MEMORANDUM

Scott C. Kelley
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September 23, 2015

TO: UT System Chief Business Officers
FROM: Scott C. Kelley

SUBJECT: Implementation of Procurement and Contracting Legislation and Working Group Recommendations on Group Purchasing Organizations and Sole Source Purchasing

This memo addresses questions about how UT System institutions should operate in light of recent procurement and contracting legislation (Senate Bill (SB) 20, Appropriations Bill Article IX, Sections 7.04 and 7.12, and House Bill (HB) 1295) and my May 2015 report to the UT System Board of Regents on group purchasing organizations (GPOs) and sole source purchasing.

My recommendations are organized by topic below:

1. General Principles

1.1 Total Contract Period. In valuing contracts and purchase orders (POs), institutions should take into account, for all reporting and approval purposes, the estimated spend over the total potential contract period. For example, if a contract has a base term of three years and provides for the possibility of two one-year extensions, the total contract period would be five years.

1.2 Spend Thresholds for Various Procurement Activities. I recommend that all UT System institutions adopt the following spend thresholds (for both goods and services) for the listed procurement activities:

<table>
<thead>
<tr>
<th>Estimated Spend</th>
<th>Procurement Activities</th>
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<tbody>
<tr>
<td>&lt;$15,000</td>
<td>No competitive procurement required</td>
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<tr>
<td>$15,000 to $50,000</td>
<td>Informal bids from three or more potential suppliers are required (institutions may allow end users to secure these bids themselves)</td>
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<tr>
<td>&gt;$50,000</td>
<td>Formal procurement by the institution directly or via another state agency or a GPO. In any such case, the institution's central procurement activity, not end users, must take lead responsibility for conducting or overseeing the procurement, unless the procurement is led by the UT System Supply Chain Alliance (Alliance).</td>
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2. Reporting of POs/Contracts

2.1 No Thresholds for SB 20 Reporting. It is clear from discussions with legislators during the legislative process that we cannot exclude from our reporting obligations any POs or other contracts, no matter how small. I recognize that this will impose a significant administrative burden on our institutions. Given that SB 20 provides for implementation to occur “as soon as practicable” after September 1, 2015, I urge you to implement SB 20’s reporting requirements as best you can, as quickly as you reasonably can.

2.2 SB 20 Reporting of Summaries Only. The UT System Board of Regents has agreed with the recommendation of the UT System’s Offices of Governmental Relations (OGR) and General Counsel (OGC) to interpret SB 20 as requiring the posting of PO/contract summaries only. I understand that efforts are underway to agree on common elements to be reported under SB 20 by all UT System institutions. Please proceed to implement SB 20’s reporting obligations on this basis.

2.3 LBB Reporting Under Appropriations Bill Limited to Appropriated Funds. Based on advice from OGR and OGC, POs/contracts should be reported to the Legislative Budget Board (LBB) (subject to applicable thresholds) under Appropriations Bill Rider Article IX, Sections 7.04 and 7.12, only to the extent they involve the expenditure of appropriated funds. LBB reporting under other statutes (involving major information systems and professional services) must be made without regard to the source of funds.

2.4 Possible “Double Reporting.” I recognize that, for both SB 20 and LBB purposes, reporting POs that merely implement contracts reported separately will arguably result in “double reporting.” I recommend, however, that all institutions minimize or avoid altogether the administrative burden that efforts to avoid double reporting would require.

2.5 Joint Reporting under SB 20 by UTShare Institutions. It has been suggested that UTShare institutions should consider using one extract program to make SB 20 reports jointly, rather than have each institution report separately. While I support this conceptually, I understand that, given the differences in business processes between the institutions, joint reporting does not appear to be feasible in the short term.

3. Implementation of Recommendations on GPO/Sole Source Purchasing

In May 2015, I discussed with the UT System Board of Regents a report by a working group on this subject. The report (Attachment A) includes nine recommendations. Except as otherwise specified in certain special cases detailed below, please implement these recommendations immediately.

3.1 Recommendation #3 – Tiering and Accrediting State Agencies and GPOs.

I plan to present for approval at the February 2016 Board of Regents meeting a program for evaluating and accrediting state agencies and GPOs used by UT System institutions for procurement. In the meantime, for all contracts signed prior to November 1, 2015, institutions should operate under the Regents’ Rules as presently written. This includes the rule which exempts from Board approval, regardless of dollar amount, all contracts resulting from GPO
procurements that follow applicable statutory and regulatory standards. At the same time, Regents' Rule 10501, Sec. 1.1 makes me responsible for identifying contracts of such significance as to require prior approval by the Board. Please notify me in writing of any proposed GPC-procured contract involving an anticipated spend of $10 million or more, so I can consider whether it should be submitted to the Board for prior approval, via the Consent Agenda or otherwise.

For all contracts signed on or after November 1, 2015, please take into account the following clarifications/modifications of the rules in Recommendation #3 on the use of state agencies and GPOs, bearing in mind that these clarifications and modifications are subject to change resulting from implementation of the accreditation program and my further discussions with the Regents:

(a) Use of Any State Agency or GPO. When total spend under a contract is anticipated to exceed $50,000 (requiring a formal procurement, per 1.2 above), any state agency or GPO may be used for the procurement, unless and until some different guidance emerges from the accreditation program.

(b) Comparison of Multiple Contract Awards.

(1) If an institution proposes to use a contract procured by a state agency or GPO other than the Alliance or Premier, the institution should obtain a minimum of three valid proposals (or two, if there are only two firms in the category) from contracted suppliers in order to identify "best value." This rule applies to the procurement of both goods and services.

(2) If an institution proposes to use a contract procured by the Premier GPO, the institution should obtain a minimum of three valid proposals (or two, if there are only two firms in the category) from contracted suppliers, in order to identify "best value," but only if the spend is anticipated to exceed the applicable spend threshold shown below, as applied to both goods and services:
   - $1.0 million for UTPB, UTRGV, UTT and UTHSCT;
   - $2.0 million for UTA, UTD, UTEP, UTSA; and
   - $3.0 million for UTAUS, UTHSCH, UTHSCSA, UTMB, UTSWMC, UTMDA, and UT System.

(3) If an institution proposes to use a contract procured by the Alliance, the institution does not need to obtain and compare proposals from multiple contracted suppliers, in order to identify "best value." (This situation will arise very seldom, since the Alliance typically makes a contract award to only a single supplier for particular goods or services.)

(c) Exclusive Acquisition Justification for Single Awards. When the Alliance, Department of Information Resources (DIR), E&I Cooperative Services, Premier or TxeMAS are used for a procurement, and an award has been made to only a single supplier in a given category, it is not necessary to justify the purchase as an exclusive acquisition, because it is presumed that the agency/GPO conducted a competitive procurement. When any other state agency
or GPO is used for the procurement, the institution must confirm that the agency or GPO in fact engaged in a competitive procurement prior to making the award. This advice is subject to any different guidance that may emerge from the accreditation program.

3.2 Recommendation #4 - Board Review of Certain Purchases under State Agency / GPO Contracts

Please take into account the following clarifications/modifications of the Rules in Recommendation #4 on the need for review by the Board of Regents of purchases made under a contract procured by a state agency or GPO and signed on or after November 1, 2015:

(a) Again, unless and until some different guidance emerges from the accreditation program, any state agency or GPO may be used for the procurement.

(b) If an institution proposes to use a contract procured by a state agency or GPO other than the Alliance or Premier, and total contract spend is anticipated to exceed $1 million, a summary of the contract must be submitted via email to the Audit, Compliance and Management Review (ACMR) committee of the Board, as described in Recommendation #4. (In all cases covered by this memo, if no member of the committee, within 48 hours after receipt of the email, raises a question about the contract or asks that it be submitted to the entire Board for review and approval, no further Board review of the contract will be required.) The institution also must submit quarterly reports of such purchases as detailed in Recommendation #4.

(c) If an institution proposes to use a contract procured by the Premier GPO, and total contract spend is anticipated to exceed the applicable spend threshold below, a summary of the contract must be submitted to the ACMR committee of the Board as described in Recommendation #4, and quarterly reports of such purchases as detailed in Recommendation #4 also must be made:
  - $1.0 million for UTPB, UTRGV, UTT and UTHSCT;
  - $2.0 million for UTA, UTD, UTEP, UTSA; and
  - $3.0 million for UTAUS, UTHSCH, UTHSCSA, UTMB, UTSMWC, UTMEDA, and UT System.

(d) If the Alliance procures a contract, and total contract spend is anticipated to exceed any of the applicable spend thresholds below, the Alliance’s Strategic Services Group will be responsible for submitting a summary of the contract to the ACMR committee as described in Recommendation #4, and for submitting quarterly reports of related purchases as detailed in Recommendation #4:
  - $1.0 million for UTPB, UTRGV, UTT and UTHSCT;
  - $2.0 million for UTA, UTD, UTEP, UTSA; and
  - $3.0 million for UTAUS, UTHSCH, UTHSCSA, UTMB, UTSMWC, UTMEDA, and UT System.

The Alliance’s Strategic Services Group also will be responsible for providing the notification required by 3.2(e) below. The UT System institutions that purchase under the Alliance-procured contract, however, will be responsible for making all required reports to
the LBB, and for posting related POs/contract summaries under SB 20, for all purchases actually made under the contract.

(e) In all cases, please notify me in writing of any proposed contract procured by a state agency or a GPO, including the Alliance, that involves an anticipated spend of $10 million or more, so I can consider whether it should be submitted to the Board for prior approval, pursuant to Regents’ Rule 10501, Sect. 1.1, via the Consent Agenda or otherwise.

4. SB 20 Restrictions on Use of DIR-Procured Contracts

DIR has proposed rules clarifying that the restrictions in Sections 15 and 16 of SB 20 do not apply to institutions of higher education. Given DIR’s interpretation of the statute, UT System institutions do not need to comply with the restrictions in these Sections.


In November 2015, a change to Regents’ Rules 20901 will be proposed to the Board of Regents, to require each UT System institution to adopt a Contract Management Handbook, in compliance with SB 20. A model template for the Handbook is being drafted by UT System OGC and should be available for distribution to the institutions for comment in early October. Each institution should use the final template to develop and adopt its own version, tailored as necessary to account for local structure and processes, consistent with applicable law.

6. UT System OGC Guidance on Legislation

In order to consolidate into this document, as much as possible, all key guidance on recent procurement and contracting legislation, I am attaching OGC’s summary on this subject (Attachment B), for your easy reference.

7. Revocation of Obsolete, Previous Guidance

The following referenced materials, which provided guidance that has been made obsolete by later developments in the regulation of procurement and contracting, should be considered revoked:


- my February 12, 2015 email to UT System Chief Business Officers, involving Contracts for Services with Multiple Awards.

- FAQs regarding Governor Abbott’s Directive. (These are being removed from the UT System Office of Business Affairs website.)
8. **Impact on UT System Administration**

All of the above guidance applies as well to UT System Administration, as if it were an institution.

If you have any questions about implementation of the above guidance, please feel free to reach out to me.

SCK:

Attachments

cc: UT System Chief Procurement Officers
    UT System Chief Legal Officers
    UT System Administration Department Heads
    UT System Administration Departmental Contract Administrators