

DEPARTMENT OF HUMAN SERVICES - CHILDREN'S HEALTH INSURANCE PROGRAM PURCHASING PRACTICES

INTRODUCTION

This memorandum addresses the bidding requirements for the Department of Human Services purchasing of health care services, health insurance policies, and health management services under the children's health insurance program state plan.

STATE LAW GOVERNING PURCHASING PRACTICES

North Dakota Century Code (NDCC) Section 54-44.4-01 provides:

[S]tate policy [is] to provide comprehensive purchasing services based upon sound procurement practices and principles wherein, through full competition with fair and equal opportunity to all qualified persons and firms to sell to the state, each state agency and institution shall obtain its necessary supplies and equipment at competitive cost, consistent with quality, time, and performance requirements.

General Rule

North Dakota Century Code Section 54-44.4-02 provides that the general rule for all state agencies and institutions of the executive branch is that the Office of Management and Budget is to purchase, lease, or otherwise arrange for procurement of "all materials, furniture, fixtures, printing, insurance, and other commodities." Exceptions to the general rule include professional services under a written contract; emergency purchases that involve public health or public safety which cannot be made within the required time; immediate expenditures the Office of Management and Budget is unable to make within the required time which are necessary to prevent or minimize serious disruption in state services; and low cost items as determined by the director of the Office of Management and Budget.

Delegation of Purchasing Authority

Under NDCC Section 54-44.4-03, the director of the Office of Management and Budget may delegate to state agencies and institutions the authority to make purchases of items not otherwise exempted by law. However, Section 54-44.4-06 provides that any purchase made by a

state agency or institution under delegated purchasing authority must comply with the written policies of the Office of Management and Budget.

Purchasing Requirements

Purchases made by the Office of Management and Budget must comply with its written policies, administrative rules, and NDCC Chapter 54-44.4. Section 54-44.4-05 provides:

Except as otherwise provided in section 44-08-01 and section 25-16.2-02, purchasing contracts must be awarded to the lowest responsible bidder considering conformity with specifications, terms of delivery, and quality and serviceability. The office of management and budget may reject any or all bids or negotiate for a lower price with a successful bidder. Each bid received, with the name of the bidder, must be recorded.

Section 44-08-01 pertains to preference given to North Dakota bidders, sellers, and contractors and Section 25-16.2-02 pertains to direct bidding with work activity centers for highway grade stakes. However, North Dakota Administrative Code (NDAC) Section 4-03-01-04(1) provides:

The competitive bidding procedures set forth in this article shall not apply in those instances in which competitive bidding may not be required by the laws of North Dakota, or the item has been verified as sole source.

Although neither the North Dakota Century Code nor the North Dakota Administrative Code defines sole source or details how a commodity is verified as a sole source, Policy 309 of the *Office of Management and Budget Policy Manual* (attached as an appendix) provides that an agency determination of sole source must be verified with the Office of Management and Budget's Central Services Division, State Purchasing, before a purchase order is issued and provides the factors to consider when making a sole-source determination.

CHILDREN'S HEALTH INSURANCE PROGRAM PURCHASING PRACTICES

Department of Human Services commodity purchases must comply with NDCC Chapter 54-44.4, unless excluded by statute or administrative rule. North Dakota Century Code Title 50, relating to the department, does not specifically address the purchasing requirements for the children's health insurance program state plan, health care services, health insurance, or health management services.

Children's Health Insurance Program

The children's health insurance program, as provided for under the Budget Reconciliation Act of 1997, does not specifically address purchasing requirements applicable to the states. The Department of Human Services is awaiting a response from federal authorities regarding state purchasing requirements under the children's health insurance program.

A determination of whether the Office of Management and Budget is required to purchase the children's health insurance program state plan related benefit services depends on a variety of factors. Ultimately, the purchasing requirements may depend on how the purchase item is classified. The proposed children's health insurance program state plan, in part, provides for the purchase of a health insurance product from an entity capable of offering statewide coverage for children. It follows that this health insurance product under the state plan would provide for health care services and in some form the management of the provision of health care services. It is likely that the product purchased under the children's health insurance program state plan would be classified as an insurance product.

Commodities

The first factor to consider is whether health care services, health insurance, or health management services are considered commodities. If the item purchased is not a commodity, or is not an excluded commodity, the purchase requirements of NDCC Section 54-44.4-02 do not apply.

"Commodity," as it applies to state purchasing practices, is not defined by law or rule. The language of Section 54-44.4-02 is the best indication of what is included in the class of items considered commodities. Under Section 54-44.4-02, it appears commodities include insurance, professional services, and equipment service and maintenance. The National Association of State Purchasing Officials defines a commodity as an "article of trade, a movable article of value, something that is bought or sold; any movable or tangible thing that is produced or

used as the subject of barter or sale." *Black's Law Dictionary* provides that the term commodity "is a broader term than merchandise."

Health Insurance

On its face, the purchasing of health insurance appears to qualify as a purchasing of a commodity because it is a form of insurance. Nothing in the Office of Management and Budget administrative rules or policies distinguishes between types of insurance or classes of insureds. The state Public Employees Retirement Board's insurance purchasing authority under NDCC Chapter 54-52.1 is an example of an express exclusion. No such express exclusion appears to apply to the purchase of the children's health insurance program state plan insurance by the Department of Human Services. An interesting distinction between the insurance purchased under the children's health insurance program state plan and insurance typically purchased by the state is that under the children's health insurance program state plan, the state is not the insured.

Health Care Services

The term professional services as used in the context of purchasing requirements is not defined by law or rule. Under NDCC Section 10-31-01, relating to professional organizations, professional service is defined in part as a "personal service to the public which requires a license as a condition precedent to the rendering of such service." The provision of health care services generally requires a professional license and is a service to the public; therefore, the purchase of health care services may qualify as a purchase of a commodity.

Management Services

North Dakota Century Code Section 54-44.4-02 provides little guidance in determining whether purchase of a management service qualifies as a purchase of a commodity. Applying the National Association of State Purchasing Officials definition of commodity, a determination of whether management services are commodities might consider whether the services are articles of trade, movable articles of value, bought or sold, or tangible things that are produced or used as the subject of barter or sale.

Exceptions

The second factor to consider is whether a commodity is exempt. Even if a purchase qualifies as a purchase of a commodity, some

commodity purchases are expressly excepted from the general purchasing requirements of NDCC Chapter 54-44.4. Subsection 5 of Section 54-44.4-02 provides that the purchase of professional services under a written contract is exempt. Therefore, if the purchase under the children's health insurance program state plan is determined to be a purchase of medical services, the purchase of health care services may be exempt as a purchase of a professional service.

Delegation of Purchasing Authority

The third factor to consider is whether a purchasing authority has been delegated. Under NDCC Section 54-44.4-03, the director of the Office of Management and Budget may delegate to the Department of Human Services the authority to make purchases of items not otherwise excepted by law. Therefore, even if a purchase is of a commodity that is not expressly excepted from the purchase requirement of Section 54-44.4-02, a procedure is in place to allow for exemption. If the Office of Management and Budget's authority to purchase the children's health insurance program state plan commodity is delegated to the Department of Human Services, the department must make the purchase in accordance with written policies of the Office of Management and Budget. To date, the director of the Office of Management and Budget has not expressly delegated the children's health insurance program state plan purchasing authority to the Department of Human Services.

Sole Source

It is unlikely that the sole-source competitive bidding procedures exemption of NDCC Section 4-03-01-04(1) applies to the purchasing of the children's health insurance program state plan services. Under the Office of Management and Budget Policy 309, in order to be a sole-source purchase the purchased item must be an item that is unique and possesses specific characteristics that can be filled by only one source. Although there may be a limited number of health insurance providers that are able to offer services throughout the state, this in and of itself does not appear to meet the sole-source requirements.

CONCLUSION

Generally, the purchase of a commodity by a state agency must be through the Office of Management and Budget. The Department of Human Services is a state agency subject to the general rule unless expressly excluded. The purchase of children's health insurance program state plan services does not appear to be expressly excluded from the Office of Management and Budget purchase requirement. The children's health insurance program state plan provides in part for services under a health insurance product and an insurance product is probably a commodity under the Office of Management and Budget purchase requirements. The purchase of the children's health insurance program state plan services does not appear to meet the sole-source requirement. Therefore, the purchase is probably subject to the purchasing requirement under NDCC Chapter 54-44.4.

ATTACH:1

Office of Management and Budget

Policy 309

August 1, 1997

Sole-source Purchases

All requirements for equipment and supplies considered sole-source by the agency must be verified with the Central Services Division-State Purchasing prior to issuance of purchase orders.

All purchases of sole-source equipment and supplies must be fully documented and retained on file by the agency with the purchase order and payment documents. Documentation is to include justification for the sole-source determination and written vendor's price quotation.

Single-source/sole source purchases shall be made only when an item is unique and possesses specific characteristics that can be filled by only one source and must have prior approval by CSD-State Purchasing. The CSD-State Purchasing in making this determination shall consider factors such as the following:

1. whether the vendor possesses exclusive and/or predominant capabilities or the item contains a patented feature providing a superior utility not obtainable from similar products.
2. whether the product or service is unique and easily established as one of a kind;
3. whether the program requirements can be modified so that competitive products or services may be used;
4. whether the product is available from only one source and not merchandised through wholesalers, jobbers or retailers;
5. whether items must be interchangeable or compatible with in-place items.

The agency is to submit in writing citing one or more of the above conditions to validate a sole source purchase. This explanation is to be attached to a requisition issued for the product or products and sent to CSD-State Purchasing for approval.