

Frequently Asked Questions regarding Governor Abbott's Directives

Directive #1: Require public disclosure of all no-bid contracts and a public justification for using such a procurement method.

- How should a UT institution title its webpage for posting "sole source" contracts?

All UT institutions should title their webpages: *Purchase and Contract Transparency Report.*

- Should the Purchase and Contract Transparency Report include reference numbers such as the Purchase Order (PO) Number or the Contract Number?

Yes, UT institutions should include a reference number for ease of locating the PO/Contract.

- UT System uses the term "sole source," but the Governor uses the term "no-bid contract"? Was this intentional?

Yes, the term "sole source" was used to clarify what types of PO/Contracts should be included on the website. The term covers all POs/Contracts *exceeding \$25,000 that were not competitively procured, including the following types of procurements:*

- Sole source (most institutions)
- Exclusive acquisition (UTMB & UTMDACC)

- Does Directive #1 include POs/Contracts for Professional Services (Chapter 2254, Gov. Code, does not permit competitive bidding, but requires review of qualifications and negotiation of price)?

Directive #1 includes *"sole source" professional service contracts for which no competitive Request for Qualifications (RFQ) was issued.*

- Does Directive #1 include a procurement by a UT institution in reliance on a group purchasing organization (GPO) that used a competitive process to procure the goods/services?

POs/Contracts entered into with a vendor who has been selected through a rigorous competitive procurement process performed by a GPO are not considered "sole source" POs/Contracts. The UT Purchasing Task Force is investigating procurement practices of the more commonly used GPOs and may provide a list of "authorized" GPOs that satisfy the rigorous competitive procurement process standard. It is clear that not all GPOs or programs within GPOs meet the necessary standard.

- Are the following POs/Contracts considered “sole source”:
 - Contracts with another Texas agency or political subdivision or with the same in another state?

Interagency and Interlocal contracts need not be listed as “sole source” contracts.

- POs/Contracts procured by another Texas agency or political subdivision or the same in another state?

UT institutions may rely on a rigorous competitive procurement process conducted by another governmental entity. However, UT institutions must confirm that the procurement and the resulting PO/Contract complies with all applicable laws, regulations, Regents’ Rules, policies and procedures, including laws related to Historically Underutilized Businesses (HUB). Note that statutes governing best value acquisition of goods and services by UT institutions contain the following mandatory evaluation criterion:

the impact on the ability of the institution to comply with laws and rules relating to historically underutilized businesses and to the procurement of goods and services from persons with disabilities.

- Research contracts or grants that have sub-awards and/or subcontracts?

In the case of research grants and contracts, there is a well-recognized distinction between sub-awards and subcontracts.

- **Sub-awards are pass-throughs of grant dollars, are not considered procurements of goods or services, and do not establish a vendor/contractor relationship. Consequently, sub-awards should not be reported as “sole source” contracts.**
- **Subcontracts, on the other hand, are procurements of ancillary goods/services and, if not competitively procured, must be reported as “sole source” if the subcontract exceeds \$25,000.**

- Does Directive #1 include hotel contracts, game agreements, art purchases, catering agreements, advertising agreements, speaker agreements, and entertainment agreements?
 - **Game agreements are not covered by this directive because a game agreement is not a “procurement of goods or services” within the meaning of Governor Abbott’s letter. Game agreements are more in the nature of cooperative program agreements. Game agreements do not need to be listed as “sole source.”**
 - **Entertainment agreements are not covered by Directive #1 because the Attorney General has ruled that university venues (e.g., Don Haskins Center at UTEP, Erwin Center at UT Austin) are “marketplace competitors” and disclosure of those performer agreements would harm the university’s legitimate marketplace interests. See OR2014-10754.**

- **Other agreements listed above, if not competitively procured, must be listed as “sole source” with the relevant information fields completed.**
 - **Art purchases are procurements of goods/services. A “sole source” procurement for these goods/services might possibly be explained by the fact that competitive procurement would be an unnecessary exercise given the goods (specific art or collection).**
 - **Hotel agreements might be location/amenity specific and may be justified “sole source” procurement. However, catering agreements and advertising agreements should generally be competitively procured.**
 - **The UT Purchasing Task Force is discussing additional “sole source” justifications for specific types of contracts, as well as specific exemptions that may apply to specific types of procurements (e.g., library materials).**
- **Does “sole source” include a “Project Addendum” executed pursuant to a Master Services Agreement (MSA) from a pool of vendors or from a single vendor with a competitively procured MSA?**

Generally, if a pool of vendors is qualified under a System-wide contract or a “master services agreement,” either an informal competition between three or more members of the pool must be conducted or if a single vendor is selected without further competition, a “sole source” selection must be justified and disclosed, if the contract exceeds \$25,000.

- **Will amendments to a previously procured “sole source” contract be included on the list?**

Yes, if the amendment changes the dollar value by \$25,000 (the threshold for listing on the webpage).

- **Should “Contract Term” be “length” as stated or rather “begin and end dates”?**

Begin and end dates would be preferable.

- **In the case of POs for commodities which generally don’t have a “term,” may we use “Upon Delivery”?**

Yes.

Directive #3: Prohibit contracts with business entities with which high-level agency leadership or staff have a financial interest.

- Has UT System decided how to handle compliance with Directive #3?

UT System and its institutions are already governed by Regents' Rule 30104, UT System Policy 180 (UTS180) governing Conflicts of Interest, Conflicts of Commitment and Outside Activities, and, in the case of regental interests, by *Texas Education Code* §51.923. These policies prohibit any UT employee or official from participating in a procurement or contracting matter if the person has *"a direct or indirect interest, including financial and other interests...that is in substantial conflict with the proper discharge of the employee's duties..."*

Under these laws, rules and policies, any employee or official with a substantial business in a business entity would have a prohibited conflict of interest if the employee or official participated in a procurement involving that business entity. These laws, rules and policies apply regardless of whether the involvement of the employee or official in the procurement is formal or informal.

Consequently, UT System employees and officials are already prohibited from engaging in the type of conduct that gave rise to Directive #3.

- What kind of financial interest will trigger Directive #3?

UTS180 contains the following definition of "substantial interest":

Substantial Interest in a Business Entity - For purposes of this policy, means:

- (1) a controlling interest;***
- (2) ownership of more than 10 percent of the voting interest;***
- (3) ownership of more than \$5,000 of the fair market value;***
- (4) a direct or indirect participating interest by shares, stock, or otherwise, regardless of whether voting rights are included, in more than 10 percent of the profits, proceeds, or capital gains; or***
- (5) service as an officer.***

"Substantial Interest" does not include investments in mutual funds or retirement accounts, so long as the individual does not directly control the investment decisions made in those vehicles.

Item 11 on the UT System Business Affairs Contract Processing Checklist has been clarified to reflect our current policies:

11. Have you determined that the procurement and resulting contract are in compliance with Regents' Rule 30104, UTS180 and Texas Education Code §51.923?"

Directive #4: Require that the agency's board chair sign any contract valued at more than \$1 million – or delegate signature authority to the agency head.

- Does Directive #4 apply to a Revenue Contract? “Revenue Contract” means any agreement under which a UT institution is being paid for services provided. Most frequently, this comes in the form of health care services, both from State and private payers. Occasionally, the revenue is for administrative services or other services. (i.e.: Contract (funds coming in) - U. T. Institution: To provide health care services to eligible women, infants, and children to Department of State Health Services.)

No, contracts under which UT institutions receive payment for providing services are not procurements by UT of goods/services and are, therefore, not covered by Directive #4.

- Does Directive #4 apply to construction and architect/engineer (A/E) contracts? Proposed SB 353, which is the underlying driver of these directives, modifies Tex. Gov't Code 2261, which applies to the purchase of goods/services. However, the recent directives make no differentiation between goods/services and construction-related contracts.

Yes, construction and A/E contracts are governed by Directive #4.

- Does Directive #4 apply to real estate transactions? Are space leases or licenses where UT is tenant considered procurement contracts? What about leases/licenses where UT is landlord? Are contracts for purchase of real property considered procurement contracts? What about contracts for the sale of real estate?

Directive #4 does not apply because real estate is not a good/service. Potential conflicts of interest in real property transactions are already addressed by UTS 180 and Regents' Rule 30104.

- Will amendments of contracts with a value of \$1 million or more also require signature of the Chancellor/President?

Yes

- If a UT institution is amending a contract that has a value greater than \$1 million and that contract was executed before February 2, 2015:
 - Should the President sign the amendment anytime the value of the amendment alone is greater than \$1 million?

Yes, the President should sign the amendment because the value of the contract, as amended, exceeds \$1 million. The value of the amendment is not determinative; the value of the contract as amended controls.

- Should the person who signed the base term contract, sign the amendment in accordance with the delegation of authority due to the contract originating before February 2, 2015?

It is recommended that the President's signature be in addition to the signatures of the authorized individuals under institution delegations of authority. Current delegations are not necessarily repealed or replaced by the requirement that the President sign contracts exceeding \$1 million; current processes can continue, with the President's signature added to the document rather than replacing current signatories.

- Should a "Notes" column be added to the *Purchase and Contract Transparency Report* Website to denote postings of contract amendments?

We are reviewing the recommended layout and elements of the Website to better reflect contract amendments.

- Should we report the base Contract Term and CAP value, as well as the contract term with all renewal options along with the total contract value? (The reported term and value should comport.)

The contract term and value should be reported in the same way it would be reported for the Consent Agenda—the contract term should reflect renewal options and the contract value should include the value of the base term and renewal options.