

Florida **PALM**

Planning, Accounting, and Ledger Management



FLORIDA PALM NEGOTIATOR TRAINING

PRESENTED BY THE RADEY LAW FIRM

AUGUST 24, 2017



Agenda

- Introduction
- Discussion of ITNs
- Legal Considerations When Using an ITN
- General Roles and Responsibilities
- Sunshine Law and Public Records



Introduction

- FL PALM Negotiators

Negotiators are members of the negotiation team for the DFS Invitation to Negotiate for the Florida Planning Accounting and Ledger Management Project (Florida PALM), Software and Systems Integrator Services. This training will review negotiator responsibilities and discuss important legal considerations.

- ITN No. DFS FL PALM ITN 1617-07 (ITN)

The ITN procurement process considers both cost and quality when purchasing goods and services to ensure best value to the state of Florida, while ensuring fair treatment of vendors submitting replies to the ITN. In this ITN, DFS is seeking a vendor to provide software and system integrator services for a new financial management solution that will provide the State with an integrated, enterprise solution that allows the State to organize, define, and standardize its financial management processes and that complies with Florida Statutes (F.S.).



ITN Process – Chapter 287, F.S.

The invitation to negotiate is a solicitation used by an agency which is intended to determine the best method for achieving a specific goal or solving a particular problem and identifies one or more responsive vendors with which the agency may negotiate in order to receive the best value. *(Reference ITN Section 1.3)*

- ▶ 1. Before issuing an invitation to negotiate, the head of an agency must determine and specify in writing the reasons that procurement by an invitation to bid or a request for proposal is not practicable. *(Completed)*

- ▶ 2. The invitation to negotiate must describe the questions being explored, the facts being sought, and the specific goals or problems that are the subject of the solicitation. *(Completed - Reference ITN Section 1.3)*



ITN Process – Chapter 287, F.S.

- ▶ 3. The criteria that will be used for determining the acceptability of the reply and guiding the selection of the vendors with which the agency will negotiate must be specified. The evaluation criteria must include consideration of prior relevant experience of the vendor. *(Completed - Reference ITN Sections 1.4, 4.1, and 4.2)*

- ▶ 4. The agency shall evaluate replies against all evaluation criteria set forth in the invitation to negotiate in order to establish a competitive range of replies reasonably susceptible of award. The agency may select one or more vendors within the competitive range with which to commence negotiations. After negotiations are conducted, the agency shall award the contract to the responsible and responsive vendor that the agency determines will provide the best value to the state, based on the selection criteria. *(Completed for evaluation and competitive range – Reference ITN Section 4.3)*



ITN Process – Chapter 287, F.S.

- ▶ 5. The contract file for a vendor selected through an invitation to negotiate must contain a short plain statement that explains the basis for the selection of the vendor and that sets forth the vendor's deliverables and price, pursuant to the contract, along with an explanation of how these deliverables and price provide the best value to the state. *(Not started)*



ITN Process

What to Expect – Negotiators

Negotiators have been appointed by the agency head or designee to conduct negotiations. The negotiation team includes:

- At least 3 people who collectively have experience and knowledge in negotiating contracts, contract procurement, and the program areas and service requirements for which commodities or contractual services are sought;
- At least one negotiator certified as a contract negotiator; and
- At least one negotiator certified as a Project Management Professional by the Project Management Institute.



ITN Process

What to Expect - Meetings

Negotiators will participate in negotiations with respondents, negotiation strategy sessions, and public meetings.

In negotiation strategy meetings, negotiators strategize about the approach to take as part of the process. These are not open to the public or to respondents, but they are recorded and become public after the solicitation ends.

Negotiations with respondents are not open to the public, but they are recorded and become public after the solicitation ends.

Public meeting(s) will be held in which the negotiators will make a determination of which reply is the best value for the state.



ITN Process

What to Expect - Meetings

The negotiation sessions will be conducted in Tallahassee, Florida (FL), unless otherwise approved by the Department.

Meeting guidelines for respondents:

- The representatives for each respondent (including a representative authorized to agree to Contract terms on behalf of the respondent and key proposed Project Team members relevant to the topic being discussed) must plan to be available in person, without interruptions, for the entirety of the respondent's scheduled negotiation session(s).
- Any respondent team members that are also members of another respondent's team shall not discuss the contents of any reply or attend any presentations or Negotiation session for more than one respondent.
- The Department reserves the right to require attendance at negotiation sessions by particular representatives of the respondent.
- The respondent should plan to limit its negotiation team to six individuals.



ITN Process

What to Expect - Negotiation Process

The first thing for negotiators to do is read the ITN, information about the Florida PALM project (e.g., Florida PALM website), and the replies.

The negotiation team may consider any information obtained during evaluation but is not bound by evaluation scoring. The negotiation team may reassess any of the evaluation determinations and may consider any additional information that comes to its attention during the negotiations.

The ITN guides the actions of the negotiations.



ITN Process

What to Expect - Negotiation Progression

Negotiators may have strategy meeting(s) prior to negotiations with respondents and throughout the negotiation process as needed, in accordance with section 287.057, F.S.

When the negotiation team is ready, selected respondent(s) will be invited to negotiation meetings to provide more detailed clarifications of their replies, to provide interactive presentations of the replies, and to enter into negotiations with the Department.

Negotiations with respondents may include discussions of the terms, conditions, costs, Statement of Work, and related Services to be provided by the respondent. Respondents, negotiators, subject matter experts (SMEs), and the procurement support team members may have action items to address individually outside of meetings.



ITN Process

What to Expect - Negotiation Progression

Respondents may be provided an opportunity to recommend enhanced value alternatives and provide information and options during negotiations. The negotiation team may address each proposed alternative during negotiations, but is under no obligation to accept a proposed alternative.

The ITN reserved the right to negotiate different terms and related price adjustments if the Department determines that such changes would provide the best value to the State.



ITN Process

What to Expect - Negotiation Progression

The ITN also allows the negotiators to use any or all ideas or adaptations of the ideas presented in any reply. Negotiators should be aware that some ideas may be trade secrets. Thus, a negotiator should consider this before discussing an idea that is redacted by a respondent so that the proper process may be followed.

It is okay during negotiations for the negotiators to ask a respondent to add something or to approach something in a different way. Recent case law suggests agencies have a lot of flexibility during negotiations and the ITN language was written to provide that flexibility.

Throughout the negotiations, documents may change, replies may be amended, and the solution may be modified. Negotiators may request clarification and revisions to replies (including Interim Revised Replies [IRRs], Best and Final Offers [BAFOs], and/or revised BAFOs).



ITN Process

What to Expect - Negotiation Progression

The Department may, at any time during the negotiations, eliminate a respondent from further consideration or stop negotiations with a respondent. Additionally, the Department reserves the right to conclude negotiations at any time and proceed to contract award.

If the negotiation team determines that a proposed alternative is not acceptable and the respondent fails to offer another alternative that is acceptable to the negotiation team, the respondent may be eliminated from further consideration or the negotiation team may stop negotiation with that respondent.



ITN Process

What to Expect - Negotiation Progression

Negotiators may continue negotiations as necessary to gain the information needed to determine best value. The negotiation team will not engage in scoring, but will arrive at its recommendation by discussion during a public meeting.

This process requires time and effort of all involved, which allows the Department to learn about the solutions offered and determine what solutions will provide the best value for the state.



ITN Process

What to Expect – Negotiator Support

Negotiators may need administrative support throughout the process, or may choose to engage SMEs.

Examples of negotiator administrative support include, but are not limited to:

- Developing detailed use cases for the negotiations;
- Managing changes to the business requirements in the business requirements repository;
- Proof-reading contract-related documents; and
- Verifying mathematical calculations in reports.



ITN Process

What to Expect – Negotiator Support

Examples of SME support include, but are not limited to:

- Providing expert factual information to the negotiators as requested (obtain information, documentation, or expertise);
- Participating in negotiations and strategy meetings as requested;
- Providing one-on-one technical/program information or assistance, as needed; and
- Answering factual questions related to the ITN, which could include statement of work, technical or functional requirements, or project execution.

A SME may not serve as a conduit for exchanging information among negotiators.

A SME should not opine as to which respondent is better. A SME should not attempt to influence the negotiators to recommend a particular respondent.

SMEs are not decision makers.



ITN Process

What to Expect – Selecting a Respondent

The negotiators will recommend awarding “the contract to the responsible and responsive vendor that the agency determines will provide the best value to the state, based on the selection criteria.” section 287.057(1)(c)4., F.S.

Best value is defined as “...the highest overall value to the state based on factors that include, but are not limited to, price, quality, design, and workmanship.” section 287.012(4), F.S.

The minimum selection criteria to be considered are listed in section 4.3.4 of the ITN. The ITN permits the negotiators to modify or add to the selection criteria as long as the modifications are disclosed to respondent(s) engaged in negotiations. Negotiators may find, as they hear from different respondents, that additional considerations may be valuable.

The entire negotiation process is working towards determining best value. Throughout the process, negotiators should be learning about the solutions and how they fit the Department’s and the state’s needs.



ITN Process

What to Expect – Selecting a Respondent

When negotiators are ready, one or more public meetings will be scheduled for negotiators to discuss best value to the state.

In a public meeting, negotiators will determine which reply provides best value to the state. Negotiators should have a full and open conversation about best value and the reasons for the decision.

The ITN explains that negotiators will not numerically score respondents or their replies. The final decision of which respondent will be recommended for award may be made by a majority vote of the negotiation team.

Members of the public will have an opportunity to give public comment at the beginning of the meeting in which best value is determined. The Department and negotiators are not required to directly respond to the comments.



ITN Process

What to Expect – Recommendation and Intent to Award

Once the negotiation team votes to recommend a respondent for award, a memorandum will be prepared and presented to the Department's head or designee for consideration.

The results of the Department's head or designee's decision will be documented in a notice of intent to award.

The notice of intent to award will be posted on the Vendor Bid System (VBS).



ITN Process

What to Expect – After Award

Once the intent to award is posted, respondents have 72 hours in which to file a notice of intent to protest before the Department can proceed with contract execution.

If a notice of intent to protest is filed, the protester will have 10 days from the notice of intent to protest to file the formal written protest and protest bond. If there is a formal written protest, a stay of the contract award will be imposed.

If there is a protest, negotiators will likely be called for depositions and to testify at a hearing. It is possible that anyone from the Florida PALM team or SMEs could also be called to testify.

Department (DFS) legal counsel will provide further instructions and information if a protest occurs.



Legal Considerations in ITNs

Legal Standards

To receive a contract award, a respondent must be responsive and responsible.

A responsive respondent is one whose reply conforms in all material respects to the solicitation. The Department may waive minor irregularities in a reply. Minor irregularities do not affect the price and they do not give one respondent an unfair competitive advantage.

A preliminary responsiveness determination was completed prior to establishing the competitive range.



Legal Considerations in ITNs

Legal Standards

A respondent is responsible when it has the capability in all respects to fully perform the contract requirements and the integrity and reliability that will assure good faith performance.

Responsiveness or responsibility may be determined at any time.

If anything arises during the negotiation process that raises a question of whether a respondent is responsive or responsible, bring the issue to the attention of the Program Lead.



Legal Considerations in ITNs

Legal Standards

If there is a protest of the intended award, an Administrative Law Judge from the Division of Administrative Hearings will determine whether the intended action is contrary to:

- the agency's governing statutes;
- the agency's rules or policies; or
- the solicitation specifications.



Legal Considerations in ITNs

Legal Standards

The protester of an intended decision has the burden of proving by a preponderance of the evidence that the Department's proposed agency action is clearly erroneous, contrary to competition, arbitrary, or capricious and therefore invalid. section 120.57(3)(f), F.S.

Agency action is clearly erroneous when, after review of the entire record, the tribunal is left with the definite and firm conviction that a mistake has been committed.

Agency action is contrary to competition if it unreasonably interferes with the objectives of competitive bidding.

Agency action is arbitrary if it is not supported by facts or logic.

Agency action is capricious if the agency takes the action without thought or reason or the action is irrational.



Legal Considerations in ITNs

Legal Standards

Fair and open competition is required.

Fair and open competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically. See section 287.001, F.S.

When conducting negotiations and making the best value determination, negotiators are directed to adhere to what is in the ITN, statutes, and relevant rules and policies. The ITN has been written very broadly to provide flexibility to the negotiation team, but if there are any concerns, inform the Program Lead. Refer back to the ITN often for direction.

Keep these legal standards in mind throughout the process and treat respondents fairly.



General Roles and Responsibilities

Purchasing Agent – Laura Jennings, DFS Purchasing Director

- Acts as the sole point of contact for the respondents outside of negotiations;
- Acts as the sole point of contact for public records requests related to the procurement;
- Maintains the official procurement file;
- Posts notices on the VBS, including public meetings; and
- Convenes and records public meetings, negotiations, negotiation strategy meetings, and manages confidential recordings as needed.



General Roles and Responsibilities

Program Lead – Stuart Potlock

- Obtains signed Attestation of No Conflict form from each negotiator and provides the forms to the Purchasing Agent;
- Acts as the point of contact for the negotiators during the negotiation phase;
- Provides replies and other materials to the negotiators;
- Coordinates with Purchasing Agent;
- Coordinates negotiation sessions, negotiation strategy sessions, and public meetings with the negotiation team; and
- Coordinates/trains SMEs as needed.



General Roles and Responsibilities

Florida PALM Project Director – Melissa Turner

- Acts as the sole point of contact for the Florida PALM Project team;
- Provides guidance to the Program Lead and the Florida PALM Project team; and
- Works in conjunction with Program Lead to coordinate access to SMEs.



General Roles and Responsibilities

Negotiators

- Sign an Attestation of No Conflict upon appointment, pursuant to sections 112.311 through 112.3261, F.S.;
- Disclose any appearance of conflict of interests to the Program Lead;
- Read the ITN and all ITN addenda and be familiar with the objectives and needs of DFS;
- Read the replies of the respondents selected for negotiations; and
- Contact the Program Lead with requests of the Florida PALM team or questions related to the negotiation process.



General Roles and Responsibilities

Negotiators (continued)

- Participate in negotiation sessions with respondents to determine final agreed-upon contract terms;
- Participate in negotiation team strategy sessions;
- Participate in the IRR and/or BAFO processes;
- Modify or add selection criteria as specified in section 4.3.4 of the ITN; and
- Participate in a public meeting(s) to determine which respondent provides the best value to the state.



General Roles and Responsibilities

SMEs

- Have expertise in a particular subject matter;
- Review relevant parts of the ITN and replies and other materials, when appropriate;
- Provide clarification about the ITN, when appropriate; and
- Communicate with Project staff at the direction of the Project Director to clarify functional, technical, or other requirements.



General Roles and Responsibilities

SMEs (continued)

- Communicate with negotiators in negotiations or negotiation strategy sessions to clarify relevant information and provide factual information;
- Communicate with a negotiator one-on-one as needed to clarify relevant information;
- Contact the Project Director with a procurement or contracting question; and
- Answer factual questions from individual negotiators, but may not speak with more than one negotiator at the same time unless in a negotiation or strategy session.



Sunshine Law

The negotiation team is subject to the Sunshine Law.

All communications between negotiators about the procurement must take place in a public meeting or in a properly recorded “shaded” meeting. A shaded meeting is a meeting that can take place without admitting the public, but the meeting must be recorded and the recording becomes public after the notice of intent to award is issued.

Negotiations are shaded meetings. All discussions in negotiations must be recorded.

Negotiators cannot communicate with other negotiators about the procurement outside of a public or shaded meeting. This includes in person, by phone, by email, text messages, through another person, or by any other means.



Sunshine Law

Violation of the Sunshine Law

A violation of the Sunshine Law could result in the contract award being found null and void.

A Sunshine Law violation may be cured (fixed) by holding a public meeting in which all matters discussed outside of a public meeting are fully discussed in the sunshine. There must be a full discussion.

A negotiator should alert the Program Lead if they think they may have inadvertently violated the Sunshine Law so legal counsel can determine whether a violation occurred and whether a meeting should be held to cure any possible violation.



Sunshine Law

Negotiation Strategy Sessions

The negotiation team may have periodic meetings to discuss strategies about negotiations.

Negotiation strategy meetings are subject to the following:

- They are not open to the public;
- They must be recorded; and
- The recording becomes public after the notice of intent to award is issued.

Florida PALM team members and SMEs may be asked to provide information for these meetings or participate in these meetings by providing factual information to the negotiators.

The purpose of these meetings is to discuss strategies. One or more public meetings will be held to discuss who provides the best value to the state.



Sunshine Law

Public Meetings

- Public meetings are open to the public.
- The Department will allow public comments at the beginning of the meeting in which best value is determined.
- The negotiators and the Department need not directly respond to the comments.
- Public meetings will be recorded or minutes will be taken.



Sunshine Law

SMEs

A SME may be asked to:

- Attend negotiations and negotiation strategy sessions and provide factual information and clarification to the negotiators; and
- Provide factual information and clarifications to an individual negotiator, one-on-one.

A SME may not:

- Relay information from a one-on-one conversation with a negotiator to any other negotiators. A SME cannot act as a go-between for negotiators to share information outside of a public or shaded meeting; or
- Act as a negotiator. SMEs only provide factual information and should not be making decisions or giving advice about which respondent should be recommended for contract award.



Sunshine Law Communications

The chart on the following page provides a good practice guideline of who can communicate about the procurement. This chart relates to communications about the procurement and the negotiations, but should not be interpreted to prohibit communications necessary for any person's day-to-day responsibilities related to the project. While some communications may not be Sunshine Law violations, we want to avoid the appearance of impropriety.

This chart is intended to provide a guideline to avoid violating the Sunshine Law and for good practices. However, if a negotiator believes he or she needs to speak to someone about the ITN not explicitly authorized in the chart below, check with the Program Lead for instructions. Any person can talk to DFS' designated attorney one-on-one.

Any questions about the procurement from anyone not listed on the chart should be directed to the Project Director.



Sunshine Law Communication Guidelines

	Respondents	Purchasing Agent	Program Lead	SMEs	Negotiators	Project Director
Respondent	N/A	YES	NO, except in recorded sessions or public meetings	NO, except in recorded sessions or public meetings	NO, except in recorded sessions or public meetings	NO
Purchasing Agent	YES	N/A	YES	YES, about admin. matters	YES, about admin. matters	YES
Program Lead	NO, except in recorded sessions or public meetings	YES	N/A	YES, about admin. matters	YES	YES
SME	NO, except in recorded sessions or public meetings	YES, about admin. matters	YES, about admin. matters	YES, but not be a conduit between negotiators	YES, one negotiator at a time	YES
Negotiator	NO, except in recorded sessions or public meetings	NO	YES	YES, a negotiator may talk to one or more SMEs	NO, except in recorded sessions or public meetings	YES, one at a time
Project Director	NO	YES	YES	YES	YES, one at a time	N/A



Public Records

Most documents relating to this procurement are public records pursuant to the Chapter 119, F.S. (the Public Records Act). This includes:

- Hard copies of documents;
- Electronic copies of documents (including documents in SharePoint or any other collaborative tool);
- Emails;
- Recordings; and
- Text messages.

All requests for documents or information related to the procurement, including replies, should be forwarded to the Purchasing Agent as soon as possible.



Public Records

Temporarily Shaded Information

- Respondents' replies and the information in the replies, including materials provided during negotiations and any IRRs or BAFOs, are exempt from disclosure under the public records statutes until the Department provides notice of an intended decision or until 30 days after opening the final replies (which includes BAFOs), whichever is earlier.
- The recording of a shaded meeting and any records presented at a shaded meeting are also exempt from disclosure under public records statutes until the notice of agency decision or until 30 days after opening final replies, whichever is earlier.
- Anyone who has access to the replies or information in the replies must keep the information confidential during the procurement.



Public Records

Litigation - Effect of Public Records Law

If there is a protest, there will likely be broad public records requests. Keep in mind that every document you work on and any email you send/receive may be produced in litigation.

Generally, your personal notes are not public records if you do not share them with anyone. (Note that reading them to someone is sharing them even if the physical document is not provided.) Personal notes ARE, however, discoverable in a bid protest. If you make notes, be aware that they will likely be seen and treat them the way you would any public record.



Public Records

Attorney-Client Relationship

There is no per se attorney-client confidentiality in an agency. There is a limited, temporary exemption for certain documents before and during litigation, but all documents become public when litigation ends. Assume that any communications that you have with the Department's attorneys are public records that must be produced.



Public Records Confidential Information

Some information is confidential and may not be disclosed to the public at all. In accordance with section 812.081(1)(c), F.S., this includes information that an entity labels as trade secret and confidential. A trade secret is:

- any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:
 1. Secret;
 2. Of value;
 3. For use or in use by the business; and
 4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it
- when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

All replies include portions labeled as confidential trade secret.



Public Records Confidential Information

- Data processing software obtained by an agency under a licensing agreement that prohibits its disclosure is exempt from disclosure under the public records statutes, as is agency-produced data processing software that is “sensitive.” (section 119.071(1)(f), F.S.)
- Data processing software includes the programs and routines used to employ and control the capabilities of data processing hardware, including, but not limited to, operating systems, compilers, assemblers, utilities, library routines, maintenance routines, applications, and computer networking programs. (section 119.011(6), F.S.)
- The software, including specifications and documentation, is sensitive when it is used to: 1) collect, process, store, and retrieve information that is exempt from section 119.07(1), F.S.; 2) collect, process, store, and retrieve financial management information of the agency, such as payroll and accounting records; or 3) control and direct access authorizations and security measures for automated systems. (section 119.011(14), F.S.)



Public Records

Protecting Confidential Information

To protect against the unintentional disclosure of confidential information, all communications and documents that may include confidential information should be labeled as “UNREDACTED.”

If records are requested, this signifies to the person producing records that the record will need to be reviewed, and confidential information will need to be redacted.

If you are unsure whether the document includes confidential information, include the word UNREDACTED.

Keep in mind that you may be working with the unredacted versions of the replies, so you may not know something has been labeled as confidential.

If you have any personal notes that contain confidential information, please label them UNREDACTED.



Public Records

Discussing Confidential Information in Meetings

In recorded strategy meetings or negotiations, if any confidential information is going to be discussed, the recording must be stopped and that portion of the meeting will be taped separately and will be labeled confidential.

If a meeting is stopped to discuss confidential information, negotiators should label their notes **CONFIDENTIAL** for the confidential portions of the recording.



Florida Cybersecurity Standards

Rules 74-2.001 through 74-2.006, Florida Administrative Code, are the Florida Cybersecurity Standards. If you are handling data related to the replies, you should be familiar with these rules.



Questions

- ▶ Any Questions?

