Attachment 6

EPA Acquisition Guide for Executives

THE U.S. ENVIRONMENTAL PROTECTION AGENCY
ACQUISITION SYSTEM

An Acquisition Guide for Executives

U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)
OFFICE OF ACQUISITION MANAGEMENT (OAM)
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EPA obligates close to $2.0 billion dollars per year to obtain services and supplies from the private sector to achieve its mission. The Government Accountability Office (GAO) defines obligation as "A definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States". Because the Federal Government has a fiduciary responsibility to ensure that taxpayer funds are spent prudently, the Federal acquisition system established to manage the expenditures of those funds is very different in some respects from commercial buying practices for transactions between private parties. This guide provides information to help you understand the Agency's acquisition system, how to use the system effectively, and to avoid ethical and conflict of interest problems.

This guide covers the following subjects:

1. What is Acquisition?
2. Purpose and Primary Functions of the Agency's Acquisition System
3. Key Organizations in Acquisitions
4. Legal Framework
5 Key Players in Acquisitions
6. Acquisition Process
7. Acquisition Thresholds and Tools
8. Contracts Versus Grants
9. Standards of Conduct
10. Disclosing Acquisition Information
11. List of Practical Suggestions
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1. WHAT IS ACQUISITION?

Within the Federal Government, the terms "procurement", "contracting", and "acquisition" are often used interchangeably. Acquisition is the process used to formalize business relationships between two parties. Federal agencies such as the EPA use this process to formalize their business relationships with private industry (both profit and non-profit), other Government agencies and educational institutions. The primary purpose

of these business relationships is to obtain goods and services needed to accomplish the Agency's mission.

Government acquisition is acquisition by regulations. As such, the Federal Acquisition Regulation, better known as the "FAR", governs the process by which Federal agencies acquire goods and services. Specifically, the FAR:

- Establishes uniform polices and procedures for acquisition of supplies and services.
- Has the force and effect of the law which allows agencies to implement strategies governing contracting.
- In addition, agencies have the ability to supplement the FAR to establish regulatory requirements to address the agency's unique requirements. The EPA's supplemental guide is the EPA Acquisition Regulations (EPAAR) which has the full effect of the law.

2. PURPOSE AND PRIMARY FUNCTIONS OF THE AGENCY'S ACQUISITION SYSTEM

PURPOSE:

The primary purpose of the Office of Acquisition Management (OAM) is to provide functional direction and control of all processes and operations governing the EPA's acquisition programs. This includes:

- Assuming responsibility and accountability for contract planning, award, and administration, acquisition policy development and maintenance, acquisition workforce development, and management oversight of the acquisition system.
- Delivering on a timely basis the best value product or service to the customers by:
  - o Maximizing the use of commercial products and services.
  - o Using contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform.

- o Promoting competition.
- o Awarding contracts that minimize risk for the Government.

- Maintaining the public's trust by conducting business with integrity, fairness, openness, and compliance with statutory and regulatory requirements.
- Fulfilling public policy objectives, such as:
  - o Protecting the environment through the promotion and purchase of energy efficient and recycled products.
  - o Promoting opportunities for socio-economically disadvantaged businesses.
  - o Using contract types that facilitate performance, excellence, and cost savings that minimize risk.

PRIMARY FUNCTIONS OF OAM:

In fulfilling this purpose, OAM performs the following primary functions:

- Manages all acquisition activities of the Agency.
- Develops, issues, maintains and interprets acquisition regulations, policies and guidance.
- Manages acquisition training and certification programs for the acquisition workforce.
- Provides assistance and oversight for all EPA acquisition activities.
- Manages all acquisition-related information technology systems.
- Provides operational acquisition services to EPA program and staff organizations.
- Manages the Agency's Commercial Services Management Program (formerly Competitive Sourcing Program), to include management of the Agency's annual Federal Activities Inventory Reform (FAIR) Act inventory.

3. KEY ORGANIZATIONS IN ACQUISITIONS

The President establishes Government-wide acquisition policies and procedures through such vehicles as Executive Orders.

The Congress plays a vital role in the acquisition process and profoundly affects Government contracting as overseers of the Federal purse strings. In addition to controlling Federal expenditures, Congress enacts laws that directly govern Federal acquisition.

The Office of Federal Procurement Policy (OFPP) located in the Office of Management and Budget plays a central role in shaping the policies and practices Federal agencies use to acquire the goods and services they need to carry out their responsibilities. OFPP was established by Congress in 1974 to provide overall direction for Government-wide acquisition policies, regulations and procedures and to promote economy, efficiency, and effectiveness in acquisition processes. OFPP also directs the Federal Acquisition Institute in developing and delivering training opportunities for the Federal acquisition workforce. OFPP is headed by an Administrator who is appointed by the President and confirmed by the Senate. The Administrator, along with the heads of the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration, comprise the Federal Acquisition Regulation (FAR) Council, which issues and maintains the Federal Acquisition Regulation. The Council is supported by the Civilian Agency Acquisition Council, of which the EPA is a member, and the Defense Acquisition Regulation Council.

The Government Accountability Office (GAO) an agent of Congress is materially involved in the acquisition process. GAO's influence is far reaching because it reports on efficiency and effectiveness of Government operations and merits of specific acquisition functions. Among other duties, the GAO hears protests of agency contract actions.

The Small Business Administration (SBA) interprets and implements statutory socio-economic requirements related to small and small disadvantaged businesses.

The Administrator of EPA delegates contracting authority to the EPA's Chief Acquisition Officer (AA for OARM), who delegates this authority to the EPA Senior Procurement Executive (Director of OAM). As the Agency's Senior Acquisition official, the Senior Procurement Executive, further delegates acquisition authority and exercises management and oversight responsibilities for the acquisition system to the Agency's contracting officers.

The Office of Inspector General reviews various EPA programs, investigates potential fraud and other criminal activities, and audits the Agency's contracts.

4. LEGAL FRAMEWORK

In 1831 (U.S. vs. Tingey), the Supreme Court declared that the Federal Government, based on sovereignty, has inherent power to contract. However, the Government's broad constitutional authority to contract is limited by statutes, common law, and administrative law. Numerous statutes govern Federal acquisitions. Among the basic statutes:

- The Federal Property and Administrative Services Act (41 U.S.C. 251 et seq.).
- The Small Business Act (15 U.S.C. 631 et seq.).
- The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.).
- Competition in Contracting Act of 1984. (P.L. 98-369)
- Federal Acquisition Streamlining Act of 1994 (P.L. 103-355).
- Federal Acquisition Reform Act of 1996 (P.L. 104-106).
- Information Technology Management Reform Act of 1996 (P.L. 104-106).
- Contracts Disputes Act (41 U.S.C 601).
- Procurement Integrity Act (41 U.S.C 423).

Administrative law includes:

- Executive Orders.
- Decisions of Boards of Contract Appeals, the Comptroller General, and other administrative bodies.
- The Federal Acquisition Regulation (FAR) (48 CFR Ch. 1) is a single, uniform regulation that applies to most executive agencies, including EPA.
- EPA Acquisition Regulation (EPAAR) (48 CFR) establishes Chapter 15, within the Federal Acquisition Regulations System.

5. KEY PLAYERS IN ACQUISITIONS

CONTRACTING OFFICERS are the Government's contracting agents for acquiring goods and services. Contracting officers are authorized to execute, administer, modify, or terminate a contract. Contracting officers may bind the Government only to the extent of the authority delegated to them in writing.

A contract is a legally enforceable agreement between two or more competent parties, is mutually binding, and obligates one party to furnish something of value and the other party to provide consideration.

In contracts with the private sector:

- The Government is one party,
- The contracting officer is the Government's agent, and
- The contractor is the other party.

Contracting officers are responsible for ensuring that:

- The Government obtains value from contracts.
- All requirements of law and regulation are met prior to executing an action.
- Sufficient funds are available for obligation.
- Contractors receive impartial, fair, and equitable treatment.

- Both parties comply with terms of the contract.
- The interests of the United States are safeguarded.
- Independence is maintained. Contracting officers often request advice from specialists in audit, law, engineering, and other fields. However, the contracting officer is solely responsible for determining the appropriate contract type, the final pricing of a contract, and other decisions related to a contract. The recommendations and counsel of contributing subject matter experts are advisory.

Contracting officers receive advice and assistance from the following officials:

Contract specialists may serve as contracting officers or support them. Contract specialists are trained in acquisition and in related business skills such as market research, source selection, cost and price analysis, negotiation, and contract administration.

Program managers are tasked with planning and controlling assigned programs/projects to achieve mandated goals. They identify the deliverables required for their missions and perform functions related to acquiring those deliverables such as:

- Identifying and defining requirements for goods or services.
- Preparing acquisition plans, purchase requests, and performance work statements.
- Recommending evaluation criteria and evaluating proposals from offerors (private sector firms competing for the award).
- Overseeing technical progress.
- Inspecting and accepting contract deliverables.

Contracting Officer Technical Representatives are generally representatives of program/staff offices that originate the requirements for goods or services. Contracting officer technical representatives are designated by contracting officers to perform contract administration activities regarding technical issues. They are delegated limited authority for such

responsibilities as monitoring contractor progress and alerting contracting officers to problems, recommending contract changes, and inspecting and accepting deliverables.

Attorneys review proposed solicitations, awards and other acquisitions and contract related documents for legal sufficiency, representing the Agency in protests and disputes, and interpret acquisition law.

Competition Advocates are responsible for identifying and removing barriers to competition. For this purpose, they review documents such as draft acquisition plans, performance work statements, and justifications for other than full and open competition, protests, etc.

Office of Small Business Programs (OSBP), formerly known as the Office of Small and Disadvantaged Business Utilization, ensures that applicable Agency personnel thoroughly consider opportunities to set-aside awards to small, small disadvantaged, HUB-Zone, service disabled veteran owned, and women-owned businesses. The office also provides assistance and counseling to business firms.

Auditors and Accountants perform such functions as:

- Auditing cost and pricing data provided by an offeror and recommending positions on proposed elements of cost.
- Investigating the financial responsibility of offerors.
- Auditing contractor invoices.
- Reviewing contractor accounting and cost estimating systems.

6. ACQUISITION PROCESS

The acquisition process for contracts is typically divided into four phases:

Presolicitation, solicitation and evaluation, award, and contract administration.

Acquisition by necessity requires collaboration among the contracting and other program/project managers, legal counsel, finance, budget, and

other experts as required. The presolicitation phase lays the groundwork for soliciting offers and awarding a contract.

In the presolicitation phase, the following tasks are generally performed:

- Identifying the requirement for products or services.
- Preparing a performance work statement.
- Committing sufficient funds to acquire the deliverable.
- Preparing purchase requests.
- Researching the market for the supplies/services.
- Determining the extent of competition for award (e.g., full and open and small business set-aside).
- Establishing technical, price-related, past performance, and other evaluation criteria for competitive acquisitions.

In the solicitation and evaluation phase, the following tasks are generally performed:

- Determining the method of acquisition (e.g., invitation for bid or negotiation) and type of contract (e.g., fixed price or cost reimbursement) and appropriateness of various incentives to motivate the contractor's performance.
- Drafting the solicitation.
- Publicizing the proposed acquisition.
- Answering inquiries from potential offerors and conducting pre-bid or pre-proposal conferences.
- Evaluating bids or proposals based on the evaluation plan for the acquisition and the criteria in the solicitation.
- Setting the competitive range and discussing proposals with offerors, as necessary.
- Determining the responsibility of the potential awardee.
- Responding to pre-award protests by offerors.

In the award phase, the following tasks are generally performed:

- Awarding the contract.
- Conducting debriefings with successful and unsuccessfully offerors.
- Responding to protests of the award by unsuccessful offerors.

In the contract administration phase, the following tasks are generally performed:

- Conducting orientation of Federal personnel who will be responsible for contract administration (e.g., Contracting Officers Technical Representatives).
- Conducting contractor orientation.
- Monitoring compliance by both contractor and Government personnel with the terms and conditions of the contract.
- Inspecting and accepting contract deliverables.
- Addressing contract performance issues, including determining whether to stop work, extending delivery dates for excusable delays, or applying formal contractual remedies (e.g., rejecting contract deliverables, termination).
- Determining the timing and amount of payments to contractors based on the contract terms.
- Modifying contracts as necessary.
- Resolving contractor claims.
- Closing out the contract.

7. ACQUISITION THRESHOLDS AND TOOLS

These are some of EPA's more commonly used acquisition thresholds and tools:

Purchase Cards - OAM delegates the authority to buy products and services through purchase cards to program managers and others. This authority is generally limited to the micro-purchase threshold for a single transaction.

Micro-purchases - Purchases below the current threshold of $3,000 ($2,000 for construction) may be awarded without soliciting competitive quotations if it is determined that the price is reasonable.

Simplified Acquisitions - Purchases greater than $3,000 but less than $150,000 (effective October 1, 2010) may be made under simplified procedures with reduced contract clause requirements.

Acquisitions greater than the simplified threshold - For acquisitions above the simplified acquisition threshold, contracting officers use one of three methods:

- Invitations for Bid require the submission of sealed bids, publicly opened, with award to the low, responsive, responsible bidder.
- Competitive Negotiation provides for publicizing and issuing a request for proposals, discussing proposals with offerors in the competitive range (i.e., those with a reasonable chance of award, if applicable), and awarding based on the evaluation criteria in the solicitation.
- Noncompetitive Negotiation is permitted only when it meets statutory exceptions to competition, such as urgency or lack of any other responsible source.
- Most of EPA's contracts are negotiated.

Use of Other Agency Contracts - GSA schedules which are also referred to as Multiple Award Schedules (MAS and Federal Supply Schedules (FSS), Government Wide Acquisition Contracts (GWACS) that help agencies meet their technology requirements and Interagency Agreements pursuant to the Economy Act.

8. CONTRACTS VERSUS GRANTS

There are distinct differences between a contract and grant.

Contract - A contract is a legally enforceable agreement between two or more competent parties, is mutually binding, and obligates one party to furnish something of value and the other party to provide consideration. Contracts benefit the government.

Grant - A statutory award of financial assistance in the form of money or other things of value (e.g., a contractor's services as in kind assistance) by the Federal Government to an eligible recipient. The term does not include technical assistance provided by Federal employees or contractors or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, or insurance. Unlike cooperative agreements, the Federal Government is not "substantially involved" in the assisted project under a grant. Neither grants nor cooperative agreements may be used to obtain services or products for the direct use or benefit of the Federal Government.

9. STANDARDS OF CONDUCT

Standards of conduct are the rules which apply to Government employees and individuals dealing with the Government. In addition to the applicable procurement and acquisition rules, Federal employees are bound by the Standards of Ethical Conduct, 5 (CFR part 2635), and the conflicts of interest statues in Title 18. Government business must be conducted with complete impartiality, and except as authorized by statute or regulation, preferential treatment provided to none. This includes:

- Avoiding any conflict of interest or appearance of conflict or lack of impartiality.
- Avoiding making Government decisions outside official procedures or without authority.
- Conducting actions as though full public disclosure is expected.

Prohibited conduct for all personnel involved in the acquisition process:

- Disclosing contractor bid or proposal information or source selection information to unauthorized sources.
- Taking bribes or soliciting or accepting certain gratuities.
- Discussing future employment or business opportunities with a bidder or offeror without promptly reporting the contact in writing and executing a recusal.
- Using an official position or non-public information to advance private or personal interests.

- Participating in any particular matter in which the employee; spouse; minor children; general partner; or organization in which the employee serves as an officer, director, trustee, general partner, or employee has a financial interest. This includes specific party matters as well as matters of general applicability, such as a bid proposal.
- Conspiring to defraud the Government.
- Making false statements.
- Contracting with Government employees or members of Congress.
- Contracting on a sole source basis with a former Agency employee within one year after his or her departure, unless a waiver has been granted.
- Seeking or engaging in outside employment or activities with a contractor or other person whose financial interests may be affected by or conflict with the performance of one's official duties.
- Engaging in certain post-employment representations to the Government on the same specific party matter, and under certain circumstances for certain people (as described in the Procurement Integrity Act), receiving compensation from a contractor as an employee, officer, director, or consultant of the contractor.

10. DISCLOSING ACQUISITION INFORMATION

Contractor bid or proposal information or source selection information may not be obtained or disclosed before or after contract award, except as authorized by law. "Source selection information" means any of the following information that is prepared for use by an agency for the purpose of evaluating a bid or proposal to enter into an agency procurement contract, if that information has not been previously made available to the public or disclosed publicly: Such information includes:

- Bid prices submitted in response to an agency.
- Invitation for bids, or lists of those bid prices before bid opening.
- Proposed costs or prices submitted in response to an agency solicitation, or lists of those proposed costs or prices.

- Source selection plans.
- Technical evaluation plans.
- Technical evaluations of proposals.
- Cost or price evaluations of proposals.
- Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.
- Rankings of bids, proposals, or competitors.
- Reports and evaluations of source selection panels, boards, or advisory councils.
- Generally any other information marked as "Source Selection."
- Sanctions: Employees who engage in prohibited conduct may be subject to administrative sanctions, civil penalties, or criminal penalties such as fines, and/or incarceration. In addition, such conduct may result in the cancellation of the procurement or rescission of a contract, causing delays and interrupted procurements for goods and services.

11. LIST OF PRACTICAL SUGGESTIONS

- Be an active advocate for complying with statutory or regulatory requirements; particularly the requirements for competition. ("Advance source selection", "this company is the best to do the work; they know what we want") or urgency ("I need it right away and I know a company who can give me what I want now", are not statutory).
- Do not provide advance information not generally made available to the public to companies or individuals regarding planned acquisitions that would, in fact or appearance, provide an unfair competitive advantage. This includes not discussing acquisition-related business outside the office. There are criminal and civil penalties for release of unauthorized information.
- Ensure that appropriated funds are available to pay for an acquisition.

- Support the mandatory acquisition of products and services from non-profit agencies employing people who are blind or severely disabled under the Javits-Wagner-O'Day Act.
- Request that the appropriate contracting officer make commitments to contractors, companies, or individuals or orders/requests for them to perform work. Do not sign (execute) contractual instruments or modifications, whether or not dollars are involved, or memoranda or letters that appear to have the effect of contractually binding the Government. An agency employee without actual authority who makes an unauthorized commitment may be subject to personal liability.
- Consult immediately with your Deputy Ethics Official and the contracting officer if you are provided information regarding or asked to be involved in any acquisition activities for which you or your family members have financial interests or other holdings in a contractor, subcontractor, or potential offeror or bidder.
- As soon as an acquisition need is identified, contact the contracting officer to obtain advice and initiate early planning strategies. This is particularly important for acquisitions with urgent time requirements. Early planning can also significantly shorten acquisition lead times for complex, large acquisitions.
- Be knowledgeable of the procurement integrity requirements and other ethical considerations before discussing any acquisition with a member of the public.
- Use care in working with support contractors including administrative/clerical support, to avoid the appearance of an employer/employee relationship. Do not direct contractors to perform any tasks. The contractors are not EPA employees. Federal employees are not authorized to direct or influence contractor staffing decisions.
- Start and end every meeting with contractor representatives to make it clear that you do not have authority to make contracting decisions.
- Ensure contractor space is clearly marked and contractor personnel wear contractor badges.
- Do not use contractors for inherently governmental functions. "Inherently governmental function" means, as a matter of policy, a

function that is so intimately related to the public interest as to mandate performance by Government employees. An inherently governmental function includes activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: the act of governing, i.e., the discretionary exercise of Government authority, and monetary transactions and entitlements.

- Do not allow contractors to participate as members of internal Agency Committees.
- Do not suggest promotion, bonus, hiring, or firing of contractor personnel.
- Do not allow contractors to make Agency or policy decisions.
- Support the small and small disadvantaged business programs.
- Make contractor source selections or influence source selections (e.g., as an evaluator or advisor) only if you have been delegated authority to do so in writing.
- Do not accept any gift from contractors or potential contractors that is worth more than $20. Also, don't accept gifts worth more than $50 in a year from that same source.
- If you have a meal with a contractor, we strongly encourage you to pay for your own meal and recognize the appearance issues.
- Discuss with the appropriate contracting officer before asking for or encouraging, orally or in writing, the submission of unsolicited proposals.
- You can provide letters of recommendation that refer to your official title and position for people you know from your Federal service (which could include contractors or subordinates) or for people who are applying for Federal positions. OGC/Ethics prefers that employees not use Agency letterhead for personal recommendations. Remember that you can't evaluate the performance of contractors outside of the established process and can't recommend contractors for any promotions or bonuses.

12. CONTACTS

For additional information on how to purchase supplies or services or find specific points of contact for questions, please visit the OAM intranet website at: **http://oamintra.epa.gov/** and OAM internet website at **http://www.epa.gov/oam/**

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