Purchases Using the Sole Source Exception
Cabinet Presentation May 19, 2017
• Mentions the Texas statute that governs community colleges purchases and specifically the two “sole source” paragraphs in the statute – Texas Education Code 44.031 (j) and (k)
• The purchases must be appropriately justified in writing
  • Must be based upon a need for some feature that is unique and cannot be provided by any other product or service
  • Explanation for the unique specification – why must we have this thing that no other vendor can provide?
  • Detail: why are competitors’ products not satisfactory?
  • Budget Head and Vice President signature and date

College Procedure – Sole Source Procurement

• Letter from the company
  • Describing unique characteristics of the good or service offered
  • A statement that this product is exclusively sold by them and cannot be purchased from any other vendor
  • Signed by an officer of that company and dated within one year of purchase

• Documentation must be kept
  • Incumbent on the District to obtain and retain documentation which clearly delineates the reasons which qualify the purchase to be made on a sole source basis

• History
  • The sole source section of Procedure was updated in 2012 at the requests of and working with two Trustees

“Without complying with Subsection (a), a school district may purchase an item that is available from only one source, including:

1. an item for which competition is precluded because of the existence of a patent, copyright, secret process, or monopoly;
2. a film, manuscript, or book;
3. a utility service, including electricity, gas, or water; and
4. a captive replacement part or component for equipment.”

“These exceptions do not apply to mainframe data-processing equipment and peripheral attachments with a single-item purchase price in excess of $15,000.”

(2) Texas Education Code 44.031 (j)(k)
Federal Treatment of Sole Source Procurement

- When a non-Federal entity is using Federal funds
  - Purchases of $3,500 or more but under $150,000 require that “price or rate quotations must be obtained from an adequate number of qualified sources.”
  - “Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:
    - (1) The item is available only from a single source;
    - (2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
    - (3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or
    - (4) After solicitation of a number of sources, competition is determined inadequate.”
  - No mention of patent, trademark or copyright

- Sole source procurement is much less common using Federal funds
  - Litigation risks; many court opinions
  - More ways, and more specific ways, to be assessed penalties, to the entity and individuals involved

(3) Code of Federal Regulations §200.320 and others
Currently, final approval of a sole source purchase is given by:

- Board of Trustees - If $50,000 or more in the aggregate
- The Buyer signing the contract - If under $50,000 in the aggregate

More Background:

- Most tenured government purchasers working in the larger entities maintain there are few real sole sources, and they will advocate a competitive process be conducted when in doubt.
  - Many vendors claim to be “the best” and state the reasons why, but that does not make them a sole source.
  - We find that vendor representatives often make “sole source” claims even when a sole source does not truly exist; or they will state that “entity so and so made the purchase using the sole source exception” as a reason why this (and every) entity should do the same.

Some established sole sources at EPCC:

- Maintenance services of patented software already purchased through a competitive process and already deployed (Banner, Oracle, etc.)
- Advertising services on media that distributes copyrighted or trademarked content (KTSM, El Paso Times, etc.)
Recommendation for “Gradcast” Type Product

1. Conduct a competitive solicitation, especially if this pilot program could turn into a multi-year purchase

2. If that is not an option at all due to time constraints, then make the purchase of this one-year pilot program using Institutional funds instead of Federal funds
   • “Spot purchase” because one-year cost is $6,930
   • However, a competitive process will be required before any multi-year contract is signed
     • $10,000 and over requires 3 quotes (internal procedure – can be overridden by President)
     • $50,000 and over requires a competitive process (State law)

3. If Federal funds must be used, then obtain a second quote for a competing product/service
Other Entities’ Sole Source Processes – EPISD

- “Personal or professional services should ordinarily not be recommended to the Board for purchase on a sole source basis…”
- “Regarding purchases or personal property, the fact that a particular item is covered by a patent or copyright should be but one factor in determining if the purchase falls under the sole-source exemption…”
- “When considering whether a certain provider is the “sole source” of a particular good or service, the administration shall determine whether the vendor is the sole person or entity in the world legally entitled to provide the particular good or service to the District…”
- Requires sole source purchases to be approved by the Board, if required by law to bid (no amount stated)
• HCC Procurement Procedures Manual
  • Section on sole source reads similar to EPCC’s, however additional requirements in HCC’s Guideline No. 4

• HCC’s Procurement Guideline No. 4
  • “It is the purpose of the Procurement Operations Department to promote the use of competitive awards...”
  • Signed justification form must be submitted by the requesting department to Procurement Operations Department
    • Step by step questionnaire, 10 questions
    • Signed by President of the requesting department’s college
  • “The following reasons to justify a sole source purchase will not be accepted:
    • Price
    • Competitive products not satisfactory
    • Subjective statements regarding product quality”
  • “Adherence to this Guideline No. 4 is required by all user departments and does not, in any way, guarantee the user department that a sole source award will be processed by the Procurement Operations Department.”

• “A sole source IS (re-states TEC 44.031(j))”

• “A sole source IS NOT
  • An item from a vendor because we really, really like that vendor and they are our friend;
  • An item we want to buy because that is the kind we have always purchased in the past;
  • An item from a vendor that is located close to us and is convenient; and
  • An item that is patented but has acceptable substitutes.
  Example: Nike athletic shoes are patent protected, but there are several other brands such as Adidas, New Balance, etc. that can provide athletic choices. Brand specificity is not considered justification for a sole source purchase.”

(6) San Jacinto College Purchasing Handbook, Revised 2.6.17 and San Jacinto College public-facing website
• Justification form must be submitted to the Purchasing Department
  • “Identification of the unique feature(s) or character(s)/specification(s) of the requested product that will serve as the basis for the proprietary/sole justification;
  • An explanation of the need for the unique specifications. This explanation must address the critical importance of the unique specifications to the intended use of the product or service;
  • A reason stating why a competitor's product is not satisfactory. This section must relate to the explanation of need for the unique specifications and should serve to support a finding that the stated need cannot be met with competing products. Sufficient detail must be included to show that the marketplace has been canvassed to locate acceptable competitive products.”
• If more than one source is out there, “preserving the competitive environment will help ensure that SJCCD receives the best price”
• Sole source justification is an overt act that must withstand public scrutiny
• “The justification cannot be that competing products are not satisfactory.”

(6) San Jacinto College Purchasing Handbook, Revised 2.6.17 and San Jacinto College public-facing website
• “It is recognized that many purchases are based upon extensive investigative work done by the end-user before submitting the purchase request and that there are good reasons why one product will work and another may not. Remember, however, that the proprietary/sole source purchase procedure is an exception to the competitive bidding requirements to be used only when appropriate.”

• Annual justification is required
  • “Annual justification is not required for software or products that would require a significant financial investment by the College to replace the major component of the item/service that is considered a sole source.”

(6) San Jacinto College Purchasing Handbook, Revised 2.6.17 and San Jacinto College public-facing website
Discussion/Questions
Appendix 4.5.1 Sole Source Questionnaire

PROCUREMENT OPERATIONS
JUSTIFICATION OF SINGLE OR SELECTED SOURCE PURCHASES
QUESTIONNAIRE

This format is to assist requestors in preparing justification letters for single or selected source procurements. The justification letter should be formatted as shown below and shall be approved by the requesting department College President or Designee (i.e. College Operations Officer), and the Executive Director, Procurement Operations.

Prepared by: __________________________ Department: __________________________
Completed by: __________________________ Purchase Requisition No.: __________________________

I request that Houston Community College (HCC) purchase __________________________ from __________________________ (Enter the name of vendor) for reasons stated below:

1) This item/service is required for use in ________________________________________________:
   ○ Research
   ○ Classroom
   ○ Lab
   ○ Other

2) On what basis was it determined that this item is the only one that meets the minimum needs of HCC?

3) Specifically state what makes this item/service so unique that no other item/service will meet the minimum needs of HCC?

4) List the name(s) of other companies, manufacturers, service providers of the item/service with similar functions or qualifications as the one being justified in this letter:

5) Why isn't a competing product be satisfactory for HCC's minimum requirements?

6) What efforts have been made to locate other items/services, which would satisfy HCC's minimum requirements?

7) Since this may be a non-competitive purchase, please suggest a basis, which HCC can use to determine that the proposed price will be fair and reasonable? (Note: Ultimately, the buyer will decide whether the price is fair and reasonable.)

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8) Is there a cost or other benefit to HCC in purchasing this particular item/service?

9) Will the item be used with existing equipment? □ Yes □ No  If yes, will the item be used as:
   a. A repair/replacement part? □ Yes □ No
   b. A component to be interfaced with existing equipment? □ Yes □ No
      If yes, specify the brand and model number of the existing equipment
   c. An accessory or option? □ Yes □ No
   d. To replace equipment that already exists? □ Yes □ No
   e. Other:

10) Comments:

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Approvals:

College President or Designee __________________________ Date __________________________
Executive Director, Procurement Operations __________________________ Date __________________________
Sole source - Without complying with 44.031, Subsection (a), the District may purchase an item that is available from only one source, including: an item for which competition is precluded because of the existence of a patent, copyright, secret process, or monopoly; a film, manuscript, or book; a utility service, including electricity, gas or water; and a captive replacement part or component for equipment. These exceptions do not apply to mainframe data-processing equipment and peripheral attachments with a single-item purchase price in excess of $15,000.

The Administration recognizes that there may be instances when proprietary or sole source purchases must be made, but such purchases must be appropriately justified. The justification for such purchases must be in writing and must be based upon a need for some feature or characteristic (specification) that is unique to the requested product or service that cannot be provided by any other product or service. The written justification must be forwarded to the Purchasing and Contract Management Department and must contain the following elements:

a. Identification of the unique specification of the requested product or service that will serve as the basis for the proprietary/sole source justification.

b. An explanation of the need for the unique specification. This explanation must address the critical importance of the unique specification as it relates to the intended use of the product or service.

c. A reason stating why a competitor’s product or service is not satisfactory. This section must relate to the explanation of need for the unique specification and should serve to support a finding that the stated need cannot be met with competing products or services. Sufficient detail must be included to show that the marketplace has been canvassed to locate acceptable competitive products or services.

d. Authorized signatures (Budget Head and the Budget Head’s Vice President) and date.

e. A letter from the company describing the unique characteristics of the good or service offered and a statement that the product or service is exclusively sold by them and cannot be purchased from any others. The letter must be dated and signed by an officer of the company. The purchase must be made within one calendar year of the date of the letter.

The written justifications may be presented to the Board of Trustees as support for the agenda item requesting Board approval for the purchase. The written justification is not a justification to purchase. The law does not require that the decision to purchase products and services be justified. It is a justification of the need for something that is unique about the product or service that precludes competition. It is important to note that the price of a product is not acceptable justification for a proprietary purchase. If there are two or more products that are acceptable, preserving the competitive solicitation environment will help ensure that the District receives the best price. The proprietary purchase procedure is a valuable tool that should be used whenever appropriate. If a proprietary purchase is justified, the request should be processed accordingly, rather than by soliciting “competitive” proposals and then attempting to disqualify proposals received on other products. As purchasing files are subject to the Open Records Act, the proprietary/sole source purchase procedure is an overt act that must withstand critical scrutiny. Justifications must be objective and must avoid statements that cannot be substantiated. The justification cannot be that competing products are not satisfactory. Statements regarding product quality that may be subjective should not be used. It is recognized that many purchases are based upon extensive investigative work done by the requester before submitting the purchase request and that there are good reasons why one product will work and another may not. Remember, however, that the proprietary/sole source purchase procedure is an exception to the competitive solicitation requirements to be used when appropriate. It is not a mechanism for avoiding such requirements.