**PUBLIC ACCESS TO DISTRICT OF COLUMBIA CONTRACTS**

Analysis of the Public Data Available in Summer 2017\*

The District of Columbia government fiscal year 2016 budget was about $13 billion (including local taxes and transfers from the federal government) and the D.C. Office of Contracting and Procurement (OCP) says one third ($4.4 billion) was spent on purchases of goods and services. Contracts are of public interest especially where core government functions are involved (such as safety net services for the most vulnerable or incarcerating prisoners) since details of award and performance appear more removed from typical executive staff accountability and legislative oversight. Initial research showed the following:

1. Contract publication required by D.C. Code § 2-361.04 (“Transparency in Contracting”) is incomplete in several ways and contracts are sorted into different databases by size and type.

* Contracts over $100,000 are required to be posted by 75 agencies that use the central OCP for their procurements. The OCP website hosts a searchable “awarded contracts database.” It includes 712 FY 2016 contracts, valued at $3.7 billion, and 885 FY 2017 contracts ($3.1 billion).
* Of the several dozen agencies with independent contract authority, half are required to send award details to OCP for the central database but appear not to do so consistently (we found contracts on some agencies’ own sites that are not in the central database). The remaining agencies have no posting requirement.

1. Other forms of purchase are tracked elsewhere. Agencies may buy things using a Purchase Card. Records are in a large downloadable file on the D.C. Open Data site. (Though it lacks explanations for the nontechnical.) And agencies issue about 18,000 purchase orders a year. The 3,000 each year that exceed $100,000 show up in the awarded contracts database, according to OCP ($2.5 billion in FY 16, $3.5 billion in FY 17). Smaller ones (over $2,500 but under $100,000, around 15,000 a year and worth about $300 million annually) are in annual files also in downloadable at the D.C. Open Data site.
2. Extent and accessibility of information varies also by contract type.

* For the larger contracts, each entry in the OCP main database includes the agency, what it’s buying, from whom and the price. The law requires public access to the solicitation, the executed contract (and modifications), and a note of any record withheld as confidential. On preliminary review, these appear to be inconsistently available through an “award doc” button on each entry. Further contract records such as proposal evaluations, vendor selection and performance are available only by request under the D.C. Freedom of Information Act (FOIA). The search interface is somewhat confusing (the menu of agencies lists some under multiple names and labels for some data fields are obscure).
* Noncompetitive or “sole source” contracts are in the main database if over $100,000 but all “notices of intent to award” such no-bid contracts are also in a single chronological text table posted by OCP. An entry is created at the time of each planned contract and published for 10 days to allow inquiries from other potential suppliers, showing the item and proposed vendor. Amounts can be large -- in the millions. A price estimate and the unique circumstances justifying the noncompetitive award are in very brief memos called “determinations and findings” prepared by the agency involved and linked from the table entry. The table is not downloadable or searchable.
* A small set of data elements are included in the big annual files of purchase orders over $2,500.

1. Public access to further contract details by FOIA request is a mixed picture. OCP commonly denies FOIA requests for records of all kinds, granting only a third in full in 2016 (79 of 242). In about half the 75 full or partial denials, the OCP cited the exemption for “trade secrets and commercial or financial information obtained from outside the government.” Withholding is allowed by law “to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained.” The exemption is D.C. Code § 2-534 (a)(1), the local version of federal exemption 4 and similar texts in most states. There is extensive case law elsewhere but here no FOIA administrative appeal or D.C. Court of Appeals opinion addresses it. Federal case law varies but in the D.C. Circuit which hears many FOIA cases the trend has been protective of business details.
2. Initiatives elsewhere on transparency in government outsourcing (analyzed by the Sunlight Foundation) have aimed at basic publication like that already available in D.C. plus greater access to details at all stages of contracting. The D.C. mayor established a high-level Procurement Accountability and Review Board in 2015 to convene quarterly to review problem cases (for example, procurements over $1 million that had been rushed through and required retroactive Council approval or court opinions on contract procedures). These are to be brought to the highest level when they suggest systemic procurement issues needing attention of the three members representing the mayor, the city administrator and the procurement chief. Very brief reports are prepared after each quarterly meeting, though recent ones had not been posted at the OCP website until the Coalition inquired.
3. Further development of ideas for better transparency of D.C. government contracts is premature. The mayor has issued new D.C. data policy (Order 2017-115, April 27, 2017) requiring agencies to assess all of their data sets, establish levels of access, and plan for publication of most in modern formats. The Coalition will await publication of data under that plan (due in 2018), to take another look at public access to government contracts.

\*Summary prepared by the D.C. Open Government Coalition Legal Committee based on initial research by Ropes & Gray LLP, counsel to the Coalition, and further supplementary inquiry including FOIA requests to OCP. The project continues.

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