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| OSD department logo  | **The Commonwealth of Massachusetts**Operational Services DivisionOne Ashburton Place, Room 1017Boston, MA 02108**Procurement Policies and Procedures** |  |
| **Policy:** | **Exceptions to Competitive Procurements** |
| Issue Date: | December 19, 2014 |

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## Executive Summary

A *competitive procurement* is required to acquire *any* commodity, service or both unless the procurement qualifies as a *competitive procurement exception under 801 CMR 21.05.* This document: will:

* explain the six competitive procurement exceptions allowed under 801 CMR 21.05; and
* explain the due diligence process that applies when a department is presented with an opportunity to make certain purchases that do not qualify as procurement exceptions but which may not require a full procurement

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| **Is a Competitive Procurement necessary?****Executive Departments (who are required to follow 801 CMR 21.00) and those other departments who have elected to follow 801 CMR 21.00 should not conduct a procurement when competitive procurements for the commodities and services sought have already been conducted.****1. Statewide Contracts: Do not conduct a competitive procurement for any commodities and services already available on Statewide Contracts. All 801 CMR 21.00 departments must either:** **(a) make their purchases from authorized vendors under the Statewide Contract’s specified terms, conditions and guidance; or,****(b) request a written exception from the Assistant Secretary for Operational Services (for additional guidance, please see the *Requests for Approval to Not Use a Statewide Contract* section in the *Procurement Overview* document and the *How to Draft a Request for Response* document.****2. Other Department Contracts: For commodities and/or services not on Statewide Contracts, a department may use another department’s competitive procurement covering commodities and services sought as long as the Solicitation and resulting Contract indicate that other entities may use the contract. This may be indicated by either or both of the following:****(a) In the body of the RFR or other contract documents by (1) designating the contract as a “Multiple Department User” or “Limited Department User” contract, and (2) including the name of the department or “executive departments” in the list of eligible users for this contract; and/or****(b) In the Master Blanket Purchase Order (MBPO) on COMMBUYS by checking off “Cooperative Purchasing Allowed” and including the executive department’s COMMBUYS organization in the list of eligible users on the MBPO “Control” tab. To search for other department contracts that may be available for use by your department, go to** [**www.COMMBUYS.com**](http://www.COMMBUYS.com) **and click on “Contract and Bid Search”, select “Contracts/Blankets”, select “Non-Statewide Contract” from the “Type Code” and any other relevant search criteria to help narrow your search and then click on “Find It”.****3. Competitive Procurement Exceptions: For commodities and/or services not on Statewide Contracts, a competitive procurement is not required if one of the competitive procurement exceptions outlined in this document apply. These exceptions are: incidental purchases; exemption from competitive procurement; emergency contracts; collective purchasing; interim contracts; and contract employees.****4. Due Diligence Posting: Certain purchases may not require a full procurement and may allow for a more streamlined process to acquire certain goods and services but still comply with the fair, open and competitive requirements of the state procurement process.** |

Contracts executed under 801 CMR 21.05, Competitive Procurement Exceptions, must have written justification and documentation available for review in the procurement file. Insufficient documentation or abuse of the competitive procurement exceptions may result in the withdrawal of procurement authority or other sanctions.

An exception from a competitive procurement does not relieve a department from complying with the remaining provisions of 801 CMR 21.00, or other statutory, regulatory or policy requirements. These include, but are not limited to, consultation with relevant personnel within your agency, maintenance of a procurement file, execution of all required contract forms, contract management and quality assurance. OSD’s Quality Assurance (“QA”) Team reviews all of the exception categories as well as the procurement file to ensure that the required documentation is present.

## Six Procurement Exceptions

801 CMR 21.05 recognizes six conditions in which a competitive procurement is not necessary.

1. Legislative exemptions or legal restrictions due to a general or special law or other existing legal obligation
2. Emergency situations that require the immediate acquisition of a commodity or service
3. Collective purchasing arrangements
4. Interim contracts to prevent a lapse in contract performance
5. Hiring contract employees
6. Incidental purchases

## 1. Legislative Exemption or Legal Restriction from Competitive Procurement

Sometimes the funding source (the state legislature or the federal government) will exempt a department from the competitive procurement requirements through the enactment of a general or special law. A legislative exemption under 801 CMR 21.05(2) may recognize, through statute or line item, a unique business relationship that it desires the department to pursue or may specifically name the contractor that may be awarded a contract.

A similar arrangement may be required through a legal prohibition such as a court order or contractual obligation, i.e., a requirement to use a named vendor for maintenance or else the warranty will be revoked. A copy of the legislative language, court order, or other language authorizing or supporting the exemption must be included as part of the contract.

Another example may include when a department seeks to acquire services that another government entity is statutorily authorized to provide. In such instances, the department may proceed with contracting with the other government entity. If the other government entity is another state department, then the department must follow the Interdepartmental Service Agreement (ISA) policy issued by the State Comptroller. If the other government entity is not statutorily authorized but is uniquely situated to provide the services, then the department must follow the applicable requirements of the Due Diligence Policy in this document.

## 2. Emergency Contracts

Regulation 801 CMR 21.05(3) recognizes that unforeseen circumstances may require departments to procure goods or services on an emergency basis. Some reasons for emergency procurements include:

* The avoidance of harm to the government
* The provision of mandated services
* The provision of services or goods for the health, welfare or safety of persons
* The prevention of property damage

When possible, departments should shop around for competitive prices for the emergency procurement.

Departments should enter into emergency contracts for only the period necessary to alleviate the immediate risk of harm, damage or danger. In certain circumstances, removal of clients receiving services through emergency human and social service contracts may be clinically contraindicated or could negatively impact clients. In those cases, departments may establish emergency contracts for a period of time consistent with the needs of the individual(s) served.

Extending emergency contracts to include other items that are not related to the immediate solution of the emergency is not appropriate. For example, an emergency contract during a power outage to provide backup power generators should not include the acquisition of other non-emergency products unrelated to the emergency or, the absence of which, present no emergency threat. Non-emergency goods and services require a standard competitive procurement.

While department heads must make this important determination, secretariats may also establish a policy for administering emergency contracts. Departments are encouraged to work with the relevant OSD Strategic Sourcing Services Team (“SSST” or “PMT”) group or with other departments to develop contingency plans for emergencies or to seek assistance when an emergency has arisen.

Departments are required to execute a contract with the entity selected to provide the emergency goods/services. This includes the appropriate version of the *Commonwealth Terms and Conditions* and a *Standard Contract Form* as soon as possible after the need for the emergency commodity or service has arisen.

*Note:* OSD has compiled a reference guide of existing statewide contracts that could be used in an emergency that requires a specific commodity or service. That booklet, *Emergency Response Supplies, Services and Equipment,* is available on OSD's website under Publications and Reports.

## 3. Collective Purchase

801 CMR 21.05(4) recognizes that opportunities for maximizing the value of a procurement are available through “teaming” with other public entities in the procurement process. Under this competitive procurement exception, departments may execute a contract for the provision of goods or services when an existing contract has already been established by federal agencies, other states or any other public entity. (Please note: This exception does not refer to other procurement options such as teaming with other executive departments who have already conducted a procurement on their own and other departments' behalf. In these cases competitive procurements have been conducted and an exception is not necessary.)

Collective purchasing with other states, federal agencies or any other public entity under 801 CMR 21.05 (4) requires that prior to any acquisition of a commodity or service under this collective purchase option, OSD should be consulted to confirm and identify those contracts that may be used by departments. In order to use the collective purchase exception, department staff may be asked to conduct a due diligence review and post a notice on COMMBUYS when it intends to join a procurement or contract already established by a federal agency, another state or any other public entity.

Due diligence and the decision to use the collective purchase exception must be based on research documenting that the procurement is consistent with the requirements of M.G.L. Chapter 7, sections 22 and 22A and M.G.L. Chapter 30, sections 51 and 52, that it is fair, open and competitive, and that the contract terms (including price terms) represent best value to the department. Research should also determine whether the procuring entity (federal, state or other public entity) complied with any posting requirements of the World Trade Organization. In addition, the department must create and maintain a procurement file, as is required for all procurements, which includes documentation on all due diligence activities and instructions regarding use of the collective purchase contracts.

**Using Existing Non-Massachusetts public entity’s Collective Purchase Contracts, including GSA or another state’s contracts:**

When using contracts administered by the General Services Administration (GSA) or another state, departments must obtain approval from OSD prior to use and must adhere to the following policy:

**When a Statewide Contract exists:**

Departments are not permitted to purchase from a GSA contract or another state’s contract if there is an active Statewide Contract for that commodity/service. If a department believes it can negotiate better value using the GSA or another state’s contract, it must send a written notification to the Operational Services Division to the attention of the Assistant Secretary for Operational Services at purchasing.agent@massmail.state.ma.us. OSD may negotiate with existing statewide contractors to “meet or beat” the other contract terms, if possible. If OSD determines that “best value” for a department can only be obtained through the GSA or other state’s contract, it will approve this in writing on a case by case basis.

**When a statewide contract does not exist:**

A Department must notify the Assistant Secretary for Operational Services at purchasing.agent@massmail.state.ma.us, in writing, of its interest in purchasing off a GSA or another state’s Collective Purchase contract. Such notification should include an analysis of whether any current Statewide Contract or Commonwealth Executive Department contracts could meet (or not meet) their needs and, if such contracts do exist, why the department is not using such contract. After a discussion with the department, OSD will make a determination of the appropriate next steps including but not limited to the following:

1. Determine if there is a sufficient need for the commodity/service to justify OSD conducting a statewide procurement and then executing a Statewide Contract or;
2. Recommend that the department conduct a procurement for the necessary commodity/service using the GSA or another state’s Collective Purchase contract’s prices and contract terms as the benchmark for best value; or
3. Approve the department using the other contract(s) based on the collective purchase competitive procurement exception available under 801 CMR 21.05 (4) and conditional upon the department adhering to the specific conditions in the GSA or another state’s Collective Purchase contract(s) in order to ensure that the contract satisfies the requirements of MGL Chapter 7, section 22 and section 22A. For example, if a department were using a GSA contract (and the GSA contract was established as a pre-qualification list without price competition), these conditions would include, among other requirements, that a department seek competitive quotes from the list of “qualified” contractors on the GSA contract in order to ensure that the “fair, open and competitive” requirements of the Commonwealth’s procurement statute are met.

OSD will respond to department requests for a specific commodity/service not on statewide contract, in writing, specifying what action(s) is necessary. Approval to use a GSA or another state’s Collective Purchase contracts will be made on a case by case basis.

Copies of all written documentation of the GSA or another state’s Collective Purchase contract and instructions regarding use of their contracts must be maintained in the appropriate procurement file and will be reviewed by the OSD QA Team.

## 4. Interim Contracts

Regulation 801 21.05(5) provides for interim contracts when either (1) an existing contract has been terminated or (2) the existing contract will end but the new procurement has not yet been completed. Under either scenario described below, departments may be faced with an interruption in contract performance, thereby necessitating an interim contract.

Early Termination of an Existing Contract:When an existing contract has been terminated prior to its expiration, a department may approach the pool of bidders who submitted responses under the original procurement. A department may offer a contract for full or part performance to the bidder that submitted the next best value response.

The contract offer is limited by the contents of the original solicitation and the bidder’s original response for the remaining duration of the original procurement. If the bidder is willing to negotiate within the scope of the original procurement, the department may execute a contract with the bidder.

If a bidder does not want the contract or wants to substantially change the original response to increase prices, the department may go to the next highest scoring bidder. If the department can't negotiate a contract with the original pool of bidders, it should proceed with a competitive procurement (unless the lapse would create an emergency situation).

Interim Contracts Due to a Delay in a New Procurement:Interim contracts may also be used to prevent a lapse in performance when a procuring department has commenced a new competitive procurement, prior to the termination date of an expiring contract, but has not yet completed the procurement. This interim contract period should not exceed three months. The procurement file should contain documentation that the procurement was commenced timely and that the delay was unforeseen and legitimate. QA reviews interim contract procurement files to ensure compliance with these requirements.

## 5. Contract Employees

When departments require the services of an individual, they must determine if the service qualifies as a competitive procurement exception (contract employee) under 801 CMR 21.05(6) or is subject to a competitive procurement (independent contractor).

Departments must complete the *Employment Status Form*, available in the *Individual Contractors: Contract Employees vs. Independent Contractors* associated guidance*,* available via a link at the end of this document.

In order to make this determination, departments must adhere to M.G.L. c. 149, s. 148B, which contains the three-part test summarized below. A worker is a contract employee (exception) unless

1. The individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact;
2. The service is performed outside the usual course of the business of the employer; and
3. The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

While the 20 factors that the IRS utilizes in its SS-8 test may help determine whether the first condition above has been addressed, the other two conditions must be satisfied as well. In addition, the Attorney General has interpreted this law to mean the test is rigid and should result in more individuals being considered contract employees (competitive procurement exception) than independent contractors. Thus, the burden is on the department to defend a determination of independent contractor status.

Additional guidance pertaining to this exception is available in the associated policy entitled *Individual Contractors: Contract Employees vs. Independent Contractors Policy Guidance,* available via a link at the end of this document.

## 6. Incidental Purchases

As authorized under M.G.L. c. 7, s. 22, regulation 801 CMR 21.05(1) recognizes the procurement exception of an incidental purchase, defined as a one-time, non-recurring, unanticipated need for goods and/or services with a total dollar value of up to $10,000. Incidental purchasing is designed to assist departments in expediting simple purchases, while reducing the administrative burden and associated paperwork of purchasing small dollar items, thereby recognizing the fact that conducting a competitive procurement for certain types of purchases is neither cost-effective nor an efficient use of administrative and staff resources. Therefore, to maximize available resources, encourage best value in purchasing practices and support timeliness, some purchases may be considered incidental in nature. Departments are generally allowed to do incidental purchasing unless this privilege has been rescinded or the amount has been lowered due to non-compliance with procurement policies.

On the other hand, when a department knows that repeated or multiple purchases for the same commodity or service are planned or are a possibility, the commodity or service is not an exception and must be competitively procured.

All departments whose purchasing is governed by M.G.L. Chapter 7, section 22 and M.G.L. Chapter 30, sections 51 and 52 are required to follow these incidental purchasing guidelines. Departments following 801 CMR 21.00 must use the guidance provided in this document and the regulation. Departments who do not follow 801 CMR 21.00 are encouraged to use this policy as a resource for establishing good business practices.

**Exceptions:** There are two notable limitations for incidental purchasing:

1. **Statewide Contracts:** For all incidental purchases by departments using 801 CMR 21.00, statewide contracts must be used, if available. If a commodity or service can be purchased from a statewide contract, regardless of the dollar value, it does not qualify as an incidental purchase (procurement exception) since it is available from a contract established as a result of a competitive procurement and must be purchased from the statewide contract using the proper referencing transaction. Departments who do not use 801 CMR 21.00 are encouraged to use statewide contracts if they meet their incidental purchase needs.
2. **Restrictions on certain MMARS object class/object codes:** Certain object codes, such as contracted employees, legal services and leases, cannot be considered incidental purchases, regardless of the dollar value. The incidental purchase exception does not apply to legal services because they require approval by the Governor's Chief Legal Counsel and a competitive procurement regardless of the dollar amount.

In addition, before utilizing an incidental purchase, a best value determination for incidental purchases should weigh the value added (cost and administrative savings) of incidental purchasing against the benefits and protections of a procurement and contract. Additional information about Incidental Purchases can be found in the *Procurement Overview*, available via a link at the end of this document.

**Determination of Department Limits:** The Assistant Secretary for Operational Services (also referred to as the State Purchasing Agent) has the authority to change department purchasing limits. The legislature has granted the Assistant Secretary for Operational Services the authority to grant departments an incidental purchase limit up to $10,000 (pursuant to M.G.L. c 7, s. 22). It has been determined by an independent audit, as well as through OSD’s QA Program’s monitoring, that $10,000 is a reasonable amount to allow departments to purchase without a competitive bid. Further, this limit poses minimal risk to the Commonwealth.

All departments are expected to effectively manage a $10,000 incidental purchase limit. Departments having the benefit of the $10,000 limit are responsible for understanding the philosophy of incidental purchasing, developing and implementing internal controls that comply with the incidental purchasing guidelines and monitoring their purchasing patterns to ensure proper usage. A department’s incidental purchase limit may be lowered or rescinded if consistent non-compliance is identified and no effort is made to address the issue.

**Supplier Diversity Program (SDP) and Small Business Purchasing Program (SBPP):** When making incidental purchases, departments are always encouraged to shop around for best value prices and consider using SDO-certified Minority- and Women-Owned Business Enterprises (M/WBEs), Service-Disabled Veteran-Owned Business Enterprises (SDVOBE) and SBPP participants for these purchases in order to assist in reaching their benchmarks and the overall goals of Executive Order 523 (SBPP) and Executive Order 524 (SDP). A listing of SDO-certified businesses may be found at [www.mass.gov/sdp](http://www.mass.gov/sdp). SBPP participants may be found at [www.COMMBUYS.com](http://www.COMMBUYS.com) by clicking on “Registered Vendor Search”, then searching by name or by selecting the applicable Certification criteria or status.

**Quality Assurance (“QA”) Reviews and Incidental Purchase:** Incidental purchasing patterns are monitored by OSD’s QA Team, who analyze Warehouse Reports (which departments may also use to monitor their own spending) for a given period of all purchases made using a GAE transaction with an INP payment transaction. The team looks for patterns of possible non-compliance. The report and analysis are then reviewed and discussed with the department’s Chief Procurement Officer (CPO) and/or Chief Financial Officer (CFO) at the QA site visit (where the contexts of these patterns are considered). When the site visit is completed, a written summary, including recommendations regarding incidental purchasing, is forwarded to the agency. If non-compliance is identified, a department will be requested to make appropriate adjustments to come into compliance with incidental purchasing guidelines.

**Transaction and Documentation Required:** The encumbrance transaction for incidental purchases is the GAE (General Accounting Encumbrance document) and the payment transaction is the INP (Incidental Payment document). For most incidental purchases, only the invoice is required. On the other hand, departments may determine it is in their best interest to execute a *Commonwealth Terms and Conditions* and *Standard Contract Form*. If they elect to do a CT (Contract Encumbrance document for services), RPO (Recurring Payment Order) or PC (Commodity Purchase Order), then both of these forms are required. Please see “INCIDENTAL/NON-INCIDENTAL PURCHASE EXAMPLES” below for guidance on when a formal Contract should be used.

**801 CMR 21.00 OBJECT CODE LIMITS FOR INCIDENTAL PURCHASES (INP)**

***Note:*** The *Expenditure Classification Handbook* (ECH) lists Incidental Purchase guidance for each object code.

**Incidental Purchase Transaction Matrix**

The matrix below provides direction to departments for making incidental purchases of goods and services that are not available on Statewide Contract. For information on purchases of goods and services that are available on Statewide Contract or that are not incidental purchases (>$10,000), please consult the *Procurement Overview* section of the Procurement Information Center.

| **Incidental Purchases/Purchases up to $10,000 (purchases NOT on Statewide Contract)** | **Transaction** | **Secondary Review** | **Contract Documentation Required** |
| --- | --- | --- | --- |
| Commodity or Service not on Statewide Contract | INP (<$5,000) | N/A | Object codes in EE, FF, GG, JJ, KK RR do not require T&C/SCF, invoice only\*Object codes in HH, LL, MM, NN do not require T&C/SCF <$5,000, invoice only\* |
| GAP/GAE/GAX (>$5,000-$10,000) | N/A | Object codes in HH, LL, MM, NN require T&C/SCF >$5,000 |
| RQS/CT/PRCRPO/PRM(service)QS/PC/PRC (commodity)(any amount) | N/A | T&C/SCF required if these transactions used |

\*T&C/SCF is recommended for any purchase requiring complex specifications, performance terms or contractual terms (such as ownership of deliverables). The AGO has advised against Departments signing vendor contracts, purchase orders or invoices with contractual terms, including website shopping carts and click through agreements.

**Additional Guidance and Examples - How to Determine When a Purchase Is Incidental:** To determine if a purchase is incidental the following four questions should be considered:

*1. Is the duration of the need one-time, non-recurring?*

If **no**, this is not an incidental purchase. If yes, determine best value using good business practices and place your order. In order to qualify as an incidental purchase, a commodity or service purchase must be for a one-time, non-recurring need. When a department knows that repeated or multiple purchases for the same commodity or service are planned or are a possibility, the commodity or service must be procured through a competitive RFR procurement and contract process.

*2.* *Is the purchase available from a statewide contract?*

If **yes**, this is not an incidental purchase. Executive departments must use statewide contracts, unless it does not meet their specific need. To determine if a commodity or service is available on statewide contract check COMMBUYS. Select “Contract and Bid Search,” then select the “Contracts and Blankets” box and then select PO Type “Blanket” and Type Code “Statewide Contract” and then click on “Find It”. Other search criteria will help to narrow your search. If a commodity or service is not available on a statewide contract, then Departments are also encouraged to investigate whether a contract, which was procured by another Department and meets the Department’s needs, is available for their use.

*3. Is the total cost of the purchase below the incidental purchase limit?*

Departments are generally granted the incidental purchasing limit (up to $10,000).

*4. Is the purchase within an eligible object class/eligible object code?*

All object codes governed by 801 CMR 21.00 have been assessed to determine the statutory limitations, legal restrictions and risk to the Commonwealth. Those object codes that are eligible for incidental purchases are listed below. Also, the *Expenditure Classification Handbook* lists whether each object code is approved for incidental purchases.

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| **Is my small purchase considered incidental?****Yes if*** It is a one-time only, unanticipated, non-recurring need, or
* It is a one-time purchase for a single event or single occurrence of events; non-recurring. An example would be the need for unique signage or posters for a series of 3 conferences. This is a one-time need but there could be 3 separate payments.

**No if*** It is an equipment or property lease (by definition leases are longer than 6 months).

**Maybe if*** It is a periodic, anticipated need, but not known when the need will arise or what the exact cost will be. It depends on the potential future need, which, if it is clearly uncertain, may be an incidental purchase.

*Note:* If the potential for repeated use is probable or likely, then this would not qualify as an incidental purchase because the need would be considered recurring. |

**INCIDENTAL/NON-INCIDENTAL PURCHASE EXAMPLES:**

| **Duration of Need** | **Anticipated Cost ($10,000 or less)** | **Eligible Object Code?** | **Is this an Incidental Purchase?** |
| --- | --- | --- | --- |
| One-time need only, unanticipated, non- recurring single purchase, purchased once. Not available on statewide contract. | $ 7,500 | Yes | **Yes.**  |
| One-time need only, unanticipated, not recurring (single or multiple purchases). **Available** on statewide contract. | $2,000 | Yes | **No**. Executive departments must use the statewide contract unless it does not meet their need. |
| One-time need only for a consultant. **Not** available on statewide contract. | $1,500 | Yes | **Yes.** A contract is encouraged for more complex performance terms |
| One-time need only for legal services. **Not** available on statewide contract. | $2,000 | No | **No.** Per M.G.L. c. 30, s. 65 and 801 CMR 21.01(2)(b) all legal services require the approval of the Governor's Chief Legal Counsel and competitive procurements. |
| Periodic, anticipated need, but not known when need may arise or exact cost, e.g., occasional or situation-specific supplies or equipment. **Not** available on statewide contract. | Average of $100 - $500 per incident. Highest annual average cost $6,000 per fiscal year. | Yes | **Maybe**. Depends on circumstances and need. Department must make best value determination of whether the cost and administrative savings outweigh the benefits and protection of an RFR and contract. A contract is encouraged for more complex performance terms  |
| Recurring, anticipated need (annual, monthly, bi-annual - periodic maintenance, repair, pest removal, licenses). **Not** available on statewide contract. | $8,000 | Yes | **No**. Anticipated purchase, not a one-time need. |
| 6 month rental of equipment or one-time, 2 year software license. Not recurring, e.g., audio-visual equipment, chairs, speaker system for series of 3 conferences; purchase of software with unlimited free upgrades. **Not** available on statewide contract. | $8,000 | Yes | **Yes.** One-time need. Department may not sign vendor rental agreement or invoice with rental terms. A contract is encouraged for more complex performance terms |
| Equipment or commodity lease (by definition leases are greater than 6 months). **Not** available on statewide contract. | $6,500 | Yes | **No.** Anticipated, recurring purchase. Leases may not be considered a one-time need. |
| Service contract for operational service, potential for repeated use if needed, subject to funding. **Not** available on statewide contract. | $7,500 for current services, additional amounts to be determined | Yes | **Maybe**. Depends on potential for the future need. If the potential is clearly uncertain, this may be an incidental purchase. If the potential for repeat use is probable or likely, then this would not be an incidental purchase because the need would be considered recurring.A contract is encouraged for more complex performance terms |

**Guidance on Execution of Vendor Contract Forms**

The Office of the Attorney General (AGO) has recommended that departments not sign vendor contracts, purchase orders, invoices or other documents containing vendor contractual terms including but not limited to waivers of liability or indemnification. Departments that choose to sign these types of documents do so at their own risk and are responsible for any associated costs and damages. Many of these forms contain terms which contradict standard Commonwealth boilerplate terms, provide a benefit to the vendor to the detriment of the Commonwealth, restrict the AGO’s ability to successfully defend or litigate on behalf of the Commonwealth or severely limit contract recoveries for breach of contract.

The AGO has approved the use of the Commonwealth Terms and Conditions (T&C and T&C HHS) for the use by Commonwealth Departments as well as other listed Commonwealth boilerplates. A vendor contract may be attached unsigned to a Commonwealth contract if the document contains relevant performance requirements, however, conflicting terms should be crossed out. Even if terms are not crossed out, conflicting terms will be superseded by the Commonwealth contract terms.

The issue of vendor contracts arises more often when Departments are procuring incidental purchases in which no procurement or contract is required (such as being required to execute a rental contract for a short term rental of equipment, furniture or space). Even though a Commonwealth contract boilerplate is not required, this does not mean that signing a vendor contract is acceptable. On the contrary, if any contract is used, it must be a Commonwealth boilerplate, not a vendor contract.

Please note that there may be certain contracts that include complex performance terms (such as license agreements, certain lease or financing agreements, etc.) which may necessitate the execution of specific contract forms. These forms should only be executed if agreed upon in advance and/or if approved by the AGO or some other oversight authority such as CTR, OSD or ITD.

## Additional Due Diligence Requirements For Certain Purchases that Do Not Qualify as Procurement Exceptions

There may be instances where a department:

* is offered something at no cost or well below market cost;
* needs to purchase proprietary licenses or products for systems or software that they have already purchased after previously conducting a competitive procurement or requires service or maintenance of products previously acquired through a competitive process that can only be provided by the original vendor;
* seeks to acquire services that another governmental entity is uniquely situated (but not statutorily authorized) to provide; or
* wants to conduct “pilot programs” or “product demos” in order to investigate new and emerging technologies.

While OSD does not recognize these instances as procurement exceptions, there may be an opportunity to conduct a more streamlined process in order to acquire goods and services and comply with the fair, open and competitive requirements of the state procurement process.

Regulation 801 CMR 21.00 does not recognize, as a competitive procurement exception, “sole source” procurements, in which only one bidder is deemed to be capable of providing the commodity or service (thus eliminating the competitive procurement process). These procurements are counterproductive because they eliminate competition and the “pool” from which departments select quality contractors.

The concept of an open, fair and competitive procurement is designed to provide a broad opportunity for bidders to compete for Commonwealth contracts. The only way to guarantee this opportunity is to ensure that due diligence is used to determine whether there are other qualified bidders. It is possible that certain bidders may appear to be the only ones capable of providing a commodity or service (due to factors such as unique licensing restrictions or training requirements). Even in these situations, the department must attempt some form of verification by posting an RFR or a notice of their intent to contract with a specific vendor on COMMBUYS using a bid record. If the RFR/notice elicits only one response, the department may proceed with a contract. If additional qualified bidders respond to the RFR/notice, then the basis for a competitive procurement has been established. Note: Even if there was only one bidder at the time of the original procurement of a proprietary product, a new competitive procurement/notice will be necessary at the end of this contract, since new bidders may have entered the market in the interim.

**Acquisitions and Purchases that Fall Under these Additional Due Diligence Requirements:**

While all state finance, procurement and internal control processes and decisions require due diligence on the part of public employees, the purpose of this policy is to ensure that a due diligence review is completed before accepting the following offers or making the following purchases without conducting a full procurement:

“Best Value” Offers - Departments are sometimes approached unsolicited by a vendor and presented with a great “deal” or a no cost or below market cost offer, which may appear so beneficial or advantageous that rejecting the deal in favor of completing a competitive procurement may seem disadvantageous, wasteful or unjustifiable. Examples of situations that might fall under this provision include offers made to the Commonwealth at zero or significantly lower than market cost and even deals that would result in payments to a department, such as services for the removal of recycled materials. However, something cannot be considered best value unless and until a department has taken steps to confirm, through a public process that is fair, open and competitive, that the “deal” truly represents best value to the Commonwealth and that there is no other bidder that can meet or beat the deal being offered to the Commonwealth. Best Value Offers will result in the acquisition of a good and/or service.

“Proprietary Products” – Departments that have conducted a prior procurement and purchase of a product or service that is proprietary in nature may seek an upgrade, maintenance, support, repair, expansion of the product or addition of peripherals to the product that are also proprietary. Such proprietary products or services may include license terms that would void a warranty, for example, if technicians not certified by a specific company service the product or if software programmers not employed by the manufacturer of the specific proprietary software make changes to the source code of that software, etc. In such instances, where there is only one vendor available, licensed or capable of providing such products or services, a department must conduct its due diligence pursuant to the requirements below in order to determine that the product is truly proprietary in nature and in order to acquire the good and/or service. Please note that if a department has included terms in their original procurement and contract that allow them to go back to the same contractor for such proprietary products/services and the time for such actions has not terminated, then a due diligence posting may not be required. A department should not use this process for acquiring vendor unique goods or services that should have been included in the original solicitation.

“Services Provided by Another Government Entity” – When a department seeks to acquire services that another governmental entity is uniquely situated to provide, it may do so after posting notice of its intent. The posting requirements for this option do not apply to those services that another governmental entity is statutorily authorized to provide, which would fall under the “Legislative Exemption or Legal Restriction from Competitive Procurement” exemption contained in this document and would not require any further due diligence by the department.

“Pilot Programs” or “Product/Service Demos” – In order to stay current on new and emerging goods and services, some departments may seek to conduct a pilot program or demo in order to test or experience such new goods or services. Such pilot programs or demos may come about in 2 distinct ways: (1) offered to departments from a specific vendor(s) or (2) requested by a department(s). An example of a pilot program would be the Registry of Motor Vehicles exploring the benefits of a pilot program to offer certain Registry services (license and registration renewals, for example) to Massachusetts citizens in the offices of industry partners such as insurance agents. When a department conducts a Pilot Program, it should limit its request in scope and time frame and must only do so after conducting their due diligence consistent with the requirements below to determine what the true marketplace is for such goods and/or services. The department must also open up the opportunity to pilot or demo goods and/or services to all other vendors offering similar goods and/or services. The goal of a pilot program or product/service demo is not to acquire a good and/or service on a long term basis but to provide the opportunity for a department to learn about new goods and/or services and, based on the information learned during the pilot, make a determination as to whether to conduct a fair, open and competitive procurement.

If a department receives an offer from a vendor to provide products or services as part of a pilot, that offer must be clearly identified in a COMMBUYS bid posting utilizing the OSD template for due diligence notices and a department must accept comparable offers from all other companies that have products and/or services to offer. A pilot or demo must clearly state that there is no promise of a future contract with a piloted product or service and that all interested bidders will have the opportunity to bid if and when the department conducts a competitive solicitation. If a department decides to conduct a procurement, the bid specifications, requirements and terms must be written to elicit the broadest possible response from the business community and to not favor a company that has participated in the demo. Information or reports generated from the pilot must be made available to all interested bidders.

**Due Diligence Posting Requirements:**

Because any misinterpretation of these options could serve to undermine confidence in the fair, open and competitive requirements of the Commonwealth’s public procurement process, the procedures for handling Due Diligence postings for the three concepts above are explicitly outlined below.

1. **Written Request:** The Chief Procurement Officer and/or Chief Fiscal Officer of the department intending to use the Due Diligence posting provision must submit a written request on department letterhead to the Assistant Secretary for Operational Services. All such written requests to the Assistant Secretary for Operational Services and all postings on COMMBUYS must reference either “Notice of Intent to Accept a Best Value Offer”, “Notice of Intent to Purchase a Proprietary Product or Service”, “Notice of Intent to Purchase Services from Another Government Entity” or “Notice of Intent to Conduct a Pilot Program or Demo” respectively in the title so OSD can track use of these provisions. The following information must be included in the written request for approval and must be submitted to the Assistant Secretary for Operational Services at purchasing.agent@massmail.state.ma.us:
* A detailed description of the commodity or service being offered or sought;
* Name of the company that is offering the commodity and/or service, if applicable;
* An explanation of why the department is seeking to post notice of the offer rather than conduct a competitive procurement including all research and due diligence conducted by the department that resulted in the decision to exercise this option;
* **Notice of Intent:** A copy of the department’s Notice of Intent, including the specifications being sought in the posting, or if a department is posting a notice of its intention to award a contract to a specific company, under any of the four options (Best Value Offer, Intent to Purchase a Proprietary Product or Service, Intent to Purchase Services from Another Government Entity or Intent to Conduct a Pilot Program or Product/Service Demo), a complete and detailed list of what is being offered by the company. The Notice of Intent will be posted on COMMBUYS if the written request is approved in writing by the Assistant Secretary for Operational Services;
* Proposed timeframes for posting the notice on COMMBUYS: Please note that, while the timeframe for posting the notice on COMMBUYS may be brief, it must be posted for at least fourteen calendar days, the minimum period of time OSD believes is sufficient for all potential companies to review the specifications and respond, if it believes that the Commonwealth can achieve a better offer through a competitive bid. World Trade Organization requirements may mandate a longer posting period based on the total dollar value of the potential contract; and
* If no other interest is generated in response to the notice under a Best Value Offer, Intent to Purchase a Proprietary Product or Service or Intent to Purchase Services from Another Government Entity, a department may proceed with a contract. However, if interest is generated, a department must conduct a procurement that is fair, open and competitive or evaluate the responses.
1. Once written approval has been received from the Assistant Secretary for Operational Services, a department must post, in their notice of intent, the offer or, in the case of department seeking to conduct a Pilot or Demo Program, draft specifications, on COMMBUYS, using a bid record and selecting the appropriate UNSPSC Codes in order to notify all potential respondents consistent with the COMMBUYS Policy for Purchasing Organizations, thereby ensuring transparency and increasing possible competition. The purpose of the posting is to determine if there are other interested vendors willing and able to:
	1. Provide a comparable or better offer (for “Best Value Offer” or “Intent to Purchase Services from Another Government Entity” only);
	2. Submit documentation that they can also provide the same proprietary product or service (for “Proprietary Product” acquisitions only); or
	3. Notify the department of their interest in providing products and/or services (for “Pilot Programs” or “Product/Service Demos” only),
		1. In the case of a pilot or demo program where a department has been offered products and services unsolicited at no or low cost, a department should post the offer or draft contract from the vendor; or
		2. In the case of a pilot or demo program where a department is seeking companies willing to provide products or services at no or nominal cost, a department should develop a scope of service or product specifications that are sufficiently detailed to allow a company to respond.
2. All documentation, correspondence and information must be retained by the department in a procurement file. OSD’s QA Team reviews these “Due Diligence Postings”, including all of the procurement file material.

# Associated Regulations and Policy Guidance

* [801 CMR 21.00 Procurement of Commodities or Services, Including Human and Social Services](http://www.mass.gov/anf/docs/osd/policy/801cmr21.doc)
* [Procurement Overview](http://www.mass.gov/anf/docs/osd/pic/procurement-intro.doc)
* [Individual Contractors: Contract Employees vs. Independent Contractors](http://www.mass.gov/anf/docs/osd/pic/contractemployee.docx) (Issued jointly by the Operational Services Division, the Office of the Comptroller and the Human Resources Division)
* [Statewide Contract, Designated Contract, Single or Multiple Department Contract Guidance](http://www.mass.gov/anf/docs/osd/pic/procurement_options.doc)