

# Hospitals and Hospital System Boards Should Review Sole Source Procurement Policies and Procedures

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A hospital system's sole source procurement of products and services provided by Board members that were not approved by the entire Board, or otherwise run through conflict of interest (COI) processes, caused the Maryland General Assembly to impose a prohibition against any sole source contracting for that state hospital system in 2019. Hospital Boards may want to review both their sole source contracting activities to ensure that they are consistent with their COI policy and the conflict policy itself to ensure that sole source agreements are required to be regularly reviewed.

The term sole source procurement is not typically found in hospital conflict of interest COI policies. Sole source procurement, also known as sole source contracting, is the solicitation of a proposal for a contract from only one source as opposed to using a competitive bidding process.<sup>1</sup> Use of sole source for contract negotiation is a relatively common practice, particularly in circumstances of necessity, such as when only a single vendor can provide the item or service; in an emergency when it may not be possible, practical, or feasible to solicit interest from various parties; and when a solicitation from numerous sources fails to yield competition.<sup>2</sup>

## 2019 Maryland Legislation

However, an action by the Maryland General Assembly in April 2019 put the spotlight on the potential relationship between conflicts of interest and abuse of the sole source procurement process. The state passed House Bill 1428, which imposed new and fairly onerous requirements with respect to the size, composition, and activities of the board of directors of a major Maryland health system. Among other things, House Bill 1428 contains highly restrictive provisions concerning sole source procurement applying to the health system.

## Sole Source Procurement and Conflicts of Interest

While sole source procurement certainly has the potential to raise concerns regarding non-competitive preferential treatment, these concerns are typically addressed by imposing guardrail procedural policies, and traditionally are not the responsibility of the Board. Most states also have preventative processes in place to address non-competitive implications, imposing processes such as requiring the applicant to apply and justify the necessity of sole source procurement to gain approval from a designated authority<sup>3</sup> and requiring compliance with public notice procedures,<sup>4</sup> to ensure compliance with the acceptable uses of sole source procurement.<sup>5</sup>

Before the Maryland legislation, states with the most restrictive provisions against sole source procurement as a general practice still permit the process when necessary because no other sources are available.<sup>6</sup> Along the continuum, less restrictive state provisions provide additional circumstances permitting sole source procurement, including when the good or service is unique in nature,<sup>7</sup> when seeking compatibility with existing systems,<sup>8</sup> and when specialized expertise is sought.<sup>9</sup> The landscape of state sole source procurement law has remained relatively stagnant between 2012 and 2021, which suggests that most states are confident their existing laws are adequate to prevent or deter abuse.

Maryland's legislation is therefore one of a kind in that it severely restricts sole source procurement without exceptions and is specifically targeted toward a nonprofit hospital system. This drastic measure reflects a high level of concern and scrutiny triggered by a misuse of sole source procurement by the targeted hospital system. Other hospitals and health systems should take this as an opportunity to review their own sole source procurement practices closely to ensure they are structured to avoid the appearance of and creation of actual conflicts of interest, including whether the hospital Board is required to assess new or existing sole source procurement opportunities.

### Recommended Review of Sole Source Policies and Procedures

Hospital Boards may consider legislation from the District of Columbia as an example of a risk-mitigation strategy for sole source procurement. The District's law addresses the use of sole source procurement in the hospital setting and highlights specific circumstances when sole source procurement might be necessary for hospitals.<sup>10</sup> Similar to the Maryland legislation, the District's law *only* applies to the board of directors of a single public medical and nursing center in the District.<sup>11</sup> The law identifies five circumstances when sole source procurement is deemed "necessary to meet an essential requirement of the Hospital,"<sup>12</sup> which can be useful as a model for other hospitals or health systems looking to enhance their existing policies.

These circumstances include use of sole source procurement after a documented determination that (1) only one source exists, (2) that only one vendor is available to perform an essential requirement of the hospital at a particular time, (3) when the board declares an emergency, and (4) when a vendor maintains a price agreement or schedule with a federal agency at a price not exceeding the agreement or (5) when a third vendor agrees to maintain the same pricing schedule as the vendor contracted with the federal agency.<sup>13</sup>

In addition, hospitals and health systems should consider implementation of a process by which existing contracts are reviewed on a regular basis to ensure that all of the above-mentioned criteria are still met and to allow the hospital or health system to assess any new competitor vendors that may become available. Such review can take place upon renewal of any such vendor agreement or, in the case of an evergreen contract, every two years or another reasonable term.

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<sup>1</sup> U.S. DEP'T OF JUSTICE, FACT SHEET SOLE SOURCE JUSTIFICATION (2017), <https://ojp.gov/training/pdfs/Sole-Source-FactSheet-C.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> Haw. Code R. § 3-122-81 (2014).

<sup>4</sup> Okla. Stat. tit. 74, § 85.45j (2012).

<sup>5</sup> Md. State Fin. & Proc. § 13-107 (2020).

<sup>6</sup> Colo. Rev Stat § 24-103-205 (2016).

<sup>7</sup> Haw. Code R. § 3-122-81 (2014).

<sup>8</sup> Or. Rev. Stat. Ann. § 279A (2018).

<sup>9</sup> Iowa Admin. Code § 11-118.7 (2019).

<sup>10</sup> D.C. Code Mun. Regs. tit. 27 § 4618.2 (2011).

<sup>11</sup> Not-for-Profit Hospital Corporation – Amend 27 DCMR (Contracts and Procurement) to add Ch. 46 (Not-for-Profit Hospital Corporation Procurement Rules), 57 D.C. Reg. 41, 00952 (2010).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*