

NYC Conflict of Interest and Related Party Transactions Policy and Guidance for Contractors of Human Services

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The City of New York Health and Human Services Cost Policies and Procedures Manual (“Cost Manual”) prohibits certain expenses from being charged to the City of New York (the “City”) if there is a *Conflict of Interest*. New York City’s standard human services contract states that “Any cost found by the Department, the City, or any auditing authority that examines the financial records of the Contractor to be improperly incurred, including but not limited to *Improper Related Party Transactions*¹, shall be subject to reimbursement to the City. Failure to make said reimbursement shall be grounds for termination of this Agreement.”²

Not-For-Profit Human Services Contractors are also required to comply with NYS Not-For-Profit Corporation Law. According to the Not-For-Profit Corporation Law, a *Related Party Transaction* is “any transaction, agreement, or any other arrangement in which a related party has a financial interest...”³ and can occur in various contexts between a Contractor’s *Directors, Officers, Key Persons, or Related Organizations*. Therefore, an *Improper Related Party Transaction* can include, but is not limited to, “Sale and Lease Back” and “*Less-Than-Arm’s Length*” agreements as defined in the Cost Manual.

These prohibitions are intended to prevent City monies from being used for wasteful or fraudulent transactions not in the City’s or Contractor’s best interest. These prohibitions are also intended to prevent unqualified Related Parties, unfair hiring and promotion practices, *Conflicts of Interest*, compromised internal control environments, and poor contract performance by the Contractor.

¹ City of New York Standard Contracts for Health and Human Services (April 2017), Section 1.01(G).

² City of New York Standard Contracts for Health and Human Services (April 2017), Section 4.06(C).

³ N.Y. Not-for-Profit Corp. Law § 102(a)(24) (Definitions).

Contractor Requirements

In order to ensure that costs are not improperly incurred, all human services Contractors with the City of New York are required to do the following:

1. Complete the HHS Accelerator Prequalification Application via PASSPort, and update and re-certify responses annually;
2. Respond to any requests made by a contracting agency and provide all requested follow-up information, clarification, documentation, and/or scheduling to meet within 30 days of such request; and
3. Comply with the contract following a contracting agency's decision/determination about a *Related Party Transaction* or *Conflict of Interest*.
4. If a transaction involving a *Related Party* or potential *Conflict of Interest* is billed to the City, whether directly or indirectly, document that the transaction is cost efficient, reasonable, and necessary pursuant to the terms of City contract(s) and the NYC Health and Human Services Cost Manual.

All disclosures submitted as part of the HHS Accelerator Prequalification Application must be consistent with the Contractor's *Related Party Transaction* policy and *Conflict of Interest* policy.

A Contractor's failure to disclose any *Related Party Transaction* or any potential *Conflict of Interest* will result in a presumption that the *Conflict of Interest* or *Related Party Transaction* is improper, and the transaction will be disallowed.

The City may review the transaction(s) to determine compliance and allowability under the contract and may require corrective actions and/or cost disallowances.

Disclosure of a *Related Party Transaction* and/or a potential *Conflict of Interest* does not necessarily indicate noncompliance with your contract, or any applicable Federal, State or Local rules or laws.

Contractor Practices to Support Compliance

Nonprofit *Directors* and *Officers* are responsible for establishing and nurturing a culture of integrity, a passion for the mission, a focus on achieving measurable mission-driven results, and commitment to ethical values and practices. They do this through personal leadership and appropriate oversight over the not-for-profit's staff, volunteers, and activities in compliance with New York State Not-for-Profit Corporation Law.

All Not-for-Profit Contractors are legally required to do the following when making decisions about a potentially conflicted issue. Following these steps will protect the Contractor and public funds from fraud, waste, and abuse:

1. Adopt and maintain a *Conflict of Interest* Policy that contains:

- A clear definition of what a *Conflict of Interest* is,
 - Procedures for disclosing a potential *Conflict of Interest*,
 - Requirement of *Related Party* recusal from board deliberations and voting when a potential *Conflict of Interest* exists, and
 - Documentation of the *Conflict of Interest* resolution process.
2. Procedures for disclosing, addressing, and documenting *Related Party Transactions* in accordance with Section 715-a of the Not-for-Profit Corporation Law must include but are not limited to:
- Any *Director, Officer, or Key Person* who has an interest in a *Related Party Transaction* must disclose in good faith to the board, or an authorized committee thereof, the material facts concerning such interest.
 - The Board of Directors, or an authorized committee, must determine whether the *Related Party Transaction* is fair, reasonable, and in the Contractor's best interest.
 - The Board of Directors, or an authorized committee, is required to consider alternative transactions prior to entering into the transaction, and vote to determine whether the *Related Party Transaction* is fair, reasonable, and in the Contractor's best interest.
 - The *Director* with the potential conflict may not participate in the decision making and must recuse themselves. Specifically, the *Director* with the potential conflict may not vote.
 - The Board of Directors must make a contemporaneous record of their decision-making process by recording their steps and discussion in the Board Minutes, or through a resolution adopted by the Board.
 - If a transaction is approved, the interested *Director* must continue to disclose their interest in relevant annual disclosure statements, and if any terms of the transaction change over time the Board must repeat the legally required decision-making process.
3. Adhere to all other provisions stated in New York State Not-for-Profit Corporation Law Section 715.

Recoupment For Improper Transactions

If a *Conflict of Interest* or an *Improper Related Party Transaction* is found between the Contractor and a *Related Party* or a *Related Organization*, "The Department may, at its option, either require the Contractor to reimburse the Department or withhold for the purposes of set-off any monies due to the Contractor under this Agreement up to the amount of any disallowance or improperly incurred costs resulting from any audits of the Contractor, the amount of any overpayment to the Contractor."⁴

⁴ City of New York Standard Contracts for Health and Human Services (April 2017), Section 4.07.

Definitions

The following definitions apply to this policy and related procedures and are italicized throughout this document.

Compensation – Includes, but is not limited to, gross salary, fringe benefits, deferred compensation, consultant payments, 1099 payments, and any items of value provided to any individual or business entity.

Conflict of Interest – A Conflict of Interest exists when the Provider or a Covered Person has an interest (whether in property, management/control, a transaction, or a legal entity) that could reasonably be viewed as adverse to (1) the Provider’s obligation to deliver cost-efficient services or (2) the City’s interest in prudently disbursing public funds only for reasonable and necessary expenses which the Provider incurs while providing services pursuant to the terms of its City contract and the HHS Cost Manual. The Provider bears the burden of conclusively demonstrating to the City that an individual interest does not present a Conflict of Interest.⁵

Corporation – “Corporation” or “domestic corporation” means a corporation (1) formed under the New York State Not-for-Profit Corporation Law (“N-PCL”), or existing on its effective date and theretofore formed under any other general statute or by any special act of this state, exclusively for a purpose or purposes, not for pecuniary profit or financial gain, for which a corporation may be formed under the N-PCL, and (2) no part of the assets, income or profit of which is distributable to, or ensures to the benefit of, its members, directors or officers except to the extent permitted under this statute.⁶

Covered Person – A Covered Person means “Related Party,” as defined in the New York State Not-For-Profit Corporation Law § 102(a)(23). For the purposes of this definition, a Covered Person additionally includes any member, partner, or employee of a Provider and any Relative of such individuals (as defined in the New York State Not-for-Profit Corporation Law § 102(a)(22)).⁷

Director – Any member of the governing board of a corporation, whether designated as director, trustee, manager, governor, or by any other title. The term “board” means “board of directors” or any other body constituting a “governing board” as defined in the New York State Not-for-Profit Corporation Law § 102(a)(6).⁸

Improper Related Party Transaction – A Related Party Transaction that violates New York State Not-for-Profit Corporation Law Section 715 and is not fair, reasonable, and in Contractor’s best interest at the time Contractor’s Board approved the transaction.⁹

Key Person – Any person, other than a director or officer, whether or not an employee of the corporation, who (i) has responsibilities, or exercises powers or influence over the corporation as a whole similar to the responsibilities,

⁵ City of New York Health and Human Services Cost Policies and Procedures Manual, Section V. Definitions and Acronyms.

⁶ N.Y. Not-for-Profit Corp. Law § 102(a)(5) (Definitions).

⁷ City of New York Health and Human Services Cost Policies and Procedures Manual, Section V. Definitions and Acronyms.

⁸ N.Y. Not-for-Profit Corp. Law § 102(a)(6) (Definitions).

⁹ City of New York Standard Contracts for Health and Human Services (April 2017), Section 1.01(G).

powers, or influence of directors and officers; (ii) manages the corporation, or a segment of the corporation that represents a substantial portion of the activities, assets, income or expenses of the corporation; or (iii) alone or with others controls or determines a substantial portion of the corporation's capital expenditures or operating budget.¹⁰

“Less-than-Arm’s Length” Agreement – An agreement under which one party to the agreement is able to control or substantially influence the actions of the other and is defined further in 2 CFR Law § 200.465(c). For the purposes of this definition, 2 CFR Law § 200.465(c) applies to all “less-than-arm's length” agreements (including leases).¹¹

Officer – Unless otherwise provided (for example, Signature Block, principal officer in Heading), a person elected or appointed to manage the organization's daily operations at any time during the tax year, such as a president, vice president, secretary, treasurer, and, in some cases, Board Chair. The officers of an organization are determined by reference to its organizing document, bylaws, or resolutions of its governing body, or as otherwise designated consistent with state law, but at a minimum include those officers required by applicable state law. For purposes of Form 990, treat the organization's top management official and top financial official as Officers.¹²

Related Organization – Organizations that stand in a parent/subsidiary relationship, brother/sister relationship, sponsoring organization of or contributing employer to a Voluntary Employees’ Beneficiary Association (VEBA), or supporting/supported organization relationship.¹³

Related Party – (i) Any Director, Officer or Key Person of the corporation or any affiliate of the corporation; (ii) any Relative of any individual described in clause (i) of this subparagraph; or (iii) any entity in which any individual described in clauses (i) and (ii) of this subparagraph has a thirty-five percent or greater ownership or beneficial interest or, in the case of a partnership or professional corporation, a direct or indirect ownership interest in excess of five percent.¹⁴

Related Party Transaction – Any transaction, agreement or any other arrangement in which a Related Party has a financial interest and in which the Corporation or any affiliate of the Corporation is a participant, except that a transaction shall not be a Related Party Transaction if: (i) the transaction or the Related Party's financial interest in the transaction is de minimis, (ii) the transaction would not customarily be reviewed by the board or boards of similar organizations in the ordinary course of business and is available to others on the same or similar terms, or (iii) the transaction constitutes a benefit provided to a related party solely as a member of a class of the

¹⁰ N.Y. Not-for-Profit Corp. Law § 102(a)(25) (Definitions).

¹¹ City of New York Health and Human Services Cost Policies and Procedures Manual, Section V. Definitions and Acronyms.

¹² Exempt Organizations Annual Reporting Requirements – Form 990, Parts I-V: Reporting compensation of principal officers | Internal Revenue Service.

¹³ Exempt Organizations Annual Reporting Requirements – Form 990, Schedule R: Meaning of "Related" Organization | Internal Revenue Service.

¹⁴ N.Y. Not-for-Profit Corp. Law § 102(a)(23) (Definitions).

beneficiaries that the corporation intends to benefit as part of the accomplishment of its mission which benefit is available to all similarly situated members of the same class on the same terms.¹⁵

Relative – (i) His or her spouse or domestic partner¹⁶; (ii) his or her ancestors, brothers and sisters (whether whole or half-blood), children (whether natural or adopted), grandchildren, great-grandchildren; or (iii) the spouse or domestic partner of his or her brothers, sisters, children, grandchildren, and great-grandchildren.¹⁷

¹⁵ N.Y. Not-for-Profit Corp. Law § 102(a)(24) (Definitions).

¹⁶ Domestic Partner is defined in the New York Public Health Law § 2994-A (Definitions).

¹⁷ N.Y. Not-for-Profit Corp. Law § 102(a)(22) (Definitions).