Procurement Under the New Requirements

Why This Session Is Needed

- New provisions in Uniform Guidance
- Changes to conflict of interest requirements in Uniform Guidance
- Improper procurement is common ETA monitoring finding
- Distinctions between subawards and contracts
- Lack of adequate procurement policies
- Not managing procurements to achieve performance

Lesson Overview & Module Objectives

- Define key procurement terms in the Uniform Guidance
- Distinguish between subrecipients and contractors and the requirements for their selection
- Identify the procurement standards and when they apply
- Identify the different methods of procurement
- Distinguish among the different types of contracts
- Incorporate performance provisions in contracts
Knowledge Check

On a scale of 1 (lowest) to 5 (highest), rate your knowledge and understanding of the following by circling the appropriate number in the middle column of the sheet, labeled Pre-Training, for each of the statements.

| Differences between a subaward and a contract |  |
| Rules that apply to pass-through-entity subawards |  |
| Procurement rules that apply to contract awards |  |
| Methods of procurement and types of agreements |  |
| Micro purchase and simplified acquisition threshold guidelines |  |

Subawards v Contracts

• Define key procurement terms in the Uniform Guidance
• Distinguish between subrecipients and contractors and the requirements for their selection

Learning objectives for this section

Grace Period for Implementation


• Grace period to implement procurement standards in 200.317 through 200.326
  - For two fiscal years that begin after the 12/26/2014 effective date of Uniform Guidance
    (Federal Register 9/10/15)
  - Need to specify in documented policies and procedures that non-Federal entity will continue to comply with the applicable OMB Circulars during the grace period
**Key Terms**

<table>
<thead>
<tr>
<th>Non-Federal entity</th>
<th>Pass-Through entity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any entity receiving Federal funds</td>
<td>Any non-Federal entity that provides a subaward to a recipient to carry out part of a Federal program</td>
</tr>
<tr>
<td>Includes for-profits and foreign entities per DOL exceptions at 2900.2</td>
<td></td>
</tr>
</tbody>
</table>

**Pass-Through entity**

Key distinction: pass-through subaward (subrecipient) vs. procurement action (contractor)

**Subawards v Contracts**

(1 of 2)

**Subaward**

- Award provided by a pass-through entity to a subrecipient
- To carry out part of a Federal award received by the pass-through entity
  - Does not include payments to contractor or to an individual as beneficiary of Federal program

**Subrecipient**

- Non-Federal entity that receives a subaward from a pass-through entity to carry out part of a Federal program

**Contract**

- Does not include subawards
- Legal instrument used to purchase property or services to carry out the project or program
  - Often the purchase of goods and services for the non-Federal entity’s own use
- Is competed

**Contractor**

- Entity that receives a contract
- Replaces the term "vendor"
**Subrecipient and Contractor Distinctions (200.330)**

<table>
<thead>
<tr>
<th>Subrecipient</th>
<th>Contractor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Determines who is eligible to receive what Federal assistance</td>
<td>Provides similar goods or services to many different purchasers</td>
</tr>
<tr>
<td>Performance is measured by whether objectives of Federal program are met</td>
<td>Provides the goods and services within normal business operations</td>
</tr>
<tr>
<td>Has responsibility for programmatic decision making</td>
<td>Provides goods or services that are ancillary to the operation of the Federal program</td>
</tr>
<tr>
<td>Responsible for adhering to applicable Federal program requirements</td>
<td>Not subject to the compliance requirements of the Federal program</td>
</tr>
<tr>
<td>Uses Federal funds to carry out a program for a public purpose</td>
<td>Provides goods and services for the non-Federal entity’s own use, creating a procurement relationship</td>
</tr>
<tr>
<td>Funded by a Subaward</td>
<td>Funded by a Procurement Contract</td>
</tr>
</tbody>
</table>

**Document Type of Agreement**

2 CFR 200.330 & 200.331

- Determine whether each agreement establishes role as a subrecipient or contractor
- If subaward to subrecipient (200.331)
  - Clearly identify as such
  - Include required information

**Pass-Through Entity (PTE)**

All non-Federal entities are pass-through entities when making subawards to subrecipients to carry out part of a Federal program.

Including Partner and Cooperative Agreements:

- Required by statute (WIOA Operators and Youth)
- Required by own policies and procedures
- Awarded on competitive basis

These subawards are not procurement actions, but they will follow the procurement rules when:
**Competitive Subaward Selection**

When subrecipients are selected on a competitive basis, follow the procurement rules at 200.318-326

- Uniform Guidance does not prohibit the use of a competitive process to select subrecipients
  - ETA encourages the use of a competitive process to select subrecipients

**Selecting Subrecipients**

What guides the selection of subrecipients when a competitive process is not required?

- **Internal Controls System**
  - Written procedures
  - Conflict of interest provisions

- **Risk Assessment**
  - Past record of performance
  - Cost principles: reasonable costs
  - Past record of compliance
  - Audit and monitoring results

**Accountability for Pass-Through Entities**

- Pass-through entity is as accountable as if it were providing the services itself

- Structure award instrument to promote performance
- Conduct vigorous oversight and monitoring
Managing Risk

Due diligence before the award
- Systems, procedures, staff in place
- Clear and measurable deliverables, interim and final

Oversight during the period of performance
- Track actual vs. plan
- Identify problems early
- Require timely corrective action

Verify results
- Monitor on site

Profit or Incentive (1 of 2)

2 CFR 200.400 (g) & 200.323 (b)

Uniform Guidance
- Non-Federal entity may not earn or keep profit unless expressly authorized by the Federal award
- WIOA
  - Does authorize profit for non-profits and for-profits
    - Non-profits: Treated as program income
    - Prohibited for Governmental entities

Requirements on profit
- Negotiate as a separate element from price
  - When there is no price competition
  - In all cases where cost analysis is performed
    - Exceeds simplified acquisition threshold

Profit or Incentive (2 of 2)

Profit Considerations
- Complexity of work performed
- Risk borne by recipient
- Recipient’s investment
- Amount passed through to subrecipients
- Quality of past performance
- Industry profit rate in surrounding area for similar work
- FAR suggests that it be less than 10%
Procurement Under the New Requirements

Procurement under the New Requirements

Status Check

What factors determine whether an award qualifies as a pass-through transaction or a procurement action?

What are some of the differences that distinguish a subrecipient from a contractor?

By what processes are subrecipients and contractors selected?

What does a risk assessment entail?

Procurement Standards

• Identify the procurement standards and when they apply

Procurement Standards

Learning objectives for this section

What are Procurement Actions?

Purchase of a specific product or service that is ancillary to the Federal program

Purchase of goods and services for the non-Federal entity's own use

As distinguished from a pass-through subaward to carry out part of a Federal program

– Equipment and supplies
– Audit services
– Consulting services
– Leases
– Training
Competitive Selection of Subrecipients

- When selecting subrecipients on a competitive basis, you must follow the procurement rules.
- When required by statute (e.g., WIOA Youth Programs).
- When required by own policies and procedures.
- When required by the Funding Opportunity Announcement (FOA) and/or grant terms and conditions.

What Procurement Standards Apply? (1 of 2)

- States:
  - Follow the same policies and procedures as for procurements using their non-Federal Funds.
  - Comply with 200.322 of Procurement of Recovered Materials.
  - Ensure that every purchase order or other contract includes the required contract provisions in 200.326.

What Procurement Standards Apply? (2 of 2)

- All other non-Federal Entities:
  - Develop and use own documented procurement procedures.
  - Follow the general procurement standards 200.318-326.
  - Reflecting applicable State/local laws and regulations.
  - Conforming to applicable Federal law and standards of the Uniform Guidance.
General Procurement Standards (1 of 5)

2 CFR 200.319

- Full and open competition
  - Restrictions on competition generally prohibited, including geographic preferences
  - Pre-qualified lists must be current and include enough qualified sources to ensure open and free competition
  - Must not preclude bidders from qualifying during solicitation period
- Written procurement policies and procedures
- Written standards of conduct

General Procurement Standards (2 of 5)

- Use most economical approach
- Cost principles apply
- Oversight of contractor performance regarding contract terms, conditions, specifications

General Procurement Standards (3 of 5)

- Award only to responsible contractors (200.318 (h))
- Prohibited organizations and individuals
  - Ability to perform successfully
  - Past performance, compliance with public policy, financial and technical resources, contractor integrity
  - Debarred or suspended
  - Tax liability
  - Felons
Maintain records sufficient to detail the history of the procurement, including:

Rationale for method of procurement
Selection of contract type
Basis for contractor selection or rejection
Basis for contract price

Contract Cost and Price Analysis

- Every procurement action in excess of the Simplified Acquisition Threshold, including modifications, MUST include an independent estimate of costs before receiving bids or proposals
- Cost plus percentage of cost contracts not allowable
- Procedures for settlement of all contractual and administrative issues (200.318(k))
  - Non-Federal entity alone responsible for resolving disputes

5 Essential Elements of a Contract (1 of 2)

Offer
- A conditional promise made by the offeror to the offeree giving the offeree the ability to accept

Consideration
- The giving of something of value in return for something of value

Authorized Officials and Purpose
- Parties involved must have the authorization to make an offer, and the purpose should be a legal and authorized purpose and during an authorized period of time
5 Essential Elements of a Contract (2 of 2)

Acceptance
• Unconditional agreement with the terms of the offer

Additional elements
• In writing (signed by both parties)
• Includes essential terms and conditions
• Specifies a period of performance

Required Contract Clauses (1 of 3)

2 CFR 200.326 & Appendix II

Administrative, contractual, or legal remedies for breach of contract if contract exceeds Simplified Acquisition Threshold (currently $150,000)

Termination for cause and for convenience if contract exceeds $10,000

Equal Employment Opportunity provisions

Required Contract Clauses (2 of 3)

2 CFR 200.326 & Appendix II

Must include EEO notice in recruiting materials

Davis-Bacon Act for construction contracts > $2,000

Contract work hours and safety standards for contracts over $100,000 employing mechanics or laborers
Required Contract Clauses
(3 of 3)

- Right to inventions for non-profit organizations and small business firms where applicable
- Clean Air Act for contracts > $150,000
- Energy efficiency standards per State plan
- Byrd Anti-lobbying certification for contracts > $100,000
- Procurement of recovered materials for States
- DOL Exception on creative commons licensing
- Not a contract clause, but Uniform Guidance prohibits use of debarred, suspended, and other excluded parties
- Grant terms and conditions may identify additional requirements

Expanded Disclosure of Violations

2 CFR 200.113

**Mandatory Disclosures**
- Non-Federal entity or applicant must disclose in writing to Federal agency or pass-through entity
  - All violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award

- Penalties for failure to make required disclosures
  - Remedies in 200.338 including termination, suspension or debarment
  - See also 2 CFR Part 180, 31 U.S.C. 3321

Expanded Disclosures

2 CFR 200.112 & 200.318 (c)

**Conflict of Interest (200.112 and 200.318 (c))**
- Disclose in writing any potential conflict to Federal agency or pass-through entity
Standards of Conduct, Conflict of Interest

2 CFR 200.112 & 200.318 (c)

Must establish policies for Federal awards

Written standards of conduct for anyone who touches process (selection, award, administration of contracts)

Real or apparent conflict of interest—personal or organizational

Neither solicit nor accept anything of monetary value

Staff, family member, partner, or employer organization has financial or other interest in or tangible benefit from awardee or bidder

Status Check

Are the statements true or false?

The purchase of equipment and supplies for the entity’s own use is a procurement action requiring compliance with the procurement standards

You must follow the procurement rules when establishing pre-qualified lists of contractors

A cost or price analysis is required for every procurement action.

Methods of Procurement

Learning objectives for this section

• Identify the different methods of procurement
Methods of Procurement

2 CFR 200.320

Methods of Procurement to be Followed
- Micro Purchase
- Small Purchase
- Sealed Bids
- Competitive Proposals
- Non-Competitive Proposals

Micro Purchases

Micro Purchase 200.320 (a)
- Acquisition of supplies or services not exceeding $3,500 in aggregate
- May be awarded without soliciting competitive quotations if price is reasonable
- Distribute equitably among qualified suppliers to extent practicable

Notable Changes
- Micro purchase procedures not previously authorized

Small Purchases

Small purchase procedures 200.320 (b)
- Informal procurement methods for securing services, supplies, or other property
- Cost is less than the Simplified Acquisition Threshold (SAT)
- SAT set by the FAR at 48 CFR 2.1
- Increased from $100,000 to $150,000 in 2010
- Price or rate quotations must be obtained from an adequate number of qualified sources

Notable changes
- Threshold linked to Simplified Acquisition Threshold
- Future changes in FAR threshold will apply
Sealed Bids

Sealed Bids (formal advertising) 200.320 (c)

- Bids publicly solicited
- Firm fixed price contract is awarded
- Successful bid conforms to all material items and conditions of the invitation for bids—and is lowest in price
- Preferred method for procuring construction

No notable changes

Sealed Bids

Competitive Proposals

Requirements 2 CFR 200.320 (d)

- Publicize RFP and identify all evaluation factors
- Solicit from an adequate number of qualified sources
- Written method for evaluating and selecting proposals
- Contract awarded to responsible firm
- Most advantageous proposal
- Price and other factors considered

No notable changes

Qualifications-Based Procurement

Qualifications-based procurement

- Architectural/engineering (A/E) professional services
- Qualifications evaluated and most qualified selected
- Subject to negotiation of fair and reasonable compensation
- No notable changes
Procurement Under the New Requirements

Non-Competitive Proposals

2 CFR 200.320 (f)

Solicitation from only one source (sole source)

- Allowable only when one or more circumstances apply:
  - Item available only from a single source
  - Public exigency or emergency will not permit a delay
  - Awarding agency authorizes non-competitive proposals in response to a written request
  - After solicitation from a number of sources, competition is determined inadequate

Small, Minority, Women’s, Labor Surplus Area Businesses

Must take all necessary affirmative steps to assure that small, minority, women’s, and labor surplus area firms are used whenever possible, to include:

- Placing qualified businesses on solicitation lists
- Soliciting them whenever they are potential sources
- Dividing total requirements into smaller tasks or quantities when economically feasible
- Establishing delivery schedules to encourage participation
- Using services of SBA and MBDA of Dept. of Commerce
- Requiring prime contractor to take these same steps

Contract Types

- Distinguish among the different types of contracts
- Incorporate performance provisions in contracts
Procurement under the New Requirements

**Contract Types (1 of 4)**

- **COST REIMBURSEMENT**
  - Pay for effort, not performance
  - Performance risk borne by awarding agency

- **FIRM FIXED PRICE CONTRACT**
  - Purchase of goods and ancillary services
  - Reasonably definite performance or design requirements
  - Pay pre-set price for each unit of deliverable regardless of actual costs incurred
  - Performance risk borne by contractor

- **FIRM FIXED PRICE INCENTIVE**

- **COST-PLUS INCENTIVE FEE**

- **TIME AND MATERIAL**

**Contract Types (2 of 4)**

- **FAR 16.2-3**
  - Cost Reimbursement Contract
    - Not recommended for contracts
    - Pay for effort, not performance
    - Performance risk borne by awarding agency

  - Firm Fixed Price Contract
    - Purchase of goods and ancillary services
    - Reasonably definite performance or design requirements
    - Pay pre-set price for each unit of deliverable regardless of actual costs incurred
    - Performance risk borne by contractor

**Contract Types (3 of 4)**

- **Fixed Price Incentive**
  - Cost uncertainties exist and there is the possibility of cost reduction by giving contractor:
    - A degree of cost responsibility
    - Positive profit incentive

- **Cost-Plus Incentive Fee**
  - Prohibited by statute and regulations
  - Fees increase with costs
Contract Types (4 of 4)

Time and Material (Labor Hour)
- Not possible to initially estimate extent or duration of work
  - E.g. engineering and design services
  - Repair and maintenance
- Fixed price per unit of materials used
- Direct labor hours at specified hourly rates that include wages, overhead, general and administrative expenses, and profit

Performance Considerations (1 of 2)

Performance requirements are defined in measurable mission-related terms

Performance standards (i.e., quality, quantity, timeliness) tied to performance requirements

Quality Assurance (QA) plan describes how the contractor’s performance will be measured against the performance standards

Positive and negative incentives appropriate if critical to accomplishing performance

(Source: White House: Best Practices for Performance-Based Contracting)

Performance Considerations (2 of 2)

- Describe the requirements in terms of results required rather than the methods of performance of the work
- Use measurable performance standards (i.e., terms of quality, timeliness, quantity, etc.) and quality assurance surveillance plans (see 46.103(a) and 46.401(a))
- Specify procedures for reductions of fee or for reductions to the price of a fixed-price contract when services are not performed or do not meet contract requirements (see 46.407)
- Include performance incentives if appropriate.