Procurement Standards in the Uniform Guidance

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Prepared for
Governor’s Office of Planning and Research
State of California
OPR Federal Assistance

Federal Assistance
Get help finding, applying for, and managing federal grants

with a focus on land use and community development, climate risk and resilience, and high road economic development.
Review of Federal Programs

The State Clearinghouse (SCH) serves as the state’s Single Point of Contact for the review of federal assistance applications pursuant to Presidential Executive Order No. 12372. Notification of all federal assistance applications must be provided to the SCH pursuant to Assembly Bill No. 1348, which in turn publishes this information for review and comment by State and local elected officials. SAM Section 0912 requires that departments submit new federal funds through the SCH and then through Finance through a DF-24 notification prior to applying for funds.

The SCH does not administer grant programs or offer any grant funding. Please visit grants.gov for funding opportunities and beta.sam.gov for the online Catalog of Federal Domestic Assistance (CFDA).
Applying for Federal Grants

Intergovernmental Review of Federal Programs

Home

The State Clearinghouse (SCH) serves as the state's Single Point of Contact for the submission of Federal assistance applications pursuant to Presidential Executive Order No. 12372 and SAM Section 0912. With the signing of Assembly Bill 1348 the State Clearinghouse is responsible for reporting on all federal grants applied for and received in California regardless if they fall under Executive Order 12372. We have developed the new on-line database to assist with that reporting.

These applications must be provided to the SCH, which in turn publishes this information for review by State and local elected officials. The SCH does not administer grant programs or offer any grant funding. Please visit Grants.gov for funding opportunities.

Federal Assistance Application

To apply for a federal assistance program, please upload a copy of your application cover form (Standard Form 424) to the SCH. DO NOT send your full application package or any other supplemental information.

In the appropriate box on Form 424, mark that the federal assistance application was made available for state review under the Executive Order 12372 process before submitting your federal assistance application to the federal funding agency.

* Organization Name

* Email Address

* Catalogue of Federal Domestic Assistance (CFDA)
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Procurement Standards

Learning Objectives
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• Raise awareness of the difference between contracts and financial assistance.
• Develop a greater understanding of the procurement standards.
• Identify common challenges with procurement.
Procurement Standards

A Few Words
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Procurement under the uniform guidance more closely follows language from prior OMB Circular A-102 (states) rather than A-110 (hospitals, nonprofits, universities).

A-102 was more restrictive than A-110.
A Few Words

Nonfederal entities had to adjust to the new standards.

Local policies and procedures must align with the new standards, and may require updates.

Challenges with procurement are among the top audit findings.
Learning Objective #1

Raise Awareness of the Difference Between Contracts and Financial Assistance
Definitions in the Uniform Guidance

• Contract.
• Cooperative Agreement.
• Grant Agreement.
• Subaward.
Contract (200.1)

• Within the context of financial assistance, a legal instrument by which a recipient or subrecipient nonfederal entity purchases property or services needed to carry out the program under the federal award.

• Contractor is an entity that receives a contract.
Cooperative Agreement (200.1)

• A legal instrument of financial assistance from a federal awarding agency (31 USC 6302-6305).

• Used to enter into a relationship to carry out a public purpose authorized by law (31 USC 6101(3)) and not to acquire property or services for the entity’s direct benefit or use.

• Requires substantial involvement between the awarding agency and recipient.
Grant Agreement (200.1)

• A legal instrument of financial assistance from a federal awarding agency (31 USC 6302, 6304).
• Used to enter into a relationship to carry out a public purpose authorized by law (31 USC 6101(3)) and not to acquire property or services for the entity’s direct benefit or use.
Subaward Agreement (200.1)

• A legal instrument of financial assistance provided by a pass-through entity to a subrecipient to carry our part of a federal award received by the pass-through entity.
Contracts and Financial Assistance Awards

• Share attributes, similarities.

• Sometimes difficult to distinguish between them:
  • Terms and conditions.
  • Subject to federal requirements.
  • Competitively awarded (although some grants and some contracts are noncompetitive).
  • Based on a solicitation and a review of selection criteria.
  • Offered to eligible applicants.
  • Awarded to responsible parties.
Contracts and Financial Assistance Awards

• Have differences that distinguish the instruments:
  • Contracts generally follow the FAR.
  • Financial assistance follows the uniform guidance.
  • Contracts deliver goods or services.
  • Financial assistance delivers mission, public good.
  • Contracts are not associated with a program statute.
  • Financial assistance originates from a program statute.
Key Attributes of Contracts

• No program statute.
• Buyer/seller relationship.
• Terms and deliverables.
• Consideration ($).
• Signatures/acceptance.
• Contracts serve as procurement agreements for purchases of goods and services within grants.
Applicability (200.101)

• Contracts awarded by federal agencies follow the Federal Acquisition Regulation (FAR).
• Financial assistance awarded by federal agencies follow the uniform guidance.

Contracts awarded within grants, however, could follow the FAR or the uniform guidance.
Applicability (200.101)

• The uniform guidance may apply to for-profits.
• For-profits usually receive contracts.
• For-profits are usually more familiar with the FAR.

* Award terms and conditions should reflect the applicable regulations. *
Applicability of Cost Principles

• Uniform guidance cost principles, Subpart E, 2 CFR 200.400s.
• FAR cost principles, could apply, 48 CFR 31.2.
• Hospital cost principals, 45 CFR 75

Award agreement should indicate which cost principles apply.
Learning Objective #2

Develop a greater understanding of the procurement standards.
Procurement in the Uniform Guidance

The procurement provisions are located in the post-award section of the uniform guidance, Subpart D, at 200.317-200.327.
Procurement by States (200.317)

• When procuring property or services with federal funds, states follow the same policies and procedures it uses with non-federal funds.
• States also follow 200.321, 200.322, 200.323, 200.327.
• All other non-federal entities follow 200.318-200.327.

*Procurement is heavily governed by state regulation.*
General Procurement Standards (200.318)

- Non-federal entity must have written procurement procedures consistent with state, local, tribal law, and the uniform guidance.
- Non-federal entity must maintain oversight.
- Non-federal entity must have written standards of conduct covering conflicts of interest with related parties, financial conflicts such as gratuities or favors, or organizational conflicts (affiliates).
General Procurement Standards (200.318)

• Non-federal entity must avoid unnecessary or duplicative items, and may consider economical options such as lease rather than purchase.

• Non-federal entity is encouraged to enter into state and local intergovernmental agreements for shared services for greater economy and efficiency.

• Non-federal entity is encouraged to use federal excess and surplus property when feasible.
General Procurement Standards (200.318)

• Non-federal entity is encouraged to use value engineering clauses for construction projects.

• Non-federal entity must award contracts only to responsible and qualified parties, with consideration to risk, integrity, compliance, past performance, resources and capacity, and suspension and debarment.
General Procurement Standards (200.318)

• Non-federal entity must maintain records to detail the history of procurement.
• Non-federal entity may use a time & materials contract only after determination that no other contract type is suitable, and the contract includes a ceiling price that the contractor would exceed at its own risk, to reduce open-ended contracts.
• Non-federal entity must be responsible to settle all claims and disputes that may arise.
Competition (200.319)

• All procurement transactions under a federal award must provide free and open competition.

• To eliminate unfair competitive advantage, contractors that develop specifications must be excluded from competing for the procurement.
Competition (200.319)

• Requirements that are considered unfair include:
  • Unreasonable requirements.
  • Requiring unnecessary experience.
  • Noncompetitive pricing practices between affiliated companies.
  • Noncompetitive contracts to consultants on retainers.
  • Organizational conflicts of interest.
  • Specifying brand name only.
  • Any arbitrary action.
• Non-federal entity must not impose local geographic preferences, except where federal statutes apply, or in architectural and engineering contracts as long as there is an adequate number of qualified firms.
LO2: Procurement Provisions

Competition (200.319)

• Written procedures for procurements must:
  • Ensure clear and accurate description of the requirements.
  • Identify all requirements.

• All pre-qualified lists of contractors must be current and include enough qualified sources to ensure free and open competition.
Methods of Procurement (200.320)

• Non-federal entity must have and use documented procurement procedures consistent with the uniform guidance, and following the identified methods of procurement.

• There are informal and formal methods.
Informal Methods (200.320(a))

• Informal methods of procurement include micro-purchase and small purchase, and are simpler procurement methods than formal procurements.
Informal Methods (200.320(a))

what's NEW
Micro-purchase (200.320 (a)(1))

- Micro-purchase threshold has increased from $3,500 to $10,000, consistent with the FAR.
- No required bid process or price quotes.
- Non-federal entity should distribute micro-purchases equitably among qualified suppliers.
- Purchase cards may be used if procedures are documented.
Micro-purchase (200.320 (a)(1))

• Non-federal entity is responsible to determine and document an appropriate micro-purchase threshold.
• Non-federal entity may establish a threshold higher than the federal threshold defined by the FAR ($10,000).
Micro-purchase (200.320 (a)(1))

- Non-federal entity may increase the micro-purchase threshold from $10,000 up to $50,000.
- Non-federal entity may self-certify on an annual basis and maintain documentation.
- Self-certification must contain a justification and documentation:
  - Low-risk auditee.
  - Annual internal institutional risk assessment.
  - For public institutions, must be consistent with state law.
Micro-purchase (200.320 (a)(1))

• Non-federal entity may increase the micro-purchase threshold over $50,000.
  • Must be approved by cognizant agency for indirect costs.
  • Increased threshold remains valid until there is a change in status affecting the approval.

APPROVED
Small Purchase (200.320 (a)(2))

• For procurements higher than micro-purchase threshold up to $250,000, currently the simplified acquisition threshold.

• No bid process.

• Adequate number of price quotes.

• A lower threshold may be used, when authorized and not prohibited by state, local, tribal laws.
Formal Methods (200.320 (b))

• Formal procurement methods include sealed bids and competitive bids.

• For procurements that exceed the simplified acquisition threshold, currently at $250,000.
Sealed Bids (200.320 (b)(1))

- Public solicitation for a firm, fixed-price contract.
- Lowest price.
- Preferred method for construction contracts.
- Specifications defined.
- Two or more bidders (adequate number).
- Selection based on price.
Competitive Bids (200.320 (b)(2))

• Public solicitation for a firm, fixed-price or a cost-reimbursement contract.
• Must be a written method for review and selection.
• Two or more bidders (adequate number).
• Selection based on most advantageous offer, with price and other factors (best value) considered.
• May be used with architectural and engineering contracts.
Non-Competitive Procurements (200.320 (c))

• May be used in specific circumstances.
• Non-competitive procurements may only be awarded when one of more of the following applies:
  • Does not exceed the micro-purchase threshold.
  • Item available only from a single source.
  • Public emergency will not permit a delay resulting from a bid process.
  • Federal agency or pass-through entity approves it.
  • A solicitation results in an inadequate number of bidders.
LO2: Procurement Provisions

Small, MBE/WBE, Labor Surplus (200.321)

• Must use when possible.

• Steps to take include:
  • Placing these types of firms on solicitation lists.
  • Assuring these types of firms are solicited, when possible.
  • Dividing larger requirements into smaller tasks to permit these types of firms to participate.
  • Establishing feasible delivery schedules.
  • Using services and assistance of SBA and MBDA.
  • Requiring prime contractors to consider these firms for subcontracts.
Domestic Preference (200.322)

- Must provide a preference for the purchase of goods or services produced in the United States.
- Produced in the United States means for iron and steel products, that all manufacturing processes occurred in the US.
- Manufactured products means items composed in whole or in part in certain defined materials.
Recovered Materials (200.323)

• State agencies or political subdivisions of states must comply with:
  • Section 6002 of the Solid Waste Disposal Act.
  • EPA guidelines at 40 CFR 247.
  • Items should contain recovered materials.
    • As much as practicable.
    • Satisfactory performance.
  • For items over $10,000.
Contract Cost and Price (200.324)

• For procurements over the simplified acquisition threshold ($250,000), must perform a cost and price analysis.
• Must negotiate price as a separate element.
• Cost estimates are allowable only to the extent that costs or estimates included in negotiated prices would be allowable under Subpart E.
• Cost-plus-percentage-of-cost and percentage-of-construction-costs methods must not be used.
Federal or Pass-Through Review (200.325)

- Review would determine if procurement system complies with standards.
- Review occurs under certain circumstances, including:
  - Federal or pass-through agencies requests the review.
  - Non-federal entities may request a review to confirm its procurement system meets standards.
  - Non-federal entity may self-certify.
Bonding Requirements (200.326)

- Construction contracts over $250,000.
- Federal or pass-through agencies may accept bonding policies of a non-federal entity, if federal interest is adequately protected.
- Different requirements:
  - Bid guarantee.
  - Performance bond.
  - Payment bond.
LO2: Procurement Provisions

Contract Provisions (200.327)

• Incorporate national policy requirements into contract agreement.

• Refer to Appendix II of the uniform guidance:
  • Drug-Free Workplace Act.
  • Buy American Act.
  • Debarment and suspension.
  • Others.
Identify common challenges with procurement.
What Are Some of the Challenges?

• Updating procurement policy and procedures.
• Hiring staff named in proposals.
• Sole source/noncompetitive procurements.
• Pre-award risk assessments.
• Cost principles.
• Contract types.
Written Procurement Policy and Procedures

• Nonfederal entities may need to update written procurement policy and procedures to align with the revised uniform guidance.
  • Incorporate new information.
  • Revise existing information, as needed.
  • Remove outdated information.
Individuals or Firms Named in Proposals

• Must be mindful of free and open competition when selecting contractual staff.
• Must be mindful of HR procedures when hiring for positions.
• Must be mindful of noncompetitive procurements without awarding agency approval.
• Must be mindful of consultants and firms on retainer.
Sole Source/Noncompetitive Procurements

- Recognize the allowable circumstances:
  - Micro-purchase threshold.
  - Public emergency.
  - Item available only from a single source.
  - Awarding agency approval.
  - Inadequate response to a bid.
Selecting Appropriate Contract Type

• Fixed-price.
• Cost reimbursement.
• Time & materials permissible, with identified ceiling to avoid open ended contracts.
• Cost plus fee when profit is treated separately.
• Cost-plus-percentage and percentage-of-construction-costs are prohibited.
Other Challenges

• Conflicts of interest.
• Suspension & debarment.
• Risk assessments.
• Responsible parties.
• Past performance.
• Stated deliverables.
Selecting Applicable Guidance

- Uniform guidance.
- FAR.
- Cost principles.
Procurement Standards

In Summary

• Contracts within grants are generally for procurement.
• Procurement standards are revised.
• Written procedures should be revised.
• Contract agreements should identify:
  • Contract type.
  • Applicability of FAR or uniform guidance.
  • Applicability of cost principles.
  • Method of procurement.
  • Deliverables.
Procurement Standards

Q & A
Friendly Disclaimer

Please be reminded:

This presentation is intended to provide general information and does not constitute legal or financial advice. Please consult with your legal and financial advisors. I hope, however, that the information helps provide some insights as you further pursue your work in the grants community.
Contact Information

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