



Procurement and Performance-Based Awards



Purpose and Introduction



Major Changes to Procurement Requirements

- Subrecipient vs. Contractor
- Conflict of Interest
- Micropurchase

Past problems using performance-based contracts



Course Objectives



At the end of this training, you will be able to:

- Define key procurement-related terms under the Uniform Guidance
- Identify pass-through entities' responsibilities for their sub-awards
- Identify the general procurement standards, contract provisions, and disclosures
- Define the methods of procurement and types of agreements and their characteristics
- Identify the provisions and issues related to performance-based awards



Course Menu



- Key Terms in Uniform Guidance

Section 1



- Pass-Through Entities

Section 2



- Procurement Standards

Section 3



- Methods of Procurement

Section 4



- Performance-Based Awards

Section 5





KEY TERMS IN UNIFORM GUIDANCE



OMB Uniform Guidance Recap



- OMB Final Rule published 12/26/2013 at 2 CFR 200
- Technical Corrections and DOL adoption of Uniform Guidance published 12/19/2014 at 2 CFR 2900.
- Consolidates eight previous Circulars into one Uniform Guidance document
 - Administrative Requirements, Cost Principles, Single Audit
- DOL exceptions as required by Federal statute
- Recipients have option to use old or new rules for Federal funds awarded prior to 12/26/2014
- Must use new rules for all Federal funds awarded beginning 12/26/14

Key Terms



Non-Federal Entity



Any entity receiving Federal funds



Includes for-profits and foreign entities per DOL exceptions

Pass-Through Entity



Any non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program



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





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 needed to carry out the project or program
 - Often the purchase of goods and services for the non-Federal entity's own use

Contractor

- Entity that receives a contract
- Replaces the term "vendor"



Subrecipient and Contractor Distinctions (200.330)



Subrecipient

Uses Federal funds to carry out a program for a public purpose

Responsible for adhering to applicable Federal program requirements

Has responsibility for programmatic decision making

Performance is measured by whether objectives of Federal program are met

May determine who is eligible to receive what Federal Assistance

Funded by a Subaward

Contractor

Provides similar goods or services to many different purchasers

Provides the goods and services within normal business operations

Provides goods or services that are ancillary to the operation of the Federal program

Not subject to the compliance requirements of the Federal program

Provides goods and services for the non-Federal entity's own use, creating a procurement relationship

Funded by a Procurement contract



PASS-THROUGH ENTITIES



Pass-Through Entity



- All non-Federal entities that make subawards to carry out part of a Federal program are pass-through entities
- Partners and Cooperative Agreements
 - Covered by rules governing subawards from pass-through entities
- These subawards are not procurement actions governed by the competitive procurement rules
 - Unless required by statute
 - Unless required by own policies and procedures
 - Unless awarded on competitive basis



Procurement Entity



- When subawards are procured on a competitive basis, follow the procurement rules at 200.318-326
- Awards to contractors continue to be competitive procurement actions governed by the procurement rules at 200.318-326
- Does not prohibit use of competitive process to select subrecipients



Selecting Subrecipients



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

- Internal Controls System
 - Written procedures
 - Conflict of interest provisions
- Service provider's track record
 - Past record of performance
 - Cost principles: reasonable costs
 - Past record of compliance
 - Audit and monitoring results



Requirements for Pass-Through Entities



- “Pass-through” does not give the entity a “pass” on accountability
- Provides funds to a subrecipient to meet the pass-through entity’s program and performance objectives
- Pass-through entity is as accountable as if it were providing the services itself



Knowledge Check 1



Match the term with the correct definition.

What factors determine whether an award qualifies as a subaward or a procurement action?

Subaward

Provides goods and services for the non-Federal entity's own use or consumption, and is ancillary to the grant's program and performance objectives

Procurement Action

An award provided by a pass-through entity to a subrecipient in order to carry out part of a Federal award to meet the pass-through entity's program and performance objectives

Knowledge Check 1 Feedback



What factors determine whether an award qualifies as a subaward or a procurement action?

- ☐ Prior to 12/26/14
- ☒ After 12/26/14

FEEDBACK:

A **subaward** is an award provided by a pass-through entity to a subrecipient in order to carry out part of a Federal award to meet the pass-through entity's program and performance objectives.

A **procurement action**, on the other hand, provides goods and services for the non-Federal entity's own use or consumption, and is ancillary to the grant's program and performance objectives.

Knowledge Check 2



Do the cost principles apply to both recipients and subrecipients?

Select your answer. Then click Submit.

- ☒ A) Yes
- ☐ B) No



Knowledge Check 2 Feedback



Do the cost principles apply to both recipients and subrecipients?

- ☒ A) Yes
- ☐ B) No

FEEDBACK:

Yes, the cost principles apply to all awards and subawards. Therefore, they apply to recipients and subrecipients.





PROCEDURE

- 1.
- 2.
- 3.



PROCUREMENT STANDARDS



What are Procurement Actions?



- Purchase of a specific product or service that is ancillary to the Federal program
 - As distinguished from a subaward to carry out part of a Federal program
- Purchase of goods and services for the non-Federal entity's own use: e.g.
 - Equipment and supplies
 - Audit services
 - Consulting services
 - Leases
 - Other examples



What are Procurement Actions? (2)



- Competitive procurement of subrecipients
 - When required by statute
 - E.g. WIA/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?



States

- Follow the same policies and procedures as for procurements using their non-Federal funds
- Comply with 200.322 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)



All other non-Federal entities that are not states:

- Follow the general procurement standards at 200.318-326
- Develop and use own documented procurement procedures
 - Reflecting applicable State/local laws and regulations
 - Conforming to applicable Federal law and standards of the Uniform Guidance



General Procurement Standards



- 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)



- Use most economical approach
- Cost principles apply
- Award only to responsible contractors
 - Contractor integrity, compliance with public policy, past performance, financial and technical resources
- Oversight of contractor performance regarding contract terms, conditions, specifications



General Procurement Standards (3)



- 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



General Procurement Standards (4)



- Contract Cost and Price Analysis
 - Every procurement action in excess of the Simplified Acquisition Threshold (2 CFR 200.88) 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



Profit or Incentive



- Negotiate as a separate element from price
 - When there is no price competition
 - In all cases where cost analysis is performed
- Profit considerations
 - Complexity of work performed
 - Risk borne by contractor
 - Contractor's investment
 - Amount of subcontracting
 - Quality of past performance
 - Industry profit rate in surrounding area for similar work
- FAR 48 CFR 15.404-4 suggests that it be less than 10%



Essential Elements of a Contract



1

Offer

2

Consideration

3

Authorized Officials and Purpose

4

Acceptance

5

Additional Elements



Required Contract Clauses



- Administrative, contractual, or legal remedies for breach of contract if contract exceeds Simplified Acquisition Threshold
- Termination for cause and for convenience if contract exceeds \$10,000
- Equal Employment Opportunity provisions
- Must include EEO notice in recruiting materials
- Davis-Bacon Act for construction contracts > \$2000
- Contract work hours and safety standards for contracts over \$100,000 employing mechanics or laborers



Required Contract Clauses (2)



- 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



Grace Period for Implementation



For all non-Federal entities and Institutions of Higher Education only

- Grace period to implement procurement standards in 200.317 through 200.326
 - For one fiscal year that begins after the 12/26/2014 effective date of Uniform Guidance
- Need to specify in documented policies and procedures that non-Federal entity will continue to comply with OMB circular A-110 during the additional fiscal year





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 suspension or debarment
 - See also 2 CFR Part 180, 31 U.S.C. 3321





Conflict of Interest (200.112 and 200.318(c))

- **Must establish policies for Federal awards**
 - Written standards of conduct for employees engaged in selection, award and administration of contracts
 - Real or apparent conflict of interest – personal or organizational
 - Staff, family member, partner or employer organization has financial or other interest in or tangible benefit from contractor or bidder
 - Neither solicit or accept anything of monetary value
- **Disclose in writing any potential conflict to Federal agency or pass-through entity**

Knowledge Check 3



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 in the Uniform Guidance, State procurement rules, and local procurement policy.

Select your answer. Then click Submit.

- ☒ A) True
- ☐ B) False



Knowledge Check 3 Feedback



The purchase of equipment and supplies for the entity's own use is a procurement action requiring compliance with the procurement standards in the Uniform Guidance, State procurement rules, and local procurement policy.

- ☒ A) True
- ☐ B) False

FEEDBACK:

It is a procurement action because the purpose of the procurement is to provide equipment and supplies for the entity's own use and consumption, and not for the purpose of carrying out part of a Federally funded program.



Knowledge Check 4



True or False?

A micro purchase is not governed by the OMB cost principles.

Select your answer. Then click Submit.

- ☐ A) True
- ☒ B) False



Knowledge Check 4 Feedback



A micro purchase is not governed by the OMB cost principles.

- ☐ A) True
- ☒ B) False

FEEDBACK:

All purchases are subject to the OMB cost principles. The cost must be reasonable in amount and consistent with the cost principles.



Knowledge Check 5



True or False?

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

Select your answer. Then click Submit.

- ☐ A) True
- ☒ B) False



Knowledge Check 5 Feedback



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

- ☐ A) True
- ☒ B) False

FEEDBACK:

For small purchases, price or rate quotations must be obtained from an adequate number of qualified sources. But a more formal cost or price analysis is only required for procurement actions in excess of the Simplified Acquisition Threshold, including contract modifications. This analysis must include an independent estimate of costs before receiving bids or proposals.



METHODS OF PROCUREMENT





200.320 Methods of procurement to be followed

Micro Purchase

Small Purchase

Sealed Bids

Competitive Proposals

Non-Competitive Proposals



Micro Purchase

- Acquisition of supplies or services not exceeding \$3,000 in the 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 purchase procedures

- Informal procurement methods for securing services, supplies or other property
- Cost is less than the Simplified Acquisition Threshold
- Set by the FAR at 48 CFR 2.1
 - Currently \$150,000 (increased from \$100,000)
- 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 (formal advertising)

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

No notable changes





Requirements

- 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
 - Whose proposal is most advantageous
 - Price and other factors considered



Competitive Proposals (2)



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





Solicitation from only one source (sole source)

- Allowable only when one or more of these circumstances applies
 1. Item available only from a single source
 2. Public exigency or emergency will not permit a delay
 3. Awarding agency authorizes noncompetitive proposals in response to a written request
 4. After solicitation from a number of sources, competition is determined inadequate

Notable change

- Omits cost analysis previously required in A-102



Small, Minority, Women's, and 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 their participation
- Using services of SBA and MBDA of Dept. of Commerce
- Requiring prime contractor to take these same steps



Agreement Types



Cost Reimbursement

- Purchase services
- Pay for effort, not performance
- Pay for actual allowable costs budgeted and expended
- Required for work between governmental entities
- Performance risk borne by awarding agency

Fixed Unit Price

- Purchase goods
- Pay pre-set price for each unit of deliverable regardless of actual costs incurred
- Performance risk borne by contractor



Agreement Types (2)



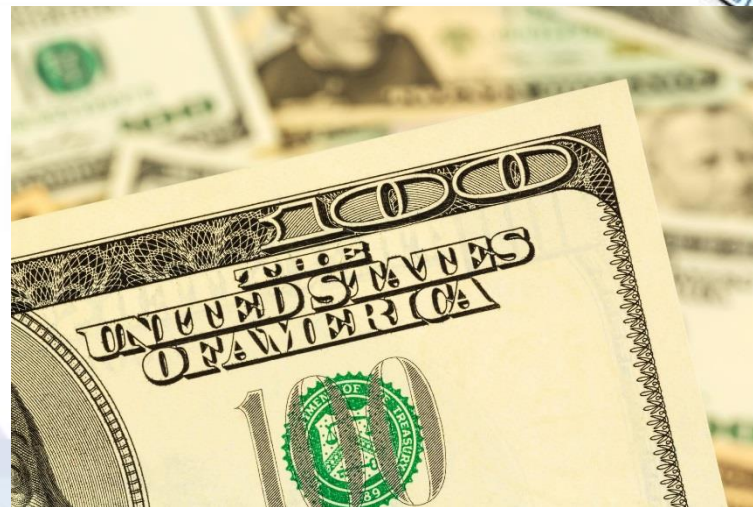
Fixed Unit Price, Performance Based (PBC)

- Purchase of services
- Pay pre-set price for each unit of deliverable regardless of actual costs incurred
- Deliverable is a specified outcome, not output
- Risk borne by contractor

Hybrid

- Purchase of services
- Reimbursed for actual costs incurred
- Incentive for performance exceeding baseline level
- Penalty for not achieving baseline level of performance
- Shared risk





PERFORMANCE-BASED CONTRACTS





Minimum requirements

- Performance requirements can be 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-Based Awards (2)



Additional components

- Historical workload analysis is performed to determine the performance requirements and standards, quality assurance (QA) plan, and incentives
- Solicitation and contract convey a logical, easily understood flow among performance requirements, performance standards, QA plan, and performance incentives
- Process-oriented reports are eliminated to the maximum feasible extent.
- Fixed price, completion type of contract





Additional components

- Past performance evaluations are based on the results of contract QA measurements and incentives, and QA plans are consistent with past performance factors.
- The contract/task order is awarded competitively.
- Best value evaluation/selection methods are used to award the contract/task order.



PBC Guidelines in the Federal Acquisition Regulations



FAR 37.6

- 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.



Common Problems with PBCs



- Performance criteria and schedule of events not clearly defined
- Reimbursement contract disguised as PBC
 - Pay for outputs rather than outcomes
 - Progress payments exceed customary standard
 - Little or no risk borne by contractor
- Lack of price competition
- No historical cost analysis
- Lack of arms length negotiation
- Unreasonable or unnecessary profit relative to actual risk





SUMMARY



Course Summary



- Key Terms in Uniform Guidance

Section 1



- Pass-Through Entities

Section 2



- Procurement Standards

Section 3



- Methods of Procurement

Section 4



- Performance-Based Awards

Section 5



Conclusion



This presentation is complete.