

PRESENTED AND ADOPTED: April 7, 2014

SUBJECT: APPROVAL OF REVISED WMATA PROCUREMENT POLICY

2014-19

**RESOLUTION
OF THE
BOARD OF DIRECTORS
OF THE
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY**

WHEREAS, Pursuant to Resolution #2011-30, the Board of Directors adopted changes to the Procurement Procedures Manual (PPM) designed to improve business functions; and

WHEREAS, The Washington Metropolitan Area Transit Authority (WMATA) Board of Directors is committed to continuing to improve WMATA's finance and administration functions, including procurement, grants management, budgeting, reporting and risk assessment; and

WHEREAS, As part of this commitment, the Board of Directors has determined that the PPM should be revised to ensure that the Chief Procurement Officer is a member of WMATA's Executive Leadership Team; to provide a more active role for the General Counsel's office in the procurement process; to require that the General Counsel's office include at least one attorney with experience in procuring information technology products and services; to strengthen WMATA's commitment to full and open competition, and limit exceptions to this requirement; to more quickly identify and thus prohibit organizational conflicts of interest in procurement; to prohibit personal conflicts of interest; to specifically prohibit procurement practices that unduly restrict competition; to detail the requirements for independent cost estimates; to ensure the revised practices are consistently incorporated in each procurement; and to provide complete, annual training for procurement personnel including attorneys; now, therefore be it

RESOLVED, That the Board of Directors approves the revisions to PPM Sections 200 and 300 set forth in the attachment to this Resolution; and be it further

RESOLVED, That the Board of Directors directs the General Manager/Chief Executive Officer (GM/CEO) to present a plan to monitor compliance with procurement policies by June 30, 2014, so that key performance measures can be adopted and monitored by the Board; and be it further

Motioned by Mr. Dyke, seconded by Mr. Downey

Ayes: 8 – Mr. Downs, Mr. Downey, Mr. Nichols, Mrs. Hudgins, Mr. Dyke, Mr. Bulger, Mr. Acosta and Ms. Porter

RESOLVED, That the Board of Directors directs that the GM/CEO ensure that all WMATA policies and procedures are conformed to the revised PPM sections; and be it further

RESOLVED, That the Board of Directors directs the GM/CEO to ensure that major projects and major procurement activities are not in the same chain of command as the Chief Procurement Officer; and be it finally

RESOLVED, That this Resolution shall be effective immediately.

Reviewed as to form and legal sufficiency,



Kathryn H.S. Pett
General Counsel

WMATA File Structure No.:
17.9.1 Procurement Procedures Manual

**ATTACHMENT: REVISIONS TO
SECTIONS 200 AND 300 OF WMATA PROCUREMENT POLICY**

Section 200 of the WMATA Procurement Policy Resolution is revised as follows:

Section 201(c) shall be amended by inserting a new sentence after the heading "**Chief Procurement Officer.**" And before the current text– which new sentence shall be as follows: "The Chief Procurement Officer shall be a full participatory member of the Executive Leadership Team."

A new Section 201(d) shall be created and the current Section 201(d) shall be re-numbered as Section 201 (e). The new Section 201(d) shall be as follows

- (d) **General Counsel.** The General Counsel shall have responsibility for: providing legal counsel regarding procurement matters within WMATA, including to the Chief Procurement Officer, contracting officers and others involved in the procurement process; assigning a cognizant attorney in the Office of General Counsel (COUN) for each WMATA procurement; reviewing and approving procurement policies and procedures within WMATA, and ensuring they are consistent with all applicable laws and regulations and effectively fulfill the needs and purposes of WMATA; and ensuring appropriate legal review at all appropriate steps of a procurement. The General Counsel may delegate within COUN any or all of the foregoing authorities and responsibilities. At least one attorney within the Office of the General Counsel shall have experience in procurement of information technology products and services.

Section 300 of the WMATA Procurement Policy is revised by replacing that section in its entirety with the revised Section 300 set forth below. Management shall incorporate these revisions into appropriate sections of the WMATA Procurement Procedures Manual.

SECTION 300 – COMPETITION REQUIREMENTS

- 301. Commitment to Full and Open Competition.** WMATA shall conduct procurements using full and open competition consistent with the standards set forth herein and in applicable statutes and regulations. WMATA shall take into account and give effect to competition requirements that are contained in any statute, regulation or guidance that applies to grant funds used in the procurement – including but not limited to the following, as applicable:

- (a) Section 73 of the WMATA Compact;
- (b) Federal Transit Administration ("FTA") enabling legislation, 49 U.S.C. § 5325(a) (FTA grant recipients to conduct all procurements financed under 49 U.S.C. Chapter 53 in a manner that provides full and open competition);
- (c) Common Grant Rule (49 C.F.R. § 18.1 et seq.);
- (d) FTA Circular 4220.1(as may be amended and revised by the FTA)
- (e) American Reinvestment and Recovery Act, Pub. L. 111-5 (Feb. 17, 2009) ("ARRA") ("To the maximum extent possible, contracts awarded under this Act shall be awarded . . . through the use of competitive procedures.")

In conducting procurements that use non-federal funds, WMATA shall use procedures pertaining to full and open competition (and pertaining to restrictions on procurements not using full and open competition or excluding sources) that are consistent with competition procedures used in procurements using federal funds. WMATA's procedures for procurements using non-federal funds also shall provide, as authorized by the Compact, for WMATA to: (i) make purchases using state and local sources; and (ii) make purchases using the GSA schedule.

302. Restrictions on Procurements Not Using Full and Open Competition or Excluding Sources. Under certain circumstances, it may be appropriate to conduct a procurement using: (a) full and open competition after exclusion of sources; or (b) other than full and open competition. Procurements not using full and open competition will be reported to the Board on a quarterly basis. Such approaches may be used only after written approval of both the General Counsel and the Chief Procurement Officer of an appropriate Determination and Findings ("D&F") – who shall approve such approaches only upon a determination that the procurement cannot reasonably be accomplished using full and open competition without exclusion of sources. WMATA procurement personnel and counsel shall comply strictly with WMATA restrictions and, to the extent applicable, federal restrictions on procurements conducted not using full and open competition or excluding sources.

303. Prohibition Against Organizational Conflicts of Interest. WMATA shall analyze each planned acquisition in order to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible, and avoid, neutralize, or mitigate potential conflicts

before contract award. In any instance in which WMATA first becomes aware of an organizational conflict of interest after contract award, it shall conduct a review to determine whether the organizational conflict of interest was reasonably foreseeable and should have been identified by the contractor prior to award. In an instance where WMATA first becomes aware of an organizational conflict of interest after award, the Chief Procurement Officer may in his/her discretion terminate the contract or, if reasonably possible, take appropriate steps to avoid, neutralize or mitigate such organizational conflict of interest.

(a) Definition. An "organizational conflict of interest" means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to WMATA, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage. An organizational conflict of interest occurs when any of the following circumstances arise:

- i. Lack of Impartiality or Impaired Objectivity. When the contractor is unable, or potentially unable, to provide impartial and objective assistance or advice to the recipient due to other activities, relationships, contracts, or circumstances. Such an OCI would occur, for example, if the service the contractor is to perform under a contract with WMATA might involve that contractor in evaluating its own performance or the performance of an affiliate under another WMATA contract.
- ii. Unequal Access to Information. The contractor has an unfair competitive advantage through obtaining access to nonpublic information during the performance of an earlier contract. Such an OCI would occur, for example, if the contractor's service under a prior contractor gave it access to non-public, proprietary information of a company competing with it for a subsequent contract. It merits note that relevant case law makes clear that no unfair competitive advantage is created by an offeror's prior performance of a particular requirement. WMATA is under no obligation to equalize other offerors with an incumbent by providing information in the hands of the incumbent due to prior performance of the requirement.
- iii. Biased Ground Rules. During the conduct of an earlier procurement, the contractor has established the ground rules for a future procurement by developing specifications,

evaluation factors, or similar documents. To ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements.

- (b) Identifying and Addressing Organizational Conflicts of Interest. The contracting officer and cognizant COUN attorney shall analyze every planned procurement to determine whether there is an opportunity for any actual or apparent conflict of interest. A clause requiring offerors to identify any potential or actual organizational conflict of interest shall be included in all solicitations, absent a written determination by the contracting officer and the cognizant COUN attorney that there is no opportunity for an actual or apparent conflict of interest and such a clause is not necessary for the procurement. In any instance where a potential or actual organizational conflict of interest is identified, the procurement shall be reviewed by the Chief Procurement Officer and the General Counsel. The Chief Procurement Officer shall be responsible for ensuring that such organizational conflict of interest is appropriately avoided, neutralized or mitigated. The Chief Procurement Officer shall not act to address an organizational conflict of interest without written concurrence from the General Counsel.

304. Prohibition Against Personal Conflicts of Interest. No employee, officer, agent, or board member, or his or her immediate family member, partner, or organization that employs or is about to employ any of the foregoing may participate in the selection, award, or administration of a contract if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when any of those previously listed has a financial or other interest in the firm considered or selected for award. This provision is applicable to individuals serving on a Technical Evaluation Team.

305. Prohibition on Provisions within Solicitation That Unduly Restrict Competition. WMATA shall not include in a solicitation any feature that unduly restricts competition. Some of the situations considered to be restrictive of competition include, but are not limited to, the following:

- (a) Excessive Qualifications. Imposing unreasonable business requirements for bidders or offerors;
- (b) Unnecessary Experience. Imposing unnecessary experience requirements for bidders and offerors

- (c) Improper Prequalification. Using prequalification procedures that conflict with the prequalification standards described in the WMATA Compact, the WMATA Procurement Policy, or the FTA Circular 4220.1F.
- (d) Retainer Contracts. Making a noncompetitive award to any person or firm on a retainer contract with the recipient if that award is not for the property or services specified for delivery under the retainer contract.
- (e) Excessive Bonding. Requiring a bonding that far exceeds the requirements described in state or local law or those described in FTA Circular 4220.1F.
- (f) Brand Name Only. Specifying only a "brand name" product without allowing offers of "an equal" product, or allowing "an equal" product without listing the salient characteristics that the "equal" product must meet to be acceptable for award.
- (g) In-State or Local Geographic Restrictions. Specifying in-State or local geographical preferences, or evaluating bids or proposals in light of in-State or local geographic preferences, even if those preferences are imposed by state or local laws or regulation except as permitted by FTA Circular 4220.1F.
- (h) Restraint of Trade. Supporting or acquiescing in noncompetitive pricing practices between firms or between affiliated companies. Questionable practices would include, but not be limited to submissions of identical bid prices for the same products by the same group of firms, or an unnatural pattern of awards that had the cumulative effect of apportioning work among a fixed group of bidders or offerors;
- (i) Arbitrary Action. Taking any arbitrary action in the procurement process.
- (j) Excessively Specific Qualifications. Development of specifications and evaluation criteria which unnecessarily favor a particular contractor.
- (k) Arbitrary Contract Splitting. Splitting larger procurements into multiple smaller procurements to evade competition requirements at certain ordering thresholds.

306. Review of Procurements by the Office of General Counsel. The General Counsel shall be responsible for ensuring appropriate legal review

at all appropriate steps of a procurement (including task orders), including the following: completion of advance procurement planning for a fiscal year, initiation of individual procurement, completion of the requirements document (e.g., specification, purchase description, statement of work); completion of solicitation; completion of source selection; contract modification; and exercise of options. The Chief Procurement Officer also shall have responsibility for ensuring that procurement personnel seek the involvement of counsel at appropriate junctures. The General Counsel and the Chief Procurement Officer shall develop and implement written procedures to give effect to the foregoing.

307. Independent Cost Estimate Required. WMATA shall perform a cost or price analysis in connection with every procurement action including contract modifications before receiving bids or proposals. The cost estimate shall be included with the procurement record submitted to the cognizant COUN attorney for review.

- (a) Equipment and Supplies. Contracting officers shall ensure preparation and documentation of equipment estimates using appropriate sources – such as published price lists; prices from past competitive procurements updated with inflation factors; and pricing data from other agencies that obtained competitive bids for the same equipment or supplies. In the case of specialized equipment, care must be taken that the source of the estimates is not disproportionately obtained from one supplier.
- (b) Professional services. Contracting officers shall ensure preparation and documentation of estimates for professional services using appropriate sources, such as past competitive procurements updated with inflation factors, published price lists such as Federal Supply Schedules, and pricing data from other agencies that obtained competitive bids for the same professional services. The Authority may also consider obtaining a professional cost estimate by a firm not interested in the final procurement if cost and price estimates are not reasonably available from other sources.
- (c) Construction. In some cases, cost estimates may be difficult to obtain or may lie outside the competence of Authority personnel. Contracting officers shall ensure preparation and documentation of cost estimates using appropriate sources, such as prior WMATA construction projects awarded competitively; and pricing data from other agencies that obtained competitive bids for similar construction work. A design firm may already be under contract, or may be engaged, to perform this service. In some cases, the Authority's in-house personnel who have participated in design or

past construction efforts may be the most professional and reliable cost estimators.

- 308. Required Use of Procurement Checklists.** The Chief Procurement Officer, with the concurrence of the General Counsel, shall create and maintain checklists to be used by procurement personnel and COUN attorneys to ensure: procurement processes are followed; all relevant considerations are taken into account in a procurement; and all components of procurement files are assembled timely. The checklists shall be consistent with the procurement checklists contained in the FTA Guide for Procurement System Reviews (including any amendments).
- 309. Procurement Training.** Under the direction and control of the GM/CEO, the Chief Procurement Officer and the General Counsel shall prepare and implement an annual training plan for ensuring that procurement personnel and attorneys in the Office of General Counsel understand and adhere to applicable procurement policies and procedures, and are fully trained to perform their duties with regard to Authority procurements.