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Commissioner

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Executive Deputy Commissioner

## **GUIDANCE MEMORANDUM**

**TO:** Office of Mental Health Licensed and/or Funded Providers (collectively, “Providers”). 

**FROM:** Christopher Smith, Associate Commissioner, Adult Community Care Group, Division of Adult Services

**DATE:** June 9, 2023

**RE:** Waiver of Competitive Bidding Requirements for General Contractors -Revised

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This revised guidance is applicable to all waiver requests of the competitive bidding requirement for construction contracts set forth at Title 14 of the State Codes, Rules and Regulations, Section 521.10(d)(2). The standard for a waiver of construction contract requirements, including bidding, is set forth at Section 521.10(d)(7), which provides: “The applicant [Provider] may request that OMH, alter or revise any of the construction contract requirements based upon sufficient cause. Sufficient cause shall include, but not be limited to, labor and market conditions.”

Providers must submit a waiver request for each specific project; no blanket waivers will be provided. The submission should be in letter form with supporting documentation as set forth below and sent in the first instance to the Director of the Bureau of Housing Development and Support.

As a threshold matter, the waiver request must address the “sufficient cause” standard of Section 521.10(d)(7) through the production of supporting documentation.

The submission should also show that the proposed negotiated contract with the selected general or other contractor (“Contractor”) provides best value to the State in light of the particulars of the project (unique funding source pressures, etc.) Pursuant to State Finance Law (“SFL”) Section 163(1)(j), “‘best value’ means the basis for awarding contracts for services...which optimizes quality, cost and efficiency. Such basis shall reflect, wherever possible, objective and quantifiable analysis.”

Additionally, when selecting a Contractor, Providers must comply with (1) applicable provisions of the Not-for-Profit Corporation Law, Executive Law and other State laws, regulations, rules and guidelines that address, among other matters, corporate governance, improper self-dealing and related party transactions, and (2) applicable provisions of the Nonprofit Revitalization Act of 2013 (the "Act") that amend these various laws. These provisions include but are not limited to restrictions on entering into a "related party transaction" unless the Provider's board determines that the transaction is "fair, reasonable and in the corporation's best interest at the time of such determination." Related-party transactions in the instant context are discouraged by OMH and should be avoided wherever possible. If the selection of a particular Contractor is a related-party transaction under the Act or other applicable State authority, then the Provider must disclose this fact to OMH and provide sufficient justification for the selection. ***OMH has sole and absolute discretion to reject the selection of a related-party Contractor.***

The selected Contractor should be presented for OMH's consideration and vetting as part of the waiver submission. The Provider should indicate the selection criteria that was used to select the Contractor, explain the Contractor's previous professional experience in producing low-income housing units and outline the role the Contractor will play during the construction phase of the project. The documentation should show if and how the Provider prequalified a group of contractors before selecting one, or if the selected Contractor was a result of a recommendation from someone (such as the architect).

References for the selected Contractor should be submitted so that OMH can ensure that the Contractor has prior experience with comparably sized projects and the financial capacity to complete the work including sufficient working capital to cover carrying charges, and has satisfied any applicable letter of credit/bond premium/retainage requirements.

The following should also be provided: (1) an AIA A305 (Contractor Qualifications Statement) completed by the Contractor. This should include complete answers on a separate sheet to questions 3.4, 3.5, and 3.6 (regarding prior project experience); and (2) the most recent copy of the Contractor's audited financial statements.

OMH may request additional information for vetting purposes and the Contractor shall cooperate fully with OMH in providing such information.

If a waiver request is not approved, OMH may, in its sole and absolute discretion, require that the applicable contract go out to bid pursuant to Section 521.10(d)(2).

## **Conditions**

All waivers that are approved will be conditioned upon agreement to and compliance with the following requirements, though OMH reserves its right to impose additional conditions as needed:

- The selected GC must provide a detailed cost estimate of the construction work based upon the preliminary drawings and specifications.
- The Provider must provide a guaranteed price for the total development cost of the project.
- The construction cost estimate must include general requirements (3% to 6% of the labor and material costs); builder's overhead (up to 2% of construction amount allowed); and builder's profit (up to 6% of the construction amount allowed).
- At least 50 percent of all subcontracts shall be competitively bid, and the GC shall submit a trade breakdown spreadsheet detailing all subcontracts for OMH review.
- Any construction cost overruns incurred during the development and construction phases of the project shall be borne by the Provider and shall be paid for from the developer's fee amount.
- General requirements that are special conditions such as security, impact fees, etc. to a project should be detailed on a separate itemized listing.
- If the Davis-Bacon Related Acts apply to a project, the Federal Labor Standards clauses for the relevant federal program and the most current wage rate for the location and type of construction must be incorporated into the GC agreement.
- An officer of the Provider must execute an affidavit that (1) attests to the fact that the choice of GC was based solely on legitimate business considerations and the determination of "best value" as defined in SFL Section 163(1)(j); and (2) assures compliance with applicable provisions of the Act, Not-for-Profit Corporation Law, Executive Law, and other applicable laws or regulations that address self-dealing, related party transactions and other corporate governance matters.
- All M/WBE requirements applicable to the pre-selected GC must be documented through the GC's selection process for sub-contractors and suppliers. OMH's M/WBE requirements are 30% total.
- The standard AIA A101 Owner/Contractor Agreement Form (current edition) should be used to execute construction contracts.
- GCs will not be allowed to obtain a profit and overhead unless they are performing actual construction based on the following criteria:

"Actual construction" means "work" as defined in AIA documents: "...labor, materials, equipment, and services provided by the contractor to fulfill the contractor's obligations." Under this definition, GCs who choose to subcontract out construction of the project to another contractor will not obtain a builder's fee (general overhead and profit) when:

- (i) More than 50 percent of the contract sum in the construction contract is subcontracted to one subcontractor, material supplier, or equipment lessor, and/or
- (ii) More than 75 percent of the contract sum in the contract is subcontracted with three or fewer subcontractors, material suppliers, and/or equipment lessors.

## Submission Suggestions

Please structure the waiver request as follows:

- Organize the narrative into the following four sections:
  - a) The factors that address the standard of “sufficient cause” as set forth at Section 521.10(d)(7);
  - b) How the proposed negotiated contract will provide “best value” to the State;
  - c) Discussion of whether the proposed negotiated contract would constitute a “related party transaction” under any applicable State law;
  - d) Detailed information about the general contractor and the selection process.
- In section (a), provide detail about the site and project-specific conditions and their relevance to the alleged need to bypass a bidding process for a general contractor.
- Provide evidence of any scheduling requirements of tax credit investors and other funding sources
- In section (b), quantify the cost savings that a negotiated contract provides.
- In section (b), describe the funding of this project and explain how a bidding process and related delays would negatively impact the project.
- Provide discussion of any past experience with the chosen contractor.
- Have the contractor submit three independent client references, with contact information, that were involved in ground-up projects comparable to the proposed project.
- In general, to the extent that documentation is provided in support of any assertions in any part of the narrative, cite to specific pages and sections.
- Include a statement in the narrative that the provider and the contractor will meet all of the conditions set forth in the OMH guidance document regarding waivers should OMH approve your request. At the time the request is made, there is no need to provide detailed information about how the conditions will be met.
- Please address to Julie Duncan or the current Director of the Bureau of Housing Development and Support.