

Bob Taft  
Governor



Barbara E. Riley  
Director

30 East Broad Street • Columbus, Ohio 43215-3414  
jfs.ohio.gov

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**FISCAL ADMINISTRATIVE PROCEDURE LETTER (FAPL) No. 2**

To: Fiscal Administrative Procedure Manual Holders  
County Departments of Job and Family Services  
County Child Support Enforcement Agencies  
County Public Childrens Services Agencies  
Workforce Development Agencies

From: Barbara E. Riley, Director

Subject: **County Procurement Guidelines Using Federal Money in Whole or in Part, and Utilizing the Ohio Cooperative Purchasing Program by Counties**

This FAPL is being issued to provide guidance to counties around the issues related to the purchase of goods and/or services using federal money obtained through the Ohio Department of Job and Family Services (ODJFS). This is a guidance document only. It should not be used as a substitute for seeking and obtaining legal counsel at the county level. Moreover, it cannot and does not purport to alter the requirements imposed on counties by federal and state law. In any instance of conflict with provisions of law, the applicable statutes and rules are determinative of the obligations of the counties, and this guidance document will not excuse any failure to comply with such laws.

The primary focus of this guidance is on purchases made utilizing any of the state contracting vehicles available to counties through the Ohio Cooperative Purchasing Program administered by the Ohio Department of Administrative Services (DAS) (in conjunction with the Ohio Office of Information Technology (OIT)).

**I. Competitive Procurement**

The baseline, guiding principle that should be followed whenever possible in the purchase of goods or services using any federal money is:

**All procurement transactions will be conducted in a manner providing full and open competition....**

This principle appears in each of the applicable federal regulations governing "procurements" using the monies distributed to counties by ODJFS [see, 7 CFR 3016.36(c)(1); 29 CFR 97.36(c)(1); and 45 CFR 92.36(c)(1)]. The Acquisition Standards and Guidelines contained in OAC 5101:9-4-07 adhere to this principle as well.

**The following categories of purchase procedures can be considered to be "competitive" for purposes of applicable federal law if the appropriate steps are followed for each.**

A. Open Market Competitions

Adequately publicized procurement opportunities that are open to competition by any interested party and that follow the standards identified in federal, state and local law will be considered to be competitive. Depending on the size, complexity and nature of the desired purchase, any number of procurement processes might be used, including: Requests for Proposals, Requests for Competitive/Sealed Bids, Requests for Quotes, *etc.* Any of these open market competitions must follow the federal standards set forth in the applicable regulations, as well as any state or local legal requirements that are at least as restrictive as the federal standards. Assuming the rules of law are followed governing the source of federal funds to be used, such purchases meet the federal definition of "competitive" and are thereby appropriate expenditures of federal funds.

When in doubt, a full and open competitive process will be best.

B. State Term Contracts (MACs and GDCs)

The term "State Term Contracts" is used to generally describe types of contracts that are procured by DAS or the OIT through a full and open competitive process. DAS/OIT will conduct a Request for Proposals process or an Invitation to Bid (*i.e.*, competitive sealed bid) process to establish vendors and products that are more efficiently and easily accessed by Ohio governmental entities. Types of State Term Contracts are "Multiple Award Contracts" (MACs) or "General Distribution Contracts" (GDCs).

Such contracts are made available to any State of Ohio political subdivision that chooses to join the State of Ohio Cooperative Purchasing Program. Because the original competitive procedure that "prequalifies" a State Term Contract vendor is full and open, counties may access a State Term Contract and purchase available goods and services from a prequalified vendor through the Cooperative Purchasing Program. Any such purchases are "competitive" for purposes of compliance with applicable federal procurement regulations.

**PLEASE NOTE: STATE TERM CONTRACTS ARE LIMITED TO MACs AND GDCs ONLY. "STATE TERM SCHEDULES" ("STSs" described in the next section) ARE NOT A TYPE OF STATE TERM CONTRACT.**

C. State Term Schedules (STSs)

"State Term Schedules" are noncompetitive schedules of products or services made available to counties through the Cooperative Purchasing Program at rates not to exceed the maximum amounts listed within each schedule. Any vendor that so chooses may obtain a schedule if that vendor has either a current General Services Administration Contract with the federal government or a recently awarded competitive contract with another state. Neither of those two prerequisite factors qualify an STS as "competitive" for purposes of federal procurement regulations.

However, STSs are efficient contracting vehicles for counties to utilize for the purchase of goods and/or services. Therefore, ODJFS has prepared the following tables to define procedures that, if followed, should allow a county to access an STS by utilizing a process that will be "competitive." In effect, the county could treat the STS as a prequalified vendor list when these procedures are followed. The legal citations provided in the following tables indicate either the source of the particular requirement/restriction or the regulation that the requirement/restriction is meant to address.

For counties using any federal money to avail themselves of the state term schedule contract vehicles while still complying with federal requirements regarding "competition," the requirements of the applicable federal regulations governing the source of federal funding used must be followed. Those procurement requirements are found in 7 CFR 3016.36 for Food and Nutrition Services funding from the Department of Agriculture, 29 CFR 97.36 for Department of Labor funding, and 45 CFR 92.36 for funding from the US Department of Health and Human Services. The requirements in these sections are virtually identical, but there are some small differences to note again depending upon the source of funding. In addition, counties must comply with OAC 5101:9-4-07.

The following table lists the affirmative requirements that must be present for a county to use a state term schedule as a prequalified vendor list. While not an exhaustive listing, many of the key requirements are listed below.

#	<b>Affirmative Requirements for Using a State Term Schedule as a Prequalified Vendor List:</b> <i>"Counties shall..."</i>	<b>Legal Citations</b>
1	Be guided by the basic principle, "All procurement transactions will be conducted in a manner providing full and open competition consistent with the [applicable federal] standards."	<b>7 CFR 3016.36(c)(1)</b> <b>29 CFR 97.36(c)(1)</b> <b>45 CFR 92.36(c)(1)</b> <b>OAC 5101:9-4-07(J)(5)</b>
2	Verify that the applicable STS includes enough qualified sources to ensure maximum open and free competition.	<b>7 CFR 3016.36(c)(4)</b> <b>29 CFR 97.36(c)(4)</b> <b>45 CFR 92.36(c)(4)</b> <b>OAC 5101:9-4-07</b>
3	Follow their own procurement standards which reflect applicable state laws, provided that the procurements conform to applicable federal law and the standards in 45 CFR 92.36.	<b>7 CFR 3016.36(b)(1)</b> <b>29 CFR 97.36(b)(1)</b> <b>45 CFR 92.36(b)(1)</b> <b>OAC 5101:9-4-07(A)(1)</b>
4	Maintain a contract administration system which ensures contractors perform according to their contracts.	<b>7 CFR 3016.36(b)(2)</b> <b>29 CFR 97.36(b)(2)</b> <b>45 CFR 92.36(b)(2)</b> <b>OAC 5101:9-4-07(J)(8)</b>
5	Maintain a written code of standards or conduct regarding award and administration of contracts.	<b>7 CFR 3016.36(b)(3)</b> <b>29 CFR 97.36(b)(3)</b> <b>45 CFR 92.36(b)(3)</b> <b>OAC 5101:9-4-04</b> <b>OAC 5101:9-4-07(J)(6)</b>
6	Maintain sufficient records to demonstrate the details and justification for the ultimate selection.	<b>7 CFR 3016.36(b)(9)</b> <b>29 CFR 97.36(b)(9)</b> <b>45 CFR 92.36(b)(9)</b> <b>OAC 5101:9-4-02</b> <b>OAC 5101:9-4-07</b>
7	Conduct a cost or price analysis in every instance.	<b>7 CFR 3016.36(f)</b> <b>29 CFR 97.36(f)</b> <b>45 CFR 92.36(f)</b> <b>OAC 5101:9-4-07(F)</b>
8	Ensure that all contracts contain the provisions found in the federal regulations applicable to the source of funding to be spent.	<b>7 CFR 3016.36(i)</b> <b>29 CFR 97.36(i)</b> <b>45 CFR 92.36(i)</b> <b>OAC 5101:9-4-07(K)</b>
9	Articulate a protest procedure for interested vendors.	<b>7 CFR 3016.36(b)(12)</b> <b>29 CFR 97.36(b)(12)</b> <b>45 CFR 92.36(b)(12)</b> <b>OAC 5101:9-4-02</b>

#	<b>Affirmative Requirements for Using a State Term Schedule as a Prequalified Vendor List:</b> <i>"Counties shall..."</i>	Legal Citations
10	Make generally available to any vendor the procurement opportunity by at least posting the opportunity on the county's website.	<b>7 CFR 3016.36(c)(1);(4)</b> <b>29 CFR 97.36(c)(1);(4)</b> <b>45 CFR 92.36(c)(1);(4)</b> <b>OAC 5101:9-4-07(C);(D);(E)</b>
11	Clearly identify that one requirement of the procurement opportunity is that the vendor have a valid Ohio STS.	<b>7 CFR 3016.36(c)(1); (4)</b> <b>(d)(2)(i)(A)</b> <b>(d)(3)(i)</b> <b>29 CFR 97.36(c)(1); (4)</b> <b>(d)(2)(i)(A)</b> <b>(d)(3)(i)</b> <b>45 CFR 92.36(c)(1); (4)</b> <b>(d)(2)(i)(A)</b> <b>(d)(3)(i)</b> <b>OAC 5101:9-4-07(D)</b>
12	Provide clear notice of any prospective vendor's ability to obtain a STS, and provide directions on how to obtain a STS. (A hyperlink to the DAS state contracting vehicles site should be sufficient.)	<b>7 CFR 3016.36(c)(1); (4)</b> <b>29 CFR 97.36(c)(1); (4)</b> <b>45 CFR 92.36(c)(1); (4)</b> <b>OAC 5101:9-4-07(J)(5)</b>
13	Provide specific notice to <b><u>ALL</u></b> vendors having an STS in the category from which the county is interested in obtaining good or services unless providing notice to all vendors is impractical. If fewer than all vendors are provided notice due to impracticality, an adequate number of vendors must be notified to allow sufficient competition (An e-mail with the hyperlink to the opportunity and some explanation sent to the vendor's contact person listed on the STS should be sufficient.)	<b>7 CFR 3016.36(c)(1); (4)</b> <b>29 CFR 97.36(c)(1); (4)</b> <b>45 CFR 92.36(c)(1); (4)</b> <b>OAC 5101:9-4-07(J)(5)</b>

#	Affirmative Requirements for Using a State Term Schedule as a Prequalified Vendor List: "Counties shall..."	Legal Citations
14	<p>Comply with the guidelines governing the types of competitive procurements identified in the federal regulations and the procedural steps for each of them found in the applicable rule. Some especially important factors are:</p> <p>a. "Procurement by <i>small purchase procedures</i>"</p> <p>(1) Simple and informal;</p> <p>(2) Under \$100,000. (<i>Important: This is a maximum price ceiling for small purchases. It may be more appropriate to utilize one of the other competitive procurement processes for purchases under \$100,000 when circumstances merit.</i>); and</p> <p>(3) Price or quotations required "from an adequate number of qualified sources." ODJFS requires at least <b>three</b> valid price or rate quotations be obtained from qualified sources.</p> <p>b. "Procurement by <i>sealed bids</i>"</p> <p>(1) Firm fixed-price contract;</p> <p>(2) Awarded to the <u>responsible</u> bidder whose price is lowest. The procurement must be "principally" based in price [7 CFR 3016.36(d)(2)(i)(C); 29 CFR 97.36(d)(2)(i)(C); 45 CFR 92.36(d)(2)(i)(C)] but elements of technical merits may be assessed to determine "responsibility;" and</p> <p>(3) Two or more responsible bidders. Complete evaluation must be made of at least <b>two</b> sealed bids. If more than one bid is received, but only one bid is completely evaluated on its technical and price merits, that is insufficient.</p> <p>c. "Procurement by <i>competitive proposals</i>"</p> <p>(1) More than one source must submit a proposal;</p> <p>(2) Firm fixed price or cost reimbursement contract; and</p> <p>(3) Award made to the "responsible firm whose proposal is most advantageous to the program, with price and other factors considered" [7 CFR 3016.36(d)(3)(iv); 29 CFR 97.36(d)(3)(iv); 45 CFR 92.36(d)(3)(iv)].</p>	<p><b>7 CFR 3016.36(d)</b>  <b>29 CFR 97.36(d)</b>  <b>45 CFR 92.36(d)</b>  <b>OAC 5101:9-4-07(B);(C);(D)</b></p>
15	<p>Completely, adequately and realistically describe all procurement opportunities in the posted announcement.</p>	<p><b>7 CFR 3016.36(c)(3)</b>  <b>29 CFR 97.36(c)(3)</b>  <b>45 CFR 92.36(c)(3)</b>  <b>OAC 5101:9-4-07</b></p>
16	<p>Publicize and identify all evaluation factors, their relative importance, and the selection procedures for the procurement opportunity.</p>	<p><b>7 CFR 3016.36(c)(3)</b>  <b>29 CFR 97.36(c)(3)</b>  <b>45 CFR 92.36(c)(3)</b>  <b>OAC 5101:9-4-07</b></p>

#	<b>Affirmative Requirements for Using a State Term Schedule as a Prequalified Vendor List:</b> <i>"Counties shall..."</i>	<b>Legal Citations</b>
17	Make available to ODJFS upon request the technical specifications on proposed procurements.	<b>7 CFR 3016.36(g)</b> <b>29 CFR 97.36(g)</b> <b>45 CFR 92.36(g)</b> <b>OAC 5101:9-4-02</b>
18	Comply with the bonding requirements for construction or facility improvement projects.	<b>7 CFR 3016.36(h)</b> <b>29 CFR 97.36(h)</b> <b>45 CFR 92.36(h)</b> <b>R.C. 307.88; 307.89</b> <b>OAC 5101:9-4-07</b>
19	Comply with any additional requirements of the Cooperative Purchasing Program administered by the Ohio Department of Administrative Services and the Ohio Office of Information technology.	<b>RC 125.04</b>

Additionally, there are some key prohibitions.

#	<b>Prohibitions: "Counties shall NOT..."</b>	<b>Legal Citations</b>
1	Simply select one vendor from an STS and negotiate with that vendor alone.	<b>7 CFR 3016.36(c)</b> <b>29 CFR 97.36(c)</b> <b>45 CFR 92.36(c)</b> <b>OAC 5101:9-4-07(J)(5)</b>
2	Limit competition by providing for in-State or local geographic preferences.	<b>7 CFR 3016.36(c)(2)</b> <b>29 CFR 97.36(c)(2)</b> <b>45 CFR 92.36(c)(2)</b> <b>OAC 5101:9-4-07(J)(2)</b>
3	Limit competition in any of the enumerated ways described in the applicable rules, including the catch all: "any arbitrary action in the procurement process."	<b>7 CFR 3016.36(c)(1)</b> <b>29 CFR 97.36(c)(1)</b> <b>45 CFR 92.36(c)(1)</b> <b>OAC 5101:9-4-07(J)(5)</b>

## II. Noncompetitive Procurements

In certain limited circumstances, federal regulations will allow procurement by "noncompetitive proposals." These types of purchases are to be extraordinary if not rare. They are the exception, not the rule. As such, noncompetitive purchases will be closely scrutinized for strict compliance to the federal rules.

The applicable regulations for these types of procurements are found at 7 CFR 3016.36(d)(4); 29 CFR 97.36(d)(4); 45 CFR 92.36(d)(4); and OAC 5101:9-4-07(E). In all instances of procurement by noncompetitive proposal, a cost analysis is required.

### A. Sole Source

"The item is available only from a single source." This type of noncompetitive proposal is typically found in instances of proprietary products. It truly means only one source exists for the good or service that is being sought. It does NOT mean obvious business justifications or long-term relationships with a particular vendor.

If what is needed requires the Dalai Lama to provide it, there is only one Dalai Lama. This is a "sole source."

### B. Emergencies

"The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation." This is typically reserved for emergencies caused by natural disasters.

### C. Prior Approval

"The awarding agency authorizes noncompetitive proposals." For purposes of this regulation as it applies to this guidance document, the "awarding agency" is ODJFS (see, 7 CFR 3016.3; 29 CFR 97.3; or 45 CFR 92.3).

For this type of noncompetitive proposal, the county must obtain PRIOR approval of the proposed noncompetitive procurement from ODJFS. Such prior approval will only be given in instances of compelling and substantial business reasons for a county. Failure to adequately plan for a needed procurement will not be considered a compelling and substantial business reason.

The procedures for consideration of requests for prior approval of noncompetitive proposal from ODJFS are as follows:

1. The county shall submit a detailed request to ODJFS thoroughly describing the county's desired purchase, the complete circumstances surrounding the proposed purchase, the county's compelling and substantial business reason for requesting the prior approval of a noncompetitive proposal, a cost analysis, and any other details relevant to the ODJFS decision on the request. ODJFS may request clarification or additional required information in its consideration of any such request.
2. Once all required information has been received by and any clarifications provided to ODJFS, ODJFS shall have thirty (30) business days to approve or deny a request.

3. Requests must be addressed to:

Ohio Department of Job and Family Services  
Deputy Director for Contracts and Acquisitions  
30 East Broad Street, 31<sup>st</sup> Floor  
Columbus, Ohio 43215-3414

*with a copy to:*

Ohio Department of Job and Family Services  
Assistant Director for Operations  
30 East Broad Street, 32<sup>nd</sup> Floor  
Columbus, Ohio 43215-3414

If approved by ODJFS, any such request for prior approval will meet the procurement requirements found in the applicable federal regulations.

D. **Failed Competitive Procurements**

"After solicitation of a number of sources, competition is determined inadequate." This is reserved for instances where a county has fully completed a legitimate and reasonable competitive procurement process and the result of that procurement is inadequate for the needs of the county. It is suggested that the competitive procurement process be attempted at least twice, both of which had unacceptable results. However, if after one attempt the county is confident that it has fully completed a legitimate and reasonable competitive procurement, a second attempt is not necessary. If a county is unsure, but wishes to proceed without attempting a second procurement, the county may submit a "prior approval" request pursuant to section II C.

Questions regarding this FAPL may be directed to your local fiscal supervisor or to the Bureau of County Finance and Technical Assistance by calling (614) 752-9194.

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