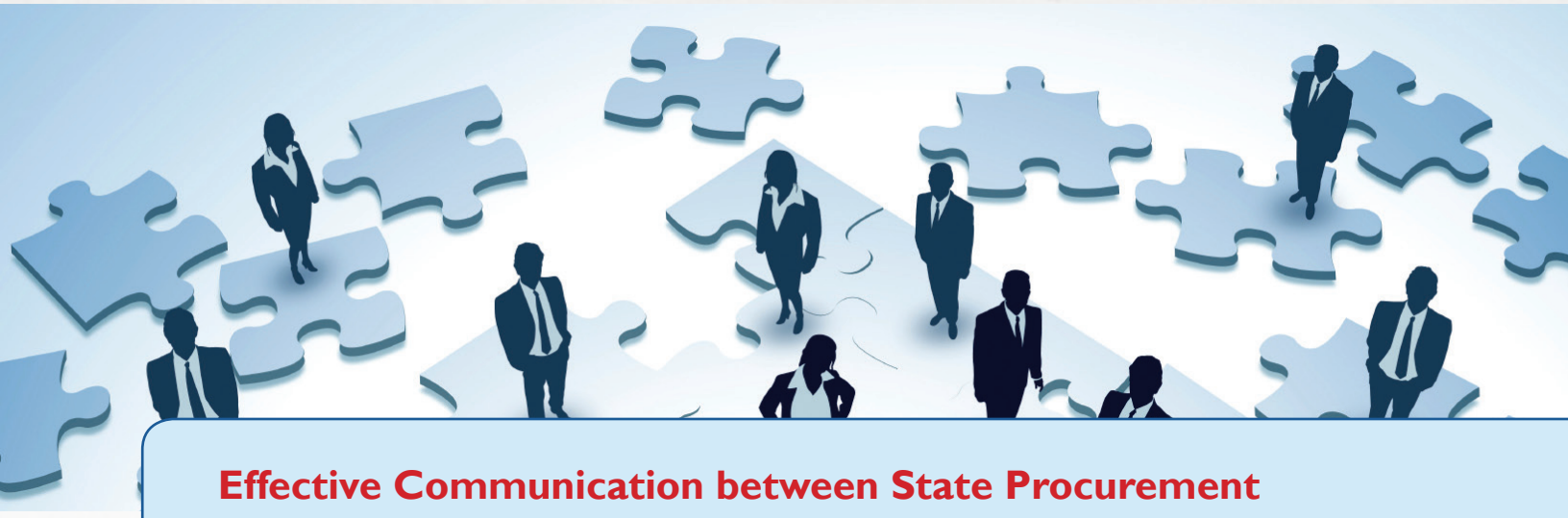

Effective Communication between State Procurement and Industry

I. Introduction

For state governments, like any sophisticated buyer, market research is a key part of developing a "best value" strategy. All states strive to conduct research regarding leading practices before issuing a solicitation. This research is particularly important when a state is acquiring complex supplies or services. The National Association of State Procurement Officials (NASPO) Practical Guide has long recognized the value of getting appropriate vendor input prior to a procurement, noting that:

> "[t]he central procurement office should develop guidelines for vendor input into the process of determining agencies' needs or preparing initial specifications, so that the agencies and the central procurement office may obtain the benefits of vendor expertise without creating unfair bias or a conflict of interest."[1]

An informed understanding of current industry capabilities and practices results in both better Requests for Proposals (RFPs) and better contracts. As Steve Kelman from Harvard's Kennedy School of Government wrote:

> "When government doesn't take advantage of [industry] knowledge before issuing an RFP, it loses. Failure to get early, honest feedback results in many misunderstandings in contract language, which bedevil contracts after they are signed and lead to disappointments or even litigation. In addition, lack of pre-RFP communication often leads to requirements that are

1 NASPO State and Local Government Procurement: A Practical Guide. (2008). Lexington, KY: National Association of State Procurement Officials

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unnecessarily expensive to meet but could have been made more economical with small changes."[2]

As states struggle with fewer staff, the pre-RFP one-on-one meeting between state officials and corporate representatives can be a very cost effective and easy-to-use tool to conduct market research. One-on-one meetings with industry representatives can, however, be controversial. Procurement officials and their customers in the agencies sometimes fear that pre-solicitation meetings and discussions with vendors will create the "appearance of impropriety" and be seen as favoritism for a particular company. For example, if a state official meets with vendor A, but not vendors B and C, and A wins the competitive bid process, does that mean the official was biased toward vendor A's solution?

NASPO Guide (2008) provides general guidelines regarding improper communication with vendors:

> "[…] purchasing personnel need to communicate with vendors, at a minimum to understand the relevant markets. However, communications should always be open to all possible vendors. A good rule is that if the procurement officer calls one vendor, he or she calls them all. Calling one the officer already knows, particularly for help in writing specifications, leads to inside information leaking out, and an unfair advantage of competitors. All communications should avoid the appearance of favoritism."

These concerns can have a chilling effect on communication with vendors. In response to a request for a meeting prior to release of an RFP, one state official wrote: "if I meet with them even as an introductory meeting, then I assume they understand they will be precluded from bidding on any project we bid out the next 6 months."[3] It is important to note that this communication came from a state that has no such prohibition to a one-on-one meeting between state officials and vendors.

To alleviate undue concerns and to facilitate such exchanges, this paper will explore how procurement officials can understand the issues involved and address them in a way that allows them to use one-on-one exchanges in a manner consistent with the obvious necessity for transparency and integrity.

First, the paper will summarize certain relevant findings from a NASPO 2011 survey of state-vendor communication practices. Secondly, the paper will examine the federal model that has existed since 1997 under the Federal Acquisition Requirements (FAR). Next, we will review the laws and policies of nine states that have policies or regulations that impact one-on-one state-vendor communications. Fourthly, the paper will provide an overview of the regulatory requirements on vendors and lobbyists involved in one-on-one meetings with state officials. Furthermore, we will discuss other pre-RFP communication tools that were addressed in the survey. Next, we will offer a framework to help state officials analyze specific situations in their own state. Finally, the paper will conclude with some recommendations to help states form their own policies.

The ultimate purpose of this research is to help procurement officials and state policy makers develop state-vendor communication guidelines or policies in their respective states. While this paper will not recommend a particular approach to one-on-one state-vendor communications, general observations and a framework for analysis are included. We hope this research and analysis will guide the discussion.

II. Survey

In 2011, the National Association of State Procurement Officials (NASPO) formed a work group to conduct a survey and study current practices in state-vendor communications.[4] The State-Vendor Communications Work Group was tasked to examine the statutory and regulatory coverage for interacting with vendors and suppliers and best practices used by states to communicate and exchange information prior to publication of a formal solicitation. A total of 33 states and the District of Columbia participated in the survey, as shown in Figure 1.

In summary, the vast majority of responding states reported that there are no statutory or regulatory limitations on their ability to communicate with vendors prior to publication of a formal solicitation. Yet, many responded that they do not take full advantage of certain opportunities for communication and exchange of information with vendors. We recognize that there are many tools for pre-RFP communication, such as RFIs, RFQs, Vendor Fairs, etc., and this paper will reference these various practices. However, one particular tool, the pre-RFP one-on-one meetings between state officials and industry representatives appears to be the most controversial and, therefore, will be the focus of our discussion in this paper.

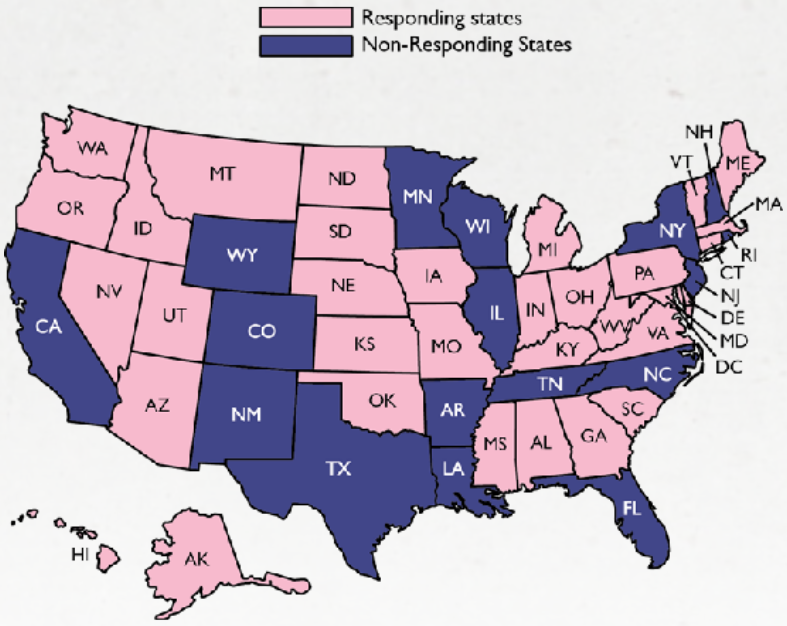
The work group began its research with the 2011 survey. The survey found that the majority of the states responding do not have "laws, rules or regulations, standard of conduct,

2 Steve Kelman (2010, February 17). Effective communication between government and industry can save money and prevent misunderstandings. Federal Computer Week. Retrieved from http://fcw.com/articles/2010/02/22/comment-steve-kelman-communications.aspx

3 This White Paper has drawn from prior research and analysis completed for an article previously published in Government Procurement Magazine. See, Campbell, P. & Rector, R. (2010, April 1). Open Access for All. Competing Priorities: Procurement Integrity vs. Need for Access to Supplier Intelligence. GOVPRO. Retrieved from http://govpro.com/resource_center/procurement_prof/open-competition-201004-05/

4 2011 NASPO State-Vendor Communication Survey Results, National Association of State Procurement Officials. Retrieved from http://www.naspo.org/content.cfm/id/communications_survey

Figure 1. 2011 NASPO State-Vendor Communication Survey

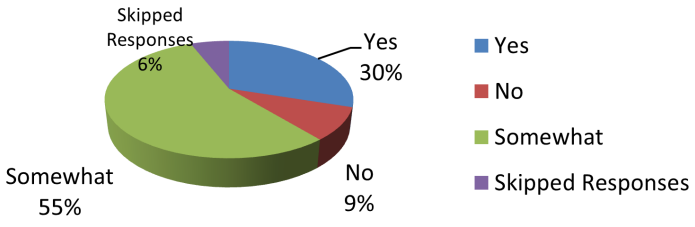


Source: 2011 NASPO State-Vendor Communication Survey

or code of ethics, containing specific provisions related to communication with vendors/suppliers prior to publication of a formal solicitation." Specifically, 88% of all respondents deem that there are no limitations in their laws, guidelines, or agency practices to their ability to communicate with vendors/suppliers prior to publication of a formal solicitation. However as shown in Figure 2, less than a third of responding states reported that they take full advantage of statutory or regulatory allowances for communication and exchange of information with vendors prior to the RFP.

When asked about practices used by the procurement agency to communicate with vendors/suppliers and allow them to understand the solicitation requirements and the needs of the agency prior to publication of a formal solicitation, only 61% responded using one-on-one meetings. That means 39% are using other tools as part of their research. See Figure 3.

Figure 2. Do you think that your agency takes full advantage of the opportunities for communication and exchange of information with vendors prior to publication of a formal solicitation, consistent with state laws governing procurement? (N=33)



Source: 2011 NASPO State-Vendor Communication Survey

Despite various jurisdictions that may not be taking full advantage of this tool, the survey results indicate that many state officials are generally comfortable with pre-RFP exchanges of information and communication with suppliers. They understand the importance of communicating with industry representatives in an open and fair manner and recognize the value vendors provide in terms of market information and industry standards.

This is further evidenced by procurement officials' attendance at various networking events, hosting of vendor shows at the state level routinely, attendance at meetings with disadvantaged businesses, green vendors, product shows, etc., or one-on-one meetings that occur every year at NASPO's "How to Market to State Governments" Marketing Event.

In addition, unpublished results from an Audio Response System (ARS) survey during a session at the 2011 NASPO Annual Conference show that the majority of the state procurement officials attending the session indicated that they feel very comfortable in meeting one-on-one with vendors while conducting general research. A significantly lower number agreed that they feel very comfortable in meeting one-on-one with vendors while in the development stage of a solicitation.[5]

Nevertheless, some state officials will decline requests for such meetings citing the concern about perceptions of

5 "Emerging Issues —State-Vendor Communications" Session at the NASPO's 2011 Annual Conference. In this session, the panel discussed findings from the 2011 State-Vendor Communication Survey and surveyed the audience using the ARS system regarding states' practices for vendor communication and exchange of information prior to publication of a formal solicitation.

unfair bias or conflicts of interest that may arise from such meetings. The survey confirms that state statutes and regulations are providing public officials with only general guidance on the matter. In the absence of specific guidance, it is reasonable to conclude that those who fail to take full advantage of this tool may be doing so because of the lack of such guidance. Moreover, questions remain on the level of specificity that a state can share with a vendor during a meeting. As with most things in life, "the devil is often in the details."

The following section will provide an overview of the federal model that was enacted in 1997 and provides specific guidance and a bright-line test.

III. Federal Model

The federal procurement model may differ from state government in many ways, but both systems require that competitive procurements be conducted with integrity, openness, and fairness.[6] At the federal level, this goal is articulated in the FAR as follows:

> "An essential consideration in every aspect of the [acquisition] System is maintaining the public's trust. Not only must the System have integrity, but the actions of each member of the [acquisition] Team must reflect integrity, fairness, and openness […] Fairness and openness require open communication among Team members, internal and external customers, and the public."[7]

Open communication with potential vendors prior to issuance of a solicitation is an essential part of the procurement process. This is consistent with the NASPO guidelines which encourage states to develop guidelines so they can use vendor expertise when preparing a solicitation in a fair, unbiased manner that does not create a conflict of interest.

But what is unfair bias? As we have asked earlier, if a state official meets with Vendor A, but not others, does that mean the official is biased toward Vendor A's solution? And what is a conflict of interest? If a state has spent time with one particular vendor discussing that vendor's approach, is there a conflict of interest?

At the federal level, this issue was addressed during the 1996 revision of FAR Part 15, "Contracting By Negotiation." Balancing the dual goals of "openness" and "integrity" in the procurement process, the FAR drafters decided to encourage exchanges of information between public officials and potential vendors:

> (a) Exchanges of information among all interested parties, from the earliest identification of a requirement through receipt of proposals, are encouraged. Any exchange of information must be consistent with procurement integrity requirements (see [FAR] 3.104). Interested parties include potential offerors, end users, Government acquisition and supporting personnel, and others involved in the conduct or outcome of the acquisition.
> (b) The purpose of exchanging information is to improve the understanding of Government requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy the Government's requirements, and enhancing the Government's ability to obtain quality supplies and services, including construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.
> (c) Agencies are encouraged to promote early exchanges of information about future acquisitions. An early exchange of information among industry and the program manager, contracting officer, and other participants in the acquisition process can identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules; the feasibility of the requirement, including performance requirements, statements of work, and data requirements; the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information; the availability of reference documents; and any other industry concerns or questions. Some techniques to promote early exchanges of information are—
> (1) Industry or small business conferences;
> (2) Public hearings;
> (3) Market research, as described in [FAR] Part 10;
> (4) One-on-one meetings with potential offerors (any that are substantially involved with potential contract terms and conditions should include the contracting officer; also see paragraph (f) of this section regarding restrictions on disclosure of in-

6 See, e.g., FAR 1.102-2(c). See also American Bar Association (ABA) Section of Public Contract Law, Principles of Competition in Public Procurements, http://www.abanet.org/contract/admin/poc.html (setting forth ten principles of competition in public procurement, including that "all parties involved in the acquisition process must participate fairly, honestly, and in good faith").
7 FAR 1.10202(c)(1).

formation);
(5) Presolicitation notices;
(6) Draft RFPs;
(7) RFIs;
(8) Presolicitation or preproposal conferences; and
(9) Site visits.
* * *
(f) General information about agency mission needs and future requirements may be disclosed at any time. After release of the solicitation, the contracting officer must be the focal point of any exchange with potential offerors. When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage. Information provided to a potential offeror in response to its request must not be disclosed if doing so would reveal the potential offeror's confidential business strategy, and is protected under [FAR] 3.104 or Subpart 24.2. When conducting a presolicitation or preproposal conference, materials distributed at the conference should be made available to all potential offerors, upon request.[8]

Thus, the federal rule not only encourages early exchanges of information with vendors, but it specifically identifies "one-on-one meetings" as an appropriate means of accomplishing these exchanges.[9] There are important caveats in the rule – added in response to public comments – that ensure fair treatment of all vendors and to make sure that procurement integrity rules are followed.[10] In addition, there is a helpful, bright-line test on when these exchanges with potential vendors should stop: "After release of the solicitation, the contracting officer must be the focal point of any exchange with potential offerors" (emphasis added).

But the overall message to federal procurement officials is clear: feel free to exchange information openly and freely with vendors prior to a solicitation being issued, just be sure to treat all vendors fairly.[11] This message was recently reinforced in February 2011 when the Office of Federal Procurement Policy issued a policy memorandum to the federal acquisition community entitled "'Myth-Busting': Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process."

Noting that access to market information is critical for public procurement, the memorandum states that "productive interactions between federal agencies and our industry partners should be encouraged to ensure that the government clearly understands the marketplace and can award a contract or order for an effective solution at a reasonable price." The memorandum also states that "[e]arly, frequent, and constructive engagement with industry is especially important for complex, high-risk procurements."

The memorandum then addresses ten "myths" about federal procurement, including the following (footnote omitted):

Misconception – "We can't meet one-on-one with a potential offeror."

Fact -- Government officials can generally meet one-on-one with potential offerors as long as no vendor receives preferential treatment.

Prior to issuance of the solicitation, government officials – including the program manager, users, or contracting officer – may meet with potential offerors to exchange general information and conduct market research related to an acquisition. In fact, the FAR, in Part 15, encourages exchanges of information with interested parties during the solicitation process, ending with the receipt of proposals. There is no requirement that the meetings include all possible offerors, nor is there a prohibition on one-on-one meetings. Any information that is shared in a meeting that could directly affect proposal preparation must be shared in a timely manner with all potential offerors to avoid providing any offeror with an unfair advantage (FAR 15.201(f)).

The government ethics rules and Competition in Contracting Act, (10 U.S.C. § 2304), prohibit preferential treatment of one vendor over another. Where vendor interaction is expected to include

8 FAR 15.201.
9 See also FAR 31.205-38(b)(5) (defining allowable "selling costs" to include efforts such as "person-to-person contact" for the purpose of familiarizing a potential customer with the contractor's products or services).
10 "Some respondents expressed concerns that the increased exchanges between the Government and industry throughout the acquisition process increased the risk of unfair practices. The final rule encourages earlier and more meaningful exchanges of information between the Government and potential contractors to achieve a better understanding of the Government's requirements and the offerors' proposals. This rule contains limits on exchanges that preclude favoring one offeror over another, revealing offerors' technical solutions, revealing prices without the offerors' permission, and knowingly furnishing source selection information. In addition, the guidance in the final rule has been revised to alert contracting officers of the safeguards contained at 3.104, Procurement Integrity, and 24.2, Freedom of Information Act." 62 Fed. Reg. 51224, Sept. 30, 1997. FAR 3.104 prohibits, among other things, the knowing disclosure or receipt of sensitive procurement information prior to award of a contract; this information includes both "contractor bid or proposal information" and "source selection information," and there are criminal and civil penalties for violations. FAR 24.2 sets forth policy and prohibitions on the disclosure of information, including contractor's trade secrets and confidential commercial information, under the Freedom of Information Act, 5 U.S.C. § 552, as amended.
11 This is consistent with guidance from the 2008 NASPO Practical Guide, which advises: "[…] communications should always be open to all possible vendors" and "all communications should avoid the appearance of favoritism."

contract terms and conditions, any one-on-one meetings should include, or at least be coordinated with, the contracting officer (FAR 15.201). After the solicitation is issued, the contracting officer shall be the focal point for these exchanges. (Special rules govern communications with offerors after receipt of proposals; that situation is not addressed here.)

Some vendors have expressed concern that involvement in pre-solicitation discussions might lead to exclusion resulting from organizational conflict of interest (OCI) concerns. This should not be the case. While a vendor who, as part of contract performance, drafts the specification for a future procurement will almost certainly be barred by OCI rules from competing for that future procurement, pre-solicitation communications are generally less structured, less binding, and much less problematic. When a vendor, in its role supporting the government, is drafting specifications for a future acquisition, the government is relying on the vendor to provide impartial advice regarding the requirements needed to meet the government's future needs. Ensuring that the vendor will not be motivated by a desire to win the future contract is the way we try to ensure that this advice will be impartial. This differs dramatically from the pre-solicitation context. In the latter context, the government is not looking for impartial advice from one source, but is instead looking for a variety of options from a variety of sources, each one understandably, and reasonably, attempting to demonstrate the value of its own approach. These marketing efforts, in themselves, do not raise OCI concerns.

In sum, as a matter of both law and policy, there is no problem at the federal level with pre-solicitation, one-on-one meetings between agency officials and vendors, provided that no vendor receives preferential treatment.[12] For example, no vendor should receive proprietary information from a Government official concerning another vendor or its solution, and no vendor should receive Government "source-selection information" that is relevant to the procurement and competitively valuable, but is not available to all competitors.[13] Source selection information is defined as "information that is prepared for use by an agency for the purpose of evaluating a bid or proposal to enter into an agency procurement contract, if that information has not been previously made available to the public or disclosed publicly."[14] This information includes, for example, vendors' costs or prices, source selection plans, evaluations and rankings of proposals, and other information marked as sensitive by the Government. In addition, if competitively useful information is provided to one vendor in a meeting, it should subsequently be provided to all potential vendors as soon as practicable, but no later than the next general release of information to all vendors.[15]

Importantly, experience at the federal level suggests that government officials have been able to follow these rules without significant protests from vendors. In fact, in the first eleven years after October 1997 when the FAR's one-on-one discussions rule took effect, there were over 9,400 bid protests filed at the U.S. Government Accountability Office ("GAO")[16], as well as hundreds at the U.S. Court of Federal Claims. In that time, there is not a single reported case in which a protest was sustained because of a vendor receiving preferential treatment during one-on-one discussions prior to release of a solicitation.[17]

This is not to say, however, that stakeholders should take pre-solicitation discussions lightly, particularly if they are likely to result in less than full competition. For example, in Google, Inc. v. United States, 95 Fed. Cl. 661 (2011), the court enjoined the agency's planned procurement of an enterprise email system using only specified Microsoft products. The court prevented the agency from proceeding because the agency did not comply with federal rules requiring it to (1) identify the statutory basis for less than full and open competition, (2) properly estimate costs of alternative courses of action, (3) identify all sources that had expressed interest in competing for the opportunity, and (4) describe how the agency would overcome or remove barriers to competition in subsequent procurements.[18] The court describes in

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12 With regard to preferential treatment, the FAR makes clear that offers must be treated equally, but not identically: "All contractors shall be treated fairly and impartially but need not be treated the same." FAR 1.102-2(c)(3). For example, as long as an agency acts impartially and provides vendors with equivalent information, it would not need to follow a "script" or establish precisely equal timeframes for such discussions.

13 See FAR 9.505(b) ("Preventing unfair competitive advantage"); . Indeed, the Procurement Integrity Act provides civil and criminal penalties for persons who knowingly disclose or obtain "contractor bid or proposal information" or "source selection information" before the award of a Federal agency procurement contract to which the information relates. See 41 U.S.C. § 423; FAR 3.104. "Contractor bid or proposal information" is defined as competitively sensitive information (e.g., cost or pricing data, information marked as proprietary by the contractor) included in a vendor's bid or proposal. See FAR 3.104-1.

14 See FAR 2.101

15 See FAR 15.201(f).

16 Report to Congress on Bid Protests Involving Defense Procurements, GAO Report No. B-401197, April 9, 2009, Figure 1 (Fiscal Year 1998 through Fiscal Year 2008).

17 There is a case in which the Department Of Justice ("DoJ") voluntarily cancelled a solicitation based on a potential "unfair advantage" provided to one or more of the offerors as a result of the agency's pre-solicitation communications with certain potential offerors; however, the DoJ subsequently awarded the contract on a sole-source basis to a contracting team that included the same contractor that received the unfair advantage, so the protest was sustained on that basis. See Superlative Technologies, Inc., B-310489, B-310489.2, Jan. 4, 2008, ____ CPD ¶ ___. See also Superlative Technologies, Inc., B-310489.4, 2008 CPD ¶ 123 (sustaining second protest when DoJ failed to implement the corrective action recommended by GAO and failed to investigate the procurement integrity and conflict of interest issues it had identified).

18 Id. at 678.

detail the numerous pre-solicitation market research meetings that the agency conducted over several years with representatives of Microsoft and Google. Significantly, the court found no evidence of bad faith or improper conduct by the parties, concluding that they were motivated by "competitive zeal and interest in customer satisfaction."[19]

The federal model is very instructive and there is over fifteen years of experience where the approach appears to be working very well. And while we know from the NASPO survey that state governments do not have such fully developed policies, it is important to review what state guidance does exist.

IV. State Statutes and Guidelines

The primary NASPO survey question was as follows: "Does your state have a law, statute, rule or regulation, standard of conduct, or code of ethics concerning any communication with vendors/suppliers prior to publication of a formal solicitation?"

For those thirteen states responding affirmatively, we have reviewed the laws, regulations and/or policies referenced in their survey responses, as well as any laws, regulations and/or policies that the work group discovered after conducting additional research. We have provided a summary of the relevant language in nine of those states: Connecticut, District of Columbia, Delaware, Georgia, North Dakota, Ohio, Oregon, Illinois, and Massachusetts. Again, our focus is not to address all pre-RFP communication tools, but rather those that focus on less formal exchanges, such as one-on-ones. While none of these state regulations or policies is as detailed or complete as the federal model, they each offer illustrative value.

In **Connecticut**, state officials must always have at least two employees meet with a vendor, one of whom shall be a purchasing/fiscal person and one could be a technical person or a product user. Agency employees should never make any promises or commitments to vendors about using their product or services during the pre-solicitation process. (Source: General Guidelines regarding Communications with Vendors)

Connecticut's General Guidelines also provide that a vendor can provide substantive help to the agency on procurement, only if this help is pursuant to an existing contract, which provides that the vendor shall not submit a bid or proposal. In fact, the guidelines specifically state with regard to vendors "if they help on the front end, then they can't play on the back end."

The key issue here is determining what is considered "substantive" help that would prohibit a vendor from bidding. According to Connecticut's Director of Procurement, the intent of this provision is not to prohibit a vendor from sharing best practices or successes in other states or innovative new solutions or for their state to gather benchmarking information. However, if a vendor provides substantive assistance, such as assisting in writing specifications or recommending an action or approach that would clearly favor the vendor, then those actions would be considered substantive and the vendor would be prohibited from bidding on the solicitation.

In the **District of Columbia**, the contracting officer shall furnish identical information concerning a proposed procurement to all prospective contractors receiving the RFP. District personnel shall not provide advance knowledge or information about a future solicitation to any prospective contractor. 27 DCMR Sec. 1602.3 & 1602.4 (Solicitation of Proposals).

The statute also states that "presolicitation notices and conferences may be used as preliminary steps in procurements by CSP. If presolicitation notices are used, the contracting officer shall prepare and issue each notice to potential sources and shall publicize the notice in a newspaper of general circulation. A presolicitation conference may only be used when approved by the contracting officer." 27 DCMR Sec. 1604 (Presolicitation Notices and Conferences)

The key issue here is determining what is considered "identical" information that must be provided to all prospective contractors. A vendor can be most helpful by suggesting solutions that address specific problems rather than generic solutions. Therefore, the state can benefit most when the procurement official shares high-level goals for the program, what will define success on the project and/or what the state perceives as the largest barriers to success.

However, unless the state official reads from the same script for every vendor meeting, and every vendor asks exactly the same questions, he/she may share information with one competitor that he/she does not share with another. Does this mean he/she has allowed one vendor to improperly acquire information that other competitors do not have?

19 Id. at 680.

By contrast, the federal rule is explicit and states that "All contractors and prospective contractors shall be treated fairly and impartially but need not be treated the same."[20]

Delaware has a general conduct statute that would govern state employee communications with vendors at all times regardless of the timeline of a procurement. To supplement the public notice of solicitations, 29 Del. C., Sec. 6923 (3) allows the maintaining of a list of perspective vendors which serves as a list of vendors to communicate upcoming solicitations to. Agencies and Procurement Officials meet with vendors one-on-one and in business reviews to share this information.

Pursuant to **Georgia's** administrative rule, as potential sources of supply are identified, "the procurement professional may contact potential suppliers directly to request information. The procurement professional's contact with potential suppliers may occur informally, such as by telephone or email. Alternatively, the procurement professional may determine a more formal method of gathering information from suppliers as desired, such as the Request for Information (RFI) method. Georgia Procurement Manual 2.2.3.2 (Request Information from Suppliers).

Finally, the Georgia Procurement Manual also provides that "advisory or consultative services which suppliers often provide to state entities will be regarded as normal sales effort, and no preferential treatment will be given to suppliers providing such services when contracts are awarded. Georgia Procurement Manual 2.2.3.3 (Use of Advisory Services).

North Dakota's administrative rule provides that "prior to issuing a solicitation, the procurement officer may hold a specification meeting to seek information necessary to prepare a suitable specification and competitive solicitation. Chapter 4-12-06 (Specifications for Commodities and Services) 4-12-06-08 (Specification Meeting). The rule also provides that "no state employee or official will furnish information to a prospective bidder or offeror if, alone or together with other information, it might give the prospective bidder or offeror an unfair advantage. Chapter 4-12-04 (Ethics in Public Procurement) 4-12-04-03 (Handling of Information).

In **Ohio**, "it is the policy of the Office of Procurement Services (OPS) to maintain open lines of communication with all parties participating in the bidding and contract award processes. […] Prior to contract award, there may be communications between OPS, the customer agency and the suppliers regarding a potential contract for supplies, services or information technology. These communications may be verbal or written. Communications are conducted prior to issuance of an Invitation to Bid, Request for Proposals or Reverse Auction Qualification Summary and may be used in developing the bidding documents, to conduct necessary research on items or services to be purchased, to ascertain if resulting specifications would be restrictive, and to discuss changes to an existing contract in preparation for the new ITB/RFP/RAQS, etc." In addition, "pre-bid conferences may be conducted prior to issuance of the ITB to discuss proposed bid specifications" Ohio Department of Administrative Services, General Services Division, Office of Procurement Services, Policy and Procedure PUR-008 "Communications and Protest Procedures"; Ohio Administrative Code Section 123:5-1-07 (Invitation to Bid Process (C) (1)).

Oregon's administrative rule provides that "authorized agencies are encouraged to conduct research with Providers who can meet the state's needs. Authorized Agencies must document the items discussed during the research phase of Solicitation development. The research phase ends the day of a Solicitation release or request for a Quote according to an Intermediate Procurement, unless the Solicitation or Intermediate Procurement provides for a different process that permits ongoing research." Oregon Administrative Rule OAR 125-246-0635 Authorized Agency and Provider Communications (1) Research Phase.

The **Illinois** Procurement Code provides that "any communication that a state employee has with a vendor pertaining to a procurement matter must be reported and made publicly available. Additionally, if a vendor has an Illinois-registered lobbyist and that lobbyist speaks to a state employee regarding a procurement matter, the lobbyist, too, will need to report the communication." Illinois Procurement Code 30 ILCS 500/50-39(a), effective January 1, 2011, concerning pre-solicitation vendor communications.

Finally, **Massachusetts'** regulations provides broad authority for procuring departments to interact with prospective bidders. The regulation provides that "a Procuring Department may gather information to assist in the development of a potential Procurement by inviting other Departments, potential Bidders or other interested parties to provide technical and business advice concerning industry standards, practice, general cost or price structures or other information which is relevant to the type of Commodities or Services, or both, that a Procuring Department seeks to procure." Section 21.03 (Requests for Information or Interest (RFI)) of Procurement Regulations 801 CMR 21.00 (Procurement

20 FAR 1.102-2(d). But, see, FAR 15.201(f) ("When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage.").

of Commodities or Services, Including Human and Social Services).

Massachusetts' procurement regulations (801 CMR 21.03) and policies (entitled "Requests for Information (RFI) - An Optional Planning Tool" found in Procurement Policy chapter entitled "How to Do a Competitive Procurement") provide such substantial flexibility that, as a matter of practice, the central procurement office, the Operational Services Division, routinely posts RFIs and draft RFRs for comment and regularly interacts with vendors in a variety of ways prior to publication of a formal solicitation as part of their "best value" procurement principles.

In each of the above nine states' regulations or policies, they appear to allow pre-RFP communication. The question remains, as it does with the federal statute, how much and what type of information can a state share with a vendor? In section VII below, the work group will share a framework that we hope will be useful in determining how much a state can share at different times during the procurement process.

V. Vendor Reporting and Disclosure

The regulatory requirement on vendors and lobbyists to report their activities has expanded over the last few years to include procurement related activities. The Illinois Procurement Code cited above is a prime example. The complexity of these requirements has created another possible barrier to one-on-one meetings with potential vendors. Procurement officials have commented that this expanded regulatory requirement creates, at minimum, confusion which can lead to additional barriers to communication.

In the final analysis, this is a reporting and disclosure requirement for vendors, not public officials. The following summary is designed to help public officials see that this is not a primary concern for states, and help vendors understand what their own requirements are in this area. Moreover, the existence of these reporting and disclosure requirements demonstrate support from policy makers that pre-RFP communications are part of the process. Policy makers could have chosen to place an outright ban on communications. Rather, they have put in place these kinds of requirements to ensure transparency in the system.

1. Lobbying

Every state, and a majority of large cities and counties, has lobbying laws. These laws require those trying to influence government to register and, in most cases, report the details of their attempts to influence. Although it varies by jurisdiction, many jurisdictions consider at least some attempts to influence the procurement process to be lobbying. Depending on how the law is written, vendors may choose to limit the amount of contact with state officials by contacting only certain individuals within an office or by limiting the discussion to certain topics.

Not every state requires company representatives involved in obtaining government contracts to register as lobbyists. However, it is becoming more and more commonplace for jurisdictions to require a company that is seeking a contract with the state to have its representative, the company itself, or both, register with the state. Every state has differing views of what sort of contacts require registration, and some also have time or expenditure thresholds that must be met before registration is required.

Some states, such as Maine, Nevada, and Nebraska, do not include the executive branch within the scope of the lobbying law, so any contact with executive branch officials or employees, whether it is with the governor or a purchasing agent, is not considered lobbying. Other states do include contact with the executive branch as part of the definition of lobbying, but do not consider sales- or contract-related discussions to be encompassed within that definition. Arizona, Colorado, and West Virginia are examples of such states.

If lobbyist registration is required in a state, periodic reporting is required in order to maintain compliance with the state lobbying laws. A majority of states have either one uniform lobbying law that covers all branches, or lobbying laws that are harmonized between branches. Tennessee is typical of the former. Its lobbying law covers both branches and requires semi-annual reporting of lobbying activity. Ohio is an example of the latter. Executive branch lobbying laws are located in a separate part of the code from the legislative branch laws, but the provisions are essentially identical, and reports are filed on the same schedule and with the same government organization.

There are a handful of states that have completely separate registration and reporting schemes for legislative and executive branch lobbying. This can be an advantage for the vendor, as the executive branch reports are typically simpler and filed less frequently. Kentucky, for example, only requires executive branch lobbyists to file once every year, while legislative branch lobbyists are required to file six reports each year. The executive branch reports are completely different from those in the legislative branch and are filed with a completely different organization.

An even smaller number of states have separate requirements for vendors' lobbyists. New York requires lobbyists to identify on their registrations and reports whether their lobbying is procurement, nonprocurement, or both. Georgia defines "vendor lobbyists" separately in its code and requires those who qualify to identify themselves as such on the reg-

istration form. Vendor lobbyists follow a monthly reporting scheme that is the same as the one for executive branch agency lobbyists, but different than the scheme for legislative branch and local lobbyists.

Just as every state has differing schemes under which their lobbying laws are laid out, every state has differing reporting requirements. With regard to reporting, the three most important issues are:

- Who is required to report;
- When are reports due; and
- What must be reported?

Reporting will be required of either the lobbyist, the employer, or in some cases, both. Exactly who needs to report will be laid out in the applicable statutes. Where the employer of the lobbyist is required to report, it is incumbent upon the employer to obtain from its lobbyist or lobbyists the information needed to correctly complete its reports.

The timing of reports also varies widely by jurisdiction. Annual, semi-annual, and quarterly reporting schedules are most common, but reports can be due three, six, and 12 times per year. The employer of a lobbyist needs to be aware that it may have reports due on a different schedule than its lobbyists.

Although the information required to be reported also varies by jurisdiction, there tends to be less variation in the kind of information sought by the regulators. Typically, a lobbyist or entity will be required to include in a report their contact information, their expenditures on lobbying for the reporting period, which may include the portion of the salary of the lobbyist attributable to lobbying in that jurisdiction, gifts or political contributions made to government officials or employees, the specific issues or contracts that were discussed with officials and employees, and the officials and employees that were contacted or provided gifts and contributions.

It is clear that any business involved in procurement needs to know whether their activity requires them to register as a lobbyist. Once registered, there are different reporting requirements and a company with a registered lobbyist will need to know exactly what those requirements are in order to remain compliant.

2. Vendor Disclosure

It is quite common for a state to require a winning bidder to disclose information about itself or its activities prior to the award of the contract. Procurement officials may be familiar with some requirements, as some laws require vendors make the disclosures directly to their office. Other disclosures are made to other organizations within government. These types of disclosures are less likely to disrupt the flow of information between the procurement office and potential vendors, as there is no relation between the required disclosure and any communications that may take place. It is possible, however, that some vendors may choose not to engage in pre-RFP communication due to the perceived burden of complying with the disclosure requirements. Again, the notice and disclosure requirements protect procurement officials and are further evidence that policy makers understand that these types of communications are appropriate and part of the process.

Required vendor disclosures generally fall into two categories: conflicts of interest and legal compliance. Conflicts of interest can take several forms. New Jersey requires vendors receiving non-publically advertised contracts with an anticipated value in excess of $17,500 to disclose political contributions made by the business entity during the preceding 12-month period. Alabama focuses on relationships with public officials and employees, requiring disclosure statements to reveal officials and employees who may gain financially from a contract due to having family relationships with the vendor, the vendor's family, or the vendor's employees. The state also requires disclosure of paid consultants or lobbyists involved in the bid or contract. Such disclosures are required from all bidders for contracts exceeding $5,000, unless the contract is awarded by competitive bid, in which case only the vendor awarded the contract is required to disclose such information.

Other states use disclosures to ensure compliance with the law. Illinois bidders and vendors must, among several requirements, certify that they are registered with the state board of elections as required by law or that they are exempt from the requirements. Kentucky requires bidders to submit an affidavit verifying compliance with the state's campaign finance laws. Contractors and subcontractors must reveal violations of the state's applicable tax, labor, and human rights statutes within the previous five years. Vendors to state, county, or local governments in Ohio with contracts aggregating more than $100,000 must certify that they are not an organization on the U.S. Department of State's terrorist exclusion list and that they have not provided support or resources to a terrorist organization.

3. Pay-to-Play

Generally, pay-to-play laws involve political contributions given with the expectation that a contract will be awarded to the contributor in exchange for making the contribution. Pay-to-play laws typically contain one or more of the following provisions:

- Restrictions on the amount of political contributions that may be made by potential or

current contractors;
• Restrictions on the ability of candidates or politicians to receive political contributions from potential or current contractors;
• Restrictions on the ability of a contractor to receive a contract if it has made political contributions to a candidate;
• Termination of a vendor's currently held contracts if that vendor makes a political contribution; and
• Reporting requirements for bidders or contractors to demonstrate compliance with the contribution restrictions.

Of course, the reporting requirements contained in pay-to-play laws are the most germane to this paper. For example, New Jersey has a reporting component where businesses holding contracts with the state aggregating over $50,000 must file an annual report listing all political contributions over $300, including contributions made by those with a 10 percent or more interest in the business, by subsidiaries of the business, by political action committees controlled by the business, and by the officers, directors, and partners of the business, and their spouses and children. The states with pay-to-play reporting all have similar thresholds and, for the most part, require similar information to be reported.

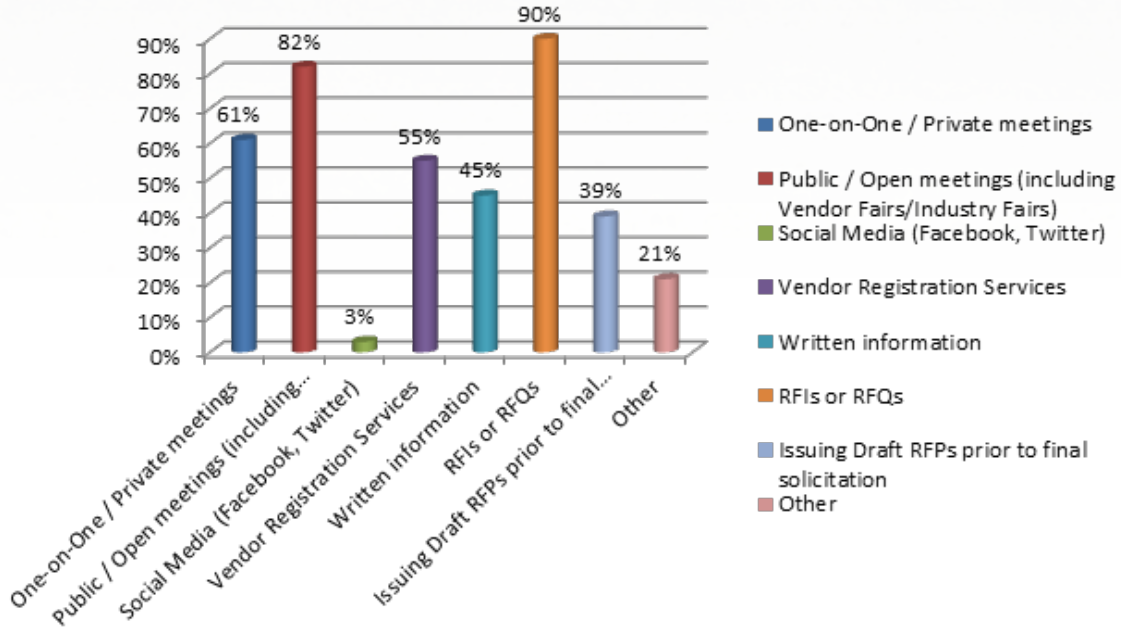
In summary, while state officials may want to be aware of these reporting and disclosure requirements, the onus is on vendors to comply with these requirements. The take away for state officials is that policy makers have put a framework in place to ensure fairness and transparency.

VI. Additional Research Tools

In addition to the one-on-one meetings, the work group wanted to address certain other tools that permit pre-RFP communications between government and industry.

Results from the survey indicate that RFIs or RFQs are practices used by most states (90% of the responding states) to communicate with vendors. Other practices used by states to communicate with vendors and explain the solicitation requirements pre-RFP include public or open meetings (including vendors fairs/industry fairs), used by 82% of the states responding to the survey; one-on-ones/private meetings are used by 61% of the responding states and vendor registration services are used by 55% of the responding states.

Figure 3. What practices does your agency use to communicate with vendors/suppliers and allow them to understand the solicitation requirements and the needs of the agency prior to publication of a solicitation? (N=33)



Source: 2011 NASPO State-Vendor Communication Survey

A Request for Information (RFI) is defined by Thai and

Pitzer (2010) as "a form of market research used prior to complex procurements, such as RFPs".[21] Like one-on-one meetings, RFIs are issued pre-RFP to gauge vendors' interest in a project and gather input from vendors regarding industry trends and practices.

The next step that can be used in a procurement process following an RFI is issuing a draft RFP. A draft RFP is a preliminary version of an RFP that is sent out to potential vendors. It provides an opportunity for industry to review and understand the requirements of a solicitation, and to provide their comments and feedback on the various sections of the solicitation including the Statement of Work (SOW) and provisions and clauses.

The NASPO State and Local Government Procurement Practical Guide (2008) recommends as a best practice to provide wide notice of the pre-solicitation conferences (convened through RFIs) and conduct them as an open meeting to ensure openness and fairness of the procurement process. And while most RFIs are published for all to see, the NASPO Guide also recognizes the discretion that procurement officials enjoy "to invite only those vendors who are expected to make a substantial contribution to the official's knowledge." It has also been noted that there are some limitations to the value provided by an RFI stemming from a vendors' reluctance to share proprietary information with their competitors in an open meeting or even in writing, knowing that states may have to make that information public under public records laws.

Another often used tool is the Requests for Quotations (RFQ). The RFQ is defined in the NIGP Public Procurement Dictionary of Terms (2008) as small order amount solicitation methods where the supplier "is asked to respond with price and other information by a pre-determined date. Evaluation and recommendation for award should be based on the quotation that best meets price, quality, delivery, service, past performance and reliability". RFQs are typically used as supporting documentation for sealed bids.

Some states responding to the 2011 survey offered additional practices they use to communicate with vendors prior to issuance of an RFP as follows:

- written information provided by the vendor

- vendor manuals (Missouri)

- e-Procurement systems (Virginia)

- pre-solicitation notices and conferences (DC)

- pre-bid or proposal conferences (South Dakota)

- public meetings after a solicitation issuance for vendor training (Massachusetts)

- one-on-one meetings offered to all vendors with the team responsible for the solicitation (Massachusetts)

- one-on-one/private meetings for information gathering, not to discuss specifics of a solicitation that has not been issued (North Dakota)

- one-on-one meetings with procurement officials and agency personnel to understand requirements and upcoming needs, in addition to periodic vendor business reviews (Delaware)

- new and closed RFIs, RFPs and related solicitation documents published on the State Procurement Portal. (Delaware)

All of these tools offer benefits to both state officials and industry representatives through enhanced dialogue about the best solution for the state.

VII. Framework

In the absence of specific rules or guidelines to address one-on-one meetings with vendors, the perception issue alone can often prevent helpful dialogue. Bottom line, ambiguity will only discourage communication and prevent constructive dialogue. As noted before, NASPO recommends that "[t]he central procurement office should develop guidelines for vendor input into the process of determining agencies' needs or preparing initial specifications, so that the agencies and the central procurement office may obtain the benefits of vendor expertise without creating unfair bias or a conflict of interest."[22]

This paper has shared the federal model and some examples from states that have attempted to codify guidelines in this area. These examples may help procurement officials to determine a policy that works in their respective state.

21 Pitzer, J. & Thai, K. (2009). Phase Two: Solicitation and Development. In Introduction to Public Procurement (3rd Edition). (pp. 125-144). Herndon, VA: National Institute of Governmental Purchasing, Inc.

22 NASPO State and Local Government Procurement: A Practical Guide. (2008). Lexington, KY: National Association of State Procurement Officials.

Figure 4: Framework Matrix

However, none of these policies, including the federal model, address with any great clarity the type of information that can be shared at various times in the process.

Moreover, despite the fairly longstanding federal rule that encourages communication, the Office of Federal Procurement Policy still had to issue its "myth-busting" memorandum in February 2011 to counter misconceptions and clarify what kinds of communication are appropriate.[23]

Regardless of what any statute, rule or policy may say, context matters. In other words, procurement officials must make judgment calls based on the specific facts and circumstances of the procurement at hand. Therefore, we have developed a framework to help analyze the question on a case-by-case basis.

As can be seen above in Figure 4, we have built a single matrix that can serve as a framework or lens to view this complex issue. It does not factor into account every variable that must be considered. It is designed to help procurement officials consider two of the most important variables: timing of the communication and the level of specificity regarding what information can or should be shared.

The "X" axis of the matrix is "Time" and the "Y" axis is "Information." The X axis spans from the initial decision to conduct a procurement, or "Decision to Source," to the release of the RFP. The Y axis spans from "General Information" to "Specific Information." This framework creates four quadrants in the matrix.

The upper left quadrant is entitled "Testing Preliminary Ideas" (I). The upper right quadrant is entitled "Finalizing Sourcing Strategy" (II). The lower left quadrant is called "General Discovery" (III) and the lower right quadrant is called "Validate Sourcing Strategy" (IV).

As an example, if it is early in the procurement process and general information is discussed, such as trends in the industry or leading practices, we are in quadrant III "General Discovery". At this stage, the likelihood of providing any one vendor an unfair advantage is unlikely. The state official can discuss goals for the procurement or larger initiatives and there should be nothing inappropriate about sharing this information.

Similarly, even if the procurement office has developed some preliminary ideas about their sourcing strategy, the state may want to test those ideas to understand their application. Testing "Preliminary Ideas" (I) is still early in the procurement process and therefore the entire sourcing strategy is subject to change. While policies should be developed for what types of information not to share, the ability to test very specific ideas with industry experts as a tool to gauge whether the approach is consistent with leading or best practices is invaluable.

23 The White House. Executive Office of the President, Office of Management and Budget. Office of Federal Procurement Policy. (2011, February 2). Memorandum from the Administrator for Federal Procurement Policy. Myth-Busting: Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process. Retrieved from http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/Myth-Busting.pdf

In both of these circumstances, quadrants I and III, the release of the RFP is still likely months away and there is plenty of time for any interested vendor to seek out this same information. And as long as that vendor is given an opportunity to meet and discuss the procurement too, this approach promotes transparency while allowing the state to complete its due diligence.

As the process gets closer to the RFP and the strategy has been developed, tested, revised and improved, the state procurement office may still need to "Validate the Sourcing Strategy" (IV). The state may still have questions about how technology platforms interact or the benefits of integrating certain programs. It may be helpful to ask about the results of similar programs in other states now that your state's strategy is more clearly defined. At this point, one must be more sensitive to disclosing information that may create a competitive disadvantage. However, the successful federal model has demonstrated that exchanges with potential vendors are appropriate at any point until release of the RFP. Nevertheless, at this point in the process, it would be important to avoid any direct reference to specific details in the RFP or tell anyone vendor what's included in the final specifications.

At some point, it is time to finalize the sourcing strategy prior to releasing the RFP. At this stage, in quadrant II, with the RFP close to final, there is a greater chance one might provide a vendor an unfair early view of the final specifications which might create an unfair advantage. Again, there is nothing to suggest communication should cease at this point, but public officials need clear guidance at this stage to preserve procurement integrity.

This framework will hopefully assist state officials in analyzing how best to approach one-on-one state-vendor communications. A consistent approach will only serve to enhance overall fairness. When equal access is the standard for fairness, the procurement official is not at risk of improperly meeting with a vendor regarding an upcoming procurement or of disclosing information that is not precisely the same to each vendor. Rather, as long as the procurement official treats all potential vendors impartially and provides equivalent access to all, the process is fair.

VIII. Conclusion and Recommendations

The issue of effective communications between industry representatives and state officials continues to warrant more education and increased awareness. The 2011 NASPO Survey has identified several practices currently being used by states across the country. This white paper focused on one particular practice, the pre-RFP one-on-one meetings between state officials and vendors. And the survey was clear that most states have not issued sufficient guidance on how best to conduct these one-on-one meetings with vendors.

The paper also provided a framework that is intended to aid procurement officials as they are presented with this issue every day. In the end, however, we hope this paper will help procurement officials and state policy makers develop guidelines for their state so that everyone will benefit when appropriate from vendor expertise.

Therefore, NASPO recommends that Chief Procurement Officers develop guidelines for vendor input into the process of determining agencies' needs or preparing initial specifications so that the agencies and the central procurement office may obtain the benefits of vendor expertise without creating unfair bias or conflict of interest. As each state engages in their own policy development, NASPO would encourage them to consider the issues raised in this white paper.

In summary, build a consensus among key stakeholders regarding the fundamental policy and legal issues that require procurement integrity and fairness to avoid creating an unfair competitive advantage. At the same time, educate your colleagues about the benefits of gaining vendor expertise as states develop strategic sourcing strategies. As Kelman from Harvard wrote, "[w]hen government doesn't take advantage of [industry] knowledge before issuing an RFP, it loses."

Next, if the state will benefit from vendor expertise, encourage one-on-one meetings with vendors in a manner that avoids creating an unfair competitive advantage. For example, the closer your meeting is to the solicitation and the more detailed the information you release may necessitate direct involvement from responsible procurement staff. Moreover, differentiate between gathering information and sharing information. Gathering information raises very few concerns. Sharing information is where most issues arise. Do what is in the best interest of the state, but do so thoughtfully and based on clear guidance from a statewide policy.
In the final analysis, NASPO believes that ambiguity surrounding the rules for one-on-one communication between states and vendors will only discourage communication and prevent constructive dialogue. NASPO remains committed to supporting its members as they develop policies in this important area.

Acknowledgements

This paper was prepared under the guidance of NASPO's State-Vendor Communication Work Group.

Appreciation is expressed to the following work group members, attorneys, and staff for lending their time, resources and information and participating in the writing of this document:

- Dean Stotler, Emerging Issues Committee Chair and Director of the Government Support Services, Office of Management and Budget for the State of Delaware
- Gary Lambert, State-Vendor Communication Work Group Co-Chair and Assistant Secretary for the Operational Services Division for the Commonwealth of Massachusetts
- Paul Campbell, State-Vendor Communications Work Group Co-Chair and Vice President, State Solutions, United-Healthcare, Illinois
- Fred Springer, NASPO Honorary Member and Partner at Bryant Miller Olive, Florida
- Keith McCook, Deputy General Counsel for the Office of General Counsel, South Carolina Budget and Control Board
- William McAvoy, Deputy State Purchasing Agent and General Counsel for the Operational Services Division for the Commonwealth of Massachusetts
- Kyu Cho, Consultant to the Operational Services Division for the Commonwealth of Massachusetts
- Richard Rector, Partner, DLA Piper, Washington, DC
- Elizabeth Bartz, President and CEO, State & Federal Communications, Inc.
- John Cozine, State & Federal Communications, Inc.
- Elena Moreland, Senior Policy Analyst for NASPO, AMR Management Services

Special thanks are owed to Paul Campbell who led this true team effort and made a significant contribution by compiling sections from each author and writing an initial draft of the paper. NASPO would also like to thank Keith McCook and Richard Rector for their legal analysis, Elena Moreland for her work as the lead NASPO staff on this project, as well as Sam Hearn and Chris Heiss from AMR Creative Services for their creative input regarding this publication.

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