6.0 PROCUREMENT

This chapter is provided for State agencies that are administering FNS programs that need to acquire or purchase services from a contractor to meet their information system (IS) needs. The information contained in this chapter is intended to serve as a guideline and is not meant to be a definitive step-by-step guide to procurement. The degree of detail in the procurement process will depend upon the extent of needed services and the phase of the Systems Development Life Cycle (SDLC) or APD process. State-specific procurement procedures are not included in this chapter, nor are FNS program-specific regulations. It is vital that the State procurement or purchasing office be consulted and involved throughout the procurement process and that the State agency is aware of and adhere to FNS program-specific regulations for procurement.

The major objective for the State agency in any procurement process should be to identify the best solution to meet the State's specific IS needs. In submitting a proposal in response to the State agency's requirements, the contractor's major objectives will be to prepare a cost-effective solution to meet these requirements and to win the business on the basis of the strengths of its proposal. For both parties, a common objective in any procurement process should also be to minimize the risks, costs, and efforts required by all parties in pursuit of these major objectives. It is essential that the State agency and FNS ensure that there is fair and open competition for IS acquisitions.

6.1. REGULATIONS AND POLICIES

The authority for government agencies to conduct acquisition of information technology (IT) systems flows from two principal sources—Executive Direction and public law (legal basis). Executive Direction flows from the authority of the President and the Federal Government's executive agencies to issue orders and regulations to both enforce and facilitate the law and to help carry out the constitutional duties of the executive branch. Executive Direction includes the President, the Office of Management and Budget (OMB), and USDA, to name a few. These offices generate Policy and Directives which impact the acquisition process.

Examples of executive direction relevant to State acquisitions include the following:

- *OMB Circular A-11* (http://www.whitehouse.gov/omb/circulars/a11/current_year/a11_toc.html) describes the process for preparation and submission of budget estimates, strategic plans, and annual performance plans, and the planning, budgeting, and acquisition of capital assets for all executive departments.

- *OMB Circular A-87, Cost Principles for State, Local and Indian Tribal Governments* (http://www.whitehouse.gov/omb/fedreg/2005/083105_a87.pdf) establishes principles and standards for determining costs for Federal awards carried out through grants, cost reimbursement contracts, and other agreements with State and local governments and Federally recognized Indian tribal governments (governmental units).

State agencies use their own applicable State procurement regulations and standards to prepare procurement documents using Federal funds, provided they conform to the Federal standards and ensure that the acquisition is conducted in the most effective and economical manner.
State agencies must conform to the following standards identified at 7 CFR 3016.36 (http://www.gpo.gov/fdsys/pkg/CFR-2011-title7-vol15/pdf/CFR-2011-title7-vol15-sec3016-36.pdf) of FNS regulations for procurement using FNS funds:

- √ Maintain a contract administration system that ensures contractors perform in accordance with the terms, conditions, and specifications of their contractor or purchase orders

- √ Maintain a written code of standards of conduct for employees involved in the award and administration of contracts to avoid conflict of interest
- √ Provide for a review of proposed procurements to avoid purchases of duplicative or unnecessary items and strive to obtain the most economical purchase
- √ Enter into State and local intergovernmental agreements for procurement or use of common goods and services for greater economy and efficiency
- √ Use Federal excess and surplus property, in lieu of purchasing new, whenever the use is feasible and reduces project costs
- √ Make awards only to responsible contractors that possess the ability to perform successfully under the terms and conditions of a proposed procurement
- √ Maintain records sufficient to detail the significant history of the contract, including the rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis of the contract price
- √ Use time and material-type contracts only after determining that no other contract is suitable and the contract includes a ceiling price that the contractor exceeds at its own risk
- √ Be responsible for the settlement of all contractual and administrative issues arising out of procurements, including protests, disputes, and claims
- √ Establish protest procedures to handle and resolve disputes.

6.2. THE ACQUISITION PROCESS

The Federal Acquisition Regulation (FAR) (2005) (http://www.arnet.gov/far) established a basic acquisition process, which begins with acquisition planning and ends with contract award, administration, and closeout for use by Federal agencies. FNS recommends that State agencies conduct the procurement and contracting process in accordance with their State-defined processes and/or with the following basic steps:

1. Determine the need for services
2. Draft the RFP or equivalent State procurement document
3. Develop the criteria to select the contractor
4. Submit the Request for Proposal (RFP) or procurement document to FNS for prior approval, if required (on the basis of funding thresholds)
5. Respond to comments or questions from FNS, as necessary
6. Release the RFP
7. Hold a bidders' conference to take questions from potential contractors (at the discretion of the State procurement office)
8. Receive proposals from bidders
9. Evaluate the proposals on the basis of previously established criteria and select the contractor
10. Draft a contract
11. Submit the contract to FNS for approval, if required
12. Receive FNS approval, if required

13. Award the contract
14. Administer the contract
15. Close out the contract.

There are different terms that are used to refer to acquisitions within a State, such as Invitation for Bids (IFB), Request for Response, Request for Quotation (RFQ) and Request for Proposal (RFP). For the purposes of this handbook, RFP is generally used to refer to all of these terms, but they may be used interchangeably. Please be aware that these terms may not be used interchangeably elsewhere as they are very specific requests for certain items.

RFPs may be written by State agencies or by their authorized contractors—FNS has no preference. However, the States must avoid any conflict of interest when using contractors to write an RFP (see Section 6.9. This section is intended to give guidance on FNS expectations and requirements for an RFP, regardless of where the State is in the APD process (e.g., planning, development and implementation, or maintenance and operations (M&O)).

State agencies are reminded that, with the exception of SNAP EBT, an approved PAPD or IAPD or Federal funding grant should be completed prior to embarking upon any procurement using Federal financial participation (FFP) or Federal funding.

Figure 6-1 indicates the funding thresholds for each program and how they relate to each major procurement document (i.e., RFP, contract, and contract amendment). The RFP will comply with Federal regulations that require, to the maximum extent practicable, open and full competition. Because most IS projects will involve competitive procurements, the remainder of this chapter will refer to funding thresholds for these types of procurements.

Figure 6-30. RFP and Contract Document Submission Thresholds

Procurement Documents	Competitive Procurements Program/Funding Source				Noncompetitive Procurements Program/Funding Source		
RFP	SNAP	SNAP EBT	WIC	WIC EBT	SNAP	WIC	WIC EBT
State agency prepares and submits RFP. FNS reviews within 60 days.	Total cost of the individual procurement cost is > $5M	For all acquisitions requesting FFP	For all acquisitions requesting Federal funding ≥$100,000	For all acquisitions requesting Federal funding	For all acquisitions with total acquisition cost > $1M	For all acquisitions requesting Federal funding ≥$100,000	For all acquisitions requesting Federal funding
Contract	SNAP	SNAP EBT	WIC	WIC EBT	SNAP	WIC	WIC EBT
State agency prepares and submits contract. FNS reviews within 60 days.	Total cost of the individual procurement cost is > $5M	For all acquisitions requesting FFP	For all acquisitions requesting Federal funding ≥$100,000	For all acquisitions requesting Federal funding	For all projects with total acquisition cost > $1M	For all acquisitions requesting Federal funding ≥$100,000	For all acquisitions requesting Federal funding
Contract Amendment	SNAP	SNAP EBT	WIC	WIC EBT	SNAP	WIC	WIC EBT
State agency prepares and submits contract	For any amendment ≥ 20% of base	For all acquisitions requesting	For any amendment ≥ 20% of	For all acquisitions requesting	For all acquisitions with total	For all acquisitions requesting	For all acquisitions requesting

amendment. FNS reviews within 60 days.	contract cost (cumulative)	FFP	base contract cost (cumulative)	Federal funding	acquisition cost > $1M	Federal funding ≥$100,000	Federal funding

The State agency should submit contracts to FNS for approval before signature and execution by the State agency, if the total project cost is greater than or equal to $100,000 in total project costs for WIC or $5 million in total cost of the individual procurement for SNAP.

Noncompetitive procurements using SNAP FFP that exceeds $1 million in total acquisition costs or WIC Federal funding that exceeds $100,000 in total acquisition costs require prior approval.

Because there are State-specific procurement regulations and requirements, FNS does not want to burden the State agency with duplicative requirements and document preparation. States may be able to submit State planning, IT project, and/or procurement-related documents that contain the information required in APDs and RFPs, provided the State submits a detailed crosswalk to FNS requirements. State agencies should consult with FNS to help make this determination.

6.2.1. State Agency Roles and Responsibilities

The contracting process includes activities designed to provide States with reliable, efficient, and current technology. Some roles, responsibilities, and authorities for IS acquisitions are specified by regulation.

For example, 7 CFR 3016.32 (http://www.gpo.gov/fdsys/pkg/CFR-2011-title7-vol15/pdf/CFR-2011-title7-vol15-sec3016-32.pdf) of the regulations requires that a State use, manage, and dispose of equipment acquired under an award in accordance with State laws and procedures, as well as with the specific provisions of the regulation. Others may vary from acquisition to acquisition and from State to State. Regardless, a senior-level official should designate an acquisition team (see Figure 6-2) with responsibilities for each acquisition early in the process.

Figure 6-31. Roles and Responsibilities in the Acquisition Process

Role	Responsibilities
Program Manager	Represent the Program Office Ensure that the organization's long- and short-term needs are met through the acquisition process Provide material for inclusion in the solicitation Prepare and submit a cost estimate to the contracting officer as soon as possible in the pre-solicitation phase Oversee the progress of the project
Project Manager	Represent the Project Office Work with the contracting officer to define the contract management plan, including acceptable performance criteria Ensure that the organization's long- and short-term needs are met through the acquisition process
Information Systems Manager	Provide technical expertise to the project manager and contracting officer throughout the acquisition process
Contracting Officer	Enter into, administer, and terminate contracts and make related determinations and findings Issue the solicitation document (i.e., RFP) when it is complete and accurate Prepare the solicitation package and incorporate input from the Program Manager

State agencies should negotiate contracts and agreements that are based on Federal procurement regulations and individual State procurement rules. Generally, terms and conditions reflect the requirements of these rules.

6.2.2. FNS Roles and Responsibilities

All contracts and their subsequent amendments that exceed applicable thresholds must be submitted to FNS for review and approval before their execution. FNS will review contracts within **60 days.**

6.2.2.1. SNAP

For the SNAP, if FNS has not provided written approval, disapproval, or a request for additional information within **60 days** of FNS' acknowledging receipt of the State's request, the request is deemed to have provisionally met the prior approval requirements. However, provisional approval will not exempt a State from having to meet all other Federal requirements that pertain to the acquisition of IS equipment and services. Such requirements remain subject to FNS audit and review.

6.2.3. Procurement Methods

State agency procurements using FNS program funds shall be made by one of the following methods:

- **Small Purchase Procedures** (for services or supplies costing in aggregate not more than $100,000)
- **Competitive Sealed Bids** (formal advertising) result in the awarding of a firm-fixed price contract to the bidder whose bid, conforming with the terms and conditions of the invitation for bids, is lowest or the best value
- **Competitive Negotiation** (proposals are requested from several sources, and the RFP is publicized) result in the awarding of either a fixed-price or cost-reimbursement type of contract
- **Noncompetitive Negotiation** (solicitation of a proposal from only one source) contract awarding is limited to the following:
  - The item is available only from a single source.
  - A public emergency is involved.
  - FNS authorizes noncompetitive procurement.
  - After soliciting several sources, competition is determined inadequate.

When submitting a request for an exception to competitive procurement (approval of a sole source or noncompetitive procurement) certain key information is required (See Appendix D-24). State agencies should contact either their State Systems Office (SSO) or Regional Office (RO) contact.

At the discretion of FNS, a State agency may be required to notify FNS regardless of the dollar amount, whenever a noncompetitive procurement strategy is chosen. For major procurements involving IS equipment and services, competitive procurements requiring an Invitation for Bids (IFB) and competitive negotiation requiring an RFP are primarily used. The nature of the IS acquisition often requires the competitive negotiation process, such as in circumstances involving development of software applications.

6.2.3.1. Procurement Cooperatives

A State agency may wish to consider making use of cooperative purchasing for its Information Technology (IT) project procurements. Cooperative purchasing is increasing as States are looking to procure goods and services in more efficient and cost effective ways.

Purchasing cooperatives leverage their combined purchasing power, and resulting higher volume of purchases from a group of suppliers, to obtain more favorable buying terms than they could each achieve on their own. The most

common method for effectuating a cooperative purchase through a formal agreement or contract is by using provisions from the adopted contract and adding or substituting terms and conditions. Resulting benefits may include: lower prices, higher quality goods and services, improved customer service, better maintenance and service agreements, and stronger contract terms and conditions.

In cooperative purchasing, two or more governments jointly identify a common need and combine their requirements into a formal solicitation. The term "cooperative procurement" covers several different sharing arrangements among any number of governmental relationships. States may sponsor cooperative purchasing programs with local governments, participate in cooperative purchasing arrangements with other States, and/or may have formalized cooperative purchasing arrangements with the Federal government.

Two commonly used methods are noted here, as examples:

- **U.S. General Services Administration (GSA)**

GSA's Cooperative Purchasing Program is one of numerous IT purchasing options available to State and local governments.

www.gsa.gov/cooperativepurchasing

GSA provides procurement assistance to other government agencies. As part of this effort, it maintains the GSA Schedule, which is a compilation of pre-negotiated contracts with vendors. GSA supply schedule contracts are designed to streamline the Federal procurement process for obtaining commonly used commercial goods and services at low prices associated with volume buying.

GSA makes its competitive negotiated schedule prices, product warranties, and other contract terms available to State, local, regional, and tribal governments through the Cooperative Purchasing Program. The point of non-Federal governments using existing GSA contracts is to make all levels of government more efficient by reducing duplication of effort and utilizing volume purchasing techniques for the acquisition of IT products and services.

Under this Cooperative Purchasing Program, non-Federal government entities may purchase a variety of IT hardware, software, supplies, support equipment, and professional services from contracts awarded under GSA Schedule 70, as well as from contracts under the Consolidated Schedule containing IT special item numbers (SINs), and contracts awarded under GSA Schedule 84, which includes system security.

- Seek Best Value

The Schedule prices are ceiling prices and may be higher than prices obtained from other procurement processes. Volume discounts are built into the Schedule contract. An established best practice is to seek additional price reductions and/or increased discounts and/or concessions when placing an order under a GSA Schedule contract. Be aware that the GSA program includes voluntary participation clauses for both the buyer and the contractor. GSA Schedule contractors are not required to offer a price reduction extended only to an individual customer for a specific order to all Schedule users. The GSA program allows vendors a window to opt-out of honoring a purchase order submitted by the State.

www.gsa.gov/schedulespricereductions

Under the GSA Schedules Program, GSA has determined that prices under GSA Schedule contracts are fair and reasonable. With regard to service contracts, while GSA has determined that the labor hour (hourly rate) for a

labor/skill category is fair and reasonable, GSA has not determined that the level of effort or mix of labor/skill categories proposed in response to a specific requirement represents the best value. Therefore, when buying services that require a statement of work, consider the proposal for a particular requirement and make a determination as to whether the total price is reasonable and represents the best value.

http://www.gsa.gov/portal/category/100631

There is a 0.75 percent industrial funding fee charged by GSA for using the program.

- Integrate Contract Terms and Conditions

Several States have implemented a procedure that integrates GSA IT schedule terms and conditions into their own, State-sponsored multiple award contract schedule programs.

In this process, known as “piggybacking,” States can make use of the most beneficial contract terms, negotiate their own prices, add provisions (such as those that ensure service reliability, delivery time lines, and product warranties), and still maintain control over the contracting process.

- Apply State Laws

Some State procurement laws and policies are more stringent than Federal regulations. Most States practice a strict procedure in soliciting bids from a certain number of contractors and conducting a formal evaluation before a contract is awarded.

Some State laws establish criteria for recognizing small businesses in their incentive programs. In order to make small business awards using the Cooperative Purchasing Program, schedule vendors would have to meet these same criteria before a State small business award could be made.

- **Western States Contracting Alliance (WSCA)**

Several States are using other procurement cooperatives operated by nonprofit organizations or fellow States to meet their needs. One example is WSCA.

www.aboutwsca.org

WSCA was established to enable participating States to benefit from cooperative multi-state contracting. This approach is intended to help States achieve cost-effective and efficient acquisition of products and services. WSCA provides members access to a range of contracts encompassing a variety of products including such goods as computers, communications equipment, and general electronics.

Cooperative purchases are developed by member States. A "lead-state" model is used in undertaking cooperative multi-state contracts. WSCA designates lead agencies to coordinate and conduct the solicitation and award. Lead State agencies are assigned a product category and are responsible for competitively soliciting prices from vendors and establishing contracts. Lead States must abide by their State’s procurement guidelines and regulations, and all contracts are to include terms allowing the other WSCA members to place orders.

To participate, States must have authority (either statutory or ordinance driven) to share the WSCA contracts with other States. Some States have the authority to utilize cooperative contracts but lack the authority to act as a lead agency on a contract.

Membership in WSCA consists of the central procurement official that heads the State central procurement organization (or a designee for that state), from Alaska, Arizona, California, Colorado, Hawaii, Idaho, Minnesota, Montana, Nevada, New Mexico, Oregon, South Dakota, Utah, Washington and Wyoming.

All governmental entities within WSCA States as well as authorized governmental entities in non-WSCA States are welcome to use the approved agreements. Non-WSCA states are generally able to use WSCA contracts if they have followed their own statutory processes.

FNS recommends States participate in such multi-State cooperatives in one of two ways:

1) Interested States should join procurements before solicitations are issued, to ensure that bidders are aware of the potential scope of the contracts.

2) States should make purchases or execute contracts based on cooperative agreements/contracts which offer an open procurement period to any additional buyers at the winning bid/price.

6.2.4. Request for Proposals

An RFP is the document that the State agency will use to obtain contractor support or purchase hardware and software. The RFP is developed to solicit contractor services for a variety of efforts, including planning activities, document development, software, and IS development, Quality Assurance (QA), operations, maintenance, training, and other program life-cycle services. The State agency is responsible for ensuring that the RFP contains the components required by FNS and that it is consistent with State procurement regulations. The State should submit RFPs meeting the thresholds as defined in Figure 6.1 to FNS for review and comment prior to release to the vendor community. FNS will review the RFP and notify the State agency of the approval or need for additional clarification within **60 days**. After FNS approval, the State agency may release any RFPs to the vendor community.

State agencies may take advantage of competitive procured master agreements or master contracts between the State and contractors for many of their requirements, though most States have procedures in place for large procurements that require the use of an RFP for vendor solicitation.

6.2.5. State Agency Roles and Responsibilities

Unless otherwise directed by FNS, the State agency shall submit the RFP or similar document for approval before its release. The RFP is normally included as a part of the contract between the State and selected vendor to ensure that the vendor complies with all of the RFP's provisions. The State agency is responsible for submitting the RFP or similar document to each individual Federal agency that may be participating in the Federal funding of the project (i.e., separate copies must be submitted to FNS and Department of Health and Human Services (HHS)).

The general system design or system specification may reference an existing State system as a possible transfer that contains the level of IT and functionality desired. The RFP must ask the vendor to bid the best possible system solution; however, the RFP itself cannot request the vendor to transfer a specific State system. States can identify the specific functionality and technical platform and cite examples but should not specify a State system by name in an RFP. An exception to this would be for those WIC State agencies seeking State Agency Model (SAM) funds.

6.2.6. Components of an RFP

During the project life cycle, the State agency will need to develop and release several RFPs for acquiring various contracted goods and services. RFPs will likely be released to procure planning, QA, development and implementation, and M&O contractor support. RFPs developed by the State agency should contain, at a minimum, the following components:

- **Introduction and Overview**—Includes details, such as background information about the effort; agencies and programs that will use the system, including any placeholders for potential future partners; major objectives of the proposed system; type of contract anticipated; and procurement schedule.
  - **Current Processing Environment**—Describes existing methods, procedures, systems, applications, hardware configurations, and components that the system will support
  - **Workload Data**—Describes statistics of online transactions, volumes of regular and peak loads, and incremental growth forecast for various workload data, etc.
  - **New System Environment**—Describes improvements that the agency expects to gain, performance requirements, database management requirements, and associated constraints, etc.
- **Solicitation Instructions and Conditions**—List issuing office and agency manager responsible for procurement; submission requirements, limitations/stipulations imposed on all bidders, standards, and subcontractors; and so forth. FNS recommends that all solicitations remain open for a minimum of 90 days to allow vendors sufficient time to respond and to promote fair and open competition.
- **Statement of Work (SOW)**—Lists the tasks and other potential activities, mandatory requirements, deliverables, and staffing, including the following:
  - **Desired Schedule**—Should provide realistic schedules, including time for Federal and State review and approval of each deliverable
  - **Contract Deliverables**—Describes the products and services that the State expects contractor to deliver (This should also include acceptable performance criteria or measurements for each deliverable.)
  - **Installation, Conversion, Maintenance, and Personnel Requirements**—Lists specific requirements for installation and onsite maintenance as well as staffing requirements
  - **Functional Requirements Document (FRD)**—Defines the proposed system and documents system goals, objectives, and programmatic requirements and describes what the new system and/or hardware should do
- **Management Plan**—Identifies management requirements, such as the State agency project manager/lead State agency to whom the contractor will report, type and frequency of project status reports, and review and approval of work performed.
- **Proposal Structure and Content**—Describes general proposal appearance and organization, attachments, supplements, and other supporting documentation.
  - Statement, including personnel background and experience, of the contractor's staff resources planned for assignment to the project
  - Statement of corporate financial resources, history of prior involvement in similar projects, and information regarding pending litigation, debarment, and suspension
  - Line-item cost statement, covering both developmental and operational costs, for the expected life of the system
- **Evaluation of Proposals and Contract Award**—Identifies proposal controls, such as the methods that States will use to evaluate proposals, requirements for benchmarks and system demonstrations, evaluation criteria, and State appeals process.

Refer to Appendix D for additional information and guidance.

6.2.7. FNS RFP Requirements

The RFP and the resulting contract should stipulate that payment will occur following review and acceptance of each major deliverable by the State agency. FNS may stipulate certain deliverables for submission and review. Major deliverables may include the detailed system design, as well as system and functional requirements documents. In addition, FNS recommends that the RFP require the contractor(s) to perform the following activities:

- √ Use configuration management (CM) software during design, development, and testing
- √ Develop requirements documents (which may include use cases) that should be signed off on and accepted by the State agency
- √ Implement a change request process to document all requested changes to the system and to track their status, to help control scope creep and ensure that all requests (implemented now or in the future) are documented
- √ Conduct an incremental system demonstration every few months during development
- √ Provide detailed system and functional requirements, system design specifications, source code with inline comments, and a complete system installation guide
- √ Ensure that the system under development occurs in accordance with FNS program requirements and regulations
- √ Conducting full system testing, including end-to-end internal testing, User Acceptance Testing (UAT), full regression testing, and pilot testing is mandatory.

6.2.8. Recommendations for Developing RFPs

Preparing an RFP consists of selecting appropriate clauses and provisions, tailoring them when necessary, and finally assembling the various parts of a solicitation for issuance. As part of this preparation, it is important that the State agency have a general source selection strategy. The RFP also should clearly state the significant evaluation factors—such as cost or price, cost or price-related factors, past performance, and other non-cost or non-price-related factors that will be considered in making the source selection and their relative weight or importance. Once the RFP is finalized and approved by the State procurement office and FNS, it is released to the contracting community.

It is important that RFPs released to the vendor community clearly outline State agency requirements and expectations. The following recommendations concerning RFP development are presented to help the State ensure that such releases are clear:

- √ Ensure that RFPs contain enough detail to clearly define requirements
- √ Describe requirements and timeline expectations in specific terms to provide the contractor with adequate information to develop a responsive bid
- √ Describe acceptable levels and measures of performance for products and/or deliverables
- √ Ensure that the State agency employs a process for RFP review by individuals having sufficient technical expertise and knowledge so that the support requested in the RFP is what the State agency desires.

Although the State agency may choose to hire a planning contractor to write the RFP for development and implementation services, State agency staff should strive to gain the confidence and expertise to drive the RFP

process and manage the contractor appropriately. Not doing so may result in a system that does not meet State agency requirements.

State agencies must conduct all procurement activities in a manner that ensures full and open competition. Examples of situations that inappropriately restrict competition include the following:

- Placing unreasonable requirements on firms to qualify to do business
- Specifying geographical preferences (prohibited by 7 CFR 3016.36(c)(2))
- Requiring unnecessary experience and excessive bonding
- Including unlimited liability clauses
- Specifying a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement
- Using noncompetitive pricing practices between firms or affiliated companies
- Permitting organizational conflicts of interest
- Allowing noncompetitive awards to consultants on retainer contracts
- Taking any arbitrary action in the procurement process.

6.3. TYPES AND ROLES OF CONTRACTORS

The contracting services that State agencies require for their IT needs may fall under any stage of the SDLC, and as the IS project progresses through its life cycle, the level of support and types of service required will change. It is the program manager's responsibility to ensure that the appropriate resources are available to complete the project on time. The requirement to provide management and monitoring on a systems project is "cradle to grave," from planning the concept through design and development, testing and deployment, M&O, and final disposition. State agencies that implement FNS programs use several types of contractors to support the different phases of the SDLC—contractors for planning, development and implementation, QA, project management, and IV&V. The type of contractor a State agency may need depends upon the complexity of the project, internal resources and expertise, and the budget allocated to the project. State agencies may have in-house resources that can carry out these functions without the need of contractor assistance. The contractor always reports to the State agency for task assignment, acceptance, and payment. The roles listed below are examples of some functions that may be performed by a contractor for a State agency.

6.3.1. Planning Contractor

The State agency may decide to retain a planning contactor to perform several planning or project management (PM) responsibilities. This type of contractor would likely play a major role during the planning and procurement phases of the project life cycle. Typical responsibilities for the planning contractor include:

- Guide the State agency in identifying system needs to meet program requirements or missing functionality (i.e., gap analysis), identify potential system solutions (upgrade, transfer, new development), and procurement methods
- May assist in business process review or reengineering efforts to streamline the process and facilitate the introduction of a new or updated system
- Guide the State agency and assist in development of the IAPD and the Implementation RFP for the development and implementation contractor (as well as the revisions, finalization, and coordination until FNS approval)

- May assist in the development of RFP for a project manager contractor (to perform project management role) as long as the planning contractor is not eligible to bid on those services
- May assist in the development of RFP for a QA contractor (e.g., to perform project QA responsibilities) as long as the planning contractor is not eligible to bid on those services
- Guide the State agency in identifying selection criteria and process for choosing development and implementation contractor (as long as the planning contractor is not eligible to bid)
- Facilitate coordination by doing the following:
  - Assist in identifying and achieving project milestones
  - Develop documentation for meetings
  - Create and maintain, a central repository to house documentation
- Arrange and set up demonstrations of potential systems
- Manage the overall project schedule
- Produce periodic status reporting for project stakeholders, including FNS and other funding agencies.

6.3.2. Project Management Contractor

A PM contractor may be retained by the State agency to carry out project management activities, and ensure that testing and training are conducted properly and meet State and Federal requirements. The focus of the PM contractor is on a well-managed project, completing a project within defined scope, time, and cost constraints. The PM contractor may play a major role during the development and implementation phase of the project life cycle. While a PM contractor may assume the day-to-day PM activities, the State agency remains responsible for project management and Federal reporting. The PM contractor reports to the project manager or project director as defined in the contract agreement. The project manager or project director is responsible for all communications with the Federal funding authorities. Typical roles and responsibilities for this type of contractor support include the following:

- Providing PM support by ensuring that the program stays on track, meets timelines, and stays within the budget
- Overseeing and monitoring program activities (State supervises system development and implementation; contractor advises State on these activities.)
- Providing the State with additional expertise and advice on the management of the development and implementation processes
- Identifying potential solutions to correct program missteps, delays, and cost overruns
- Coordinating activities of key stakeholders and decision makers (e.g., arranging meetings, developing support documents)
- Arranging and setting up additional demonstrations of systems, as needed
- Producing periodic status reporting for State decision makers, FNS, and others
- Facilitating coordination by doing the following;
  - Assist in identifying and achieving project milestones
  - Develop documentation for meetings
  - Maintain a central repository to house documents

- Developing a user training plan.

6.3.3. Pros and Cons of Contractor Support Options During the Initial Life-Cycle Phases

To decide the level and type of contractor support required during the initial planning phases of the project life cycle, the State must evaluate the options for selecting a planning and PM contractor. Figure 6-3 identifies some of the considerations involved in making decisions concerning planning and PM support.

Figure 6-32. Pros and Cons of Contractor Options

Option	Pros	Cons
1. A single contract award for performance of both planning and PM roles	• Increases continuity of efforts • Does not require additional ramp-up time to learn issues • Has potential for increased efficiency of contractor resources; already familiar with State agency operating procedures • Can result in time savings	• Harder to define roles and responsibilities for future project phases, because the planning phase for defining roles, responsibilities, and activities covering the entire project has not yet occurred • May increase cost by resulting in higher bids from potential contractors due to unknowns.
2. Two separate contracts awarded for contractor performance of planning and PM roles In this instance: • State writes RFPs for planning and PM contractor functions OR • Planning contractor writes PM contractor RFP	• Could facilitate project movement by allowing release of the initial planning contractor RFP instead of requiring additional time to define specifications and release a single RFP • Provides the opportunity for decreased risk of conflict of interest if bidders are limited to only one of the two project phases • Enables more accurate definition of roles and responsibilities in the RFPs • Allows more specific definition of tasks and requirements prior to contract award • Potentially lowers contract costs due to contractors' bidding for the PM support tasks after they have been fully defined and accurately detailed	• Requires two RFPs to retain contractors (however, both RFPs may be drafted initially, and the second RFP may be revised later) • Can lead to loss of continuity and efficiency • Can reduce the choices of contractors if potential bidders choose not to bid on the planning role, allowing them to be eligible to bid on the longer term and greater value contract to fulfill the PM role

6.3.4. Development and/or Implementation Contractor Support

A development and/or implementation contractor may be retained by the State agency to design, build, and implement a new IS. This contractor will play a major role during the development and/or implementation phase. Typical roles and responsibilities for the development and implementation support contractor(s) that may be provided either by the State agency or contractor support include the following:

- Creating a detailed project timeline
- Guiding the State agency through a detailed design process to verify functional and technical requirements
- Writing or adapting software code and converting the data from the old system
- Writing technical and user documentation
- Installing hardware and software to support the system
- Developing any necessary interfaces to other systems, such as Electronic Benefits Transfer (EBT)

- Testing and demonstrating system functions
- Training personnel on the new system
- Implementing rollout of the new system
- Designing and building enhancements to the system
- Testing and demonstrating system enhancements
- Developing test plans and scenarios for users of system enhancements
- Training personnel on system enhancements
- Implementing enhanced system rollout
- Providing preliminary Help Desk support.

6.3.5. Maintenance and Operations Contractor Support

States either provide their own staff or may want to hire a contractor or multiple contractors for M&O of the IS after implementation. M&O may be a separate procurement from the initial implementation RFP, or it can be a phase requested as part of the initial implementation RFP. Regardless, M&O cannot be added noncompetitively once the project has started.

When transitioning to a new M&O contractor, a smooth handover requires a reasonable transition period to the non-incumbent. The more complex the system is the longer the transition period needs to be to ensure success. A transition plan that addresses at least the following items is helpful to all parties involved.

- Project Initiation with the new contractor
- Project planning and management
- System documentation
- Contractor system testing
- Transfer initiation
- Transfer User Acceptance Testing
- System conversion

6.4. AWARDING GOVERNMENT CONTRACTS

Once all bids have been received, the State agency must evaluate contractor offers for comparison with its proposal and select the best-value offer in accordance with State procurement process. This section provides general practices that may be used in awarding contracts, but States should follow their procurement processes at all times.

6.4.1. Evaluating Proposals

The State must use an evaluation process to determine the relative merits of an offer and the offeror's ability to successfully accomplish the prospective contract. A competitive range is determined on the basis of the ratings of each proposal against all evaluation factors and refers to the range of proposals that are identified as the most highly rated.

An evaluation team is selected that can commit time for a thorough review of a proposal. The evaluation team should comprise members from diverse stakeholder groups, such as the State program director, lead nutritionist, EBT/vendor coordinator, State purchasing representative, IT department representative, and local agency representatives. The team should be trained on the evaluation criteria, process, and timeline. The evaluation team

will judge the proposals in accordance with the evaluation factors (specified in the RFP). The offeror with the highest score will be recommended to the procurement office for review and contract award.

When evaluating a proposal, the State should consider the following basic questions:

- √ To what extent does the proposed alternative perform essential functions?
- √ Are program interests and goals represented?
- √ Are the planned equipment and software purchases appropriate for the tasks they are to perform?
- √ Is the technical proposal current and reflective of up-to-date technology when compared with industry standards?
- √ Do system functions match specific State program needs in detail?

The State should be wary of bids that either offer what was not asked for or simply restate the requirements defined without specifying *HOW* to meet the requirements. Benefits of each alternative should be weighed in the context of managerial requirements and efficiency, as well as technological effectiveness.

The evaluation should include an examination of the technical proposal and the management structure of the proposal, respectively, based on a comparative assessment of proposals against all source selection criteria in the solicitation. The evaluation team should be able to provide the rationale for its award decision

6.4.2. Criteria for Evaluating Proposals

All government agencies seek to award contracts on the basis of the best overall value. This means that the State should consider all relevant factors, such as cost, performance, quality, and schedule, and make potential tradeoffs between cost and non-cost factors, rather than just buying from the lowest cost, technically acceptable offeror. Relevant factors include the following:

- Response format as required by the RFP
- Adequacy and completeness of proposal
- Offeror's understanding of project/statement of understanding (Offeror demonstrates they understand the purpose and goals of the project.)
- Project experience in providing similar services (Offerors should provide samples of past work experience and qualifications relevant to the RFP.)
- Project personnel (Offerors should submit resumes of the staff that will participate in the project.)
- Project management plan and methodology to accomplish tasks
- Proposed system documentation
- Technical skills (Offerors should map staff skills to the functional areas identified in the RFP.)
- Cost
- References (Offerors should provide valid references and points of contact, including telephone numbers and mailing addresses.)
- Other factors (e.g., current relationship with the contractor and ability to accept incremental funding and Subject to Availability of Funds orders)

- Company stability (e.g., cancelled contract history, financial stability).

The State agency should weigh the cost of each bidder's proposal, with attention paid not just to the actual project costs, but also to the costs of ongoing operations of the proposed system compared with the State's current technical operations costs. For example, can the State afford the M&O costs on this proposed system, once the development and implementation contractor and any special FNS funding for it are gone? Efficient and careful use of funds is crucial in managing FNS programs, but the States should not base their decision solely on cost, unless their procurement laws direct them to use lowest bidder procurement. To ensure the best product and long-term value for the project, it is important that the State agency not weight the cost proposal too highly and choose the lowest bidder, regardless of other factors.

FNS recommends the cost proposal be weighted as 20 percent to 40 percent of the total proposal, to provide a balanced evaluation between the technical and cost factors. States should test their formula before use to ensure they are comfortable with the results. Scenarios to be tested include the following:

- High technical score, low cost score
- Low technical score, low cost score
- High technical score, high cost score
- Low technical score, high cost score.

Too little weight on the cost may result in a strong technical proposal's winning, no matter how high the cost. Too much weight on the cost may result in a low bid's winning, no matter how poor the technical proposal.

The contracting officer should use every means available to determine whether a fair and reasonable price can be determined before requesting cost or pricing data from the contractor. Contracting officers must not require unnecessarily the submission of cost or pricing data, because it leads to increased proposal preparation costs, generally extends acquisition lead time, and consumes additional contractor and Government resources. Normally, competition establishes price reasonableness.

6.4.2.1. Previous Program Experience

States should not put previous program experience in their selection criteria as a pass/fail element. Instead an RFP may require and assign evaluation points for relevant experience in large-scale eligibility or benefit management programs and may award more points for program-specific experience. Therefore, the RFP should not contain language, such as "must have WIC experience" but should assign points on the basis of experience. States should assess the quality of the experience as well as the existence of the experience.

6.4.2.2. Geographic Preference Prohibition

The USDA rule at 7 CFR 3016.36(c)(2) (http://www.gpo.gov/fdsys/pkg/CFR-2011-title7-vol15/pdf/CFR-2011-title7-vol15-sec3016-36.pdf) states that grantees and sub-grantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases in which applicable Federal statutes expressly mandate or encourage geographic preferences. Nothing in this section preempts State licensing laws; therefore, a State can require that a vendor be licensed in the State.

6.5. TYPES OF CONTRACTS

A contract is a legally binding obligation between the buyer (client) and the seller (offeror/contractor) and establishes a legally binding obligation for the seller to furnish goods and services and for the buyer to compensate the seller. The contract must clearly and accurately describe the goods and services to be delivered or performed and the terms and conditions of the agreement. Contracts should be consistent with State and Federal Government regulations, including those of OMB. Therefore, all Federal Government requirements and program procurement provisions must be included in all contracts approved by FNS. All contracts must be in accordance with individual State agency procurement or acquisition rules and regulations.

Government contracts generally are grouped into two broad categories: fixed-price contracts (including firm fixed-price contracts) and cost-reimbursement contracts.

6.5.1. Firm Fixed-Price Contracts

Although there are several types of fixed-price contracts, the Federal Government, including USDA advocates the use of firm fixed-price contracts to acquire goods and services when feasible. Firm fixed-price contracts provide a firm price for services delivered. In other words, the price is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This type of contract places maximum risk and full responsibility for all costs and resulting profit or loss on the contractor. Firm fixed-price contracts provide maximum incentives for the contractor to control costs and to perform effectively, imposing a minimum administrative burden on the contracting parties. Firm fixed-price contracts are usually implemented when the following conditions exist:

- There is adequate price competition.
- Reasonable price comparisons are available through prior purchases of the same or similar supplies or services made on a competitive basis or supported by valid cost or pricing data.
- Pricing comparisons are available to permit realistic estimates of the probable costs for goods and services.
- Services and quantities are known and unlikely to fluctuate.
- Processes or methods are mature.
- Requirements are stable.
- Cost control is a driving factor.

When a reasonable basis for firm fixed-pricing does not exist, other contract types should be considered, and negotiations should be directed toward selecting a contract type that will appropriately tie profit to contractor performance. For example, another type of fixed-price contract is the fixed-price contract with award fee. This contract type is used to motivate a contractor when contractor performance cannot be measured objectively, making other incentives inappropriate. The contracting officer may use a firm fixed-price contract in conjunction with an award-fee incentive when the award fee or incentive is based solely on factors other than cost.

6.5.2. Travel and Per Diem in Fixed Price Contracts

Travel policy and per diem for contractors normally follow the specific State's travel regulations for its employees. Per diem is the allowance for lodging (excluding taxes), meals, and incidental expenses for temporary duty travel. The General Services Administration (GSA) (http://www.gsa.gov) establishes per diem rates for destinations within the Continental United States for Federal travelers and contractors who travel on official business. The rates should be adhered to when any work is performed under Federal government contracts. Contractors working for States should follow the State travel guidelines in a similar manner. Some State procurement laws allow the use of the GSA per diem rates for contractors.

States should define a methodology that allows travel and per diem associated with all aspects of a project, including individual tasks, to be readily identifiable within the proposal's budget. Many times these costs are embedded in the bid as a portion of the price to complete the individual task and cannot be easily separated. FNS strongly recommends that all travel and per diem be identified as a separate budget line item, with the number of events, staff, and associated costs clearly identified. Likewise, the States need to have controls in place to ensure that meetings and events that occur sequentially at a location are not over-billed. These events may have been bid as separate occurrences, but in reality occur over a collapsed period of time at one location, thus incurring less cost for air fare and transportation than originally budgeted. States should only be billed for actual costs incurred. This situation also applies to strict accounting of time sheets for hours worked, such that there should not be a 24-hour hourly rate charge when in travel status. Often, the requirements of a task change and affect the amount of travel and per diem that should be reimbursed to the contractor.

6.5.3. Cost-Reimbursement Contracts

Cost-reimbursement contracts provide for payment of allowable incurred costs to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer.[9] Cost-reimbursement contracts are used when the following conditions exist:

- Fixed-price contracts are inappropriate because of uncertainty with probable costs. Cost-reimbursement contracts may be appropriate if the service or product to be provided is unique and exact costs are difficult to determine.
- Services can be described only in general terms.
- It is likely that there will be a need to rapidly refocus efforts (e.g., changing requirements).
- The contract involves development of new processes, products, or intellectual capital for which there are few or no precedents.
- Technical quality or schedule performance is the driving factor.

Cost-reimbursement contracts are rare in the system development arena, but may occur in the M&O phase or with certain types of system enhancements.

6.5.4. Contract Comparisons

The biggest difference between the two major contract types is in the assignment of risk (see Figure 6-4). In fixed-price contracts, the contractor is required to deliver the product specified, and there is a maximum limit on the amount of money the Government must pay. In cost-reimbursement contracts, the contract is required to deliver a best effort to provide the specified product. All allowable costs must be reimbursed, regardless of delivery, up to the level specified in the contract.

[9] FAR, Subpart 16.3.

Figure 6-33. Comparison of Fixed Price and Cost-Reimbursement Contracts [10]

Characteristic	Fixed Price	Cost Reimbursement
What is Promised	Contractor Will Deliver	Contractor's Best Effort
Risk to Contractor	High	Low
Risk to State Agency	Usually Low	High
Cash Flow	Paid On Delivery	Cost Incurred by Invoice
Fee/Profit Payment	On Delivery	Periodic
Financing	Progress/Performance Payments	None
Administration of Contract	Minimum Surveillance	Maximum Control

6.5.5. Considerations for Determining Contract Type

Among the factors to consider when making the determination of which contract type to select are the following:

- Price competition
- Price analysis
- Cost analysis
- Type and complexity of the requirement
- Urgency of the requirement
- Period of performance or length of production run
- Contractor's technical capability and financial responsibility
- Adequacy of the contractor's accounting system
- Concurrent contracts
- Extent and nature of proposed subcontracting
- Acquisition history

FAR Section 16 (http://www.arnet.gov/far/current/html/FARTOCP16.html#wp226194) states that "a *firm-fixed price contract*, which best utilizes the basic profit motive of the business enterprise, shall be used when the risk involved is minimal or can be predicted with an acceptable degree of certainty." Figure 6-5 identifies some major differences to consider when selecting the type of contract.

Figure 6-34. Considerations for Choosing Contract Type

Firm Fixed-Price	Cost-Reimbursement
• Adequate price competition exists • Reasonable price comparisons are available • Known services and quantities • Little chance of requirements fluctuation • Processes and methods for service/goods delivery are mature	• Unique services; thus, costing estimates are inexact • Uncertainty in costs • Changing requirements • Few precedents for goods and services to be delivered • Technical quality or schedule performance the driving

[10] Integrated Defense Acquisition, Technology and Logistics Life Cycle Management Framework Back of Chart, http://www.dau.mil/pubs/IDA/chart%20back%208-5X11.pdf

Firm Fixed-Price	Cost-Reimbursement
• Cost control the driving factor	factor

6.5.6. Service Agreements

A service agreement can take many different forms, depending upon the type and scope of the service, the service arrangement, and type of organization. State agencies should execute service agreements when IT services—such as telecommunications, network installation and maintenance, hardware installation and maintenance, and system planning services—are to be provided by their internal IT department or by other State and local agencies. Examples of service agreements include: Master Service Contracts, General Schedules, Blanket Purchase Agreements, and Service Level Agreements (SLA). These are all competitively procured by the State to provide the best value solutions available to State agencies.

Service agreements typically contain the following components:

- **Introduction**—Introduces the purpose, participants, and general service description.
- **Service Environment**—Describes the environment in which the organization will perform the service, from physical location, to hardware/software being used and the policy and procedures the service provider will need to follow.
- **Roles and Responsibilities**—Describes the roles and responsibilities of all major participants. The service provider responsibilities need to articulate not just the service tasks but also the documentation of their services, reporting their actions, and support functions (e.g., if the new service will likely initiate trouble calls, the service agreement should articulate who and how these calls will be handled)
- **Service Level**—Identifies the measurement, the service level, and methodology for assessing the service level. (Organizations may choose to articulate the service level in a range: from unacceptable to minimum to interim to target, or they may choose to set varying service levels for various user groups or schedule times. If so, each service level will need to be articulated.)
- **Terms and Adjustments**—Provides the costs (e.g., proposed budget and schedule of charges) and period of performance of the service levels and roles and responsibilities articulated in the previous sections. Also provides processes for resolving service agreement disputes, remedying noncompliance, and amending the agreement to account for changing requirements.

IT security managers should develop their system security component of the service agreement only after negotiations with the service provider and, most importantly, in consultation with their organization's legal and contractual experts.

Although service agreements need not be submitted for prior approval, the State agency must have valid service agreements on file and available for FNS review. In addition, any equipment or software acquired through a service agreement–type relationship must have FNS prior approval if federally aided public assistance programs may reasonably be expected to be billed for more than 50 percent of the total. Equipment may be acquired through State schedules, assuming that such schedules have been established competitively. It is also recommended that States consider the quantities of hardware or software licenses being acquired vis-à-vis guaranteed quantities under State schedules. ***Separate procurements for large quantities may be advisable and result in significant cost savings over costs incurred using State schedules.*** Costs for unapproved acquisitions or undocumented service agreements may be disallowed by FNS.

6.5.7. Performance-Based Contracting

Performance-based contracting emphasizes that all aspects of an acquisition be structured around the purpose of the work to be performed versus the manner in which the work is to be performed (e.g., broad, imprecise statements of work that preclude an objective assessment of contractor performance).[11] It is designed to ensure that contractors are given freedom to determine how to meet the Government's performance objectives that appropriate quality levels are achieved, and that payment is made only for services that meet these needs.

Performance-based contracting involves employing acquisition strategies, methods, and techniques that describe and communicate measurable outcomes rather than direct performance processes. It is a method for acquiring what is required and placing the responsibility for how it is accomplished on the contractor.[12] Performance-based contracting methods are intended to ensure that required performance quality levels are achieved and that total payment is related to the degree that services performed meet contract standards.

Performance-based contracting provides many benefits, including the following:

- √ Likelihood of meeting mission needs increased
- √ Focus on intended results, not the process
- √ Facilitating meeting the goal of obtaining better value and enhanced contractor performance
- √ Risks shifted to contractors
- √ No detailed specification or process descriptions required
- √ Encouragement to contractor innovation in proposing solutions
- √ Facilitating more meaningful and less frequent contract surveillance.[13]

6.5.8. Elements of Performance-Based Contracting

The *Guidebook for Performance-Based Services Acquisition (PBSA)*, published by the Office of Federal Procurement Policy (OFPP), describes the following four elements that must be present for an acquisition to be considered performance-based:

- **Statement of Objectives—**Provides a summary of the key goals, outcomes, or both, that are incorporated into performance-based acquisitions
- **Performance Work Statement (PWS)—**Identifies the technical, functional, and performance characteristics in a specification for a performance-based acquisition
- **Quality Assurance Surveillance Plan (QASP)**—Measures contractor performance
- **Incentives and Remedies**—Adjusts profit and establishes the final contract price on the basis of contractor performance.

The PWS, QASP, and incentives and remedies components are interdependent; they must be compatible in form, style, and substance and should be cross-referenced in any solicitation.

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[11] *A Guide to Best Practices for Performance-Based Service Contracting*, Office of Federal Procurement Policy, OMB, and Executive Office of the President, Final Edition, October 1998.

[12] Guidebook for Performance-Based Services Acquisition in the Department of Defense, December 2000.

6.5.9. Quality Assurance Surveillance Plan

The FAR[14] states that agencies must develop a QA plan when acquiring contractor services. The QA plan, also known as the QASP, can be part of the solicitation and is usually referenced in the PWS. However, in most cases, because of its size, it is a separate contract exhibit. The QASP recognizes the responsibility of the contractor to carry out its Quality Control (QC) obligations and contains measurable inspection and acceptance criteria corresponding to the performance standards contained in the SOW. Further, it identifies the performance standards and measures the contractor's performance. The QASP is needed to determine whether contractor services meet contract PWS requirements. Negative, and possibly positive, performance incentives based on QASP measurements should be included in this plan. The QASP will specify procedures for the reduction of fee or price when services are not performed or do not meet contract requirements and rework is not feasible. In addition, the QASP may also include positive performance incentives.

6.5.10. Incentives and Remedies

The OFPP recommends that incentives be used when they will promote better quality contractor performance. Incentives may be positive, negative, or a combination of both. They should apply to the most important aspects of the work instead of being applied to every task. Incentives should correlate with results and are best used for high-dollar efforts or efforts with a history of problems with performance or cost overruns. To achieve the greatest effect, incentives should be applied selectively to motivate contractor efforts that might not otherwise be emphasized and to discourage inefficiency. Definitions of
the maximum positive and negative incentives should be clearly spelled out in the solicitation. OFPP has provided the following useful guidelines on incentives:

- √ Avoid rewarding contractors for simply meeting minimum standards of contract performance
- √ Use incentives to create a proper balance among cost, performance, and schedule factors
- √ Use incentive amounts that correspond to the difficulty of the task required but do not exceed the value of the benefits the Government receives
- √ Verify the effectiveness of incentives to ensure they accomplish what they are intended to (e.g., encourage good performance and discourage unsatisfactory performance).[15]

Remedies are used in performance-based contracts to specify procedures or reductions in price (or fee) when services are not performed or do not meet contract requirements. As part of the process for implementing remedies, the State agency must give the contractor the opportunity to correct nonconformance service at no increase in contract price. In addition, the State agency can choose to allow the contractor to re-perform the service at no additional cost to the State agency. Acceptance procedures should be clearly identified by the State agency to ensure that the contractor adequately meets requirements. The purpose of remedies is to ensure that the State agency does not pay for services that do not meet identified requirements and performance standards.

6.5.11. Terms and Conditions

States should use contract terms to ensure that systems developed for Federal programs meet the Federal requirement for maximum practical open and full competition and that these systems are procured in the most cost-effective way. States should be aware that excessive terms and conditions such as large performance bonds,

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14 *Seven Steps to Performance-Based Services Acquisition*, OFPP, online at www.acqnet.gov/Library/OFPP/Best Practices/pbsc.FAR,
15 General Services Administration, DoD, National Aeronautics and Space Administration, July 2004.
[15] *A Guide to Best Practices for Performance-Based Service Contracting*, OFPP, OMB, and Executive Office of the President, Final Edition, October 1998.

unlimited liability, and large holdbacks on payments may limit competition. States undertaking IS development projects should balance these concerns with State requirements and vendor performance remedies when contemplating the inclusion of the following in their contracts:

- **Prescribed Payment Terms**—Payments or holdbacks are prorated according to the relative value of, and tied to acceptance of, deliverables. In many cases, this includes a final payment that is a substantial percentage of the total contract value (e.g., 20 percent). This amount is not paid until the system is accepted or certified. The preferred method of ensuring contractor performance is through prescribed payment terms. Payment terms may be used in conjunction with liquidated damages clauses to ensure that all contract obligations, including timeliness and quality of deliverables, are met by the vendor.

- **Liquidated Damages**—Fixed amounts are assessed to contractors for compensation of damages, which may be difficult or impossible to determine precisely, as a result of contractor nonperformance. Provision for liquidated damages, in combination with prescribed payment terms, provides the level of security needed to ensure vendor performance. Most contractors are willing, and expect, to abide by a combination of holdbacks (i.e., payment percentage terms), liquidated damages, and software escrow. While vendors must be held accountable for their performance, using one or a combination of the methods described above involves costs for contractors that are passed on to Federal and State agencies.

- **Performance Bonds**—Bonds, from which costs for noncompliance can be assessed, are secured usually through financial or insurance firms. Performance bonds, in particular, are costly, because a contractor must make a direct outlay of funds to acquire the bond and the systems initiatives being bonded are costly, which affects the cost of the bond. This increases the bid price and the cost of the project, and may deter potential bidders from doing government business and ultimately may inhibit competition.

For cases in which States have had problems or failures in systems projects, performance bonds would not have provided the compensation States seek. In these cases, performance problems most often stem from a lack of specificity in the SOW section of the RFP and other matters, including PM. When the project is effectively managed, performance issues are kept to a minimum.

6.6. CONTRACT COMPONENTS AND REQUIREMENTS

The basic format for Government contracts is outlined in Figure 6-6. For brevity, not all sections are described in detail.

Figure 6-35. Uniform Contract Format[16]

Section	Title
Part I—The Schedule	
A	Solicitation/contract form
B	Supplies or services and prices/costs
C	Description/specifications/SOW
D	Packaging and marking

[16] FAR, 15.204; http://www.arnet.gov/far.

Section	Title
E	Inspection and acceptance
F	Deliveries or performance
G	Contract administration data
H	Special contract requirements
Part II—Contract Clauses	
I	Contract clauses
Part III—List of Documents, Exhibits, and Other Attachments	
J	List of attachments
Part IV—Representations and Instructions	
K	Representations, certifications, and other statements of offerors or respondents
L	Instructions, conditions, and notices to offerors or respondents
M	Evaluation factors for award

The same basic format is used to issue the RFP as is used to award a contract. The RFP explains to the proposed contractor the SOW, the terms and conditions, the type of contract, delivery schedule, and the format of the proposal and evaluation factors.

State procurement regulations and standards should reflect the Federal regulations and ensure that the acquisition is conducted in the most effective and economical manner. The standards do not relieve the State agency of any contractual responsibilities. The State agency is responsible for settling all contractual and administrative issues resulting from procurements. In addition to the contract terms (i.e., holdbacks, liquidated damages, and performance bonds) that were described as incentives and remedies in performance-based contracting, additional contract requirements related to procurement standards include the following:

- √ **Effective Date and Term**—Identifies when the project starts and ends
- √ **Performance Standards**—Describes the subject matter of the contract, why the contractor has been selected, and expectations for contractor performance
- √ **Priority of Documents**—States that the conditions, provisions, and terms of the RFP which the contractor's proposal must meet under this contract
- √ **Quality of Work and Warranty**—States the requirements concerning contractor expert knowledge and skills needed to accomplish the tasking in a manner acceptable to the State
- √ **Modifications to the RFP**—Describes all modifications, if any, to the RFP
- √ **Duties and Obligations of the Contractor**—Describes the scope of work
- √ **State Duties and Obligations**—States the project management process, time limit for acceptance of deliverables, compensation requirements, contract renewal or extension requirements, and other contract modifications
- √ **Breach Procedure**—Describes the procedures for notice of breach, the right to cure, and available remedies

- √ **General Provisions**—Describes in detail the legal conditions and issues regarding the relationship between the contractor and the client, including insurance policies and compliance with Federal requirements and regulations

- √ **Special Provisions**—Lists other special conditions, such as funds availability, software piracy prohibition, and employee financial interest.

6.6.1. General and Special Provisions

6.6.1.1. Code of Conduct and Conflict of Interest

The State agency should maintain a written code of conduct that governs the performance of its officers, employees, or agents engaged in contract awards and administration funded in whole or in part by FNS program funds.

6.6.1.2. Contracting with Small and Minority Firms, Women's Business Enterprises, and Labor Surplus Firms

State agencies should be aware of the Federal regulations for how contracting applies to such concerns as small and minority business firms, women's business enterprises, and labor surplus area firms. State agencies must take affirmative steps to ensure that such businesses are used, when possible, as sources of supplies, equipment, and services.

6.6.1.3. Full and Open Competition

All State agency procurements must be conducted in a manner that provides for maximum full and open competition. In this regard, States should have written selection procedures that should not unduly restrict or eliminate competition. Solicitation of offers, whether by competitive sealed bid or competitive negotiation, shall accurately describe the technical requirements for the material products or services desired. These descriptions should not, in competitive procurements, contain features that unduly restrict competition. Descriptions may state the qualitative nature of the product or service desired and set forth those minimum essential characteristics and standards to which the product or service must conform. A brand name or equal description may be used to define the performance or requirements desired when it is impractical or uneconomical to describe clearly and accurately the technical requirements.

6.6.1.4. State Agency Procurement Records and Information Systems

The State agency must make available to FNS procurement records and provide access to all aspects of the IS. This includes design, development, operation, and work performed by any source, including cost records of contractors and subcontractors. Failure to provide this access will result in suspension or termination of FNS funds for the costs of the system and its operation.

6.6.1.5. Ownership Rights

6.6.1.5.1. *Policy Requirements*

There are several policy requirements State or local governments must include in all contracts for *any* software or software modifications and associated documentation designed, developed, or installed with Federal financial participation funding. These include ownership rights and a broad Federal License, among others. (7 CFR 277.18(l)) (http://edocket.access.gpo.gov/cfr_2006/janqtr/pdf/7cfr277.18.pdf).

> "The federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes the copyright in

any work developed under a grant, sub-grant, or contract under a grant or sub-grant or any rights of copyright to which a grantee, sub-grantee or contractor purchases ownership with grant support."

Proprietary vendor software packages and operating systems (OS) that are provided at established catalog or market prices and sold or leased to the public are not subject to these ownership provisions. Federal funding is not available for proprietary applications software developed specifically for SNAP or WIC.

6.6.1.5.2. *Understanding the Policy*

6.6.1.5.2.1. Purpose

The primary purpose of these policy requirements is financial stewardship of FFP to insure that Federal funds are not used to pay repeatedly for the same functionality. Another purpose is to facilitate transfers of useful systems among States in support of the financial stewardship purpose. There are two major considerations affecting transferability: the right to transfer (i.e., ownership and licensing) and the ability to transfer (i.e., technological compatibility, interoperability, and portability).

6.6.1.5.2.2. Supporting the Policy in Acquisitions

State agencies' ability to fulfill these policy requirements depends largely on well written solicitations and requests for proposals (RFPs). State agencies must explicitly include sufficient information for offerors to understand what the State Agency is buying, what information they must provide, and how their proposals will be evaluated.

> *It is not enough to simply state the requirements; it is equally important to evaluate the responses from offerors for their ability to meet the requirements and use objective evaluation criteria as discriminators for making an award decision.*

There are four sections of the solicitation/RFP critical to presenting the information for offerors;

- **Section C** – *Description/Specification/ Statement of Work* (SOW). The SOW contains the description of the products to be delivered or the work to be performed under the contract. This section typically includes the State Agency's preliminary system performance specification. References to requirements should be explicitly included in the SOW and not linked to external web pages or Internet sites. Access to requirements on external web pages or Internet sites is not likely to be available post-award.
- **Section L** – *Instructions, conditions, and notices to offerors or respondents*. Section L of the RFP instructs the offerors on how to structure their proposal and what should be included in each proposal section. It needs to clearly identify the structure and composition of each volume and section of the proposal and should track to the evaluation factors in Section M. The technical definition of the computer software architecture and data meta-model, estimated sizing, throughput timing, and growth migration strategy also need to be defined as criteria in Section L and in the offeror's proposal.
- **Section M** – *Evaluation factors for award*. Section M should be carefully structured to address only those elements determined to be discriminators in the source selection to select the best proposal with acceptable program risk. The most effective Section M evaluation factors are measurable, relevant to the program, traceable, with expected differentiation among the offers, and under the offeror's control.
- **Section I** – *Contract clauses*. Because the acquisition of rights to computer software and computer software documentation is a special interest for use of FFP, Section I language should include relevant clauses for acquiring ownership rights for software being procured using FFP. Section I typically incorporates the clauses by reference to appropriate State or Federal policies and regulations (for example, the Federal Acquisition Regulations (FAR) where applicable in Federal contracts) with the same force and effect as if they were given in full text. However, in the absence of references, the clauses need to be clearly and properly written.

When creating the solicitation and RFP, it is important to consider sections L and M first. Section M should be approached before Section L since evaluation factors should be defined before attempting to complete the

Instructions to Offerors. This establishes the conditions so that Section L directly elicits information supporting Section M. Section M should not contain any evaluation factors or sub-factors for which there is not a corresponding request for proposal information in Section L. In preparing Sections M and L, be aware of the proposal preparation time and page limitations by which offerors are constrained. Ask only for information that should be readily available to offerors and that is necessary to accomplish the source selection evaluation.

States are not required or obligated to use FAR references in their solicitations/RFPs. Likewise, the FAR is not applicable in State contracts. In State contracts, the responsibility and discretion to negotiate the State's minimum needs is significant. Many States may have default clauses for intellectual property (IP) rights and rights in technical data. In the absence of State specific procurement clauses for such contracts, the parties must negotiate all that is addressed in the standard IP contract clauses. If these clauses do not exist (the potential rights and issues are so involved), it is a best practice to use as a guide some model which has been rigorously tested. The FAR clauses would be a viable reference, especially given the Federal awarding agencies involvement and the use of FFP.

6.6.1.5.3. *Software Ownership*

Under the Federal License, FNS and the State agencies who grant the license, may use this license to share the software and associated system documentation with other State agencies who may be interested in transferring the software. The Federal License is a product of intellectual property rights (i.e., copyright) rather than funding source (i.e., State public funding and/or Federal financial participation). State ownership of software designed, developed, or installed with FFP means the State agency should acquire copyright ownership from the vendor or developer through specific contract clauses. These are included in the appropriate sections of the solicitation, RFP, and resulting contract.

6.6.1.5.3.1. Licensing Principles

Software is a product or work of intellectual activities and is covered by copyright law. Copyright law establishes ownership for the creator of the work who, as the owner, retains all copyright protections, unless they transfer those through a recognized written legal instrument. For software, this is typically accomplished though user licenses, which are further reinforced by contract law.

Generally speaking, there are two types of licenses; exclusive and non-exclusive. Under copyright law, the copyright owner has exclusive rights to "reproduction, adaptation, publication, performance, and display." The phrase "exclusive right" means that only the copyright holder, or licensees that have been granted those exclusive rights, are free to exercise those rights, and others are prohibited from using the work without the copyright holder's permission. This is an exclusive license. The exclusive rights may be sub-divided into limitations, restrictions, qualifications, and exemptions, which are then provided in specific sections of the U.S. copyright law. For these to be legitimate, they must be in writing and signed by the grantor. As the exclusive rights are limited, qualified, and restricted, they become non-exclusive and the written result is a non-exclusive license. Non-exclusive licenses mean that the copyright owner has some rights and the license holder has some rights. However, unless the license transfers all *exclusive rights* to the licensee, the licensor (i.e., the copyright holder) still has exclusive rights and has only granted permissions to the licensee. Without a valid, thorough, written and signed agreement, the legal status of the many rights that are the subject of a copyright may be difficult to unravel. The issue becomes who has the right to do what with the respective copyrights. The terms of licenses can be negotiated and executed through contracts, serving as a mechanism establishing the respective rights in writing.

6.6.1.5.3.2. "Rights in Data" and "Work for Hire"

Government entities often express ownership of software produced as a contract deliverable as "rights in data." The content of these rights in data clauses varies with each contract, although they are outlined in the FAR. While the FAR has extensive provisions for "rights in data," the FAR is not directly applicable to State agencies when acquiring software using FFP. This is because, even though States are using FFP, they are executing State contracts (i.e., non-FAR contracts), not Federal contracts (i.e., FAR contracts). However, the FAR is indirectly applicable through the various Codes of Federal Regulations (CFR) governing use of FFP and administration of public

assistance programs. Although not required, many States often use language similar to the FAR for rights in data in their contracts for procuring software using FFP.

"Data" means recorded information, regardless of form or the media on which it may be recorded. The term is widely understood to include technical data and computer software delivered in the performance of a government contract. The rights to that data may be unlimited, limited, or restricted. Unlimited data rights is the default rights in data and means that the contractor who delivered the data is generally not allowed to assert intellectual property rights unless the contracting officer grants permission. It also means the government may use the data in any manner it sees fit without restraint or restrictions. State agencies and contractors may negotiate rights in data when writing contract clauses for acquisitions using FFP but must protect State interests for ownership and transferability to maintain eligibility for FFP.

States may also invoke "works-made-for-hire" clauses in their contracts, which have special meaning within U.S. copyright law. "Works-made-for-hire" clauses mean that an employee of an organization is not entitled to intellectual property rights for works created in the performance of their duties for the employer. Any intellectual property rights attendant to works created by employees is reserved for the employer. State contracts, unlike Federal contracts, may apply the "works-made-for-hire" clauses. Unlike the Federal government, U.S. copyright allows States to own copyrights under U.S. copyright law for works produced by their employees. This provides a stronger basis for establishing State ownership for deliverables based on copyright law rather than FFP eligibility policies, but is not sufficient by itself.

Assignment of rights or transfer of rights clauses must also be included to assure proper State ownership in copyrights for software and technical documentation is achieved. Assignment and/or transfer of rights clauses operate under both U.S. copyright law and contract law, providing the most effective means to secure ownership for software and technical documentation as contract deliverables. States should take steps to verify that the contractor assigning copyright has full right and title to the copyright being transferred. In other words, that prime contractors have established proper employer/employee relationships with their own employees and any sub-contractors they may use for the delivery of contract deliverables.

6.6.1.5.3.3. Assistance Provided by State Employee

Whether FNS may use privately developed software when a State employee may have assisted the private developer depends on the degree of assistance. If the employee's assistance is significant enough to make him or her a joint author of the software, then Section 201(b) of the Copyright Law, Title 17 of the U.S. Code (http://www.copyright.gov/title17) would confer ownership of the employee's share upon the State, and it could be argued strongly that Section 3016.34 of the regulations would give FNS a license, at least with regard to the employee's contribution. The government is not in a strong position to claim licensing rights in software developed at private expense with assistance from a State employee, unless the employee's contribution is equal to co-authorship. Such rights are best addressed in a formal agreement at the time a State employee is requested by a private organization to participate in software development.

6.6.1.5.3.4. Public Domain Status

Public domain software is, technically speaking, the complete absence of copyright ownership or intellectual property rights for the software. Statutes and case law do not recognize public domain intellectual property as public property; public property is still owned. They recognize public domain intellectual property as those intangible works *which no one owns* and are available for use by members of the public without infringing on anyone's intellectual property rights.

"Public domain" may be used incorrectly to refer to any software distributed under a free software license. Although the software distributed under a free software license was released under a license that grants rights to others (such as the freedom to modify and redistribute the software), the copyright (or other rights) to the software may still be held by the author. Therefore, such software would *not* be in the public domain. The term "public domain" may also be used to mean free, as in having no cost (i.e. *gratis*). However most *gratis* software is not in the public

domain, but simply released under a free software or Open Source Software license that permits distribution of the software so long as no charge is levied. Examples of this would be *Adobe Acrobat Reader* and *Mozilla's Firefox* internet browser.

When a State agency obtains ownership through the application of copyright laws in contracts, the software or software modifications and associated documentation designed, developed, or installed with FFP is not public domain. The use of FFP does not revoke the State's copyright ownership, nor does the Federal License.

6.6.1.5.4. *Transferring Software*

Traditionally, systems considered for transfer between States are customized for each State, making them proprietary from a technology standpoint. This customization complicates transfers because future recipient States may also be required to customize to achieve compatibility with their IT infrastructures. Each customization reduces the degree of technological standardization that would facilitate adopting and implementing the system. State agencies should strive to acquire systems better suited to transferability. Systems considered for transfer between States are often comprised of functional components so tightly integrated that extracting any component from the solution causes its failure to operate outside of its native implementation. The systems are largely self-contained, even when based on commercial enterprise database architectures and commercial programming technologies. The emergence of COTS solutions and their integration into traditional transfer systems has changed the dynamics of transferring these systems to other States and jurisdictions.

Facilitating transfer of systems involves more than ensuring the solicitation and RFP contain appropriate provisions for intellectual property rights. It also means including requirements that result in a system that is oriented towards transferability in its design; that it will be interoperable, portable, and that commercial elements can be easily identified and segregated from elements owned by the State agency. Listed below are several key transferability characteristics States need to consider when going through the APD process. The intellectual property clauses and the Modular Open Systems Architecture (MOSA) examples in section *6.8.1.5.5 Applying the Policy - Contractual Provisions* below are examples of how many of these can be addressed in RFPs and contracts.

Intellectual Property Transferability Considerations

- **State Ownership** – Is transferability possible because the donor State has full ownership of the system?
- **Federal License** – Does the donor system have a Federal license associated with it in accordance with applicable policies?
- **Rights for Derivative Works** – Does the donor system include appropriate licensing for the recipient State to be able to use derivative components of the donor system?
- **Licensing for Third Party Software** – Are all licenses for third party software that are components of the donor system available to the recipient State to use and keep the system operating?
- **Ownership of Preexisting Products** – Are proprietary components and vendor-owned components of the donor system clearly identified and licensed for the recipient State to use and keep the system operating?

Technological Transferability Considerations

- **Interoperability** – Are the predominant technological architectures of the recipient system compatible with those of the donor system? For example, there may be technological hurdles to overcome if the donor system is built on .Net Framework & SQL Server whereas the recipient system is based on Java and Oracle.
- **Portability** – Are proprietary, vendor unique or closed interfaces, code modules, hardware, firmware, or software used in the donor system clearly identifiable and cataloged to facilitate a thorough system analysis and evaluation for interoperability?
- **Supportability** – Are supportability, interoperability, and growth for future modifications easily discernible in the system integration design and operational approach. Do systems components facilitate future upgrades and permit incremental technology insertion to allow for incorporation of additional or higher performance

elements with minimal impact on the existing systems? Does the overall design preclude long term dependence on closed or proprietary interface standards, technologies, products, or architectures?

- **Scalability** – Is there a detailed description of the donor system addressing a system architecture that incorporates appropriate considerations for re-configurability, portability, maintainability, technology insertion, vendor independence, reusability, scalability, interoperability, upgradeability, and long-term supportability?

State agencies should plan to share and make readily available a machine-readable and executable copy of the software and system documentation for others' use. This would include: a complete copy of the electronic components of the software and its associated application source code, database models and non-client related data, which could be limited to reference tables, and all system and user documentation, excluding materials that could result in security risks to the State. *The RFP and contract must make it clear that the source code, documentation, database schema, and other supporting components must be made available by the State and/or Vendor to other State agencies for Federal Government purposes such as system analysis and/or transfer*. In doing this, the aforementioned transferability considerations should be addressed in the documentation. Such documentation may be part of the service deliverables from the system provider as part of the RFP and the resulting contract for the selected offeror. See examples of how to incorporate appropriate clauses addressing these considerations in section *6.8.1.5.5 Applying the Policy - Contractual Provisions* below. State agencies may also plan to collaborate, to the extent that it is practical to do so, on further development of the software. This may be facilitated by including a provision in the RFP/contract which recognizes the State agency may be sharing software code on an ongoing basis to promote the efficient use of resources for system enhancements.

6.6.1.5.5. *Applying the Policy - Contractual Provisions*

6.6.1.5.5.1. Ownership and Licensing

In fulfilling compliance requirements for FFP eligibility, the State agency should secure intellectual property ownership for *any* software or software modifications and associated documentation through the application of U.S. copyright law principles. By securing copyright ownership, the State agency will have exclusive ownership in the intangible property delivered under the State contracts for SNAP and WIC systems, which allows them to grant licenses. This is the foundation upon which the Federal License and system transfers are possible.

6.6.1.5.5.1.1. Example Contract Clauses

Under a State contract, in any case of application of "work-for-hire" clauses, assignment of rights, or transfer of rights, the State Agency should seek copyright ownership in any deliverables; this would be an exclusive license. It is important to use appropriate contract clauses to secure copyright ownership. Likewise, it is important not to negotiate these rights through subsequent licensing of rights back to the vendor once secured. The clauses for copyright ownership and licensing for software delivered in performance of the contracts for the systems can be grouped into five major categories:

- State Ownership
- Federal License
- Rights for Derivative Works
- Licensing for Third Party Software
- Ownership of Preexisting Products

Included below are ***examples*** of contract language that have been used by various State agencies to achieve FFP eligibility requirements and proper ownership of software or software modifications and associated documentation designed, developed, or installed with FFP. A "Jurisdiction" might be county, State, a Consortium of States or Counties, a Territory or an Indian Tribal Organization.

6.6.1.5.5.1.1.1. State Ownership

All Deliverables and modifications, in whole and in part, shall be deemed works made for hire of [the jurisdiction] for all purposes of copyright law, and copyright shall belong solely to [the jurisdiction]. To the extent any work or Deliverable is deemed not to be, for any reason whatsoever, work made for hire, the Contractor agrees to assign and hereby assigns all rights, title and interest, including but not limited to copyright patent, trademark and trade secret, to such work and Deliverables, and all extensions and renewals thereof, to the [jurisdiction]. The [jurisdiction] shall own all right, title, and interest to the software and associated documentation, including all copyright, patent, trade secret, trademark and other intellectual property rights created by the contractor in connection with such work (in whatever form), that comprise the [jurisdiction's] System as designed, developed or installed in accordance with the terms of this Agreement. The contractor shall take all actions necessary and transfer ownership of the Deliverables to the [jurisdiction], including, without limitation, the Custom Software and associated Documentation, including all copyright, patent, trade secret, trademark and other intellectual property rights, on Acceptance of each Deliverable and following final payment for each Deliverable.

6.6.1.5.5.1.1.2. Federal License

All appropriate State and Federal agencies (including without limitation the Federal Government agencies providing Federal Financial Participation) shall have a royalty free, nonexclusive, and irrevocable license to reproduce, publish, translate or otherwise use and to authorize others to use for Federal Government purposes all materials, the software and modifications thereof, and associated documentation designed, developed, or installed with Federal Financial Participation under this Agreement.

6.6.1.5.5.1.1.3. Rights for Derivative Works

The Contractor shall grant to the [jurisdiction] and the Contractor shall require each Contractor Custom Software Sub-Licensee to grant to the [jurisdiction] a worldwide, non-exclusive, perpetual, irrevocable, fully paid up right and license to use, copy, modify and prepare derivative works based on custom deliverables, such modifications thereof, and derivative works.

6.6.1.5.5.1.1.4. Licensing for Third Party Software

The Contractor will represent and warrant to the [jurisdiction] that it has obtained all rights, grants, assignments, conveyances, licenses, permissions and authorizations necessary or incidental to any materials owned by third parties supplied or specified by it for incorporation in the deliverables to be developed.

6.6.1.5.5.1.1.5. Ownership of Preexisting Products

The Vendor will retain all right, title and interest in and to all Property developed by it, 1) for clients other than the [jurisdiction], and 2) for internal purposes and not yet delivered to any client, including all copyright, patent, trade secret, trademark and other intellectual property rights created by the Vendor in connection with such work prior to the date of the contract.

6.6.1.5.5.1.2. Inappropriate Intellectual Property Clauses

Having used properly structured clauses to obtain ownership of deliverable software, and to put in-place applicable licensing, the State agency must guard against negating or nullifying these by including other clauses. Below are discussions of clauses that could effectively negate or nullify the State agency's ownership rights and the Federal License.

6.6.1.5.5.1.2.1. Limiting State Ownership

Any contract language that undermines the objective of obtaining absolute State ownership of the copyrighted works should not be included in contracts. States should avoid any language that implies that the deliverable provides for

anything other than the State's complete and exclusive ownership. For instance, language that implies that the software is being licensed to the State by the vendor should be avoided. A request to sign an EULA (end user license agreement) or to pay ongoing license fees indicates that the State is not receiving absolute ownership. The contract should be reviewed and amended to secure full ownership for the State.

6.6.1.5.5.1.2.2. Use of the Software or resulting work

Any language that states or implies that the State is limited in what it may do with the deliverable is objectionable. Ownership of the copyright, as required by rules governing FFP eligibility, implies freedom to transfer or dispose of the intellectual property in whatever way the State sees fit. The State is free to grant, sell, or license the software however it wants. Any language that implies the State must seek permission from the vendor for the deliverable, excluding third party components identified elsewhere in the contract, is suspect and indicates that the vendor is retaining rights that should be delivered to the State.

6.6.1.5.5.1.3. Best Practices

6.6.1.5.5.1.3.1. Maintaining authority to hold copyright

Nothing in U.S. copyright law implies that software developed with FFP automatically becomes public domain. Although the U.S. Copyright Act precludes the Federal Government from asserting copyright in government works under federal contracts, States are authorized to hold copyright in such works. However, not all States choose to do so. States do have the discretion to avoid holding copyrighted works, or to dispose of the copyright and put the software in the public domain. Some States don't hold copyrights as a rule, and some State agencies are required to receive permission from higher State authorities in order to hold copyrights. FFP eligibility requires that the State obtain ownership of the copyright in order to transfer the required non-exclusive license to the Federal awarding agency. In order to remain in compliance with the FFP eligibility rules, States may need to ensure that proper authorization from higher State authorities exists for them to accept ownership of copyright. Failure to do so may jeopardize compliance with FFP eligibility requirements. It may also mean that no mechanism exists for the State to grant the required non-exclusive license to the Federal government in accordance with FFP requirements. A State cannot transfer a license to a copyrighted work for which it does not hold exclusive rights.

6.6.1.5.5.1.3.2. States Capitalizing on Intellectual Property

States have discretion to determine whether it is in their best interest to capitalize on their intellectual property. Some States may not consider intellectual property as an asset that can be used for revenue generation, whereas others may be required to do so in some circumstances. Licensing State-owned copyrights back to the vendors is a better practice than simply granting rights to the vendor to profit from State-funded works. This allows the State to generate revenue from their IP, and secure rights in derivative commercial works.

6.6.1.5.5.1.3.3. Vendor Profiting from Deliverables

States have discretion to decide whether to allow vendors to profit from deliverables under a State contract by licensing products developed at the public expense to third parties, or by creating derivative works from such products. However, States should be aware of vendors' intentions to profit from works developed at public expense, and at least secure irrevocable non-exclusive rights in the derivative works. Because the State is required to own the copyright, the vendor would be required to receive a license from the State before it could market the copyrighted work, or risk infringing the State's copyright. If a State Agency decides to provide a license to the contractor, a best practice might be for the State to license the work to the vendor to include securing a licensing fee from any sale or license of the work, or derivative works to third parties.

6.6.1.5.5.2. Technology

To support transferability of systems procured with FFP, consideration needs to be given to including appropriate requirements, instructions to offerors, and evaluation for award criteria in the applicable solicitation and RFP sections. Below are several ***simplified examples*** adapted from actual clauses included in Federal and DoD contracts,

including the solicitation and RFP section where they should be included. Not all examples would necessarily be required in a solicitation and RFP. More extensive and detailed examples of relevant contract clauses can be found in "*Incorporating Software Requirements into the System RFP - Survey of RFP Language for Software by Topic, v. 2.0*" from the Software Engineering Institute (SEI) at Carnegie Mellon University (http://repository.cmu.edu/cgi/viewcontent.cgi?article=1037&context=sei).

6.6.1.5.5.2.1. Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation - Section M – Evaluation:

In evaluating the Data Rights, the [jurisdiction] will use information in the proposal to assess the extent to which the rights in technical data, computer software, and computer software documentation, offered to the [jurisdiction] ensure unimpeded, innovative, and cost effective production, operation, maintenance, and upgrade of the [SYSTEM NAME] throughout its life cycle; allow for open and competitive procurement of [SYSTEM NAME] enhancements; and permit the transfer of the [SYSTEM NAME] non-proprietary object code and source code for [jurisdictional] purposes in accordance with applicable intellectual property rights established by the contract.

6.6.1.5.5.2.2. Treatment of Proprietary or Vendor Unique Elements - Section L - Instructions to Offerors:

The Offeror shall justify any use of proprietary, vendor-unique, or closed components, including but not limited to Commercial off-the-shelf software (COTS)), and interfaces in current or future designs. This justification shall include documentation of the decision leading to the selection of specific COTS products (e.g. with test results, architectural suitability, best value assessments, etc.). The Offeror shall define its process for identifying and justifying proprietary, vendor unique or closed interfaces, code modules, hardware, firmware, or software to be used. The Offeror shall describe how the integration of closed or proprietary, vendor-unique equipment, interfaces, data systems or functions due to a unique or specific system requirement will not preclude or hinder other component or module developers from interfacing with or otherwise developing, replacing, or upgrading open parts of the system. The Offeror shall identify and take steps to prevent the open elements of the system from intertwining with proprietary or vendor-unique elements in a manner that restricts or limits the ability to replace or upgrade the open elements using an open competitive selection process. The Offeror shall describe and demonstrate that the modularity of the system design promotes identification of multiple sources of supply and/or repair, and supports flexible business strategies that enhance subcontractor competition.

6.6.1.5.5.2.3. Modular Open Systems Approach (MOSA)

Section C - SOW Requirements

The Offeror shall use a modular open systems approach (MOSA) to evaluate the appropriateness of implementing a modular design strategy for building systems. A primary consideration to meet the design functionality shall be the impact to the overall modular open systems architecture. A modular open systems approach and analysis of long term supportability, interoperability, and growth for future modifications shall be major factors in the Offeror‘s final selection of an integration approach. All the systems components shall facilitate future upgrades and permit incremental technology insertion to allow for incorporation of additional or higher performance elements with minimal impact on the existing systems.

The architectural approach shall provide a viable technology insertion methodology and refresh strategy that supports application of a modular open systems approach and is responsive to changes driven by mission requirements and new technologies. The Offeror shall develop a detailed modular design and integration that includes but is not limited to the following aspects: interoperability, intra-operability, upgradeability, re-configurability, transportability, software standards, interface standards, long term supportability, sources of supply and/or repair, business strategies, and other entities that affect application of a modular open systems approach.

For those portions of hardware, firmware, or software that are driven to proprietary and/or closed system architectures by mission specific requirements, a hardware/firmware/software partitioning or other design features to mitigate the system level impacts shall be provided. The Offeror shall provide an orderly, planned approach to address migration of proprietary or closed system equipment or interfaces to a modular design when technological advances are available.

The Offeror‘s modular design and integration shall preclude long term dependence on closed or proprietary interface standards, technologies, products, or architectures. Secure or classified data systems shall also conform to the modular design approach as much as practical. The design shall provide sufficient growth and open interface standards to allow future reconfiguration and addition of new capabilities without large-scale redesign of the system.

Section M – Evaluation Criteria

1. Identification of specific acquisition objectives (e.g., affordability, ease of change, leveraging commercial investment in new technology, etc.) and operational capabilities (e.g., ease of integration, interoperability, etc.) directly or indirectly dictate the use of open systems in your program.
2. A system architecture characterized by modular design.
3. The degree to which the program risk management strategy and modular open systems approach (MOSA) complement each other.
4. Justification of modular open system design via business case analysis (e.g., cost/benefit analysis, market research findings, etc.).
5. Proactive management of system interfaces.
6. Identification of key system interfaces based on the module characteristics (e.g., criticality of function, ease of integration, change frequency, interoperability, commonality, etc.).
7. Appropriate designation of open standards for key system interfaces.
8. Open Standards Indicators - Feasibility studies to assess the use of open standards for key interfaces.
    a. Application of a standards selection process that gives preference to open standards.
    b. Standards selection for key interfaces is based on application of specific criteria (e.g., industry consensus, market support, prime contractor recommendation, etc.). Additionally, does the Offeror‘s proposal provide the User with the ability to:
        i. quickly interconnect, reconfigure, and assemble existing forces, systems, subsystems, and components?
        ii. interchange and use information, services and/or physical items among components within a system?
        iii. interchange and use information, services and/or physical items among systems within an integrated architecture, platform, or domain?
        iv. support reuse of software and the common use of components across various product lines?
        v. transfer a system, component, or data, from one hardware or software environment to another?
        vi. adapt hardware or software to accommodate changing work loads?

Section L - Instructions to Offerors

Open Systems Approach and Goals. The Offeror shall describe its open systems approach for using modular design, standards-based interfaces, and widely supported, consensus-based standards to achieve the following goals. At a minimum the Offeror shall provide the following as part of its proposal:

a. Address Open Architecture Requirements – A detailed description of the Offeror‘s approach for addressing a system architecture that incorporates appropriate considerations for re-configurability, portability, maintainability, technology insertion, vendor independence, reusability, scalability, interoperability, upgradeability, and long-term supportability.

b. Design Disclosure – Within the constraints of contractual data rights, a detailed description of the Offeror‘s approach to facilitate the sharing of system or component (e.g., software, hardware, middleware) design information in support of peer reviews and the development process. The Offeror shall describe how its design will be documented and modeled using industry standard formats (e.g., Unified Modeling Language), and how it will use tools that are capable of exporting model information in a standard format (e.g., Extensible Markup Language Metadata Interchange (XMI) and AP233/ISO 10303). The Offeror shall identify the proposed standards and formats to be used.

c. Technology Insertion and Refresh – A detailed description of how the Offeror‘s proposed system will allow for rapid and affordable technology insertion and refresh. For example, the Offeror should describe how the proposed system will allow incremental systems improvement through upgrades of individual hardware or software modules with newer modular components. At a minimum, the description shall address how the Offeror‘s architectural approach will support this requirement including how components from third party providers and reuse sources shall be included.

d. Asset Reuse – A detailed description of the steps taken to reduce acquisition of duplicative system components where possible. At a minimum, the Offeror shall describe what artifacts from the [Explanation: The specific asset reuse repositories/libraries that the Contractors will review for components should be identified] or common components.

e. Modular Open Systems Approach (MOSA) – A detailed description of the Offeror‘s modular open systems approach. At a minimum, the Offeror shall address:

   i. Plans for integrating the systems both internally and with external systems;

   ii. The means for ensuring conformance to open standards and profiles, as discussed in Section C, throughout the development process;

   iii. A description of how the technical approach ensures having access to mature as well as the latest technologies by establishing a robust, modular, and evolving architecture based on open standards.

   iv. A description of the strategy for maintaining the currency of technology (e.g., through Commercial off-the-shelf software (COTS) or reusable Non-Developmental Item (NDI) insertion, technology refresh strategies, and other appropriate means); and

   v. Identification of processes for:

      (1) Isolating functionality through the use of modular design;

      (2) Evaluating modular open system baseline standards, defining and updating profiles, and evaluating and justifying new or vendor-unique profiles;

      (3) Validating implementation conformance to selected profiles;

(4) Managing application conformance to selected profiles; and

(5) Training in use of profiles.

vi. A detailed description of how the Offeror intends to use a modular open systems approach as an enabler to achieve the following objectives:

(1) Adapt to evolving requirements as identified by the [jurisdiction];

(2) Enhance interoperability and the ability to integrate new capabilities without redesign of entire systems or large portions thereof;

(3) Facilitate systems reconfiguration and integration;

(4) Reduce the development cycle time and total life-cycle cost; and

(5) Mitigate the risks associated with reliance on a single source of supply over the life of the system, to include, but be not limited to, technology obsolescence and dependence on proprietary or vendor-unique technology.

f. Life-cycle Supportability – A detailed description of how the Offeror intends to enhance life-cycle supportability by implementing performance-based logistics arrangements to sustain the components through their lifecycle.

g. Employ a Layered Modular Architecture – A detailed description on how the proposed system architecture is layered, modular, and uses of COTS that do not hinder or conflict with open standards architectures.

h. Traceability of System Requirements – A detailed description of the Offeror‘s approach for ensuring that all system requirements (including those contained in Section C of this Solicitation) are accounted for through a demonstrated ability to trace each requirement to one or more modules. Modules consist of components (one of the parts that make up a system and may be hardware and/or software) which are self-contained elements with well-defined, standards-based and published interfaces.

i. Minimize Inter-component Dependencies – A detailed description of the Offeror‘s approach for designing a system that, to the maximum extent practicable, minimizes inter-component dependencies and allows components to be decoupled and re-used, where appropriate, through transfer to other State systems.

j. Rationale for Modularization Choices – A detailed description of the Offeror‘s rationale for the modularization choices made to generate the design. At a minimum, the rationale shall explicitly address any tradeoffs performed, particularly those that compromise the modular and open nature of the system.

k. Future System Upgrades – A detailed description of how a modular design strategy will be demonstrated in all aspects of future system upgrades.

i. In addressing the specified requirements, the proposal, at a minimum, must demonstrate how the modular design strategy applies, and the effect it will have on future system maintenance, operations, and upgrades.

ii. The proposal shall describe an orderly planned process to address migration of proprietary, vendor-unique, or closed system equipment or interfaces to a modular open systems design when technological advances are available or when operational capability is upgraded. The proprietary, vendor-unique or closed systems implementation shall also be reflected in the Offeror‘s system level life cycle cost estimates.

iii. The modular design approach shall either mitigate or partition – at the lowest subsystem or component level — proprietary, vendor unique or closed system implementation to avoid out-year supportability issues, diminished maintenance and upgrades, interoperability, and portability.

6.6.1.5.5.2.4. Inter-Component Dependencies - Section C - SOW Requirements

The Contractor‘s design approach shall result in a layered system design, maximizing software independence from the hardware, thereby facilitating technology refresh. The design shall be optimized at the lowest component level to minimize inter-component dependencies. The layered design shall also isolate the application software layers from the infrastructure software (such as the operating system) to enhance portability and to facilitate technology refresh. The design shall be able to survive a change to the computing infrastructure with minimal or no changes required to the application logic. The interfaces between the layers shall be built to open standards or available to the [jurisdiction] with at least a nonexclusive, irrevocable, paid-up royalty-free worldwide license to use, modify, reproduce, release, perform, display or disclose the work by or on behalf of the [jurisdiction] and the FFP Federal awarding agency. The system architecture shall minimize inter-component dependencies to allow components to be decoupled and re-used, where appropriate, to support maintenance, upgrades, interoperability, and portability.

6.6.1.5.6. *Use of Privately Developed Software*

Privately developed software is considered to be proprietary, typically based on the principle that the developer used private funding exclusively to develop the software independent of any contract. Such development inherently means copyright attaches to the software, making it proprietary as a matter of intellectual property rights. Provisions in 7 CFR 3016.34 (http://www.gpo.gov/fdsys/pkg/CFR-2013-title7-vol15/pdf/CFR-2013-title7-vol15-sec3016-34.pdf) and 7 CFR 277.18(l) (http://www.gpo.gov/fdsys/pkg/CFR-2013-title7-vol4/pdf/CFR-2013-title7-vol4-sec277-18.pdf) require State agencies acquire a Federal License to privately developed software where grant or sub-grant money was used to purchase copyright ownership or grant or sub-grant funds was used in the development of software. This is relevant with regard to FNS’ right to use privately developed software.

This regulation means that State use of FNS funds to purchase ownership of copyright in software would give FNS royalty-free use of the software, including the right to authorize other States to use the software in FNS programs. State use of FNS funds simply to lease contractor-developed software would not give FNS such royalty-free use.

FNS requires State agencies to incorporate the Federal License in any Federally-funded sub-grant or contract to develop software. FNS is entitled to the Federal License in software only if FNS funds are used to develop the software, or if a State uses FNS funds to purchase copyright ownership of privately developed software.

6.6.1.5.7. *Acceptance of Free Software*

Offers of free, or practically free, software should be rejected if acceptance thereof would give the offeror an unfair competitive advantage as to subsequent hardware procurement or follow-on software. This would be equal to receiving a gift from an interested party or would be an unauthorized barter arrangement rather than a gift.

6.6.1.5.8. *Protecting State Agency Ownership*

Any time (prior to contract award or during contract performance) that a contractor offers or proposes to pay for part of the development costs, a red flag should be waving. Do not allow the contractor to formally or informally shift costs so that the contractor exclusively is funding some piece of the requirement. Do not allow statement of work changes which might lead to the same result. These concerns also apply where the contractor attempts to partially fund something that previously was funded exclusively by the State, as software not paid for by the State may not be covered by transfer, assignment, copyright or ownership provisions in the contract.

6.6.1.5.9. *Hardware*

Title to property whose acquisition cost is borne, in whole or in part, by FNS will become vested with the State agency upon acquisition. The State agency shall use the property for program purposes. When this need no longer exists, the State agency may use the property where needed in the administration of other programs in the following order: other Federally-funded FNS programs, other Federally-funded USDA programs, or other Federally-funded programs. When a need in any of these categories ceases to exist, the property may be used for the State agency's own official activities under the following conditions:

- If the property had a total acquisition cost of **less than $5,000 per unit,** the State agency may use the property without reimbursement to FNS.
- If the property had a total acquisition cost of **more than $5,000 per unit,** the State agency may retain it for its own use, provided fair compensation is made to FNS for the FNS share of the property (compensation is computed by applying the percentage of FNS participation in the cost of the property to the current fair market value of the property).

If the State agency has no need for the property, disposition shall be made in accordance with FNS regulations. Refer to 7 CFR 3016.32 (http://www.gpo.gov/fdsys/pkg/CFR-2013-title7-vol15/pdf/CFR-2013-title7-vol15-sec3016-32.pdf) of the regulations.

6.6.1.6. Disallowance of Federal Financial Participation

Payments of FFP may be disallowed if FNS finds that any approved ADP acquisition fails to comply with the criteria, requirements, and other activities described in the approved or modified APD.

Figure 6-7 displays a summary of the major contract provisions that should be contained in any contract entered into by the State agency.

Figure 6-36. Basic Contract Provisions Checklist

Provision Type	Examples	
Standard Contract Provisions	• Governing laws of the State, county, and/or Federal Entity under whose purview the contract will be governed • Agreement duration of the start and end periods of the contract and possible extensions • Document incorporation and order of precedence (i.e., controlling order) • Scope of contract • Contract amendment provisions • Subcontracting provisions • Interpretation and disputes • Contractor hold-harmless clause • Force majeure • Record retention • Reporting requirements • Confidentiality provisions • Affirmative Action provisions • Indemnification provisions of patents and copyrights	• Key personnel provision • Termination provisions • System acceptance criteria • System warranty provisions • Maintenance provisions • Payment provisions • Charges to be reported by contractors to the State agency • Liquidated damages • Notice provisions • QA provision • Risk of loss or damage provision • Ownership of source code provision • specifications (SOW) • Training provisions • Out-of-scope services • Contractor bond provisions (for action as an irrevocable letter of credit) • Limitation of liability clause • Ownership of materials provisions • Jointly developed materials provisions

Provision Type	Examples	
FNS-Required Provisions (based on 7 CFR 3016)	• Compliance with Executive Order 11246 related to Equal Employment Opportunity • Compliance with Section 306 of the Clean Air Act • Compliance with Section 308 of the Clean Water Act • Compliance with the Anti-Lobbying Act • Compliance with Americans with Disabilities Act • Compliance with Drug-Free Workplace requirements • Compliance with suspension/debarment requirements • FNS has royalty-free rights to use software and documentation developed	
Commonly Found Provisions	• Executory clause • Non-assignment clause • Comptroller's approval • Workers' compensation benefits • Wage and hours provisions • International boycott prohibition • Conflict of interest	• Fair practices • Antitrust • Publicity • Reduction of Federal or State funding • Penalty clause • Off-set rights • Insurance provisions

6.6.2. Required Federal Assurances

Contractors entering into agreements with State agencies to perform work funded by FNS and other cognizant Federal agencies are required to agree to several required assurances the State agency must include in the contract. Figure 6-7 provides a list of these provisions. Additional information regarding each of these is provided in Appendix F.

For IS purposes, State agencies will need to include a statement in an RFP or procurement vehicle that at least one of these actions will be taken for all viable responding vendors and a statement in the contract that this action has been taken for the selected vendor. Therefore, the contract may include a clause that requires bidders to certify that they have not been indicted as part of this process. For example, this clause may state: *In accordance with this assurance, Contractor understands that it must comply with Federal Executive Order 11246, Section 306 of the Federal Clean Air Act, Section 508 of the Federal Clean Water Act, and that it has certified that neither it nor its principals are debarred or suspended from Federal financial assistance programs and activities and to complete and return in pursuit of such certification any appropriate form required by the State agency (see Federal Executive Order 12549 and 7 CFR Part 3016).*

Suspension and debarment actions preclude companies and individuals from participating in Government contracts or subcontracts. Suspension or debarment by one Federal agency is Government wide and prohibits a company from doing business with other agencies. The suspension/debarment rules provide grantees with two options for obtaining satisfaction that prospective contractors are not suspended, debarred, or disqualified—check the list on the website (https://www.sam.gov/portal/public/SAM/) or include an applicable clause in the contract. The title of the list of suspended, debarred, and disqualified parties has been changed to Excluded Parties List System (EPLS) (https://www.sam.gov/portal/public/SAM/). Now a part of the System for Awards Management (SAM) the EPLS is an electronic, web-based system that identifies those parties excluded from receiving Federal contracts, certain subcontracts, and certain types of Federal financial and non-financial assistance and benefits. The EPLS keeps its user community aware of administrative and statutory exclusions across the entire government, and individuals barred from entering the United States. See Appendix G for sample form.

6.7. CONFLICT OF INTEREST

"The appearance of impropriety can be as damaging as the act of impropriety." – Anonymous

Conflict of interest situations may arise when procuring contractors for IS acquisition efforts, particularly related to planning and implementation activities. A conflict of interest is any situation that may or may appear to do the following:

- Impair a contractor's ability to provide objective and impartial information, advice, or counsel
- Create an unfair competitive advantage for the contractor or its subcontractors.

A conflict of interest can have serious consequences for the contractor and the State agency. The contractor runs the risk of being precluded from bidding or performing future work due to a perceived unfair competitive advantage; of damaging its professional reputation; or being debarred. The State agency may suffer injury due to real or perceived bias or lack of objectivity in its work. No employee, officer, or agent of the State agency shall participate in the selection, award, or administration of a contract if a conflict of interest, real or apparent, would be involved. Such conflicts may arise when an employee, officer, agent, or any member of his or her immediate family, his or her partner, or an organization that employs or is about to employ any of the above has a financial or other interest in the procurement.

6.7.1. Contracts with Potential Conflict of Interest

FNS strongly discourages States from pursuing combo contracts, such as PM/QA or Planning/QA. Although these areas are closely related, States should strive to promote full and open competition and avail themselves of expertise in all areas to avoid any conflict of interest. States should carefully weigh the roles and responsibilities of each area in making this decision.

6.7.2. Examples of Conflict of Interest Situations

Contractors potentially enter a conflict of interest situation when asked to do any of the following:

- Analyze or evaluate the performance of components of an agency where they have ongoing or future expectations of business
- Review products or deliverables they have helped develop
- Develop specifications or SOWs that they may wish to respond to or that will be responded to by organizations with which they have business relationships
- Provide acquisition support to an agency and also seek to be a product or system supplier to that agency
- Have access to budgetary, source selection, or other nonpublic information on future procurement programs for which they expect to compete
- Have access to sensitive third-party information that gives insight into competitor approaches to future procurements
- Streamline or perform enterprise business architecture (EBA) work (e.g., identify the appropriate architectures or interfaces, define the requirements, and integrate/implement them)
- Define or measure performance parameters against which implementers must deliver (modeling and simulation)
- Prepare, review, evaluate, or modify program and planning information
- Perform systems planning and implementation activities.

For example, no contractor is allowed to define the requirements, tasks, or skills for another contracted function and then bid on that function. This would occur if a planning contractor wrote the requirements or RFP for the QA contractor and then bid on the work, or if a project management contractor also served as a QA contractor by evaluating the project. See Figure 6-8 for Conflict of Interest examples.

Figure 6-37. Conflict of Interest Examples

Conflict of Interest among contractors boils down to two simple conflict scenarios.
The same contractor must never:
1) Define the work and then bid on it, or
2) Perform the work and then evaluate it.

Each of the rows in the chart below further expands on these basic prohibitions.

Activity A	Activity B	Conflict	Rationale
Planning	Development/ Maintenance & Operations	Yes	This violates the rule against defining the work and then bidding on it. Planning contractor would have unfair advantage in bidding process based on knowledge of the development requirements.
Project Management	Development	Yes	This violates the rule against performing the work and evaluating it. Project manager cannot provide objective management/oversight of its own work.
Project Management	Maintenance & Operations	Yes	If the PM helped define the M&O responsibilities and deliverables, it would have an advantage over other bidders. If filling both roles, the PM cannot provide objective management/oversight of its own work.
Development	Quality Assurance	Yes	This violates the rule against performing the work and evaluating it. The contractor cannot provide objective QA of its own work.
Planning	Project Management	Possibly	If the planner helped define the roles and responsibilities of the PM, it would have an unfair advantage in bidding based on inside knowledge of those requirements. This would not be a conflict of interest if the State defined both roles up front in the same RFP (so no contractor helped define either role). However, it may be difficult to accurately define the PM responsibilities and expectations before the planning process even begins.
Planning	Quality Assurance	Possibly	There would be a conflict of interest between these two roles if the planning vendor helped define the responsibilities of the QA and had "inside knowledge" of those requirements, an unfair advantage in bidding. A contractor who helped define the project requirements in the planning phase may be well-suited to help evaluate whether the deliverables meet them, as the QA, as long as no conflict of interest occurred in securing both roles. However, the state may prefer the greater impartiality of a third party.
Project Management	Quality Assurance	Possibly	This potentially violates the second rule against performing the work and then evaluating it. The QA role may include evaluation of the effectiveness of the project management process.
Quality	Independent	Yes	IV&V is a review process performed by an organizational

Assurance (or any other function)	Verification & Validation	entity that is independent of the QA contractor or any other project role. Independence increases the success of system testing and implementation.

6.8. DISPUTES

The State's own standard contract or boilerplate language should include steps for dispute resolution, which include how to initiate the process, the office with oversight, and any procedural time limits.

6.8.1. Order of Precedence

FNS strongly recommends, and most States' contract language specifies, that the various documents in the procurement process be ranked in order of precedence, so that all parties understand which document prevails in the event of a disparity. The State contract must include an Order of Precedence or Governing Documents clause to facilitate dispute resolution. For example, the State's own language in the RFP should outrank the contractor's language in the proposal, if the two should differ. This order of precedence should then be consulted in the investigation and resolution of a dispute. It is usually labeled "Order of Precedence" or "Governing Documents" in the RFP and/or contract.

An example of "Order of Precedence" may be:
"The order of precedence of the contract documents is as follows:

1. Memorandum of Agreement (MOA)/Contract
2. Final BAFO Documents (BAFO Form, Negotiation Items, Pricing Tables, Payment Terms, Functional Response Spreadsheet, Proposed Work Plan)
3. RFP Addendum(s) (in descending numerical order)
4. RFP
5. Bid dated xx-xx-xxxx
6. Contract Award Justification Memo"

6.8.2. Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) is an essential contract tool that includes any procedure, or combination of procedures, voluntarily used to resolve issues in controversy without the need to resort to costly and time-consuming litigation. There should be multiple levels and opportunities to settle disputes before the State agency or contractor must turn to legal remedies. Failure to include such options may force the parties into costly litigation over relatively simple matters.

The following methods are intended to suggest options that have worked in the past. They are designed to supplement, but not to replace, existing extrajudicial approaches to dispute resolution:

- **Mediation**—A neutral third party serves as an advisor to determine mutual interests and defines best and worst alternatives to a negotiated agreement. Mediation may also be called conciliation.
- **Mini-trials**—Each party makes presentations to a panel composed of senior executives from each side and also a neutral party. The panel attempts to work out an equitable agreement.
- **Fact-Finding**—An impartial third party examines the issues and submits a report with a recommended settlement.
- **Partnering**—An agreement between the parties describes how they will work together to keep issues from

becoming adversarial.

- **Arbitration**—A neutral third-party serves as decision maker to examine issues and render a binding opinion.

Any method that results in settlement, or partial settlement, of a contract dispute is a good method. The parties may select any ADR method for any claim of more than $50,000. (For claims of $50,000 or less, an Appellant may elect consideration under the Expedited Procedure, Board Rule 12.2 (http://www.usda.gov/bca/rul.html#R_12_2), without agreement by the Government. Guidelines, schedules, and requirements implementing the ADR method selected will be by agreement of the parties and the settlement judge or neutral advisor. ADR can be used successfully at any stage of an appeal, although election should be as early as possible. Proceedings generally will be conducted within 120 days of approval.

These ADR procedures are intended to shorten and simplify the ADR Board's more formalized procedures. Parties who in good faith attempt to resolve their differences by agreement will gain both time and money and be able to maintain or restore amicable relations. This tool acknowledges that unforeseen problems may occur and that no contract is perfect, allowing the State agency and contractor to engage in a collaborative process to remove obstacles and enable joint mission success.

6.9. CONTRACT CLOSEOUT

Contract closeout is the process of completing and settling the contract to ensure that all terms and conditions and deliverables have been met. A contract is not complete and ready for closeout until the contractor complies with all the terms of the contract, such as the following:

- Disposition of any classified material
- Disposition of government property
- Settlement of interim or disallowed costs
- Settlement of any subcontracts by prime contractor
- Completion of price revisions.

Closeout is completed when all administrative actions have been completed, all disputes are settled, and final payment has been made.

6.9.1. Disposition of Government Property

When the State agency no longer has need for such property in any of its Federally financed activities, the property may be used for the State agency's own official activities without reimbursement to FNS if the property had a total acquisition cost of less than $1,000.

If the State agency has no need for the property, disposition of the property will be made as follows:

- If the property had a total acquisition cost of less than $1,000 per unit, the State agency may sell the property and retain the proceeds;
- If the property had an acquisition cost of $1,000 than more per unit, the State agency will:
    - Ship the property to another site. If instructed to ship the property elsewhere, the State agency will be reimbursed with an amount which is computed by applying the percentage of the State agency's participation in the cost of the property to the current fair market value of the property plus any shipping or interim storage costs incurred.

- Otherwise dispose of the property. If instructed to otherwise dispose of the property, the State agency shall be reimbursed by FNS for the cost incurred in such disposition.
- No disposition or instructions from FNS. If disposition or other instructions are not issued by FNS within 120 days of a request from the State agency, the State agency shall sell the property and reimburse FNS an amount which is computed by applying the percentage of FNS participation in the cost of the property to the sales proceeds. The State agency may deduct and retain from FNS' share $500 or 10 percent of the proceeds, whichever is greater, for the State agency's selling and handling expenses.

6.10. SUMMARY

FNS encourages State agencies to share their experiences and lessons learned related to procurement. Navigating the acquisition process is not easy, so States should seek assistance from FNS, such as requesting sample RFPs and contracts from States that have undergone a recent successful procurement. Many States choose to perform planning activities themselves, while others may wish to acquire a contractor who will not only assist in performing the feasibility and requirements analyses, but also produce the IAPD and RFP for the implementation phase. However, to avoid conflict of interest situations, contractors that assist States with acquisition activities may not bid on the work to be procured. For instance, planning contractors are not allowed to bid on the implementation phase of the project.

The RFP, SOW and contract should confer language and clauses in regards to intellectual property (IP) rights for IT and IS systems procured using FFP, as well as promoting system transferability. There are several policy requirements State or local governments must include in all contracts for *any* software or software modifications and associated documentation designed, developed, or installed with Federal financial participation funding. Proprietary vendor software packages and operating systems (OS) that are provided at established catalog or market prices and sold or leased to the public are not subject to these licensing and ownership provisions. Federal funding is not available for proprietary applications software developed specifically for SNAP or WIC.

Contract and contractor management are processes to ensure that vendor or contractor performance meets contractual requirements. Contract administration includes all activities performed by Government officials after award to ensure that the performance and delivery of requirements are within the terms of the contract. Contractor management requires State agencies to periodically evaluate contractor performance to ensure that the State obtains the goods and services for which it will pay. Good contract administration and contractor management helps ensure the following outcomes:

- The contractor and the Government completely understand their respective roles in the contract arrangement and their relationship after award and before contract performance begins.
- A clear and mutual understanding of contract requirements, terms, and conditions is achieved.
- Any potential or current problems are promptly identified and resolved.
- End users are satisfied with the product or service being obtained under the contract.