authority of PCC § 6611 to the Technology Agency. Also pending before the California Legislature is Governor Brown's reorganization proposal that would create a new Government Operations Agency in which the Technology Agency would be a department, as would DGS.

II. The Importance of Acquisition Practices to California

California's budgetary crisis has sharpened the focus of both industry and state officials on the effectiveness and affordability of acquisition techniques. Budgetary considerations alone motivate state officials to find ways to save money in IT and telecommunications, especially. Fiscal pressures, however, are in tension with the State's needs to update, improve and make greater use of IT solutions and enhance telecommunications functionality. Many legacy systems are nearing the end of their useful or sustainable life, changing population demographics indicate greater demand for services, and evolving expectations mean California residents will make greater use of electronic interfaces with government.

TechAmerica members active within California have reported, over recent years, recurring problems that beset important, complex and high dollar value State procurements. All too often, California's procurement practices have proven unwieldy, expensive for all involved, slow and contentious. Vendors have been discouraged from participating by the rigidity and inflexibility of the acquisition process. Prices are higher than need be in order for bids to cover excess risks imposed by unnecessary contract terms, conditions and requirements. Important procurements, begun under conventional means (without negotiations) under PCC § 12100, sometimes have not succeeded.[2] In a few instances, no qualified bidders have submitted a responsive proposal. In other examples, there is less robust competition than desired. The State also has been disappointed where received bids were priced higher than expected. When these problems occur, and where negotiations have not been used, long delays can result and the State on occasion has declined to make an award or canceled a solicitation.

Unsuccessful procurements are expensive to vendors and to the State alike. With fiscal budgets tight, and many needs for improved government services to be met, the State should seek to improve its acquisition practices. California has legislative authority in PCC § 6611 to introduce agility and responsiveness to its public contracting and encourage innovation and strong competition, through the use of "negotiations" processes. Therefore, this White Paper concludes that:

- DGS should make greater use of PCC § 6611 and encourage negotiated procurements.
- Better policies are needed to guide utilization of this authority. Existing procedures are insufficient and need to be thoroughly reworked.
- Much more transparency is necessary and appropriate.
- Respective roles and responsibilities within the Executive Branch should be clarified
- Because telecommunications have great importance and represent sizable expense, the Legislature should act to extend negotiations authority to the Technology Agency.

[2] PCC § 12100 provides that all contacts for the acquisition of information technology goods or services, whether by lease or purchase, shall be made by or under the supervision of the Department of General Services."

III. The Statutory Authority for Negotiations (PCC § 6611)

A. Legislative History

PCC § 6611 part of a budget trailer bill, AB 1756, in 2003 and has remained in effect ever since.. The Assembly Floor analysis provided in July 2003 offered some detail regarding the portion of the budget bill that would become PCC § 6611 the following month. The Analysis explained that PCC § 6611 would exempt DGS "from various provisions in order to achieve improved levels of performance by focusing its efforts on enhancing the value of the services it delivers as a fee-for-service organization. These provisions are intended to assist DGS in providing services on a cost-competitive basis.

Later in 2003, the law was amended as part of AB 296. The amendments, introduced in September of that year, did not change the substance of the law. No discussion of the purpose or intent of PCC § 6611 were included in the legislative histories of AB 296.

When PCC § 6611 first went into effect, it included the following, "sunset" language in subdivision (d):

> This section shall become inoperative on July 1, 2006, and, as of January 1, 2007, is repealed, unless a later enacted statute, that is enacted before January 1, 2007, deletes or extends the dates on which it becomes inoperative and is repealed.

In 2005, however, AB 139, another budget bill, successfully sought to delete this section. Again no Senate or Assembly analysis discussed PCC § 6611.

At the same time budget discussions were occurring, a Senate Bill, SB 837, sought to amend the Public Contract Code to provide for an alternative bid protest procedure. Language discussing the alternative bid protest procedure replaced the time limitation that was originally subdivision (d) of PCC § 6611. PCC § 6611(d) now reads:

> An unsuccessful bidder shall have no right to protest the results of the negotiating process undertaken pursuant to this section. As a remedy, an unsuccessful bidder may file a petition for a writ of mandate in accordance with Section 1085 of the Code of Civil Procedure. The venue for the petition for a writ of mandate shall be Sacramento, California. An action filed pursuant to this subdivision shall be given preference by the court.

The analysis of PCC § 6611 offered by the Senate in connection with SB 837 merely defines the text of the law. The Assembly Committee on Appropriations analysis offered slightly more information, providing the view of DGS on how negotiating flexibility had been used to the State's advantage. DGS supported the use of negotiations authority:

> "The department provided several examples where this flexibility has been used to leverage the state's buying power to the fullest extent in order to reduce overall contract costs."

Finally, the Senate Floor analysis explained that the argument in favor of adopting PCC § 6611 permanently (as supported by DGS) was to "make permanent provisions of law permitting DGS to use a negotiation process for contracts involving goods, services, IT, or telecommunications, and to renegotiate existing contracts, under specified conditions." There were no arguments presented in opposition to making PCC § 6611 permanent.

B. The Statutory Language

By PCC § 6611, the Legislature granted broad authority to DGS to use a negotiation process for many of the needs of the State of California – including "goods, services, information technology, and telecommunications."[3] That authority was extended "[n]otwithstanding any other provision of law" – meaning that DGS has the authority to proceed with negotiations irrespective of any other statutory or regulatory restriction that otherwise might apply. The Legislature made this exceptional grant of authority to DGS because it believed that the State had encountered "business problems," in contracting for goods and services, that justified departure from the norm that awards would be made on the basis of contract terms and conditions provided on a non-negotiable, "take-it-or-leave-it" basis.

As concerns *new* contracts, the statute permits DGS to use negotiations where *any* of four, broad conditions are present, i.e., when use of negotiations will enable the State -

- to better define the "business purpose or need" of a procurement;
- to identify different types of solutions to fulfill a known business need or solution;
- where the purpose or need was complex and costs of a bidder's response is high; or
- to ensure receipt of "best value" or the "most cost-effective" solution.

The statute, at § 6611(b), also permits negotiation of amendment to *existing* contracts, where "in the best interests of the state." Amendments may be made to the *terms and conditions* and to the *scope* of work of existing contracts for goods, services, IT and telecommunications, whether or not the original contract was competitively awarded. DGS may negotiate such amendments "on behalf of itself or another state agency."

[3] Telecommunications procurement now is the responsibility of the Office of Technology Services, a unit of the Technology Agency. Government Code § 11541. The authority of DGS to use PCC § 6611 still encompasses "telecommunications," however. While this suggests that DGS could approve or delegate use of negotiations for telecommunications procurement, that would be cumbersome and could invite legal question as it would require the involvement and approval of DGS in actions the Legislature now has assigned to the Technology Agency.

At § 6611(c), the statute require that DGS establish procedures and guidelines for the negotiation process to be used, under § 6611(a), for new contracts. The procedures are to provide a "clear description of the methodology" DGS is to use to evaluate bids where a negotiation process may be used. The procedures may include provisions which authorize DGS to "receive supplemental bids after the initial bids are opened." This provides authority, on its face, for DGS to request "best and final offers" or additional bids subject to negotiation, in the event of dissatisfaction with original bids.

In public contracting, conceivably, use of negotiations could prompt a "bid protest" by a disappointed bidder. For example, a vendor might object that a contract, as awarded, differed materially from what it could reasonably expect at the time requirements were established by the solicitation. Or, a bidder might argue that the evaluation of its proposal was unfair or that a rival was allowed concessions not made available to it. These typical grounds for protests all fall under the rubric of "unfair competition" and proceed on a premise that it is as much in the State's interest as that of its vendors that public procurements be fairly conducted, on a "level playing field," and free from undue influence, bias or favoritism. By operation of PCC § 6611(d), however, California law states that an unsuccessful bidder shall have "no rights to protest" the results of the negotiating process and has only the right to proceed by writ under Civil Code of Procedure § 1085.

IV. DGS Administration of PCC § 6611 – Guidelines & Procedures

Pursuant to § 6611(c), DGS issued Administrative Order 05-01 on February 7, 2005. Presently, administration of PCC § 6611 is incorporated in the State Contracting Manual (SCM).[4] Under the "Negotiations Process Guidelines" if one or more of four conditions, the 'Bases for Negotiations," are satisfied, then DGS may initiate negotiations. The four conditions, in the SCM correspond to PCC §§ 6611(a)(1) – (4) and concern only *new* contracts. The SCM contains no guidance on the use of a negotiations to amend *existing* contracts under § 6611(b).

The SCM addresses the use of negotiations by restating the statutory conditions for use and by reference to short, illustrative examples.[5] Beyond these examples, *policy* guidance is sparse and the Guidelines do not address crucial questions such as *when* should negotiations be utilized, *what* conditions or benefits justify negotiations, *how* negotiations can be used to encourage competition, or *why* negotiations will advance the State's needs or save it money.

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[4] *See* State of California, State Contracting Manual (SCM), Revision 4 (July 2010), at Volume 2, Chapter 2 ("Procurement Planning"), Section B, Topic 6 ("Negotiation Process Guidelines and Procedures Under Public Contract Code Section 6611"), *available at* http://www.dgs.ca.gov/pd/Resources/publications/SCM2.aspx.

[5] For example, of the four conditions which justify negotiations, one is where "the business need or purpose of a procurement can be further defined as a result of a negotiation process." PCC § 6611(a)(1). The SCM, at 2.B6.2, provides the following "example:"

> **Example.** The State has identified a general need for a new technology; however, market research indicates the technology may have multiple, unanticipated, secondary benefits. The State would be able to further define its business needs for the technology by conducting direct negotiations with the contractors who are subject matter experts

The SCM does inform state agencies and departments that, during the planning for an acquisition, they may consider whether to use a negotiation process and are to contact DGS for assistance and include language in a solicitation advising bidders of intent to utilize negotiations. The request to DGS to implement negotiations must describe the procurement, explain how the procurement meets the State's needs, and explain why the procurement meets one or more of the four conditions which constitute the "bases for negotiations."

We believe this guidance falls short of establishing clear standards or promoting consistency in utilization. Moreover, issues of transparency and accountability are present because stakeholders do not have a common or informed understanding of what circumstances justify the use of negotiations, who makes such a decision or what may be negotiated.

Though Executive Order S-08-09 promotes transparency in state contracting, the utilization of PCC § 6611 is little known, reported or examined. The SCM, at item (13) of the "Negotiation Process Guidelines, provides that DGS is to maintain a "written record describing the procedural steps taken in the negotiation process and the basis for final contract award." While it may maintain such records as a matter of internal administration, DGS does not report publicly on use of negotiations. So far as the author has been able to determine, there is no regular mechanism today by which DGS informs the public or interested parties, including the Legislature, of current utilization of PCC § 6611 and any benefits like improved competition or reduced costs that have resulted.

Thus, the current treatment of PCC § 6611 in the SCM falls short of what the law requires. At § 6611(c)(1), that statute provides that DGS "*shall* establish the procedures and guidelines for the negotiation process" and these "*shall* include, but not be limited to, a *clear description* of the methodology that will be used …." (Emphasis added.)

V. Utilization of a Negotiations Process under § 6611

When PCC § 6611 was enacted, in 2003, the State then (as now) faced budget pressures. The Legislature, according to former state officials who participated in the process, enacted this legislation as a way to *save money through better contracting practices*. Information technology and service contracts can present very complex requirements and risks. TechAmerica members report that there has been increased use of negotiations, authorized by PCC § 6611, in years following 2008. [6] Member companies generally believe that use of negotiations in has produced positive results for both the State and vendors. [7]

[6] As noted, there is no official report or other government resource or information source that collects information on the use of "negotiations" in California procurements. As a result, the observations here are the product of informal interviews, conducted over the past 2-3 years with information technology companies that are TechAmerica members. This is not a "scientific" method of review and no assurance can be provided that this information is representative of the actual experience with PCC § 6611.

[7] Not all companies, however, share this view. Concern was expressed that the flexibility of a "negotiated" approach to state procurements is accompanied by a greater risk of unfairness or that favoritism will be applied in the award of state contracts. One comment was that PCC § 6611 could be misused to the disadvantage of companies based out of state that lacked a presence in Sacramento. Several companies observed that care should

There are only a few known examples where PCC § 6611 has been used throughout the solicitation and award process. Nonetheless, many TechAmerica members believe that building a negotiations process in the *design* of a new procurement can encourage more vendors to participate, facilitate innovation, foster creative and aggressive competition, and produce ultimate and material savings to the State. As envisioned by the express terms of the statute, negotiations can assist the State to better understand its "*business need or purpose*," identify *different types of solutions* to fulfill its needs, *better define the State's requirements* so as to minimize the costs of proposal preparation and assure responsive bids, and for the overarching purpose of achieving a "*best value*" solution. When negotiations are used only narrowly, or just to "fix" a particular barrier to concluding negotiations, the potential value sought by the statute is never realized.

Fact-finding in support of this White Paper shows that negotiations, under PCC § 6611, most frequently have occurred at the end of a procurement process, to address specific problems encountered after procurements were started using conventional methods.[8] Even when introduced at a later stage, for such limited purposes, negotiations enabled the State to reach agreement with vendors that *reduced price* by *adjusting contract scope* and better managing allocation of risk by *revising key terms and conditions*. Using negotiations in this way enabled the State to salvage procurements that otherwise would have failed to result in award. Vendors also cited examples of procurements, where negotiations were not used and that did not succeed, which could have succeeded had negotiations been used. Overall, the evidence is that use of negotiations has enhanced competition and led to contract savings and that innovative solutions have been offered when negotiations are used to permit alternate approaches to the State's needs. However, DGS has used negotiations relatively infrequently and generally for narrow purposes, thus limiting the benefits it could have realized through negotiations.

A. Negotiations to Achieve Innovative Solutions

New solicitations with innovative structure were used, under PCC § 6611 authority, for the 2009-2010 rebid of the services component of the 21st Century payroll project (now called MyCalPAYS) conducted for the State Controller's Office, and more recently in 2011-2012 with the Fi$Cal procurement conducted by the Department of Finance, the State Controller's Office, the State Treasurer's Office and DGS. In the rebid of the 21st Century project, the State used negotiations authority to secure the participation of vendors who likely would have declined to bid had the State been unwilling or unable to accommodate changes to critical terms and conditions that vendors perceived as risk-critical. In other situations, such as the California Longitudinal Teacher Information Data Education System (CalTIDES) of the California

be taken to ensure "downstream" competitive opportunity when PCC § 6611 is used to negotiate and conclude an IT contract. Such concerns about fairness, and propriety, have special significance in that PCC § 6611(d) removes contracts awarded through negotiations from any administrative bid protest right.

[8] In a number of reported examples, DGS needed a price reduction but vendors needed relaxation of onerous terms and conditions to reduce risk and facilitate price cutting. DGS proposed that vendors agree to a final price, reduced from the best previous offer, but negotiate the terms and conditions revisions only after contract award. Vendors objected to this practice because it requires risk management decisions before final agreement on terms and conditions that may present material economic risks. Some vendors will not participate in a procurement unless they know in advance that satisfactory terms and conditions can be achieved.

Department of Education, PCC § 6611 enabled the State to obtain price reductions (necessary to satisfy budget and approval limits) through negotiated adjustments to scope of work, terms and conditions, and otherwise.

The rebid of State payroll project (MyCalPAYS), using PCC § 6611, followed an earlier competition in which several leading companies declined to bid because of concerns about terms and conditions. In the rebid, the State constructed a RFP process which was iterative and "conversational," involving extensive dialogue with the participating vendors. After a qualification phase, the State conducted initial negotiations *before* final proposal submission, during which each vendor identified a number of terms and conditions, and other business issues, which they asked to have changed from the State's original approach. The State prepared two alternative sets of terms and conditions, each reflecting a different combination of vendor suggestions, and each vendor was permitted to choose among the "standard" (or original) set of terms and conditions or one or the other of the two offered alternatives. Also innovative was the use of a multi-step process. The first step was the qualification phase leading to the "downselect" to two vendors. In the second step, the vendors were asked to evaluate certain project artifacts and provide recommendations on key design issues (for which the vendors received modest funds) and to prepare their final proposal in consultation with the State Controller's Office. The negotiation process culminated in two responsive proposals and selection and award to a solution provider.

B. Negotiations to Adjust Scope to Achieve Necessary Price Reduction

Negotiations have been used to reduce scope requirements in order to reduce bid price. In reported examples, the State initially received bids at prices higher than planned for or budgeted. Having reserved the right to use negotiations under PCC § 6611, in the original solicitation, the State acted to negotiate with bidders in order to resolve the pricing problem, rather than terminate the solicitation without award. In several examples involving high dollar value contracts, negotiations at the later stages of a procurement succeeded in "saving" a procurement that otherwise would not have concluded with any contract award.

When negotiations occur at a late phase, a combination of measures often were employed, including adjustments in the assignment of respective duties between buyer and seller, and reductions in the scope of required work. Interviewed companies commented that these changes allowed negotiated tailoring of work to conform to the available budget. In some situations, the State decided to own (or use its) existing facilities and make these facilities available for use by the vendor rather than requiring the vendor to assume such capital costs. In others, the State relaxed certain non-critical objectives or narrowed performance requirements, enabling the vendor to offer significant price reductions. Changes to the negotiated scope, statement of work, or deliverables (particularly in combination with adjustments to terms and conditions) reduced the vendor's perception of performance risk and permitted the vendor to eliminate costs that it otherwise might have assigned to cover such risks. These positive experiences suggest the mutuality of benefits achievable through a negotiations process.

Also noted is that in a number of instances where PCC § 6611 was employed, and where more than one bidder was present, the State followed negotiations with a request for a new "best

and final" offer. Our anecdotal information indicates that this approach was a successful method to obtain reduced prices for the State while sustaining competition.

The State has successfully used negotiations to adjust scope (or requirements) in order to realize a contract within budget objectives. Holding negotiations "in reserve," however, may not be the optimum. Some companies assess the relationship between project risk and reward on the basis of the RFP. Where serious issues of scope or risk are presented, some companies will not find it worth participation if there is only a *possibility* they of a *later* opportunity to negotiate the key issues. If a procurement is initiated under PCC § 12100 – without negotiations – a vendor risks exclusion should it take any exception to stated requirement or contractual terms and conditions. Except where *negotiations* are authorized under PCC § 6611 and used, taking such exceptions in a final proposal considered a "conditional bid" or "failure to conform to material requirements of an RFP," in either case a cause for disqualification.

C. Negotiations to Make Necessary Changes to Terms & Conditions

Contract terms and conditions can have decisive significance to many companies. Some terms are perceived as creating enterprise-level risk or exposing technology-driven companies to the loss of critical rights to IP. Issues of terms and conditions (T&Cs) have proven, time and again, to be sources of great concern to companies and contention between companies and the State. A reason for enactment of PCC § 6611, in 2003, was to give DGS the tool to negotiate where prudent and necessary. When the State uses this tool, it can overcome at the bargaining table issues with terms and conditions that otherwise could doom a procurement.

In reported examples, the State successfully has used PCC § 6611 to negotiate adjustments to key terms and conditions. Several very complex and important IT contracts were awarded where negotiations were crucial. The perspective of TechAmerica members is that the State remains too rigid on T&Cs and only infrequently, and without consistency, is willing to negotiate.

Most IT procurements incorporate the State's "model" terms and conditions, Form GSPD-401 IT, which resulted from a cooperative effort, in 2003, of the State and a predecessor organization to Tech America. Industry generally supports these "model" terms, but issues with terms and conditions arise nonetheless. In some situations, often without explanation, a department or agency, or DGS, has varied from the "model" terms. In other situations, the "model" terms draw objection or new issues arise that are not covered by these terms.

Where the State insists on T&Cs that vendors perceive as causing excess cost or risk, or imposing duties they cannot fulfill, leading companies have declined to participate. In several procurements, including some of greater importance to the State, companies have spent months (or even years) and millions of dollars to prepare a proposal only to be disqualified because exception was taken to terms and conditions. Greater willingness to negotiate terms and conditions can avoid this result, will motivate leading companies to bid for California work, and will produce better price competition. Fair competition is present where the State allows all vendors to identify issues with terms and conditions and is willing to negotiate acceptable outcomes rather than insist that every bidder conform to terms as dictated by the State.

Generally, TechAmerica members react positively to utilization of PCC § 6611 to permit negotiation to key terms and conditions, particularly if the opportunity is afforded at the outset. Negotiation of terms and conditions are important to managing the risks posed to vendors, and it is clear that there can be important price benefits, and savings to the State.

D. Negotiations to Solicit Alternative Solutions

PCC § 6611(a)(2) authorizes the use of negotiations to "identify different types of solutions." This authority has been used only rarely. Using negotiations to seek alternative solutions is especially important should the State, for example, seek more "benefit-based" contracts (where payments to the vendor are derived from success in achieving improved financial results for the State) or "solution-based" awards (where the vendor may be paid in reflection of the success of services rendered against an objective baseline). In fiscally difficult times, the State should encourage innovative solutions that meet its business needs and cost less.

Several TechAmerica members expressed wariness, however, because it can be very costly to participate in an innovative procurement process and the outcome is often uncertain. Also of concern to TechAmerica members is that the risk of unfairness increases with the degree of novelty employed in the procurement process. As innovation increases, in the range of solutions offered, the hazard is present that vendors will bid without a common understanding of the State's requirements. Another stated concern is that encouraging "alternative solutions" puts the State at greater risks because vendors may promise more than they can deliver.

At the same time, the State's budget problems and IT needs powerfully argue that vendors should be encouraged to think "outside the box" and enabled to offer truly innovative solutions which produce the best value at least cost to the State. This conundrum can be managed by improvements to the policy and process by which § 6611 is employed. If the State intends to invite alternative proposals or use similarly innovative or unconventional procurement strategies, it should employ PCC § 6611 from the outset, and ensure all would-be participants are well aware of the strategy and process to be employed. If vendors are fully informed of what is expected of them, and told of boundaries within which they are free to innovate, then fundamental fairness would be respected. Fair competition can occur even in the context of negotiations used to encourage and develop alternative solutions to the State's business needs.

Negotiations under the authority of PCC § 6611(a)(2) could be especially important should the State seek further to explore cloud-based services and solutions. Today, there is much attention to the potential promise of cloud computing to assist states and local governments to deliver enhanced technology-enabled services at lower cost.[9] Realization of this opportunity can present a challenge where the nature of cloud services is at variance with traditional requirements and issues are presented of alignment with existing laws, regulations, policies and practices. Since a negotiations process can be used "[n]otwithstanding any other provision of law" by PCC

[9] TechAmerica in February 2012 released a study on this important subject, "The Cloud Imperative – Better Collaboration, Better Service, Better Cost – A Comprehensive Guide for Best Practices in Cloud Computing for State and Local Governments." This study is available through the TechAmerica website at http://www.techamericafoundation.org/slg-cc-download.

§ 6611, DGS should be encouraged to utilize this authority to accommodate cloud solutions in prospective IT acquisitions.

E. Negotiations to Amend and Extend Critical Current Contracts

PCC § 6611(b) provides that a department may negotiate *amendments* to terms and conditions, including scope of work, of existing contracts when "in the best interests of the state." The utilization of this authority must be managed prudently. Potential harm could be suffered to the integrity and efficacy of the process if existing contracts could be changed or extended in ways that discourage competitors and competition or which promote favoritism.

The author of this White Paper was informed of one situation where PCC § 6611 was used to permit a negotiated extension of an existing contract. (There may be other examples.) The department in question was seeking to replace a legacy system with a new and more capable system. The procurement ran into problems reflecting budgetary issues, as well uncertainties regarding applicable federal requirements, with the result that the department could not conclude the new procurement before the expiration of the existing contract. PCC § 6611 was used to negotiate a "refresh" of the old contract that permitted interim adoption of new hardware and provision of additional services. PCC § 6611(b) should be used, selectively, to extend existing contracts if more time is needed to plan and execute a new procurement.

F. Missed Opportunities for Negotiations

Several vendors cited examples of state procurements attempted, during the past several years, which were not successfully completed. Examples were cited where RFPs were released that produced no bids, one bid, or fewer bidders than the State hoped for. Some procurements were cancelled or withdrawn when insufficient bids were received or bid amounts were deemed too high. Also noted were procurements on which multiple addenda were released, changing requirements or terms and conditions. This process was characterized by significant delays and frustration for "buy" and "sell" side alike. Delays of well over a year were reported. Not to be neglected is the substantial cost, both to the State and to its vendors, of these protracted exercises. These costs can be so great as to discourage vendors from future participation, especially if, for example, a vendor assembles a key program team and then must keep it intact for an extended period of time. Even worse is the where DGS cancels a procurement for insufficient competition or after bids, as received, are perceived as too costly or non-responsive. In many if not most such cases, early introduction of negotiations could have avoided this result.

VI. Uncertainty as to Executive Branch Roles & Responsibilities

Among industry representatives contacted, there was considerable uncertainty about the respective roles and responsibilities of officials in the Technology Agency, DGS, and the various departments and agencies. Many of those interviewed reported distinctly different impressions of how decisions were made among agencies and departments, and which among them took the lead. Similarly, the role of DGS vis-à-vis the department varied. Several vendors reported that they negotiated directly with the department rather than DGS and that DGS was in a background role. Other vendors, on the other hand, reported that the Procurement Division of DGS took the

lead role in negotiations. Several vendors commented that different DGS procurement analysts exhibited significantly different understanding of, and support for use of, PCC § 6611 for negotiations. A theme of several comments was that decisions tended to be based on the individual DGS procurement analyst or responsible lawyer from the State's Office of Legal Services (OLS). Because of inconsistencies in expertise and understanding, vendors did not have a consistent experience when PCC § 6611 was employed. Strengthened policies and procedures, and better training, should go a long way to reducing the extent to which negotiation decisions turn upon the attitude or competence of individuals.

Resource constraints, particularly at DGS, appear to limit the ability and effectiveness of use of negotiations. One comment was that DGS lack of resources was "the reasons for many of the delays [in concluding negotiations]" and that limitations in staffing (numbers of assigned personnel as well as well as their experience and ability) were part of the reason that the State was unable to leverage § 6611 fully. Different views also were expressed regarding the role of the OLS. Several companies were particularly complementary of some OLS attorneys, crediting them with key roles in successful negotiated outcomes. Other companies saw OLS as risk-adverse and uncomfortable with the authority granted by the statute, and therefore wary of using it. Better training and further elaboration of policies and procedures can address this concern.

One interviewee commented that state personnel involved in negotiations should conduct a "lessons learned" review and "regularize the steps and process." It seemed that departments did not fully or consistently understand when PCC § 6611 could or should be employed. Nor were vendors sure of whether they could, or should, take the initiative of proposing to a department that a particular procurement problem be addressed via § 6611 negotiations. These observations underscore the recommendation that the existing SCM Guidance be replaced in order to conform to the mandate of the statute, at PCC § 6611(c), that DGS establish procedures and guidelines for the negotiations and state a clear description of the methodology.

Some vendors reported experiencing significant delays in negotiated procurements, with little communication or explanation from the State. A common perspective of the vendors was that there should be greater transparency into the decision-making and administration of § 6611 authority and greater predictability in how the authority will be employed.

VII. Fairness Concerns; Absence of Protest Rights

The use of PCC § 6611, to negotiate a new contract or amend an existing contract, can produce perceptions of arbitrary, unfair or unwise results. Several vendors interviewed expressed some frustration that a competing vendor could be awarded a contract under § 6611 on terms, or with changed scope, different than what they had understood the State to expect when the competition began. The risk of this problem, namely, that the award (after negotiations) differs materially on terms and scope than what was required by the solicitation, is most acute

when PCC § 6611 is invoked for negotiations *after* bids are received on an acquisition initiated via a conventional RFP under PCC §12100.[10]

Notwithstanding these concerns, the great majority of TechAmerica member companies contacted endorsed use of the negotiations authority. Though the particulars of their reasoning vary, a general theme was that the legacy, rigid method of procurement is simply too slow, too expensive and too likely to produce unaffordable or otherwise unsuccessful procurement results. Many companies commented that a procurement should be considered "fair" if all parties eligible and interested had a common understanding at the outset that there could be negotiations, and the scope and objectives of such negotiations. A perception of unfairness can arise, however, when negotiations are introduced only on an "opportunistic" basis after initial proposals are received. Management of these risks argues for greater disclosure of policy, process and results, as well as greater regularity and consistency in the way in which PCC § 6611 is authorized and used.

As noted, PCC § 6611(d) divests bidders, on contracts awarded through a negotiations process, from any administrative protest right. Instead, the remedy of the unsuccessful bidder is to file a petition for writ of mandate, in Superior Court, under CCP § 1085. A number of companies expressed negative views on the present formulation of the statute which denies an unsuccessful bidder the right to protest when a negotiating process is used. Writ litigation can be complex, expensive and time-consuming. It is not an effective or accessible remedy for review of potential errors or omissions in the State's conduct of negotiated procurements.

PCC § 6611 has been used for complex, high value procurements. The recommendation of this White Paper is to increase use of this authority and for negotiation of more State contracts. Where the State uses negotiations process, it serves its own purposes as well as those of its vendors. It should not be a condition to negotiations that participating bidders are denied *any* means to present objections or protest selection actions short of filing suit in Superior Court.

TechAmerica well understands that bid protests can be abused and, when abused, can frustrate orderly accomplishment of public program objectives. A fair, expedient and objective review mechanism, however, does serve an important public purpose of protecting the integrity of the procurement system and guarding against abuse, bias, favoritism or serious misjudgment. The Legislature may wish to revisit the statutory bar on protests on procurements accomplished under PCC § 6611. Alternatively, DGS can create an internal review mechanism short of a "protest remedy" as precluded by the present statutory language.[11]

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[10] The situation can be even more problematic where a conventional RFP produces but a single bid, and then negotiations occur over scope or terms in order to conform the price of that bid to what the State has budgeted.

[11] Ostensibly, DGS supports the proposition that IT contracting should provide a right to protest an award. *See* Presentation of Fred Klass, Director, Department of General Services, 7th Annual State of California Technology Executive Briefing, September 8, 2011, at 4, *available at* *http://www.techamerica.org/Docs/fileManager.cfm?f=techamerica%20fk%20presentation%209-8%20final.pdf*.

VIII. Recommendations

Several recommendations here are presented for consideration by the Executive Branch and the Legislature of the State of California.

1) Extend Negotiations Authority to Telecommunications

Now that responsibility for telecommunications procurement resides with the Technology Agency, the Legislature should act to assure that negotiations authority is available to the Technology Agency. This matter is timely and important because the current CALNET 2 contract expires in January 2014 and a new RFP for CALNET3 is expected in the fall of 2012.

2) New Policies and Procedures Should Replace the SCM Guidelines

The existing SCM Guidelines on PCC § 6611 fall short of what the Legislature required, frustrate use of negotiations and limit realization of the statute's objectives. The Guidelines should be reworked and replaced with thorough, more informative policies and procedures. All stakeholders, including the vendor community, should have an opportunity to provide input. Additionally, formulation of new policies and procedures should be a cooperative effort among DGS and the Technology Agency.[12]

- New policy should be issued – applicable to all procurements – describing the processes to be applied in making and documenting decisions to use the 6611 negotiations authority, as well as the obligations to periodically report on the results.

- The decision whether to use negotiations should be consistent with policies established by the Technology Agency or the Procurement Division of DGS.

- Operational responsibility, for the conduct of procurements where negotiations are used, should be clearly assigned to DGS or the Technology Agency, as applicable, or to departments, if under delegation. The role of the Technology Agency, when it participates in IT contract negotiations, should be described, and the respective roles of the Technology Agency and DGS should be articulated.

- Respective roles within DGS, particularly of OLS and the Procurement Division, should be described and documented.[13] Procedures or practices should be established to govern the role of OLS, e.g., in the decision to utilize negotiations, documentation, oversight of the process, and management of or support for the negotiations.

[12] As recognized at Government Code § 11545(b)(2), the state Chief Information Officer (CIO) is to consult with the Director of DGS and with the Director of Finance, "concerning policies and standards." The Legislative grant of negotiations authority, however, did not treat IT differently from other state contracts and therefore consistent policy and practice for use of negotiations should apply to IT and non-IT contracts.

[13] PCC § 12104(c) requires review by OLS of all IT requests for proposals prior to release to the public.

Improved documentation should inform agencies and departments and reduce inconsistencies. Attention should be directed to making clear assignments of responsibilities, in part to avoid dissension and in part to facilitate the training of personnel. By definition, the use of negotiations does impose certain added demands upon the State. Therefore, sufficient, capable resources should be assigned to projects where PCC § 6611 is utilized.

3) Involve the Vendor Community in Setting Policy and Procedures for Use of Negotiations

Vendors have important interests and input to the utilization of negotiations authority, whether for new procurements or amendments to existing contracts. In addition, PCC § 12104(a) requires the public announcement of "policies, procedures, and methods" for the acquisition of information technology. PCC § 12104(d) recognizes that representatives of the IT industry are to participate in the issuance of standards for IT procurement. The subject of "uniform standards" for IT procurement now is addressed at SAM Chapter 5200. SAM 5230 articulates a number of standards that are to apply to all IT procurements, one of which is that "[a]cquisitions shall be conducted in a professional manner that promotes direct, straightforward, and cooperative communication with the supplier community." At SAM 5230, one of the "general principles" for IT procurement is that the State "communicates clearly and consistently from procurement to procurement with interested parties so that they understand its goals."

Despite these principles, today there is considerable room for improvement in the communication to vendors of how, for what purpose, and with what effect, the State uses PCC § 6611 negotiations authority. Transparency considerations, as well as the cited provisions of the Public Contract Code and the SAM, call for the involvement of the vendor community in prospective efforts to improve, describe, define and document the utilization of negotiation authority for IT and non-IT procurements. TechAmerica can play a significant role in such a cooperative effort, as it has in past procurement reform initiatives.

4) A "Determination and Finding" Process Should Accompany Utilization

DGS should establish a formal requirement of a documented "determination and finding" (D&F) to justify utilization of contract negotiations under the authority of PCC § 6611. Doing so would promote a consistent process, establish objective standards, provide a basis for oversight and assure accountability for utilization decisions.

In areas of federal procurement, a D&F process is used where Congress has established important statutory objectives but extended to executive branch personnel the authority to exercise their discretion to vary from statutory norms. Agencies adopt D&F-type regulations in order to inform their personnel on the level of the government officer empowered to make decisions, content expected or required for a sufficient justification, policy and practice considerations to be addressed, and the nature of documentation to be prepared and reviewed. A useful example might be found, for example, in the administration of statutorily permitted exemptions from the ordinary requirement, of the Competition in Contracting Act, 41 U.S.C. § 253 ("CICA"), that federal requirements be awarded on the basis of "full and open competition." CICA permits seven exceptions to the requirement of competition. The

Department of Defense, at FAR Subpart 6.300, has promulgated regulations which proscribe the policies and procedures for contracting without full and open competition. Each of the seven statutory grounds is addressed by regulations specifying particular principles and considerations. The use of any exception must be accompanied by "justifications" the content of which is established by the regulations, e.g., at FAR 6.303.

There are a variety of examples of such "justifications," or D&F, which may be considered if a comparable process is to be applied to the non-routine act (in California) of using a negotiations process in the award of a public contract. Describing the process and defining the requirements serves many useful purposes, among them clarification for departments and agencies as well as demystifying the process for the vendor community. A formalized, regularly applied process, with documentation prepared in accordance to established standards, satisfies current expectations of transparency and has obvious and important benefits for accountability.

5) Measures Should Be Taken to Collect Information on Use of PCC § 6611 and to Assure Transparency and Accountability

State Executive Order S-20-09 describes transparency as "fundamental to promoting efficiency and effectiveness in government and strengthening the democratic process by giving citizens enough information to reach their own conclusions about how their tax dollars are being spent."[14] For many reasons, PCC § 6611 should be included among activities which are known to the public (and vendor community). PCC § 6611 often is used to deal with budget issues or to solve other business problems which confront the State on important programs and affect key services and functions. The public's interest in the results is self-evident. Further, each use of PCC § 6611 has implications for the procurement system and is important to participating vendors.

A formal mechanism should be installed to collect information about utilization of PCC § 6611 and to evaluate results of its use. Such reports, for illustration, might provide documentation of the reasons for use of PCC § 6611, a summary of changes accomplished through negotiation, a discussion of the respective roles of the Technology Agency, DGS and the departments, an assessment of the benefits realized through negotiations and recognition of "lessons learned." Such a report should be prepared annually and coordinated among the Department of Finance, the Technology Agency and DGS. The report should be furnished to the Legislature and be publicly available.

Finally, the State should improve information communicated to prospective and actual bidders when PCC § 6611 is invoked to permit negotiations. Many vendors commented that they were largely uninformed about the decision to use negotiations or what process to expect. No constructive purpose is served by keeping vendors uninformed or misinformed. Certain information, of course, could be kept confidential if it would jeopardize the integrity of the procurement, impair state internal functions or compromise vendor proprietary data.

[14] The 2008 Report of the Little Hoover Commission stated, at p. 32: "The state CIO must provide transparency and demonstrate results. The state CIO must regularly supply the Legislature, interested parties and the public with ample and relevant information."

6) Increase Utilization of PCC § 6611 to Permit Negotiations in Order to Realize Innovative, Cost-Effective Solutions and Savings

Negotiations can achieve needed savings on many contracts – including telecommunications contracts if authority is available for this purpose. Early consideration and use of negotiations should motivate vendors to offer their most innovative and best-value solutions. Use of a negotiations process enables the State to realize savings through new contracting techniques, such as benefits-based or solutions-based contracts, and can serve as the basis to employ cloud-computing solutions where long-term savings may be achieved. Rather than using a negotiations process only sparingly, if at all, in planning for new procurements DGS should invite vendor suggestions on how use of negotiations can reduce program costs and otherwise benefit the acquisition process. Vendors should be asked to describe particular issues suitable for negotiation, to propose opportunities for savings and innovation, to identify potentially critical terms and conditions, and the like. Departments also should be encouraged to raise business needs or other conditions which they believe may justify use of negotiations.

PCC § 6611(b) authorizes use of negotiations to modify *existing* contracts when in the "best interests" of the State. DGS should examine where it can use this authority to realize immediate savings through such negotiated amendments, recognizing the principle that such negotiations should preserve (and not preclude) future competition. DGS may wish to consider incorporating a contract clause in future contracts to encourage vendors to submit proposals for negotiated changes where vendors identify and quantify expected performance improvements, cost savings, schedule improvements or other objective benefits to the State.

IX. Conclusion

Public Contract Code § 6611 is a powerful tool that enables California to achieve savings, improve competition and accelerate the public contracting process through the use of negotiations. Responsibility for its use resides with DGS. While negotiations authority has been employed over the past several years, with generally successful results, DGS has been reluctant to use negotiations in California procurements and has treated the authority of PCC § 6611 with reluctance bordering on aversion. Only in a comparatively small number of instances, such as the new State payroll project and the more recent Fi$Cal procurement, was PCC § 6611 invoked at the outset to frame and structure the competition. More frequently, negotiations have occurred only at the latter stages of procurements that were started using conventional, rigid techniques. The State can realize savings, get more participation from vendors, and attract more innovation in solutions, by using 6611 authority earlier in the process.

The State also can negotiate amendments to existing contracts when is its best interest. This authority, used infrequently to date, should be used more often, and vendors should be encouraged to offer revisions to contracts if the State will save money or achieve better value.

The present administrative guidelines governing negotiations should be replaced to better inform state departments and agencies, as well as vendors, about the policies and objectives for negotiations, and practices to be employed. Greater transparency will be achieved through improved, regular, and formal reporting of the use of a negotiations process.

TechAmerica supports the objective of the State of California to satisfy its services and solution needs at reduced cost and with a more effective procurement process. Greater and better use of negotiations in public contracts will help to achieve these aims.

Rather than being the rare exception, California should move in the direction of making greater, consistent use of negotiations authority. Further, TechAmerica supports the proposal currently before the Legislature to extend statutory authority for negotiations to procurements conducted by the Technology Agency.

APPENDIX I: PUBLIC CONTRACTS CODE § 6611

(a) Notwithstanding any other provision of law, the Department of General Services may, relative to contracts for goods, services, information technology, and telecommunications, use a negotiation process if the department finds that one or more of the following conditions exist:

(1) The business need or purpose of a procurement or contract can be further defined as a result of a negotiation process.

(2) The business need or purpose of a procurement or contract is known by the department, but a negotiation process may identify different types of solutions to fulfill this business need or purpose.

(3) The complexity of the purpose or need suggests a bidder's costs to prepare and develop a solicitation response are extremely high.

(4) The business need or purpose of a procurement or contract is known by the department, but negotiation is necessary to ensure that the department is receiving the best value or the most cost-efficient goods, services, information technology, and telecommunications.

(b) When it is in the best interests of the state, the department may negotiate amendments to the terms and conditions, including scope of work, of existing contracts for goods, services, information technology, and telecommunications, whether or not the original contract was the result of competition, on behalf of itself or another state agency.

(c) (1) The department shall establish the procedures and guidelines for the negotiation process described in subdivision (a), which procedures and guidelines shall include, but not be limited to, a clear description of the methodology that will be used by the department to evaluate a bid for the procurement goods, services, information technology, and telecommunications.

(2) The procedures and guidelines described in paragraph (1) may include provisions that authorize the department to receive supplemental bids after the initial bids are opened. If the procedures and guidelines include these provisions, the procedures and guidelines shall specify the conditions under which supplemental bids may be received by the department.

(d) An unsuccessful bidder shall have no right to protest the results of the negotiating process undertaken pursuant to this section. As a remedy, an unsuccessful bidder may file a petition for a writ of mandate in accordance with Section 1085 of the Code of Civil Procedure. The venue for the petition for a writ of mandate shall be Sacramento, California. An action filed pursuant to this subdivision shall be given preference by the court.