

## **Federal Procurement Requirements: Introductory Guidance**

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### **Background**

Contracts which are paid for by federal funds, in whole or in part, are subject to the administrative requirements contained in 45 C.F.R. Part 75. In general, the procurement standards contain provisions requiring health centers to:

1. Establish and maintain written standards of employee conduct including a conflict of interest provision;
2. Establish and maintain written procurement procedures;
3. Maximize open and free competition;
4. Use methods of procurement that are appropriate to the size, type, and nature of the transaction;
5. Conduct a cost/price analysis (for certain procurements);
6. Maintain procurement records;
7. Maintain a contract administration system to ensure conformance with the terms and conditions of the contract (and includes monitoring and oversight of the vendor's performance); and
8. Include specific contract provisions relating to compliance with government-wide requirements for the use of federal dollars.

Each of these standards is described in more detail in this Introductory Guidance.

### **Standards of Conduct**

The procurement standards require health centers to establish, maintain and comply with written standards of conduct that apply to officers, directors, employees, contractors, and agents engaged in the selection, award and administration of procurement contracts. The regulations provide that the following areas be addressed:

- a. Conflict of interest standards, which prohibit anyone associated with the health center (i.e., employees, contractors, agents, directors, officers), or any of their immediate family members, business partners or employers, from participating in the procurement process if a real or apparent conflict of interest exists.
- b. Standards prohibiting anyone associated with the health center from soliciting or accepting gratuities, favors, or anything of monetary value from vendors or parties to sub-agreements.
- c. Specific disciplinary actions for violations of the standards.

- d. Organizational conflicts of interest, should the non-federal entity have a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe.

### **Written Procurement Procedures/Maximizing Competition**

The procurement standards require health centers to establish and implement written procurement procedures that contain provisions designed to assure that the health center obtains the best quality goods and services at the lowest cost. A health center's procurement procedures, therefore, should include provisions that assure that it will avoid purchasing unnecessary items, award contracts to capable vendors who have not been debarred or suspended (taking into account factors such as vendor integrity, past performance, and resources available), and analyze lease versus purchase alternatives to determine which would be most economical and practical.

Written procurement procedures must ensure that all solicitations incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. In cases of competitive procurements, such descriptions must not contain features which unduly restrict competition. When necessary, the description must set forth minimum essential characteristics and standards to which the desired procurement must conform if it is to satisfy its intended use. In addition, written procurement standards must also identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

Health centers are expected to provide for full and open competition in contracting with third parties to the maximum extent feasible. Unless a procurement qualifies as a micro-purchase or a sole source procurement can otherwise be justified, health centers should seek competing bids in response to clear and accurate requests for proposals.

Health centers must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. In addition, health centers must not preclude potential bidders from qualifying during the solicitation period.

### **Methods of Procurement**

Health centers are expected to use one of the following methods of procurement for each purchase and to abide by the requirements of the method selected:

- a. *Procurement by micro-purchases.* This method of procurement involves the acquisition of supplies or services, the aggregate dollar amount of which does not exceed \$3,000 (or \$2,000 in the case of acquisitions for construction subject to the Davis-Bacon Act. To the extent practicable, health centers must distribute micro-purchases equitably among suppliers. Micro-purchases may be awarded without

soliciting competitive quotations if the non-federal entity considers the price to be reasonable.

- b. *Procurement by small purchase procedures.* This method of procurement is allowed for purchases that do not cost more than the Simplified Acquisition Threshold (currently \$150,000). Small purchase procedures require health centers to obtain price or rate quotations from an adequate number of qualified sources.
- c. *Procurement by sealed bids (formal advertising).* Bids are publicly solicited and a firm fixed price contract is awarded to the responsible bidder whose bid, conforming with all material terms and conditions of the invitation for bids, is the lowest in price.

The sealed bid method is the preferred method for procuring construction if:

- i. A complete, adequate, and realistic specification or purchase description is available;
- ii. Two or more responsible bidders are willing and able to compete effectively for the business; and,
- iii. The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

If sealed bids are used, the following requirements apply:

- i. Bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids;<sup>1</sup>
  - ii. The bid invitation must include any specifications and pertinent attachments, and must define the items or services in order for the bidder to properly respond;
  - iii. All bids will be opened at the time and place prescribed in the invitation for bids;
  - iv. A firm fixed price contract award will be made in writing to the lowest responsive bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and
  - v. Any or all bids may be rejected if there is a sound documented reason.
- d. *Procurement by competitive proposals.* Generally used when conditions are not appropriate for the use of sealed bids. This method is normally conducted with more

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<sup>1</sup> Note: For state, local, and tribal governments, the invitation for bids must be publicly advertised.

than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. If a health center selects this procurement method, the following requirements apply:

- i. Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposal must be considered to the maximum extent practical;
  - ii. Proposals must be solicited from an adequate number of qualified sources;
  - iii. The health center must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;
  - iv. Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and
  - v. The health center may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed activity.
- e. *Sole source procurements.* This method of procurement is characterized by solicitation of a proposal from only one source (i.e., noncompetitive procurement). Sole source procurement is only available when one or more of the following circumstances apply:
- i. The item is available only from a single source;
  - ii. A public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
  - iii. The federal awarding agency or pass-through entity expressly authorizes the use of sole source procurement in response to a written request from the Health Center; or,
  - iv. After solicitation from a number of sources, competition is determined inadequate.

### **Conducting Cost/Price Analysis**

Health centers must perform a cost or price analysis for every procurement in excess of the simplified acquisition threshold (currently \$150,000) including contract modifications. The method and degree of analysis depends on the facts surrounding the particular procurement situation. At a minimum, the cost/price analysis must include the basis for vendor selection; if applicable, a justification for the lack of competition (i.e., sole source procurement); and the basis for the award cost or price. In addition, health centers must negotiate profit as a separate

element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed.

### **Procurement Records and Files**

Health centers must maintain records sufficient to detail the history of procurement, which (at a minimum) includes the following essential information: (a) rationale for the method of procurement, (b) selection of contract type, (c) contractor selection or rejection, and (d) basis for the contract price.

An ideal procurement file includes the following documentation:

- *Solicitation documents.* The procurement record should contain a dated copy of the solicitation announcement, RFP, and/or internet post. For telephone solicitations, health centers should retain notes taken contemporaneously with the telephone solicitation. In addition, the procurement file should include a summary of contractors that received the solicitation and how the health center selected those contractors, as well as responses from each contractor that submitted a bid.
- *Source selection memorandum.*<sup>2</sup> A written explanation detailing why the health center chose a particular contractor. The content of the source selection memo is dependent upon the procurement purchase amount. The following shall be used as a guide:
  - *Micro-purchases:* Memo need only demonstrate that the price was reasonable.
  - *Small purchase procurements (greater than \$3,000, but not more than \$150,000).* Memo should list potential contractors and denote that a particular company (selected for the procurement) had the lowest price.
  - *Source selection purchases greater than \$150,000:* Dependent upon criteria listed in the solicitation notice.
- *The signed contract and amendments.* Health centers are advised to retain signed agreements and legal documents, as well as any attendant amendments. In the case of procurement actions that are not recorded in formalized written contracts, but instead may be traced via receipts or invoices, health centers are advised to retain such records, in addition to retaining a printout of the terms and conditions to which the health center agrees, and any purchase confirmation page (in the event of an online purchase).
- *Correspondence related to the contract.* The procurement record should contain a record of all letters, emails, and notes from phone calls that relate to the procurement of the goods or services.
- *Invoices and receipts, purchase orders, and packing slips.* The procurement record should document how much the health center paid, when payments were made, and

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<sup>2</sup> Because the contract offering the lowest price may not always be the best choice for the procurement, the source solicitation memorandum is a useful tool for justifying procurement selections that do not reflect the lowest price option. In addition, the source selection memorandum is also critical to justifying a sole source procurement.

who approved the payments. For long-term contracts, if payment deadlines were not met, the reasons should be documented. If the deliverable was a report or other document, retain a copy of the deliverable in the record, if possible, considering any confidentiality restrictions or other interests in restricting access to the deliverable.

- *Debarment and suspension certification.* For any contract using federal grant funds valued at \$25,000 or more, health centers must verify that their contractor is not excluded from participating in federal contracts (even as a subcontractor). Such a certification should be included in the procurement record.

Procurement records generally must be retained for three years after the final related federal funding expenditure report is filed. Unless litigation, audit, or another dispute arises concerning an expenditure related to the procurement after the applicable retention period has expired, health centers may dispose of the records in accordance with their document retention policy.

### **System of Contract Administration**

Health centers must maintain a system for contract administration that allows it to track the vendor's performance and accountability. Generally, the contract administration system should ensure that vendors conform to the terms, conditions, and specifications of their contracts and that there is adequate and timely follow up of all purchases. The health center is required to evaluate and document the vendor's performance. It is also important to include provisions relating to contract disputes, *i.e.*, how they are processed, settled, etc.

### **Contract Provisions**

Procurement requirements also specify various provisions which must be included in federally-supported contracts, whether a particular agreement is associated directly with the performance of the terms and conditions of its federal grant award or is executed in connection with general work which is paid for, in whole or in part, with funds originating from a federal award. In general, all contracts must include provisions that constitute a "sound and complete" contract. Further, contracts must include:

- The vendor's record-keeping and reporting responsibilities;
- Requirements that the vendor notify and receive prior approval from the health center in the event that there is a material change in the scope of work or the approved budget for such services;
- Provisions that address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for sanctions and penalties as appropriate (for contracts exceeding the simplified acquisition threshold (currently \$150,000));
- Provisions that address termination for cause and for convenience by the health center including the manner by which it will be effected and the basis for settlement (for contracts exceeding \$10,000);

- A provision stating that the health center, DHHS, the U.S. Comptroller General, and any of their duly authorized representatives, shall have access to any of the vendor's books, documents, papers, and records which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions;
- Requirements relating to the vendor's compliance with the following laws:
  1. Nondiscrimination: Equal Employment Opportunity requirements found in Executive Order 11246, as amended by Executive Order 11375, and as supplemented by regulations at 41 C.F.R. Part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor;"
  2. Copeland Anti-Kickback Act, 40 U.S.C. 3145, as supplemented by Department of Labor regulations (29 C.F.R. Part 3) (for construction or repair projects in excess of \$2000);
  3. Davis-Bacon Act (40 U.S.C. §§ 3141-3144, and 3146-3148 as supplemented by Department of Labor Regulations (29 C.F.R. Part 5)) (if required by the authorizing statute);
  4. Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of "funding agreement" under 37 C.F.R. § 401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that "funding agreement," the recipient or subrecipient must comply with the requirements of 37 C.F.R. Part 401 and any implementing regulations issued by the awarding agency;
  5. For contracts and subgrants in excess of \$150,000, compliance with both the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and the Federal Water Pollution Control Act, as amended, 33 U.S.C. §1251 *et seq.*;
  6. Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 3701-3708 (for construction contracts and other contracts that involve the employment of mechanics or laborers, which exceed \$100,000);
  7. Debarment and Suspension, Executive Orders 12549 and 12689, which prohibits contracting with an entity that has been debarred, suspended or otherwise excluded from contracting with federal agencies; and,
  8. The Byrd Anti-Lobbying Amendment (31 U.S.C. § 1352), which requires organizations (that apply or bid for an award exceeding \$100,000) to certify that they will not use federal funds to lobby the legislative or executive branch of the Federal Government in connection with a specific grant, cooperative agreement, contract, or loan.
- [Clauses relating to compliance with rules of government-wide application under Appendix II of 45 CFR part 75: Sample language](#)

### Advice and Recommendations<sup>3</sup>

As a preliminary matter, before executing and implementing a procurement agreement, health centers should understand what a procurement contract is and when it should be employed. While there is no bright line test for determining whether an award of federal funds under a grant should take the form of a subrecipient agreement or a procurement, guidance is set forth in the Federal Uniform Grant and Cooperative Agreement Act. A grant or cooperative agreement is generally awarded in order to carry out the public purpose which the health center has agreed to carry out (typically in a specific location within the health center's service area) by an entity that itself would be eligible to receive the grant, while a contract/procurement is typically issued in order to purchase goods or services for the direct benefit of the grantee.

Once the health center has determined that a procurement contract is appropriate, if the purchase will be paid for, in whole or in part, with federal funds, the health center should assess whether certain grant-related requirements should be passed through to the contractor. The procurement standards included in 45 C.F.R. Part 75 specify that certain contractual provisions be included in procurement contracts executed by federal grantees.

The purpose of federal procurement standards is to ensure that goods and services are obtained in an effective and efficient manner. Compliance with these standards, however, does not relieve the health center of its contractual obligations arising from contracts for goods and services. The health center remains ultimately responsible for its performance and that of its contractors, without recourse to the Federal Government – in other words, compliance with federal standards does not imply that the Federal Government is party to the contract.

Further, compliance with procurement standards does not affect the health center's overall responsibility with respect to federally-supported activities and accountability to the government. Accordingly, the health center should establish strict monitoring and oversight provisions and require reports as it deems necessary to maintain responsibility and accountability.

- [Procurement: Sample policy and procedure](#)

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<sup>3</sup> The Authors of these materials include attorneys at the law firm of Feldesman Tucker Leifer Fidell LLP. The advice and recommendations consist of general guidance based on federal law and regulations and do not necessarily apply to all health centers under all facts and circumstances. Further, these materials do not replace, and are not a substitute for, legal advice from qualified legal counsel.