



# APTA Legal Affairs Seminar 2019

## Procurement 101: THE BASICS

STEVEN MILLER, PARTNER, HANSON BRIDGETT LLP

SAMANTHA LESLIE, SAN DIEGO METROPOLITAN TRANSIT  
SYSTEM, STAFF ATTORNEY – REGULATORY COMPLIANCE

NICOLE WITT, ATTORNEY, HANSON BRIDGETT LLP

# Procurement 101: The Basics

1. Purpose of Legal review in Procurements – Role of the Lawyer
2. How to be Involved Early
3. Bulletproofing Against Protests
4. Questions/Hypotheticals

# Role of the Lawyer in the Procurement Process

1. Follow the Law/Policy
2. Bullet Proof For Protests
3. Help Elicit Best Possible Proposals
4. Facilitate Procurement Professionals In Their Job

How to be Involved:

# First Step

- ▶ What Procurement Requirements must your agency follow?
  - ▶ Agency Enabling Legislation?
  - ▶ State/Local Statutes that apply to Public Agency / Transit Agency / Local Government Contracting?
  - ▶ If FTA Funds, FTA Circular 4220.1F / FTA Master Agreement / Fed Statutes that apply to Contracting?
  - ▶ Agency Board Policy Decisions on Procurement?

How to be Involved:

# Solicitation and Contract Templates

- ▶ Small Purchases (RFQ, RFP) and Formal Procurements (IFB, RFP, RFSQ)
  - ▶ Includes Solicitation (Bid Instructions, Bid Forms), Section for Scope and Technical Specifications, Contract Terms and Conditions, FTA Clauses (if applicable)
- ▶ Benefits
  - ▶ Saves time for both Procurement and Legal Staff, Promotes Compliance with Procurement Regulations

How to be Involved:

# Key Contract Provisions

- ▶ Key Contract Clauses
  - ▶ Insurance
  - ▶ Indemnification
  - ▶ Termination by Convenience
  - ▶ Termination by Default
  - ▶ Scope
  - ▶ Compensation
  - ▶ Acceptance

# Bulletproofing Against Protests

- ▶ Grounds for a Protest
  - ▶ Specifications that restrict competition (Pre-bid)
  - ▶ Improprieties in the bidding procedures or specifications (Pre-bid)
  - ▶ Disputes over staff recommendation of award (Pre-award)

Bulletproofing Against Protests:

# PROTECTING AGAINST PROTESTS

## 1. Qualifications Based/Best Value Procurements

- All items to be evaluated by the agency should appear in the proposal content list.
- Set a clear and consistent process for seeking additional information/BAFOs.
- Embrace the subjectivity.



Bulletproofing Against Protests:

# PROTECTING AGAINST PROTESTS

## 2. Low Bid Procurements

- Make sure every item on the price sheet appears in the technical specs/scope of work.
- Have a clear approved equals process.

Bulletproofing Against Protests:

# PROTECTING AGAINST PROTESTS

## 3. Common to All Solicitations

- Be sure the specifications do not unduly limit competition.
- Avoid ambiguous or confusing specifications.
- Have a clear process for requesting clarifications and avoiding ex parte communications.

Bulletproofing Against Protests:

# FTA's Role in Protests

"The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction." (2 CFR § 200.318)

QUESTIONS?



# THANK YOU!

- ▶ Steven Miller – 415-995-5831 or [smiller@hansonbridgett.com](mailto:smiller@hansonbridgett.com)
- ▶ Samantha Leslie – 619-557-4539 or [Samantha.Leslie@sdmts.com](mailto:Samantha.Leslie@sdmts.com)
- ▶ Nicole Witt – 415-995-6454 or [nwitt@hansonbridgett.com](mailto:nwitt@hansonbridgett.com)