



THE COUNTY OF ORANGE

County Executive Office

County Procurement Office

Procurement Ethics Guide



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Issue Date: August 2017

Preface

The County of Orange spends approximately \$1.5 billion a year contracting for goods, services and construction. Those with whom we contract are sometimes unfamiliar with the standards of conduct expected from them. In general, since public funds support most aspects of government activity, including procurement, the standards of conduct and ethical behavior tend to be stricter in the public sector than in the private sector. Actions and decision-making that are appropriate in the private sector may be unacceptable or illegal in the public sector.

The County Executive Office has prepared this *Procurement Ethics Guide* as a resource to advise companies who contract with the County, as well as County employees who process those contracts, about the ethical obligations and standards that govern County procurement. The guide may be used as a reference tool for County Deputy Purchasing Agents (DPAs) and contractors alike, as well as anyone who may be involved either directly or indirectly, in the County procurement process. One caveat: This guide is not an exhaustive compilation of all criminal, civil and ethical laws and rules covering County procurements. When there are doubts about whether conduct is legal or ethical, it is advisable that you contact the County Procurement Office (CPO) for guidance, and in the case of County employees, your County Counsel attorney.

The County Procurement Office is charged with oversight of decentralized purchasing operations. Any person who believes that there has been unfairness, favoritism or impropriety in any contract should inform the County Procurement Office at 1300 S. Grand Ave., Bldg. A, Santa Ana, CA 92705; telephone: 714-567-7314 or via email at CPO@ocgov.com.

For further information on County procurement policies and for a copy of the most recent version of the County's *Contract Policy Manual*, contact the County Procurement Office/Policy Unit at 1300 S. Grand Ave., Bldg. A, Santa Ana, CA 92705; telephone: (714) 567-7363. This guide is also available on the CEO/County Procurement Office website at: <http://olb.ocgov.com>.

Sources Used to Develop this Guide:

Model Procurement Code, American Bar Association
Codified Ordinances of the County of Orange
Contract Policy Manual 2017
National Institute of Governmental Purchasing (NIGP)
State of California Government Code

CHAPTER 1

WHAT THE CONTRACTOR SHOULD EXPECT FROM COUNTY EMPLOYEES

Public employment is a public trust. Public employees must discharge their duties impartially to assure fair, competitive access to governmental procurement by responsible contractors. Moreover, they shall conduct themselves in such a manner as to foster public confidence in the integrity of the County procurement process. All procurements must be “arm’s-length” transactions.

When it comes to public purchasing, ethical behavior is imperative. Ethics go beyond what the law says; and encompasses a person’s moral character, conduct, and perceptions of moral behavior. Because public procurement is undertaken on behalf of the taxpayers and the public at large, it is important that those who engage in public procurement do so with integrity and honor. This means treating vendors fairly, not engaging in questionable practices, and resisting offers of personal benefit.

The NIGP code of ethics serves as an important model for ethical behavior in contracting. The code says that those involved in public purchasing:

1. Should believe in the dignity and worth of the services rendered by the organization and the social responsibilities assumed as a trusted public servant.
2. Should be governed by the highest ideals of honor and integrity in all public and personal relationships in order to merit respect and inspire the confidence of the organization and the public being served.
3. Should believe that personal aggrandizement or personal profit obtained through misuse of public or personal relationships is dishonest and not tolerable.
4. Should identify and eliminate participation in operational situations where a conflict of interest may be involved.
5. Should keep his/her organization informed, through appropriate channels, on problems and progress of applicable operations by emphasizing the importance of facts.
6. Should seek or dispense no personal favors. Should handle each administrative problem objectively and empathetically without discrimination.
7. Should recognize that their purchasing activities are of public interest and a matter of public record, and therefore conduct their operations so that all actions can be

fully substantiated and legally defended in accordance with the awarding authority of the agency which they serve. To this end, they should maintain adequate records on all purchases as to class of purchase, prices paid, source of supply, and justification of award.

8. Should take a stand against any and all proposals which would hamper the performance of their duties in a manner which will best serve the interests of all citizens served by their agency, resisting all pressures which might tend to benefit any specific group or groups to the detriment of the best interest of the whole.
9. Should endeavor to keep themselves free from involvements which would place them in a position of possible conflict of interest.
10. Should, to the maximum extent possible, employ the practice of open competitive bidding based upon adequate and non-restrictive competition.

Any attempt to obtain personal gain through public employment by conduct inconsistent with the proper discharge of the employee's duties is a breach of the public trust.

To the extent that violations of the ethical standards of conduct constitute violations of state and local law, they can result in criminal prosecution and civil actions. Such proceedings shall be in addition to any other remedies which the County may pursue in its best interests.

County employees responsible for procurement actions are obligated, under both County and State law policy, to obtain the best price or value for the expenditure of public funds. Generally, this is accomplished through full and open competition, which requires that:

- County contracts are made accessible to a wide number of prospective contractors through the internet by visiting the County Procurement Office website at <http://olb.ocgov.com>;
- Requirements, designs, work plans, and specifications are not tailored to favor a particular contractor; and
- No competitor is permitted an advantage by the premature disclosure of contract details or the disclosure of competitors' confidential information.

CHAPTER 2

WHAT THE COUNTY EXPECTS FROM THE CONTRACTOR

As described in Chapter 1, the County relies upon open, arms-length, competitive procurements, to ensure that it spends the public's money wisely. To do business with the County, contractors must respect and not undermine that process. We also expect contractors to perform fully, timely, and honestly in accordance with the terms of their contracts and to demonstrate their responsibility through a history of successful and honest performance.

1. BEFORE YOU CONSIDER BECOMING A CONTRACTOR

For every proposed County contract, the Procurement Division is required to consider whether the contractor has the requisite "responsibility", (i.e. relevant experience combined with performance reliability) for the contract award. Before engaging in the County procurement process, you may want to take a hard look at your firm's history of business integrity as well as whether your firm has the capability of fully meeting the demands of the work. To do business with the County you must:

- Be prepared to demonstrate that your firm has the resources and experience to perform the work successfully;
- Be prepared to publicly and truthfully disclose your firm's management and ownership, officers and owners, and current financial condition with an expectation that any of their legal, financial or performance problems will need to be explained;
- Be current on your obligations, including paying corporate, real property, payroll taxes, social security contributions, as well as water, sewer, and other local assessments; and
- Pay prevailing wages, where legally required.

2. WHEN YOU OFFER A BID OR PROPOSAL

County officials are generally required to conduct competitive procurements and to award contracts on the basis of price and/or ability. Efforts by a contractor or by a lobbyist acting on behalf of a contractor to gain an "inside track" by inhibiting competition or providing information, summaries, bid comparisons, or alternatives not considered in the formal bid process is prohibited.

A. Undermining the Competitive Process

Contractors are expected to independently and honestly prepare and submit bids and proposals based upon their own costs and qualifications, and without colluding or otherwise obtaining information about a competitor's proposal or bid. With this approach, the County obtains the most advantageous price or proposal available among firms doing business in that market.

- Do not “cooperate” or share pricing information with competitors when preparing your bids. Anti-competitive activity, where competitors agree on the prices to be submitted, is known as “collusive bidding, or price fixing or “bid-rigging” and is illegal.
- Do not submit artificially high or low bids to make a competitor's price look more reasonable. This is known as “complementary bidding” and is similarly prohibited.
- Do not submit bids or proposals that are deceptively attractive with an expectation that after winning the contract you will receive your additional costs or inflate profits through change orders or amended contracts in which you then have a “sole source” competitive advantage.
- Do not manipulate unit cost awards by selectively underbidding particular line item costs in the expectation that their quantities will change after award (i.e., do not engage in “unbalanced bidding”).

B. Gifts

Do not offer a gift of any kind to a public servant to directly or indirectly influence the drafting of procurement requirements, evaluations, awards, or payment. Such an offer is not a “gift”, but a bribe. The employee must report attempts at bribery.

Offering a gift to a public servant is a crime. Title 1, Division 3, Article 2 of the Codified Ordinances of the County of Orange prohibits the donation and receipt of specified gifts to public officials. This article is referred to as the Orange County Gift Ban Ordinance (See Attachment I – *Orange County Gift Ban Ordinance Guidelines*.)

Violation of the Orange County Gift Ban Ordinance shall constitute a misdemeanor, and any employee found in violation shall be subject to discipline, including, in appropriate cases, termination of employment.

If a County employee suggests or demands a “gift” for providing any service, consideration, or advantage to you, you should report this to the Orange County Internal Audit – Fraud Hotline at (714) 834-3608.

C. Job Offers

It shall be considered a breach of ethical standards for any employee or former employee to act as a principal or as an agent for any non-County entity in connection with any matter in which the employee participated personally while employed by the County. Moreover, no business in which the employee has a financial interest shall act as a principal or agent for the County.

D. Confidential/Protected Information

Confidential information is defined as that information which is available only because of one's status as a County employee. It shall be a breach of ethical standards for any employee or former employee to use confidential information for actual or anticipated personal gain or for the actual or anticipated personal gain of another person (*i.e.*, contractor).

For each procurement, there is generally a mechanism created to apprise potential contractors of the information they need to prepare their bids or proposals. For example, all interested contractors may be invited to ask questions at a pre-bid or pre-proposal conference or to direct inquiries to the contracting officer in writing. Responses are then shared with all other contractors. Often, negotiations will be conducted with qualified contractors based upon a protocol developed for the procurement. Do not circumvent this process by asking a current or former County official to provide you with information to which you are not entitled. Information relating to the identity of potential offerors, proposal contents, cost/pricing data, proprietary information and trade secrets, technical and cost evaluations, and proposal rankings is confidential; at least until the procurement award has progressed to the point where the information is publicly available.

3. YOUR WORK UNDER CONTRACT

A contractor's ethical obligations do not end upon award of a contract. Gifts and job offers may not be offered to improperly influence County employees to approve work, materials, or payments under the terms of a contract. Contractors are required to perform fully in accordance with the terms of their County contracts. Where progress payments are sought, or payments are made on a budgetary or cost-reimbursement basis, a contractor's business records must truthfully support its claims for payment.

A. Product Substitution

The delivery of goods or services that fall below contractual requirements, but are nevertheless invoiced by the contractor as if the contractual specifications had been met, is known as "product substitution". Product substitution is a violation of your contract. The following acts are considered product substitution:

- Providing inferior quality or substandard raw materials and finished products;

- Attempting to bribe County employees to accept or overlook product deficiencies may result in criminal prosecution;
- Substituting generic or foreign-made products when particular brand names or domestically produced products are required in the contract specifications;
- Submitting for compliance testing, samples or items that are not representative of actual production materials or products; and
- Substituting used or refurbished products without authorization.

B. Premature Progress Payments

Certain long-term contracts permit payments to be made as construction or other performance proceeds. These “progress payments” are generally payable upon proof that costs have been incurred or milestones in the contract have been reached. A contractor’s falsification of labor or material costs, or a misrepresentation of progress reached, to obtain faster County payments, is illegal even where the total amount paid to the contractor is ultimately no more than the contract allows.

C. Improper Claims for Cost Reimbursement

When a contractor enters into a County contract for an amount based upon its actual costs, the contractor must maintain an accounting system that accurately categorizes its costs so that only costs that are “reasonable” and “allowable” under the contract are claimed for reimbursement. Some examples of costs that should not be claimed for reimbursement include but are not limited to fines, gifts, bribes, entertainment costs, and certain legal costs. “Cost mischarging” occurs when such costs and other unwarranted expenditures are the result of the contractor’s own negligence or misconduct, but are nonetheless charged to the County.

D. Proper Control and Accounting

Internal controls – Keep control over operations and assets by maintaining adequate systems of internal controls including separation of duties.

Record keeping – Maintain reliable records to help insure that actions pertaining to the contract, inventory, expenses, and other reportable items are accurately, completely, and fairly recorded and reported.

CHAPTER 3

SANCTION FOR MISCONDUCT

A wide range of criminal, civil, administrative, and contractual sanctions can be applied in addressing procurement fraud and misconduct. These include, but are not limited to, filing of State and Federal criminal charges; civil contract remedies, including treble damages (i.e., tripling the amount of damages); assessment of liquidated damages; the voiding or rescinding a contract; finding a contractor non-responsible; and debarment. Remember, it is not only the contractor that will gain notoriety from dishonest, unethical, and poor performance, but also the contractor's key personnel.

Stay honest. Protect yourself. Do not involve County employees in dishonesty. The County has the authority to void a contract between the County and a contractor if policies are violated. The contractor and County employee alike can find themselves facing misdemeanor or felony charges for procurement fraud.

Maintaining a good relationship with the County involves an understanding of both the County's business needs and our ethical environment.

Examples of Misconduct

- Vendor Name Changes – Submitting duplicate or multiple invoices for the same service under different vendor names in an attempt to receive double payment.
- Billing At Year End – Agreeing to submit invoices for services not yet rendered at the end of the budget year to secure funds for future services is a violation of County policy and constitutes fraud.

Attachment I

OC GIFT BAN ORDINANCE GUIDELINES

No person who is doing business with the County shall make any gift to any County officer and/or designated employee who, by virtue of his/her County employment, could make a governmental decision, participate in making a governmental decision, or use his or her official position to influence a governmental decision regarding the pending business of the donor. For a complete copy of the OC Gift Ban Ordinance, please visit:

http://cams.ocgov.com/Web_Publisher/Agenda12_07_2010_files/images/O00310-001731A.PDF

Guidelines:

- No County officer shall solicit or accept any gift from any person whom he knows, or has reason to know, is doing business with the County.
- No designated employee shall solicit or accept any gift from any person whom he knows, or has reason to know, is doing business with the County.
- No public official shall accept any gift when the identity of the donor is not known to the public official.

Violations and enforcement

- Any County officer who violates the County's Gift Ban Ordinance shall be guilty of a misdemeanor.
- Any designated employee who violates the County's Gift Ban Ordinance shall be subject to discipline for such violation, including, in appropriate cases, termination of employment.
- Any member of any County board or commission, other than a board or commission established by the Constitution or a statute of the State of California, who violates the County's Gift Ban Ordinance, shall be subject to removal from office.

Attachment II

CONFLICT OF INTEREST GUIDELINES

The State of California Government Code addresses conflicts of interest as follows:

- Section 87100: “No public official at any level of state or local government shall make, participate in making, or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.”
- Section 87103: “An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or member of his or her immediate family, or on:
 - (1) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.
 - (2) Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.
 - (3) Any source of income, other than gifts or other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided to, received by or promised to the public official within twelve months prior to the time when the decision is made.
 - (4) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.
 - (5) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within twelve months prior to the time when the decision is made.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official’s agents, spouse, and dependent children own directly, indirectly, or beneficially a ten percent interest or greater.”

- Section 1090: “Members of the legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by anybody or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

As used in this Section, ‘district’ means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.”

Any employees who, in the course of their employment, make or participate in the making of, decisions which may potentially have a material effect on a financial interest of the employees are deemed ‘designated employees’ and are required to complete a Conflict of Interest Disclosure Statement (Form 700) on an annual basis, when they assume employment with the County, and when they terminate employment with the County.

Upon discovery of an actual or potential conflict of interest, an employee shall promptly file a written statement of disqualification with the County Procurement Agent or appropriate Deputy Purchasing Agent and shall withdraw from further participation in the transaction involved. The employee may, at the same time, request through his department head an advisory opinion from County Counsel as to what further participation, if any, the employee may have in the transaction.

Restrictions on Employment of Present and Former Employees

It shall be considered a breach of ethical standards for any employee or former employee to act as a principal or as an agent for any non-County entity in connection with any matter in which the employee participated personally. Moreover, no business in which the employee has a financial interest shall act as a principal or agent for the County.

Use of Confidential Information

Confidential information is defined as that information which is available only because of one’s status as a County employee. It shall be a breach of ethical standards for any employee or former employee to use confidential information for actual or anticipated personal gain or for the actual or anticipated personal gain of another person.

Purchase of Surplus Material and Equipment

For any employee who participates in the decision to put materials or equipment in surplus status, it shall be a breach of ethical standards for that employee or any members of that employee’s immediate family to offer to purchase the same through sealed bid, auction, or any other manner, or request that acquisition be made on his or her behalf by another person or persons.

Auction Techniques

It shall be a breach of ethical standards for any employee to engage in the practice of bid auctioneering, a technique whereby one vendor is given the price offered by another vendor and asked to submit a lower bid. Bids offered by vendors will not be revealed to anyone until such time as all bids become public information.

Purchase for Personal Use

It shall be a breach of ethical standards for County employees to use the County’s procurement personnel or facilities for personal transactions unless such transactions can be shown to be in the County’s best economic interest.

Equal Opportunity

County employees shall ensure that all vendors receive an equal opportunity to do business with the County. This opportunity will be provided without regard to race, gender, religion, sexual orientation, age, disability/medical condition, national origin, marital status, or physical handicap.