



**The Navajo Nation** **DR. BUU NYGREN** *PRESIDENT*  
Yideeskáądi Nitsáhákees **RICHELLE MONTOYA** *VICE PRESIDENT*

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MEMORANDUM

TO: All Branches, Divisions, Departments, Programs, Offices, and Chapters of the Navajo Nation

FROM: *Valerie Bitsilly*  
Valerie Bitsilly, Acting Department Manager  
Purchasing Department  
Office of the Controller

*Notah C. Silversmith*  
Notah Silversmith, Department Manager  
Business Regulatory Department  
Division of Economic Development

DATE: May 24, 2024

SUBJECT: Procurement via Direct or Solo Source through the 2023 Amended Procurement Act and Regulations

**I. Introduction**

In 2023, the Navajo Nation Council comprehensively amended the Procurement Act,<sup>1</sup> which included removing the Sole Source procurement method, one often used by the divisions, departments, offices, and programs of the Navajo Nation (“Navajo Nation”).<sup>2</sup> Now, under the Procurement Act, the Navajo Nation may source a procurement from a specific vendor when using the Direct Source or Solo Source procurement methods if the facts of the procurement meet the requirements of the method. This memorandum provides the Navajo Nation guidance for understanding when a procurement qualifies for use of either the Direct Source or Solo Source method and the procedures necessary to appropriately complete each method in the current legal environment.

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<sup>1</sup> CO-81-23.

<sup>2</sup> 12 N.N.C. § 308(N) (Division, Department, Office, or Program of the Navajo Nation means, “Department, Commission, Council, Board, Bureau, Committee, Institution, Legislative Body, Agency, Government Corporation, non-LGA governance certified Chapter, or other establishment or Public Official of the Executive, Legislative, or Judicial Branch of the Navajo Nation government. It does not mean an LGA governance certified Chapter, an Enterprise, or an Authority of the Navajo Nation.”).

## **II. Direct Source: What it is and how to use it.**

A Direct Source procurement occurs when competitive selection is an ineffective or inefficient use of government resources.<sup>3</sup>

### **A. What criteria must the Procuring Party meet to use the Direct Source method?**

A Procuring Party may procure using the Direct Source method for Goods, Services, or Construction after it first determines that the procurement meets one (1) of the three (3) options below:

- 1) prior attempt(s) at procuring through competitive selection methods received:
  - a. no offers;
  - b. only offers greater than the Maximum Feasible Price; or
  - c. only offers where it was unable to issue an award or execute a contract;
- 2) the procurement is for selection of a utility provider, but:
  - a. there is only one utility provider available in the procurement's location; or
  - b. regardless of the amount of available utility providers in the procurement's location, the Navajo Tribal Utility Authority is the preferred provider; **or**
- 3) the Procuring Party wishes to engage with a specific Contractor because that Contractor has direct knowledge of, or past experience with, the actual procurement, such as:
  - a. being the prior Contractor on an unfinished procurement; **and**
  - b. rehiring that Contractor would be in the best interest of the Navajo Nation to continue and finish the procurement.<sup>4</sup>

### **B. How does a Procuring Party receive approval to use the Direct Source method?**

To use the Direct Source method, the Procuring Party must provide its written determination that the procurement meets one (1) of the three (3) options above to DOJ and copy the Purchasing Manager at the Office of the Controller in writing. This written determination shall include the following:

- 1) statements noting:
  - a. how the procurement meets one (1) of the three (3) options above for using the Direct Source method, including providing detailed facts relevant to the option;
  - b. how the Procuring Party utilized NBOA priority business certification or competition in its offeror selection; or if not, why such utilization was not practical<sup>5</sup>; and

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<sup>3</sup> 12 N.N.C. § 348 (In the 2023 Procurement Act, the Direct Source method is most similar to the prior Sole Source method; however, unlike Sole Source, it has criteria that must be met prior to requesting approval for its use.).

<sup>4</sup> 12 N.N.C. § 348.

<sup>5</sup> The Procuring Party must attempt to implement preference for NBOA Priority certified businesses and competitive selection in manner practicable under the circumstances. This means that, *when and if possible*, the Procuring Party shall select vendors listed on the NBOA source list and seek to obtain offers from multiple sources to encourage competitive pricing.

- 2) a space for DOJ signature if it approves of the Procuring Party's determination.

If the Procuring Party seeks an offer(s) prior to seeking DOJ approval, it may internally select its preferred offeror; however, it may not issue a contract award or begin developing the contract packet without first submitting its Direct Source determination to DOJ for approval.

Once received, DOJ reviews the written determination and if it approves, signs and returns it to the Procuring Party. The Procuring Party must receive the DOJ signed determination prior to submitting any related contract packet through the 164 Statutory Review Process ("164 Process"). Any contract packet submitted without a DOJ signed determination to the Business Regulatory Department ("BRD"), or otherwise submitted through the 164 Process, will be returned to the Procuring Party with instructions to seek DOJ approval.

### **III. Solo Source: What is it and how to use it?**

A Solo Source<sup>6</sup> procurement occurs when the Procuring Party receives written approval to directly contract with the only available ("solo") vendor capable of providing the needed Good, Service, or Construction because no reasonable alternative or generic option exists that is capable of fulfilling the requirements of the procurement. The Solo Source method is not a commonly used procurement method.

#### **A. What criteria must the Procuring Party meet to use the Solo Source method?**

The Procuring Party may utilize the Solo Source method without first using competitive selection or other procurement methods, when it receives approval of its written determination that:

- 1) there is only one source available for the Good, Service, or Construction required; and
- 2) no reasonable alternative exists that would meet the intended purpose of the procurement contract.

When writing its determination, the Procuring Party shall consider:

- 1) whether a generic or a reasonable equivalent to the procurement are available; and
- 2) information regarding patents, trade secrets, or similar intellectual property protections that result in only the Vendor being capable of providing the Goods, Services, or Construction sought.

If the Procuring Party identifies even one (1) generic or reasonable equivalent, it shall utilize competitive selection, not the Solo Source method.

#### **B. How does a Procuring Party receive approval to use the Solo Source method?**

To use the Solo Source method, the Procuring Party must provide its written determination to the DOJ and the Purchasing Manager. The written determination shall include the following:

- 1) statements noting:
  - a. how the procurement meets the criteria above;

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<sup>6</sup> 12 N.N.C. § 349.

- b. how the Procuring Party has utilized NBOA priority business certification in its offeror selection; or if not, why such utilization was or is not practical;
- 2) a space for:
- a. DOJ signature if it approves of the Procuring Party's determinations; and
  - b. the Purchasing Manager's signature if it concurs with DOJ's approval.

Once received, DOJ reviews the written determination and if it approves, signs and returns it to the Procuring Party. Once the Procuring Party receives the DOJ signed determination, it shall submit it to the Purchasing Manager for concurrence. If concurred, the Purchasing Manager signs and returns the determination to the Procuring Party. At this point, the Procuring Party may submit the contract packet through the 164 Process. Any contract packet submitted without a DOJ approved and Purchasing Manager concurred determination to BRD, or otherwise submitted through the 164 Process, will be returned to the Procuring Party with instructions to seek DOJ approval and Purchasing Manager concurrence.

After receiving approval and concurrence from DOJ and the Purchasing Manager on its written determination to utilize the Solo Source Method, the Procuring Party may seek offers from and initiate contract execution through the 164 Process with the solo vendor.

#### **IV. Conclusion**

The 2023 Procurement Act replaced the Sole Source method with the Direct Source and Solo Source methods. While this memorandum provides guidance for using the Direct and Solo Source methods, should the Procuring Party have questions or be concerned with its compliance for either method, it may reach out to the appropriate reviewing office—i.e., BRD would assist with questions related to NBOA compliance, the Purchasing Manager would assist with general procurement and purchasing questions, and DOJ would assist with concerns regarding the applicability of either procurement method.

Concurrence:



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Katherine Belzowski, Assistant Attorney General  
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