

DO'S AND DON'TS FOR PROJECT OFFICERS AND GRANT SPECIALISTS

Topic # 1. EPA involvement in financial assistance recipients' contracting, subaward, and personnel decisions; promoting compliance with applicable regulations while staying in the federal lane.

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Overview: This informal guidance is intended to provide advice on how POs and GSs should promote compliance with EPA's financial assistance regulations governing recipient procurements and subawards in a manner that complies with the Standards of Ethical Conduct. Additionally, the document addresses the limits on EPA employee participation in recipient personnel decisions. The guidance must be read in conjunction with the financial assistance regulations, the Standards of Ethical Conduct and official EPA policies and does not supersede any aspect of those authorities. Further, this guidance is not a substitute for legal advice specific to a particular factual situation from OGC or ORC—POs and GSs should not hesitate to contact Agency counsel if they have questions on any area covered by the guidance document.

References:

40 CFR Part 33: EPA's Regulations for Participation of Disadvantaged Businesses in EPA Programs.

2 CFR Part 200: OMB's Uniform Grant Guidance (Effective December 26, 2014)

EPA Order 5700.1: *Policy for Distinguishing Between Assistance and Acquisition.*

Grants Policy Issuance O4-04: *Consultant Fees under EPA Assistance Agreements*

Grants Policy Issuance 16-01: *EPA Subaward Policy*

5 CFR Part 2635, the Standards of Ethical Conduct for Employees of the Executive Branch

Settings: Recipients may pose questions to POs and GSs regarding their plans to use EPA funds to hire contractors or make subawards of financial assistance to partner organizations. Also, information may come to POs and GSs attention through reviews of work plans or communications with recipients that indicate there may be issues related to recipients' compliance with requirements for competition in awarding contracts, including contracts with individual consultants, or the use of improper subawards to avoid competition. Recipients may also seek, or be required by the regulations to obtain, EPA input on personnel decisions. The guidance below describes how to respond to some common situations.

Situation 1. A state recipient contacts a PO and indicates that the state intends to use EPA funds to hire a consultant to provide advice on air issues and represent the state in negotiations with EPA on regulatory issues. The state staffer asks whether it must compete the contract and, if not, whether the PO has any recommendations for an experienced consultant to hire sole source.

Do: Remind the state staffer that EPA’s grant regulations provide that states follow their own procurement regulations and suggest that the staffer work with state procurement officials. 2 CFR 200.317.

Do: Keep in mind that state contracts must include required clauses specified in the Uniform Grant Guidance. 2 CFR 200.317.

Do: Remind the state staffer that the “individual consultant fee cap” may apply since it is required by statute. If the state is considering awarding a contract to an individual consultant use GPI O4-04 to work with the state to ensure compliance with 2 CFR 1500.9 which includes coverage on the individual consultant fee cap.

Don’t!!! Suggest, recommend or otherwise endorse any individual consultant or consulting firm for the state’s contract. Under the misuse of position regulations, employees are prohibited from using or permitting the use of their government position, title or authority to endorse any product, service or enterprise. Don’t make any recommendations or suggestions. 5 CFR 2635.702(c).

Situation 2. A non-profit recipient (“A”) contacts a PO and asks whether a “partnership agreement” with another non-profit (“B”) that will transfer \$100,000 to B is subject to competition. “A” has not selected “B” yet but wants advice on the rules. Additionally, A asked the PO to participate on a panel to select subrecipients if a competition is conducted.

Don’t!!!! Assume because the “partnership agreement” will be between two nonprofits that the transaction is a proper subaward. Such arrangements will generally be subawards but EPA considers ancillary services that are widely available in the competitive market such as accounting or information technology for operations (e.g., payroll) one nonprofit provides to another nonprofit are characteristic of a procurement contract.

Do: Find out more about what activities “B” would perform under the “partnership agreement” and consult Appendix A to EPA Subaward Policy to determine whether the substance of the transaction indicates that “A” is providing financial assistance to “B” or acquiring services from “B”. If the arrangement is characteristic of a proper subaward then competition is not required unless the EPA program office has included a term and condition in “A”’s award requiring competition for subawards.

Do: Remind “A” to carefully review EPA’s National Term and Condition for Subawards (Appendix B of the *EPA Subaward Policy*) for UGG and EPA requirements applicable to subawards.

Do: Remind “A” that any subrecipients must not be suspended, debarred or otherwise ineligible for federal financial assistance. 2 CFR 200.205(d).

Do: Advise “A” that EPA POs may participate in selection panels for subrecipients as either technical advisors or panel members only if EPA awarded A a cooperative agreement authorizing “substantial involvement”. EPA Order 5700.1, section 7. Consult Section 10.0 of the *EPA Subaward Policy* for further guidance on both roles.

Don’t!!!! Suggest, recommend or otherwise endorse any organization for a subaward. EPA *Subaward Policy*, Section 10.0 (b) (1). Under the misuse of position regulations, employees are prohibited from using or permitting the use of their government position, title or authority to endorse any product, service or enterprise. Don’t make any recommendations or suggestions. 5 CFR 2635.702(c).

Don’t!!!! Exercise improper influence over the panel by threatening adverse consequences “from EPA” if the recipient selects or does not select a particular applicant. *EPA Subaward Policy*, Section 10.0 (b) (2). EPA employees are prohibited from using or permitting the use of their government position, title or authority to coerce or induce another to provide any benefit, financial or otherwise, for private gain. 5 CFR 2635.702(a).

Situation 3A. While reviewing a proposed scope of work prior to award of a competitive grant, a GS notices that the non-profit applicant has named a consulting firm as its “partner” on the project and that the budget detail indicates that the contract will be for \$100,000.

Don’t!!! Ignore the situation.

Do: Contact the non-profit and asks what process the organization followed to select the firm.

Situation 3B. The nonprofit’s project manager advises the GS the consulting contract will be a sole source because the nonprofit “partnered” with the firm in developing the application and has done business with the firm for years under a retainer contract. The non-profit also points out that it named the firm as its partner in the application and that the firm qualifies as a disadvantaged business.

Don’t!!!! Accept the nonprofits argument without further information. Under 2 CFR 200.319 of non-profits must compete EPA funded contracts to the maximum extent practicable. Recipients must solicit offers from an adequate number of firms when the amount of the contract will exceed the 2 CFR 200.67 Micro-purchase threshold. That threshold is currently \$3,500 but is subject to changes which will be codified in the Federal Acquisition Regulation at 48 CFR 2.101.

-The commercial marketplace is replete with engineering consulting firms.

-Although 40 CFR Part 33 requires that recipients take affirmative steps to allow disadvantaged businesses to compete for EPA funded work, that regulation does not authorize sole source contracts solely on the basis of a firm’s disadvantaged status.

-EPA solicitations for competitive grants advise applicants that naming a consulting contractor in an application or allowing the firm to participate in developing a proposal does not, in and of itself, justify a sole source contract.

-The UGG expressly provides that noncompetitive contracts with consulting firms on retainer improperly restrict competition. 2 CFR 200.319(a)(4).

Do: Advise the nonprofit in writing that it must conduct a fair competition for the consulting services. Under the UGG, because the amount of the contract is under the federal simplified acquisition threshold (currently \$150,000) the nonprofit need only obtain an adequate number of price or rate quotations for the contract; the nonprofit is not required to issue a formal request for proposals. 2 CFR 200.320(b). EPA considers price or rate quotes from at least 3 qualified sources to be adequate.

Do: Document the basis for selection, properly administer the contract and include all clauses and contract terms required by the regulations. 2 CFR 200.323 and 200.326.

Note: The UGG provides at 2 CFR 200.318(e) that both governmental and nonprofit recipients may enter into “inter-entity” agreements for “procurement or use of common or shared goods or services”. That authority was previously available only for governmental recipients under 40 CFR 31.36(b)(5). The underlying procurement must comply with the UGG.

Situation 4. A local government recipient’s project manager for a cooperative agreement who was identified in the recipient’s application became unresponsive to the PO’s requests for information, submitted late and incomplete performance reports and was generally difficult. The situation deteriorated to the point where the recipient failed to produce the deliverables required by the agreement. On the recommendation of the PO and the GS, the Award Official issued a “show cause” notice to the recipient advising that unless corrective actions were taken immediately EPA would terminate the agreement.

The project manager’s supervisor contacts the PO and asks whether the recipient should demote and replace the project manager. Additionally, the supervisor asks whether there is anyone on the recipient’s project team who would be acceptable to EPA to promote as the project manager’s replacement.

Don’t!!!! Recommend that a recipient dismiss, discipline or promote an employee. Generally speaking, EPA employees should not get involved with the personnel practices of outside entities. Doing so may violate the appearance of governmental sanction and/or endorsement provisions of the misuse of position regulations at 5 CFR Part 2635, Subpart G.

Don’t!!!! Recommend or suggest that the recipient promote or hire a particular individual. EPA Order 5700.1 provides that under a cooperative agreement EPA may be involved in the selection of key personnel and collaborate on staffing. The UGG provides that EPA may approve changes in key personnel identified in an application or the terms of the award. 2 CFR 200.208(c)(2). However, OGC has advised that the Standards of Ethical Conduct limit the Agency’s role to approval of the qualifications of individuals the recipient proposes.

EPA employees may review the technical qualifications of individuals proposed by the recipient. However, EPA cannot use or rely upon non-public information to make its determination, nor can EPA provide any ranking of the candidates. Under the Standards of Ethical Conduct, EPA

employees are prohibited from using or permitting the use of their government position, title or authority to endorse any particular product, service or enterprise. 5 CFR 2635.702(c).

Do: Document your conversation with the project manager's supervisor with an email to him or her clearly stating that it is up to the recipient to decide who will be the project manager. The PO should also explain that an EPA PO's role is limited to discussing the technical qualifications a project manager would need to successfully carry out the cooperative agreement and approving the qualifications of a replacement project manager if the recipient chooses to make a personnel change.

Situation 5. A nonprofit recipient contacts the PO and asks whether the organization must solicit bids to replenish its inventory of office supplies. The amount of the purchase will be less than \$1,000.

Do: Indicate to the recipient that the UGG provides that when the amount of a "micro-purchase" is less than \$3,500 (\$2,000 if subject to the Davis Bacon Act) recipients must distribute such purchases equitably among suppliers to the extent practicable but need not solicit competitive quotes if the price is reasonable. 2 CFR 200.320(a). "Off the shelf" items such as office supplies, personal computing devices, and occasional document reproduction services are subject to price competition in the commercial marketplace such that price reasonableness may generally be presumed. The \$3,500 amount of the UGG micro-purchase threshold is the same as that currently at the federal level and may be adjusted in the future for inflation. 2 CFR 200.67.

Don't!!!! Suggest or recommend that the recipient purchase the office supplies from a particular vendor even if you are aware of a sale offering deep discounts. EPA employees cannot endorse or recommend any particular entity. 5 CFR 2635.702(c). In addition, Federal policy prohibits commercial advertising, and Government Printing Office regulations prohibits commercial advertising in any printed material which may include emails. GAO, Principles of Federal Appropriations Law, Vol. 1, 4-229; Government Printing & Binding Regulations (S. Pub. 101-9 at § 13 (1990)).

Situation 6A. EPA has awarded a cooperative agreement to a nonprofit organization to produce public service announcements on preventing lead based paint poisoning of low income children. After conducting a competition in which there was only one bidder, the recipient's project manager advised the PO that the president of the organization has selected a highly qualified firm to produce the PSA for \$500,000. Because it seemed odd that there would be only one bidder for producing the PSA, the PO contacts the GS and they request copies of the relevant procurement documents under 2 CFR 200.324(b)(2). The documents reveal that the specifications for the PSA production were highly prescriptive requiring that qualified bidders use a particular brand of camera and prior "partnerships" with the nonprofit. Their research reveals also that the president's spouse owns the production firm the recipient intends to contract with and that the firm is affiliated with the recipient.

Don't!!!! Advise the recipient that EPA agrees that the proposed transaction with the firm may go forward. The circumstances described above indicate that the recipient did not conduct a full and open competition (2 CFR 200.319(a)) and that the proposed contract is tainted by a conflict

of interest prohibited by 2 CFR 200.318(c)(1). Additionally, the UGG contains coverage prohibiting recipients from procuring services from affiliates when there is an organizational conflict of interest. 2 CFR 200.318(c)(2).

Do: Work with the Award Official and OGC/ORC to advise the recipient in writing that the proposed contract would be a material violation of a regulation governing the cooperative agreement which may warrant termination. The communication should come from the Award Official given the seriousness of conflicts of interest.

Do: Contact the Office of Inspector General and advise them of the situation.

Situation 6B. Following receipt of the Award Official's warning letter, the recipient's Board of Directors accepts the president's resignation and severs connections with his spouse's production company. Using the affirmative steps to encourage participation of disadvantaged businesses in EPA funded work at 40 CFR Part 33, the recipient receives several bids and selects a nationally recognized production firm willing to produce the PSAs for \$400,000.

The Agency's PO has extensive expertise in media productions and EPA's Senior Management has asked to be kept informed of the recipient's progress and the quality of the PSAs. As part of EPA's substantial involvement, the PO has provided comments on the draft scripts and production plans for the PSAs. The terms of the cooperative agreement require that the recipient receive EPA approval of the draft scripts and production plans before production will begin. The recipient's project manager asks the PO to work directly with the recipient's contractor to resolve the PO's comments.

Don't!!!! Direct the recipient's contractor to make changes to the script and production plans. The PO should continue to work with the recipient's project manager although the recipient's contractor may participate in meetings with the project manager and the PO to facilitate effective communication. Because the "privity of contract" is between the recipient and the contractor POs should avoid taking actions that create the appearance that EPA is directing the contractor to incur costs that the recipient may later claim were unauthorized. It is the recipient's responsibility to administer the contract. 2 CFR 200.318(b)

Do. Respect the recipient's discretion to determine the final content of the PSAs provided that content is consistent with the scope of work. The recipient is not an EPA contractor subject to the Agency's direction. Under EPA Order 5700.1 the Agency must allow the recipient to carry out the cooperative agreement for its own purposes rather under detailed specifications imposed by EPA. On the other hand, costs the recipient incurs for activities that are outside the scope of work are not allocable to the agreement and are unallowable under 2 CFR 200.405. The PO may ensure that the PSA is consistent with the scope of work for the cooperative agreement. Additionally, the PO should review GPI 14-02, *Enhancing Public Awareness of EPA Assistance Agreements* and consult with OGC/ORC if the recipient intends to give "credit" to EPA or use the EPA seal in the PSA.