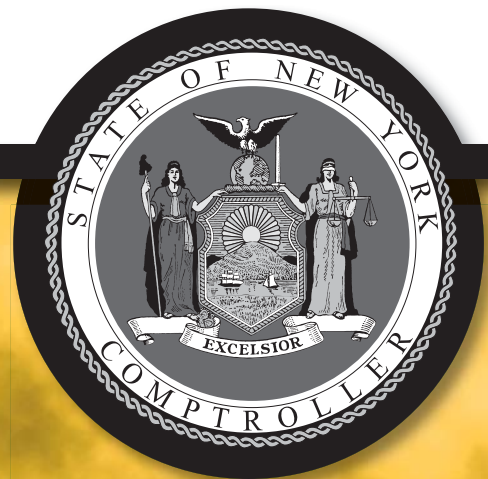




LOCAL GOVERNMENT MANAGEMENT GUIDE

# Seeking Competition in Procurement



*For additional copies of this report contact:*

**Division of  
Local Government and School Accountability**

110 State Street, 12th floor

Albany, New York 12236

Tel: (518) 474- 4037

Fax: (518) 486- 6479

or email us:

[localgov@osc.state.ny.us](mailto:localgov@osc.state.ny.us)

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# Seeking Competition in Procurement

Seeking competition in procurement is important in our business and often in our personal lives too. In our personal lives, we seek competition instinctively when we shop at the grocery store, or when we purchase a new or used vehicle. No one needs to tell us that it's a smart idea to make price and quality comparisons between different stores and different manufacturers in an effort to obtain the best value for our own money.

In our business lives we also know that we need to seek competition, but rather than just relying on common sense, seeking competition is often required by State law or by locally adopted policy. If managed effectively, State and local procurement requirements can increase competition and reduce the cost of goods and services of acceptable quality. A fair and open competitive process will also help discourage favoritism in public procurements, encouraging additional vendors to compete for your business. Increasing your organizational knowledge about State and local requirements will help you create a proactive, competitive environment in your procurement function.

This guide provides an overview of the following procurement topics:

- Who is Responsible?
- Planning and Promotion
- Competitive Bidding
- E-Bids
- Cooperative Purchasing
- State and County Contracts
- Procurement Policy and Procedures
- Professional Services and Insurance
- Preferred Sources
- Environmentally Responsible Purchasing
- Ethics and Conflicts of Interest.

In addition to these topics, Appendix A defines the types and dollar thresholds of purchases and public works subject to competitive bidding or to local policy and procedures. Appendix B will assist you in updating or creating your own procurement policy and procedures.

Seeking competition in public procurements is a complex topic and the information contained in this guide is not a substitute for the services of your locality's attorney. This guide is designed as a layperson's guide to relevant information. When necessary, we encourage you to seek the advice of your attorney on legal issues pertaining to bidding and other contractual arrangements for the acquisition of goods and services.

**If managed effectively, State and local procurement requirements can increase competition and reduce the cost of goods and services of acceptable quality.**

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It is vitally important that purchasing agents and other procurement officials have sufficient knowledge about State laws and local policies that guide competitive procurement.

## Who is Responsible?

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Whether your procurement process is centralized in a purchasing agent, or decentralized with many officials conducting their own procurements, it is the people making procurements who are the front line in seeking competition. It is vitally important that purchasing agents and other procurement officials have sufficient knowledge about State laws and local policies that guide competitive procurement. It's also important that these individuals possess a spirit of thriftiness and cost consciousness.

While the primary responsibility rests with officials who actually make the procurements, management plays an important role in maintaining effective communication. Management's communication of the organizational requirements and expectations for seeking competition will have a pervasive affect on how diligently competition is sought throughout the entity. The best policies ever written are just paper unless they are clearly conveyed to staff and then enforced.

Responsibility for procurement actually starts with the governing board. The governing board adopts policies that describe goals for procurement, including a formal policy and procedures that govern the acquisition of any goods and services not required by law to be competitively bid. In some cases, the initial policy and updates will be drafted by procurement officials for the board's review and eventual approval. The governing board is also responsible for adopting a code of ethics that supplements State law relating to conflicts of interest on the part of officers and employees. A code of ethics is required to set forth standards of conduct relating to several specific areas and may contain provisions addressing ethical behavior in the procurement process also.<sup>1</sup>

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<sup>1</sup> General Municipal Law, section 806 requires that municipal codes of ethics, at a minimum, provide standards for officers and employees with respect to disclosure of interest in legislation before the local governing board, holding of investments in conflict with official duties, private employment in conflict with official duties and future employment.

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## Planning and Promotion

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One of the best methods for ensuring that goods and services are acquired in a cost effective manner is to create as much competition as possible. In our personal lives, vendors compete for our business every day in the form of advertisements, holiday sales, and coupons. Competition for local government and school district dollars is not always as dynamic as what we experience in our own personal lives. To create as much market awareness as possible, local governments and school districts should carefully plan their solicitations for future procurements. Whether using formal competitive bids, requests for proposals (RFPs), or written and verbal quotes, a well-planned solicitation effort is needed to reach as many qualified vendors as possible. If conducted properly, the competition generated from advance planning may save your locality money.

Advertising is the heart of seeking competition, and localities may benefit from publicizing their procurement needs (beyond traditional legal notices) to attract prospective vendors. Although not commonly used in government, some economical forms of disseminating information that treat all prospective vendors in a fair and equitable manner are certainly worth considering. For example, preparation of a pamphlet, such as a “Guide to Doing Business with [Name of Unit]” may help attract new vendors and encourage current vendors to keep their prices competitive. The pamphlet could include descriptions of the types of commodities commonly purchased, general bidding instructions, when certain types of bids are usually solicited, the name of the official newspaper and any other places where bid advertisements will be published. Other helpful information would include the location and business hours of the purchasing department or contact person, key telephone and fax numbers, and driving directions for bid openings. Once developed, this type of pamphlet can be posted on your website and mailed upon request to prospective vendors.<sup>2</sup>

Keep in mind that when soliciting competitive bids, you can utilize more than one form of media to attract qualified bidders. In addition to using your official newspaper, you may advertise in other newspapers and trade journals, and notices can be posted on your website. You may also maintain a comprehensive list of prospective bidders and provide bid notices directly to those on the list.<sup>3</sup> A comprehensive solicitation effort ensures that the largest possible pool of potential vendors is made aware of your needs. You will need to weigh the cost of using additional forms of media against the potential savings from increased competition.

Whether using formal competitive bids, requests for proposals (RFPs), or written and verbal quotes, a well-planned solicitation effort is needed to reach as many qualified vendors as possible.

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<sup>2</sup> Any such method of dissemination of information should be undertaken in a way that treats all prospective vendors in a fair and equitable manner.

<sup>3</sup> Care should be taken to ensure that all known prospective bidders, with reasonable limitations, are included on the list and that no bidders are arbitrarily excluded or removed from the list.

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**Planning and gathering pertinent information is vital in any decision-making process, and this golden rule also applies to seeking competition in procurements.**

Another good business practice is to prepare a purchasing calendar to facilitate and coordinate the purchasing function. A purchasing calendar identifies dates on which certain classes of items will be bid or otherwise purchased. This type of planning helps coordinate the purchasing process on a weekly, monthly, and yearly basis. If possible, you should also plan to acquire particular types of items when the best prices are available and prompt deliveries can be made. Annual purchases (for example, volume purchasing and bidding) can be scheduled during periods when suppliers can be the most competitive. However, this option only works if ample storage space is available for bulk purchases. The use of an orderly purchasing calendar will also help ensure that established procurement policy and procedures are followed and goods and services are received in a timely manner.

Depending on the type and dollar value of the procurement, planning and disseminating information about future purchases can be relatively simple and require minimal effort, or it can be a complex and time-consuming process. Be sure to allow sufficient lead time to permit adequate planning, advertising, review of vendor qualifications, and possible rebidding, especially in the case of large dollar acquisitions. Planning and gathering pertinent information is vital in any decision-making process, and this golden rule also applies to seeking competition in procurements.

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## Competitive Bidding

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One of the goals of competitive bidding is to foster honest competition so that quality commodities and services are obtained at the lowest possible price. Competitive bidding also guards against favoritism, extravagance, and fraud, while allowing interested vendors a fair and equal opportunity to compete. Organizations that embrace the goals of competitive bidding can realize both monetary benefits and product satisfaction from the time, effort, and resources required to conduct statutorily required competitive bidding. To realize these benefits fully, procurement officials need to be knowledgeable about the requirements of competitive bidding.

**Bidding Thresholds** – Generally, local governments and school districts are required to advertise for competitive bids when procurements exceed certain dollar thresholds. Purchase contracts involving expenditures in excess of \$10,000 (\$20,000 effective June 22, 2010)<sup>4</sup> and contracts for public work involving expenditures in excess of \$20,000 (\$35,000 effective November 12, 2009) are subject to competitive bidding under the law.<sup>5</sup> Contracts are awarded to the “lowest responsible bidder” after public advertisement for sealed bids. There are several exceptions from competitive bidding requirements such as purchases made through the New York State Office of General Services, purchases made through certain county contracts, emergency purchases, and purchases from a legitimate sole source. In addition, procurements of commodities and services may be required to be made from preferred sources. We discuss some of these exceptions and purchases from preferred sources later in this guide.

In many instances, the first step in the bidding process is to analyze proposed procurements and determine whether the bidding threshold will be exceeded. In determining the necessity for competitive bidding, the aggregate amount known or reasonably expected to be expended for like commodities or services in a fiscal year (whether from a single vendor or multiple vendors) must be determined. If relevant, planning documents should state how the amount was determined and whether the procurement will be a purchase or a contract for public work.

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<sup>4</sup> The competitive bidding dollar threshold for purchase contracts was increased from \$10,000 to \$20,000 pursuant to Chapter 56, Part FF, of the Laws of 2010, effective June 22, 2010. Accordingly, this publication has been updated to incorporate the change in that threshold amount. Chapter 56 also made certain other amendments to the competitive bidding provisions of the General Municipal Law, which, along with other subsequent changes in the law, will be incorporated, as appropriate, in a future update to this publication. If you have questions concerning the amendments to the bidding statutes, please feel free to contact our Division of Legal Services staff at 518-474-5586.

<sup>5</sup> General Municipal Law, section 103

One of the goals of competitive bidding is to foster honest competition so that quality commodities and services are obtained at the lowest possible price.

In general, for purposes of the bidding thresholds, purchase contracts involve the acquisition of commodities (materials, supplies, or equipment), while contracts for public work involve services, labor, or construction.

### Example - Aggregate Purchases

Copy paper is purchased throughout the fiscal year and purchased from more than one vendor. Vendor A is projected to supply \$14,500 in copy paper and Vendor B \$10,000 in copy paper. Both vendors have very similar pricing structures. The total amount expected to be expended for the year on copy paper throughout the local government or school district determines whether the competitive bidding threshold is exceeded. Because the aggregate purchase of the copy paper for the fiscal year was estimated to be excess of \$20,000, competitive bidding is required for these purchases, unless an exception applies. It is easy to see from this example how annual planning plays an important role in determining the need to comply with statutory bidding requirements and in fostering competition and potential cost savings.

As a general guide, items or work of the same or similar nature, which are customarily handled in the marketplace by the same groups of vendors or contractors, should be treated as a single item for purposes of determining whether the dollar thresholds will be exceeded. The dollar thresholds specified in the bidding statutes may not be avoided by artificially splitting or breaking up contracts into lesser agreements, or entering into a series of agreements, for sums below the bidding thresholds.

In general, for purposes of the bidding thresholds, purchase contracts involve the acquisition of commodities (materials, supplies, or equipment), while contracts for public work involve services, labor, or construction. When a contract involves acquisition of both goods and services, it may be difficult to determine which bidding threshold applies. In these cases, the “total character” of each procurement should be reviewed on a case-by-case basis. As a general rule, if a contract involves a substantial amount of services so that the acquisition of commodities is only incidental to the work, it should be considered a contract for public work for purposes of the bidding threshold. Conversely, if services or labor are only minor or incidental to the acquisition of goods, it generally should be considered a purchase contract for this purpose.

### **Example – Purchase versus Public Work Contracts**

A contract for interior painting of a building involves both material (paint) and labor (painting). In most instances, the labor component of the contract clearly will be predominant, making it a contract for public work. Public works contracts in excess of \$20,000 (\$35,000 effective November 12, 2009) are subject to competitive bidding under the law.

In contrast, replacing a water heater, while involving both equipment (the water heater) and labor, involves primarily an equipment acquisition with incidental labor, as a general proposition, making it a purchase contract. Purchase contracts in excess of \$10,000 (\$20,000 effective June 22, 2010) are subject to competitive bidding under the law.

Advance planning and effective management of the competitive bidding process increases the likelihood of obtaining cost effective purchase and public work contracts for your locality.

The bid specification document sets forth the standards and requirements that bidders must observe, and provides bidders with information necessary to prepare their bids.

**Bid Specifications** – The bid specification document sets forth the standards and requirements that bidders must observe, and provides bidders with information necessary to prepare their bids. Specifications should be clearly written and allow vendors supplying reasonably equivalent items to compete on an equal basis. They should provide prospective bidders a common standard by which to be measured and provide assurance that bidders will be competing on a common and equal basis, which should encourage bidders to be responsive and competitive. Preparing bid responses can be costly, so qualified firms may be unwilling to go through the work and expense of preparing a bid if critical details of the engagement or the criteria used to select the vendor are not clearly communicated during the solicitation process. Specifications should not be too vague or indefinite, so that bidders do not have enough information to formulate intelligent bids, or be unduly restrictive, thereby shutting out or stifling open and fair competition among vendors. Through the use of fair bid specifications, participation in the bidding process may increase, resulting in a potential cost savings.

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Another possibility for increasing competition and also convenience is to accept bids electronically. The law authorizes local governments and school districts to receive electronic bids in connection with purchase contracts.

## E-Bids

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Another possibility for increasing competition and also convenience is to accept bids electronically. The law authorizes local governments and school districts to receive electronic bids in connection with purchase contracts.<sup>6</sup> The governing board may by resolution authorize the receipt of bids in an electronic format. The bid advertisement must designate how the electronic bid will be received, such as designating the website or email address where the bid should be sent.<sup>7</sup>

The submission of bids in electronic format may not be required as the sole method for the submission of bids, and paper bids must still be accepted. All other minimum requirements of the competitive bidding process remain the same (e.g., advertising in the official newspaper, public opening of bids, etc.).

Any method used to receive electronic bids must also comply with article 3 of the State Technology Law (the “Electronic Signatures and Records Act”) and related regulations. Also, the method used must, at a minimum:

- Document the time and date of receipt of the bids received electronically
- Authenticate the identity of the sender
- Ensure the security of the information transmitted, and
- Ensure the confidentiality of the bid until the time and date established for the opening of bids.

The authorization for electronic bids is scheduled to sunset and expires on June 1, 2013.

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<sup>6</sup> General Municipal Law section 103[1]

<sup>7</sup> 9 NYCRR section 540.2

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## Cooperative Purchasing

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In a cooperative purchasing arrangement, two or more localities work together to procure commodities or services jointly rather than separately. The benefits of cooperative purchasing are potential cost savings attained by lower commodity prices (achieved through economies of scale) and lower joint administrative costs. The basic principle behind cooperative purchasing is that supplies, materials, and equipment can often be purchased for substantially less if bought in quantity.

Cities, towns, counties, villages, fire districts, school districts, and BOCES are authorized to enter into cooperative purchasing arrangements through intergovernmental cooperation agreements.<sup>8</sup> Intergovernmental cooperation may be defined as an arrangement between or among two or more governments for accomplishing common goals, providing a service, or solving a mutual problem. Basically stated, local governments and school districts may generally perform any function or service on a cooperative basis that they may perform individually. Purchasing is an example of where intergovernmental cooperation can be employed.

In a cooperative purchasing arrangement, all laws relating to competitive bidding must be complied with and the cooperative agreement, which must be approved by each board, must be in place prior to the solicitation of bids. Local policies, such as the locality's procurement policy, may also need to be amended to ensure that they are consistent with the cooperative purchasing agreement. Many local governments and school districts purchase similar items such as electricity, office supplies, vehicle maintenance parts, cafeteria food and beverages, sports equipment, and cleaning supplies, that could be purchased through a cooperative arrangement. Typical cooperative purchasing activities include development of a single set of specifications for common items, preparation of bid advertisements, administration of the bidding process, and arrangement for purchase deliveries. Cooperative purchasing can provide all participants with the economies of large scale purchasing.

**In a cooperative purchasing arrangement, two or more localities work together to procure commodities or services jointly rather than separately.**

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<sup>8</sup> General Municipal Law, sections 119-n, 119-o

As an alternative to soliciting your own bids or entering into cooperative bidding arrangements, localities may “piggyback” on county and New York State contracts that have been extended to local governments and school districts.

## State and County Contracts

As an alternative to soliciting your own bids or entering into cooperative bidding arrangements, localities may “piggyback” on county and New York State contracts that have been extended to local governments and school districts. County contracts (from counties in New York State) that have made provision for extension, and many State Office of General Services contracts, are available for use by local governments and school districts. These contracts constitute an exception to the bidding requirements of the law.<sup>9</sup>

**County Contracts** – County governing boards may authorize the inclusion in their purchase contracts, and certain contracts for services, of a provision for any local government or school district to obtain commodities or services under such contracts.<sup>10</sup> Procurements made under these contracts by other localities must be made in accordance with the rules adopted by the county board. These rules prescribe the conditions under which, and the manner in which, the procurements may be made. Information relative to county contracts that have been extended to other localities can be obtained from county purchasing agents or other appropriate county officials. Certain counties list available contracts on their websites or mail listings of contracts upon request.

**State Contracts** – The New York State Office of General Services (OGS) awards contracts for the procurement of commodities, services, and technology products. These contracts are available to local governments and school districts, which may make purchases at the same prices and under the same terms as the State. For example, these contracts include awards for road salt and fuel, vehicles and heavy equipment, school buses, computer hardware and software, and much more.

OGS contracts are readily accessible on the OGS website at [www.ogs.state.ny.us](http://www.ogs.state.ny.us). You can view them there or you can register online at [www.ogs.state.ny.us/pns](http://www.ogs.state.ny.us/pns) to receive email notices on contracts as well as other related information. You can sign up to receive information for as few or as many of the contract areas that interest you. The majority of State contracts can be used as soon as they are awarded. Orders are placed directly with the contractors listed, using your own locality’s or school’s purchase order. The State contract number should be included on both your purchase order and the original invoice presented for payment.

<sup>9</sup> General Municipal Law, sections 104 and 103(3)

<sup>10</sup> County Law, section 408-a(2). Only contracts for services other than those services that are subject to articles 8 and 9 of the Labor Law, relating to prevailing wage requirements, may be extended.

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The price of certain OGS commodities is directly impacted by volatile market conditions. These commodities include road salt, fuel oil, gasoline, diesel fuel, and propane. In order to participate in the next contract for any of these price-sensitive commodities, you must complete and return a requirement letter to OGS before the required due date. OGS uses the data from the requirement letters to prepare bid document information and then to solicit competitive bids. The filing of a requirement letter will bind you to the OGS contract as if you had contracted directly with the vendor.<sup>11</sup>

While purchasing through extended State and county contracts is encouraged, it is not required and does not guarantee a lower price and/or suitable quality item. On the plus side, State and county contracts provide officials with access to the State's and county's buying power and expertise, as well as the following additional benefits:

- Reduction or elimination of the time required to prepare bid specifications
- Enhancement and simplification of the procurement process, and
- Minimization of the time required to determine "responsibility" of bidder(s).

When using a State or county contract, you should also consider other cost factors including delivery charges. Most OGS contracts are FOB (free on board) and delivery to the purchaser's location is generally free, another advantage of using State contracts. All other miscellaneous costs should be investigated before you commit to purchasing through a State or county contract.<sup>12</sup> Once again, allowing sufficient time to plan for major purchases is absolutely essential.

**While purchasing through extended State and county contracts is encouraged, it is not required and does not guarantee a lower price and/or suitable quality item.**

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<sup>11</sup> Effective for all "bids issued" on or after July 1, 2008, State contractors that are awarded a centralized contract for commodities, services, or technology must add a "centralized procurement contract fee" of 0.5 percent to the price of the contract, pursuant to State Finance Law section 163-c. Further information concerning the fee can be obtained from OGS.

<sup>12</sup> In fact, General Municipal Law section 103(3) expressly provides that, prior to making a procurement through a county contract, the appropriate officer, board, or agency of the local government or school district must consider whether the procurement will result in cost savings after all factors, including charges for service, material and delivery, have been considered.

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## Procurement Policy and Procedures

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A procurement policy and procedures generally ensure that competition is sought in a reasonable and cost effective manner for procurements below the bidding thresholds and for other contracts exempt from bidding.

Every local government and school district must adopt its own policy and procedures for procurements of goods and services not required by law to be competitively bid. A procurement policy and procedures generally ensure that competition is sought in a reasonable and cost effective manner for procurements below the bidding thresholds and for other contracts exempt from bidding. A procurement policy and procedures applies to:

- Purchase contracts involving expenditures of \$10,000 (\$20,000 effective June 22, 2010) or less
- Contracts for public work involving expenditures of \$20,000 (\$35,000 effective November 12, 2009) or less, and
- Professional services and other procurements not required by law to be competitively bid.

The law provides that goods and services not required to be competitively bid must be procured in a manner to assure the prudent and economical use of public moneys in the best interest of the taxpayers; to facilitate the acquisition of goods and services of maximum quality at the lowest possible cost; and to guard against favoritism, improvidence, extravagance, fraud, and corruption.<sup>13</sup>

As there are vast differences in the size and nature of local government and school district operations, and in the dollar value of their procurements, management should carefully consider what procedures are appropriate for their operations, within the requirements of the law.<sup>14</sup> The policy and its procedures should be well thought out and designed specifically to benefit the locality and its taxpayers and not simply a copy of a sample policy. Procedures should be created after input is solicited and considered from all staff involved in the procurement process.<sup>15</sup>

When a procurement is not subject to bidding requirements, the law generally requires that the procurement policy provide that alternative proposals or quotations be obtained by use of written requests for proposals (RFPs), written quotations, verbal quotations or any other method that

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<sup>13</sup> General Municipal Law, section 104-b(1)

<sup>14</sup> General Municipal Law, section 104-b

<sup>15</sup> General Municipal Law, section 104-b(3) requires that comments concerning the policies and procedures must be solicited from officers of the political subdivision who are involved in the procurement process prior to the enactment of the policies and procedures and from time to time thereafter.

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further the purposes of the law. The procurement policy may set forth circumstances when, or types of procurements for which, in the sole discretion of the governing body, the solicitation of alternative proposals or quotations will not be in the best interest of the local government or school district. These exceptions should be limited and be set forth only when properly justified in the public interest.<sup>16</sup> Otherwise, the effectiveness of the procurement policy and its procedures will be diminished.

Each locality should develop detailed procedures that are appropriate for the size and complexity of its operations. As most every requirement involves benefits and costs, any new policy should consider the cost-benefit relationship between procedures and the expected outcomes. In adopting and carrying out a procurement policy and procedures, the benefits of required actions should not outweigh the costs, nor overburden the process.<sup>17</sup> Additionally, the policy and procedures must require adequate documentation of actions taken. Documentation may include memoranda, written quotation forms, telephone logs (for verbal quotes), RFPs, and copies of State or county contracts. If a contract is awarded to an offer other than the lowest dollar offer, the policy must require that there be justification and documentation, setting forth the reasons the award furthers the purposes of the statute.

Your policy and its procedures should be reviewed annually, as required by law. This annual review can help ensure that procedures are current and appropriate to meet the changing needs of your local government or school district. Comments from purchasing officials should be requested at review time as they may identify the need to amend the policy or procedures.

Appendix A contains a chart designed to assist you in distinguishing between purchases and contracts for public work that are subject to competitive bidding and those that are subject to your local procurement policy and procedures. Appendix B contains a sample procurement policy that will assist you in developing or modifying your procurement policy and procedures.

**If a contract is awarded to an offer other than the lowest dollar offer, the policy must require that there be justification and documentation, setting forth the reasons the award furthers the purposes of the statute.**

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<sup>16</sup> Examples may include emergencies when time is a crucial factor, procurements for which there is no possibility of competition and very small procurements for which solicitations of competition would not be cost effective.

<sup>17</sup> General Municipal Law, section 104-b(2)(c) requires that the procurement policies and procedures set forth when each method of procurement will be utilized, taking into account which method will best further the purposes of section 104-b and “the cost-effectiveness of the method.”

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Professional services generally include services rendered by attorneys, engineers, and certain other services requiring specialized or technical skills, expertise or knowledge, the exercise of professional judgment, or a high degree of creativity.

## **Professional Services and Insurance**

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One of the most prominent exceptions to competitive bidding is professional services. Professional services generally include services rendered by attorneys, engineers, and certain other services requiring specialized or technical skills, expertise or knowledge, the exercise of professional judgment, or a high degree of creativity. In addition, insurance coverage (e.g., health, fire, liability, and workers' compensation) is also not subject to competitive bidding requirements.

Professional services can involve significant dollar expenditures, and localities generally must include in their procurement policy a proposal or quotation process to ensure that these procurements are made on the most favorable terms and conditions or at the best value. Seeking competition for professional services and insurance coverage may be an opportunity to generate cost savings for your locality. Your policy should describe the methods and procedures for promoting competition in the procurement of professional services.

One way to promote competition in professional services is to issue requests for proposals (RFPs). Using an RFP is a common method of seeking competition where competitive bidding is not required and where price should not necessarily be the sole criterion for award of the contract. An RFP generally is a document that provides detailed information concerning the type of service to be provided including minimum requirements and, where applicable, the evaluation criteria that will govern the contract award. Potential vendors typically are supplied with copies of the RFP and are requested to submit proposals by a specified date. Proposals can be solicited via public advertisement, or a comprehensive list of potential vendors can be compiled with vendors contacted directly and provided with the RFP. An RFP can provide a mechanism for fostering increased competition for professional services and can ensure that these contracts are awarded in the best interests of the taxpayers.

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RFP procedures should include a comprehensive, fair solicitation process. Prospective contractors should be made aware of your locality's needs, the procedures involved in responding to the RFP, and the process for evaluating proposals. Evaluation criteria and any weighting or ranking of the importance of those criteria should be set forth in the RFP. The evaluation criteria can include factors in addition to price (e.g., experience, staff availability, and estimated completion times). The process should be based on a fair and equitable review and evaluation or ranking of the proposals. A well-planned effort can help encourage qualified providers to respond to the RFP and ultimately result in increased competition and potential cost savings.

Your procurement policy should designate whether RFPs or other similar procedures should be used to solicit professional services and insurance. The solicitation of these services via RFP can help provide assurance that quality services are obtained under the most favorable terms and conditions possible.

Generally, there are no set rules regarding the frequency of RFPs. However, provision should be made for periodic solicitations at reasonable intervals. Specific requirements do apply, however, to school and fire district audit services. The law requires school districts to utilize a competitive RFP process when contracting for annual audit services, and limit the audit engagement to no longer than five consecutive years.<sup>18</sup> In addition, the law requires those fire districts that are required to obtain an annual audit to procure those services through a competitive RFP process and also limits the audit engagement to a term no longer than five consecutive years.<sup>19</sup>

**Prospective contractors should be made aware of your locality's needs, the procedures involved in responding to the RFP, and the process for evaluating proposals.**

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<sup>18</sup> Education Law, section 2116-a(3)(b)

<sup>19</sup> Town Law, section 181-b(3)

The OGS regularly updates comprehensive information about preferred sources, and it also provides an official “List of Preferred Source Offerings.”

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## Preferred Sources

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New York State has enacted legislation to advance “special social and economic goals,” that accords certain providers with “preferred source” status.<sup>20</sup> Procurements of commodities and/or services, when available in the “form, function and utility” required by the political subdivision, are required to be made from preferred sources and are not subject to competitive procurement requirements. Preferred sources include: the Department of Correctional Services’ Correctional Industries Program (CORCRAFT); approved qualified, nonprofit agencies for the blind; approved special employment programs for mentally ill persons; approved qualified charitable nonprofit agencies for other severely disabled persons; and certain approved qualified veterans’ workshops. The law establishes the priority to be accorded to the various preferred sources.<sup>21</sup>

Those who are not familiar with the commodities and services of preferred sources are often surprised to learn of the broad range of offerings and their quality and competitive pricing. Commodity offerings include office and classroom furniture such as desks, chairs, tables, and lockers; flags, cleaning products, and janitorial supplies; packaged foods and beverages; office and school supplies; and safety supplies and equipment such as fire extinguishers and signage. Services include document processing, mail services, messenger and phone answering services; food services; maintenance and janitorial services; garbage pickup and recycling; and electronics recycling. Preferred sources provide direct sales to local governments and school districts.

An assessment of preferred vendor availability should be made before a commodity or service is considered for competitive bidding or alternative procurement procedures. The OGS regularly updates comprehensive information about preferred sources, and it also provides an official “List of Preferred Source Offerings.” This information can be obtained from the OGS website ([www.ogs.state.ny.us](http://www.ogs.state.ny.us)) or by inquiry. Some preferred sources also have websites and can be contacted directly for information about their commodities and services.

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<sup>20</sup> State Finance Law section 162 (1), (2); Correction Law section 184

<sup>21</sup> State Finance Law section 162 (4)

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## Environmentally Responsible Purchasing

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Purchasing “green” is a socially responsible initiative that has gained momentum throughout our State and our country. In an effort to preserve our natural resources, many organizations, businesses, and governments have embarked upon programs that encourage environmentally responsible purchasing. When seeking competition, local governments and school districts generally can consider whether energy-efficient equipment will produce savings in energy costs and, if properly justified, may include an energy efficiency threshold in their specifications. In addition, bid specifications can provide for a preference for “recycled products.”<sup>22</sup> It’s important to realize that a decision to purchase energy-efficient or recycled products may not save your locality money initially. However, long-term benefits may be realized through a reduction in energy costs or a positive impact on the environment.

In at least one instance, purchasing green is mandatory. The law<sup>23</sup> requires all “elementary or secondary schools”<sup>24</sup> to follow guidelines established by the New York Office of General Services for “environmentally-sensitive cleaning and maintenance products” that are available in the form, function and utility generally used by schools in their facilities. The term “environmentally-sensitive cleaning and maintenance products” is defined as those products that minimize adverse impacts on children’s health and the environment.<sup>25</sup> OGS has developed lists of green cleaning products for this purpose. The OGS website also includes information on purchasing recycled or remanufactured products, and energy-efficient products.

In an effort to preserve our natural resources, many organizations, businesses, and governments have embarked upon programs that encourage environmentally responsible purchasing.

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<sup>22</sup> GML, section 104-a sets forth an exception to the “lowest responsible bidder” requirement of GML, section 103 for the purchase of “recycled products.” “Recycled product” is defined to mean any product manufactured from secondary materials (as defined in Economic Development Law section 261), and meeting the requirements of Environmental Conservation Law section 27-0717 (the State recycling emblem program) and any regulations of the Department of Environmental Conservation. If a “recycled product” meets specifications and the price is “reasonably competitive,” the political subdivision may award the contract to the vendor of to the recycled product, even though it is not the lowest responsible bidder. “Reasonably competitive” is defined to mean a cost premium not to exceed 10 percent of the comparable nonrecycled product or 15 percent if at least 50 percent of the secondary material utilized in making the recycled product is generated from the waste stream in New York State.

<sup>23</sup> Education Law section 409-i; see also State Finance Law section 163-b

<sup>24</sup> This is defined to cover school districts, BOCES, charter schools, approved private schools for the education of students with disabilities, State-supported schools for the deaf or blind operated pursuant to article 85 of the Education Law, and any other private or parochial elementary or secondary school (Education Law section 409-i[1][a]).

<sup>25</sup> Education Law section 409-i[1][b])

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Generally, local governments and school districts are required to have a code of ethics that sets forth standards of conduct reasonably expected of its officers and employees.

Besides opportunities for purchasing green, local governments and school districts are also exploring other options that help protect our environment. The Office of the State Comptroller released an audit report<sup>26</sup> in 2008 that describes six local governments that installed solar panel electrical systems to reduce their reliance on traditional electric sources and to reduce greenhouse gases released into the atmosphere. By installing solar panel electrical systems, the six local governments realized immediate savings on their electrical bills and have avoided environmental emissions. Although the upfront cost to install these systems was expensive, the audit found that these local governments could reduce their carbon dioxide, nitrous oxide, and sulfur dioxide emissions by more than 6.6 million pounds over the 40 to 50 year estimated life of the panels.

Each local government and school district needs to assess its own purchasing needs and objectives in relationship to green purchases. In some instances, environmentally responsible purchasing may be prohibitively costly or only produce limited benefits or efficiencies. Providing options for recycled and energy-efficient green products can often be and, in some cases, must be part of seeking competition and the procurement process.

### **Ethics and Conflicts of Interest**

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Generally, local governments and school districts are required to have a code of ethics that sets forth standards of conduct reasonably expected of its officers and employees.<sup>27</sup> Although a code of ethics is an entity-wide document, it may be beneficial to include standards for procurement activities in your code. Procurement is a function where the public and private sectors meet to conduct business. Public procurement officials need to have a clear understanding of what business practices are permissible and what ones are not. It is also important that all local government and school district officers and employees maintain high ethical standards of conduct and avoid situations where there is even the appearance of impropriety.

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<sup>26</sup> OSC, *Usage of Solar Panels in Municipalities*, 2008-MS-1

<sup>27</sup> General Municipal Law, section 806

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Among the ways in which procurement activities may be addressed in your code of ethics are by the inclusion of provisions:

- Purchasing activities are to be conducted in a manner that is in accordance with law; in the best interests of the local government or school district; avoids favoritism, wastefulness, extravagance, fraud, and corruption; and fosters honest competition to obtain the greatest value for every tax dollar expended.
- Procurement officials should insist on and expect honesty in sales representation whether offered verbally or in writing, through the medium of advertising, or in the sample of a product submitted.
- Procurement officials must treat all bidders and vendors and prospective bidders and vendors fairly and equally.
- Procurement officials should discourage the offer of gifts and decline gifts that in any way might influence or have the appearance of influencing the procurement of goods or services.<sup>28</sup>

**Gifts** - Governing boards should consider providing guidance in their codes of ethics on the acceptance of gifts by local government and school district employees. The law prohibits any officer or employee from directly or indirectly soliciting any gift.<sup>29</sup> It also prohibits any officer or employee from accepting or receiving any gift having a value of \$75 or more, in any form, under circumstances in which it can reasonably be inferred that the gift was intended to influence the officer or employee, or could reasonably be expected to influence the officer or employee, in the performance of his or her official duties, or was intended as a reward for any official action on his or her part.<sup>30</sup> It is a common practice for vendors in the private sector to offer tickets to sporting and other entertainment events, lunches at exclusive locations, clothing with company logos, and a variety of other perks. Officers and employees with purchasing or financial responsibilities are sometimes offered such gifts. Your locality's code of ethics could supplement the prohibitions contained in the law, including addressing gifts to close relatives of officers and employees.

**Governing boards should consider providing guidance in their codes of ethics on the acceptance of gifts by local government and school district employees.**

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<sup>28</sup> As discussed below, General Municipal Law, section 805-a(1)(a) prohibits municipal officers and employees from accepting gifts having a value of \$75 or more under circumstances where it could reasonably be expected or inferred that the gift is intended to influence the performance of official duties or as a reward for any official action.

<sup>29</sup> General Municipal Law section 805-a(1)(a)

<sup>30</sup> Ibid.

The law limits the ability of officers and employees to enter into contracts in which their personal financial interests and their public powers and duties conflict.

**Conflicts of Interest** - Besides including guidance on the acceptance of gifts in your code of ethics, local governments and school districts also need to have a system in place for ensuring that potential conflicts of interest are identified, prohibited interests are avoided and any disclosure requirements are followed. The law limits the ability of officers and employees to enter into contracts in which their personal financial interests and their public powers and duties conflict.<sup>31</sup>

Unless a statutory exception applies, the law prohibits officers and employees, including purchasing officials, from having an “interest” in contracts with the local government or school district for which they serve when they also have the power or duty, either individually or as a member of the board, to negotiate, prepare, authorize, or approve the contract; to authorize or approve payment under the contract; to audit bills or claims under the contract; or to appoint an officer or employee with any of those powers or duties. Officers and employees have an interest in a contract, including purchase contracts, when they receive a direct or indirect monetary or material benefit as a result of a contract. Officers and employees are also deemed to have an interest in the contracts of: their spouses, minor children and dependents (except employment contracts); any firm partnership or association of which they are a member or employee; and any corporation of which they are an officer, director, or employee, or directly or indirectly own or control any stock. As a rule, interests in actual or proposed contracts on the part of an officer or employee, or his or her spouse, must be publicly disclosed in writing to the officer or employee’s immediate supervisor and to the governing board of the municipality. The written disclosure must be made part of and be set forth in the official record of the proceedings of the board.

Conflicts of interest can be identified by the use of disclosure forms that identify outside employment, business interests, investments, or other interests. Counties, cities, towns and villages with populations of 50,000 or more must, and other local governments and school districts may, promulgate annual statements of financial disclosure for certain officers and employees.<sup>32</sup> Careful use of financial disclosure forms can help identify potential conflicts of interests at an early stage.<sup>33</sup>

Ensuring the highest of ethical standards in the procurement process is an important ingredient in creating a fair and competitive procurement process that makes prudent and cost effective procurements in the best interest of the locality and the taxpayer.

<sup>31</sup> General Municipal Law, article 18

<sup>32</sup> General Municipal Law sections 810-812

<sup>33</sup> Your legal counsel should be consulted with respect to whether any specific financial disclosure requirement for employees constitutes a mandatory term or condition of employment for purposes of collective bargaining under Civil Service Law, article 14.

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## Conclusion

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Seeking competition in the purchasing cycle isn't just a matter of ensuring compliance with laws and local policy. The people who are directly responsible for making procurement decisions should help to create a cost-conscious and thrifty procurement environment in which seeking competition becomes intuitive and second nature for the organization. The benefits of seeking competition, including the potential for cost savings, should motivate a culture of competition within your procurement function. Seeking competition can be enhanced when a community of best practices, within legal parameters, is developed by each local government or school district. Participation in professional procurement groups can also assist in developing a cost-conscious atmosphere within your locality. Communication within your organization about procurement goals, laws, and local policy is also essential to enhancing your organization's expertise and commitment to seeking competition. Management can play a key role in bringing together the various factors needed to create an organizational mindset of seeking competition.

The Office of the State Comptroller would be pleased to assist you with any questions you have regarding the information contained in this guide or any special circumstances with which you may need assistance. The addresses and telephone numbers for each of our regional offices, and our legal staff, are located at the end of this publication. Please contact the regional office for your locality or, for legal issues, our legal staff, with any questions you may have.

The benefits of seeking competition, including the potential for cost savings, should motivate a culture of competition within your procurement function.

## Appendix A – Categories of Procurement

<p>Most proposed procurements generally fit into one of the 15 categories in the following table. This table identifies whether these categories are within the competitive bidding requirements of GML Section 103 or within local procurement policy and procedures required by GML Section 104-b.</p>	<b>Subject to Competitive Bidding (section 103)</b>	<b>Local Policy and Procedures (section 104-b)</b>
<b>Purchase Contracts and Contracts for Public Work if No Other Exception Applies<sup>34</sup></b>		
1. Purchase Contracts – In excess of the \$10,000 (\$20,000 effective June 22, 2010) Threshold	X	
2. Purchase Contracts – Below the \$10,000 (\$20,000 effective June 22, 2010) Threshold		X
3. Contracts for Public Work – In excess of the \$20,000 (\$35,000 effective November 12, 2009) Threshold	X	
4. Contracts for Public Work – Below the \$20,000 (\$35,000 effective November 12, 2009) Threshold		X
<b>Procurements Exempt from Both the Bidding Requirements of section 103 and the Quotations/Proposals Requirement of section 104-b (Village Law Section 5-508[4])</b>		
5. Preferred Sources (State Finance Law, section 162; Correction Law, sections 184,186)		X <sup>(a)</sup>
6. State Contract (GML, section 104)		X <sup>(a)</sup>
7. County Contract (GML, section 103[3])		X <sup>(a)</sup>
<b>Procurements Exempt from section 103</b>		
8. Emergency (GML, section 103[4])		X
9. Sole Source		X
10. Professional Service		X
11. True Leases	X <sup>(b)</sup>	X
12. Insurance		X
13. Surplus/Second-hand Materials, Supplies, Equipment from Certain Other Governments (GML, section 103[6])		X
14. Certain Food and Milk Purchases (GML, section 103[9],[10])		X <sup>(c)</sup>
15. Certain Municipal Hospital or Nutrition Program Purchases (GML, section 103[8])(Village Law Section 5-508[4])		X

(a) Although GML section 104-b exempts these procurements from the requirement of written or verbal quotations or proposals, each political subdivision should include in their policies and procedures a provision to ensure that use of the exception is documented and, in the case of State or county contracts, that procurements from these sources are in the best interest of the unit. In the case of procurements through a county contract, the law expressly requires that the local government consider whether use of the county contract “will result in cost savings after all factors, including charges for service, material and delivery, have been considered.” (GML section 103[3]). This could be accomplished by comparisons of prices to catalogs or other market price comparisons.

(b) School districts only, Education Law, section 1725.

(c) School districts only.

<sup>34</sup> See pages 5–7, discussing the determination of whether the bidding thresholds will be exceeded.

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## Appendix B – Sample Format for Procurement Policy and Procedures

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**Instructions:** This template is a guide for local governments and school districts to utilize when developing or updating their procurement policy and procedures. The policy content and extent of required procedures, subject to the minimum statutory requirements, should be tailored to meet the needs of each locality’s procurement function and should consider the costs and benefits of such procedures.

This resolution sets forth the policy and procedures of the *(Insert name of political subdivision)* to meet the requirements of General Municipal Law, section 104-b.

### Purpose

Goods and services that are not required by law to be procured pursuant to competitive bidding must be procured in a manner as to assure the prudent and economical use of public moneys in the best interest of the taxpayers; to facilitate the acquisition of goods and services of maximum quality at the lowest possible cost under the circumstances; and to guard against favoritism, improvidence, extravagance, fraud, and corruption. To further these objectives, the governing board is adopting an internal policy and procedures governing all procurements of goods and services which are not required to be made pursuant to the competitive bidding requirements of General Municipal Law, section 103 or of any other general, special, or local law.

### Procedures for Determining Whether Procurements are Subject to Bidding

The procedures for determining whether a procurement of goods or services is subject to competitive bidding and documenting the basis for any determination that competitive bidding is not required by law is as follows:

Procedure: *(Insert specific procedures required)*

Documentation: *(Describe documentation requirements)*

### Statutory Exceptions from Quotations/Proposals Requirements of This Policy and Procedures

Except for procurements made pursuant to General Municipal Law, section 103(3) (through county contracts) or section 104 (through State contracts), State Finance Law, section 162, Correction Law, sections 184 and 186 (from “preferred sources,” including articles manufactured in correctional institutions), or the items excepted herein (see below), alternative proposals or quotations for goods and services shall be secured by use of either written requests for proposals, written quotations, verbal quotations or any other method of procurement that furthers the purposes of the General Municipal Law, section 104-b.

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## **Appendix B – Sample Format for Procurement Policy and Procedures**

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### **Methods of Competition to be Used for Non-Bid Procurements**

The methods of procurement to be used are as follows:

*(Insert circumstances when each specific method of procurement will be utilized and procedures appropriate for the size and complexity of your locality; take into account which method will best further the purposes of General Municipal Law, section 104-b and the cost-effectiveness of the method)*

### **Adequate Documentation**

Documentation of actions taken in connection with each such method of procurement is required as follows:

*(Insert specific documentation requirements)*

### **Awards to Other than the Lowest Responsible Dollar Offerer**

Whenever any contract is awarded to other than the lowest responsible dollar offerer, the reasons that such an award furthers the purpose of General Municipal Law, section 104-b, as set forth herein above, shall be documented as follows:

*(Insert specific documentation requirements)*

### **Items Excepted From This Policy and Procedures by the Board**

The board sets forth the following circumstances when, or types of procurements for which, in the sole discretion of the governing body, the solicitation of alternative proposals or quotations will not be in the best interest of *(Insert name of political subdivision or district)*.

*(Insert list of circumstances or types of procurements for which the board has determined that the solicitation of alternate proposals or quotations are not in the best interest of the taxpayers. The number of such circumstances and/or types of procurements should be limited and only where adequately justified.)*

### **Individual(s) Responsible for Purchasing**

*(Insert names and titles of the individual or individuals responsible for purchasing and their respective titles; information to be updated biennially).<sup>35</sup>*

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<sup>35</sup> Note that this is a new requirement, effective January 1, 2009 (General Municipal Law, section 104-b(2)(f)).

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## **Appendix B – Sample Format for Procurement Policy and Procedures**

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### **Input From Officers**

Comments have been solicited from officers of the political subdivision or district therein involved in the procurement process prior to the enactment of this policy and procedures, and will be solicited from time to time hereafter.

### **Annual Review**

The governing board shall annually review and, when needed, update this policy and procedures.

The *(Insert name or position of designated person)* shall be responsible for conducting an annual evaluation of the effectiveness of the procurement policy and procedures and an evaluation of the control procedures established to ensure compliance with the procurement policy, and shall be responsible for reporting back to the board.

### **Unintentional Failure to Comply**

The unintentional failure to comply fully with the provisions of General Municipal Law, section 104-b shall not be grounds to void action taken or give rise to a cause of action against the *(Insert name of the political subdivision or district)* or any officer or employee thereof.

### **Resolution**

Adopted on *(Insert date)* by *(Insert results of board vote)* vote of the governing board of the *(Insert name of political subdivision)*.

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**New York State  
Office of the State Comptroller  
Division of Local Government and School Accountability  
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