

Topic 5 – Negotiation Process Procedures and Guidelines Under Public Contract Code 6611

Summary This document outlines the procedures governing the Department of General Services' (DGS) use of negotiations as well as the procedures departments or agencies must follow when requesting that DGS authorize negotiations for IT goods and services. For procedures and guidelines related to non-IT services, see SCM Volume 1; for non-IT goods, see SCM Volume 2.

2.C5.0 Authority over negotiations Public Contract Code (PCC) Section 6611 sections (a) and (b) set forth the conditions under which the DGS may use negotiations for new and existing contracts and/or procurements.

When an appropriate basis exists, DGS may authorize negotiations in any of the following circumstances:

1. At the outset of a procurement (new in 2012),
2. During a competitive procurement in which at least one responsive, responsible bid has been received, or
3. As a remedy for a competitive procurement that has failed to produce any responsive, responsible bids (new in 2012)

PCC Section 6611(b) authorizes DGS to use a negotiation process to amend existing contracts when it is in the best interest of the state.

In all circumstances, approval of the Director of DGS or their designee is required in advance, and negotiations must be conducted under the auspices of DGS.

The DGS recommends that during the acquisition planning phase agencies and departments plan accordingly and consider whether a negotiation process is appropriate for a given procurement. If so, departments should contact DGS for assistance in determining how best to use PCC Section 6611(a) and develop the framework for the negotiation process.

2.C5.1 How to make a request to DGS In order to implement negotiations pursuant to PCC Section 6611(a), State Agencies and Departments shall submit a written request to the DGS containing the following information:

- Description of the procurement
- How the procurement meets the State's needs
- Explanation of why the procurement meets one or more of the four conditions listed below under the topic *Bases for Negotiations*.

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

DGS will respond to the requesting department, in writing, with a determination

on the request to use a negotiation process. If approved, the DGS will stipulate any conditions on the use of a negotiation process.

2.C5.2 Bases for negotiations (PCC section 6611(a))

The DGS may initiate negotiations if 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 (PCC section 6611(a)(1)); In general, this may occur when a business solution common in the commercial marketplace needs to be tailored to fit the unique needs of the State.

Example: Use of temporary and contract labor to meet volatile staffing demands is commonplace in the private sector. However, due to restrictions on use of personal services contracts for civil service functions, the State often is unable to use these services “as is.” The State would be able to negotiate with temporary labor contractors to provide their services in such a way that meets the unique restrictions of California law under GC 19130.

2. The business need or purpose of a procurement or contract is known, but a negotiation process may identify different types of solutions to fulfill the business need or purpose (PCC section 6611(a)(2)); In general this condition can exist with emerging technology where fully developed solutions do not yet exist and require negotiations to ensure the solution meets the State’s needs.

Example: The State identifies a need to block unauthorized mobile phone communications at correctional facilities. While emergent frequency management technology exists, no complete solutions have been delivered to the market. Through a negotiation process, the state would be able to identify potential solutions prospective contractors may be willing to offer.

3. The complexity of the purpose or need suggests a bidder’s costs to prepare and develop a solicitation response are extremely high (PCC section 6611(a)(3)); This condition can exist when the State is acquiring solutions of an extremely large scale and/or scope requiring bidders to perform significant analysis, design, and/or development in order to bid. It can also occur when past attempts to secure bids have resulted in no compliant bids.

Example: Acquisition of the Financial Information System for California constituted a complex system of significant scale and scope. A negotiations process that provided for regular discussion of the state’s needs, refinement of requirements, the creation and evaluation of pilot systems, and bargaining to trade-off costs and benefits reduced the costs for bidders to submit acceptable bids.

4. The business need or purpose of a procurement or contract is known, but negotiation is necessary to ensure the department is receiving the best

2.C5.2 Bases for negotiations (PCC section 6611(a) (continued))

value or the most cost-effective goods, services, information technology, and telecommunications (PCC section 6611(a)(4)); This condition most commonly exists when bid prices exceed the State’s target price compared to historical costs or established through market research.

Example: The State has conducted a bid for office supplies, however bidder prices were higher than expected compared to the State’s prior contract. A negotiation process is used to obtain pricing more in line with the estimate.

2.C5.3 Participants and Roles

While DGS (and CTA as applicable) is responsible for the administration of the negotiating authority, successful negotiations require the cooperation of three key stakeholders: DGS, CTA, and the buying agency. The following guidelines establish that all three are co-approvers of any final, negotiated outcome. Not all participants listed in the table below are required in all situations.

State Participants

| Participant | Roles |
|-----------------------------------|--|
| Procurement Official (DGS or CTA) | <ul style="list-style-type: none"> ▪ Conducts the procurement in accordance with the laws of the State of California; ▪ Coordinates contract negotiations sessions; ▪ Coordinates DGS Legal participation in negotiations, if required; and ▪ Oversees negotiation sessions. ▪ Co-approval of final negotiated agreement. |
| Sponsoring Department | <ul style="list-style-type: none"> ▪ Participates in negotiation sessions to ensure outcomes meet program needs. ▪ Co-approval of final negotiated agreement. |
| Core Negotiation Team | DGS and/or CTA, and sponsoring agency <ul style="list-style-type: none"> ▪ Provides negotiation facilities; ▪ Prepares negotiation points; ▪ Participates in negotiation sessions; and ▪ Tracks status of outstanding items and completed agreements |
| State Evaluation Team Members | SMEs tasked with evaluating bid submissions <ul style="list-style-type: none"> ▪ Participates in negotiations sessions, as required. May be same individuals as core negotiation team. |
| Subject Matter Experts (SMEs) | <ul style="list-style-type: none"> ▪ Provides subject matter expertise and support to the Core Negotiation Team and State Evaluation Team, as requested. |
| CTA | <ul style="list-style-type: none"> ▪ Ensures negotiations meet all applicable IT architecture, technical, and project standards. |

**2.C5.3
Participants and
Roles (continued)**

Bidder Participants

| Participant | Role |
|-------------------------|---|
| Bidder Negotiation Team | At a minimum, the supplier team: <ul style="list-style-type: none"> ▪ Prepares negotiation materials in response to negotiations points; ▪ Participates in negotiations sessions; ▪ Develops and provides revised proposal materials for State review and agreement during the negotiation sessions; and ▪ Provides Best and Final Offer (BAFO) that incorporates all negotiated changes. |

**2.C5.4 Procedure
when conducting
negotiations from
the outset of a
procurement**

Follow these steps when conducting negotiations from the outset of a procurement:

1. Obtain approval from DGS to utilize negotiations (see Section 2.C5.1 above).
2. Craft a solicitation under the authority of PCC 6611. The solicitation should include administrative and technical requirements, a cost proposal, and reference the state's general provisions. It should also explain the general purpose and scope of the negotiations, the anticipated schedule for the negotiations; and the procedures to be followed for those negotiations [PD TO DEVELOP A TEMPLATE]
3. Identify in the solicitation document the requirements for bidders to be included in negotiations. This may include, but is not limited to, establishment of objective pre-requisites based on capabilities, experience, expertise, or capacity.
4. Evaluate bids.
 - a. The solicitation may allow for evaluation of all bids, even bids that would not be responsive under the rules of PCC 12100. Alternatively, the solicitation may require that bids meet certain minimum criteria in order to be evaluated.
 - b. Buyers may choose to establish an evaluation team to evaluate bids according to the methodology specified in the solicitation.
 - c. Establish initial scores either via ranking, as a percentage of total possible points, or other method that clearly differentiates between each bid.
5. Negotiate.
 - a. Follow the rules of the solicitation in negotiating with bidders.
 - b. Negotiations may be completed after a single round, or may be done in several rounds.
 - c. Negotiations may be conducted orally and/or in writing. Oral negotiations may be held in person by conference call, or by use of video or web conferencing.
 - d. The negotiation process may include persuasion, alteration of assumptions and positions, give and take, and may apply to price, schedule, requirements, or other terms of the proposed contract. The State may discuss other aspects of the Bidder's proposal that could,

2.C5.4 Procedure when conducting negotiations from the outset of a procurement (continued)

- in the opinion of the state, be altered or explained to enhance materially the proposal's potential for award. However, the State is not required to discuss every area where the Bidder's proposal could be improved. The scope and extent of negotiation exchanges are the matter of the state's judgment.
- e. The state may establish a negotiation team to consist of representatives from the DGS and the requesting department, and other state representatives as appropriate. The table in 2.C5.3 identifies the general roles and responsibilities of a negotiation team although the composition of any team may vary based upon the procurement.
 - f. Supplemental bids may be received after initial bids are opened. At the conclusion of negotiations, Bidders may be given an opportunity to submit a Best And Final Offer (BAFO) to the State. The State will establish a date and time for receipt of each Bidder's BAFO.
6. Final evaluation and award. Use one of the following options to make a final award:
 - a. Using the original criteria in the solicitation, score all proposals based on either the results of negotiations or, if applicable, the BAFO. Award to the highest ranked bidder.
 - b. Award to the bidder providing the best value to the state as determined by the results of the negotiations. Document the decision in the procurement file.
 7. DGS may terminate negotiations and/or the solicitation at any time.
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2.C5.5 Procedure when conducting negotiations during a procurement

Follow these steps when conducting negotiations during a competitive procurement in which at least one responsive, responsible bid has been received:

1. Obtain approval from DGS to utilize negotiations (see Section 2.C5.1 above).
2. Only bidders that submitted responsive, responsible bids may participate in negotiations. Notify bidders that will be selected to participate in negotiations. Buyers must make this determination in one of the following ways:
 - a. Establish the criteria for selection in the solicitation either from the outset or via addendum.
 - b. Establish a competitive range based on bidders' rankings following bid/proposal evaluations.
 - c. Negotiate with all responsive, responsible bidders.
 - d. Initiate negotiations with the highest ranking bidder then, if no agreement can be reached, move on to the next highest ranked bidder continuing until an agreement can be reached.
3. Negotiate. See the steps in "Negotiate" of Section 2.C5.4 above.
4. Final evaluation and award. Use one of the following options to make a final award:
 - a. Using the original criteria in the solicitation, score all proposals based on either the results of negotiations or, if applicable, the BAFO. Award to the highest ranked bidder. Documents the award in the

2.C5.5 Procedure when conducting negotiations during a procurement (continued)

- procurement file.
- b. Award to the bidder providing the best value to the state as determined by the results of the negotiations. Document the award in the procurement file.
- 5. DGS may terminate negotiations and/or the solicitation at any time.

2.C5.6 Procedure when no responsive bids are received

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

1. Obtain approval from DGS to use negotiations (see Section 2.C5.1 above). Usually, subsection 3, “the complexity of the purpose or need suggests a bidder’s costs to prepare and develop a solicitation response are extremely high” or subsection 4, “negotiation is necessary to ensure the department is receiving the best value” will apply.
2. If any responsive, responsible bids have been received, buyers must follow the procedures in 2.C5.4 or 2.C5.5.
3. In order to use negotiations in this circumstance, the criteria for participation must have been established in the solicitation (either from the outset or through an addendum). Any of the following criteria may be used:
 - a. All firms that submitted a bid may participate
 - b. Bidders within a competitive range may participate. Rankings may be established by using a percentage of required items and/or scoring non-mandatory items.
 - c. The highest ranking bidder negotiates first, then, if no agreement can be reached, the next highest similarly ranked bidder may negotiate continuing the process until the state reaches an acceptable agreement. Rankings may be established by using a percentage of required items and/or scoring non-mandatory items.
4. Negotiate. See the steps in “Negotiate” of Section 2.C5.4 above.
5. Final evaluation and award. Use one of the following options to make a final award:
 - a. Using the original criteria in the solicitation, score all proposals based on either the results of negotiations or, if applicable, the BAFO. Award to the highest ranked bidder. Document the award in the procurement file.
 - b. Award to the bidder providing the best value to the state as determined by the results of the negotiations. Document the award in the procurement file.
6. DGS may terminate negotiations and/or the solicitation at any time.