The Importance of Competitive Negotiations to State Information Technology Procurement

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Information technology (IT) and telecommunications are crucial to the successful operation of state governments. Deltek estimates that the state and local IT market will grow from $56.4 billion in 2012 to $64.9 billion in 2017—a figure that represents a compound annual growth rate of 3.1 percent and $8.5 billion in new spending during the period.[1] States need complex and expensive new IT systems to deliver governance functions more effectively.[2] At the same time, the majority of states remain pressed financially.[3] Funds for big capital projects are scarce and little can be reserved for delays and overruns. The state workforce can also be overmatched. While there are many able state employees assigned acquisition duties and made responsible for technology policy, the pace of change of technology and scale of new multifunctional initiatives inevitably puts the public workforce at something of a disadvantage when it deals with private sector IT companies, whether large integrators or small specialists and consultants.

Further, there are many workforce challenges facing state governments as they confront IT acquisition and implementation challenges.[4] Subject area knowledge of state personnel can be uneven, untimely, or insufficient—*uneven*, in that the necessary competence may not be present across the available workforce; *untimely*, in that some of the persons most knowledgeable may be nearing retirement or departed from the state payroll; or *insufficient*, in that there are just not enough state personnel trained to address IT acquisition or implementation problems.

The paradox is that states have great need for new and improved business systems, but often lack funds or resources to acquire or operate these systems with high assurance. Similarly, vendors have great opportunity for new business but are exposed to great performance risk in implementation and financial risk should implementation fail.[5]

State and local governments increasingly rely upon IT (and sophisticated communications networks), and many legacy systems are no longer up to the job. Thus there is powerful cause to invest in new systems and services. Especially where systems seek to leverage common core information to achieve multiple public purposes, state governments will find they must embark upon large-scale and complex system integration projects. Implementation is even more complex where legacy systems with discrete components are to be replaced by a new and integrated solution. The migration from historical data to current formats is arduous. Emerging delivery methods, such as software as a service or cloud-based storage or application processing, add further complication to the project design and scope. Ahead is the increasing importance of mobility. This comes both from the "supply" side, in that the public work force will want to use mobile devices of their own choosing, and not be tied to fixed workstations, as well as from the "demand" side, as the population increasingly expects to interact with state government through mobile devices and web-enabled interfaces.[6]

Situations among the states differ, of course. Some states require much more in IT-driven solutions than do others. Resources also vary among the states. Allowing for these variations, however, there are certain conditions that apply with some universality:

- Many legacy systems must be replaced. In California, for example, the state payroll system, which served more than 294,000 employees, is more than 30 years old and, as acknowledged by the state controller's office, lacks the "flexibility to adapt to the changing requirements of government today, as well as for the future."[7]
- Federal mandates require new capabilities for functions that involve state responsibility, such as operation of child welfare or health services.[8] It is not uncommon for these mandates to link access to

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federal funds with certain minimums in operating efficiency, transparency, information management, data and privacy security.

- States need to embark upon IT consolidation projects in order to improve operating efficiencies and get the business of state governance done with reduced budgets and a smaller public workforce.[9]
- Contemporary governance recognizes that organized information (databases) should be leveraged for cross-functional utility, a far cry from the many data "stove-pipe" functions that accrued over many years and that states now need to retire.[10]
- The interface between states and those governed has changed radically, as residents now will approach their dealings with state government with expectations reflecting the ordinary and contemporary experience they have in the commercial world of web-enabled and mobile access to information and decision.[11]

The ubiquity to these common conditions acts as a "mandate" for continued investment and advances in deployment of IT-driven governance, whether a state acts as regulator, grantor of benefits, protector, or business partner.

Answering this mandate requires reconciliation of lofty and demanding goals and scarce resources. This is why the *procurement* function is vitally important to achieve efficient and cost-effective state governance in the 21st century. We can think of the IT acquisition process as one of "question and answer." The *question* is presented by the state's "business needs." The *answer* is in vendors' proposals. The sum of the question and answer, in this construct, is the *contract* by which vendors commit to satisfy the state's needs.

The procurement function is how the state's needs are satisfied by its vendors. That function is achieved through an acquisition *process*. Historical experience shows that, all too often, there are flaws in that process. These flaws, when present, work against satisfaction of needs.

Some states continue to rely upon a rigid, rule-driven acquisition process. This may have worked well when states were purchasing supplies, and when many of those were indistinguishable "commodities." Such formalistic acquisition techniques, such as making contract award based solely on price, however, are a very poor fit when complex solutions are sought or where projects call for IT system implementation. Often, the procurement process is "closed" in the sense that the state purchaser will document its "business needs" through a requirements document, or in a statement of work or specifications, but allow only a priced bid rather than any give-and-take with the vendor community. This is a mistake because of the risk that both the state's objectives and the vendors' capabilities will be imperfectly understood. Where a state does not fully comprehend the technologies available to its vendors, or differences in the strategies or methods by which those technologies may be employed, it is all too likely that a request for proposals will produce unsatisfactory answers to the wrong question. States experience this outcome when they undertake large-scale procurements only to find there are no responsible bids, or fewer than desired for effective competition, and/or that prices bid are higher than the state expects or can afford.

No participant gains when state procurements fail. A state's acquisition workforce is an instrumentality to provision state agencies to perform their functions. Hence, a failed acquisition disappoints the "consumers" of the acquisition function just as much as it wastes the time and talents of those who propose to sell supplies or services to the state. Especially in states that cling to rigid procurement methods, and who cannot take vendor input into account, vendors will be discouraged both by process limitations and by performance risk. This leads to "no bid" and "high bid" answers from the "sell side," and disappointment or acquisition failure on the "buy side." These undesirable outcomes could be avoided with a better process. For example, in all too many instances states have insisted upon terms and conditions, especially imposing liability risks or seeking intellectual property rights, that are seen by commercial enterprises as imposing disproportionate or even confiscatory risks to enterprise value. Rarely is the gain or protection sought by the state, in risk-shifting by overly protective terms and conditions, worth the negative consequence of failed procurements or proposals priced high to include "risk premiums." On the other hand, it is also true that every state purchaser has to protect the public trust and comply with applicable law and regulation. Rigid procurement process, where communication is foreclosed, makes it hard if not impossible to find an informed middle ground.

Conceptually, these problems can be addressed, and in many cases may be resolved, through increased use of competitive *negotiations* in the state procurement process. (As a matter of definition, "competitive negotiations" refer to an acquisition where a public purchaser evaluates and negotiates with multiple responsive offerors, as distinct from a situation where a public purchaser elects to negotiate only with one source.) A competitive negotiations process can be used to better define a state's requirements, to better understand vendor capabilities and encourage innovative solutions, to refine offers, to reconcile price to funds available, and to overcome contractual obstacles. Competitive negotiations can adjust the statement of work, to eliminate or mitigate expense and risk drivers. Where terms and conditions pose a barrier to a successful procurement, or push prices upward, through competitive negotiations a state can adjust its demands to encourage participation and realize lower prices. This does not imply that states surrender necessary rights or values, but it does suggest that the acquisition process accommodate exchanges between buyer and prospective seller on matters of economic signifi-

cance to the transaction, to find the affordable balance of risk and reward. Such is the way that similar services or supplies are routinely offered and sold among commercial actors.

At the same time, however, it should be recognized that "standard" terms and conditions, accumulated over time and issued by a state as a matter of habit or routine, may outlive their utility or outlast the assumptions on which they were initially formed. When that occurs, as may occur when changes in service delivery, technology, or even industry structure dictate, terms and conditions can become fatal barriers to the necessary business that each state must do with qualified, responsible bidders. States should follow the example of California, a state that periodically has engaged with industry to "refresh" and reconsider its "standard" IT terms and conditions.[12] To the extent that terms and conditions are aligned better to commercial norms and expectations, and present fewer enterprise-critical risks to capable vendors, states may find there is less contention and more achievement in individual procurements. Also, where standard terms and conditions more clearly align with commercial norms, there is less need to use a competitive negotiations process to resolve business issues that arise when vendors object to standard terms.

This is not to say that all states are equally situated or to suggest that every state can deal similarly with the challenge of getting the right "answer" to the "questions" presented by their business needs. Every state is different; indeed, in some states, there are different laws or regulations that apply among various agencies and departments. However, in every state there is a hierarchy of constraints and conditions that can be identified and must be navigated. Some of these are objective and easily found in statute or regulation. Others, still important, can be discerned only from experience. From the least resistant to change to the most susceptible, these are:

> A State's Constitution and its Statutory Laws → Formal Regulations → Published Policies and Established Procedures → Documented Practice → Accepted but Undocumented Preference → Habit → Inertia (or "Fear of The Unknown")

The opportunity to use a competitive negotiations process will not be available in all states, because in some there is a statutory barrier. The particulars and operation of the constraints and conditions, cited above, will be outcome-determinative as to *whether* negotiations can be used, *how* negotiations can be employed, *what* can be achieved through negotiations, and *who* within a state government can decide. In many states, however, the explanations for little or no use of negotiations reside in the "lower" categories of the cited constraints and conditions, i.e., those that can be addressed by decision, exercise of discretion, and action short of statutory or regulatory change.

A competitive negotiations process, properly defined and fairly employed, can and will improve the effectiveness of the state procurement function and, especially for complex IT systems and solutions, will cause more acquisitions to lead to success in contracts awarded to qualified vendors whose prices and values are determined through effective competition. A competitive negotiations process can help states better define both their needs and the choices available to satisfy their needs, and can bring vendors to the table who can offer their "best price" after negotiations clarify or adjust requirements and other risk-generating obstacles.

In this article, we examine three states—Oregon, California, and New York—to illustrate the operation of particular constraints and conditions and to examine how competitive negotiations have been used in state contracting and what initiatives are underway to improve the negotiations process and its results. Oregon is an example of a state that has embraced negotiations with positive results. California has unusually broad statutory authority, permitting competitive (or sole-source) negotiations (if benefitting the state) notwithstanding any other provision of state law, but the state's use of that authority, until recently, has been fitful and obscure. New initiatives are underway to greatly increase the use of negotiations and improve transparency while assuring fairness to bidders. New York is an example of a state that has no mechanism for pre-award negotiations, as negotiations there, when permitted at all, are limited to non-material, post-award bargaining.

Our conclusion is that the experience of Oregon validates the proposition that a negotiations process has positive utility for a state's acquisition process. California explains some of the reasons that states, even where they possess authority to negotiate, have been wary of doing so—but California also shows how a state can deal with those issues by improved implementation and process. New York is an example of a state where statutory and regulatory change is needed.

Oregon: Optimum Use of Negotiations

In 2003, Oregon enacted ORS chapters 279A, 279B, and 279C, known as the Public Contracting Code. The stated goal of the enactment was to create "a sound and responsive public contracting system" that would "take full advantage of evolving procurement methods as they emerge within various industries" while allowing for "impartial and open competition, protecting both the integrity of the public contracting process and the competitive nature of public procurement."[13] ORS 279B.060 sets forth the requirements for the solicitation and award of public contracts for goods and services. It was first introduced during the 72nd Oregon Legislative Assembly during the 2003 regular session as House Bill 2341 "to accommodate new industry practices . . . without affecting traditional forms of contracting."[14] The bill, enacted into law, states that as part of the solicita-

tion and evaluation of competitive sealed proposals, the agency may identify in its RFP "those contractual terms or conditions the contracting agency reserves . . . for negotiation with proposers."[15] It also gives the contracting agency authority to conduct "serial negotiations, beginning with the highest ranked proposer; [or] competitive simultaneous negotiations."[16] A prospective offeror who believes the "procurement process is contrary to law or that the solicitation document is unnecessarily restrictive" may file an agency-level protest, which may then be reviewed by the court.[17] Vendors who submitted responses to an RFP also maintain protest rights.[18]

In 2009, the assembly amended ORS 279B.060, though the language relating to negotiations remained substantively unchanged.[19] The statute was amended again in 2011, to no effect.[20] ORS 279A.065 requires that the attorney general "prepare and maintain model rules of procedure appropriate for use by all contracting agencies governing public contracting under the Public Contracting Code." These rules are known as the Oregon Administrative Rules (OARs), and are compiled into the *Attorney General's Administrative Law Manual* with monthly updates provided in the *Oregon Bulletin*. A contracting agency may adopt its own rules of procurement for public contracts, including any portions of the Model Rules, or adopt the Model Rules in full.[21]

The Model Rules established under ORS 279A.065 echo the code's grant of broad discretion by a contracting agency to engage in negotiations. It defines the areas available for negotiation with one or more offerors:

> A Contracting Agency may commence serial negotiations with the highest-ranked eligible Proposer or commence simultaneous negotiations with all eligible Proposers. A Contracting Agency may negotiate:
>
> (a) The statement of work;
>
> (b) The Contract Price as it is affected by negotiating the statement of work and other terms and conditions authorized for negotiation in the Request for Proposals or Addenda thereto; and
>
> (c) Any other terms and conditions reasonably related to those authorized for negotiation in the Request for Proposals or Addenda thereto. Proposers shall not submit for negotiation, and a Contracting Agency shall not accept, alternative terms and conditions that are not reasonably related to those authorized for negotiation in the Request for Proposals or any Addendum.[22]

It also separately states that the agency's RFP need not include all terms and conditions of a contract when "the Contracting Agency either will reserve them for negotiation, or will request Proposers to offer or suggest those terms or conditions."[23] It permits the agency to engage in the solicitation of best and final offers after negotiation, and to conduct still further negotiations if unsatisfied with the BAFOs.[24]

The Model Rules also explain an offeror's right to protest throughout the solicitation process. It affirms that any offeror eliminated from the competitive range, who thus does not have the opportunity to engage in negotiations, may protest its exclusion if the RFP so allows.[25] If, after negotiations, the agency issues an addendum, any eliminated offeror is granted the opportunity to protest its exclusion or the addendum.[26] All unsuccessful bidders may protest the award.[27]

The attorney general issues both formal and informal opinions to respond to questions concerning the applications of Oregon's laws, including the Public Contracting Code. To date, the attorney general has not issued an opinion relating to a contracting agency's use of negotiations in public procurements. The *Statewide Policy Manual*, issued by the Department of Administrative Services, also does not address the use of negotiations.

Oregon has been particularly successful in implementing the Public Contract Code's objective of "tak[ing] full advantage of evolving procurement methods"—including negotiations—in the IT context. It has held a variety of procurement forums, and has regularly sought input from the private sector. For example, on April 6, 2010, Oregon held an Innovation in IT Procurement Forum to discuss improvements to the procurement of IT services with chief information officers, IT managers, and designated procurement officers.[28] It was cosponsored by Jan Dean, the State Services Division administrator of the Department of Adminstrative Services, and Dugan Petty, the state chief information officer. An effort was made at that forum to coordinate between the IT departments and the procurement division of the DAS. IT managers expressed frustration with the risk-adverse nature of the state's procurement processes, which, in their opinion, had led to ineffective results. They suggested increased communication with IT professionals in the creation of solicitation documents.

Thus Oregon has effectively reconciled flexibility and fairness in structuring a procurement process in which negotiations can be liberally used by contracting agencies. The agency has broad discretion to negotiate both the scope of work and the terms and conditions, but is restrained by the preservation of a robust protest process. The right to protest is particularly important when a contracting agency can negotiate with vendors, in order to ensure fairness throughout the competition. But perhaps most importantly, the state has expressed a willingness to involve the private sector in structuring and implementing innovative solutions to the state's IT needs—something it can only realistically accomplish with expansive negotiation authority. This allows Oregon agencies to utilize the expertise of the private sector, while selecting the best value solution for the state.

California: Underutilized Statutory Authority

In 2003, California enacted a law that permits the California Department of General Services to use a "negotiations process" for procurement.[29] California's legislature decided to exempt DGS from various provisions of law otherwise applicable in order to "achieve improved levels of performance by focusing [DGS's] efforts on enhancing the value of the services it delivers."[30] The resulting statute, Public Contract Code ("PCC") § 6611, describes the utility of engaging in negotiations during procurement. Negotiations assist the state in understanding its "*business need or purpose*," in finding "*different types of solutions*" to fulfill the state's needs, in defining better *the state's requirements* so as to minimize the costs of proposal preparation and to assure responsive bids, and in achieving an truly "*best value*" solutions.[31]

The statute, as it remains today, grants DGS very broad authority to use a negotiations process "[n]ot withstanding any other provision of law" to procure "goods, services, information technology, and telecommunications."[32] This authority extends to both new contracts *and* amendments to existing contracts. As to new contracts, DGS may use negotiations when any of the following four conditions are met:

- Where it will enable the state to better define the "business purpose or need" of a procurement;
- Where it will assist the state in identifying different types of solutions to fulfill a known business need or solution;
- Where the purpose or need is complex and the cost of a bidder's response is high; or
- Where it will ensure a "best value" or "most cost-effective" solution.[33]

As to existing contracts, DGS may use negotiations when doing so is "in the best interests of the state."[34] Amendments can extend not only to the terms and conditions of the contract, but also to the scope of the work, whether or not the contract was awarded through a competitive procurement. However, unlike Oregon's similar statute, subdivision (d) of PCC § 6611 denies a disappointed bidder any rights of protest excepting a civil writ proceeding:

> 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.[35]

Subdivision (c) requires that DGS establish procedures and guidelines for the negotiations process for new contracts. The procedures must give bidders a "clear description of the methodology" that will be applied by DGS to evaluate bids, including the intended use of requests for supplemental bids (e.g., best-and-final offers). Pursuant to this mandate of PCC § 6611(c), DGS incorporated guidelines into the *State Contracting Manual* that primarily consist of illustrative examples that largely restate the statutory requirements.[36] These guidelines provide little insight into the critical questions of when negotiations are proper, how negotiations should be conducted, or why negotiations will advance the state's goals.

On June 20, 2012, TechAmerica, a trade association representing much of the IT vendor community, released a "white paper" examining California's use of the negotiations authority of PCC § 6611.[37] The white paper was critical of the uneven and infrequent utilization of negotiations, the absence of transparency and documentation of negotiations, and shortcomings in the applicable policies and procedures.[38] A further objection was that vendors had insufficient opportunity to object to exclusion or to bring protests where they objected to the process or outcome of a negotiated procurement.[39]

On the whole, however, the white paper found that California has experienced positive results from use of negotiations.[40] Examples were cited where California was able to use negotiations to achieve innovative solutions,[41] to adjust contract scope to achieve necessary price reductions,[42] to make necessary changes to terms and conditions to include more competitors and get lower prices,[43] and to solicit "alternative" solutions such as "benefits-based" contracts where payments to the vendor are derived from success of services rendered against an objective baseline.[44] Few instances were found where the negotiations authority was used to amend existing contracts.[45]

Where negotiations were used, California was able to reduce price by adjusting contract scope and better manage contract risk by revising key terms and conditions. Through negotiations, procurements were salvaged that otherwise would have failed, saving the state from expending both the time and money that would be required to engage in a second, and perhaps similarly unsuccessful, procurement competition.

Nonetheless, the white paper criticized DGS for missed opportunities to use negotiations.[46] Until very recently, DGS had been hesitant to use a negotiations process other than as exceptions to normal practice. Another weakness was uncertain allocation of roles and responsibilities within the executive branch of the state government.[47] Furthermore, the sparse guidance from DGS, coupled with the absence of protest rights, raised serious concerns about fairness and consistency.[48] The white paper made recommendations in six categories. It recommended that the state:

1. Extend negotiations authority to telecommunications;
2. Issue new policies and procedures;
3. Involve the vendor community in setting policy and procedures;
4. Use a "determination and finding" process to deter-

mine when to utilize negotiations;
5. Take actions to increase transparency and accountability; and
6. Increase the use of negotiations under the statutory authority.[49]

On September 5, 2012, DGS announced a new initiative to make greater use of the section 6611 negotiations authority.[50] In a "paradigm shift," state officials communicated an intention to greatly increase the use of negotiations, whereas negotiations previously were used only rarely.[51] To its credit, DGS solicited and has since taken into account the reaction of other state agencies, notably the California Technology Agency, as well as the vendor community. On January 8, 2013, DGS released a revised statement of the changes it would implement, for the use of negotiations, and new procedures to be included in the *State Contracting Manual*.[52] Significant further improvements were made, with the state responding positively to all six of the recommendations of the TechAmerica white paper.[53] Some changes include:

- As revised, DGS now requires issuance of a "final evaluation and selection report" documenting decisions relating to selection of bidders to participate in negotiations, final scoring of proposals, and award decisions.[54]
- DGS has agreed to implement "an internal review mechanism" for bidders to raise objections to use of section 6611 negotiations.[55] DGS now proposes to allow any bidder to "raise questions during the procurement process" and such questions will be assigned to a designated procurement official for resolution or an ombudsman.[56]
- If evaluation criteria are revised based on the results of negotiations, all bidders participating in the negotiations "shall be informed of the revised evaluation criteria and shall have the opportunity to submit a BAFO based on those criteria."[57]
- DGS has added new language to the *State Contracting Manual* that requires, in preparation for negotiations, a determination of "the negotiation sequence which may include the order of steps, such as negotiations, bid submission, evaluation, confidential discussions, supplemental bid submission, and contract award."[58]

The announced 2013 revisions do not address several areas of concerns to TechAmerica. One was whether, in negotiations, all bidders would be informed of changes to requirements (e.g., scope of work, or specifications) and offered an opportunity to bid or (as in Oregon) an opportunity to object to the changes. Nor was any improvement registered or new guidance given on use of negotiations to amend existing contracts; DGS in January 2013 said only that this area is "deserving of further clarification" and "will be addressed in the near future."[59]

New York: Limited Authority

Unlike California and Oregon, New York disfavors competitive procurements at the agency level, and does not permit any form of pre-award negotiation. One of the operating principles, as described in the New York State Finance Law, under which state procurements are to be conducted, is that the state is to "clearly articulate[ ] . . . a clear statement of product specifications."[60] As compared to a state such as Oregon, whose stated objective is to take advantage of innovative procurement methods, New York is extremely risk-adverse in its public contracting, and its finance law reflects the adherence to traditional, inflexible methods of procurement.

Furthermore, New York has a strict preference for centralized contracting, rather than contracting by individual agencies. In fact, an agency may conduct its own procurement only when preferred source offerings,[61] the Office of General Services' centralized commodity contacts,[62] or agency or multiagency established contracts[63] are unable to fulfill the agency's needs.[64] The state agencies are "responsible for determining the need for a given service or commodity" and then must select, in the stated order of preference, from qualified sources.[65] This puts the onus on an agency to clearly define and understand its needs, and requires the agency to justify any diversion from the state's pre-established vendor relationships. As the state's IT needs become progressively more complex, with the advent of newer technologies and the necessary retirement of antiquated telesystems, the state's ability to best define the most efficient and economical solution to its needs increasingly deteriorates.

Even in the limited circumstances in which an agency may conduct its own procurement, its discretion is severely limited. Not only must the state clearly define its needs, but when it prepares for a best-value evaluation, it must also include "in the procurement record and in advance of the initial receipt of offers, the determination of the evaluation criteria, which whenever possible, shall be quantifiable."[66] In attempting to make an inherently subjective best-value determination as mathematical as possible, the state indicates a desire to create procurements that are seemingly objective and therefore predictable, presumably in an attempt to ensure fairness. The effect, however, is to create rigidity that leaves little room for the private sector to propose innovative responses to an agency's expressed goals.

New York law allows an agency to request clarification to vendors' bids "for purposes of assuring a full understanding of responsiveness to the solicitation requirements," but does not permit true negotiations, in which an offeror may suggest an alternative to the agency's stated solution.[67]

The New York State Procurement Guidelines, issued by the New York State Procurement Counsel, are the only state resource that discusses the use of negotiations with offerors. These state that an agency may "negotiate

with the successful bidder within the scope of the IFB/RFP"[68] *after* award, but only if the solicitation so states, and so long as the "revisions . . . [do] not substantially alter the requirements or specifications set out in the RFP."[69] The Procurement Guidelines later reiterate "[m]aterial terms of a contract awarded pursuant to a competitive bid cannot be negotiated."[70] Thus negotiations are to be used only sparingly, and in insignificant ways.

With this public procurement regime in place, New York treats complicated IT solution contracts much like basic commodity purchases. This model represents an extremely risk-adverse take on public procurements in which predictability is valued over innovation. The contracting agency is required to identify and understand its needs, but is unable to take advantage of the industry's specialized knowledge base. As the state constitution offers no barrier to amending the state finance law to allow for more flexible contracting, the legislature should consider amending the code to reflect the changed environment of public contracting, and to encourage greater use of a negotiations process.

Conclusion

The diverse demands of state governance will require increased use of solutions enabled by information technology. To meet the challenge, state governments must facilitate effective competition among leading and capable vendors and encourage innovative, "best value" solutions at the lowest attainable price. As shown by experience in Oregon and new initiatives in California, state officials are urged to examine their practices and to embrace the use of competitive negotiations in their procurement process. PL

Endnotes

1. *State and Local IT Spending Driven by Unintended Consequences* (June 5, 2012), *available at* http://tinyurl.com/82fvj6t. Deltek's figures are that the 50 states (plus the District of Columbia) serve the entire U.S. population of 313 million and employ 3 million workers.

2. The National Association of State CIOs (NASCIO) in November 2012 put consolidation, cloud services, security, budget, health care, and mobile services at the top of critical policy and technology issues to be faced by state government in 2013, according to a survey of state CIOs. *See State CIO Priorities for 2013* (Nov. 13, 2012), *available at* http://tinyurl.com/b4tqvjl.

3. An April 2012 report of the U.S. Government Accountability Office observes that "[t]he fiscal situation of the state and local government sector has improved in the past year as the sector's tax receipts have slowly increased in conjunction with the economic recovery. Nonetheless, total tax receipts have only recently returned to the prerecession levels of 2007 and the sector still faces a gap between revenue and spending." U.S. Gov't Accountability Office Report, GAO-1523SP, State and Local Governments' Fiscal Outlook – April 2012 Update (2012), at 1.

4. *See Survey Findings: State and Local Government Workforce: 2012 Trends*, slge.org, *available at* http://tinyurl.com/ag82lx2.

5. Failures of complex IT system projects can frustrate important state goals and lead to expensive and protracted litigation. *See* Robert S. Metzger and Mark J. Linderman, *What Contractors Can Learn From* Indiana v. IBM, Law 360 (Aug. 15, 2012), *available at* http://www.rjo.com/PDF/Indiana_v_IBM-Law360.pdf.

6. California recognizes these propositions in its 2012 Statewide Information Technology Strategic Plan:

> Our citizens connect to business, banking, healthcare, entertainment, education and to each other through mobile phones, tablet devices, social media, personal computers, and the web. Californians access helpful information and services on demand. They transact business or communicate with each other when they want, from wherever they are, and at their convenience. The 21st century consumer has come to expect similar capabilities and service delivery from the public sector. Technology is a powerful tool, which makes it possible for state government to re-envision how efficiently it interacts with and serves Californians, providing an opportunity to deliver services with the convenience and economy Californians expect and deserve.

California Technology Agency, *California Information Technology Strategic Plan* (January 2012), *available at* http://tinyurl.com/b6kpzrg.

7. *See 21st Century Project*, California State Controller's Office, http://www.sco.ca.gov/21century.html (last visited Jan. 20, 2013).

8. One example is presented by federal requirements that govern state operation of Health Insurance Exchanges. *See Guidance for Exchange and Medicaid Information Technology (IT) Systems*, v. 2.0, Department of Health & Human Services, Centers for Medicare and Medicaid Services (May 2011), *available at* http://tinyurl.com/azhrrow.

9. *See Advancing the C⁴ Agenda: Balancing Legacy and Innovation*, Joint Report of NASCIO, TechAmerica, and Grant Thornton (Oct. 2012), *available at* http://tinyurl.com/a55bqt5, at 1 (IT consolidation is identified as a "big cost saver" that is "driven by budget pressures and the need for operational cost savings").

10. The need to replace stove-pipe systems has been recognized for some years. In 2007, for example, the State of California undertook a "performance review" to restructure, reorganize, and reform state government. Under the component, "Improved Services and Productivity," the state recognized that:

> California must replace the duplicative and conflicting financial, human resources and procurement systems with a common set of management tools that are interoperable across state government. California has multiple accounting and financial systems across the departments and there are duplicative, conflicting legacy systems supporting the major back office operations of the state. Additionally, the payroll system is nearing the end of its useful life. All these outdated stove-pipe systems increase the cost of government, seriously complicate any efforts to build cost-effective, inter-departmental enterprise-wide e-government applications and result in basic information about state operations being unavailable to policy makers and the public when and where it is needed.

The California Performance Review: Creating the first 21st Century Government in America, State of California (2007), *available at* http://cpr.ca.gov/About_CPR/.

11. Again, this is hardly a novel concept—though achievement remains daunting. On December 17, 1999, President William Clinton remarked: "As public awareness and Internet usage increase, the demand for on-line Government interaction and simplified, standardized ways to access Government information and services becomes increasingly important." Intergovernmental Advisory Board, *Citizens Expectations for Electronic Government Services* (Sept. 2000), *available at* http://tinyurl.com/b2v2xdw.

12. The Department of General Services, Procurement Division, has announced its intent to enter into negotiations with the information technology vendor community to modify the standard terms and conditions for IT contracts. *See* Dept. of General Services, Bulletin # K-36-12 (July 17, 2012), *available at* http://tinyurl.com/ap2s6pr.

13. Or. Rev. Stats. § 279A.015 (2013). All references are to

current statutes and regulations, unless otherwise noted.

14. 2003 Or. Laws 794.
15. 2003 Or. Laws 794, 52.
16. *Id.*
17. Or. Rev. Stats. § 279B.405.
18. Or. Rev. Stats. § 279.410; Or. Rev. Stats. § 279B.415.
19. 2009 Or. Laws 880, 6.
20. 2011 Or. Laws 458, 12.
21. Or. Rev. Stats. § 279A.065; Or. Rev. Stats. § 279A.070.
22. Or. Admin. R. 137-047-0261, subd. (8).
23. Or. Admin. R. 137-047-0260.
24. *Id.*, subd. (10).
25. Or. Admin. R. 137-047-0720.
26. Or. Admin. R. 137-047-0261, subd. (5).
27. *Id.*
28. *See Innovation in IT Procurement Forum*, Oregon.Gov, http://tinyurl.com/atwcmsm (last visited Jan. 20, 2013).
29. The substance of what was to become PCC § 6611 was first introduced as part of a budget trailer bill. *See* AB 1756 (2003) ("This bill would authorize the Department of General Services to establish a negotiation process that may be used during various stages of the procurement process when the department procures goods, services, construction services, or information technology for itself or on behalf of another state agency. This bill would authorize the use of this negotiation process only when the department makes specified findings regarding the procurement.") Legislative Counsel's Digest, AB 1756, *available at* http://tinyurl.com/bhac96q.
30. Assembly floor analysis of AB 1756 (2003), *available at* http://tinyurl.com/aoye2lj.
31. Pub. Contract Code § 6611, *see* Legislative Counsel's Digest, *supra*, n.29, at Sec. 40.
32. Pub. Contract Code § 6611.
33. Pub. Contract Code § 6611, subd. (a), (1)-(4).
34. Pub. Contract Code § 6611, subd. (b).
35. Pub. Contract Code § 6611, subd. (d). Awards of IT contracts in California, when not using negotiations under the auspices of PCC § 6611, are made under the authority of PCC § 12012, which includes protest procedures, at § 12102(h), "to provide bidders an opportunity to protest any formal, competitive acquisitions conducted under the authority of this chapter." Protests under section 12102(h) are decided by the State Board of Control (BOC) and the contract may not be awarded until the protest is resolved. An "Alternative Protest Process" was first authorized by statute in 1998, by AB 1159 and since, in 2005 by SB 837 has been extended without sunset. Statutory treatment of the Alternative Protest Process is codified at PCC §§ 12125, *et seq*. Where invoked, a protest is heard by DGS (rather than the BOC) under an accelerated process and the state may make a contract award pending final decision on the protest.
36. *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://tinyurl.com/b3hmdaf.
37. TechAmerica is a trade association of approximately 1,000 members focusing on information technology matters. Robert Metzger, coauthor here, prepared the white paper, *California's Use of Negotiations Authority for State Technology Contracts*, *available at* http://tinyurl.com/a5992ae (hereinafter referred to as "white paper").
38. Especially because protest rights are denied, and recognizing the need for fairness in public contracting, it was especially important that DGS fully document how it would use negotiations authority. The white paper faulted DGS on these counts, and on transparency and accountability, "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." White paper, at 5–6.
39. *Id.* at 13–14.
40. *Id.* at 7–9.
41. *Id.* at 8–9.
42. *Id.* at 9–10.
43. *Id.* at 10–11.
44. *Id.* at 11.
45. *Id.* at 12.
46. *Id.* at 12.
47. *Id.*at 12–13.
48. *Id.*at 13–14.
49. *Id.* at 15–18.
50. *Overview of Changes to Procedures for Administration and Use of Public Contract Code 6611*, Department of General Services Draft (Aug. 30, 2012), *available at* http://tinyurl.com/awhr7yt. The initiative followed experience where DGS "used the authority to remedy failed procurements or to negotiate savings with existing suppliers during periods of state crisis" and reflected a successful application on two multi-stage procurements. Also a factor was the TechAmerica white paper.
51. *See DGS Director Fred Klass announces explanation of negotiation process to procure IT goods and services*, Techwire.net (Sept. 7, 2012), *available at* http://tinyurl.com/as2haae (expanded use of 6611 will "streamline the processes for departments in negotiations, add flexibility to the circumstances under which negotiations can be used and clarify the negotiation process").
52. "*Overview of Requested Changes to Proposed Procedures for Administration and Use of Public Contract Code 6611*, Department of General Services (Jan. 13, 2013) ("2013 Overview"), and *Negotiation Process Procedure*, Department of General Services (Jan. 13, 2013) ("2013 Procedures"), both available through DGS via the Overview of Changes and Procedures hyperlinks, respectively.
53. DGS did not agree to employ a "determination and findings," process, but did act to clarify what information would be required when state agencies and departments request approval from DGS to utilize negotiations.
54. 2013 Procedures, *supra*, n.52, at 2.C5.4.8, 2.C5.5.5 and 2.C5.6.7.
55. *Id.* at 2.C5.7 ("Informal Objection Process).
56. Such measures comport with the statute, which at PCC § 6611(d) states that an unsuccessful bidder "shall have no right to protest the result of the negotiations process undertaken pursuant to this section." Submission of "objections" for internal resolution are distinguishable from any "protest" rights under PCC §§ 12012(h) or 12125, as previously reviewed.
57. 2013 Procedures, at 2.C5.4.6.f, 2.C5.4.7.b, 2.C5.5.4.b and 2.C5.6.5.b.
58. *Id.* at 2.C5.4.4.
59. 2013 Overview, *supra* , n.52.
60. N.Y. State Fin. § 163, subd. (2)(b).
61. Certain nonprivate sector providers are granted preferred source status under law. New York State Finance Law §§ 162, 163 define the organizations that are given preferred source status, and require OGS to publish a list of all commodities and services that are available from preferred sources. The current list is available at http://tinyurl.com/b76gqxp.
62. Agencies are required to use OGS centralized contracts for commodities when a contract is in place that meets the agency's form, function, and utility requirements. Agencies are encouraged but not required to use OGS centralized contracts for service or technology needs. Under this regime, goods are purchased through a purchase order and the agency is granted authority only to negotiate price. *See New York State Procurement Guidelines*, at 7, *available at* http://ogs.ny.gov/BU/PC/Docs/Guidelines.pdf (last visited Jan. 20, 2013).
63. These contracts are established between an agency (or multiple agencies) and a vendor to procure goods or services on an

ongoing, multiyear basis. They can include contracts that result from a competitive bidding process, a sole source contract, a single source contract, or a piggyback contract. *New York State Procurement Guidelines*, at 8–9.

64. *See New York State Procurement Guidelines*, at 4.
65. N.Y. State Fin. § 163, subd. (5).
66. N.Y. State Fin. § 163, subd. (9).
67. N.Y. State Fin. § 163, subd. (9)(c) (2012).
68. *New York State Procurement Guidelines*, at 14.
69. *Id.* at 35.
70. *Id.* at 38.