

**COUNTY OF ORANGE  
PROCUREMENT POLICY**

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## **PART I. PURPOSE**

Pursuant to New York State General Municipal Law ("General Municipal Law") §104-b, "to assure the prudent and economical use of public moneys in the best interests of the taxpayers,...to facilitate the acquisition of goods and services of maximum quality at the lowest possible cost under the circumstances, and to guard against favoritism, improvidence, extravagance, fraud and corruption", the following County of Orange ("County") Procurement Policy is applicable to procurements not subject to competitive bidding under General Municipal Law §103.

## **PART II. AUTHORIZATIONS**

### **A. Procurement and Award Authorization**

Unless this Policy, or a delegation of solicitation and contracting that is approved by the County Executive and promulgated by the Commissioner of the Department of General Services ("DGS") pursuant to Section 27.02(3) of the Orange County Charter, provides otherwise, the procurement and award of all Commodities, Equipment, Technology and Services (including Professional Services and Public Works) shall be the responsibility of the Commissioner.

### **B. Supersession of Legal Authorizations**

1. All procurements under this Policy, shall be made in accordance with the version of the law, regulation, guidance or funding requirement, as may be referred to in this Policy, applicable at the time of the procurement (i.e. as may be amended from the original version referenced in this Policy).
2. Procurements may also be made in accordance with any other lawfully authorized manner, including, but not limited to, federal or New York State statutory or regulatory authorizations, existing or future, regardless of whether they are mentioned in this Policy, as determined by the Commissioner in consultation with the County Attorney.
3. If a procurement is made under this policy (as opposed to via any other lawful manner), the failure to observe any notice, recordkeeping or formality shall not render the procurement invalid provided the Commissioner, in consultation with the County Attorney, determines that the failure did not lead to favoritism, improvidence, extravagance, fraud and/or corruption in the procurement.

### **C. Authorization to Require Use of Countywide Purchase Orders and Contracts**

1. Per §27.02(8) of the Orange County Charter, the Commissioner reserves the right to require solicitation and procurement of any type of Commodities, Equipment, Technology and Services (including Professional Services and Public Work) by one Unit of Government for all or several Units of Government in the aggregate, upon the approval of the County Executive, and all such Units of Government shall be required to use the Countywide purchase order or contract once the current term of any Unit of Government's purchase order or contract for the same Commodity, Equipment, Technology or Service expires.
2. The costs for the Commodities, Equipment, Technology and Services procured shall accrue to each end user Unit of Government, or as may otherwise be directed by the County Executive, regardless of which Unit of Government administers the Countywide purchase order or contract.

**D. Designees**

References to positions or titles including, but not limited to: Commissioner, County Executive, County Attorney, or Department Head shall be construed to mean the right, duty or action associated with that position may also be performed by an authorized designee.

**E. Compliance**

Compliance with this Policy and any related procedures for such purchases will be the responsibility of the Procuring Agency and DGS, each with respect to their roles in the process as outlined in this Policy.

**PART III. DEFINITIONS**

The definitions below are for terms as used in this Policy. References to laws or regulations may indicate the source on which the definition is modeled but, should not be construed to imply expansion of applicability of that law or regulation to anything other than that which is specifically governed by that law or regulation.

**A. Building Service Work.**

Means services (which may also include the supply of Commodities, Equipment, and/or Technology) currently subject to Article 9 of the New York State Labor Law ("Labor Law") and as may be further determined by New York State Department of Labor. Procuring Agencies may confer with the Commissioner and the County Attorney on any questions or concerns regarding categorization of Building Service Work procurements.

**B. Commodity or Commodities.**

"Means material, goods, supplies, products, construction items, electronic information resources or other standard articles of commerce, which are the subject of any purchase or other exchange". (Cf. New York State Finance Law ("State Finance Law") §160(3)).

**C. Commissioner.**

Means the Commissioner of the Department of General Services.

**D. Contract Administrator.**

Means the staff or individual in a Procuring Agency that assists with procurement (i.e. personnel that handle contract management for their department).

**E. Contractor.**

Means an entity (e.g. vendor, consultant, supplier, lessor) that is supplying Commodities, Equipment, Technology or Services to the County under a purchase order or contract (including leases or rental agreements) but, does not include a Subrecipient.

**F. Department Head.**

Means a Commissioner, Director or other head of a "Unit of County Government" as defined in Part III(W) of this Policy.

**G. Equipment.**

Means tangible personal property (including Technology) having a useful life of more than one year and a per-unit acquisition cost which equals or exceeds five hundred dollars (\$500.00). (See 2 CFR §200.33).

**H. Federal Competitive Proposal.**

Means Federally-Funded procurements conducted in accordance with 2 CFR §200.320(d).

**I. Federally-Funded.**

Means activities financed through federal funding awards, **including federal funding passed through New York State or another entity to the County.**

**J. Federal Micro-Purchase.**

Means a Federally-Funded procurement conducted in accordance with 2 CFR §200.320(a). The Micro-Purchase threshold is set by 48 CFR §2.101 and, per Presidential Memo 18-18, is currently \$3,500, with certain exceptions. Presidential Memo 18-18 allows use of a \$10,000 threshold in certain instances as of June 20, 2018 and regulatory updates pursuant to this memo are anticipated in 2018. Consult with the County Attorney on questions regarding thresholds.

**K. Federal Noncompetitive Proposal.**

Means Federally-Funded procurements conducted in accordance with 2 CFR §200.320(f). (*See also* Part XI. [Sole or Single Source Procurement] of this Policy).

**L. Federal Sealed Bid.**

Means Federally-Funded procurements conducted in accordance with 2 CFR §200.320(c).

**M. Federal Small Purchase.**

Means Federally-Funded purchases that do not cost more than the Simplified Acquisition Threshold (“SAT”) (as defined in Part III(T) of this Policy) and which are conducted in accordance with 2 CFR §200.320(b).

**N. Procurement Record.**

Means documentation of the decisions made and the approach taken in the procurement process. (*Cf.* New York State Finance Law 163(1)(f) and *See also* Part XXV of this Policy.)

**O. Procuring Agency.**

Means the Unit of County Government (as defined in Part III(W) of this Policy) procuring a Commodity, Equipment, Technology or Service.

**P. Professional Services.**

Are a subset of the general category Services, further defined in Part X of this Policy.

**Q. Public Work.**

Means services (which may include the supply of Commodities, Equipment and/or Technology) currently subject to Article 8 of the Labor Law and as may be further determined by New York State Department of Labor. Procuring Agencies may confer with the Commissioner and the County Attorney on any questions or concerns regarding categorization of Public Work procurements.

**R. Purchase Contract.**

Means procurements of Commodities, Equipment, Technology or Services (including Building Service Work), except for Public Work and Professional Services.

**S. Service or Services.**

Means the performance of a task or tasks, which may also include supply of Commodities, Equipment or Technology as part of the procurement. Unless otherwise specified, Services include Professional Services, Building Service Work, Public Work and all other types of Services.

**T. Simplified Acquisition Threshold (SAT)**

Means the amount set forth at 48 CFR 2.101. In October of 2018, with certain exceptions as per 48 CFR 2.101(1) and (2), the SAT, as authorized by the National Defense Authorization Act for FY 2018 and Presidential Memo 18-18, is \$250,000. Presidential Memo 18-18 anticipated regulatory updates pursuant to the memo in 2018.

**U. Subrecipient.**

Means an entity receiving from the County a subaward of State, Federal or other funds to carry out a State, Federal or other program. (Cf. 2 CFR §200.93).

**V. Technology.**

“Means either a good or a service or a combination thereof, that results in a technical method of achieving a practical purpose or in improvements in productivity. Goods may be either new or used.” (Cf. State Finance Law §160(10)).

**W. Unit of County Government or Unit of Government.**

“Means any part of the County Government, including Officers thereof [as well as the Legislature] and any quasi-independent agency, board, commission or committee receiving County funds or on a budgeted basis by appropriation”, unless such unit is required to enact their own Procurement Policy pursuant to New York State law. (Orange County Charter § 1.05(x)).

**PART IV. APPLICABILITY OF ETHICS AND CONFLICTS OF INTEREST LAWS AND REGULATIONS**

**A.** The County Ethics Law<sup>1</sup> and New York State General Municipal Law Article 18 Conflicts of Interest of Municipal Officers and Employees, are applicable to all procurement and funding<sup>2</sup> activities carried out by County officials, officers, employees and contractors. Conflicts between these two laws shall be resolved pursuant to Section 13 of the County Ethics Law.

**B.** In addition, for Federally-Funded procurements, 2 CFR §200.318(c) shall be applicable.

**PART V. APPLICABILITY OF FUNDING SOURCE REQUIREMENTS**

**A. Conflicting Requirements**

Unless the funding source (i.e. any funds other than County taxation, including but not limited to discretionary, block and entitlement grants) for a procurement requires otherwise, procurements not subject

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<sup>1</sup> Local Law No. 1 of 2017, with Appendix A amended by Resolution No. 293 of 2016 and Resolution No. 350 of 2017.

<sup>2</sup> Federal Regulations in 2 CFR Part 200 Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards and 2 CFR Part 180 OMG Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) distinguish between “procurement” and “nonprocurement” activities, the latter of which includes grants and subawards, such as a grant received from a federal agency by the County, or a “contract” (which may be considered a “subaward” under 2 CFR §200.92) with a not-for-profit agency to implement a federal program on behalf of a County department. In terms of federal regulations, such a subaward to a not-for-profit would be a “nonprocurement” activity, even though this Policy may require a RFP for issuance of a subaward. The use of “procurement and funding activities” is meant to encompass what are considered “nonprocurement” activities under federal regulations to allow this reference to the applicability of the County Ethics Law and Article 18 of General Municipal Law.

to competitive bidding under General Municipal Law §103 must be made in accordance with this Policy. **If funding source guidelines conflict with this Policy, Contract Administrators should generally use the more stringent requirements (unless prohibited by the other requirements) and, with respect to any questions, confer with the Commissioner and the County Attorney prior to soliciting the procurement.**

## **B. Federal Funding Requirements**

1. For Federally-Funded procurements made on or after January 1, 2018, the County will comply with the procurement standards in 2 CFR Part 200. Procurements prior to that date are subject to the previous federal procurement standards.

2. In addition to the requirements of any federal award or state subaward for pass-through of federal funding (including, but not limited to, terms and conditions of funding agreements or program regulations), the General Procurement Standards found in 2 CFR §200.318 are applicable to all procurements subject to federal funding, unless exempted from such regulations. For exemptions, refer to the section for the Catalog of Federal Domestic Assistance (“CDFA”) number for the funded program in the applicable annual publication(s) of the Appendix XI Compliance Supplement to 2 CFR Part 200 for information on which federal regulations are applicable to a funded program. The Compliance Supplements are available at: <https://www.whitehouse.gov/omb/management/office-federal-financial-management/>

### 3. Pre-Procurement Requirements for Federally-Funded Procurements

When planning a Federally-Funded procurement, in addition to any other guidance in this Policy or the Procurement Manual (See Part XXVI of this Policy), Procuring Agencies must also observe the following guidelines:

- a. Procuring Agencies “must avoid acquisition of unnecessary or duplicative items” (2 CFR §200.318(d));
- b. “Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase” and encourage MWBE and DBE participation, however, breaking out a procurement must NOT be used to circumvent use of the applicable procurement method when applied to the overall spend for that procurement (2 CFR §200.318(d));
- c. Make an analysis of “lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach” (2 CFR §200.318(d));
- d. “To foster greater economy and efficiency, and...promote cost-effective use of shared services,...enter into intergovernmental or inter-entity agreements where appropriate for procurement or use of common or shared goods and services” (2 CFR §200.318(e));
- e. “Use federal excess and surplus property in lieu of purchasing new Equipment and property whenever such use is feasible and reduces contract costs” (2 CFR §200.318(f));
- f. “Use value engineering clauses in contracts for construction project of sufficient size to offer reasonable opportunities for cost reductions” (2 CFR §200.318(g));
- g. Use time and materials contracts only when the requirements of 2 CFR §200.318(j) are met;

- h. When the procurement of an item designated under 40 CFR Part 247 (currently including, but not limited to: paper and paper products, vehicular products, construction products, transportation products, park and recreation products, landscaping products, non-paper office products and miscellaneous products), “exceeds \$10,000, or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000,” the procurement must comply with Section 6002 of the Solid Waste Recovery Act, as amended by the Resource Conservation and Recovery Act, including implementing regulations at 40 CFR Part 247 (2 CFR §200.322). Specifications for such procurements “should contain the highest level of recovered materials practicable, consistent with maintaining a satisfactory level of competition” (2 CFR §200.322). The level of recovered materials specified shall be at least the minimum level for total recovered content noted for that material in the applicable United States Environmental Protection Agency “Product Resource Guide” available here:

<https://www.epa.gov/smm/product-resource-guides-comprehensive-procurement-guideline-cpg-program>

A Product Supplier Directory is available here:

<https://www.epa.gov/smm/comprehensive-procurement-guideline-cpg-program>

However, as always, Procuring Agencies should also forward solicitations to any other potential sources they find through internet research, trade associations or MWBE directories, etc.

For questions on this sourcing requirement, please consult with the Commissioner and the County Attorney.

- i. When a procurement exceeds the SAT, **PRIOR TO SOLICITATION**, the Procuring Agency or the DGS must perform a cost and price analysis, which, at a minimum, should include an independent estimate (2 CFR §200.323(a));
- j. **When a procurement has no price competition (i.e. Federal Noncompetitive Proposal per 2 CFR §200.320(f)) or a cost analysis has been performed (i.e. for procurements in excess of the SAT)), profit must be negotiated as a separate element of price per 2 CFR §200.323(b).** This means solicitations must be designed to require profit to be separately indicated in the bid or cost proposal. “To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the [C]ontractor, the [C]ontractor’s investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work” (2 CFR §200.323(b)). For questions on profit specification requirements or evaluating and negotiating profit, please consult with the Commissioner.
- k. Costs plus percentage of cost and percentage of construction cost methods of contracting are not permitted (2 CFR §200.323(d)).
- l. Federal awarding agencies or a pass-through entity (i.e. New York State) may require Procuring Agencies to provide specifications, solicitation documents, or independent cost estimates for review **PRIOR TO SOLICITATION** (2 CFR §200.324(a) and (b)). Circumstances in which this may occur are listed in 2 CFR §200.324(b). However, the certifications of procurement systems noted in 2 CFR §200.324(c) **MUST NOT** be undertaken by a Procuring Agency without specific written approval by both the Commissioner and the County Attorney.



m. Competition in Federally Funded Solicitations

1. To ensure full and open competition in Federally-Funded procurements (including federal funds received by pass-through from New York State) the following requirements from 2 CFR Part 200 shall apply to solicitations for such procurements:

- a. Solicitations “must identify all requirements which [potential Contractors] must fulfill and all other factors to be used in evaluating bids or proposals” (2 CFR §200.319(c)(2)).
- b. Specifications “may include a statement of the qualitative nature of the [Commodity, Equipment, Technology or Service] . . . and, when necessary, must set forth those minimum essential characteristics and standards . . . to satisfy [the] intended use. Detailed product specifications should be avoided if at all possible” (2 CFR §200.319(c)(1)).
- c. If a Contractor “develops or drafts specifications, requirements, statements of work”, requests for quotes, bids or proposals for a competitive procurement, “that Contractor must be excluded from competing for that procurement” either as a prime contractor or a subcontractor (2 CFR §200.319(a)). However, to the extent permissible under 2 CFR Part 200, this exclusion requirement shall not apply to:
  - i. Procurements subject to Professional Services exemptions, Sole/Single Source procurements, Emergency procurements, or Piggyback procurements; or
  - ii. When the County has obtained Contractor specifications from a website, trade show, publication or similar generally available resource, or a Contractor has furnished, at County request, commonly available standard specifications or information regarding a product or service they provide, but such Contractor has not been directly requested to write specifications for a solicitation.

2. Per 2 CFR §200.319(a), factors considered to restrict competition include, but are not limited to:

- a. “placing unreasonable requirements on [potential Contractors] in order to qualify them to do business” (2 CFR §200.319(a)(1));
- b. “requiring unnecessary experience [or] excessive bonding” (2 CFR §200.319(a)(2)); however, bidders and contractors still must comply with applicable New York State, federal and County bonding requirements;
- c. “non-competitive pricing practices between [potential Contractors]” (2 CFR §200.319(a)(3));
- d. “non-competitive contracts to [Contractors] that are on retainer contracts” (2 CFR §200.319(a)(4));
- e. “organizational conflicts of interest” (2 CFR §200.319(a)(5));
- f. “specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement” (2 CFR §200.319(a)(6));

- g. “any arbitrary action in the procurement process” (2 CFR §200.319(a)(7));
- h. including state, local or tribal geographic preferences unless a federal statute mandates or encourages geographic preference; however, “for architectural or engineering (A/E) services, geographic location may be a selection criterion if this leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract” (2 CFR §200.319(b)); or
- i. using a prequalification list which is not current, “does not include enough qualified sources to ensure maximum open and free competition”, or prohibits potential Contractors from qualifying during a solicitation from the list (2 CFR §200.319(d)).

## **PART VI. PREFERRED SOURCE PROCUREMENT**

**A.** As required by New York State Finance Law §162, except in emergency situations, if the necessary Commodities, Equipment, Technology or Services are available from a Preferred Source provider in the form, function and utility required by the Procuring Agency; the Commodities, Equipment, Technology or Services must be purchased from one of the Preferred Source providers in accordance with the current version of the “NYS Procurement Bulletin, Preferred Source Guidelines” (the “Guidelines”) which are maintained by the New York State Procurement Council and available here:  
<https://www.ogs.ny.gov/procurecounc/pdfdoc/psguide.pdf>.

**B.** Procuring Agencies should consult the Guidelines for current Preferred Source procurement procedures as well as any additional guidance materials provided by the New York State Office of General Services (“OGS”), such as the “List of Preferred Source Offerings” currently made available through a hyperlink in the Guidelines. General reference information from OGS pertaining to Preferred Source procurement is available here:  
<https://nyspro.ogs.ny.gov/content/buying-preferred-source-0>.

**C. PRIOR TO SOLICITATION THROUGH ANY OTHER PROCUREMENT METHOD OR FROM ANY OTHER SOURCE,** all procurements must be checked against the current List of Preferred Source Offerings, (always check the URL in Subpart B of this Part VI for an update), and follow the process under the Guidelines applicable to the procurement type.

**D.** New York State laws and regulations governing Preferred Source procurement (including, but not limited to, New York State Finance Law §162 and 9 NYCRR Part 250) shall control over any conflicting provisions in this Policy.

**E.** All questions concerning Preferred Source procurement should be directed to the Commissioner and the County Attorney.

## **PART VII. DETERMINING WHETHER A PROCUREMENT IS SUBJECT TO COMPETITIVE BIDDING**

### **A. Reasonably Expected Countywide Aggregates**

1. Before any solicitation occurs, Contract Administrators need to first determine whether the intended procurement is subject to competitive bidding under General Municipal Law §103. Competitive bidding is required if the reasonably expected countywide aggregate expenditure will exceed the threshold amounts of

\$20,000 for Purchase Contracts (See Part VIII of this Policy) or \$35,000 for Public Work (See Part IX of this Policy) within 12 months of the date of the procurement.

2. Under General Municipal Law §103(1), aggregates must be examined as follows:

Contract Administrators must determine the reasonably expected countywide aggregate amount of all purchases of the same or similar Commodities, Equipment, Technology or Services whether from the same or different Contractor, that will be made within 12 months of the date of the procurement. This means that if your department is purchasing janitorial services (a Purchase Contract for Building Service Work) for \$5,000 on October 13, you need to evaluate whether it is reasonably expected that the entire County will purchase over \$20,000 in janitorial services within 12 months of October 13 or if such amount has been exceeded for these services in the 12 months prior. If it is reasonable to expect the countywide aggregate purchase of all in janitorial services will exceed \$20,000, the \$5,000 in janitorial services for your department must be competitively bid pursuant to General Municipal Law §103.

#### **B. Aggregate Determination**

Artificial division of procurements to avoid the competitive bidding thresholds is prohibited by General Municipal Law §103(1). While it is not easy to examine or guarantee the accuracy of aggregates, the following methods may be useful:

1. Reviewing past use of that Commodity, Equipment, Technology or Service, both from general knowledge and by querying the NIGP code in Oracle;
2. Conferring with the Commissioner and/or staff in departments that are known to use similar Commodities, Equipment, Technology or Services to determine their reasonably expected procurements for the 12 months before or after your purchase; or
3. Noting grant awards or significant projects in other departments (e.g. when they appear in newspapers or the County website or are announced in Department Head, legislative or other meetings) that may involve purchases that could be similar to yours.

### **PART VIII. PURCHASE CONTRACT PROCUREMENT**

#### **A. General Provisions for Purchase Contract Procurements**

The following guidelines apply to all Purchase Contract procurements, whether via contract or purchase order, when the procurement is not an emergency and cannot be made through a Preferred Source or other procurement method authorized under this Policy.

For Purchase Contracts with a reasonably expected countywide aggregate expenditure within 12 months of the date of the procurement in the amount of: Procurement shall be made as follows:

Federally-Funded	For Federally-Funded procurements, the applicable procurement method, in accordance with 2 CFR §200.320 and this Policy must be used. See Part III(H)-(M) and Part V of this Policy for additional information.
\$0 – \$10,000.00	<b>For Commodities, Equipment, and Technology</b> , at the discretion of the Commissioner, and <b>for Services</b> , (all including Federal Micro-Purchases or Federal Small Purchases) at the discretion of the Department Head of the Procuring Agency.
\$10,000.01 – \$19,999.99	Procuring Agencies shall submit the proposed procurement method(s) to the Commissioner for approval <b>prior to solicitation</b> . Procurement methods may include soliciting written quotes from at least three (3) separate potential Contractors, if available; or alternative procurement methods, including, but not limited to, Preferred Source, Piggybacking, Sole/Single Source or Emergency Procurement in accordance with applicable provisions of this Policy or otherwise lawfully available pursuant to Part II(B)(2) of this Policy.
\$20,000.00 and up	By sealed competitive bids issued by the Commissioner in conformance with General Municipal Law §103 or via Best Value in conformance with Part XVI of this Policy. As Federal Small Purchase procedures in 2 CFR §200.320(b) are less stringent, Procuring Agencies must use the General Municipal Law §103 or Best Value procedures, as applicable, for any Federal Small Purchases falling into this procurement cost range.

**PART IX. PUBLIC WORK PROCUREMENT**

**A. General Provisions for Public Work Procurements**

The following guidelines apply to all Public Work procurements, whether via contract or purchase order, when the procurement is not an emergency and cannot be made through a Preferred Source or other procurement method authorized under this Policy.

For Public Works with a reasonably expected countywide aggregate expenditure within 12 months of the date of the procurement in the amount of:

Procurement shall be made as follows:

Federally-Funded

For Federally-Funded procurements, the applicable procurement method, in accordance with 2 CFR §200.320(c) and this Policy must be used. See Part III(H)-(M) and Part V of this Policy for additional information.

\$0 – \$10,000.00

At the discretion of the Department Head of the Procuring Agency.

\$10,000.01 – \$34,999.99

Procuring Agencies shall submit the proposed procurement method(s) to the Commissioner for approval **prior to solicitation**. Procurement methods may include soliciting written quotes from at least three (3) separate potential Contractors, if available; or alternative procurement methods, including, but not limited to, Preferred Source, Piggybacking, Sole/Single Source or Emergency Procurement in accordance with applicable provisions of this Policy or otherwise lawfully available pursuant to New York State Law or Part II(B)(2) of this Policy.

\$35,000.00 and up

By sealed competitive bids issued by the Commissioner in conformance with General Municipal Law §103. As Federal Small Purchases procedures in 2 CFR §200.320(b) are less stringent, Procuring Agencies must use the aforementioned General Municipal Law §103 procedures for any Federal Small Purchases falling into this procurement cost range.

## **B. Wicks Law Requirements**

1. Solicitations for Public Work under the General Municipal Law §101 threshold amount (presently \$500,000, but may be revised pursuant to any State Law) involving a scope of work including a) plumbing and gas fitting; b) steam heating, hot water heating, ventilating and air conditioning apparatus; or c) electric wiring and standard illuminating fixtures, **MUST REQUIRE THE BIDDERS TO SUBMIT A SEPARATE SEALED LIST WITHIN THEIR SEALED BID** with the names and pricing for any subcontractor(s) that will perform Public Work in any of the trades specified above. This separate sealed list shall be opened for only the apparent low bidder, unless that bidder is declared non-responsive or non-responsible, in which case the Procuring Agency shall open the sealed list for the next apparent low bidder and so on.

2. Pursuant to Labor Law §222, contracts subject to Project Labor Agreements are not required to be bid using Wicks Law formatted specifications.

## **PART X. PROFESSIONAL SERVICES PROCUREMENT**

### **A. Determination of Professional Services**

1. Professional Services are defined in New York case law and Comptroller opinions. As a general guideline, Professional Services require specialized or technical skills or expertise, training, licensing or certifications, exercise of judgment or discretion, a high degree of creativity and/or a relationship of personal trust and confidence. Some examples of Professional Services include, but are not limited to, Services provided by: physicians, nurses, therapists, engineers, surveyors, attorneys, artists, designers, photographers, publicity agents, laboratories, and insurance or financial service firms.

2. Procurements that involve both the acquisition of Professional Services and other Services, Commodities, Equipment or Technology (e.g. Equipment or computer software that needs to be customized for the County) do not require competitive bidding if there is an "inextricable integration" between the professional services and the Commodities, Equipment, Technology or other Services required for the procurement. (e.g. design work with printing or installation and maintenance of a security system) (See, *Emergency Services Marketing Corp., Inc. v. County of Orange, et al.* (Supreme Ct., Orange County, December

5, 2017); *Burroughs Corp. v. New York State Higher Education Services Corp.*, 458 N.Y.S.2d 702 (3 Dept. 1983); *Doyle Alarm Co., Inc. v. Reville*, 410 N.Y.S.2d 466 (4 Dept. 1978)). To determine whether the procurement is subject to competitive bidding, one factor to consider is whether the other, so-called, "non-professional" Services, Commodities, Equipment or Technology are predominant or merely incidental. Consult with the Commissioner and the County Attorney to determine whether something is a Professional Service or not.

## **B. Solicitation of Professional Services<sup>3</sup>**

Unless exempted under Part X(C); the following guidelines apply to all Professional Services procurements, whether via contract or purchase order, when the procurement is not an emergency and cannot be made through a Preferred Source or other procurement method authorized under this Policy:

For Professional Services when an individual Procuring Agency estimates an overall expenditure for a type of service, over the term of the purchase order or contract for such service, of:

Procurement, whether via contract or purchase order, shall be made as follows:

Federally Funded

For Federally-Funded procurements (including federal Procurements funds received by pass-through from New York State), the applicable procurement method, in accordance with 2 CFR §200.320(c) and this Policy must be used. See Part II(H)-(M) and Part V(B) of this Policy for additional information.

\$0 - \$25,000.00

At the discretion of the Department Head of the Procuring Agency.

\$25,000.01 – \$99,999.99

Procuring Agencies shall submit the proposed procurement method(s) to the Commissioner for approval **prior to solicitation**. Procurement methods may include soliciting written quotes from at least three (3) separate potential Contractors, if available; or alternative procurement methods, including but not limited to, Preferred Source, Piggybacking, Sole/Single Source or Emergency Procurement in accordance with applicable provisions of this Policy or otherwise lawfully available pursuant to New York State Law or Part II(B) of this Policy.

\$100,000 and up

The Procuring Agency must issue a Request for Proposals ("RFP") through DGS (unless the Commissioner approves issuance by the Procuring Agency directly) that, at a minimum, requires submission of pricing and qualifications by potential service providers.

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<sup>3</sup> As amended by Resolution No. 193 of 2013, effective September 6, 2013, which increased the threshold for Department Head discretion from \$5,000.00 to \$10,000.00 and increased the threshold for written quotes from \$34,999.99 to \$74,999.99, and by Resolution No. 272 of 2017, which increased the threshold for department head discretion from \$10,000.00 to \$25,000.00 and increased the threshold for written quotes from \$74,999.99 to \$100,000.00.

### C. Exemptions from Solicitation for Professional Services

1. Certain types of Professional Services may be exempt from the solicitation process upon approval of the Commissioner. Such an exemption might apply to purchase orders or contracts for Services with set rates for classes of Contractors or for contracts where the County was mandated to use certain Contractors by State or Federal laws, regulations or grant requirements. Examples of such purchase orders or contracts include, but are not limited to, the examples listed below:

**IMPORTANT NOTE: In the case of Federally-Funded purchase orders, contracts or subawards, Professional Services exemptions are only allowable to the extent permissible under any applicable requirements of 2 CFR Part 200, other applicable terms and conditions of a funding agreement, or regulations applicable to the funding agency:**

- a. Purchase orders or contracts with Early Intervention Providers and Pre-School Service Providers certified by the State;
- b. Purchase orders or contracts with third-party agencies hired by the State to pass-through funds for or to implement certain Federal or State programs;
- c. Purchase orders or contracts with properly credentialed Foster Care and Adoption agencies;
- d. Purchase orders or contracts at rates set by federal, state or local agencies (including the County), statute, regulation, or agency guidance, including, but not limited to, the Centers for Medicare and Medicaid Services;
- e. Purchase orders, contracts, subgrants, inter-municipal and similar agreements for Professional Services provided in relation to a State or Federal grant for which the County is the responsible Grantee and the contracted party was identified in the grant or is required to be identified in a plan or other document that must be submitted for mandatory approval by a State or Federal funding entity;
- f. Purchase orders or contracts for the placement of specific advertisements or public service announcements, or a series thereof (including, but not limited to: print, radio, billboards, television or internet advertising), but excluding purchase orders or contracts for general consulting related to advertising and promotional services;
- g. Federally-funded purchase orders or contracts or subawards with providers of employment and training services, or for wage reimbursements, including, but not limited to: On the Job Training Agreements (OJT), Individual Training Accounts (ITAs) for Tuition Reimbursement Agreements, One Stop Provider Agreements, and Summer Youth Employment Program (SYEP) Worksite Agreements;
- h. Purchase orders or contracts for which New York State Office of Mental Health guidance prohibits solicitation or re-solicitation;
- i. Purchase orders or contracts for court transcripts;
- j. Agreements with not-for-profit corporations and other organizations that advance or promote the health, safety and welfare of the people of Orange County. When more than one such

organization provides the same Professional Services, as determined by the Commissioner, then such funding agreement may be subject to a Request for Applications or Qualifications;

- k. Purchase orders or contracts with former employees for transitional consulting;
- l. Purchase orders or contracts for emergency, transitional and supportive housing or beds;
- m. Purchase orders or contracts to implement a program that is jointly funded by the County and an outside agency or entity (i.e., a program in which both the County and/or the outside agency or entity contributes funding or in-kind Services); or
- n. Purchase orders or contracts for existing projects that require the continuity of Professional Services to ensure proper completion of the project.

2. To the extent the Procuring Agency determines the same is exempt based on a-i above, the Procuring Agency may proceed to purchase order or contract without solicitation. Standing justifications for purchase orders or contracts exempt based on a-i above will be kept on file by the Commissioner. All requests for exemptions, except those based on a-i above, require that the Procuring Agency provide written justification in accordance with Part XXII(C) of this Policy to the Commissioner, for review and approval and the Procuring Agency shall maintain the request and approval or denial in the Procurement Record.

## **PART XI. SOLE OR SINGLE SOURCE PROCUREMENT**

### **A. General Provisions for Sole or Single Source Procurement**

1. Sole or Single Source Procurement is an exception to the general rules and policies stated herein, governing the procurement of Commodities, Equipment, Technology and/or Services. Sole or Single Source Procurement may only be used in rare and extraordinary cases where the Commodities, Equipment, Technology or Services sought and required are manufactured, sold or performed by only one entity and/or individual. Sole Source procurements occur when there is only one entity that manufactures a certain good or provides a certain service. Single Source procurements occur when there may be more than one supplier of goods or provider of services but the goods or services may only be obtained from a single entity due to, for example, distribution territory controls set by a manufacturer. Generally, Sole or Single Source Procurements exemptions may apply in the following situations:

- a. Only one company in the world makes and sells a unique good or provides a unique service.
- b. Only one company in this territory can service or maintain the Equipment without voiding the warranty. (Note: This only applies during the warranty period, so a Sole or Single Source exemption cannot be granted after warranty expiration. After warranty expiration, repairs and maintenance must be obtained using the appropriate procurement method under this Policy.)
- c. When a certain type of consumable component (e.g. ink cartridges) must be used to avoid breaching a warranty or a maintenance provision of an equipment lease.
- d. It is a service performed by companies that traditionally have territories (e.g., cable television or certain types of Equipment dealerships).
- e. Software support, licensing, or maintenance (S/L/M) purchase orders or contracts specific to software already in use.



2. **For Federally-Funded sole or single source procurements,** Federal Noncompetitive Proposal procedures per 2 CFR §200.320(f) must be met and noted in the justification required by Subpart (B) of this Part XI.

**B. Sole or Single Source Procurement Exemptions**

1. In determining whether a purchase qualifies for a Sole or Single Source exemption, the Procuring Agency must submit to the Commissioner, a brief written explanation of the procurement and need therefore, including any relevant information on related purchase orders or contracts (e.g., dates, costs, initial procurement method) and then provide an explanation for each of the following three points (See Opns St Comp, 1986 No. 86-25):

- a. The unique benefits to the County of the Commodity, Equipment, Technology, or Service (including Professional Services and Public Works) as compared to other Commodities, Equipment, Technology or Services available in the marketplace;
- b. That no other Commodity, Equipment, Technology or Service provides substantially equivalent or similar benefits and there is no possibility of competition from competing dealers or distributors; and
- c. That, considering the benefits received, the cost of the Commodity, Equipment, Technology or Service is reasonable.

2. No Sole or Single Source purchase will be approved by the Commissioner, without:

- a. written justification from the Procuring Agency responding to points (a) through (c) above; and
- b. supporting documentation on the letterhead of the entity providing the Commodity, Equipment, Technology or Service explaining why they are the Sole or Single Source provider.

**PART XII. EMERGENCY PROCUREMENT**

**A.** General Municipal Law §103(4) defines a "public emergency [as] arising out of an accident or other unforeseen occurrence or condition whereby circumstances affecting public buildings, public property or the life, health, safety or property of the inhabitants [of the County] require immediate action which cannot await competitive bidding or competitive offering". Procurements normally subject to the competitive bidding or best value requirements of General Municipal Law §103, or other competitive solicitation requirements under this Policy, are exempt from such requirements in public emergencies.

**B.** However, when practicable, as determined by the Department Head requesting the emergency procurement, efforts should be made to obtain three (3) written quotes or, if not practicable, three (3) verbal quotes. Procurements in emergency circumstances should be justified in writing by the Department Head of the Procuring Agency and approved in writing by the County Executive.

**PART XIII. LEASES**

Unless otherwise required by the Commissioner, True Leases of Commodities, Equipment, Technology or Services require solicitations from at least three (3) separate potential Contractors, if available. True Leases include leases that do not contain or refer to installment plans, purchase options or otherwise result in the

ownership of the leased Commodity, Equipment, Technology or Service at the expiration of the lease. Please consult with the County Attorney to determine whether something is a True Lease.

#### **PART XIV. SURPLUS PROCUREMENT**

Pursuant to General Municipal Law §103(6), “[s]urplus and second-hand supplies, material or equipment may be purchased without competitive bidding or competitive offering from the federal government, the state of New York or from any other political subdivision, district or public benefit corporation.”

#### **PART XV. PIGGYBACK PROCUREMENT METHODS**

The following “piggyback” procurement methods are available to Procuring Agencies pursuant to the laws cited. “Piggybacking” refers to use of, or participation in, a purchase order or contract let by another entity. Requirements for each piggyback method may be noted in the actual law; related regulations; additional agency, entity or contract guidance; or in an applicable subdivision of this Policy.

##### **A. General Municipal Law §103(1-b) or §104(2) – GSA Contracts**

This piggybacking method allows certain procurements, through certain federal General Services Administration (GSA) schedules, as specified in General Municipal Law §103(1-b) or §104(2), and otherwise in compliance with any applicable requirements of federal or New York State law or regulation or GSA guidance pertaining to the use of such a contract.

##### **B. General Municipal Law §103(3) – Other New York County Purchase Orders or Contracts**

This piggybacking method allows Procuring Agencies “to make purchases of material, equipment or supplies, or to contract for services...through any county within the state”, except for Building Service Work purchase orders or contracts, which are specifically excluded from this authorization. Additionally, since prevailing wages are set by county, to use a Public Work purchase order or contract from another county, the prevailing wages in that purchase order or contract must be equal to or greater than those applicable in Orange County. “Prior to making such purchases or contracts” the Department Head of the Procuring Agency shall document for the Procurement Record whether the procurement “will result in cost savings after all factors, including charges for service, material, and delivery have been considered” (General Municipal Law §103(3)).

##### **C. General Municipal Law §103(8) – Group Purchasing Organizations**

This piggybacking method is available to Procuring Agencies which qualify as a municipal hospital or nutrition program pursuant to General Municipal Law §103(8). Prior to the Commissioner authorizing the use of group purchasing organization contracts or arrangements by a Procuring Agency, group purchasing organizations, and the contracts or arrangements maintained thereunder, shall be vetted for compliance by the Commissioner and the County Attorney.

##### **D. General Municipal Law §103(16) – Other Governmental Purchase Orders or Contracts<sup>4</sup>**

1. This piggybacking method allows “purchases of apparatus, materials, equipment or supplies, or to contract for services related to the installation, maintenance or repair of apparatus, materials, equipment, and supplies, may make such purchases, or may contract for such services related to the installation,

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<sup>4</sup> Added by Resolution No. 168 of 2013, dated August 1, 2013, effective as of that date and amended and reaffirmed by Resolution No. 242 of 2015 and Resolution No. 272 of 2017.

maintenance or repair of apparatus, materials, equipment, and supplies, as may be required by such political subdivision or district therein through the use of a contract let by the United States of America or any agency thereof, any state or any other political subdivision or district therein if such contract was let to the lowest responsible bidder or on the basis of best value in a manner consistent with [General Municipal Law §103(16)] and made available for use by other governmental entities” (General Municipal Law §103(16)).

2. This is the Piggybacking method addressed in the July 2016 State of New York, Office of State Comptroller Memo To: Chief Fiscal Officers, Subject: New “Piggybacking Law – Exception to Competitive Bidding (updated) (the “Piggybacking Memo”). Procuring Agencies shall comply with the provisions of General Municipal Law §103(16) and the guidance set forth in the “Piggybacking Memo”.

3. Additionally, under this piggybacking method, National Cooperative contracts held by “leading agencies” which are governmental entities may be authorized for Procuring Agencies’ use by the Commissioner in consultations with the County Attorney.

4. A caveat to this procurement method is that General Municipal Law §103(1) excludes purchase orders or contracts for Public Work from best value procurement. Additionally, since prevailing wages are set by county, to use a purchase order or contract involving Building Service Work, the wages paid under that purchase order or contract must be equal to or greater than the applicable prevailing wage for that labor classification in Orange County.

#### **E. General Municipal Law §104 – New York State Purchase Orders or Contracts**

This piggybacking method allows Procuring Agencies “to make purchases [in excess of \$500] of commodities, materials, equipment, technology, food products, supplies or services available pursuant to [State Finance Law §163],...through the [New York State] Office of General Services or any other department or agency of the state subject to rules promulgated pursuant to article eleven of the [S]tate [F]inance [L]aw” (General Municipal Law §104).

#### **F. General Municipal Law 104-b – Other Governmental Purchase Orders or Contracts**

1. Any procurement not subject to competitive bidding or best value requirements under General Municipal Law §103(1), if not otherwise prohibited pursuant to New York State or federal law or regulation, may be made pursuant to a purchase order or contract of the United States or any agency thereof, any state, or any other political subdivision or district therein (“Government Entity” or, collectively, “Government Entities”), if such purchase order or contract has been made available for use by other Government Entities and was let in a manner consistent with the applicable requirements of this Policy in:

- a. Part VIII for Purchase Contract expenditures below the competitive bidding threshold;
- b. Part IX for Public Work expenditures below the competitive bidding threshold;
- c. Part X for Professional Services regardless of threshold;
- d. Part XI for Sole or Single Source Procurements;
- e. Part XII for Emergency Procurements; or
- f. Part XIII for Leases.

2. Purchase orders or contracts that may be used, pursuant to this Part XV(F) shall also include, but not be limited to, National Cooperative contracts whether or not held by “lead agencies” which are Government Entities, that have been authorized for Procuring Agencies’ use by the Commissioner in consultation with the County Attorney.

3. A caveat to this procurement method is that General Municipal Law §103(1) excludes purchase orders or contracts for Public Work subject to General Municipal Law §103(1) from best value procurement so use of this method when any Public Work is involved, must be below the competitive bidding threshold for Public Work and therefore not subject to General Municipal Law §103(1). Additionally, since prevailing wages are set by county, to use a purchase order or contract involving Public Work or Building Service Work, the wages paid under that purchase order or contract must be equal to or greater the applicable prevailing wage for that labor classification in Orange County.

#### **PART XVI. BEST VALUE<sup>5</sup>**

1. Pursuant to General Municipal Law § 103(1) Purchase Contracts may be awarded based on Best Value, to “the Offeror which optimizes quality, cost and efficiency, among responsive and responsible [O]fferors” (State Finance Law §163(1)(j)).

2. Best Value solicitations shall prescribe the minimum specifications or requirements that must be met to be considered responsive and shall describe and disclose the method by which the evaluation and selection shall be conducted.

3. The Basis of Award of the Best Value “solicitation shall identify the relative importance and/or weight of the cost and the overall technical criteria to be considered by a [Procuring Agency] in its determination of [B]est [V]alue” (State Finance Law §163(1)(j)). The evaluation may also identify a quantitative factor for [potential Contractors] that are small businesses, certified Minority- or Women-owned business enterprises, as defined in [Executive Law §310 (1), (7), (15) and (20)] or certified service-disabled veteran-owned business enterprise as defined in [Executive Law §369-h(1)]” (State Finance Law §163(1)(j)). The “Basis [of Award] shall reflect, wherever possible, objective and quantifiable analysis” (State Finance Law §163(1)(j)). “Documentation in the Procurement Record shall, where practicable, include a quantification of the application of the [evaluation] criteria to the rating of proposals and the evaluation results, or, where not practicable, such other justification which demonstrates that Best Value will be achieved” (State Finance Law §163(9)(a)).

4. All procurements based upon Best Value shall be approved by the Commissioner in consultation with the County Attorney.

#### **PART XVII. USE OF COUNTY PURCHASE ORDERS AND CONTRACTS BY OTHER LOCAL GOVERNMENTS, SCHOOL DISTRICTS AND CERTAIN NOT-FOR-PROFIT CORPORATIONS**

**A.** Any officer, board or agency of a New York state political subdivision, fire company, district, or not-for-profit corporation, as respectively authorized by General Municipal Law §103(3), §103(16), or §109-c or County Law §408-a(2), to make purchases of materials, equipment or supplies, or contract for services, may make such purchases through County purchase orders or contracts, with the exception of purchase orders or contracts exempted under the aforementioned statutes or excepted by the terms and conditions of the purchase order or contract.

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<sup>5</sup> Added by Local Law No. 12 of 2013 and effective as of its filing with the Secretary of State on September 3, 2013 and Resolution No. 168 of 2013, amended and reaffirmed by Resolution No. 242 of 2015 and Resolution No. 272 of 2017.

**B.** The following rules govern such procurements through County purchase orders or contracts.

1. The Commissioner may make available through their webpage award information on County purchase orders or contracts that may be used by other political subdivisions, districts, or not-for-profit corporations.

2. Other political subdivisions, districts, or not-for-profit corporations shall issue purchase orders directly to the Contractor, within the specified purchase order or contract term, referencing the County's purchase order or contract and shall be solely liable and responsible for all payments due under the purchase order or contract for their use of the purchase order or contract. The County shall not be liable or responsible for any costs, expenses, fees or debts incurred by the other users of a County purchase order or contract.

3. All purchases by political subdivisions, districts or not-for-profit corporations shall be subject to audit and inspection by and at the discretion of the County.

4. The County's solicitation documents for any purchase order or contract that may be used by other political subdivisions, districts, or not-for-profit corporations must contain a provision alerting all Bidders or Offerors that the purchase order or contract may be used by others and stating whether the use of that contract by others is a mandatory requirement for award of the purchase order or contract.

5. Necessary deviations from the County's specifications in the terms of a purchase order or contract, whether such deviations relate to quantities or delivery points, shall be resolved between the Contractor and the other political subdivision, district, or not-for-profit corporation. However, at no time shall any change to price and product specification be permitted, except where an item has been replaced by another item due to obsolescence or pricing is contingent on an outside factor (e.g. fuel at market rates) pursuant to the terms of the purchase order or contract, and/or the Contractor offers reduced pricing to any participant, which then must be made immediately available to all participants. If a product specification requires modification due to obsolescence, the County must approve a change of product in writing in order for it to be valid. In the event a product substitution is approved, no change in price will be permitted except when the price will be lower than the originally awarded price. Any reduced pricing shall be applicable to all other participants' quantities ordered on and after the date such reduced pricing became effective for the initial participant receiving such pricing.

## **PART XVIII. BONDING REQUIREMENTS**

### **A. Bid Bonds**

1. At the discretion of the Commissioner, if the average annual budget of a procurement is estimated at \$50,000, or more, or the cost and/or complexity of the preparation of a solicitation merits the precaution of Bid Security, a Bid Bond, irrevocable letter of credit, bank check or certified check may be required.

2. However, for Federally-Funded construction or facility improvement contracts or subcontracts exceeding the SAT, bid security in the amount of five percent (5%) of the bid price is required per 2 CFR §200.325(a).

### **B. Payment Bonds**

1. In accordance with State Finance Law §137, and as required to effectuate the purposes of New York State Lien Law §5, all purchase orders or contracts for public improvements, including, but not limited to

Public Work, (*See Davidson Pipe Supply Co., Inc. v. Wyoming County Industrial Development Agency*, 85 NY2d 281 (Ct. App. 1995) and New York State Lien Law) require a Payment Bond or irrevocable letter of credit for the value of the Services to be performed or Commodities, Equipment or Technology to be supplied. For “as needed” purchase orders or contracts an estimated base amount may be required for an initial bond and such amount shall be adjusted as necessary during the term of the purchase order or contract to reflect the value of the Services to be performed or Commodities, Equipment or Technology to be supplied.

2. At the discretion of the Commissioner, for procurements with an average annual budget of \$100,000 or more that involve Commodities, Equipment, Technology or Services of significant value, to be performed or supplied by other than the contracted party, a Payment Bond may be required.

3. However, for Federally-Funded, construction or facility improvement contracts or subcontracts exceeding the SAT, a performance bond in the amount of one hundred percent (100%) of the bid price is required, per 2 CFR §200.325(c).

#### **C. Performance Bonds**

1. At the discretion of the Commissioner, for procurements with an average annual budget of \$100,000 or more, a Performance Bond or irrevocable letter of credit may be required.

2. However, for Federally-Funded (construction or facility improvement contracts or subcontracts exceeding the SAT, a performance bond in the amount of one hundred percent (100%) of the bid price is required per 2 CFR §200.325(b).

#### **D. Maintenance Bonds**

In addition to any guarantees or warranties specified in a purchase order or contract for Public Work or Building Service Work, the Commissioner, in consultation with the Department Head of the Procuring Agency, may require a Maintenance Bond or irrevocable letter of credit in an appropriate amount to ensure the maintenance or repair of any work for one or more years following the completion of such work.

### **PART XIX. MWBE/DBE REQUIREMENTS**

All solicitations shall be performed, and purchase orders or contracts prepared, in compliance with all applicable New York State or federal laws, regulations, grant requirements and County policies and procedures governing and/or relating to Minority- or Women-Owned Business Enterprises ("MWBE") and/or Disadvantaged Business Enterprises ("DBE"). MWBE and DBE procurement goals are specific to each funding source and Procuring Agencies must comply with the requirements of each funding source. If there is a conflict between the requirements of a funding source and the County policy, the more stringent requirements shall control. The County MWBE Policy is maintained by the Commissioner. County DBE policies are currently maintained by to the Procuring Agencies funded by grants through the United States Department of Transportation or units thereof, which may include "pass-through" grants from New York State agencies.

### **PART XX. PROCUREMENT LOBBYING**

#### **A. Solicitation Requirements and Contacts During the Restricted Period**

1. State Finance Law §139-j prohibits "Contacts" (verbal, written or electronic as defined in State Finance Law §139-j(1)(c)) that a reasonable person would infer are “intended to influence the County's

conduct or decision regarding [a] "Governmental Procurement" (as defined in State Finance Law §139-j(1)(e))" during the "Restricted Period" (as defined in State Finance Law §139-j(1)(f)). This period begins when the earliest written notice, advertisement or solicitation for a procurement occurs and ends when the final purchase order or contract is awarded and approved.

2. A Governmental Procurement involves a "Procurement Contract" which is a procurement involving an estimated annualized expenditure in excess of \$15,000 "including any amendment, extension, renewal or change order (other than amendments, extensions, renewals or change orders that were authorized and payable under the terms of the original [purchase order or] contract" (as defined in State Finance Law §139-j(1)(g)). This includes all Commodities, Equipment, Technology and Services purchase orders or contracts as well as the sale, lease, acquisition or granting of an interest in real property and revenue contracts where the County is granting a concession or franchise. (State Finance Law §139-j(1)(b) and (i) and §139-k(1)(b) and (i)). Grants, intergovernmental agreements and utility relocation project agreements, among other statutory exceptions, are not considered Procurement Contracts (State Finance Law §139-j(1)(g) and §139-k(1)(g)).

3. Every solicitation for a Procurement Contract, must designate a person or persons in the Procuring Agency who may be contacted by Offerors or Bidders in relation to the Procurement Contract (State Finance Law §139-j(2)(a)).

4. The following types of contacts are permissible exceptions during the Restricted Period (State Finance Law §139-j(3)(a)):

- a. Submissions of Quotes, Proposals or Bids "or other response from [O]fferors intending to result in a permanent [purchase order or] contract;
- b. Questions submitted for question and response under the solicitation;
- c. Participation in "a demonstration, conference, or other means of exchange of information in a setting open to all potential [Offerors or] Bidders";
- d. Complaints to the County Attorney that the designated individual of the Procuring Agency has failed to respond in a timely manner to authorized contacts;
- e. Negotiation of purchase orders or contracts with Offerors or Bidders who have been "notified of a tentative award";
- f. Offerors or Bidders contacting the designated individual(s) to request review of an award;
- g. "Contacts by Offerors [or Bidders] in protests, appeals or other review proceedings' or, "complaints of alleged improper conduct" to the County Attorney, District Attorney or Office of the State Comptroller;
- h. Communications "that solely address the determination of responsibility" of an Offeror or Bidder; and
- j. Communications with Preferred Sources.

5. Every solicitation for a Procurement Contract, (as defined in Part XX(A)(2) of this Policy), must include a summary of the policy and prohibitions regarding permissible contacts, a copy of any guidelines, rules and regulations regarding permissible contacts, and must also require a written affirmation from the Offeror or

Bidder as to their understanding of an agreement to comply with the County's procedures relating to permissible contacts. See State Finance Law §139-j(6)(a) & (b).

6. Every solicitation for a Procurement Contract must also require Bidders or Offerors to disclose findings of non-responsibility, within the previous four years, by any governmental entity where the prior finding of non-responsibility was due to violation State Finance Law §139-j or the intentional provision of false or incomplete information to a governmental entity (State Finance Law §139-k(2)). Furthermore, each Procurement Contract awarded must also require Bidders or Offerors to certify that all information provided with respect to this disclosure requirement is "complete, true and accurate". (State Finance Law §139-k(5)). Each Procurement Contract must also contain a provision authorizing the Government Entity to terminate the Procurement Contract in the event such certification is found to be intentionally false or incomplete.

7. For any Contact during the Restricted Period, the Procuring Agency must "obtain the name, address, telephone number, place of principal employment and occupation of the person or organization making the Contact and inquire and record whether the person or organization making such contact [is a Bidder or] Offeror or was retained, employed or designated by or on behalf of [a Bidder or] Offeror to appear before or contact the [Procuring Agency] about the procurement. All such Contacts must be included in the Procurement Record (State Finance Law §139-k(4)). However, any communications received by a Procuring Agency "from members of the [New York] State legislature, or [New York State] legislative staff, when acting in their official capacity, shall not be considered a Contact...and shall not be recorded by [the Procuring Agency]" (State Finance Law §139-k(6)).

## **B. Violations and Investigations**

1. "Any officer or employee of [the County] who becomes aware that [a Bidder or] Offeror has violated [the restrictions on] permissible contacts shall immediately notify the [Director of Operations and Cost Control in the Office of the County Executive,] Ethics Officer, Inspector General, if any, or other official of the Government Entity responsible for reviewing or investigating such matters" (State Finance Law §139-j(8)).

2. "Upon notice of any allegation of a violation of the [Restricted Contacts] provisions...with regard to permissible Contacts on Governmental Procurements, the [person notified who is] [responsible for reviewing or investigating such matters shall immediately investigate such allegation to be initiated and, if sufficient cause exists to believe it is true, shall give the [Bidder or] Offeror reasonable notice that an investigation is ongoing and an opportunity to be heard in response to the allegation" (State Finance Law §139-j(10)(a)).

3. If a violation is found to be knowing and willful, the Bidder or Offeror shall be deemed non-responsible and the person notified under this provision (B) shall notify the New York State Office of General Services of any such finding of non-responsibility (State Finance Law §139-j(10)(b)).

4. In the event of a knowing and willful violation, the person notified under this subpart XX(B) shall report the employee's violation of this Policy and procedures to the County Executive (State Finance Law §139-j(10)(c)).

## **PART XXI. RESPONSIBILITY DETERMINATIONS**

### **A. Responsive and Responsible**

1. Prior to the award of a purchase order or contract, the Procuring Agency must determine that the intended awardee is responsible and responsive, in accordance with any guidance or requirements established in this Policy or the Procurement Manual.



2. Responsive Bidder or Offerors are those that meet the minimum specifications or requirements set forth in the solicitation for the procurement (See State Finance Law §163(d)). Non-responsive Bids or Offers do not need to be considered for award.

3. Responsible Bidders or Offers are those having the financial ability, legal capacity, integrity, technical resources, and past performance, including compliance with public policy, to provide the Commodities, Equipment, Technology or Services required (See State Finance Law §163(c) and 2 CFR §200.318(h)). Bidders or Offerors who do not meet these standards may be declared non-responsible. Before declaring a Bidder or Offeror non-responsible, the Procuring Agency, in consultation with the Commissioner and the County Attorney, must provide the Bidder or Offeror notice that he or she may be declared non-responsible and an opportunity to be heard in accordance with procedures for all such hearings by any Procuring Agency as established by the Commissioner and approved by the County Attorney and County Executive.

#### **B. Federally-Funded Purchase Orders and Contracts**

1. In addition to the requirements of Part XXI(A) of this Policy, for Federally-Funded awards to Contractors or Subrecipients, prior to award, Procuring Agencies must screen Contractors and Subrecipients for debarment and suspension, as applicable, pursuant to 2 CFR §200.213.

2. For subawards of federal funds, prior to award, the Procuring Agency must “evaluate each Subrecipient’s risk of noncompliance” in accordance with 2 CFR §200.331(b), “which may include consideration of such factors as”:

- a. prior experience with same or similar subawards;
- b. results of previous audits;
- c. whether the subrecipient has new personnel or new or substantially changed systems;
- d. the extent and results of federal awarding agency monitoring.

### **PART XXII. AWARD AND MODIFICATION OF PURCHASE ORDERS, CONTRACTS AND SUBAWARDS**

#### **A. Compliance with Basis of Award**

All awards must be made in accordance with the evaluation criteria (i.e. “Basis of Award”) specified in the solicitation document. Failure to follow the requirements for the Basis of Award may lead to the invalidation of any resulting purchase order or contract.

#### **B. Authority to Award**

With the exception of the Legislature’s authorization to “obtain and employ professional and technical assistance and advice” pursuant to §2.02(q) of the Orange County Charter; the Commissioner has the authority to award purchase orders or contracts, unless delegated pursuant to the Orange County Charter §27.02(3). Prior to awarding a purchase order or contract, the individual making the award must have a written designation authorizing that individual to make such award on file with the Commissioner. The County Executive or Commissioner shall have the discretion to approve such designations, which shall be made and maintained by the Commissioner, in consultation with the Department Head of each Procuring

Agency. Designations may be made with regard to the type of procurement, dollar thresholds, etc. as the County Executive or Commissioner, shall see fit.

**C. Written Justifications**

1. A written justification by the Procuring Agency for the Procurement Record is required if:
  - a. an award was given to someone other than the lowest priced Offeror or Bidder (General Municipal Law §104-b(2)(e));
  - b. a Professional Services exemption is requested (Part X(C));
  - c. a Contract Modification is requested (Part XXII(E)); or
  - d. other provisions of this Policy require a justification in accordance with this Part XXII(C).
2. The written justification must contain a brief explanation of the request (*e.g.* selection process for Contractor, Professional Services Exemption, history of the contract timeline and funding, etc.) and then state each of the following three points, with a response to each, that explains how such an award:
  - a. assures the prudent and economical use of public money in the best interests of the taxpayers;
  - b. facilitates the acquisition of Commodities, Equipment, Technology or Services of the maximum quality at the lowest possible cost under the circumstances; and
  - c. guards against favoritism, improvidence, extravagance, fraud and/or corruption.
3. The Procuring Agency shall maintain the justification and any applicable approval or denial in the Procurement Record.

**D. Federally-Funded Fixed Amount Subawards**

Fixed amount subawards which are Federally-Funded are only permitted in accordance with 2 CFR §200.201(b).

**E. Modifications to Purchase Orders and Contracts**

1. Purchase order and contract modifications (amendments, change orders, etc.) shall be done in accordance with applicable provisions of New York State and Federal law, this Policy and the purchase order and contract documents. General Municipal Law §103(1) does not permit change orders to or renewals of Purchase Contracts or Public Works purchase orders or contracts that were not initially competitively bid because they did not meet the threshold, if the change order or renewal would bring the reasonably expected countywide 12-month aggregate amount of the countywide spend for the Commodity, Equipment, Technology or Service (excluding Professional Services) over the applicable threshold.
2. Modifications of purchase orders or contracts which, absent the exercise of a right of renewal or extension in the original purchase order or contract:
  - a. extend the term of the purchase order or contract by more than three (3) months; and/or

- b. increase the not-to-exceed amount of the purchase order or contract price by more than \$5,000 at one time or through a combination of increases

require written justification from the Procuring Agency in accordance with Part XXII(C) of this Policy (which may be combined with a Professional Services exemption justification, as applicable) for review and approval by the Commissioner. The Procuring Agency shall maintain the request and approval or denial in the Procurement Record.

## **PART XXIII. CONTRACT TEMPLATES**

### **A. Policy Requirements Still Applicable**

All other pertinent requirements of this Policy are still applicable to a procurement even if standard contract templates are not required.

### **B. Standard County Contract Templates**

Procuring Agencies shall use standard County contract templates, as approved by the County Attorney in consultation with the Commissioner, and maintained for Procuring Agency use by the Commissioner.

### **C. Non-County Contracts**

The use of something other than a standard County contract template (e.g. Equipment leases, Technology contracts, provider agreements, energy and utility supply contracts) requires the approval of the County Attorney.

### **D. Technology or Services Procurements Less Than \$5,000**

1. Individual Procurements under \$5,000.00 for Technology or Services where the Contractor will **NOT** be:

- a. using County real or personal property;
- b. performing maintenance or warranty service for any County property;
- c. entering any County grounds, buildings or facilities;
- d. performing services involving protected health information, financial or educational data, personally identifiable information, or the storage or processing of County records or data; or
- e. accessing information systems owned by or under the control of the County, or that are required to be used by the County in the performance of County obligations (e.g. use of information systems under the control of federal or New York State agency information systems for certain grant programs);

do not require the use of a contract unless required by the County Executive, County Attorney, or New York State or federal funding requirements. However, requisitions, purchase orders, vouchers and similar forms that may be required by the DGS, Department of Finance, Division of Budget, Division of Risk Management or the County Attorney must still be used for such procurements.

2. Additionally, the County Attorney, may designate in writing categories of payments (e.g., utility bills) that do not require a written contract or purchase order, however all purchases must still comply with the requisition process in §27.3 of the County Charter.

**E. Federally-funded Purchase Orders and Contracts**

1. In addition to any funding agency required terms, conditions or forms, Federally-Funded purchase orders or contracts must contain the applicable provisions described in Appendix II to [2CFR] Part 200 – Contract Provisions for non-Federal Entity Contracts Under Federal Awards per 2 CFR §200.326.

2. Subawards of federal funds must contain all the information, terms and conditions required by 2 CFR §200.331(a) and (c).

**PART XXIV. OVERSIGHT OF CONTRACTORS AND SUBRECIPIENTS**

The Procuring Agency must maintain oversight of Contractors and Subrecipients to ensure performance in accordance with the terms, conditions and specifications of purchase orders, contracts or subawards. In addition to this general oversight requirement, Procuring Agencies are responsible for complying with all oversight and monitoring requirements of their funding agencies (e.g. terms and conditions in grant agreements or applicable regulations including, but not limited to, 2 CFR §200.330-332 [Subrecipient Monitoring and Management]).

**PART XXV. RECORDKEEPING**

**A.** Procuring Agencies may be required to use standard forms or formats for Procurement Records at the discretion of the Commissioner. Otherwise, each Department Head shall be responsible for creating and maintaining the appropriate documentation to demonstrate his or her Unit of Government's compliance with this Policy and any related procedures.

**B.** Contract Administrators responsible for procurement activities must be designated in writing by the Department Head, which shall be maintained on file with the Commissioner and shall be updated as changes occur.

**C.** In addition to any further recordkeeping requirements in the Procurement Manual, if any (*See Part XXVI of this Policy*) and any federal or New York State statutory, regulatory or funding source requirements, the Procuring Agency shall maintain a written record for every procurement (whether via Purchase Order or Contract), which contains the following information, **as applicable**:

1. Determination of whether the procurement is subject to competitive bidding;
2. Preferred Source inquiry and solicitation documentation;
3. Documentation from New York State Office of General Services, other governmental entities procurement agencies, government surplus programs, group purchasing organizations and/or their distributors, or any other entity through which a piggyback inquiry or purchase was made;
4. Solicitation documentation appropriate to the procurement method used (e.g., Request for Quotes/Bids/Proposals; advertising and other records of public distribution; contact records required by the Procurement Lobbying Law; quotes, bids or proposals received, etc.);

5. Award documentation (e.g., score sheets or other written analysis of the quotes, bids or proposals, the award decision, notice of award, justifications, etc.);
6. Purchase order or contract documentation (e.g., purchase order or contract with all attachments, appendixes, business associate agreements, insurance, etc.);
7. Contract Administration documentation (e.g., performance reports, invoices, payroll certifications, payment records, records of disputes, etc.);
8. For Federally-Funded procurements, the following minimum requirements, per 2 CFR §200.318(i), are applicable:
  - a. rationale for the method of procurement;
  - b. selection of contract type;
  - c. contractor selection or rejection; and
  - d. basis for purchase order or contract price.

#### **PART XXVI. PROCUREMENT MANUAL**

The Commissioner is authorized to promulgate procedures to implement this Policy in the form of a Procurement Manual.

#### **PART XXVII. INDIVIDUALS RESPONSIBLE FOR PURCHASING**

With the exception of the Legislature's authorization to "obtain and employ professional and technical assistance and advice" pursuant to §2.02(q) of the Orange County Charter; pursuant to §27.02(3) of the Orange County Charter, James P. Burpoe, the Commissioner is responsible for solicitation and contracting of all purchases of Commodities, Equipment, Technology and Services for all Units of County Government in accordance with applicable federal, New York State law and County policies. To the extent this Policy authorizes certain solicitations and procurements to be made directly by a Unit of Government, without review or approval by the Commissioner, the individual making the procurement decision shall be the current Department Head of the Unit of County Government responsible for the procurement.

#### **PART XXVIII. PAY-TO-PLAY<sup>6</sup>**

All procurements must comply with Local Law No. 13 of 2013, known as the "Pay-to-Play Law".

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<sup>6</sup> Added by Local Law No. 13 of 2013 and effective as of the date of its filing with the Secretary of State on November 12, 2013, amended by Local Law No. 2 of 2014, Local Law No. 3 of 2014 and Local Law No. 5 of 2014.

**PART XXIX. EFFECTIVE DATE<sup>7</sup>**

The effective date of this Policy is March 1, 2019 as reaffirmed on December 3, 2020.

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<sup>7</sup> Resolution No. 189 of 2011 authorized the adoption of the Orange County Procurement Policy, effective September 1, 2011, subsequently amended and reaffirmed by Resolution No. 79 of 2012, Resolution No. 168 of 2013, Local Law No. 12 of 2013, Resolution No. 193 of 2013, Local Law No. 13 of 2013 (see Footnote 6), Resolution No. 91 of 2014, Resolution No. 242 of 2015, Resolution No. 272 of 2017, Resolution No. 90 of 2019, and Resolution No. 171 of 2019.