



BOARD OF SUPERVISORS AGENDA ITEM REPORT

Requested Board Meeting Date: June 12, 2018

Title: Board of Supervisors Policy, D 29.4, Contracts

Introduction/Background:

In September 2017, after a complete review of all Board of Supervisors Policy, Series D 29 Procurement, the Board approved changes to all of the procurement-related Policy. Board of Supervisors Policy D29.4 Contracts was rewritten in its entirety.

Discussion:

Since the revision, a business need to further define what does or does not constitute a "contract" was discovered. During many construction projects, arrangements must be made with utility providers which requires Pima County to use the utility companies' standard form documents to have utilities brought to the property. These arrangements are more similar to obtaining a permit for utilities than procuring services. The issuance of similar permits by Pima County to other agencies or the public are already not considered "contracts" for the purpose of this Policy.

Conclusion:

The proposed Policy change provides increased clarity to the definition of what is considered a "contract" subject to this Policy.

Recommendation:

Staff recommends the Board adopt the changes to Board of Supervisors Policy D 29.4, Contracts.

Fiscal Impact:

None.

Board of Supervisor District:

1 2 3 4 5 All

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**PIMA COUNTY, ARIZONA
BOARD OF SUPERVISORS POLICY**

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I. Purpose

To establish a consistent, uniform and efficient contracting policy and process that optimizes the prudent expenditure of public funds while protecting the interests of Pima County.

II. Scope

Applicable to all County employees and departments of Pima County, including those legal districts where the County Board of Supervisors serves as the district's Board, and all contractual arrangements or agreements ("contracts") established on behalf of the applicable entities. All such contracts and agreements must be established consistent with and pursuant to the Pima County Procurement Code, Board of Supervisors policies and Procurement procedures.

III. Policy

This Policy applies to all contractual arrangements or agreements, including all non-procurement or Procurement Code-exempt contracts as further described in this Policy. All contractual arrangements or agreements (excluding Grant Agreements) must be processed through the Procurement Department in accordance with this Policy.

No County Department will execute any contractual arrangement or agreement, except as stated in this Policy, unless such authority has been otherwise delegated in writing by the Procurement Director per Pima County Procurement Code Section 11.08.010, or by the Board of Supervisors.

The department engaging or acquiring the material or service is responsible for monitoring, evaluating and ensuring the delivery of all contracted performance.

IV. Centralized Contracts Processing and Repository

All contracts (excluding Grant Agreements and recorded Real Property agreements), even if exempt from the Procurement Code, requiring the approval of the Board of Supervisors, the Procurement Director, authorized designees, or delegated authorities, will be processed through the Procurement Department to ensure proper administrative review. The Procurement Department will maintain a centralized, comprehensive contract repository system that will provide positive identification for filing and retrieval of the contract documents. This repository and its contents must be freely accessible as a public record, except where limited pursuant to confidentiality conditions prescribed in Policy D 29.2 XVIII.

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V. Contracts

The use of the term "contract" includes both procurement and non-procurement related agreements. Contracts may include, but are not limited to the following categories:

- Disposition Contracts: Contracts involving the disposition or conveyance rather than acquisition of materials or services.
- Emergency Contracts: Emergency contracts for materials and services, excluding design and construction services, must be acquired in accordance with Procurement Code Section 11.12.060. Contracts for design and construction services must be acquired in accordance with Arizona Revised Statutes § 34-606. The authority allowed under Procurement Code Section 11.12.060 and A.R.S. § 34-606 is more expansive than for emergency situations. The responsible department must prepare supporting justification of need and obtain the County Administrator's approval unless the Board of Supervisors has declared an emergency. The Procurement Director will determine if a limited competitive process is appropriate. Pursuant to the Board of Supervisors' declaration or approval by the County Administrator, the responsible department must prepare the contract for execution. If the County Administrator and/or Procurement Director determines that the emergency procurement is not justified, the originating department will be notified, which may, if appropriate, supply additional information and request reconsideration.
- Funding Agreements: As authorized by A.R.S. § 11-254 and Board of Supervisors Policy E 36.1, the County has developed several programs for awarding County funds to federally tax-exempt non-profit corporations and government agencies, to be used for specified public purposes. Grants or sub-grants and resulting agreements must follow established internal selection procedures and utilize contract templates developed specifically for that purpose. Funding agreements must be for a specified community/public purpose; the funded agency must be a government agency or federally tax-exempt non-profit entity with a tax identification number, registered in Procurement's vendor database; funding must provide community and economic development benefits; and depending upon the value of award, may be authorized via Board of Supervisors Policy D 29.3 or through a standard funding agreement template. An aggregate funding cap will be approved and monitored by Budget Control for these purposes annually.

Funding agreements will be drafted by the funding department and, regardless of the dollar amount involved, must be processed for signature by the Chair after Board of Supervisors action approving the funding and purpose, except that funding amounts less than \$10,000 may be authorized and paid pursuant to Board of Supervisors Policy D 29.3.

- Grant Awards to Pima County: All agreements to accept grants awarded to the County must be executed by the Board of Supervisors. Departments must comply with Board of Supervisors Policy D 22.6, which governs all grant awards to Pima County. Grant awards

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and execution of agreements must be processed through the Finance Department Grants Management Division for approval and signature.

- Intergovernmental Agreements: If authorized by their legislative or other governing bodies, two or more public agencies or public procurement units by direct contract or agreement may contract for services or jointly exercise any powers common to the contracting parties and may enter into agreements with one another for joint or cooperative action or may form a separate legal entity, including a nonprofit corporation, to contract for or perform some or all of the services specified in the contract or agreement or exercise those powers jointly held by the contracting parties. For Pima County purposes, if the agreement is a result of a procurement process, it is a standard contract.
- Legal Services Contracts: The contracting of legal services is exempt from the Procurement Code per Section 11.04.020 and is not required to follow competitive processes. Legal services include all necessary general and professional services for administrative proceedings and pending or anticipated litigation, such as investigators, expert witnesses, attorneys and support staff.

Contracting for attorney services must adhere to the following guidelines:

- An applicant for a legal services contract as an attorney must not be a current Pima County employee at the time of application and for the duration of any resulting contract with Pima County.
- Pima County Attorneys, Pima County Public Defenders and Pima County Legal Defenders who were employed by the County for less than five (5) consecutive years may not apply for an indigent legal defense contract for one year following retirement or resignation from Pima County employment.
- Applicants for indigent legal defense contracts must submit appropriate documentation to enable the County to verify the character, ethics and reputation of the applicant. The County must reject the application of any applicant who discloses any criminal charges or criminal complaints, criminal convictions, or the completion of any type of deferred prosecution that constitutes a criminal conviction on the underlying criminal charge within the five year period prior to initial application for an indigent legal defense contract. A rejected applicant may appeal to the Board of Supervisors.
- Naming Rights Agreement: A binding agreement as defined in Board of Supervisors Policy C 3.19.
- Permits: Issuance by the County of permits related to regulatory requirements of a technical nature (i.e., building, flood control, environmental permits, etc.). See Exclusion section below for the exclusion of unilateral, standard form permits and licenses that are issued by the County.

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- **Real Property Agreements:** Real Property Agreements are generally exempt from the Procurement Code per Section 11.04.020 and are not required to follow competitive processes. Real Property agreements may be subject to non-procurement requirements under Arizona Revised Statutes Title 11, 28, or 48. Real Property agreements include but are not limited to:
 - **Contracts for Sservices** related to land titles, appraisals, acquisitions, dispositions, relocation, or property management.
 - **Contracts and conveyance instruments** involving the acquisition or disposition of any real property interests including the use of County property by other entities or individuals.
 - The use by the County of non-County owned property, or the use by third parties of County-owned property pursuant to state statutes on either a short term or long term basis; i.e., leases, licenses, easements, permits, etc.

Supplemental documents and **conveyance** instruments necessary to complete or “close” a transaction **under a previously approved contract** (such as deeds, easements, **and** real property closing statements) are not considered **as** contracts.

- **Regulatory Process Contracts:** Contracts processed for the approval or acceptance of certifications or undertakings by third parties in connection with any regulatory approval process (i.e., development assurances).
- **Revenue Contracts:** The income generated from any source, such as sale of goods or services or use of real or personal property.
- **Site-specific Agreement:** A supplemental agreement as may be reasonably necessary to effectuate the intent of an overarching contract or intergovernmental agreement.
- **Software License Agreements:** A software license agreement is the legal contract between the licensor and/or author and the purchaser of a piece of software that establishes the rights of the parties. A software license agreement details how and when the software may be used, and provides any restrictions that are imposed on the software. This does not include annual maintenance agreements or as required services.
- **Software Maintenance and Support Agreements:** A software maintenance and support agreement is the legal contract between the licensor and/or author and the user of software that defines provisions for the updates, upgrades and support of software. This does not include the license or as required services.
- **Standard Contracts:** Standard contracts include agreements for the competitive acquisition or disposition of materials, general and professional services, including design and construction services within the scope of the Procurement Code, and contracts pursuant to Board of

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Supervisors Policy D 29.6 and D 29.7.

● **Exclusion:**

Permit and License Exclusion: The use of the term “contract” does not include unilateral, standard form permits and licenses that are issued by the County in exchange for payment of a standard fee, ~~which and~~ are not treated as “contracts” subject to approval and processing through the Procurement Department. This includes such things as permits for the temporary exclusive use of park facilities; rights of entry for County officials to enter upon the property of another for temporary use or inspection; and building and other development-related technical permits. The form of these permits and licenses, and any requirements or parameters, with respect to their use, must be approved by the County Attorney's Office and Risk Management. Provided that the requirements and parameters are followed and the standard form of permit or license is used, individual documents of these types need not be reviewed by the County Attorney's Office or Risk Management.

Utility Agreement Exclusion: “Contract” also does not include standard utility-related permits, easements, and other agreements between the County and an organization supplying a utility, such as but not limited to natural gas, water, or sewer to the County at the County's request. Such instruments are not treated as “contracts” subject to approval and processing through the Procurement Department. When such an instrument needs to be executed in conjunction with a County construction project, it may be signed by the project manager, the Director of Facilities Management, or the Manager of Real Property Services. The instrument must be maintained with the project records and, if the instrument is a permanent easement, a copy of the recorded easement must be furnished to the Manager of Real Property Services.

VI. Contract Development

- A. Wherever possible, all contract document forms will be initiated and developed by Pima County. Standard contract templates approved “as to form” by the County Attorney's Office are available on the Procurement Department intranet website; other contract forms may be developed and approved “as to form” by or through the County Attorney's office. All contract forms must be developed and approved as defined by Section VII of this policy.
- B. All contract documents must be reviewed, modified, executed and administered in accordance with Procurement Department procedures.
- C. All contracts must include, in general as well as specific provisions, all terms and conditions necessary to maximize protection of Pima County's fiscal, legal, and functional liabilities to the greatest extent possible consistent with the form of contract.

Contracts for the acquisition of goods or services funded by Grant funds may require incorporation of additional terms and conditions to satisfy grant-related or other legal requirements. Departments will consult with the “Grantor”, assigned legal counsel and the

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Finance Department Grants Management Division to identify and ensure inclusion of contract language that specifically assigns satisfaction of those requirements to either County or the Contractor and that optimizes and minimizes all legal, financial and functional liabilities of Pima County.

- D. The Procurement Department, when requested, will provide contract-drafting support to client departments.
- E. The Procurement Department may execute contracts by issuing system-generated contracts, such as Master Agreements for as-required annual contracts, Purchase Orders for discrete orders, or Delivery Orders for Architectural and Engineering projects using Qualified Consultants Lists. Dependent on the dollar amount, an award made by the Board of Supervisors or the Procurement Director may be required prior to the issuance of a system-generated contract. If consistent with the terms of the solicitation, the signed response submitted by the Contractor will constitute a firm and binding offer. Electronic transmission of a Master Agreement, Purchase Order, or Delivery Order, by an authorized agent, results in an executed contract binding upon both parties without further action.

In processing contract revisions under this section, the Procurement Director will adhere to the requirements of Sections XIV of this Policy.

Nothing in this section will be construed to alter the scope of the Procurement Director's authority as set in Section XII of this Policy, other Board of Supervisors Policy or Pima County Procurement Code. Any contract that exceeds the Procurement Director's authority must be awarded or executed by the Board of Supervisors, with any subsequent amendment awarded or executed by the Board of Supervisors, subject to the exceptions set forth in Sections XII and XIV of this Policy.

VII. County Attorney Approval as to Form

- A. All contracts committing the County to \$10,000.00 or more for the duration of the contract and all Intergovernmental Agreements will be approved as to form by the County Attorney's Office before being submitted to the Contractor and to either the Procurement Director or the Board of Supervisors for approval, except as set forth below. Contracts under \$10,000.00, may be executed without the County Attorney's Office approval as to form however, the Procurement Director may, on a case by case basis, request such review and approval.
- B. Notwithstanding the above requirement, contracts for materials, general, professional, architectural, engineering, and construction services, processed pursuant to Section VI E that utilize a form of contract with standard terms and conditions previously approved by the County Attorney's Office, need not be subsequently approved as to form by the County Attorney's Office. The Procurement Director may, on a case by case basis, request such review and approval.

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- C. Notwithstanding the above requirement, real property agreements that utilize a form of contract with standard terms and conditions previously approved by the County Attorney's Office, need not be subsequently approved as to form by the County Attorney's Office.

VIII. Contract Term

Contracts, except for those that are tied to a specific single project, must have a specific term that does not exceed one year, unless the Procurement Director has approved an initial term of more than one year up to five years with written justification, or there is specific statutory authorization. Unless otherwise provided in the contract, contracts tied to a specific single project will terminate upon project acceptance and final payment by the County and release of retainage, if any. "As-required" contracts with multi-year terms must be evaluated for continuation or modification on an annual basis during the term of the contract. Contracts for the acquisition, conveyance or leasing of an interest in real property, the granting of licenses and franchises and other contracts involving real property may be for a term in excess of one year if in compliance with applicable law. All contracts should specify any terms, such as indemnity provisions, that survive termination or expiration of the contract term.

IX. Contract Scope

Each proposed contract must specifically define the exact materials or services to be provided, and include all monetary and non-monetary commitments of each party. It is the responsibility of the department engaging or acquiring the service or commodity to ensure the Contractor's strict compliance with all terms of the contract.

X. Monetary Commitments

All contracts or agreements that involve payment or receipt of monies by the County must have a specific or clearly ascertainable and objectively limited dollar commitment, be it a fixed, budgetary, or "not-to-exceed" amount, or an amount determined by application of a specified formula to specified data (that is, amounts such as verifiable operating expenses for a leased facility that are set at the discretion of the County or the Contractor, and closing costs for real estate acquisitions and sales).

XI. Central Procurement Administrative Processing and Retention

- A. Except for contracts originated by central Procurement or contracts that pursuant to this Policy do not require processing by Procurement, all contracts must be:
1. Approved as to content by the Department Head or Authorized Signer;
 2. Submitted by the Department to the County Attorney for legal review and approval "as to form" as required by this Policy;
 3. Signed by the Contractor before submission to the Procurement Department; and

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4. Executed by either the Procurement Director or the Board of Supervisors, pursuant to Section XII of this Policy.

Where changes are required, the contract will be returned to the originating Department Head or Authorized Signer, with appropriate recommendations.

- B. Upon execution by either the Procurement Director or the Board of Supervisors, or as otherwise authorized by this Policy, the contract must be scanned by the Procurement Department to the County's document management system for viewing on the internet public portal and notification provided to the originating Department and Contractor.
- C. One hardcopy of the contract or agreement will be retained by Procurement. Electronic, scanned or copied signatures are acceptable for the retained Procurement copy, unless otherwise indicated by the County Attorney's Office. If other arrangements (e.g. additional hardcopies, triplicate ink signed originals, etc.) are required, the originating department must coordinate this with Procurement at the time of submission of the contract for processing.
- D. If at any time the Clerk of the Board receives a contract or agreement for execution by the Board of Supervisors that has not been processed through the Procurement Department, the Clerk's Office will email the Procurement Director seeking direction with respect to the contract. The contract will be delivered to Procurement for processing before the Board of Supervisors executes the contract unless the Procurement Director indicates otherwise.

XII. Contract Approval

All contracts must be approved and signed by the Board of Supervisors, Procurement Director, authorized designee, or delegated authority.

- A. The following contracts must be approved and executed by the Board of Supervisors:
 - Contracts for professional services procured pursuant to BOS Policy D29.6 greater than \$100,000
 - Contracts involving revenues or expenditures greater than \$250,000
 - Contracts with a term of more than five years, including all renewals, with the exception of Software License and Software Maintenance and Support Agreements as stated in C below
 - Intergovernmental Agreements
 - Grant awards made to the County
 - Funding agreements authorized by A.R.S. § 11-254

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- B. The following awards must be approved by the Board of Supervisors and may be executed by the Procurement Director, or authorized designee:

Contracts pursuant to Section VI E involving revenues or expenditures greater than \$250,000 for discrete purchases or \$250,000 per year for as-required contracts.

- C. The Procurement Director, or authorized designee, can award or approve and execute contracts as follows:

- Contracts for professional services procured pursuant to BOS Policy D 29.6 equal to or less than \$100,000
- Contracts involving revenues or expenditures, equal to or less than \$250,000, or for as-required contracts equal to or less than \$250,000 per year
- Contracts with a term equal to or less than five years, including all renewals, with the exception of Software License and Software Maintenance and Support Agreements as stated below
- Software License and Software Maintenance and Support Agreements, including renewal periods, that exceed five years, provided the agreement does not obligate the County to an expenditure of more than \$250,000 annually

- D. Delegated Authority can approve and execute contracts only as specifically allowed in their written delegation.

- E. Contracts requiring Board of Supervisors approval, which are deemed necessary to be executed prior to Board of Supervisors action, may be executed by the Chair of the Board of Supervisors and subsequently ratified by the Board of Supervisors.

XIII. Authorization to Proceed and Retroactive Effective Dates

Authorization to proceed or performance under the contract is not permitted until after the contract is fully signed and executed. If a department has a particular need to process a contract with a retroactive start date, the contract, with accompanying justification supporting its retroactive execution, must be submitted through the Procurement Department following standard contract processing procedures. The Procurement Director, authorized designee, delegated authority or the Board of Supervisors must review the retroactive reason and make a determination whether processing the contract retroactively is in the best interest of the County. Contracts not approved will be returned to the department with instructions to follow contract procedures to meet these requirements.

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XIV. Contract Modifications/Amendments

All contract modifications, including but not limited to, scope modifications, time extensions, dollar amount, and/or name, location or contact information changes, must be executed in the form of a contract amendment. Templates for departmental use are available on the Procurement Intranet website. All amendments must be approved and signed by the Procurement Director, authorized designee, delegated authority or the Board of Supervisors.

- A. With the exception of Intergovernmental Agreements, grant awards made to County, and Funding Agreements, the Procurement Director may execute an amendment to any contract approved by the Board of Supervisors provided the amendment does not alter the scope of the contract or the monetary commitment of the initial or amended Board of Supervisors award, is limited to term extensions resulting in a maximum contract term of five years as permitted in the original contract, or is for administrative changes such as, but not limited to, an assignment, allowance for non-competed charges such as taxes and freight, and changes to the name, location or contact information of the Contractor.
- B. The Procurement Director may execute an amendment to any contract approved by the Procurement Director provided the amendment is permitted in the original or amended contract and is limited to their authority as defined in section XII.
- C. If specifically allowed under the terms of the solicitation issued by County, and previously awarded by the Board of Supervisors as an annual award with renewals or by the Procurement Department, contracts pursuant to section VI E may be amended by the issuance of a revision to the Master Agreement, Purchase Order, or Delivery Order.

Contracts pursuant to section VI E will be amended by the issuance of a revised Master Agreement, Purchase Order or Delivery Order. The revision is effective and binding upon both parties if the Contractor fails to object to the revision within ten (10) calendar days of the date of issuance by County. Any amendment that exceeds the Procurement Director's authority stated in Section XII must be awarded by the Board of Supervisors, subject to the exceptions in this section.

- D. Delegated Authorities may execute an amendment to any contract approved by the Delegated Authority provided the amendment is permitted in the original or amended contract and is limited to their authority as defined in section XII.

Contract amendments must be processed according to standard contract processing procedures except that certain changes to construction contracts will be processed in accordance with the Procurement Code Section 11.16.010(C).

XV. Contract Termination

Any department intending to terminate a contract for convenience or cause must notify the Procurement Director of its intent before termination proceeds. If the Director determines that

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cause exists to terminate the contract or if the department intends to terminate for convenience, the Procurement Director will notify the Contractor of the County's intent to terminate the Contract. The Procurement Director must then draft a document that terminates the contract in accordance with the termination procedures in the contract and forward that notice document to the authority that executed the original contract for signature, after approval by the County Attorney's Office. If the contract does not specify termination procedures, the effective date must be thirty days after the notice of intent to terminate or as specified in the notice of termination, whichever is earlier. The termination notice must become a part of the official contract file.

XVI. Administrative Follow-up

For contracts required to be procured by the Procurement Department as defined by Pima County Procurement Code, the Procurement Department will, in cooperation with involved departments, follow up on matters such as certificates of insurance, payment and performance bonds, retentions, expirations, cancellations, renewals, and other contract administration matters not directly related to delivery of the service or commodity to be supplied under the contract. Contractors and departments must reference the contract number on all bonds, insurance certificates, invoices, credits, correspondence and other documents related to the contract.

XVII. Procedures

Specific procedures that detail a uniform process and consistent standards for development, execution, and monitoring of all contracts to protect and maximize the taxpayers' investment in Pima County government pursuant to this Policy will be the responsibility of the Procurement Director.

Adopted Date: August 18, 1997
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May 3, 2005
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July 11, 2006
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