

FOMB POLICY: REVIEW OF CONTRACTS

Authority

This FOMB Policy (the “Policy”) is established pursuant to Section 204(b)(2) of PROMESA to require prior FOMB approval of certain contracts to assure that they “promote market competition” and “are not inconsistent with the approved fiscal plan.” This Policy also underlines the sense of Congress as provided in Section 204(b)(3) that any policy under Section 204(b)(2) should be designed “to make the government contracting process more effective” and “to increase the public’s faith in this process.” This Policy shall also apply as provided in Section 204(b)(5).

Applicability¹

This Policy applies to any contract that is proposed to be entered into by the Commonwealth (which includes the Executive, Legislative and Judicial branches of government) or any covered instrumentality. As used in this Policy, “contracts” also applies to grants, sub-grants, and tax abatement or similar tax relief agreements. This Policy applies to all contracts in which the Commonwealth or any covered instrumentality is a counterparty, including those with the federal government, state governments, private parties, and nonprofit organizations.

The Commonwealth or any covered instrumentality must inform potential contract counterparties, including federal government agencies, about this Policy and the requirement that the FOMB approve any contract pursuant to this Policy before execution.

In establishing this Policy, the FOMB is mindful of Section 204(d)(2) and does not intend to impede the implementation of any federal programs, particularly those related to disaster response and recovery. To the contrary, the FOMB established this Policy in large part to support the implementation of federal programs related to funding and reimbursement for disaster aid spending.

Contracts executed prior to date of adoption of this Policy, shall, at the request of the FOMB, be subject to review by the FOMB to ensure that they do not “adversely affect the territorial government’s compliance with the Fiscal Plan”.

Scope of Review

The FOMB will review contracts to determine whether they are consistent with the applicable fiscal plan. To the extent contracts are related to disaster aid spending, eligibility for federal funding and/or reimbursement will also be reviewed; provided, however, that the contracting parties retain responsibility for fulfilling any federal funding or reimbursement requirements notwithstanding any approval under this Policy.

¹ Pursuant to Section 204(b)(4), the FOMB retains the authority to review any “rule, regulation, or executive order proposed to be issued by the Governor (or the head of any department or agency of the territorial government) in the same manner as such provisions apply to a contract.” Section 204(b)(5) likewise applies equally to such rules, regulations, and executive orders as it does to contracts.

While the FOMB retains the authority to expand the scope of its review, it will not generally engage in legal review of the contractual documentation or the contracting process, including without limitation: (i) compliance with contracting requirements under applicable laws, rules, and regulations, both federal and local and (ii) compliance with applicable laws, rules, and regulations governing procurement activities, both federal and local. In addition, the FOMB will not engage in any due diligence or background check with respect to the contracting parties nor review whether the contracting parties comply with the requirements under the applicable contract.

Approval Process

All contracts or series of related contracts, inclusive of any amendments, modifications, or extensions, with an aggregate expected value of \$10 million or more, including any professional advisory or personal services contracts, must be submitted to the FOMB for its approval before execution at contracts@promesa.gov. The FOMB will select, on a random basis or otherwise in its sole discretion, agencies or other governmental entities for review of contracts below the \$10 million threshold, to assure that they promote market competition and are not inconsistent with the approved fiscal plan, including the measures provided therein. To effectuate this Policy, the FOMB may issue subpoenas and exercise any other powers granted to it under PROMESA.

In addition, the contracting party must include in its submission: (i) a completed copy of the Contract Submission Questionnaire, attached herein as Appendix A, (ii) the Agency Certification Requirement, attached herein as Appendix B, and (iii) the Contractor Certification Requirement, attached herein as Appendix C. The FOMB may require additional information during the course of its review.

Following receipt of the proposed contract and all required information, the FOMB will notify the contracting party by formal response within seven business days whether the FOMB approves the contract, rejects the contract, or requires further information and/or modifications to the documentation. If the FOMB requires further information and/or modifications to the documentation from the contracting party, the FOMB will provide a final response of either approving the contract or rejecting the contract within seven business days of receipt of all requested information and/or confirmation of the modifications.

The FOMB will publish a status report of each contract under review, including, but not limited to, the name of the contracting party, the date of submission, the date of any response from the FOMB or from the contracting party, and a copy of all the FOMB's formal responses. In addition, for all contracts that were reviewed prior to the adoption of this modified Policy, the FOMB will publish a copy of the FOMB's final response.

To ensure the FOMB is able to review the proposed contracts expeditiously and to increase the likelihood that the FOMB will determine that the proposed contracts are consistent with this Policy, the FOMB encourages the Commonwealth or covered instrumentality, as applicable, to provide the relevant documents on an ongoing basis.

For the avoidance of doubt, the FOMB's Code of Conduct applies to this Policy.

Appendix A

Contract Submission Questionnaire

1) Agency

- a) Agency name:
- b) Contact name:
- c) Contact e-mail:
- d) Contact phone number:
- e) Person(s) who will sign the contract on behalf of the agency:
- f) State what statute, regulation, or resolution authorizes such person(s) to execute the contract on behalf of the agency:

2) Contractor

- a) Name:
- b) Parent organization (if applicable):
- c) Principals of the contractor and/or parent organization (if applicable):
- d) State of organization:

3) Contract

- a) Type (disaster relief or other):
- b) Value:
- c) Service or products description:
- d) Timing (e.g., need processing by end of year before benefits expire):
- e) New contract, amendment, or extension:
- f) Language (Spanish or English):
- g) Any related contracts (if applicable):

4) Budget Questions:

- a) Are the funds for the contract included in the budget?
 - i) If yes, in which allotment? Please specify (A) the line item(s) in the budget that this contract will be funded from and (B) what other expenses have been committed or planned for that budget item.
- b) Does the existing budget fully cover the cost of the contract? If multiple line items, please specify the amount against each budget line
 - i) If not covered in the budget, which allotments need to be reprogrammed?
- c) If the contract extends past the current fiscal year, does the current budget line item include the full cost of the contract or only the portion applicable to the current budget time period?
 - i) If only the portion applicable to the current budget, how much will be funded from the future budget? Are the budget line items the same and are there sufficient funds within those? Please provide supporting evidence

5) Fiscal Plan Questions

- a) Is the contract consistent with the applicable Fiscal Plan? Please provide some commentary on why / why not.
- b) Does the contract constitute separate and additional disaster aid spending?
 - i) Will the contract be partially or fully federally funded?
 - ii) RFP information
 - (1) Name:
 - (2) Issue date:
 - (3) Due date:
 - (4) Award date:
 - (5) Applicable RFP rules and regulations:
 - (6) Amendments (Yes or No):
 - (7) Description of efforts undertaken to advertise the RFP:

6) Documentation

Are all the following documents included in the submission? For any documents not included in the submission, please provide explanation as to why not.

| | Document | Yes | No | Document Reference |
|--|--|--------------------------|--------------------------|---------------------------|
| 1. | Agency Certification Requirement, attached herein as Appendix B | <input type="checkbox"/> | <input type="checkbox"/> | |
| 2. | Contractor Certification Requirement, attached herein as Appendix C | <input type="checkbox"/> | <input type="checkbox"/> | |
| 3. | A formal estimate of the impact that the contract will have on compliance with the certified Fiscal Plan | <input type="checkbox"/> | <input type="checkbox"/> | |
| 4. | Recommendation to award memo or other document containing rationale for the award | <input type="checkbox"/> | <input type="checkbox"/> | |
| 5. | Copy of final contract | <input type="checkbox"/> | <input type="checkbox"/> | |
| The following documents are only applicable to contracts relating to funding and reimbursements for disaster aid spending. | | | | |
| 6. | Existing procurement policies | <input type="checkbox"/> | <input type="checkbox"/> | |
| 7. | RFP package issued | <input type="checkbox"/> | <input type="checkbox"/> | |
| 8. | Documentation regarding advertising of RFP | <input type="checkbox"/> | <input type="checkbox"/> | |
| 9. | Internal independent cost estimate prepared as part of issuing the RFP | <input type="checkbox"/> | <input type="checkbox"/> | |
| 10. | Evaluation criteria | <input type="checkbox"/> | <input type="checkbox"/> | |
| 11. | Copies of the responses to RFP received | <input type="checkbox"/> | <input type="checkbox"/> | |

| | Document | Yes | No | Document Reference |
|-----|--|--------------------------|--------------------------|---------------------------|
| 12. | Copies of correspondence with bidder (Q&A, BAFO discussions, etc.) | <input type="checkbox"/> | <input type="checkbox"/> | |
| 13. | Names of individuals who are part of the evaluation team(s) | <input type="checkbox"/> | <input type="checkbox"/> | |
| 14. | Proposed evaluation and scoring records | <input type="checkbox"/> | <input type="checkbox"/> | |
| 15. | Any other information, communications, or documentation that helps support or explain the procurement and resulting contract | <input type="checkbox"/> | <input type="checkbox"/> | |

Appendix B

Agency Certification Requirement

The following certification shall be provided to the Oversight Board by each agency submitting contracts for review:

1. [Name of Agency], its officials and employees have complied with all applicable conflicts of interest laws, rules, regulations and policies in connection with the procurement and negotiation of the contract².
2. To the best knowledge of the signatory (after due investigation), no person has unduly intervened in the procurement, negotiation or execution of the contract, in contravention of applicable law.
3. To the best knowledge of the signatory (after due investigation), no person has: (i) offered, paid, or promised to pay money to; (ii) offered, given, or promised to give anything of value to; or (iii) otherwise influenced any public official or employee with the purpose of securing any advantages, privileges or favors for the benefit of such person in connection with the contract.
4. To the best knowledge of the signatory (after due investigation), neither the contractor, nor any of its owners³, directors, officials or employees, or its representatives or sub-contractors, has required, directly or indirectly, from third persons to take any action with the purpose of influencing any public official or employee in connection with the procurement, negotiation or execution of the contract.

The above certification shall be signed by the head or general counsel of the agency submitting the contract for review.

In the event that the agency is not able to provide any of the above certifications, it shall provide a written statement setting forth the reasons therefor.

² As used herein, the term “contract” is inclusive of any amendments, modifications or extensions.

³ For purposes of this certification, a contractor’s “owner” shall mean any person or entity with more than a ten percent (10%) ownership interest in the contractor.

Appendix C

Contractor Certification Requirement

The following certification shall be provided to the Oversight Board by each contractor under contracts submitted for review:

1. The contractor's subcontractor(s) in connection with the contract⁴ is (are) the following:
2. Neither the contractor nor any of its owners⁵, partners, directors, officials or employees, has agreed to share or give a percentage of the contractor's compensation under the contract to, or otherwise compensate, any third party, whether directly or indirectly, in connection with the procurement, negotiation, execution or performance of the contract, except as follows:

(Name of individual or firm, including names of principals or owners of the latter)
(Principal terms and conditions of the compensation sharing arrangement)

3. To the best knowledge of the signatory (after due investigation), no person has unduly intervened in the procurement, negotiation or execution of the contract, for its own benefit or that of a third person, in contravention of applicable law.
4. To the best knowledge of the signatory (after due investigation), no person has: (i) offered, paid, or promised to pay money to; (ii) offered, given, or promised to give anything of value to; or (iii) otherwise influenced any public official or employee with the purpose of securing any advantages, privileges or favors for the benefit of such person in connection with the contract (such as the execution of a subcontract with contractor, beneficial treatment under the contract, or the written or unwritten promise of a gift, favor, or other monetary or non-monetary benefit).
5. Neither the contractor, nor any of its owners, partners, directors, officials or employees or, to the best of its knowledge (after due investigation), its representatives or sub-contractors, has required, directly or indirectly, from third persons to take any action with the purpose of influencing any public official or employee in connection with the procurement, negotiation or execution of the contract.

The above certifications shall be signed by the Chief Executive Officer (or other officer with equivalent position or authority to issue such certifications) of the contractor.

In the event that a contractor is not able to provide any of the above certifications, such contractor shall provide a written statement setting forth the reasons therefor.

⁴ As used herein, the term "contract" is inclusive of any amendments, modifications or extensions.

⁵ For purposes of this certification, a contractor's "owner" shall mean any person or entity with more than a ten percent (10%) ownership interest in the contractor.