



Procurement, Subawards, and Participant Support Costs

Office of General Counsel
Office of Grants and Debarment

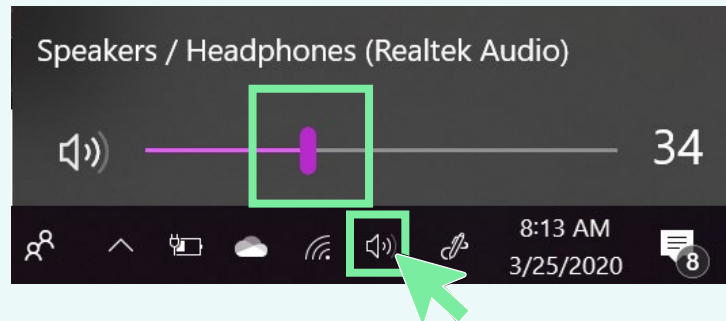
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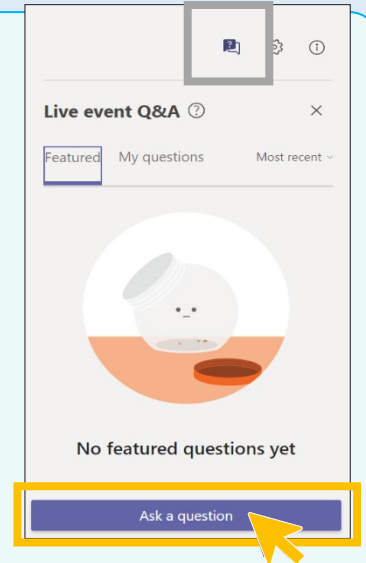
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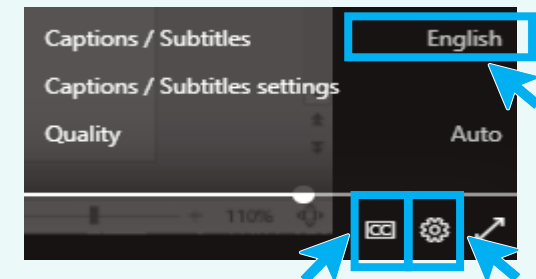


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Procurement
Contract v.
Subaward



Procurement under the Uniform Grants Guidance

- Recipients, other than state entities, that procure a contractor(s) where the amount of the contract will be more than the micro-purchase threshold in [2 CFR 200.320\(a\)\(1\)](#) (\$10,000 for most applicants) must select contractors (including consultants) in compliance with the fair and open competition requirements in 2 CFR Part 200 and 2 CFR Part 1500.
 - States follow the same procurement procedures as they do for non-Federal funds with the exception of requirements in [200.321](#) (small and disadvantaged businesses), [200.322](#) (domestic preferences), [200.323](#) (recycled materials), and [200.327](#) (contract clauses contained in [Appendix II](#)).
 - EPA's [40 CFR Part 33 Disadvantaged Business Participation](#) rule also applies to states.
- Refer to EPA's [Best Practice Guide for Procuring Services, Supplies, and Equipment Under EPA Assistance Agreements](#) as guidance.



What are Subawards?

Subawards are financial assistance transactions between the EPA grant recipient and an eligible subrecipient (or by a subrecipient to a lower subrecipient). This does not include:

- Payments to a contractor.
- Payments to an individual that is a beneficiary or participant in a Federal program.

Profit is NOT allowable.



EPA's Subaward Policy

- The [EPA Subaward Policy](#) implements new Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards ([Uniform Grant Guidance or UGG](#)) regulatory requirements.
 - UGG codifies standards for distinguishing between subawards and contracts at [2 CFR 200.331](#).
- The National Term and Condition for Subawards can be found in Appendix B of the EPA Subaward Policy.
- **EPA grantees must include a number of provisions in subaward agreements and implement systems to monitor and guide subrecipient performance. (Appendix D of the Subaward Policy provides a model agreement).**



Subaward Policy Attachments

- ✓ The [EPA Subaward Policy](#) has several appendices, including:
 - Appendix A: [Distinctions Between Subrecipients and Contractors](#)
 - Appendix B: [National Term and Condition for Subawards](#)
 - Appendix C: [Model Programmatic Subaward Reporting Requirement](#)
 - Appendix D: [Subaward Agreement Template](#)
- ✓ Additionally, EPA posted an [EPA Subaward Policy Frequently Asked Questions](#).



Substance of a Subaward

- A subaward may be provided **by any form of legal agreement**, even if the recipient considers it a contract; the *substance* of the agreement is more important than the form.
 - See the definition of *Subaward* at [2 CFR 200.1](#) and [EPA's Subaward Policy](#) for more information.
- For example, if EPA receives an assistance agreement application and the applicant has identified funding for a “contract,” EPA will work with the applicant to determine whether the relationship was appropriately categorized as a procurement contract or subaward.



Identifying Procurement Contracts



In contrast to subawards, as provided in [2 CFR 200.331\(b\)](#), procurement contractors (including individual consultants) typically:

- Provide goods and services on commercial terms;
- Provide similar goods and services to many different purchasers;
- Operate in a competitive environment; and
- A reasonable profit is allowable.

Transactions with for profit companies and individual consultants are (with very, very few exceptions) procurement contracts.



Subawards and Partnership Agreements



Q: Does EPA consider all “partnership agreements” that establish funding relationships to be subawards that are not subject to competition?

A: NOPE.

- Transactions are either subawards, procurement contracts, intergovernmental/inter-entity agreements for common procurement, interagency service agreements or services, or participant support costs.
- Characterizing the transactions consistently with the terms used in the UGG is important for determining what rules govern the agreement.

Some recipients refer to their contractors (particularly consultants) as “partners” so the label the recipient places on the transaction is not determinative.



Back to Procurement.....



Competition Thresholds

1. Purchases up to the micro purchase level (generally **\$10,000**) may be made without competition provided the recipient distributes purchases equitably among qualified suppliers to the extent “practicable” and the prices are reasonable. [2 CFR 200.320\(a\)\(1\)](#).
 - Generally, for purchases of supplies (including computing devices) but recipients may obtain consulting or instructional services PROVIDED the equitable distribution requirement is met.
 - A series of micro purchases with the same consultant without using other sources as well will raise compliance issues.
 - Some universities or nonprofit research institutions may have higher micro-purchase threshold if approved by cognizant Federal agency for indirect costs.



Competition Thresholds (cont.)

2. Recipients may use small purchase procedures for contracts up to the simplified acquisition threshold (**\$250,000**) by obtaining price or rate quotations from an adequate number of qualified sources. [2 CFR 200.320\(a\)\(2\)](#).
 - EPA expects recipients to obtain prices/quotes from at least 3 sources.
 - For professional services, recipients may use email solicitations to document their files.
 - For equipment, internet searches of price catalogues documented by “screen shots” are acceptable.
 - Recipients must justify selection of contractors quoting higher prices/rates based on qualifications or technical factors.
 - Good faith efforts must be made to solicit disadvantaged businesses per [40 CFR Part 33](#).



Competition Thresholds (cont.)

3. For procurements **in excess of \$250,000**, recipients must either advertise for sealed bids or publicly solicit competitive proposals. [2 CFR 200.320\(a\)\(2\)](#).

- Sealed bidding is appropriate when detailed specifications are available & selection is based principally on price.
- Competitive proposals are typically used for professional services.
- Generally, cost/price **MUST** be used as a selection factor in evaluating proposals.



- Qualifications-based procurement may be used when acquiring services that can **ONLY** be provided by a licensed Architectural and Engineering (A/E) firm (such as when **REQUIRED** by federal (Brooks Act), state, or local law).



Sole Source Contracts

As provided at [2 CFR 200.320\(c\)](#), procurement through solicitation of a proposal from only one source may be used only when one or more of the following circumstances apply:

- The item is available only from a single source.
- The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.
- The federal awarding agency or pass-through entity expressly authorizes non-competitive proposals.
- After solicitation of a number of sources, competition is determined inadequate.

EPA's position is that "single source" procurements are justified by copyrights, patents, and equipment maintenance agreements with manufacturers or similar arrangements.



Sole Source Contracts (cont.)

- The fact that a contractor prepared a proposal does not justify a sole source contract for that entity to perform work.

“XYZ contractor is familiar with our program and we have partnered with the firm for years” - Does not work!

EPA will not approve sole source contracts for goods and services that are readily available in the commercial market-place including consulting or instruction services provided by individuals.



Improper Procurement Practices



As provided in [2 CFR § 200.319\(b\)](#), “In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements.”

Practices that are restrictive of competition include:

- ⊘ Using sample language or templates from contractors planning to bid on the services
- ⊘ Accepting any assistance from a contractor *if* that contractor plans to compete for the resultant contract
- ⊘ Imposing unreasonable competition requirements, such as:
 - ⊘ Overly narrow specifications that only one firm can meet
 - ⊘ Requiring firms to have experience with EPA Grants
- ⊘ Making noncompetitive awards to consultants that are on retainer contracts
- ⊘ Discouraging other contractors from submitting an offer by naming firms

Procurement & Conflicts of Interest

Conflicts of interest are prohibited by [2 CFR 200.318\(c\)](#).

Personal conflicts of interest: “No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts.”

Organizational Conflicts of Interest

“If the [recipient] has a parent, affiliate, or subsidiary organization that is not a State, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.”



Considerations for Preparing RFPs/RFQs

Make good faith efforts to solicit quotes from Disadvantaged Business Enterprises required by [40 CFR Part 33](#).

- EPA does not currently have a directory or list of certified MBEs/WBEs, however, EPA recommends checking with the Small Business Administration, Department of Transportation, or the state in which your organization intends to do business.

EPA recommends publicly advertising RFPs/RFQs and keeping the bidding period open for **at least 30 days** for full and open competition.



Considerations for Preparing RFPs/RFQs (cont.)

Compete SMART!

Consider use of multi-year contracts with broad scopes and options when investing in a competitive proposal process.

- ✓ Cost/price analysis must be done in advance
- ✓ Profit must be negotiated as separate element for each contract in which there is no price competition



Considerations for Preparing RFPs/RFQs (cont.)

- ✓ Include “**options**” in the RFP/RFQ that will allow the same contractor to conduct work under current and future grants.
- ✓ Must request updated cost information from the contractor to determine if there is a change in rates and to ensure the new price for services is reasonable as required by [2 CFR 200.324\(a\)](#) & [404](#).
- ✓ Verify any price increase is reasonable by using information available online (or other sources) to conduct a market survey.

For example...

“The resulting contract will be for 4 years. [Organization Name] may amend or extend this contract beyond the initial 4 years to accommodate the terms and conditions of the FYXX Grant or future EPA grants awarded to [Organization Name] within this 4-year period provided a market survey conducted by [Organization Name] indicates that the prices the contractor proposes are reasonable.”



Considerations for Preparing RFPs/RFQs (cont.)

You must have weighted evaluation factors

- Document rationale for selecting the contractor (required by [2 CFR 200.318\(i\)](#))
- EPA recommends that the **reasonableness of cost/price proposal is at least 25% of the total percentage**
- **Reasonableness of cost/price** should be evaluated at the same time as the other factors for all bids (which is EPA's preference) **OR** only evaluated for two or more top-scoring bids (when multiple bids are received)

Evaluation criteria

- Use weighted percentages;
- Assign points to each selection factor; or
- Include a range of points with associated descriptors



Examples of Weighted Evaluation Factors

For example, responses will be evaluated against the following factors:

- X% - Demonstrated experience in [XXX type of activities (e.g., assessment, remediation, infrastructure)]
- X% - Successfully completing tasks/projects
- X% - Engaging with community member, federal & state agencies
- X% - Experience and capacity of project team/personnel
- X% - Reasonableness of cost/price proposal (e.g., rates, other available info)
- X% - References



90 - 100	Most Effective	5
80 - 89	Above Average	4
70 - 79	Average	3

Or, for example

- Highly Advantageous (4 Points)
- Advantageous (3 Points)
- Not Advantageous (2 Points)
- Unacceptable (0 Points)

Considerations for Preparing RFPs/RFQs (cont.)

If only one bid is received, you **MUST** negotiate profit as a separate element of the contract, as required by [2 CFR 200.324](#).

Ask the contractor to disclose its profit rate as part of the negotiations.

- Exercise judgment as to whether **the profit rate is reasonable**, use experience or research for determining.
- Applies to "Qualifications-based" procurement for Architectural and Engineering services where price is not a selection factor as required by [2 CFR 200.320\(b\)\(2\)\(iv\)](#).



Note: EPA may ask for more information regarding the contractor's profit margin at a later date.

Considerations for Preparing RFPs/RFQs (cont.)

As required by [2 CFR 200.318\(h\) and \(i\)](#), if you select a contractor that is not offering the lowest price, you must document the rationale and basis for the contract price.

You may be required to provide this documentation to EPA's Grants Management Officer for review as stated in [2 CFR 200.337\(a\)](#).



Participant \$upport Costs

- Participant support costs are defined at 2 CFR 200.1 and are allowable with prior EPA approval (pre or post award) as provided at [2 CFR 200.456](#). Common examples include travel assistance and stipends for trainees and incentives to participate in research programs.
- EPA expanded the definition of participant support costs in 2 CFR 1500.1 to include rebates and subsidies for the purchase of pollution control equipment for Diesel Emission Reduction Act (DERA) grants as well as subsidies to promote participation in environmental stewardship programs under CWA 319 and other statutes.
- Detailed information is available at [EPA Guidance on Participant Support Costs](#) and internal [Frequent Questions](#).



Other Requirements for Participant Support Costs

- Participant support costs are subject to the “Basic Considerations” for the allowability of costs described in [2 CFR Part 200, Subpart E](#).
- The costs must be reasonable, incurred within the project period, and otherwise allocable to the EPA assistance agreement and adequately supported by accounting records.
- For example, recipients should develop a documented allocation methodology for program participant travel that accomplishes multiple purposes that include activities outside of the scope of work for the EPA assistance agreement.
- Recipients should obtain receipts for training or community meeting attendance stipends particularly if the payments are made in cash.



Special Rules for Rebates and Subsidies

- Participant support costs for rebates/subsidies must be supported by EPA program guidance memoranda or by guidelines issued by the recipient and approved by EPA. [*EPA's DERA program provides this guidance.]
- These documents should define the rules, restrictions, timelines, programmatic requirements, reporting and transaction documentation requirements, eligibility, and funding levels that rebate, subsidy or other payments beneficiaries must follow.
- Other forms of program records that are transaction specific (e.g., memoranda of understanding) may be acceptable.
- The terms of the EPA assistance agreement must describe allowable rebates, subsidies or other payments.
- There must be a written agreement between recipient or subrecipient and the program beneficiary that outlines the program requirements.



Budgeting for Participant Support Costs

Under [2 CFR 200.308\(c\)\(5\)](#), “Revision of budget and program plans,” recipients must obtain approval from an Authorized EPA Official to transfer funds budgeted for participant support costs to other categories of expense.

- This requirement makes it particularly important for Project Officers and Grant Specialists to ensure that the recipient’s budget narrative specifies the amount of Participant Support Costs in a separate line item in the “Other” category.
- Travel for program participants should not be budgeted in the “Travel” category—per [2 CFR 200.474](#) allowable travel costs are only for recipient employees.
- A recipient’s failure to obtain prior EPA approval to transferring funds from PSC to other direct cost categories may be subject to cost disallowance or other enforcement action.



Financial Management Common Sense Tips

- Records must tell a complete story – tracing costs from planning through drawdown and payment, showing need, approvals, proper accounting, and receipt of goods and services.
- You can only have one set of books. Your financial management system must be used for all accounts.
- Payroll records, including timesheets, must account for 100% of the time of every employee. This includes non-working hours (leave, etc.) and all activities charged by each employee.
- Employees charged to more than one cost center must charge actual hours spent on each; they cannot be paid based on a pre-determined allocation. Non-working hours must be properly prorated among all cost centers, or charged to the general ledger.
- Charges have to make sense. For example, you cannot charge an employee's travel to a different account than his/her payroll for the same day. The appropriate account should be charged for both.



Timely Disbursement of EPA Funds

Recipients, other than states, must minimize time elapsing between draw down and disbursement as required by [2 CFR 200.305\(b\)](#).

- State draw downs are covered by agreements with U.S. Treasury.
- Drawdowns should be based on actual costs incurred (e.g., payroll, payment of contractor invoices) rather than estimates or “even” amounts each month or week based on anticipated cash flow.
- ASAP system allows almost instantaneous payment. No need to wait for check in mail.



Timely Disbursement of EPA Funds (cont.)

- [EPA policy](#), as reflected in General T&Cs, requires recipients to enroll in ASAP.
- EPA will measure compliance with [2 CFR 200.305\(b\)](#) based on disbursement of at least 95% of drawn down funds within 5 business days. Clear audit standard.
- **5 business day disbursement standard does not apply to states.**

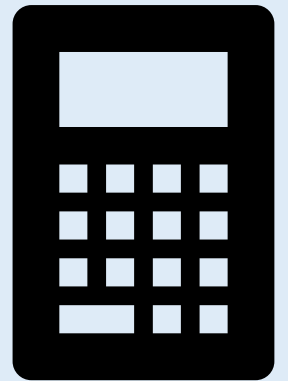


How to Survive an Improper Payment Review

- EPA conducts reviews of a sample of recipient drawdowns to monitor compliance with regulatory requirements.
- Recipients must provide accounting documentation to support the amount of funds drawn down and timely disbursement.

Examples of documentation include:

- ✓ Payroll records showing compensation charged to EPA assistance agreement based on contemporaneous estimates of actual hours performing work under the assistance agreement. Charges based on percentage of time in budgets must be adjusted to reflect after the fact determinations of hours worked.
- ✓ Invoices from contractors or payment requests from subrecipients.
- ✓ Travel vouchers, receipts from hotels, etc. to support travel reimbursement.
- ✓ Procurement records documenting compliance with competition requirements.



What is Fraud, Waste, Abuse, & Mismanagement?

Fraud: An intentional deception designed to unlawfully deprive the government of something of value for an individual benefit, privilege, allowance, or consideration to which they are not entitled

Waste: Extravagant, careless or needless expenditure of government funds that results from deficient practices, systems, controls, of decisions

Abuse: An intentional and unacceptable use of grant funds or misuse of one's position

Mismanagement: Failure to appropriately manage budgets, expenditures, or documentation for grant funds



Watching for Waste, Fraud, Abuse, etc.

As an EPA recipient, you are responsible for carrying out your EPA grant as described in the award document and T&Cs. Oversight of your subrecipients is crucial.

Please watch for suspicious activities, such as:

- Subawards were not awarded properly, or they were awarded to excluded entities (this information is available in SAM.gov); and/or
- Subawardees are not using the grant funds on agreed-upon activities under the subaward; and/or
- Subrecipients are not providing financial or reports as required, and/or the funds requested do not match the amount of work completed.



Reporting Fraud, Waste, Abuse, and Mismanagement

DO:

- [Contact the Office of Inspector General \(OIG\) Hotline](#)
- Discuss your concerns with the OIG
- Seek answers to your questions in the normal course of business
- Cooperate with the OIG and expect to be contacted and involved

DON'T:

- “Tip off” subjects of actual or pending investigation
- Feel compelled to “prove” a case or intent
- “Stop” your normal course of business unless otherwise directed

EPA OIG Hotline Complaint Form

Anyone with knowledge of fraud, waste, abuse, misconduct, or mismanagement involving the U.S., Environmental Protection Agency should contact the Office of Inspector General's hotline.

Further details are provided on the [EPA OIG Hotline Information](#) webpage about:

- reporting to the Hotline
- understanding fraud, waste and abuse
- information about whistleblowing
- information about mandatory disclosures

The easiest way to submit a hotline complaint is to fill out and submit the following form.

General

I am providing my name and I agree that EPA OIG can disclose my name and other information I provide, if necessary, to ensure my issues are addressed.

Confidential

I wish to be confidential, meaning I am providing the OIG my name, but I request that the OIG not disclose my name outside the OIG. This option is appropriate for complainants who fear reprisal.

Anonymous

I wish to be anonymous, meaning the OIG will not know my name. If



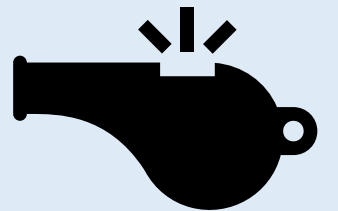
Whistleblower Protections

The [EPA OIG's Whistleblower Protection page](#) provides helpful information on protections for those who report suspected waste, fraud, abuse, and/or mismanagement.

- Complainants who are not EPA employees do not have an automatic right to confidentiality under section 7(b) of the [Inspector General Act of 1978](#). However, non-EPA employees may specifically request confidentiality, and the OIG will protect the confidentiality of such complainants to the maximum extent permitted by law (for example, by using applicable exemptions and exclusions of the Freedom of Information Act and applicable exemptions of the Privacy Act).

Anonymity

- If you do not wish to disclose your identity, you may remain anonymous when contacting the OIG. However, please keep in mind that anonymity may impede a quick or thorough investigation or the success of a later prosecution.



Conclusion

- Proper characterization, budgeting and oversight of recipient practices for subawards, procurements, and participant support costs is not easy.
- EPA has posted answers to questions regarding Subawards at <https://www.epa.gov/grants/epa-subaward-frequent-questions>.
- EPA Grant Policies are available at <https://www.epa.gov/grants/epa-grants-policy-resources>.

Questions?

- Seek advice initially from your Grant Specialist and Grants Management Officer.
- OGC and OGD's National Policy Training and Compliance Division are available to provide assistance on difficult issues or areas that require national consistency.
- In addition, answers to questions asked during this webinar will be provided in the next few weeks and will be available on the [Procurement, Subawards, and Participant Support Costs - June 27, 2023](#) page.

