



## Non-Competitive / Sole Source Procurement: Seven Questions

*Briefing Paper (January 2015)*

Non-competitive / sole source procurement is a sensitive topic in the public sector. While competition is the preferred method of performing a procurement process, non-competitive procurements such as sole source procurements are not categorically a “bad thing”, and may be the appropriate tool under certain circumstances. The goal of this briefing paper is to explore the topic further.

This briefing paper was written in response to the NASPO members’ request to address the topic of non-competitive / sole source procurements and gauge current practices in state central procurement offices nationwide. To this end, the Emerging Issues Committee undertook a data gathering effort in the summer of 2014. This paper contains the results of this research exercise and is aimed at assisting public procurement professionals when assessing current state processes and practices for non-competitive procurements.

### 1. What is a Sole Source Procurement?

While there is no one, common definition used by all states, we attempted to define the term, based on the operational definitions indicated by states that participated in the survey. We also recognize that some states also make distinctions between “sole source” and “single source” procurements. The term “sole source”, however, is often used more generally for non-competitive procurements, and is used generally for the purposes of this briefing paper.

A “sole source” procurement can be defined as any contract entered into without a competitive process, based on a justification that only one known source exists or that only one single supplier can fulfill the requirements. Although states generally do not permit non-competitive procurements by statute, exceptions are allowed where competition is not feasible.

Examples of acceptable exceptions from the competitive procurement process may include:

- only one known source exists for supplies or services as determined by documented research;
- no other reasonable alternative source exists that meets the agency requirements;
- only one source meets the business needs of the agency/state (e.g., compatibility, unique feature to meet state’s business need, etc.); and
- procurement of public utility services.

### 2. What’s not a Sole Source Procurement?

- An agency requirement for a particular proprietary product or service does not automatically justify a sole source procurement if there is more than one potential bidder or offeror for that item.
- An agency preference for a brand name product does not justify a sole source procurement.
- A good’s or service’s “uniqueness” alone may not qualify the producer or supplier of the good or service as a sole provider of a good or service.

### 3. What are the most common sole source procurement contracts in the states?

Top three most common sole source procurement contracts in the states are the following, based on existing practices in the 41 states responding to the NASPO survey:

- systems/product maintenance (e.g., additional licenses, updates, replacement parts);
- information technology; and
- laboratory equipment.

### 4. What are acceptable considerations for sole source procurements?

Agency reasons for sole sources vary greatly but should fall within the following:

- only one known source that can provide the commodity or service;
- unique source (commodity/service is unique/special in nature);
- compatibility (e.g., a public safety agency requiring a specific piece of equipment to be compatible with an existing equipment system);
- limited or proprietary systems (i.e. additional licenses, updates, specialized replacement parts, etc.);
- a professional expert is requested; and
- sales territories or product availability within limited geographic boundaries.

### 5. What can be recommended for reducing sole source procurements?

#### 1) Provide a standard template for a written justification.

Most states require a written justification to support the request for sole source procurement. The justification may require the requestor to provide information such as:

- a description of the unique features that prohibit competition;
- documented research conducted to verify the vendor as the only known source;
- a description of the marketplace to include distributors, dealers, resellers, etc.;
- known compatibility issues; and/or
- timing issues.

For samples of standardized justifications forms, see [NASPO Sole Source Procurement web page](http://www.naspo.org/SoleSourceProcurement/) at: <http://www.naspo.org/SoleSourceProcurement/>

#### 2) Centralize review and approval of all sole source requests.

In most states (20 of 41 responding jurisdictions), the Chief Executive/Commissioner or the requesting procurement officer for the requesting department is required to approve a sole source procurement. Final approval for sole source procurement requests in most states resides with the Chief Procurement Official. A few states have that power vested with the Governor, State Comptroller, Commissioner, or the Board or higher authority that oversees the procurement.

#### 3) Consider publishing all sole source requests for public notice.

When processing a sole source procurement, 50 percent of respondents require that some form of public notification (i.e. “intent to sole source”) be published. The requirement to publish a “notice of intent to sole source” resides in statute for most states, and in policy for a few.

Posting allows potential vendors to view and indicate interest in bidding on the proposed sole source procurement, in which case a competitive process could be used. There are various practices for handling the situation when a member of the public notifies the procurement office (as a result of the public posting) indicating that they can provide the good or service requested. The Chief Procurement Official can cancel the sole source and a review of the documentation can take place with all other sources being considered. Vendors are given the opportunity to respond through a new bidding process and the intent to sole source is withdrawn.

Some states allow for an appeal/protest process related to sole source procurements. Documentation provided by the challenging vendor is reviewed, and the appeal/protest can be sustained if the intended vendor for the sole source was indeed not the only vendor who can provide the service or commodity. If sustained, then the agency is denied permission to proceed with a sole source and must choose another competitive procurement method. If the appeal/protest is denied or overruled, then the sole source procurement moves forward.

## 6. How can my state maximize the use of competitive procurement?

- Ensure that timely market research and acquisition planning processes are in place.
- Include a requirement to post a notice of intent to sole source in your state laws, regulations, and/or policies.
  - For most states, the requirement to post a “notice of intent to sole source” is found in statute or policy, and the notice is placed on the central procurement office website and/or email notifications are used through the state’s eProcurement or ERP system. A few states have a requirement to place a legal notice in a local newspaper.
- Maintain a record listing all sole source contracts.
- Publish your record of sole source contracts, and/or submit a copy to your Governor’s Office or legislature, if requested.

## 7. How can my state mitigate the risk of using sole source procurements?

- Limit the term of a sole source contract.**

One way to mitigate the risk of overspending posed by a sole source contract -- which by definition is negotiated in the absence of a direct market mechanism -- is to limit the length of the contract.

Only a limited number of responding states put a limit on the length of a sole source contract. Some states have a one-year term for sole source procurement contracts, after which a determination is made as to whether a sole source contract is warranted or competition is available, or whether requirements have changed before a new justification is provided by a state agency. Other states’ laws and regulations already have a limitation in place for all other contracts with lengths varying depending on whether it is a contract for commodities or services.

- Educate agencies about ending any unnecessary reliance on non-competitive contracts.**

Unjustified, non-competitive procurements are generally not allowed under state law, and are generally not a sound business practice.