

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 or any covered instrumentality. As used in this Policy, “contracts” also applies to grants and sub-grants. 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.

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, including, for example, to ensure that contracts are consistent with the requirements of federal programs, particularly those 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.”

Requirements

All contracts to which this Policy applies must be:

- i. Consistent with the then-applicable fiscal plan for the contracting party, or represent separate and additional post-Hurricanes Irma and Maria spending which may not yet be

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.

reflected in existing fiscal plans but may be integrated into revised fiscal plans as deemed appropriate by the FOMB

To the extent the FOMB determines any of the following are applicable, all contracts to which this Policy applies must also be:

- ii. The result of a competitive and transparent procurement and tender process; and/or
- iii. Consistent with relevant federal regulations, including those pertaining to procurement, scope, documentation, and payment terms, to ensure eligibility for and receipt of federal funding and/or reimbursement.

All contracts or series of related contracts, inclusive of any amendments or modifications, with an aggregate expected value of \$10 million or more must be submitted to the FOMB for its approval before execution.² 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.

Process

All contracts or series of related contracts, inclusive of any amendments or modifications, with an aggregate expected value of \$10 million or more must be sent before execution to the FOMB at contracts@promesa.gov. In addition, the Commonwealth or covered instrumentality, as applicable, must include in its submission, to the extent applicable, the following:

- i. Existing procurement policies
- ii. RFP package issued
- iii. Documentation regarding posting of RFP
- iv. Internal independent cost estimate prepared as part of issuing the RFP
- v. Evaluation criteria
- vi. Copies of the responses to RFP received
- vii. Copies of correspondence with bidder (Q&A, BAFO discussions, etc.)
- viii. Names of individuals who are part of the evaluation team(s)
- ix. Signed certification that all applicable conflicts of interests laws, regulations, and policies have been complied with
- x. A formal estimate of the impact that the contract will have on compliance with the certified Fiscal Plan
- xi. Proposed evaluation and scoring records

² The FOMB retains the authority to adopt other methods, such as random sampling of contracts below the \$10 million threshold, to assure that they “promote market competition” and “are not inconsistent with the approved fiscal plan.”

- xii. Recommendation to award memo or other document containing rationale for the award
- xiii. Drafted contract with pricing information
- xiv. Any risk assessment performed on the entity entering into the contract
- xv. Any addenda or extensions issued (including supporting independent cost estimates)
- xvi. Any other information, communications, or documentation that helps support or explain the procurement and resulting contract

In all events, within seven business days of receipt of a proposed contract and the required supporting documentation as described above, the FOMB will respond:

- i. “No observations” because the review is complete and FOMB has not identified areas of risk.
- ii. “Observations, Feedback not Required” because FOMB has identified areas of risk. However, areas of risk are not considered high and do not require feedback from the contracting party. It is the contracting party’s responsibility to take corrective action based on the observations provided and proceed with the procurement as they see fit.
- iii. “Observations, Feedback Required” because FOMB has identified areas of risk where additional clarity is required from the contracting party, or where modifications need to be made to the documentation and/or awarding decisions and FOMB needs confirmation of the modifications. In instances where this response is issued, the contract may be able to proceed once the observations are responded to and required actions are completed. However further rounds of review by FOMB may be required.
- iv. “Requires Further Review” because the FOMB has identified areas of risk which required additional time for review. FOMB may require additional documentation to complete its review.
- v. “Non-Compliant” because the proposed contract is inconsistent with this Policy and significant changes or potential RFP re-issuance may be required.

If the FOMB responds “Observations, Feedback Required” or “Requires Further Review,” the requested responses and/or additional documentation must be provided within five business days. The FOMB will provide a revised response within five business days of receipt of the requested responses and/or additional documentation.

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.