

FAQ: Procurement of Goods and Services with Federal Grants

A grantee may acquire a variety of commercially available goods or services in connection with a grant-supported project or program. Grantees can use their own procurement procedures that reflect applicable state and local laws and regulations, as long as those procedures conform to the following applicable U.S. Department of Health and Human Services (HHS) regulations:

- HHS regulations at 45 CFR § 74.40 through § 74.48, Procurement Requirements for Institutions of Higher Education, Hospitals, Other Nonprofit Organizations, and Commercial Organizations http://www.access.gpo.gov/nara/cfr/waisidx_07/45cfr74_07.html
- HHS regulations at 45 CFR Part 92, Procurement Requirements for State, Local and Tribal Governments
 - States must follow the requirements at Title 45 Code of Federal Regulations(CFR) § 92.36 (a). Generally, States must follow the same policies and procedures they use for procurements from non-Federal funds.
 - Local and Tribal governments must follow the requirements at 45 CFR § 92.36 (b) through (i).

Responsibility

The grantee is responsible for the settlement and satisfaction of all contractual and administrative issues related to contracts entered into in support of an award. This includes disputes, claims, protests of award, source evaluation, or other matters of a contractual nature.

Avoiding Conflicts of Interest

Grantees shall avoid real or apparent organizational conflicts of interests and non-competitive practices among contractors with procurement supported by Federal funds. Procurement shall be conducted in a manner to provide, to the maximum extent practical, open and free competition.

In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft grant applications, or contract specifications, requirements, statements of work, invitations for bids, and/or requests for proposals shall be excluded from competing for such procurements.

Contracts Pre-existing to the Grant Award

When a grantee enters into a service-type contract in which the term is not concurrent with the budget period of the award, the grantee may charge the costs of the contract to the budget period in which the contract is executed:

- The awarding office has been made aware of this situation either at the time of application or through post-award notification.
- The contract was solicited and secured in accordance with Federal procurement standards.
- The recipient has a legal commitment to continue the contract for its full term.
- Contract costs will be allowable only to the extent that they are for services provided during the grant's period of performance. The grantee will be responsible for contract costs that continue after the end of the grant budget period.
- **Piggybacking onto existing, open contracts is generally unallowable.**

Factors that should be considered when selecting a contractor are:

- Contractor integrity;
- Compliance with public policy;
- Record of past performance;
- Financial and technical resources;
- Responsive bid; and
- Excluded Parties Listing (Debarred Contractors <https://www.epls.gov/>).

Contracts will be normally competitively bid unless:

- The item is available only from a single source;
- After solicitation of a number of sources, competition is determined inadequate; or
- Meets the requirements of simplified acquisition.

Simplified Acquisition

Procedures shall be used to the maximum extent practicable for all purchase of supplies or services not exceeding the simplified acquisition threshold. The threshold for purchases utilizing the Simplified Acquisition Procedures cannot exceed \$100,000. Procurement actions may not be split to avoid competition thresholds. The simplified acquisition procedures were not developed to eliminate competition but to reduce administrative costs, improve opportunities for small, small disadvantaged, and women-owned small business concerns, promote efficiency and economy in contracting, and avoid unnecessary burdens.

FREQUENTLY ASKED QUESTIONS

Q1: What procurement rules and requirements are capital grant recipients expected to comply with?

A1: As recipients of Federal grant funds, health centers are already expected to comply with procurement regulations that apply to Federal grantees. These same requirements and regulations apply to any contracts entered into using capital grant funds. Alteration/renovation and construction projects usually are carried out through one or more contracts under the grant. Therefore, the circumstances of the procurement are critical to the successful completion of the grant-supported project. All capital projects proposed to be completed under contractual arrangements **must be procured** by the methods described in 45 CFR § 74.40 through § 74.48 or in § 92.36, as applicable. It is the grantee's responsibility to make every effort to award any contract(s) under a process where maximum competition is achieved in order to obtain the most reasonable price.

Q2: Can you please clarify when it is allowable to hire/contract without competitive bidding?

A2: If the goods or services are only available from a single source, or if the transaction meets the requirements for simplified acquisition. The Federal threshold for simplified acquisition procedures for the procurement of goods and services is \$100,000; contracts of \$100,000 or more need to go through competitive bidding 45 CFR § 92.36 (b) through (i). Contracts secured under the simplified acquisition procedure must still document that the grantee took actions to ensure that it is receiving the best price for the services/goods purchased (e.g., document three (3) separate price quotes for equipment and justify why one was chosen).

Q3: What if the grantee is a division of State or local government and the State or local government has more stringent requirements around procurement?

A3: State and local government grantees and subgrantees must comply with their written procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in 45 CFR § 92.36. State and local government grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract. It is the grantee's responsibility to comply with State and local laws, and HRSA encourages grantees to ensure they are aware of and are complying with all applicable State and local laws. HRSA may not be able to fund a project that is clearly in violation of a State or local law.

Q4: Does the grantee need to publish the results of an open but private bid?

A4: The grantee does not need to publish the results but does have to document the rationale for the selected contractor and ensure that the selection criteria were evenly applied to all bids.

The following questions and answers are based upon HHS regulations at 45 CFR § 74.40 through § 74.48, Procurement Requirements for Institutions of Higher Education, Hospitals, Other Nonprofit Organizations, and Commercial Organizations

Q5: What requirements exist regarding competitive bidding and contractors that developed components of the capital grant application?

A5: Per 45 CFR §74.43, procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open, and free competition. The recipient shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft grant applications, or contract specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

Q6: Are non-profit organizations that received capital grants required to contract with small businesses and minority- and women-owned businesses?

A6: Per 45 CFR §74.44, positive efforts shall be made by recipients to utilize small businesses, minority-owned firms, and women's business enterprises, whenever possible. Recipients of HHS awards shall take all of the following steps to further this goal.

- (i) Ensure that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable.
- (ii) Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women's business enterprises.

- (iii) Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.
- (iv) Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.
- (v) Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms, and women's business enterprises.

Q7: What types of procurement instruments can health centers use to establish contracts?

A7: Per 45 CFR §74.44, the type of procuring instruments used (e.g., fixed price contracts, cost reimbursable contracts, purchase orders, and incentive contracts) shall be determined by the recipient but shall be appropriate for the particular procurement and for promoting the best interest of the program or project involved. The "cost-plus-a-percentage-of-cost" or "percentage of construction cost" methods of contracting shall not be used.

Q8: What do solicitations for goods and services procured with capital grant funds need to include?

A8: Per 45 CFR §74.44, nonprofit organizations must provide for all of the following in solicitations:

- (i) A clear and accurate description of the technical requirements for the material, product or service to be procured. In competitive procurements, such a description shall not contain features which unduly restrict competition.
- (ii) Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals.
- (iii) A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.
- (iv) The specific features of "brand name or equal" descriptions that bidders are required to meet when such items are included in the solicitation.
- (v) The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement.
- (vi) Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient.

Q9: What level of cost/price analysis should grantees perform on bids for contracts?

A9: Per 45 CFR §74.44, some form of cost or price analysis shall be made and documented in the procurement files in connection with every procurement action. Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts. Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability, and allowability.

Q10: What needs to be included in a contract for capital projects?

A10: Per 45 CFR § 74.48, the non-profit organization (grantee) shall include, in addition to provisions to define a sound and complete agreement and specific provision required by the ARRA, the following provisions in all contracts. The following provisions shall also be applied to subcontracts.

- (a) Contracts in excess of the small purchase threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.
- (b) All contracts in excess of the small purchase threshold shall contain suitable provisions for termination by the recipient, including the manner by which termination shall be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.
- (c) Except as otherwise required by statute, an award that requires the contracting (or subcontracting) for construction or facility improvements shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds unless the construction contract or subcontract exceeds \$100,000. For those contracts or subcontracts exceeding \$100,000, the Federal awarding agency may accept the bonding policy and requirements of the recipient, provided the Federal awarding agency has made a determination that the Federal Government's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows.
 - (1) A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder shall, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.
 - (2) A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.
 - (3) A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract.
 - (4) Where bonds are required in the situations described herein, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR part 223, "Surety Companies Doing Business with the United States."
- (d) All negotiated contracts (except those for less than the small purchase threshold) awarded by recipients shall include a provision to the effect that the recipient, the Federal awarding agency, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions.
- (e) All contracts, including small purchases, awarded by recipients and their contractors shall contain the procurement provisions 45 CFR § 74.44, as applicable.