



DATE: June 1, 2004

TO: Agency Heads

FROM: Brian J. Lamb
Commissioner

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POLICY & PROCEDURE
ADMIN 04-06

SUBJECT: Foreign Outsourcing

POLICY OBJECTIVES:

- To educate agencies on and to facilitate the use of the state's "best value" procurement authority to consider, when appropriate, the location where services will be conducted in the performance of state contracts;
- To ensure that state contracting procedures facilitate the capture of data on the location where state contracted services, both direct and subcontracted, will be performed;
- To offer agencies a tool to facilitate annual reporting requirements regarding the use of workers in foreign countries in the performance of state contracts; and
- To provide agencies a mechanism to guarantee that the location where work has been indicated to be performed will not change during the course of the contract unless authorized in writing.

BACKGROUND

In 1998, significant changes to the state's procurement laws took place with the passage of the Department of Administration's Procurement Reform Initiative. The reform shifted the state's restrictive "low bid" award requirement to a "best value" approach, enabling the state to take into account factors in addition to price when determining what goods to purchase and services to use.

This legislation paved the way for the state to consider a variety of important factors when making procurement selections. These considerations regularly include the extent to which goods and services are environmentally friendly, the past experience of the vendor, and overall quality of the product or service.

In March 2004, Governor Tim Pawlenty issued Executive Order 04-02 that addresses an emerging concern of Minnesotans and U.S. citizens alike regarding the extent to which tax dollars are being

spent on services provided by workers located in countries outside the United States. The Executive Order recognizes that the subject of international outsourcing presents complex issues that entail a combination of potential benefits and detriments that vary by transaction.

“Best value” procurement is a valuable tool to responsibly consider the extent to which a vendor proposes to utilize workers outside the United States to perform a contract when making an award decision. This policy is intended to assist agencies in identifying what factors to consider when deciding whether the level of foreign outsourcing needs to be a factor in the procurement and how to implement the findings.

Currently, there is widespread debate about the overall impact and long-term effects of foreign outsourcing. Some sources describe a damaging impact on the economy, while others predict a long-term net gain. Whatever the case, an assessment of our local impact must begin with meaningful data collection and assessment. As such, this policy will also establish specific data elements that all vendors will be required to disclose if they desire to do business with the State of Minnesota. To achieve this end, forms have been created to provide a mechanism to state agencies to obtain disclosures from state vendors and in return, submit the collected data to the Commissioner of Administration. These efforts will provide the basis for meaningful assessments for future transactions as well as enable the submission of annual reports to the Governor and other interested parties. Finally, standard forms requiring the vendors to certify that the location where work is being performed will not change throughout the course of the contract without the state’s consent will work to maintain the “best value” status of the contract and protect the accuracy of the collected data.

AUTHORITY

This policy is enacted pursuant to the authority specified by the Governor in Executive Order 04-02 and by the Legislature in Minnesota Statutes, section 16C.03, subdivision 8 (2002).

POLICY AND PROCEDURE

A. SCOPE

- This policy applies to professional/technical services contracts, service contracts, or any other contract with the State of Minnesota or one of its agencies in which the provision of services is a significant part of the contract. Professional/technical services are defined as “services that are intellectual in character, including consultation, analysis, evaluation, prediction, planning, programming, or recommendation, and result in the production of a report or the completion of a task.” General service contracts include all other contracts for services that are not professional/technical by definition. When the term “services” is used in this policy, it refers to both categories of contracts.
- This policy applies to the above-referenced categories of contracts that exceed \$5,000.
- This policy is effective June 1, 2004, and is not to be applied retroactively. This policy applies to solicitations issued after the indicated effective date.

- Because of the State's participation as a sub-central government under the World Trade Organization's (WTO) Government Procurement Agreement and other international agreements, when the procurement exceeds an established threshold, companies from member countries that are responding to a solicitation must be treated in the same manner as responding U.S. companies. No such restrictions apply to contracts under the monetary threshold, and in those instances, the evaluation should be conducted in a manner that is detailed in the solicitation document and consistent with the objectives of this policy.

If the procurement exceeds \$477,000 it is a WTO covered transaction. The following countries are WTO members:

▪Austria ▪Belgium ▪Canada ▪Cyprus ▪Czech Republic ▪Denmark ▪Estonia ▪Finland, ▪France ▪Germany ▪Greece ▪Hong Kong China ▪Hungary ▪Iceland ▪Ireland ▪Israel ▪Italy ▪Japan ▪Korea ▪Latvia ▪Liechtenstein ▪Lithuania ▪Luxembourg ▪Malta ▪Netherlands with respect to Aruba ▪Norway ▪Poland ▪Portugal ▪Singapore ▪Slovak Republic ▪Slovenia ▪Spain ▪Sweden ▪Switzerland ▪United Kingdom ▪United States

(Note: Monetary threshold and listing of member nations current as of May 26, 2004).

B. UTILIZATION OF "BEST VALUE" AUTHORITY

During the planning stages of a solicitation, an agency must assess whether:

- 1) foreign outsourcing is likely to occur given what is known about the industry;
- 2) services required are also readily available from companies that perform the services within the United States;
- 3) there are anticipated differences in price between foreign outsourced services and those performed within the United States, based on market analysis, comparisons involving previous transactions or other reliable information;
- 4) there are anticipated differences in quality or the time in which the contract can be performed between any foreign and domestic services; and
- 5) the potential for foreign outsourcing raises other relevant factors that require consideration such as effects on the local economy, workplace safety issues, or potential for compromised security of data, systems, or other resources.

If, after considering these factors, an agency determines that anticipated differences in price, quality or other determining criteria exist, the agency must then proceed to either (1) establish requirements within the solicitation document with respect to foreign outsourcing or (2) prepare the solicitation document using the degree to which the contractor will perform (directly or indirectly) services overseas as one of the contract award factors. The Contract Certification Form and Sample Request for Proposal ("RFP") document have been amended to include information to assist agencies in developing this aspect of their solicitation document and to remind agencies to consider this factor when appropriate.

In cases where the agency has determined to prohibit foreign outsourcing as a requirement of a bid or proposal, the solicitation must simply indicate this requirement and, along with the other specifications, make it clear that any bid or proposal that does not comply will be considered non-

responsive. **NOTE:** If the responses are expected to exceed the WTO threshold (\$477,000), the solicitation should not include an outright ban on work performed outside the United States. Rather, an RFP can be used with points distributed in the manner described below for procurements above the WTO threshold.

In cases where an agency is proceeding to evaluate the extent to which services are performed overseas as one of several evaluation criteria, the following demonstrates how this can be done using an RFP:

Proposal Evaluation – SAMPLE FOR CONTRACTS ANTICIPATED TO EXCEED \$477,000

All proposals that are responsive to the requirements of the RFP and received by the deadline will be evaluated by the _____[State Agency]. A 100-point scale will be used to create the final evaluation recommendation. The factors and weighting on which proposals will be judged are:

- | | |
|---|-----|
| 1. Qualifications/experience of personnel working on the project | 40% |
| 2. Work plan | 25% |
| 3. Cost detail | 25% |
| 4. Extent services performed under this contract will be performed within the United States or by a WTO country company within its own borders* | 10% |

* In WTO covered transactions (those exceeding \$477,000) where responses are received from responders from countries other than the United States, all WTO member countries should be identified as such and evaluated consistently. To the extent a WTO member is performing work within its own borders, it cannot be penalized, but awarded the same points as if it were performing within the U.S. Otherwise, points are awarded based on the percentage of work to be performed within the United States.

Note: The above is for example purposes only. Contracting agencies should use their best professional judgment in selecting evaluation factors and appropriate weights.

C. DATA COLLECTION AND CERTIFICATION

Effective June 1, 2004, when issuing solicitations for contracts or when negotiating a single source contract in which the provision of services is a significant part of the contract, all state agencies must require vendors to disclose the following with respect to foreign outsourcing:

- 1) The location where services under the contract will be performed;
- 2) Any subcontracting of services under the contract and the location where any subcontracted services will be performed;
- 3) The percentage of work as compared to the whole that will be conducted in each identified foreign location; and
- 4) To ensure that this data will remain consistent during the course of the contract and to make certain the factors upon which a “best value” determination was made remain constant, the vendor is required to certify that the location where the services are being performed will not change during the course of the contract unless prior,

written consent is obtained from the state. (Agency contract administrator's must make reasonable efforts to assure contractors are adhering to this provision and report any actual or suspected violation immediately to the Materials Management Division [MMD].)

The State's sample RFP contains the required requests for data and the associated certification language. This form is available on the MMD Website at <http://www.mmd.admin.state.mn.us/process/contract/ptcIndex.asp>

D. REPORTING

Pursuant to Executive Order 04-02, the Commissioner of Administration is required to summarize and report to the Governor specific information regarding state agency use of workers in foreign countries. As a result, agencies must report related information to accommodate requirements under the Order. To ease the administrative burden associated with this new reporting requirement, the following procedure has been developed:

- 1) Agencies need only report on general service and professional/technical service contracts and any contract in which the provision of services is a significant part of the contract
- 2) A form has been prepared by the Department of Administration to accommodate agency reporting. This form is available on the MMD website at: _____;
- 3) Agencies must print out the form and return it to MMD when submitting contracts for final signature. The form requires detailed information ONLY WHEN any one of the responses to a solicitation contain a positive indication that the contract will involve foreign outsourcing; and
- 4) Reporting is required on a real-time basis to minimize end-of-year administrative burden and to enable periodic data assessment.

Questions concerning this policy may be addressed to Brian Lamb, Commissioner of Administration, at 651.296.1424 or to Kent Allin, Materials Management Director, at 651.296.1442.