E-2

TOWN/VILLAGE OF HARRISON
COMPTROLLER'S OFFICE

TO: Ronald Belmont, Supervisor and Members of the Town Board

FROM: Maureen MacKenzie, Comptroller

RE: New "Piggybacking" Law
Town Board Meeting of April 18, 2013

DATE: April 5, 2013

Attached please find documentation relating to the new "Piggybacking" Law-Exception to Competitive Bidding.

Municipalities in New York State are now allowed to purchase items and to contract for service's through the use of contracts let by the United States or any agency thereof, any state or any other political subdivision or district therein. In the past, we were only allowed to purchase off of a NYS contract. If there was no NYS contract and the amount of the purchase or service contract exceeded our purchasing threshold, we would have to go out to bid, which is both costly and time consuming.

I have attached a copy of the bulletin from the NYS Comptroller's Office for your review, along with documentation on two cooperative purchasing organizations that I would like to register with in order to take advantage of this new policy. There is no cost to register or use the companies. It would require an approval by you via resolution at a town board meeting. Once approved, a procedure, which would include approval by the law department as to whether the procurement falls within the exception, would be instituted to insure compliance with the new law.

If you so choose, kindly adopt a resolution giving approval for our registration with National IPA and US Communities.

Respectfully submitted.

LGSA-Audits@osc.state.ny.us

11/19/2012 11:20 AM

To LGSA-Audits@osc.state.ny.us

cc

bcc Maureen MacKenzie/Town Of Harrison

Subject OSC Bulletin - New "Piggybacking" Law

This bulletin provides guidance on a recent addition to General Municipal Law § 103 that authorizes political subdivisions to purchase apparatus, materials, equipment and supplies, and to contract for services related to the installation, maintenance or repair of those items, through the use of contracts let by the United States or any agency thereof, any state or any other political subdivision or district therein.

The bulletin is available at http://www.osc.state.ny.us/localgov/pubs/piggybackinglaw.pdf

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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
110 STATE STREET
ALBANY, NEW YORK 12236

November 2012

To: **Chief Fiscal Officers**

Subject: **New "Piggybacking" Law – Exception to Competitive Bidding**

Please provide copies of this bulletin to others who may need this information.

Background

A new subdivision 16 has been added to General Municipal Law (GML) § 103 to authorize political subdivisions to purchase apparatus, materials, equipment and supplies, and to contract for services related to the installation, maintenance or repair of those items, through the use of contracts let by the United States or any agency thereof, any state or any other political subdivision or district therein. The contract must be let in a manner that constitutes competitive bidding "consistent with state law," and made available for use by other governmental entities. Purchases made in accordance with this new law are not subject to the competitive bidding requirements of GML § 103. The amendment became effective on August 1, 2012 and is scheduled to expire five years from that date. The stated purpose of the new law is to reduce administrative and product cost, and increase efficiencies.[1]

Many local governments have already been approached by vendors offering goods and services under other governmental contracts. In some cases, vendors may have asserted that the contract falls within the exception. It is the responsibility of local officials to review each proposed procurement to determine, on advice of the local government's counsel as appropriate, whether the procurements falls within the exception. To assist local government officials in undertaking this review, we offer the following guidance:

Three Prerequisites

There are three prerequisites that must be met in order for a procurement of apparatus, materials, equipment and supplies, and related installation, repair and maintenance services, to fall within this exception:

(1) The contract must have been let by the United States or any agency thereof, any state or any other political subdivision or district therein. Therefore, there must be an

underlying contract let by one of the listed governmental entities. Contracts developed for use by local governments that are let by private parties (e.g., a private company, association or not-for-profit corporation is the party awarding the contract to the vendor), and not by the United States or any agency thereof, any state or any other political subdivision or district therein, would not fall within the exception.[2]

The phrase "any state or other political subdivision or district therein" clearly includes other states, and political subdivisions in other states. In our view, it also includes New York State political subdivisions. Therefore, in addition to the current competitive bidding exception for certain purchases through contracts of New York State counties (County Law § 408-a; GML § 103 [3]), local governments also may purchase through qualifying contracts let by other New York State political subdivisions under this exception.

(2) The contract must have been made available for use by other governmental entities. This means that the other governmental entity has taken steps to make its contract available for New York local governments. In general, this would occur by inclusion in the contract let by the other entity of a clause extending the terms and conditions of the contract to other governmental entities. Unilateral offers by vendors to extend contract pricing and other terms and conditions would not fall within the exception.

(3) The contract must have been let in a manner that constitutes competitive bidding "consistent with state law." We believe the term "state law" refers to New York State's bidding law applicable to its political subdivisions (GML § 103 and related case law). The purchasing local government would need to obtain background information on the procedures used to let the contract and, as necessary, consult with its counsel, to determine whether this prerequisite is met. Additional guidance on complying with this prerequisite follows.

Determining Consistency with GML § 103

In order for a non-New York contract to have been let in a manner "consistent" with New York State bidding law, the procedures used by that government need not be exactly the same as those under GML § 103. Rather, the procedures for letting the non-New York contract must be in harmony or general agreement with, and further the same principles as; the bidding requirements of GML § 103.[3] In this regard, the courts in this state have stated that the underlying purposes of GML § 103 are to guard against favoritism, improvidence, extravagance, fraud and corruption, and to foster honest competition in order that the local government may obtain the best goods and services at the lowest possible price to protect the public fisc.[4]

Based on the provisions of GML § 103 as construed by the courts in this state, and the underlying purposes of GML § 103, we believe there are four fundamental elements that should be present in the procedures used by the non-New York entity in letting its contract in order for the process to constitute competitive bidding consistent with GML § 103. These elements are:

- Public solicitation of bids. A public solicitation is consistent with the statutory advertising requirement in GML § 103,[5] and serves to ensure that the purposes of GML § 103 are furthered.

- Submission of sealed bids or analogous procedures to secure and preserve the integrity of the process and confidentiality of the bids submitted. A secure bidding process is consistent with the sealed bidding requirement of GML § 103[6] and helps foster honest competition and guard against collusion.

- Preparation of bid specifications, or a similar document that provides a common standard for bidders to compete fairly. Consistent with the purposes of GML § 103, the contracting entity, in advance of bidding, should convey the nature of the goods or services and other information necessary for prospective bidders to make an intelligent evaluation and bid, without being unduly restrictive.[7]

- Award to the lowest bidder who materially or substantially meets the bid specifications and is determined to be a responsible bidder.[8] A contract awarded to other than the lowest responsible bidder meeting the specifications, or a contract awarded through a negotiation process, would not be consistent with the requirements and purposes of competitive bidding under GML § 103.[9]

Other Factors to Consider; Internal Controls.

- Contractual Relationship. By placing an order with the contract vendor, the purchasing local government generally will be entering into a contractual relationship with that vendor in accordance with the terms and conditions of the contract. Accordingly, local officials, in consultation with the attorney for the local government as necessary, should carefully review those terms and conditions before making the purchase. In some cases, the contract may have been let in a manner consistent with GML § 103, but the terms and conditions of the contract may conflict with other New York State laws or regulations.[10] This could result in the local government being unable to use the contract.

- Audit of Claims. The payment to the contract vendor would be subject to standard procedures for claims processing, including audit of claims procedures.

- Cost Savings Justification. Unlike recent amendments to GML §§ 103 (3) and 104 pertaining to county and certain federal contracts (L 2003, ch 62; L 2011, ch 97), GML § 103 (16) does not expressly require local governments to consider whether the contract will result in cost savings. Nonetheless, local officials should perform a cost-benefit analysis before utilizing this exception. This will help ensure that the local government is furthering the underlying purposes of the new law, and that the procurement is consistent with the purposes of GML § 103. The analysis should be used to demonstrate whether "piggybacking" is cost effective and should consider all pertinent cost factors, including any potential savings on the administrative expense

that would be incurred if the local government initiated its own competitive bidding process.

- Documentation. Local governments should maintain appropriate documentation to allow for a thorough review of the decision to use this exception to competitive bidding by local government officials, external auditors and taxpayers. This documentation may include such items as copies of the contract, analysis of the contract to ensure it meets the three prerequisites stated above, and cost savings analysis including consideration of other procurement methods.

Procurements Below the Bidding Monetary Threshold; Policies and Procedures

As noted, GML § 103 (16) provides an exception to the competitive bidding requirements of that section. However, procurements that are below the bidding monetary thresholds set forth in Section 103 (1)[11] (or otherwise fall within another exception to bidding, such as emergency purchases)[12] already are exempt from bidding requirements. Those procurements, instead, are subject to the local government's own procurement policies and procedures adopted pursuant to GML § 104-b. Therefore, whether a local government may make purchases that are below the bidding thresholds by "piggybacking" on contracts let by governmental entities listed in GML § 103 (16) will be governed by the local government's own procurement policies.[13]

Please feel free to contact Mark Stevens in our Division of Legal Services (518-402-4437) with legal questions, and the State Comptroller's regional office that serves your local government with internal control and documentation questions.

End Notes

[1] NY Senate and Assembly Memo in Support of S. 5525-C/A. 8034-C, 2012. The amendment also states that the authority provided in GML § 103 (16) does not relieve any obligation of the local government to comply with any applicable M/WBE business enterprise mandates and the preferred source requirements of State Finance Law § 162.

[2] In 2011, the GML was amended to permit political subdivisions to participate in two specific federal contract extension programs ("Supply Schedule 70" and "Section 1122") as exceptions to the bidding requirements of GML § 103 (GML §§ 103 [1-b], 104, scheduled to sunset on June 24, 2014). These exceptions are separate from, and not subject to the prerequisites of, GML § 103 (16). Other federal contracts are subject to the prerequisites of GML § 103 (16).

[3] See e.g. Slocker v Sheehan, 13 AD3d 1.

[4] See e.g. AAA Carting v Town of Southeast, 17 NY3d 136; Associated General Contractors v New York State Thruway Authority, 88 NY2d 56; Jered v NYCTA, 22 NY2d 187; see also GML § 100-a.

[5] See GML § 103-(2).

[6] See GML § 103 (1).

[7] See e.g. AAA Carting v Town of Southeast, 17 NY3d 136; Browning-Ferris v City of Lackawanna, 204 AD2d 1047; Progressive Dietary v Wyoming County, 90 AD2d 214; Matter of L. & M Bus Corp. v New York City Dept. of Educ., 17 NY3d 149; Gerzof v Sweeney, 16 NY2d 206.

[8] Whether a bidder is "responsible" involves a factual, case by case examination into a bidder's background, assessing factors such as a bidder's capacity and financial ability to complete the contract, accountability, reliability and integrity (see e.g. DeFoe v New York City, 87 NY2d 754; Abco Bus v Macchiarola, 75 AD2d 831 revd on dissent 52 NY2d 938). The New York Court of Appeals has held that, as a matter of due process, a bidder is entitled to reasonable notice and a timely and adequate opportunity to be heard before a determination of non-responsibility is made (LaCorte v County of Rensselaer, 80 NY2d 232). In addition, the New York courts have distinguished between the case by case determination of responsibility and the authority to debar or suspend bidders from future

contracts (see e.g. Callanan v White, 118 AD2d 167 lv denied 123 AD2d 462 and 69 NY2d 601). There is only limited authority in New York to debar bidders from future contracts (e.g. Labor Law § 220-b, 235). There is, however, authority for bidders on contracts for public work to be "pre-qualified" under certain circumstances (GML § 103 [15]).

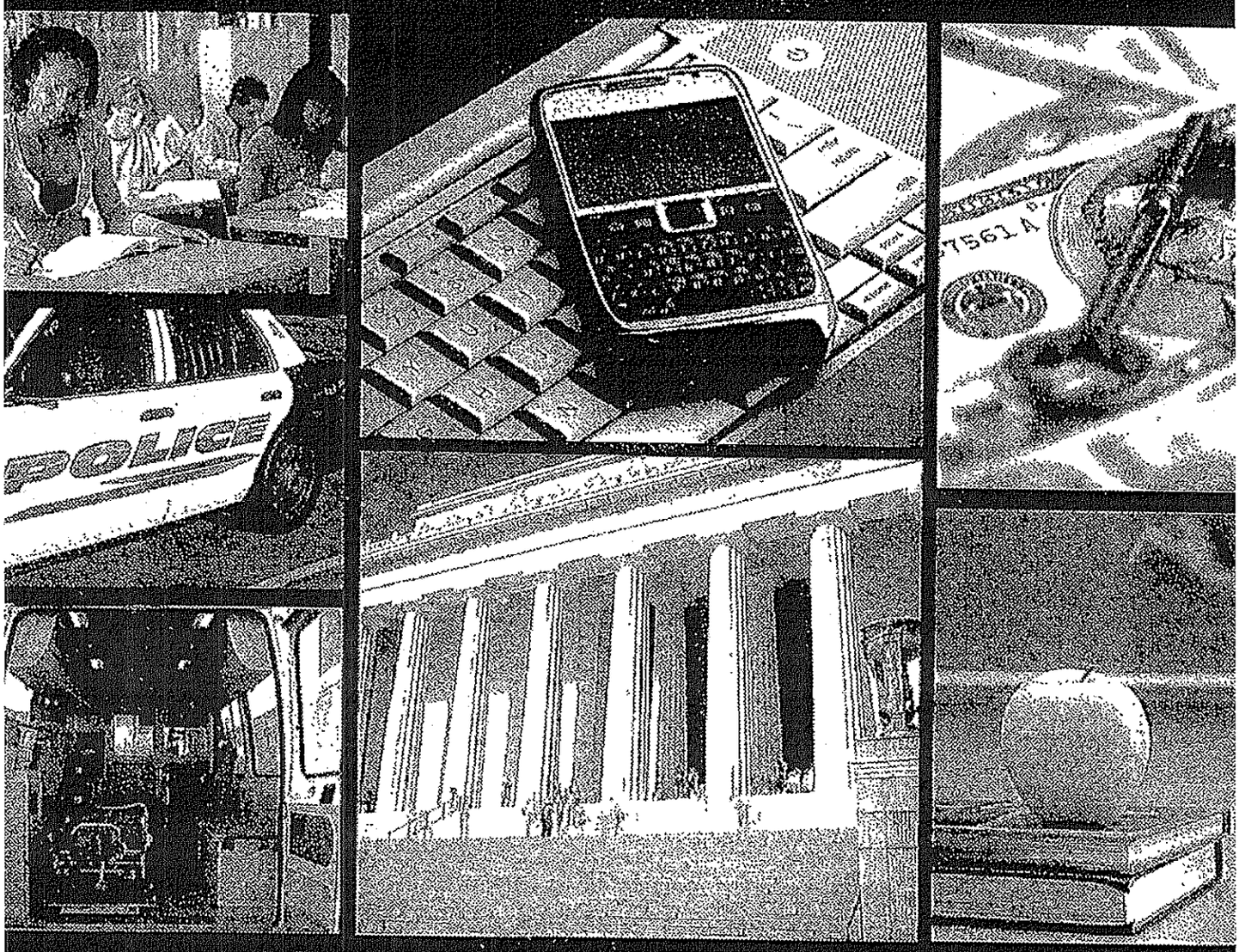
[9] See e.g. AAA Carting v Town of Southeast, 17 NY3d 136; Sinram-Morris Oil v New York City, 74 NY2d 13; compare Fischbach & Moore v NYCTA, 79 AD2d 14, lv denied 53 NY2d 604. The "lowest responsible bidder" requirement dictates that the contract award be made to the low price bidder who is determined to be a responsible bidder (see e.g. AAA Carting v Town of Southeast, id.). As an alternative to lowest responsible bidder awards, GML § 103 allows political subdivisions, by local enactment, to make awards of certain purchase contracts to "responsive and responsible" vendors on the basis of "best value," as defined in State Finance Law § 163. "Best value" is a basis for awarding a contract to the offerer which optimizes quality, cost and efficiency among responsive and responsible offerers, reflecting, whenever possible, objective and quantifiable analysis. The amendments to GML § 103 which added the "best value" option (L 2011, ch 608 as amended by L 2012, ch 2) distinguished the "best value" process from competitive bidding, referring to the "best value" process as "competitive offering" (GML § 103 [1-a], [4], [6], [7]; see also GML § 103, section heading). Therefore, it appears that "best value" awards, or contracts awarded on a similar basis, would not constitute "competitive bidding" consistent with GML § 103, as required to fall within the exception under GML § 103 (16).

[10] For example, an out-of-State contract may require advance payment to the vendor. With limited exceptions, local governments may not pay a claim for goods or services prior to audit and approval by the claims auditing body or official, or prior to the receipt of goods or services (see e.g. Town Law § 118; Village Law § 5-524 [4]; County Law § 369 [2]; Education Law § 1724; 8 [A-2] NYCRR § 170.2 [k]). Therefore, such a clause may conflict with New York State statutes.

[11] The monetary threshold is $20,000 for purchase contracts, and $35,000 for contracts for public work, calculated as prescribed in GML § 103 (1).

[12] See GML § 103 (4).

[13] GML § 104-b generally requires that the procurement policies and procedures provide for obtaining alternative proposals or quotations when a procurement is not subject to bidding requirements (GML § 104-b [2] [b]). The procurement policies, however, may set forth circumstances when, or types of procurements for which, in the sole discretion of the governing body, the solicitation of alternative proposals or quotations will not be in the best interest of the local government (GML § 104-b [2] [g]). Local officials should undertake the same type of cost-benefit analysis and documentation as discussed above before permitting an exception to the local government's procurement policies and procedures for these contracts. Local officials also should review and, as necessary, update the policies and procedures to ensure that use of the new exception for procurements above the bidding threshold is consistent with the relevant policies and procedures, and that provisions for cost savings justification and documentation to support the use of "piggybacking" as an exception to bidding are incorporated.



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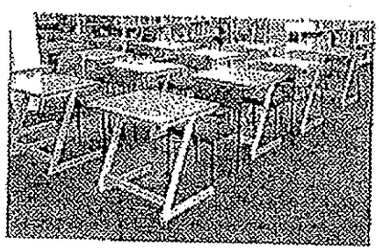

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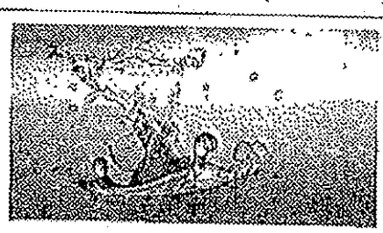

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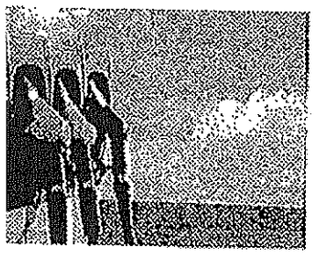

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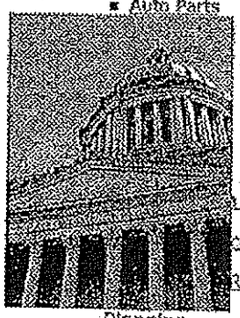

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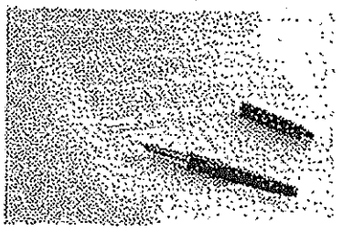
Our Contracting Process



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1. The Principal Procurement Agency (PPA) prepares a competitive solicitation, incorporating language to make the agreement accessible nationally to agencies in states that allow intergovernmental (i.e.: "piggyback") contract usage.
2. The PPA issues the solicitation and any required amendments and notifications, and conducts pre-proposal conferences/meetings.
3. Interested suppliers respond to the solicitation.
4. The PPA evaluates the responses, negotiates the final terms and conditions and ultimately awards the master agreement.
5. All documentation is posted on the National IPA website and made available to the public.

National IPA is committed to the integrity of the procurement process. Access to solicitation and award documentation is always available in the Documentation sections of each awarded agreement. No FOIA or special request necessary.

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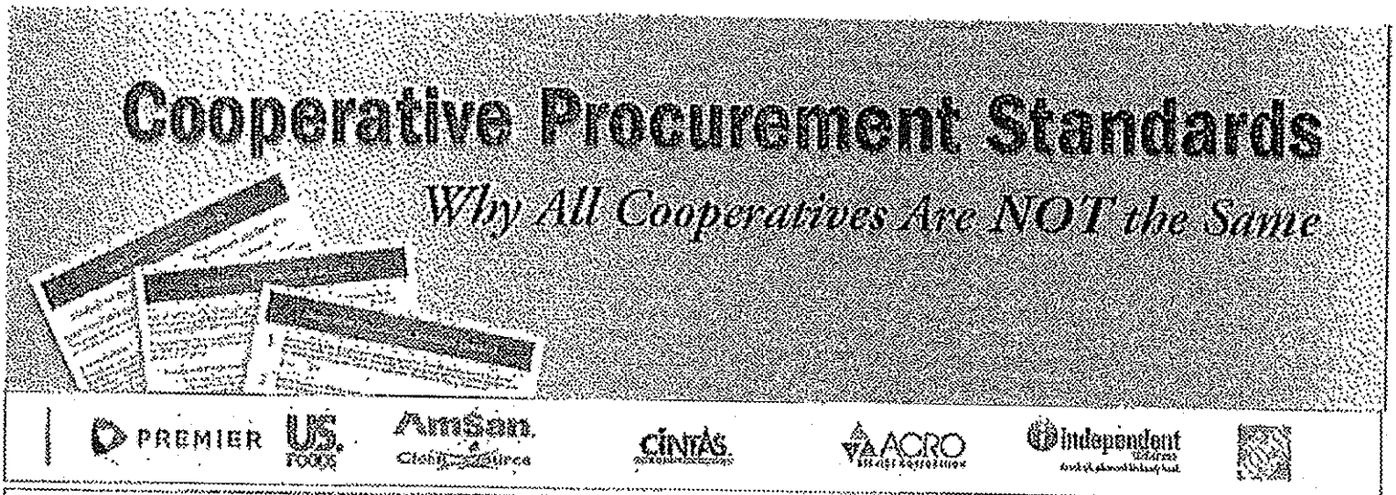

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Select Agency Type: Cities, Towns, Villages and Boroughs Display Report

Just Registered (Last 7 Days): Display Report

If your agency is not yet a participant of the U.S. Communities Program, please Register to Participate and begin purchasing under any of the U.S. Communities competitively solicited contracts.

If you need assistance, please email info@uscommunities.org or Contact Us.

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FREQUENTLY ASKED QUESTIONS (FAQS)

What is U.S. Communities?
What are the advantages of participating in U.S. Communities?
Does U.S. Communities have professional public purchasing advisors?
Can my public agency use the program without going out for solicitation?
What is a Joint Powers or Cooperative Procurement Authority?
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How is U.S. Communities funded as a nonprofit?
Can agencies other than public agencies use the program?
If there is a performance problem with a supplier, what steps do I take to resolve the problem?
If our agency wants to use the U.S. Communities contracts and buy from other contracts is that permitted?
How do I become an authorized supplier of U.S. Communities?
Does U.S. Communities offer solutions for green procurement?

What is U.S. Communities?

U.S. Communities is a nonprofit government purchasing cooperative that reduces the cost of goods and services for participating agencies by aggregating their purchasing power nationwide. Lead public agencies competitively solicit contracts which U.S. Communities makes available to agencies and nonprofits nationwide.

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What are the advantages of participating in U.S. Communities?

- All contracts are competitively solicited by a lead public agency
- Best supplier overall government pricing
- No user fees
- The ONLY cooperative purchasing program founded by NACo, NLC, ASBO, USCM and NIGP
- Sponsored by 70+ state and regional organizations
- Broad range of high quality products
- Third party audits performed
- Benchmarking analysis
- Oversight by key public purchasing professionals

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Does U.S. Communities have professional public purchasing advisors?

Yes. The Advisory Board consists of public purchasing professionals that provides leadership and overall direction for U.S. Communities. View the list of Advisory Board members.

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Can my public agency use the program without going out for solicitation?

Yes, in most states. All U.S. Communities contracts have been competitively solicited by a lead public agency in accordance with their government purchasing rules and regulations. Each solicitation contains language that advises all suppliers that the contract may be used by other government agencies throughout the United States. This language is based on the lead jurisdiction "Joint Powers Authority" or "Cooperative Procurement Authority". Although each government purchasing organization may have different purchasing procedures to follow, applying these competitive principles satisfies the competitive solicitation requirements of most state and local government agencies.

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What is a Joint Powers or Cooperative Procurement Authority?

State statutes and, if applicable, local ordinances generally allow one government agency to purchase from contracts competitively solicited by another government agency ("Lead Public Agency"). This, of course, would require the consent of all parties including the supplier, the Lead Public Agency and the government agency purchasing from the Lead Public Agency contract. U.S. Communities contracts are established to meet both the competitive solicitation and consent requirements. Generally, a public body may participate in, sponsor, conduct or administer a cooperative procurement agreement with one or more other public bodies, or agencies of the United States, for the purpose of combining requirements to increase efficiency or reduce

administrative expenses. In some states, this power is not passed on to localities.

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How can I obtain copies of the legal documentation associated with each competitively solicited contract?

The contract documents including the Master Agreement, Amendments, Extension, RFP and Solicitation documents are available for download on each supplier page, View Product and Supplier pages.

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What does a public agency do to participate?

Public agencies must register to participate. Registration is free and there are no restrictions on the amount or size of an order.

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How much does it cost to participate in U.S. Communities?

There are no costs or user fees to the local agency to participate.

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How is U.S. Communities funded as a nonprofit?

Each contract supplier pays a 1% - 2.5% administrative fee to participate in the program and such fees fund operating expenses and offset costs incurred by national and state sponsors.

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Can agencies other than public agencies use the program?

Yes, nonprofit organizations can use the program in addition to counties, cities, special districts, schools, universities and colleges, towns, villages and state agencies.

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If there is a performance problem with a supplier, what steps do I take to resolve the problem?

First speak to the supplier representative, but if this does not work, contact a U.S. Communities program manager.

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If our agency wants to use the U.S. Communities contracts and buy from other contracts is that permitted?

Yes, all U.S. Communities' contracts are non-exclusive.

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How do I become an authorized supplier of U.S. Communities?

Please read the Become a Supplier page.

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Does U.S. Communities offer solutions for green procurement?

Yes, U.S. Communities has a website that can help you Buy Green, with step by step guides and tips to implement a green government purchasing program. In addition, many of our suppliers have items designated to help you buy green.

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