

How to Use the Distributor Umbrella Contract

This document provides the Authorized User instructions on how to use the Information Technology Umbrella Contract – Distributor Based (Statewide) Contract. An Authorized User must adhere to the terms and conditions of the Contract, these How to Use the Distributor Umbrella Contract procedures, as well as the Authorized User's internal policies and procedures.

The Contract prohibits the sale and purchase of all Cloud products.

Contract documents can be found on the Contract website. Please refer to Section 5 of this document for answers to frequently asked questions. Authorized Users should not hesitate to contact the OGS Contract manager with additional questions, concerns, or clarifications regarding the Contract.

<https://online.ogs.ny.gov/purchase/snt/awardnotes/7360022876can.HTM>

Additional OGS procurement information is available at the New York State Procurement website:

<https://ogs.ny.gov/procurement/buyer-information>

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Section 1. GENERAL INFORMATION

1.1 CONTRACT SCOPE

The Information Technology Umbrella Contract – Distributor Based (Statewide) Contract serves as a “catch-all” contract for IT Products not found on the Information Technology Umbrella Contract – Manufacturer Based (Statewide), or any other OGS Centralized Contract for the sale of Software, Hardware, and Related Services.

Contracts have been established with Distributors (Contractors) of IT Products under Lot 1 – Software and Lot 2 – Hardware. Under awarded Lots, Contractors can provide Products from various IT Manufacturers, including, but not limited to, those listed on Appendix H – Contract Rates (Refer to Section 1.5 of this document). Contractors may only offer Authorized Users Products as defined within the scope of each Contract Lot and are restricted from offering prohibited Products.

1.2 PROHIBITED PRODUCTS

This Contract prohibits the sale and purchase of the following Products:

- Lot 1 – Software: Products of a Manufacturer that holds an OGS Contract for the sale of Software Products.
- Lot 2 – Hardware: Products of a Manufacturer that holds an OGS Contract for the sale of Hardware Products.
- All Cloud Products regardless if the Manufacturer has an OGS Contract.

The Contract definition of Cloud is:

“Cloud shall mean any Product, Bundles or Service sold as an “as a service” offering or in which Authorized User Data is transmitted, acted upon, or stored on non-Authorized User equipment. This may include, but is not limited to, hosted applications, managed services, and off-site Data storage. Cloud includes IaaS, PaaS, SaaS, and XaaS.”

- Contractors cannot sell their own Products, or Products of other Contractors, under this Contract.

For example, Dell cannot sell their own Products, but may offer Products of other IT Manufacturers whose Products are not prohibited.

1.2.1 Prohibited Lists

The Contract contains “Prohibited Lists” which act as references to assist Authorized Users in determining if a Manufacturer’s Products are available under an existing OGS centralized contract for the sale of Software or Hardware Products, and therefore, whose Products are prohibited for purchase under the Contract.

There are two separate lists: one for Lot 1 – Software and one for Lot 2 - Hardware. If a Manufacturer appears on the Lot specific Prohibited List, then their Products cannot be purchased under that Contract Lot. For example, Microsoft appears on the Lot 1 – Prohibited List because a OGS centralized contract, Award 23116, Microsoft Reseller Agreement (Statewide), is in place for the sale of their Software Products; therefore, Authorized Users cannot purchase Microsoft Software through the Distributor Umbrella Contract.

Prohibited Lists are located on the Contract website.

1.3 LOT OVERVIEW

This Contract encompasses the following Lots:

Lot 1 – Software

<p>Inclusions:</p> <ul style="list-style-type: none"> • Software Products; • Commercially available Maintenance/Support for Manufacturer’s Proprietary product line; and • Related Services listed in the Manufacturer’s commercial price list.
<p>Exclusions:</p> <ul style="list-style-type: none"> • Cloud Products <p><i>Note: Some Software Products only contain cloud in the name or are on-premises Software that contain Cloud options and fall outside of the definition of Cloud as defined in the Contract. If a Software Product only has cloud in the name, but does not meet the definition of Cloud, it can be sold. If a Product is on-premises with Cloud options, it can be sold, yet it is the responsibility of the Authorized Contract User to refrain from using the Cloud options, as Cloud services are not covered by the Contract.</i></p>

Lot 2 – Hardware

<p>Inclusions:</p> <ul style="list-style-type: none"> • Hardware Products (including new, refurbished, and remanufactured Hardware); • Telecommunications Hardware; • Appliances; • Storage; • the Hardware’s Related Ancillary Products and Related Software; • Warranties and Maintenance/Support for Manufacturer’s Proprietary product line; and • Related Services listed in the Manufacturer’s commercial price list.
<p>Exclusions:</p> <ul style="list-style-type: none"> • Cloud Products

1.4 RELATED SERVICES

<p>Related Services are limited to the following items:</p> <ul style="list-style-type: none"> • Installation; • Implementation; • Configuration; • Pre-packaged Training; and • Volume License Agreement management.

Other Related Services Requirements:

- All Related Services must be listed on the Manufacturer's commercial price list.
- Related Services cannot exceed 20% of total purchase of Products and Maintenance.
- Related Services must be completed within 12 months from the date listed on the Purchase Order for Products.
Note: Authorized Users that purchase Related Services after initial purchase of the Product must include documentation of the initial purchase in the subsequent purchase’s procurement record. The procurement record must include the total cost of Product previously purchased and must document that the Related Services do not exceed 20% of the total cost of the Product purchase.
- The Related Services cost to Contractor cannot exceed the pricing on the Manufacturer’s commercial price list.

Related Services may be performed by the Product Manufacturer or by another company but may not be performed by any of the Contractors.

1.5 APPENDIX H - CONTRACT RATES

The Appendix H – Contract Rates price lists do not contain Products or prices. Instead, they list Cost-Plus percentages for a variety of Manufacturers. All Cost-Plus percentages listed on Appendix H - Contract Rates are “not-to-exceed” percentages which the Contractor may not surpass when providing quotes under the Contract. Contractors may offer lower Cost-Plus percentages or Cost-Minus percentages to the Authorized User for more favorable pricing.

Contractors' Appendix H – Contract Rates price lists can be found on the Contract website under the links “Contractor Information”, then “Price List”.

Note: The Appendix H – Contract Rates Template does not contain Cost-Plus percentages.

1.5.1 Cost-Plus/Cost-Minus Percentages

A Cost-Plus percentage is the percentage added to the cost that the Contractor pays the Manufacturer or Reseller. (Refer to Section 2.5 of this document for guidance on how to obtain a copy of the Manufacturer or Reseller quote for the purposes of price verification.)

Pricing Example-Cost-Plus Percentage:
If the purchase price paid by the Contractor to the Manufacturer or Reseller is \$100, and the Cost-Plus percentage listed on Appendix H for that Manufacturer is 5%, then the cost to the Authorized User would be \$105.

A Cost-Minus percentage is the percentage subtracted from the cost the Contractor pays the Manufacturer or Reseller.

Pricing Example-Cost-Minus Percentage:
If the purchase price paid by the Contractor to the Manufacturer or Reseller is \$100, and the Cost-Minus percentage listed on Appendix H for that Manufacturer is -5%, then the cost to the Authorized User would be \$95.

1.5.2 Pricing Categories

Appendix H – Contract Rates is broken down into two categories which apply to both the Lot 1 – Software and Lot 2 – Hardware columns:

- Category 1 contains a list of pre-established manufacturers each with an assigned Cost-Plus Percentage; and
- Category 2 contains one Cost-Plus percentage assigned to all other Manufacturers not listed in Category 1.

Section 2. REQUEST FOR QUOTE DEVELOPMENT

2.1 RFQ FORMAT

A competitive Request for Quote (RFQ) process is required. An Authorized User must understand the terms and conditions of the OGS Centralized Contract prior to RFQ development. Authorized User transactions under the Contract shall be based on Contractor Cost-Plus or Cost-Minus bids for Products in accordance with the Contractual terms.

Authorized User must identify the corresponding Lot(s) involved and distribute the RFQ to all awarded Contractors within the Lot(s).

Quotes obtained without utilizing the RFQ process will not be considered valid under the Contract. Submitting a Purchase Order directly to a Contractor without first utilizing the RFQ process (except as provided in Appendix B, Section 27(e)) is prohibited.

A Contractor Mailing List and an RFQ template along with a Financial Template are available on the Contract website. Authorized Users are not required to use the OGS RFQ templates and can utilize another RFQ format as long as that format includes core information from the templates (see Section 2.2 of this document) and references Group 73600, Award 22876 Information Technology Umbrella Contracts – Distributor Based (Statewide).

2.2 INFORMATION TO INCLUDE IN THE RFQ

OGS recommends providing detailed information in the RFQ document which clearly defines the Authorized User's need. While completing the OGS RFQ Template, or developing another RFQ document, the Authorized User should include factors such as, but not limited to:

- RFQ Title (determined by Authorized User)
- RFQ Number (determined by Authorized User)
- Authorized User Information
- Procurement Lobbying Law/Restricted Period
- Key Events/Dates
- E-Rate Eligibility
- Product Information
- Authorized User Terms and Conditions
- Dispute Resolution Process
- Manufacturer Contact Information
- Delivery requirements, including Product delivery date
- Necessary Related Services
- Hardware and Software environment
- Installation date
- Systems to integrate with
- Fiscal year budget/legislative deadlines
- Quote due date

OGS advises the Authorized User to set a reasonable deadline to allow the Contractors enough time to obtain a quote from the Manufacturer or Reseller.

2.3 AUTHORIZED USER ADDITIONAL TERMS AND CONDITIONS

An Authorized User may add additional required terms and conditions to the RFQ and resultant Authorized User Agreement if they are more favorable to the Authorized User and do not conflict with or supersede the OGS Centralized Contract terms and conditions. Examples of additional terms and conditions include:

- Inclusion of the NYS Department of Labor Prevailing Rate Schedule when utilizing a telecommunications worker to install cable;
- Expedited delivery timeframe;
- Additional incentives, such as discount for expedited payment/Procurement Card use;
- Additional requirements imposed by the funding source;
- Inclusion of a Non-Disclosure Agreement;
- Security Conditions;
- MWBE, SDVOB, and/or SBE goals; and
- Requiring the Contractor to hold pricing for a specified timeframe (see Section 2.6 of this document).

2.4 RELATED SERVICES REQUIREMENT

Authorized Users may put a requirement in their RFQ that the Related Services must be performed by the Manufacturer. This requirement may only be included if the Related Services are offered on the Manufacturer's commercial price list.

2.5 MANUFACTURER QUOTE FOR PRICE VERIFICATION

Authorized Users reserve the right to require the Contractor to supply a copy of the quote the Contractor received from the Manufacturer or Reseller for Products included in an RFQ. The quote allows Authorized Users to verify the Contractor has not exceeded the Cost-Plus percentage indicated on their price list. Language stating this requirement is in the OGS RFQ template; however, if the Authorized User wants to require this of the Contractor and is using other RFQ documentation, then language stating the requirement should be added.

2.6 PROJECTED SPEND AND SECURING FUTURE DISCOUNTS

Authorized Users are permitted to include RFQ language that allows them to hold pricing for Products that they intend to re-purchase within a specified timeframe designated by the Authorized User.. Although a lengthier time frame of 6 to 12 months may be appropriate for high dollar items, OGS suggests not exceeding a 3 month timeframe for low dollar items, as a timeframe over 3 months may discourage contractors from providing responsive bids.

Authorized Users should refrain from overstating their volume needs and attempt to make accurate predictions as to realistic purchase estimates. Sample Language:

“Agency will purchase some, all or more of the quantities of the products and services detailed in the Financial Template (see Excel spreadsheet) over a three (3) month period from date of award, but not necessarily at one time. The Agency requires that the prices be held for three (3) months from the date of award.”

Section 3. EVALUATION AND AWARD

3.1 LATE BIDS

Authorized Users reserve the right to accept late bids if it is in the best interest of the State.

3.2 LESS THAN THREE RESPONSIVE PROPOSALS RECEIVED

If less than three (3) responsive proposals are received, an Authorized User must canvass all the no-bid responses without a reason and no-replies for the reasons that the Contractor(s) did not participate and document the results of such canvass in the procurement record. Only quotes from Contractors will be considered responsive proposals; no-bids and no-replies are not responsive proposals.

Depending on the feedback of the canvass, an Authorized User will need to determine whether the RFQ specifications were drawn too narrowly so as to exclude potential responsive bidders, and whether modifications to the RFQ would result in a larger pool of qualified bidders and better value to the Authorized User. The feedback may also serve to support the Authorized User’s decision when making an award.

If the Contractor does not respond to the no-bid/no-reply canvass, the Authorized User is not required to reach out any further. Authorized Users should document the no-bid/no-reply canvass in their procurement record.

3.3 EVALUATION OF QUOTES AND METHOD OF AWARD

The RFQ must be evaluated based on lowest total price. Evaluation tools cannot be altered any time after the RFQ due date. All evaluation tool notes and extraneous items must be included in the Authorized User’s procurement record.

3.4 ADDITIONAL CONTRACTOR TERMS AND CONDITIONS WITHIN AN AUTHORIZED USER AGREEMENT

In accordance with Appendix B, Section 28, Modification of Contract Terms, as part of Contractor’s response to an Authorized User RFQ, a Contractor may propose additional terms and conditions which do not contradict or violate any of the terms and conditions of this Contract, are more advantageous to the Authorized User, and place no additional liability or responsibility on the Authorized User. Such additional terms and conditions may be allowed and incorporated into the Authorized User Agreement, provided the Contractor identifies such terms and conditions in Contractor’s response to the Authorized User’s RFQ and the Authorized User accepts such additional terms and conditions.

Authorized User should carefully review any such terms and conditions proposed by the Contractor to ensure compliance with the Contract.

3.5 PASS-THROUGH TERMS AND CONDITIONS

Software and/or Hardware offered through this Contract is generally offered with “click through”, “shrink wrap” or other pass-through terms and conditions imposed by the Product Manufacturer. **OGS has NOT reviewed or approved these “click through”, “shrink wrap” or other pass-through terms and conditions.** An Authorized User looking to acquire Software and/or Hardware under this Contract must review the terms and conditions associated with the Products. The Authorized User must ask if “click through”, “shrink wrap” or other pass-through terms and conditions are present, and if so, the Authorized User is responsible for having its agency counsel review and approve such terms and conditions prior to ordering the Software and/or Hardware. If the terms and conditions are not acceptable to agency counsel, it is the responsibility of such agency counsel to negotiate any needed amendments with the Distributor and/or Manufacturer.

3.6 NEGOTIATION WITH TENTATIVE AWARDEE

Based on the specifics of the Authorized User's transaction, if desired, once tentative award has been made based on lowest cost, the Authorized User should enter into negotiations to obtain the best price possible, or to obtain additional savings. If the Authorized User and the Contractor enter into pre-award negotiations, those negotiations must be in good faith, including, for example, realistic timeframes.

3.7 NOTIFICATION OF QUOTE RESULTS

The Authorized User shall notify the awardee and non-awardees of RFQ results.

3.8 KICK-OFF MEETING/PROJECT PLAN DISCUSSION

The Authorized User may require a kick-off meeting with the selected awardee to provide in-depth details of the Project and each other's roles and responsibilities.

Section 4. AUTHORIZED USER RESPONSIBILITIES

4.1 PROCUREMENT LOBBYING LAW

For entities described in State Finance Law §139-j (1) (a), the requirements of the New York State Procurement Lobbying Law (State Finance Law §§139-j and 139-k) may apply to transactions under this Contract. A bidder is restricted from making contacts from the earliest notice of intent to solicit offers/bids through final award and approval of the Authorized User Agreement. Refer to the following information resources for more detail on the requirements of the Procurement Lobbying Law: <http://ogs.ny.gov/acpl/>

4.2 AT-RISK WORK PROHIBITED

Authorized Users are cautioned that at-risk work is strictly prohibited. No work is to be undertaken by the Contractor prior to receipt of the Authorized User Agreement. Additional information is available in OSC Guide to Financial Operations,FXI.2.F Timely Submittal of Contracts:

<http://www.osc.state.ny.us/agencies/guide/MyWebHelp/Content/XI/2/F.htm>

4.3 NEW YORK STATE OFFICE OF INFORMATION TECHNOLOGY SERVICES POLICIES

Authorized Users are to review all applicable ITS Security policies found at: <https://its.ny.gov/ciso/policies/security>

4.4 OFFICE OF THE STATE COMPTROLLER

For purchases available from this Contract, the Authorized User may issue a Purchase Order/Authorized User Agreement directly to the Contractor without prior approval by the Office of the State Comptroller (OSC).

The State retains the right to post-audit any procurement, including those executed from this Contract. Authorized Users are reminded to follow all procurement guidelines.

4.5 NEW YORK STATE PROCUREMENT COUNCIL GUIDELINES/PROCUREMENT RECORD

The following link to the New York State Procurement Council Guidelines provides additional procurement information and examples of documentation that should be created and maintained by the Authorized User as part of a procurement record:

<https://ogs.ny.gov/system/files/documents/2018/08/psnys-procurement-guidelines.pdf>

4.6 PREVAILING WAGE RATES - PUBLIC WORKS AND BUILDING SERVICES CONTRACTS

Installation of IT Equipment being done under a resulting Authorized User Agreement may be subject to the prevailing wage rate provisions of the New York State Labor Law. See "Prevailing Wage Rates – Public Works and

Building Services Contracts' in Appendix B, Clause 10, OGS General Specifications. Any federal or State determination of a violation of any public works law or regulation, or labor law or regulation, or any OSHA violation deemed "serious or willful" may be grounds for a determination of Contractor non-responsibility and rejection of proposal.

The Prevailing Wage Case Number for this Contract is PRC# 2016007939.

The Prevailing Wage Rates for various occupations and General Provisions of Laws Covering Workers on Article 8 Public Work Contract can be accessed at the following NYS Department of Labor website:

<https://apps.labor.ny.gov/wpp/showFindProject.do?method=showIt>

- Insert PRC# 2016007939 in the box provided and click Submit.
- Click Wage Schedule located underneath the main header of this page. The PDF file may be searched to obtain the Prevailing Wage Rate for a specific occupation.

4.7 LIVING WAGE

An Authorized User subject to a local law establishing a "living wage", such as Section 6-109 of the New York City Administrative Code, is required to ensure the Contractor sought to be hired complies with such local law. If the pay rate(s) for a job title(s) as set forth in Appendix H – Contract Rates is less than the local law "living wage," then the Authorized User subject to such local law cannot use this Contract for such job title(s). See Appendix B, Paragraph 60 for Legal Compliance.

Section 5. FREQUENTLY ASKED QUESTIONS AND ANSWERS

1. **Q: Do I need to release a Request for Quote to purchase under this contract?**

A: Yes, the Request for Quote process is mandatory for procurements under this Contract.

2. **Q: There are no products on the price list. How do I know if I can purchase a product under the Distributor Umbrella Contract?**

A: Since Contractors resell Products from a multitude of Manufacturers, the price lists do not contain a list of Products, but rather Cost-Plus (mark-up) percentages for a variety of Manufacturers. Refer to Section 1.5 of this document.

A Product may be purchased under the Contract if the Manufacturer is not listed on the lot specific Prohibited List and if the Product is not Cloud per the Contract definition. Refer to Section 1.2 of this document.

3. **Q: I noticed Dell holds a Distributor Umbrella contract. Can Dell sell their products under this contract?**

A: No, Dell may sell other Manufacturers' Products under the Distributor Umbrella contract but may not sell their own Products. Dell is included on both Prohibited Lists because they hold a Manufacturer Umbrella contract for the sale of their Software and Hardware Products.

For example, if you want to purchase a Dell laptop, you should look to the Manufacturer Umbrella contract; but if you want to purchase Adobe software, Dell may sell it to you through the Distributor Umbrella Contract.

4. **Q: Does "OGS or Less" apply to this contract?**

A: No, there is not "OGS or Less" clause in the Contract. Per Section 163 of the State Finance Law, this clause is relative to commodities contracts.

5. **Q: Is it possible to have a multi-year agreement that extends beyond the expiration of the contract?**

A: There are no limits to the maximum length of an agreement; however, Purchase Orders must be executed prior to the expiration date of the Contract (December 6, 2021). An agency should justify the term of the agreement in their procurement record.

With an extended agreement length, there is always a risk that pricing could decrease during the term of the agreement. Due to this, OGS advises to add a clause to the agreement allowing the agency cancellation for convenience. Please refer to Section 47.b of Appendix B which states:

“...By written notice, an Authorized User may terminate an Authorized User Agreement at any time for convenience upon sixty (60) calendar days written notice or other specified time period of at least sixty calendar days without penalty or other early termination charges due...”

6. Q: Can an RFQ for Related Services be released for Products not purchased on the Distributor Umbrella contract?

A: The Contract does not expressly prohibit releasing an RFQ for Related Services applicable to Product(s) previously purchased under a different contract vehicle. Refer to Section 1.4 of this document for requirements relating to Related Services.

7. Q: Can I include two similar products by two different Manufacturers in one RFQ so I can compare the pricing of the two products?

A: OGS recommends that you conduct two separate RFQs for the two different Manufacturers instead of including them both on one RFQ, then make your comparison once both RFQs are received. If both Manufacturers' Products were included in one RFQ, the Contractors could get the wrong idea about the volume of the sale. The RFQ for the Product you decide not to purchase can be canceled for convenience and Contractors will need to be informed that no award will be made from that RFQ.

8. Q: Can I release an RFQ for back-dated services?

A: No, Authorized Users may not release an RFQ for back-dated services.

9. Q: Is a contractor allowed to increase pricing after award, i.e. during the purchase order transaction?

A: Pursuant to the Distributor Umbrella contract, Section 47. *Obtaining Quotes*, “The Contractor is required to honor all quotes for 30 calendar days, regardless of price increases, unless otherwise specified in Authorized User Request for Quote.”

10. Q: The Manufacturer wants to charge a late-fee for reinstatement of a product. Is this allowable under the terms of the contract?

A: The terms of the Contract, including Appendix B, only apply to the Contractors awarded OGS Distributor Umbrella Contracts. As OGS does not have a contract with the Product Manufacturers, they are not bound by the terms of the Contract. Instead, Manufacturers can pass through their own terms and conditions, which could include reinstatement/late fees. Authorized Users are responsible for having their agency counsel review and approve such terms and conditions prior to ordering the Product. If the terms and conditions are not acceptable to agency counsel, it is the responsibility of such agency counsel to negotiate any necessary amendments.

11. Q: What is the correct procedure to follow if I received three responses to an RFQ and all three bids came in at exactly the same amount?

A: Pursuant to Appendix B, Section 23.TIE BIDS: “In the event two Bids are found to be substantially equivalent, price shall be the basis for determining the award recipient. While prompt payment discounts will not be considered in determining the low Bid, the Commissioner may consider any prompt payment discount in resolving Bids which are otherwise tied. If two or more Bidders submit substantially equivalent Bids as to pricing or other factors, the decision of the Commissioner to award a Contract to one or more of such Bidders shall be final.”

To clarify, the “prompt payment discount” is located on the Distributors' Appendix D – Contact Information page. In the case of tie bids, if one Distributor offers a higher prompt payment discount, they can be determined to be the winner. If a prompt payment discount is not offered, or if they are the same across the tied Distributors, the Authorized User would need to turn the decision over to their commissioner or head of their organization to break the tie.

Q: We released an RFQ under the Distributor but received no responsive bids. Therefore, are we allowed to do an open market purchase for the products?

A: OGS is happy to assist with questions about the Distributor Umbrella Contract, but we cannot advise an Authorized User on what procurement vehicle to use. Authorized Users should refer to the NYS Procurement Guidelines as defined by the State Finance Law and their agency's internal policies and procedures when determining the path of a procurement.