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# FDIC DIRECTIVE 3700.16

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## Acquisition Program

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**Approving Official:** Daniel Bendler, Deputy to the Chairperson and Chief Operating Officer

**Originating Division/Office:** Chief Operating Officer Organization

**Approval Date:** 07/26/2023

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## PURPOSE

This revised Directive provides policy for the FDIC Acquisition Program and the authority and responsibility for the development, maintenance, and issuance of the Acquisition Procedures and Guidance Manual (APGM).

## SCOPE

This Directive applies to all FDIC Divisions/Offices; procurement actions awarded by the Division of Administration (DOA), Acquisition Services Branch (ASB); and acquisitions of goods and services by the Corporation, acting in its various capacities, except: (1) Acquisitions by the Office of Inspector General, which are governed by the Inspector General Act of 1978, as amended; (2) Acquisition of legal services by the Legal Division, which has independent contracting authority; (3) Leasing of office and warehouse space by the DOA, Corporate Services Branch; (4) Establishment of depository accounts at financial institutions<sup>1</sup> by the Chief Financial Officer; and (5) Non-procurement related expenses.

## AUTHORITIES

See [Appendix A](#).

## FORM(S)

See [Appendix B](#).

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<sup>1</sup> Includes setting the terms of the accounts, such as the designating of signatories, acquiring ancillary services for the processing of receipts and disbursements, and purchasing and selling investments.

## **SUMMARY OF CHANGES**

This Directive supersedes FDIC Circular 3700.16, FDIC Acquisition Policy Manual, dated August 22, 2008.

REVISION, dated July 26, 2023

This revised Directive has been updated to replace the Acquisition Policy Manual in its entirety.

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## BACKGROUND

In accordance with 12 U.S.C. Section 1819, the Federal Deposit Insurance (FDI) Act, the FDIC possesses independent authority to enter into contracts for goods or services. The FDI Act authorizes the FDIC to establish policies and processes to administer the powers granted to it, including the authority to enter into contracts.

The Acquisition Program ensures:

1. Goods and services are acquired for the FDIC using reasonable competition,<sup>2</sup> except where otherwise authorized;
2. Procurement processes are tailored to meet individual requirements, consistent with overarching procurement principles applicable in the case of all FDIC procurements, so that the appropriate contractor is selected for each requirement;
3. Contractors are selected on the basis of the best value to the FDIC;
4. Minority-owned and women-owned businesses are provided with opportunities to participate as contractors and subcontractors; and
5. Protests and contract disputes are resolved fairly and timely at the lowest level possible.

The Acquisition Program and APGM are intended to achieve these key attributes of professional acquisition management:

1. Effectiveness: The timely and cost-effective procurement of goods and services;
2. Flexibility: The ability to make decisions based on best practices;
3. Efficiency: The design and implementation of simple processes that achieve positive results without the need for undue oversight or the application of excessive resources;
4. Responsibility: The exercise of sound business judgment and personal initiative by each member of the FDIC Acquisition Team; and
5. Public Trust: Fair and transparent communications with contractors, the public and with both internal and external oversight officials.

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<sup>2</sup> Reasonable competition is defined in the implementing document, the APGM.

Interagency agreements (IAA) and memoranda of understanding (MOU) are not addressed in the APGM. Guidance on IAAs and MOUs is addressed in Directive 3800.10, Memoranda of Understanding and Interagency Agreements.

Questions regarding the FDIC Acquisition Program or the APGM may be directed to DOA, ASB at [ASBPolicy@fdic.gov](mailto:ASBPolicy@fdic.gov).

## POLICY

It is FDIC policy that the acquisition of supplies and services supporting the mission is planned, awarded, and administered efficiently and effectively and is to be accomplished in accordance with applicable procurement policies and regulations. Acquisition policies are implemented through the procedures set forth in the APGM, as approved by the Deputy Director, ASB.

### A. Acquisition Controls

The following controls are established when conducting business with the private sector for goods and services:

1. Contracting Authority
  - a. The Certificates of Appointment issued by the Deputy Director, ASB establish the scope and limits of a Contracting Officer's authority. Contracting authority is delegated to named individuals, rather than to positions, based on the individual's education, experience, and training.
  - b. Contracting authority is delegated to contracting officers for specified contracting dollar thresholds based on training and experience.
2. Ethics and Minimum Standards of Integrity and Fitness
  - a. FDIC business must be conducted in a manner that is above reproach, with complete impartiality and preferential treatment for none. The general rule is to avoid any conflict of interest or even the appearance of a conflict of interest or unethical behavior in FDIC-contractor relationships. While many federal laws and regulations place restrictions on the actions of government personnel, FDIC official conduct must be such that there would be no reluctance to make a full public disclosure of procurement-related actions (as appropriate).
  - b. FDIC contract awards must comply with requirements regarding ethics issues. In accordance with 12 CFR Part 366,<sup>3</sup> contractors and subcontractors must meet minimum standards of integrity and fitness in the areas of ethics, conflicts of interest, and the use of confidential information.

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<sup>3</sup> While this regulation expressly applies to contractors and subcontractors performing service contracts, as interpreted, the FDIC expects *all* contractors and subcontractors to perform using the highest ethical standards, reflecting the integrity necessary to support and retain public trust and confidence in the FDIC's acquisition process.

## **B. Acquisition Process**

### 1. Planning

Planning guidance in the APGM is used by ASB and Divisions/Offices when arranging procurements, preparing acquisition plans, and developing requirements packages.

### 2. Competition

- a. ASB engages in reasonable competition, at a minimum, when soliciting offers and awarding contracts for acquisitions over the micro-purchase threshold. Non-competitive acquisitions are considered an exception and therefore must be justified in writing.
- b. Competition requirements for acquisitions subject to the Trade Agreements Act (TAA)<sup>4</sup> must comply with solicitation posting requirements required by the TAA. For acquisitions to which the TAA does not apply, the FDIC uses reasonable competition, at a minimum, as the preferred method of source selection.

### 3. Contracting Methods

Any contracting method that otherwise complies with applicable law and FDIC policies is permissible. Contracting methods provided in the APGM are used by ASB to ensure that acquisition requirements are accurately determined based on the contracting type performed.

### 4. General Contracting Requirements

Compliance requirements, including (but not limited to) privacy, security, facilities, regulations, taxes, payments, and disputes, must be adhered to throughout the acquisition process and the life of any ensuing contract.

### 5. Contract Management

Effective contract management complies with APGM procedures regarding the acquisition system, oversight, modifications, terminations, property, and closeout.

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<sup>4</sup> TAA requirements are specified in the APGM.

## 6. Contract Provisions and Clauses

Provisions and clauses in solicitations and contracts must comply with the procedures set forth in the APGM.

### **C. Training**

1. Contracting Officers must complete all required training and meet the minimum education and experience requirements set forth in the APGM prior to being appointed as a Contracting Officer and to maintain their delegated warrant authority.
2. Oversight Managers and Technical Monitors must complete all required training set forth in the APGM prior to being appointed to their respective roles and as otherwise required to maintain their appointments.

### **D. Personal Services Contracts and Inherently Governmental Functions**

1. The award of contracts for personal services is prohibited, unless specifically authorized by statute. A contract for personal services can arise when the terms of the contract or its actual performance create a situation where:
  - a. FDIC employees are providing day-to-day supervision of contractor personnel; or
  - b. Contractor personnel are performing or engaging in a function that is inherent to the mission of the FDIC as defined in subsection D.2., immediately below.
2. An inherently governmental function is a function that is so intimately related to the public interest as to mandate performance by Government employees (only). Such functions typically include those activities that require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government. Included within such functions, the performance of which contractor personnel may neither perform nor unduly influence, are the performance of various government adjudications or investigations, determinations of entitlements to monetary compensation, and final cost comparisons. The foregoing list is, however, meant to be merely illustrative, not comprehensive. For further guidance regarding which functions might be inherently governmental, resort to Office of Management and Budget Circular A-76 and the Legal Division, Contracts and Risk Management Unit (CRMU). It is the policy of the FDIC to:
  - a. Prohibit the use of service contracts for the performance of inherently governmental functions; and



- b. Provide greater scrutiny and an appropriate enhanced degree of management oversight when contracting for functions that are not inherently governmental, but closely support the performance of inherently governmental functions. In using the products of contracts that closely support the performance of inherently governmental functions, ASB and Divisions/Offices must ensure that:
  - 1) Any final FDIC action complies with applicable laws and policies and reflects the independent conclusions of FDIC officials and not those of contractors who may have interests that are not in concert with the public interest, and who may be beyond the reach of management controls otherwise applicable to public employees; and
  - 2) Reasonable identification of contractors and the contractors' work product is made whenever there is a risk that the public, Congress, or other persons outside of the FDIC might confuse them with FDIC officials or with an FDIC work product, respectively.

#### **E. Socioeconomic Programs**

1. It is FDIC policy to encourage the use of minority and women-owned businesses (MWOBs) in the acquisition of goods and services, whether as contractors or subcontractors. ASB includes these types of business concerns in FDIC acquisition planning and contracting opportunities, whenever practicable.
2. The Office of Minority and Women Inclusion (OMWI) has Corporate-wide responsibility for oversight of the FDIC Minority and Women Outreach Program. The goal of the program is to increase participation of MWOBs in programs and contracts of the FDIC. The Outreach Program identifies qualified MWOB firms that are interested in providing goods and services used by the FDIC.

#### **F. Exceptions and Waivers**

Deviations to procurement policy must be approved and granted by a waiver, prepared by the Contracting Officer and processed by DOA, ASB. Any approval or coordination required from other Divisions/Offices must be included in the waiver request prior to submission.

## **G. Disqualifying Conditions**

Under 12 U.S.C. Section 1822(f), as further interpreted in 12 CFR Parts 366 and 367, the FDIC has the authority to suspend and to exclude a contractor or a subcontractor from providing services to the FDIC if the FDIC determines the contractor has violated integrity and fitness standards or has shown itself to be unsuitable to perform services or functions for the FDIC. Furthermore, any violations of 12 CFR Part 366 may subject covered persons to disciplinary action, criminal sanctions, civil actions, and rescission or termination of a contract.

## RESPONSIBILITIES

### A. Director, Division of Administration:

1. Establishes policies and procedures for the contracting program as delegated by the FDIC Board of Directors, which appoints the DOA Director as the FDIC Chief Contracting Officer with the authority to:
  - a. Develop contracting policy;
  - b. Solicit proposals;
  - c. Enter into, modify, and terminate contracts on behalf of FDIC in any of its capacities; and
  - d. Coordinate the provision of procurement actions within the FDIC more generally.
2. Re-delegated all of the authority in A.1 above, the authority to appoint Contracting Officers, and the authority to issue Purchase Card (P-Card) appointment letters to the Deputy Director, ASB.<sup>5</sup>

### B. Deputy Director, Acquisition Services Branch (ASB):

1. Provides for the overall management, administration, and oversight of acquisition policies and procedures;
2. Appoints Contracting Officers by issuing Certificates of Appointment;
3. Manages the direction of acquisition policy for the FDIC, including implementation and approval of acquisition policies (in accordance with the APGM); and
4. Delegates authority to the Assistant Director, Acquisition Policy and Systems Section (APSS) to issue P-Card Appointment Letters.

### C. Assistant Director, APSS, ASB:

1. Develops and maintains acquisition program management procedures (through the APGM), ensuring timely updates are made;

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<sup>5</sup> See the Legal Division's Delegation of Authority webpage for the COO Contracting Authority delegation.

2. Engages with the Legal Division and Division/Office Directors, as appropriate, for changes to procedures and guidance to include revising and/or creating solicitation provisions and contract clauses;
3. Provides interim procedures and guidance, including solicitation provisions and contract clauses, as required, and other tools and training, as appropriate, to keep FDIC personnel involved in acquisitions fully informed and supported; and
4. Delegates authority to the P-Card Agency Program Coordinator to issue P-Card Appointment Letters.

**D. Office of Minority and Women Inclusion:**

Oversees the Minority and Women Outreach Program to identify and increase participation of qualified MWOB firms in FDIC contracting.

**E. Contracts and Risk Management Unit (CRMU), Legal Division:**

1. Advises ASB on acquisition issues, providing overall legal guidance and support to ASB regarding procurement matters;
2. Coordinates with APSS when changes are needed and/or new provisions and clauses are required to comply with statutes and regulations;
3. Engages with APSS to review, help develop, or to draft changes to existing and/or new procedures, provisions, and clauses consistent with statutes and regulations;
4. Provides legal review and concurrence for changes to existing and/or new procedures, provisions, and clauses; and
5. Provides legal review and guidance on specified procurement actions.

**F. Corporation Ethics Committee:**

1. Ensures FDIC business and official conduct is conducted impartially, avoiding any conflict of interest or unethical behavior in FDIC-contractor relationships;
2. Ensures contractors and subcontractors meet minimum standards of integrity and fitness in accordance with 12 CFR Part 366; and
3. Ensures FDIC contract awards comply with requirements regarding ethics issues in accordance applicable laws and regulations.

#### **G. Division/Office Directors:**

1. Collaborate with ASB officials in the oversight and planning of specific acquisitions; and
2. Identify a designee to:
  - a. Work with ASB during the acquisition process;
  - b. Notify APSS and the Legal Division when changes to existing and/or new procedures, provisions, and clauses may be required;
  - c. Engage with APSS and the Legal Division to develop and draft proposed changes to or new procedures, provisions, and clauses when required;
  - d. Provide Division/Office subject matter expertise to review changes to existing and/or new procedures, provisions, and clauses, as requested by APSS; and
  - e. Make procurement requests and approve awards and payments to contractors.

#### **H. Contracting Officers:**

1. Have the exclusive authority to enter into, administer, and terminate contracts that meet the requirements of this Directive, the APGM, and applicable laws, executive orders, regulations, procedures, and approvals as delegated under the authority of Certificates of Appointment issued by the Deputy Director, ASB;
2. Assist Legal Division personnel to ensure that contractors meet the minimum standards of integrity and fitness in accordance with 12 CFR Part 366;
3. Ensure the performance of all actions necessary for efficient and effective contracting, ensuring compliance with the terms of contracts and the protection of FDIC interests in all of its contractual relationships;
4. Manage contractor relationships by overseeing the integrity and effectiveness of the contracting process, ensuring that all contractors are treated in a business-like and objective manner, and maintaining effective communications with contractors during contract performance;
5. Consult and confer with Divisions/Office Directors and CRMU to exercise sound business judgment based on the competitive and business needs of the FDIC; and
6. Delegate certain responsibilities to Oversight Managers and Technical Monitors.

## **APPENDIX A - AUTHORITIES & RELEVANT STATUTES, REGULATIONS, AND EXECUTIVE ORDERS**

### **Authorities**

- Title 12, United States Code (U.S.C.), Section 1819, Corporate Powers
- Procurement and Payment Approval Authority Delegations for Contracts, Leases, Legal Referrals, and Non-Procurement Related Expenses<sup>6</sup>

### **Labor Laws**

- Title 40, United States Code (U.S.C.), Section 3131 et seq., Bond of contractors of public buildings or works (formerly known as the Miller Act)
- Title 40, U.S.C., Section 3141 et seq., The Davis-Bacon Act
- Title 40, U.S.C., Section 3701 et seq., Contract Work Hours and Safety Standards Act
- Title 41, U.S.C., Sections 6501-6511, The Walsh-Healey Public Contracts Act
- Title 41, U.S.C., Section 6701 et seq., Service Contract Act (SCA) of 1965

### **Socio-Economic Programs**

- Title 12, U.S.C., Section 1833e, Equal Opportunity, and Title 12, Code of Federal Regulations (CFR), Part 361, The FDIC Minority and Women Outreach Program for Contracting
- Title 12, U.S.C., Section 5452 (Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010)
- Title 15, U.S.C., Sections 631(j)(3) and 644(e), and Title 15, U.S.C., Section 657q, Small Business Act
- Title 18, U.S.C., Section 4124, Federal Prison Industries (FPI)
- Title 19, U.S.C., Section 2501 et seq., Trade Agreements Act (TAA) of 1979
- Title 29, U.S.C., Section 793, and Title 29, U.S.C., Section 794d, Rehabilitation Act of 1973
- Title 38, U.S.C., Section 4212, Vietnam Era Veterans' Readjustment Assistance Act of 1972, as amended
- Title 41, U.S.C., Section 8301 et seq., Buy American Act (BAA)
- Title 41, U.S.C., Section 8501 et seq., Javits-Wagner-O'Day Act (formerly known as JWOD, now commonly known as AbilityOne)

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<sup>6</sup> See the Legal Division's Delegations of Authority webpage for the Resolution bearing Seal No. 072865, dated December 7, 2004 ("Resolution No. 072865"), as clarified by Resolution bearing Seal No. 073261, dated May 16, 2005 ("Resolution No. 073261"), and Additional Clarifying Resolution bearing Seal No. 074567, dated December 5, 2006 ("Additional Clarifying Resolution No. 074567").

- Executive Order (EO) 11246, Equal Employment Opportunity, dated September 24, 1965, as amended
- EO 12564, Drug-free Federal Workplace, dated September 15, 1986

### **Privacy and Payment Laws**

- Title 5, U.S.C., Section 552a, Privacy Act of 1974
- Title 31, U.S.C., Section 3727, Assignment of Claims Act
- Title 31, U.S.C., Section 3901 et seq., Prompt Payment Act
- Title 31, U.S.C., Chapter 75, The Single Audit Act

### **Ethics and Integrity Laws and Regulations**

- Title 12, U.S.C., Section 1822(f), Corporation as Receiver, and Title 12 C.F.R., Part 366, Minimum Standards of Integrity and Fitness for an FDIC Contractor
- Title 31, U.S.C., Section 1352, Byrd Amendment
- Title 40, U.S.C., Section 3145, and Title 18, U.S.C., Section 874, Copeland (Anti-Kickback) Act
- Title 41, U.S.C., Sections 8701 et seq., Anti-Kickback Act of 1986
- Title 41, U.S.C., Section 4712, Contractor and Subcontractor Whistleblower Rights

### **Suspension and Exclusion of Contractors**

- Title 12, CFR, Part 367, Suspension and Exclusion of Contractor and Termination of Contracts

### **Environmental Laws<sup>7</sup>**

- Title 33, U.S.C., Section 1251 et seq., and Title 33, U.S.C., Section 1318, Clean Water Act
- Title 42, U.S.C., Section 7401 et seq., and Title 42, U.S.C., Section 7414, Clean Air Act (CAA) of 1990<sup>8</sup>

### **Information Security Law**

- Title 44, U.S.C., Chapter 35, Subchapter II, Information Security
- Title 44, U.S.C., Sections 3607 - 3616, FedRAMP Authorization Act

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<sup>7</sup> Environmental laws apply to construction contracts.

<sup>8</sup> The FDIC voluntarily complies with the CAA of 1990 (specifically 42 U.S.C. Sections 7671g and 7671j) for contracts for either goods or services associated with refrigeration equipment or air conditioning, or goods containing ozone-depleting substances.

- Public Law (PL) 115-232, Section 889, John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019
- PL 115-91, Section 1634, NDAA for FY 2018

### **Tax Law**

- Title 12, U.S.C., Section 1825, Issuance of Notes, Debentures, Bonds, and Other Obligations; Exemptions

### **Claims Process**

- Title 12, U.S.C., Section 1821(d), Powers and Duties of Corporation as Conservator or Receiver<sup>9</sup>

### **Office of Management and Budget Approval Law**

- PL 96-511 (codified at Title 44, U.S.C., Section 3507), The Paperwork Reduction Act of 1980

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<sup>9</sup> Disputes arising from certain receivership contracts are handled under the claims process set out in 12 U.S.C. Section 1821(d).



## **APPENDIX B - APPLICABLE FORMS**

- FDIC Form 3700/01, Procurement Requisition
- FDIC Form 3700/04A, FDIC Contractor Representations and Certifications
- FDIC Form 3700/09, Tax Exempt Status
- FDIC Form 3700/12, FDIC Integrity and Fitness Representations and Certifications
- FDIC Form 3700/22, Oversight Manager Appointment Memorandum
- FDIC Form 3700/23, Technical Monitor Appointment Memorandum
- FDIC Form 3700/24, Contractor Performance Evaluation and Reporting Form
- FDIC Form 3700/46, Confidentiality Agreement (For Contractors/Subcontractors/Consultants)
- FDIC Form 3700/46A, Confidentiality Agreement (For Contractor/Subcontractor/Consultant Personnel)
- FDIC Form 3700/50, Application for Contracting Officer Warrant
- FDIC Form 3700/55, Solicitation/Award
- FDIC Form 3700/56, Amendment of Solicitation/Modification of Award
- FDIC Form 3700/57, Past Performance Questionnaire
- FDIC Form 3700/60, Checklist for Information Security and Privacy Provisions/Clauses

## GLOSSARY OF TERMS

**Acquisition:** The process of procuring goods and services through contracts or other authorized mechanisms.

**Acquisition Planning:** A process that includes the determination of the requirements and appropriate strategy for procuring necessary goods or services, and the development of requirements packages and acquisition strategies, both at the larger corporate and individual Division/Office levels.

**Acquisition Team:** A group that consists of the Contracting Officer; supporting Contract Specialists and other support staff in ASB; the responsible officials of the Division/Office, particularly including the Oversight Manager and Technical Monitor; the Legal Division, including the CRMU and the Opinions and Research Unit; and, as appropriate, the supporting officials and staff of OMWI and APSS, ASB.

**Competition:** The act of soliciting multiple businesses in anticipation of receiving multiple offers.

**Contract Clause:** A specific term or condition incorporated into a binding agreement

**Contractor:** A corporation, partnership, joint-venture, individual, or other entity that enters into a contract with FDIC to provide goods or services.

**Micro-Purchase Threshold:** The dollar amount at or below a set limitation for purchasing goods or services.

**Non-Competitive Acquisition:** The acquisition of goods or services when only one source is solicited or when the goods or services can only be provided by a single source.

**Non-Procurement Related Expenses:** Expenses that will result in payments by the Corporation or receiverships using approved methods and procedures other than contracts awarded by DOA or legal referrals awarded by the Legal Division. Such methods include, but are not limited to, Payment Authorization Vouchers issued in accordance with corporate policies and procedures, Petty Cash vouchers, training reimbursements under SF-182, Travel Authorizations/Notices of Relocation Authorization, Memoranda of Understanding, and Interagency Agreements.

**Procurement:** Refer to the definition for "Acquisition."

**Solicitation:** A process in which offers are obtained for a contract.

**Solicitation Provision:** A representation or certification of an offeror, or a term or condition against which offerors for procurement awards will be assessed.

## **GLOSSARY OF ACRONYMS**

**APGM:** Acquisition Procedures and Guidance Manual

**APSS:** Acquisition Policy and Systems Section

**ASB:** Acquisition Services Branch

**CRMU:** Contracts and Risk Management Unit

**DOA:** Division of Administration

**IAA:** Interagency Agreements

**MOU:** Memoranda of Understanding

**MWOB:** Minority and Women-Owned Business

**OMWI:** Office of Minority and Women Inclusion

**TAA:** Trade Agreement Act