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Frequently Asked Questions HB 953

The following frequently asked questions (FAQs) provide additional guidance to procurement staff for implementation of House Bill (HB) 953, which became effective **January 1, 2021**. These FAQs review the following sections of the House Bill:

- Section 2, which identifies certain terms that may not be included in state contracts and, if included, shall be void an unenforceable and
- Section 3, which establishes that bids, offers or proposals shall be available or public inspection in accordance with the Georgia Open Records Act.

For any questions regarding Section 1 (authorizing contracting with for-profit cooperative entities) or any other portion of HB 953, please contact the State Purchasing Division at process.improvement@doas.ga.gov.

1) How does HB 953 affect in-flight procurements?

a. Procurements that have not been posted should utilize the new RFX templates containing language addressing HB 953, including records release provisions and language addressing the SPD-SP060 "Contracting with State Entities" Document.
b. Procurements that have been posted, but have not closed should be amended to include the new RFX template language.
c. Procurements that have closed, but have not been awarded:
    i. Suppliers should be notified of the implementation of the provisions of Section 2 of HB 953 during contract negotiations (contract provisions to which the state cannot agree).
    ii. Upon receipt of an Open Records Request for bids or proposals, suppliers should be notified that they may submit redacted bid documents along with trade secret affidavits. SPD has published a sample form for supplier reference: SPD-SP044 Trade Secret Affidavit.

2) How does Section 2 of HB 953 impact existing contracts?

Existing contracts do not need to be amended at this point in time, but state entities should, at the time of contract renewal, attempt to make any revisions warranted.

3) How should this information be provided to suppliers?

a. A new version of the "Contracting with DOAS" document (now renamed "Contracting with State Entities" has been uploaded to the DOAS website and may be found at http://doas.ga.gov/state-purchasing/seven-stages-of-procurement/stage-3-solicitation-preparation. This document may be provided to suppliers and a reference has been included in the updated RFX templates.
b. The Georgia Procurement Manual has been updated to address the new records release procedures and the RFX templates have been updated to address the new records release procedures, as well.

4) When should Supplier's requested redactions to bids/proposals be reviewed?
In the event a supplier's bid or proposal is requested pursuant to an Open Records Act Request, it will be necessary for the state entity to review the records for appropriate redactions. State entities may conduct their review prior to issuance of the NOIA and in advance of any Open Records Request; however, it is unlikely the entity can recoup the costs associated with a review prior to an Open Records request. A State entity could choose to wait to review redactions until after issuance of the NOIA and upon receipt of an Open Records Request however, a delay in producing the records may delay the protest process and final award.

5) What do we do about evaluation documents that may reference/disclose trade secrets?
State entities should review evaluation documents to determine whether they reference/disclose information in proposals that has been claimed as trade secret or otherwise exempt from disclosure under the Open Records Act. If such information is included, it should be redacted from the evaluation comments. State entities may permit each supplier to review its own evaluation document to determine if any information contained in the document may be redacted pursuant to the Open Records Act.

6) What is SPD's position on the third-party Software EULAs offered by DOAS under its third party reseller statewide contracts?
State entities should continue to review Software EULA's offered under statewide contracts and strike terms as warranted. The state does not maintain necessary resources to review the thousands of software offerings under those contracts. Therefore, it is up to each purchasing entity to continue to review the terms and conditions of its particular purchases. A state entity should attempt to negotiate revisions to unacceptable terms; however, in the event that a state entity and software publisher are unable to come to terms regarding the provisions listed in Section 2 of HB 953, the provisions will be deemed void under Georgia law. Please remember that there are many other provisions that impact state entities beyond those addressed by HB 953, such as warranties, terms of use, and limitation of liability. Accordingly, state entities should be familiar with the terms of their purchase and negotiate based upon the business and legal risks of the use contemplated by the state entity.

7) Is the prohibition regarding automatic renewals O.C.G.A. § 50-5-64.1(a)(2)(E) applicable to contracts funded solely through federal funding sources?
O.C.G.A. § 50-5-64.1(a)(2)(E) specifies that a contract shall not contain a term that provides for an automatic renewal such that *state funds* are or would be obligated in subsequent fiscal years. This provision is solely applicable to state funds and would not be applicable to federal funds.

8) Clarify how O.C.G.A. § 50-5-67(d)(4) interacts with the Open Records Act, O.C.G.A. § 50-18-72(a)(10). The Open Records Act states that sealed bids and proposals are not subject to disclosure until the *final* award of contract is made. O.C.G.A. § 50-5-67(d)(4) states, subject to the Open Records Act, bids, offers or proposals are available after *notice of intent* to award a contract.
The more specific would control; therefore, it is the intent that the sealed bids and proposals become available after posting of the NOIA rather than final award.

9) How should the release of documents be handled under the Open Records Act?

Pursuant to the Open Records Act, "Agencies shall produce for inspection all records responsive to a request within a reasonable amount of time not to exceed three business days of receipt of a request…In those instances where some, but not all, records are available within three business days, an agency shall make available within that period those records that can be located and produced. In any instance where records are unavailable within three business days of receipt of the request, and responsive records exist, the agency shall within such time period, provide the requester with a description of such records and a timeline for when the records will be available for inspection or copying and provide the responsive records or access thereto as soon as practicable." O.C.G.A. § 50-18-71(b)(1)(A). DOAS would encourage state entities to have evaluation documents ready for release upon issuance of an NOIA. As the review of bids/proposals may be labor (and thus cost) intensive, state entities should make a case by case determination as to whether those documents should be reviewed prior to NOIA or after issuance of NOIA. The protest procedures allow for extension of the protest period in the event certain records requests have not been fulfilled, so as to allow for a meaningful protest process.

10) When we begin negotiations, do we need to start by trying to negotiate out the terms specifically mentioned in the new code? Or, will there be a standard addendum in place that we can provide to the supplier? How should renewals of contracts containing terms prohibited under O.C.G.A. § 50-5-64.1 be handled?

State Entities should continue to follow the current process, attempting to negotiate out the terms specifically prohibited under state law. The purpose of the new Code Section is to provide additional support to the State's position and to allow for voiding of a term in the event that the State does not maintain sufficient leverage to negotiate deletion of the term or in the event that a contract is inadvertently signed without sufficient legal review (for example in a click-through license). Additionally, DOAS intends to provide during calendar year 2021, a standard addendum that can be attached to supplier contracts, that addresses removal of those prohibited terms. The standard addendum or specific provisions of the standard addendum may be incorporated in renewal of contracts that contain terms prohibited under O.C.G.A. § 50-5-64.1. The state entity may also utilize the "Contracting with State Entities" document as a tool to inform suppliers of the change in law.

11) Please confirm that the new code is not retroactive to contracts/agreements signed prior to January 1, 2021. What is the effect of a statement of work (SOW) entered into after 1/1/21 under a master service agreement (MSA) signed prior to 1/1/21?

O.C.G.A. § 50-5-64.1 will apply to contracts executed or renewed on or after January 1, 2021; however, it is DOAS's position that the contractual provisions prohibited under O.C.G.A. § 50-5-64.1 were already prohibited by law, as described in the "Contracting with State Entities" document. O.C.G.A. § 50-5-64.1 simply codifies and provides a method for voiding the provisions without necessarily voiding the entire contract. In the event that a SOW is negotiated pursuant to a contract that contains provisions contrary to O.C.G.A. § 50-5-64.1, State Entities should attempt to negotiate an amendment to the Master Service Agreement at the same time that the SOW is being negotiated.

12) Will we be required to update agency contracts with the addendum or will this be a case by case decision for the state entity?
The standard addendum will be a discretionary tool. Ultimately, each state entity should examine its contracts to determine if the contracts contain prohibited clauses and how to best address each instance.

13) O.C.G.A. § 50-5-64.1 seems to apply only to purchases issued under Chapter 5 of Title 50 of OCGA. Please clarify its applicability.
O.C.G.A. § 50-5-64.1 is only applicable to procurements subject to the State Purchasing Act. Accordingly, O.C.G.A. § 50-5-64.1 would not be applicable to entities that are not subject to the requirements of the State Purchasing Act, such as Authorities, or to procurements exempt from the State Purchasing Act, such as the purchase of professional services or public works procurements conducted by GDOT or USG.

14) Please clarify if the new law does or does not apply to the following:

a. BOR contracts for public works/constructions issued by the Board of Regents as an exception to 50-5-72?

i. O.C.G.A. § 50-5-64.1 is not applicable, as public works/construction conducted by BOR are not under DOAS's purview per § 50-5-72(e). Please note that the provisions of O.C.G.A. § 50-5-64.1 simply codifies terms that the State has identified which are generally not permitted by law. For example, it has long been the position of the State that it cannot indemnify another party. This position is supported by case law and Attorney General Opinions.

b. Purchases where competitive bidding requirements have been waived as listed in the GPM section 1.2.3.2?

i. DOAS would maintain the position that O.C.G.A. § 50-5-64.1 is applicable to items identified in O.C.G.A. § 50-5-58(a), as DOAS maintains discretion as to whether to exercise purview regarding those purchases. In any event, the state entity should attempt to negotiate provisions from the contract that are contrary to state law.

c. Purchases where the NIGP code is exempt as identified in the GPM section 1.2.4?

i. This is a bit more complicated, as the exempt NIGP codes include all exemptions. DOAS maintains the position that if a good/service is explicitly exempt from DOAS's purview, such as professional services, personal employment services (O.C.G.A. § 50-5-51(1)), or school textbooks (O.C.G.A. § 50-5-58), then O.C.G.A. § 50-5-64.1 does not apply. However, general principles of state law may still prohibit some of those terms specifically identified in O.C.G.A. § 50-5-64.1.

d. Purchases against a Cooperative- bid contract?

i. O.C.G.A. § 50-5-64.1 is applicable to purchases made pursuant to a Cooperative-bid contract.

e. Intergovernmental Agreements?

i. O.C.G.A. § 50-5-64.1 is not applicable to intergovernmental agreements.

15) If the supplier provides a redacted version and trade secret affidavit along with its submittal, do we need to have Legal review prior to sharing the bids with end users for determination of responsiveness to specifications or prior to releasing proposals to an evaluation committee?

Legal review of proposed redactions is not required prior to evaluation. The submission of a redacted version of trade secret information are for the purposes of records release in response to an Open Records Request. The non-redacted version of the proposal is utilized for evaluation purposes.

16) What if a supplier does not provide an affidavit and redacted copy with its bid/proposal but at time of contract signature they make you aware of documents/items that need to be redacted? Will this be handled on a case by case basis at the state entity's discretion?

a. If a supplier does not provide an affidavit and redacted copy with bid/proposal but indicates in the proposal or otherwise that it considers portions of its bid/proposal to be confidential, the state entity should request a redacted version of the bid/proposal along with a trade secret affidavit at that time.