



John A. Carey
Inspector General

OFFICE OF INSPECTOR GENERAL PALM BEACH COUNTY

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Exempt Purchases that deviate from the Competitive Solicitation Process: Emergency, Piggybacking, and Sole Source Purchasing



Overview

Governmental entities often utilize a competitive solicitation¹ in order to secure fair competition upon equal terms to all prospective bidders. Statutes, ordinances, policies, and regulations (“governing directives”), however, may also identify circumstances when the governmental entities may forgo competitive procurement practices and utilize an exempt, non-competitive method.



This *Tips and Trends* focuses on three common exemptions from competitive procurement: emergency purchases, piggybacking, and sole source purchases. The governing directives authorizing governmental entities to use non-competitive methods to acquire goods and services often define the terms “emergency purchase”, “piggyback,” or “sole source” purchase and set forth the specific circumstances justifying their use. The governmental entity should review its governing directives when evaluating whether a competitive solicitation is appropriate or whether the purchase qualifies for one of the exempt, non-competitive methods.

¹ Competitive solicitations include invitations to bid, requests for proposals, and invitations to negotiate.

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Emergency Procurements

The National Institute of Government Procurement (NIGP) defines emergency purchases as “a purchase made due to an unexpected and urgent request where health and safety or the conservation of public resources is at risk.”² Governmental entities must review its own governing directives to determine the definition of and requirements for the use of emergency purchases.

It is important that the governmental entity considers the timeframe for administering a procurement from start to finish to ensure that the circumstances relating to the purchase truly constitutes an emergency purchase as defined in applicable governing directions, and not merely a failure to properly plan. The use of a timeline and documenting the legal and factual justification for determining that the purchase meets the definition of an “emergency purchase” could minimize the risk of misusing the emergency purchase method.

Sole Source Procurements

Generally, NIGP defines “sole source” as, a “non-competitive method of procurement used when only one supplier possesses the unique ability or capability to meet the particular requirements of the entity or when only one supplier is practicably available.”³

Maintaining integrity and transparency is an important goal with all public procurement. Below are some best practice tips that would assist governmental entities with maintaining integrity and transparency when using the sole source procurement method.

SCENARIO

A department knows what it wants to purchase and has a favored vendor in mind. However, there are four or five potential suppliers. Based on past success with the favored vendor, the department acquires the commodity from the favored vendor via a sole-source acquisition. The department did not comply with the rules established by its entity.

PROBLEM: Misuse of sole source procurement method, and providing unfair advantage to favored vendor that could lead to legal risk to the entity from the other potential suppliers.

SOLUTION: Know your entity's rule on exempt purchases, and offer training.



²Jack Pitzer and Khi Thai, Introduction to Public Procurement Third Edition (NIGP: The Institute of Public Procurement, 2009), P. 135.

³ Jack Pitzer and Khi Thai, Introduction to Public Procurement Third Edition (NIGP: The Institute of Public Procurement, 2009), P. 134.

Consider including the following in the purchasing file:

- evidence of due diligence in conducting market research regarding goods or services that could meet the governmental entities' needs;⁴
- verify that the good or service cannot be sourced from multiple providers or vendors; and
- justification from the end user stating why a sole source provider's goods or service is an appropriate solution to fulfill the entity's needs.⁵

Transparency increases when governmental entities document the rationale and intent of procurement decisions and maintain records that include the justification for using a competitive or non-competitive purchasing method. A trend that some entities are moving towards, that supports the goal of transparency, is to provide public notice and post the sole source award. This trend allows other possible supplier(s) to notify an entity that they offer the same product and challenge the sole source award.

Piggybacking Procurements

"Piggyback procurements" are a form of cooperative purchasing allowing a governmental entity to access goods or services in similar size, scope, and price as contracted by another governmental entity. A governmental entity wishing to utilize the piggybacking procurement method should determine whether its own governing directives allow for piggybacking, ascertain whether the vendor and underlying contract permit piggybacking, and follow the piggybacking process applicable to it. Additionally, the governmental entity should exercise due diligence when deciding whether piggybacking is in its best interest by performing market research, assessing the needs of the entity, and conducting a thorough review of the originating entity's contract to ensure that the scope of the goods and services within the contract will satisfy its needs.

The benefits of piggybacking include saving time, effort, and cost in comparison to administering a formal solicitation. However, recognizing the fact that the piggybacking policies and procedures differ from entity to entity, it is imperative to ensure proper application of your entity's piggybacking procedures when utilizing the piggyback procurement method.⁶

⁵ National Association of State Procurement Officials Procurement Toolbox Issue 4:" Solicitation Methods Page 2.

⁶ Pennington, R. (2012). 'Piggybacking' on the Law (of Piggybacking). *Govpro Hot Topics Legal Pro - NIGP Online Magazine, December/January 2012*, 7-8. [Accela, Inc. v. Sarasota County, 993 So. 2d 1035 (Fla.App.2 Dist.2008)]

Recommendations

We recommend that local governmental entities:

- Review the statutes, ordinances, policies, or regulations governing their acquisition of goods and services to determine whether a competitive process must be utilized or whether the purchase qualifies for one of the exempt, non-competitive methods,
- Stay abreast of changes to applicable statutes that may require revisions to local ordinances, policies, or regulations to ensure compliance and consistency
- Regularly train procurement staff on the requirements for competitive solicitations and exempt procurement methods; and
- Document the rationale and intent of procurement decisions and maintain records that include the justification for using a competitive or non-competitive purchasing method.

