EPA Grants Procurement, Subawards, and Participant Support Costs Webinar, June 27, 2023
Frequently Asked Questions (FAQ)

Q1: As an environmental consultant, if my company is paid to prepare a Multipurpose, Assessment, RLF, and Cleanup (MARC) EPA Brownfield Grant Application, can my company compete for the implementation of the grant?

A1: **It depends. An applicant/recipient may issue a competitive solicitation to procure a qualified environmental professional (QEP) for grant writing services as well as to implement the grant, if selected for funding, as long as that applicant/recipient complies with the competitive procurement requirements in 2 CFR Part 200, 2 CFR Part 1500, and 40 CFR Part 33.**

Moreover, EPA does not prohibit consultants who prepare grant applications from competing for contracts that will be funded under the grant as long as the competition is conducted fairly and openly. The contractor may not assist with drafting specifications, requirements, statements of work, or invitations for bids or requests for proposals and also be allowed to compete for the services or products that will be procured as indicated in 2 CFR 200.319(b). As indicated in the Best Practice Guide for Procuring Services, Supplies, and Equipment Under EPA Assistance Agreements, EPA interprets this regulation to preclude applicants and recipients from "working with, using sample language or templates from, accepting free services from, or hiring any contractors to develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals for procurements if that contractor will be competing for the resultant contract . . ."

Q2: Can a contract be awarded to a public university, or does that have to be a subaward? Our state agency's policies allow for agency-to-agency transfer of funds to a public university without competition.

A2: It depends on state law. If state law provides that state universities are legally separate from other components of the state for the purposes of financial transactions, then EPA would consider the transaction to be a subaward for the purposes of the Uniform Grants Guidance (UGG). There may be unique situations in which state law characterizes transfers of funds between state agencies and state universities as Interagency Service Agreements or a similar designation for an internal financial transaction because state universities are instrumentalities of state government. If that is the case, the governing regulation would be 2 CFR 200.417. There may also be other unique situations in which state law provides that transactions between state universities and other components of the state government are procurement contracts in all cases. As provided at 2 CFR 200.317, states follow their own procurement procedures with the exception of the requirements in 2 CFR 200.321 (small and disadvantaged businesses), 2 CFR 200.322 (domestic preferences), 2 CFR 200 200.323 (recycled materials), and 2 CFR 200 200.327 (contract clauses contained in Appendix II to 2 CFR Part 200). EPA's 40 CFR Part 33 Disadvantaged Business Participation rule also applies to states.

Q3: Are contracted legal services under $10k considered microtransactions and thus not held to competitive procurement policy? Specifically, when those legal services are used to create subaward agreements/assist with contract drafting.

A3: Yes, procurement of legal services described in this question would be considered a microtransaction because is it under the $10,000 threshold. Also, law firms are not subject to the consultant fee cap consistent with 61 Comp. Gen. 69 (1981). The grant regulations at 2 CFR 200.320(a)(1) discuss procurement procedures for micro-purchases, including the requirement for distributing micro-purchases equitably among qualified sources. *See also* A65.

Q4: If our Agency's thresholds are more stringent than the thresholds EPA has, then we still follow our own purchasing policy, correct? We are an independent special district.

A4: Yes, if your Agency's competition thresholds are more stringent than the federal thresholds, you would follow your Agency's procedures.

Q5: Can you give an example of what it means for a competition to be determined inadequate (re: sole source)?

A5: An example of a situation where competition could be deemed inadequate and a sole source permitted for contracts above the simplified acquisition threshold (>$250,000), is when the applicant/recipient goes out to bid with a federally compliant Request for Proposals ("RFP")/Request for Qualifications ("RFQ"), publicly advertises the RFP/RFQ, and only receives one offer. In this situation, competition may be determined inadequate because you only received one bid, despite a federally compliant RFP/RFQ process. Note, however, that in this situation and consistent with 2 CFR 200.324, profit must be negotiated as a separate element of the contract because there is no price competition.

Q6: If a contractor provides services in the design phase of a project, are they not able to compete for the construction phase of the project?

A6: It depends. EPA's regulation that speaks to this scenario is 2 CFR 1500.11. If an applicant/recipient competed the contract at the design phase, they could use the same firm for the construction phase. However, construction is <u>different</u> than architectural/engineering (A/E) services. The grant regulations at 2 CFR 200.320(b)(2)(iv) make clear that an applicant/recipient can use qualifications-based procurement for A/E services, where price is not a selection factor, only for the A/E services, not subsequent construction services. If the A/E firm gives an applicant/recipient the specifications for the general contract for the construction work, the construction arm of the A/E firm cannot bid on that work. This situation is explicitly prohibited by 2 CFR 200.319(b), which states that "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." *See also* A1.

Q7: If a Request for Proposals/Quotes or Qualifications developed by a city includes an attachment with a logo of a private company, does that disqualify the company? Can any material developed by a prospective bidder be included, attributed or not (e.g., with a logo)?

A7: Yes, that disqualifies the company from bidding on the procurement. No material developed by a prospective bidder can be included in the RFP/RFQ. This situation is explicitly prohibited by 2 CFR 200.319(b), which states that "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." *See* A1.

Q8: To confirm, if a competitive sealed bidding process was conducted but only one bid was received, does the entity need to then follow the sole source procurement process?

A8: Assuming you conducted a federally compliant competition, this scenario would be an example of an acceptable sole source justification. *See* 2 CFR 200.320(c). However, because there is no price competition, consistent with 2 CFR 200.324, profit must be negotiated as a separate element of the contract. *See also* A5.

Q9: If Company A is paid to write a grant proposal, which is successful, and then the grantee issues a RFP, can Company A submit a proposal? If the employee at Company A who wrote the proposal leaves to work for Company B, can Company B compete? If company A subcontracts with Company B for the grant writing, who is eligible to submit for the RFP?

A9: Yes, so long as Company A did not prepare the RFP and the grantee does not use the scope of work prepared by Company A in the RFP, Company A can compete for the work. Otherwise, the prohibition in 2 CFR 200.319(b) would be triggered.

Yes, Company B could compete as long as Company B takes measures to ensure that there is no actual or apparent conflict of interest stemming from the role the former employee of Company A played in writing the grant proposal.

Neither Company A nor Company B would be eligible to compete. Clarifying the facts, Company A is subcontracting to Company B to write the grant application and the

grant application becomes part of the RFP. When the grant application becomes the scope of work, both the prime and sub-contractors have essentially prepared the RFP that they are bidding on and are precluded from competing by 2 CFR 200.319(b).

Q10: How does the municipality obtain the grant funding? Do you reimburse or do we simply provide invoices and get paid (in a subaward or procurement contract situation)?

A10: EPA typically pays municipal recipients in advance as provided in 2 CFR 200.305(b) and the EPA General Term and Condition *"Automated Standard Application Payments (ASAP) and Proper Payment Draw Down."* Recipients must be enrolled or enroll in the ASAP system to receive payments under EPA financial assistance agreements. 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. Recipients must disburse essentially all drawn down funds within 5 business days of receiving payment from EPA via ASAP.

Q11: The state of Ohio has a Request for Quote (RFQ) process (law) whereby cost is not allowed to be considered in selecting the most qualified firm for professional/engineering services. Is that acceptable for the EPA Community (CDS) Grant?

A11: This question is difficult to answer without further information regarding what professional/engineering services the firm will provide. Please follow up with your EPA Project Officer or Community Grants Regional Point of Contact.

Q12: Are there any suggestions where to research to find profit margins for different categories?

A12: Online; speaking with other grantees located in your area.

Q13: If professional/engineering services are not included in the grant (funded by the grant), is the grant recipient required to follow the procurement requirements when procuring the professional/engineering services?

A13: No.

Q14: Is quality of work or experience level acceptable for not selecting the lowest bidder?

A14: Yes, quality of work/experience could be a basis for not selecting the lowest bidder. As required by 2 CFR 200.318(h) and (i), however, 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 also be required to provide this documentation to the EPA Award Official.

Q15: If using the QBS process to select an engineer, how do we negotiate costs?

A15: It depends on the grant program. If the Brooks Act applies, the requirements for selection/negotiation of A/E services are discussed at 40 USC 1101; and, under 2 CFR 200.320(b)(2), costs for A/E services must be fair and reasonable even though price may not be a selection factor. Conducting market research to make independent estimates of prices for A/E services is one means of complying with the cost/price analysis provisions of 2 CFR 200.324(a). In any event, the A/E firm must not charge recipients more than their commercial rates for similar services.

Q16: Would the inability to comply with the Build America, Buy America Act (BABA) be a suitable reason for not going with the lowest bid?

A16: Yes, the inability to comply with BABA could be an acceptable reason for not going with the lowest bid. However, you are going to have to provide documentation showing that you conducted market research and there is only one domestic firm who can provide American-made goods; a conclusory statement is insufficient. *See* 2 CFR 200.318(h), (i). EPA's BABA website contains resources on market research for firms that supply American-made materials.

Q17: I work at a state entity and we follow our rules for a sole source. Is this something that we still need to get additional approval from EPA for?

A17: No, as stated in 2 CFR 200.317, states follow their own procurement procedures. However, it is important to have the justification for sole source within your documentation.

Q18: Can RFPs take place before the grant is approved?

A18: Yes. Note, however, that consistent with 2 CFR 1500.9, "all costs incurred before EPA makes the award are at the recipient's risk. EPA is under no obligation to reimburse such costs if for any reason the recipient does not receive a Federal award or if the Federal award is less than anticipated and inadequate to cover such costs."

Q19: Can an entity that is awarded a federal grant pass-through funds to a nonprofit association to pay a contractor, if the association competed for the contractor services and the scope of services for the federal grant is consistent with the scope of services for the competed contract?

A19: Yes, the grant recipient can passthrough funds to a nonprofit which then selects a contractor in compliance with the competitive procurement requirements in 2 CFR Parts 200 and 1500 as well as 40 CFR Part 33. However, the pass-through funding is subject to the requirements for subawards in 2 CFR 200.332, the EPA Subaward Policy, and EPA's General Term and Condition *"Establishing and Managing Subawards."*

Q20: If an applicant was approved based on their application stating they would use a specific vendor, does that constitute approval from EPA?

A20: No. The fact that a recipient has named a contractor in its application, including as a "partner" or otherwise, does not justify a sole-source procurement. Note, some EPA grant programs are now imposing a threshold requirement that if applicants name a contractor, the applicant needs to be able to demonstrate that it complied with competitive procurement procedures.

Q21: Our participants are seasonal W2 employees. How would that impact participant support costs?

A21: Persons who receive W2s are employees. The fact that they are seasonal is irrelevant. You would classify these costs as *Personnel* costs and whatever fringe benefits they receive.

Participant support costs are the direct costs for items such as stipends or subsistence allowances, travel allowances, and registration fees paid to or on behalf of participants or trainees (but not employees) in connection with conferences, or

training projects. *See Participant Support Costs* as defined in 2 CFR 200.1. A grantee's employees cannot receive participant support costs, but grantees may train the employees as provided in 2 CFR 200.473.

Q22: How does the Brooks Act, a United States federal law passed in 1972 that requires that the U.S. Federal Government select engineering and architecture firms based upon their competency, qualifications and experience rather than by price, play into the cost inclusion in a competitive solicitation?

A22: The Brooks Act requirements for procuring A/E services do not apply to all EPA grant programs, only if the Act is incorporated by reference in the grant statutory language such as for the Clean Water State Revolving Fund (33 U.S.C. 1382(b)(14)). However, when the Brooks Act applies, the negotiation/selection of A/E services must be in accordance with the procedures discussed at 40 USC 1101 etc. Specifically, and in relevant part, qualifications-based procurement, where price is not a consideration, is required.

Q23: Do all bids need to be open to public? My construction project is under a 5-year contract with six selected contractors. Will it be ok if we bid the project out only with these six pre-selected contractors under our annual water and wastewater contract?

A23: This is a project specific question and difficult to answer without knowing more about the specific grant program, the amount of the contract, the procedures followed to select the contractor, and applicable federal, state, and/or local requirements. Please reach out to your respective EPA point of contact/Project Officer to discuss further.

Q24: Does the competition and selection reason information need to be submitted when applying for the grant or is this completed once the grant is awarded?

A24: It depends. Depending on what EPA grant you are applying for, if you have named your contractor in your grant application, you may have to demonstrate to EPA that you properly selected that contractor as a threshold requirement. Competition requirements would be followed post-award if you have not selected a contractor at time of application. In any event, you must maintain documentation regarding the competitive process as required by 2 CFR 200.318(i) should any questions arise regarding the procurement post-award.

Q25: Our local government does NOT receive direct Federal contracts. We DO receive direct and indirect Federal grant awards, including EPA dollars. We require all subrecipients to have a UEI issued from SAM; we do NOT have the same requirements for contractors/consultants/vendors. Am I reading 2 CFR 25.100 (a) and 2 CFR 25.105 correctly? On a related note, we DO check SAM for Suspension & Debarment, and if a Contractor is not registered in SAM ("No Record Found") we document that. This question about UEI for non-subrecipients (i.e., contractors) comes up frequently.

A25: Yes, Federal regulations do not require that recipient contractors have UEIs.

Q26: We issued an RFQ for design, development, and construction management service (professional services.) We did have a consultant do a sewer study in 2016 and update the study in 2021. We provided those studies to all service providers requesting RFQ requirements. We received three proposals, had an evaluation and selection committee review all the submittals and then graded the submittals. The grades were tallied, and a consultant was retained. The consultant who had

provided the initial studies was the chosen firm. Have we done all that is needed to have provided a fair and equitable bidding process?

A26: We need more information. If the sewer study was incorporated into the RFQ as specifications that firms submitting proposals must meet, then the practice violated 2 CFR 200.319(b). Just providing the sewer studies to service providers requesting RFQ requirements would not violate the regulations. Please reach out to your respective EPA point of contact/Project Officer to discuss further.

Q27: Can a private company that is an EVSE (chargers) provider prepare grant application and be a partner for applicant (bus contractor) for the Clean School Bus Grant program? Then, if that grant wins, does the bus contractor still have to go to RFP?

A27: The private company that is an EVSE provider may prepare a grant application and be an eligible recipient itself (as an "eligible contractor" is defined at 42 USC § 16091(a)(4)).

Separately, they can work with/partner with another third party applicant, such as a bus contractor, to prepare an application, but they may not submit that application together as co-applicants, as this is not permitted under program rules (CSB program Q&A 2.43).

Following this hypothetical, if the bus contractor was awarded a grant, they would still have to compete their purchase of chargers in a manner consistent with 2 CFR Part 200. From the CSB program's Q&A 9.12:

> **If the direct applicant is a third-party, the purchasing school districts do not need to compete their purchases from the third-party applicant. Any other goods and services purchased by the applicant are subject to federal competitive procurement requirements. If an applicant awards a subaward to a subrecipient to carry out part of the program, subrecipients (e.g., school district subrecipients or the private bus fleets serving the school district subrecipients) must also comply with 2 CFR Part 200 for purchasing any other goods and services besides those offered by the third-party applicant.**

The program does provide an exception if the applicant can show that it already went through a competitive procurement with the EVSE provider that satisfies 2 CFR 200.319 & 200.320.

Q28: How often can you draw down grant funds? We pay biweekly, can we draw down on that schedule?

A28: With the exception of states, recipients must comply with the "immediate cash needs" requirements in 2 CFR 200.305(b) as interpreted in EPA's *"Automated Standard Application Payments (ASAP) and Proper Payment Draw Down"* General Term and Condition which requires that recipients disburse substantially all drawn down funds within 5 business days of receiving payment from EPA. 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. If

your payment schedule is biweekly, then you can draw down funds biweekly as long as the funds are disbursed in compliance with the term and condition.

Q29: To confirm, the requirement to disburse funds in 5 business days only applies to non/for-profit entities that receive grants from the EPA, correct?

A29: No. The 5-business day disbursement standard applies to local governments and tribes as well as non-profits. Only states are not subject to the requirement.

Q30: We will bid and construct a potable water storage tank. Does our bid package need EPA review prior to public bidding?

A30: It depends on the grant program as well as the amount of the contract. Generally, only procurement documents for contracts in excess of the simplified acquisition threshold (currently $250,000) are subject to EPA review as provided in 2 CFR 200.325. However, not all EPA grant programs exercise that authority. Some grant programs are requiring review of bid packages prior to opening bids to the public, including OW Community Grants, for contracts in any amount.

Q31: If you have a multi-year agreement, how often do you have to check whether a subrecipient or contractor is an excluded entity?

A31: Consistent with 2 CFR 180.300, every time you renew the agreement, you must check whether the organization or firm is an excluded entity.

Q32: Can you please explain using an RFQ instead of an RFP and how cost should be considered when doing an RFQ (for EPA Brownfields Assessment Grants)?

A32: Please see the MARC Grant Application Resources page for detailed information on acquiring services to implement Brownfields Assessment Grants.

Q33: How do you best recommend working with subrecipients to ensure compliance? Do we ask for time records? We have subrecipients of $5-10k so wondering about how much onus we can put on them for relatively small amounts of money.

A33: **As provided in 2 CFR 200.332(d), pass-through entities have several tools to monitor and verify subrecipient compliance with regulatory requirements and the terms of their Federal award. Pass-through entities can require subrecipients to provide timesheets or other documentation of the subrecipient work. It may be easier if the recipient enters into fixed amount procurement contracts when acquiring services from for-profit organizations or when a micro-purchase (typically $10,000 or less) is a more efficient means of supporting an eligible subrecipient's participation in a project. Please refer to RAIN-2018-G04-R1, *Micro-Purchase and Simplified Acquisition Threshold for Procurement by EPA Assistance Agreement Recipients and Subrecipients*.**

Q34: Is it acceptable to issue one RFQ for multiple professional services needed? It would spell out the different services and qualifications needed to be evaluated separately as well as result in individual contracts per service, i.e., NEPA Consultant, Materials Testing Consultant, etc.

A34: Yes, so long as the competition is conducted fairly and openly, recipients may procure multiple types of services through a single RFQ. Note, this may not be practically feasible, and you should speak with your own procurement professionals.

Q35: If another city went through a competitive procurement process for selecting an engineering firm, can we go into an interlocal agreement with that city to utilize their procurement so we do

not have to do it ourselves? (We are a very small town, and the lack of recourse to do RFQ and RFP is why we want to do that.)

A35: Yes. The grant regulations at 2 CFR 200.318(e) state: "To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal Government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services. Competition requirements will be met with documented procurement actions using strategic sourcing, shared services, and other similar procurement arrangements."

Q36: What is the allowable overhead charge from a state university?

A36: The state university's indirect cost rate with their cognizant federal agency is allowable as provided at 2 CFR 200.332(a)(4). *See* Appendix III to 2 CFR Part 200 for information on indirect cost rates for institutions of higher education.

Q37: What sort of documentation do you require to show staff/personnel time spent on grant-funded work for organizations that don't use timesheets?

A37: As provided at 2 CFR 200.430(i), recipients must have some type of system that provides actual estimates of the time spent on the grant. EPA cannot endorse or recommend a specific software system that would keep track of employee's time spent on grants.

Q38: Are there any specific rules for competition when a subrecipient uses subcontractors?

A38: The same rules for competitive procurement that apply to the pass-through/direct recipient flow down to the subrecipient as provided 2 CFR 200.322(a). *See* EPA's General Term and Condition "*Establishing and Managing Subawards*."

Q39: When writing the proposal, the Program Director included a specific consultant on the budget with his qualifications and reasons why his specific knowledge serves the grant. Do we still need to go through a procurement process?

A39: Yes, naming a consultant in the grant application and describing his or her qualifications does not allow the recipient to make a sole source contract to the consultant if the amount of the contract is over the 2 CFR 200.320(a) micro-purchase threshold. EPA does not accept sole source justifications for consultant services given that those services are widely available in the commercial marketplace. *See* 2 CFR 200.320; *see also* A20 and A24.

Q40: I work for a municipality who is the grant recipient. Our project will have legal costs. The municipality has a contract with an Attorney's office. Can we use our contracted attorney, or do we need to put an RFQ out?

A40: It depends. If the direct cost for legal services that will be charged to the grant exceeds the municipality's micro-purchase threshold under 2 CFR 200.320(a), which is generally $10,000, the municipality must follow competitive procurement procedures to acquire the legal services.

Q41: What type of information is necessary to justify a sole source when contractor is the only organization that can offer services required? Why would a sole source justification be deemed insufficient?

A41: Documentation showing that the contractor is the only organization that can offer the services required (e.g., patents/copyrights/maintenance agreements with equipment manufacturers required to maintain a warranty) is the type of documentation EPA requires. As part of the sole source justification, you must document that you searched for other contractors that could offer the services required. Web searches, email inquiries asking if those services are provided, or other documentation must be available, to show that you did try to find other sources of those services. Note that EPA does not accept sole source justifications for services widely available in the commercial marketplace such as consulting, A/E, construction, IT management, curriculum development, or air monitoring maintenance based on an argument that the firm or individual has "unique" qualifications or is a long term "partner" of the recipient. *See* A5.

Q42: If we have to make a purchase of various types of equipment over $10k, are we able to use a store/vendor we have a current account with even if we might find it less expensive somewhere else for reasons other than cost? For example, Amazon might be less expensive but it's better for us to use a local company that provides better support and we already have a tax-exempt account with.

A42: No, you must follow the competitive procurement procedures discussed at 2 CFR 200.320 to acquire equipment. Off the shelf equipment is fungible and does not matter where you have the account, it matters who gives you the best price. However, you can take the availability of technical support into account in determining which vendor offers the best overall package as part of the competitive selection process.

Q43: The presentation focused on the dollar value of procurement rather than designating an item as supplies vs equipment. Do the procurement practices for equipment differ from those for supplies or is really the key issue the cost of the item and not which category it is listed in on the budgeting form?

A43: No. The focus is the cost of the supplies, services, or equipment, not which category it is listed in on the SF 424 budgeting form. Although items with unit costs of less than $5,000 are considered supplies, when a recipient buys supplies in bulk, the total purchase amount may exceed the 2 CFR 200.320(a) micro-purchase threshold for non-competitive procurement.

Q44: We have a salaried person whose time on the EPA grant project can be reimbursed up to a dollar maximum. The actual hours will be 3 or 4 times what can be billed. They do not keep time sheets showing 100% of their work. Can they keep a time sheet for just EPA work along with dates, times of day, and what was done that day? Reworking the entire payroll process for our city is not reasonable for the small amount of the reimbursement.

A44: Yes. As long as the time keeping system produces accurate estimates of actual time spent working on the grant funded activity, the system will comply with 2 CFR 200.430(i).

Q45: What if the bid for a particular item is lower, but purchasing said item will cause the City higher costs in the end? (For example, a police department has a particular type of radio with specific chargers and mounts). Ten radios out of thirty quit working. If the lowest bid to replace the radios comes from a different company that is not compatible with our charging equipment or

radio mounts, it will ultimately cause us to spend more to make them compatible. In this instance, could we prove sole source with the original company?

A45: Yes. This may be an acceptable argument for a sole source justification. For instance, in the scenario described in the question, if the lowest bid to replace the radios is incompatible with charging equipment or radio mounts, you would need to purchase new charging equipment and radio mounts, and this would make the overall contract more expensive than the cost of replacing the radios with additional radios of a type that are compatible with your current chargers and radio mounts.

Q46: Does EPA have a set aside Disadvantaged Business Enterprise (DBE) goal for Construction Invitation for Bids (IFBs) over $250k? Or do you review Construction IFBs documents for over $250k?

A46: EPA's DBE rule at 40 CFR 33.301 requires recipients to make good faith efforts as discussed in that regulation whenever procuring construction, equipment, services and supplies under an EPA financial assistance agreement. The DBE rule does not mandate that recipients set aside a specific amount of work for DBEs.

EPA may review construction IFB documents at the recipient's request. Additionally, the grant regulations at 2 CFR 200.325 discuss specific scenarios when the recipient/subrecipient must make available upon request, for EPA or pass-through entity pre-procurement review, procurement documents, including when the recipient/subrecipient's procurement procedures fail to comply with the Federal procurement standards or when the procurement is expected to exceed the Simplified Acquisition Threshold and the contract is awarded without competition/only one bid is received in response to the procurement. Moreover, and consistent with 2 CFR 200.337, EPA "must have the right of access to any documents, papers, or other records of the non-Federal entity which are pertinent to the Federal award, in order to make audits, examinations, excerpts, and transcripts."

Note, some EPA grant programs are now imposing a threshold requirement that if applicants name a contractor, the applicant needs to be able to demonstrate that it complied with competitive procurement procedures.

Q47: If we use a Master Program Agreement for a professional corporation contractor, then identify a task for them, how do we document the price negotiation for each task?

A47: We will presume for the purposes of our response that the recipient entered into the Master Program Agreement in compliance with the competitive procurement requirements in 2 CFR Parts 200 and 1500 as well as EPA's 40 CFR Part 33 Disadvantaged Business Enterprise rule. Consistent with 2 CFR 200.324(b), non-federal entities 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. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

Q48: Can you bid on design, build, and maintenance together if your grant is about $390,000?

A48: This question is difficult to answer without further information. If the recipient issues a solicitation for a contract to design, build, and maintain a facility and the amount of the contract exceeds the Simplified Acquisition Threshold formal procurement procedures, which include public advertising, would be required. Design services that only licensed architects and engineers may provide under state law can be procured on a qualifications basis where price is not a selection factor as provided in 2 CFR 200.320(b)(2)(iv). However, that regulation also provides that the qualifications-based approach ". . . cannot be used to purchase other types of services though A/E firms that are a potential source to perform the proposed effort." The recipient must design the request for proposals in compliance with the regulation by evaluating the design services component separately.

Note that if the Brooks Act or an equivalent State qualifications-based requirement applies (as is the case for OW Community Grants with projects that have workplans inclusive of Clean Water State Revolving Fund eligible activities), then recipients must use a qualifications-based procurement for the design services. The Brooks Act and equivalent State qualifications-based procurement requirements do not govern acquisition of construction and maintenance services.

Q49: What process should a rural small town with staff inexperienced in EPA matters put together the scope and cost estimates required for a grant application without excluding any of the few local consultants from applying for the work?

A49: EPA provides guidance on acquiring consulting services for grant application preparation and grant implementation in a manner that complies with the full and open competition requirements in 2 CFR 200.319 at MARC Grant Application Resources. *See also* Best Practice Guide for Procuring Services, Supplies, and Equipment Under EPA Assistance Agreements.

Q50: Can hourly rates for personnel be used in the selection for professional services as the determining factor for selecting a subcontractor using a Master Program Agreement?

A50: If the question is can you as the grant recipient use the rates you pay your own employees as a benchmark for determining whether the rates that a subcontractor are proposing for their professionals is reasonable, the answer is yes. Keep in mind, however, that for individual consultants, there is the statutory consultant fee cap at Level IV of the Executive Schedule that EPA implements at 2 CFR 1500.10. The Best Practice Guide for Procuring Services, Supplies, and Equipment Under EPA Assistance Agreements provides additional guidance on the consultant fee cap.

Q51: If the contractor is part of writing the grant, can they be part of the support services to execute the grant without competition?

A51: No! This is not an adequate justification to award a sole source contract and improperly evade the 2 CFR 200.319 full and open competition requirements. *See* 2 CFR 200.320 and the EPA Subaward Frequent Questions; *see also* A1 and A20.

Q52: An Environmental Consulting firm charged us their hourly rate which did not exceed the Level IV of the Executive Compensation rate, but they also added on a profit margin which made their hourly billable rate at $185 an hour, higher than the Level IV Executive Compensation rate. Is this okay or is profit margin too high?

A52: The cap does not include the firm's overhead rate or the amount of profit a consulting firm earns. The loaded hourly rate can be above Level IV of the Executive Schedule. The consultant fee cap only applies to personal compensation (as depicted on W-2s or 1099s for Federal income tax purposes) for *individual* consultants and rarely applies to rates charged by consulting firms as indicated in 2 CFR 1500.10. The Executive Compensation rate cap only applies to individual consultants who you select and are functioning like your employees subject to your direction and control. The Best Practice Guide for Procuring Services, Supplies, and Equipment Under EPA Assistance Agreements provides additional guidance on the consultant fee cap.

Q53: If awarded a CDS Grant, is it acceptable that we follow our state threshold for engineering services?

A53: This question is difficult to answer without further information regarding what specific engineering services are at issue. Please follow up with your EPA Project Officer or Community Grants Regional Point of Contact.

Q54: Is the $10k per contract or per total project cost for micro purchases?

A54: Per total project cost. You cannot break your contracts up to avoid competition and micro-purchases must be rotated among qualified sources as provided at 2 CFR 200.320(a)(1).

Q55: Can ordering off of GSAFleet or Sourcewell suffice instead of going through the RFP process?

A55: Non-federal entities other than tribes are generally not eligible to use GSAFleet/GSA Schedule. Regardless, some contractors may offer you their GSA-listed price, however, that still does not justify lack of full and open competition.

Please reach out to your EPA Project Officer/point of contact regarding Sourcewell as it appears this only applies for the state of Minnesota. As a general matter, if state law allows local governments to procure services or products through master agreements entered into by the state, that practice complies with 2 CFR 200.318(e).

Q56: Most workplans for Brownfields grants are taking the scope of work (SOW) from grant applications; that being said, even though it is competitively procured, can the same firm who wrote the grant still submit a proposal if the SOW is essentially the same?

A56: This is difficult to answer without reviewing the solicitation documents, grant application, and other documentation relating to the procurement processes followed. Generally, EPA does not prohibit consultants who prepare grant applications from competing for contracts that will be funded under the grant as long as the competition is conducted fairly and openly. Nonetheless, the contractor may not assist with drafting specifications, requirements, statements of work, or invitations for bids or requests for proposals and also be allowed to compete for the services or products that will be procured as indicated in 2 CFR 200.319(b). The grant application the firm wrote cannot become the specifications or scope of work for the procurement. Please see the MARC Grant Application Resources page for more information.

Q57: When do we have to have everything submitted by to draw down funds?

A57: The answer to this question depends on the grant program. States follow their Cash Management Improvement Act agreements with the Department of Treasury or

default procedures under 31 CFR Part 205 as provided in 2 CFR 200.305(a). Other recipients are subject to 2 CFR 200.305(b) as implemented in the EPA General Term and Condition "*Automated Standard Application Payment (ASAP) and Proper Payment Drawdown.*" EPA generally does not require recipients to submit documentation prior to drawing down funds and recipients must disburse substantially all of the drawn down funds to satisfy obligations to pay employees, contractors, subrecipients and other entities within 5 business days of receiving payment from EPA via ASAP. If EPA requires you to submit documents to the EPA before drawing down funds (e.g., for Superfund Technical Assistance Grants, construction grants such as OW Community Grants, or recipients EPA places in reimbursement status under 2 CFR 200.208), you have some discretion, depending on how quickly you would like to draw down the funds. It may coincide with biweekly payroll, quarterly accounting reconciliation, as soon as costs are incurred, or other times as appropriate based on the terms and conditions of the grant.

Q58: Under the MARC EPA Brownfield Grant rules, does the "Dual Procurement" model allow a single contractor to write an application and implement that grant?

A58: Yes, as long as the "dual procurement" is federally compliant. Please see the MARC Grant Application Resources page for more information. *See also* A1.

Q59: If a contractor is selected through a competitive procurement process for work on a project funded in part by EPA, and then further funding for that project is provided by the National Oceanic and Atmospheric Administration (NOAA), would broad language in the original contract with that firm allow the recipient to avoid a second procurement process to use the NOAA funds to pay that contractor for further work on the project? Or does that somehow fall under sole source?

A59: NOAA would be the Agency to ask.

Q60: Would a university be considered a subrecipient or contractor in cases where it is retained to conduct research on behalf of a pass through entity and: (1) the pass through entity retains all rights to the data collected; and (2) the pass through entity oversees the research being performed through collecting and supplying the university with samples, and the pass through entity reviews and approves the data analysis conducted by the university?

A60: As indicated in Appendix A to EPA's Subaward Policy, transactions between recipients and institutions of higher education are subawards in almost all cases particularly when the university is performing research. The fact that the pass-through entity retains all rights to the data collected does not change that relationship given that pass-through entities always have rights to use data subrecipients collect pursuant to 2 CFR 200.315 which flows down to subawards pursuant to 2 CFR 200.322(a)(2) and (3). Note also that pursuant to EPA's General Term and Condition "*Copyrighted Material and Data*" EPA has a "Federal Purpose" license in the data collected by the subrecipient as well given that this term and condition also flows down through the pass-through entity's agreement with EPA under EPA's General Term and Condition "*Establishing and Managing Subawards*."

Q61: So if the contractor assists in writing the grant and is named, as long as hiring the contractor has gone through the bid process and that documentation can be shown, naming the contractor is acceptable?

A61: Yes, provided the applicant conducted the procurement in compliance with the full and open competition requirements in 2 CFR 200.319 and 2 CFR 200.320 in acquiring grant writing and grant implementation services the applicant may name the contractor in its application. Please refer to A49 for additional guidance.

Q62: Is there going to be another training for construction procurement using EPA grants?

A62: The information presented today does apply to solicitations/contracts for construction services. However, if you are referring to OW Community Grants, please see the EPA Community Grants webpage for the most up to date information regarding trainings.

Q63: If a grant recipient contracts services with a competitive market and the contractor they select has contracted employees under them as part of their "package," do the contractor's contractors also need to be competitive?

A63: No, it is up to the contractor on how they pick their subcontractors.

Q64: Are all the requirements presented today applicable to Infrastructure Investment and Jobs Act (IIJA) funded projects?

A64: It depends on which grant program you are referring to, but generally yes. There were no exemptions from competitive procurement requirements enacted in IIJA; but for some IIJA funded programs such as the Clean Water and Drinking Water State Revolving Fund and the Brownfields Revolving Loan Fund, the 2 CFR Part 200 procurement standards do not apply to borrowers.

Q65: What about the Minority/Women-owned Business Enterprises (MBE/WBE) 6 good faith efforts? Don't they apply to all procurements regardless of size/threshold?

A65: Yes. For example, even though recipients do not need to competitively procure services and products in amounts less than the micro-purchase threshold, EPA expects recipients to make good faith efforts to include MBE/WBE firms in efforts to rotate micro-purchases among qualified sources. *See also* Best Practice Guide for Procuring Services, Supplies, and Equipment Under EPA Assistance Agreements.

Q66: What if you are not in compliance with your reporting requirements; can you still draw down funds?

A66: This is difficult to answer without context, as "not in compliance" could have different meanings. If you are a week late with a report, and this is not part of a larger pattern of noncompliance, it is unlikely that you would be prevented from drawing down. However, if patterns of noncompliance, evidence of financial management noncompliance, or other serious issues with grants management occur, EPA does have the ability to take action, such as withholding payment until reporting requirements are met or placing the recipient in reimbursement status as authorized by 2 CFR 200.208 and 2 CFR 200.305(b)(6).

Q67: Do contractors procured on a federal grant award have to have a Unique Entity Identifier from SAM.gov?

A67: No.

Q68: Do we need to compete for the services of the grant recipient's employees and do the services of the contracted employees also need to be competed?

A68: No and yes. No, a grant recipient's employees are their own employees and may be hired in accordance with HR procedures as long as the recipient complies with Civil Rights Laws as provided in 40 CFR Part 7. Employees receive W-2s for Federal income tax purposes. Yes, for the contract employees, they are contractors/consultants whose services must be procured in compliance with the 2 CFR Parts 200 and 1500 Procurement Standards. The easy way to differentiate employees versus contractors is employees receive W-2s, you pay payroll taxes on them, and you report their income on a W-2 form. Independent contractors receive 1099s and are not on payroll. Note, contractor employees are subject to the consultant fee cap at Level IV of the Executive Schedule for their individual compensation as indicated in 2 CFR 1500.10.

Q69: Are non-employees who travel to meetings to serve as presenters considered participants for participant support costs?

A69. It depends. That could be a participant support cost if, for example, you have people from the community/as part of a community involvement type of meeting and the non-employee is going to come and make a presentation, that could be a participant support cost. Sometimes, however, presenters are consultants, and you pay them a fixed-price speaker fee (honorarium) using micro-purchase procedures.