



DEC - 4 1995

Dear State Medicaid Director:

We are writing to inform you of our policy on sole source procurements and prior approval requirements for certain procurements in light of recent revisions to our Departmental regulations. On August 25, 1994 the Department of Health and Human Services (DHHS) published an interim final rule in the Federal Register which amended 45 CFR Part 74. The amendments to Part 74 contained in this rule deleted appendixes G and H, which set forth the procurement standards found in previous versions of the Office of Management and Budget (OMB) Circulars A-102, "Uniform Administrative Requirements for Grants-In-Aid To State and Local Governments" and A-110, "Grants and Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Institutions" respectively. Also deleted were many subparts of Part 74, including subpart P, which contained a provision that set forth the types of procurements that were governed by OMB Circulars A-102 and A-110.

The interim final rule incorporated into Part 74 revisions which OMB made in its Circular A-110, which governs procurements by nongovernmental grant recipients. The preamble to the rule states that, in the future, DHHS and OMB intend to propose either a separate new regulation for the entitlement programs or a complete revision of OMB Circular A-102, which contained the procurement standards for grants to State and local governments. The Department has reserved 45 CFR Part 92, subpart E, for future placement of entitlement program regulations. In the meantime, Part 74, as amended, remains applicable to the entitlement programs, including the Medicaid program.

The deletion of Appendix G removed regulatory provisions regarding procurement standards which limited the circumstances under which Federal grantor agencies could require States to secure prior approval of procurements and related procurement documents. Also eliminated was the specific provision which permitted sole source procurement only in four limited circumstances. The deletion of subpart P removed the exception to the Circular A-102 procurement standards for transactions between governmental entities. In deleting these provisions, the interim final rule did not indicate any intent to eliminate existing agency regulations or policies pertaining to these matters.

In addition, we have consulted with DHHS officials on whether our existing policies on prior approval requirements and noncompetitive procurements are affected by the removal of Appendix G and subpart P of Part 74. We were advised that existing policies of HHS awarding agencies pertaining to pre-award approval and other requirements regarding procurements remain valid unless they are specifically rescinded or amended by the awarding agencies. When the final rule is published, DHHS will include language in the preamble which will explicitly state that existing policies of awarding agencies are not invalidated by the Part 74 revisions.

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While the revisions described above would also affect the rules governing managed care contracts, the Office of Managed Care in the Health Care Financing Administration (HCFA) has separately established policies and guidelines for procurements entered into under managed care arrangements, as well as those entered into under section 1915(b) freedom of choice waivers. Therefore, this letter does not affect the Federal policy regarding those procurements.

Outside of the ambit of the managed care arrangements discussed above, HCFA will maintain limited Federal oversight of State procurements. Pre-award review and approval of a State's proposed contracts and related procurement documents, such as requests for proposals and invitations for bids, will be required when any of the following conditions apply:

1. A State's procurement procedures or operations fail to comply with the procurement standards in 45 CFR Part 74.
2. The procurement is expected to exceed the small purchase threshold fixed at 41 U.S.C. 403(11) (currently \$100,000) and is expected to be awarded without competition or only one bid or offer is received in response to a solicitation.
3. The procurement is expected to exceed the small purchase threshold and specifies a "brand name" product.
4. The proposed award is over the small purchase threshold, and is to be awarded to other than the apparent low bidder under a sealed bid procurement.
5. A proposed contract modification changes the scope of a contract or increases the contract amount by more than the amount of the small purchase threshold.

While the revisions to Part 74 eliminated the provision which limited sole source procurement to specific delineated situations, the new regulations, at §74.43, retain the general requirement that all procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. Therefore, we will continue to limit the allowability of noncompetitive procurements. The circumstances under which a contract may be awarded by noncompetitive negotiation are limited to the following:

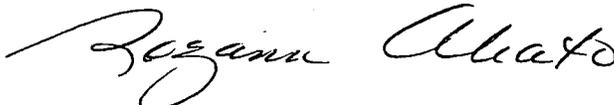
1. The item is available only from a single source;
2. Public exigency or emergency when the urgency for the requirement will not permit a delay incident to competitive solicitation; or
3. The Federal grantor agency authorizes noncompetitive negotiation; or
4. After solicitation of a number of sources, competition is determined inadequate.

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We will not require prior approval for transactions between governments or agencies or instrumentalities of governments as long as there is an interagency agreement that does not provide for reimbursement above cost. We will require approval where the State Medicaid agency proposes to contract with another government or agency or instrumentality of government when there is a negotiated payment level which allows for profit.

Federal policies give States considerable latitude in procurement processes. HCFA's oversight through prior approval requirements or evaluations of State procurement processes is meant to promote the purposes of the Medicaid program in a cost effective manner. We hope that this letter clarifies HCFA's role in States' procurement transactions in light of the revisions to 45 CFR Part 74.

If you have any questions regarding this matter, please contact Ed Davies on (410) 786-3280.


for Sally K. Richardson
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cc:

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