

Chapter 13

Procurement

INTRODUCTION

This chapter provides guidance on the procurement of goods and services under the WtW program. It includes a discussion of the various methods available for procurement and the development of procurement policies and procedures, lists the required contract elements, provides guidance on the use of fixed-price contracts, and discusses additional requirements for WtW programs such as holdback clauses. Appendix F to this TAG provides guidance on distinguishing between subrecipients and vendors. This chapter contains the following sections:

- State and Other Governmental Grantees
- Nongovernmental Grantees and Subgrantees
- Required Contract Clauses
- Fixed-Price/Performance-Based Contracts
- Additional WtW Considerations.

What the Regulations Require

The WtW regulations at 645.230(a) apply the “Uniform Administration Requirements” to the management of grants. For States and other governmental grantees and subgrantees, these requirements are contained in 29 CFR Part 97. The provisions applicable to procurement of both goods and services under WtW programs are found at 97.36.

Similar requirements for procurement activity by nonprofit organizations, institutions of higher education, hospitals, and commercial organizations that receive grants and subgrants are found in 29 CFR Part 95. The specific provisions governing the procurement of goods and services are at 95.40-48.

Both parts provide rules governing procurement procedures, codes of conduct, cost and price analysis, agreement documents, and required clauses.

STATE AND OTHER GOVERNMENTAL GRANTEES

The requirements pertaining to the procurement of goods and services are listed in 29 CFR 97.36. States are required to follow the same policies and procedures they employ for procurements from non-Federal funds. In addition, they are required to ensure that all federally-required clauses are included in all purchase orders and other agreements. All other governmental grantees and subgrantees are required to follow the requirements of 97.36(b-i).

Procurement Policies and Procedures

As stated above, States are required to follow the same procedures as are followed for non-Federal procurements. Local governmental and Indian tribe grantees and subgrantees may follow their own policies and procedures *if* they reflect State and local laws and regulations and the procurements conform to the standards of 97.36(b-i). Grantees and subgrantees are required to maintain a system for the administration of contracts. In order to comply with these requirements, grantees/subgrantees should maintain written procedures that, at a minimum, address the following standards:

- Maintenance of a contract administration system that ensures contractors perform in accordance the requirements of any awards
- A written code of conduct for employees engaged in the award and administration of agreements. The grantee/subgrantee must also include the standards for conduct specified at 20 CFR 645.230(a)(4), which address conflict of interest provisions for local area grantee board members.
- Procedures that detail the requirement for a review of prospective procurements to avoid purchase of unnecessary or duplicate items, including analysis of lease vs. purchase
- A process that promotes the use of intergovernmental agreements for procurement or use of common goods and services, as well as the use of Federal excess and surplus property wherever possible
- A process to ensure that awards are made only to responsible contractors with the ability to perform successfully. The awarding agency may include standards such as integrity, compliance with public policy, past performance, and contractor resources (technical and financial).
- Documentation of the record requirements for award. These must include rationale for selection, selection of agreement type, selection or rejection criteria, and the basis for the contract price.
- Settlement process. Grantees and subgrantees are solely responsible for the settlement of all procurement actions, including those related to source evaluation,

protests, claims, and disputes. Violations of law must be referred to the appropriate Federal agency.

- Protest procedures to handle disputes related to both award and administration of contracts. Protest procedures must include available remedies, and the information related to protests must be disclosed to the awarding agency. Protestors must exhaust all administrative remedies before pursuing a protest with a Federal agency, and any protest to the Federal level must allege a violation of Federal law or regulation or of the governmental grantee's violation of its own protest procedures.

Written procedures will also assist grantees and subgrantees to meet the requirements for certification that are contained in 97.36(g)(3) related to awarding agency review of proposed procurement actions.

Procurement Methods

Section 29 CFR 97.36(c) specifies that all procurement actions are conducted in a manner that provides for "full and open competition". Within the context of open competition, there are four methods discussed in 97.36(d) by which agencies may procure goods or services. They are described in the following paragraphs.

Small Purchase. A relatively informal method used primarily to procure goods (supplies and equipment) not costing more than \$100,000 in the aggregate. If the small purchase procedures are used, price or rate comparisons from an adequate number of sources must be obtained. This method is appropriate only when price is the overriding factor and may be easily quoted and compared, delivery is standardized, and performance outcomes are not dependent upon the content of the goods being procured. While the Federal threshold for small purchase is currently \$100,000, the locally imposed threshold may be substantially smaller, and grantees/subgrantees must adhere to the lower threshold.

Example. The agency has a need for automobiles. It compares the prices at three different sources and makes a selection based on price. The total procurement is approximately \$31,000.

Sealed Bids. Under sealed bid procedures, bids are publicly solicited and the procurement is awarded to the lowest bidder, resulting in a fixed-price (either lump sum or unit price) contract. In order for this process to be feasible, three conditions must be met—a complete and realistic specification of required goods or services is available and part of the solicitation, there are at least two bidders, and the procurement may be made principally on the basis of price. A firm fixed-price contract may be awarded. This method is used if a larger number or more complex specifications require that all the specifications and acceptable variations be written in order to have a fair and open competition. The requirements for use of sealed bids are specific, as listed below:

- The invitation for bid (IFB) is publicly advertised and bids are solicited from an adequate (more than two) number of known suppliers.

- The IFB contains all pertinent specifications and defines the items or services to be procured in sufficient detail for a response.
- All bids are publicly opened.
- A firm fixed-price contract is awarded to the lowest and most responsive bidder.
- Any or all bids may be rejected if there is a documented reason.

Example. The organization is looking to procure computer hardware, including printers, and peripheral hardware needed for establishing a network. The exact specifications for the computer hardware, including numbers and required capacity, are contained in the IFB, published in the local newspaper, and sent to prospective suppliers. The award is a fixed-price contract to the lowest bidder.

Competitive Proposals. Competitive proposals are used when there is more than one prospective bidder, the lowest price is not necessarily the determining factor for award, and either a fixed-price or cost-reimbursement agreement will be awarded. The competitive proposal method also meets the standards for “full and open competition” and is appropriate when the agency seeking goods or services is looking for a variety of methods that may be employed to achieve the results called for in the Request for Proposal (RFP). Often, the evaluation factors will focus on approach, program design, innovation, coordination, and experience. The following requirements apply:

- RFPs are publicized. They must contain the specifications for the proposed goods or services and identify all the evaluation factors and their relative importance or weight in selection of successful bidders.
- Proposals are solicited from an adequate number of potential providers.
- A method for conducting technical evaluations of proposals and selection of awardees is in place.
- Awards are made to selected bidders whose proposals are most advantageous to the program based on price and the other evaluation factors.

Example. An RFP is issued for prospective providers of job readiness services to WtW participants. The RFP is published and the submitted proposals are reviewed for responsiveness to RFP specifications, proposed performance criteria, and costs. Awards may be made to more than one successful bidder and either fixed-price and cost-reimbursement contracts may be awarded, depending on the uniformity and predictability among individual providers and such factors as occupations, pay rates, number of training hours, etc.

Non-Competitive Proposals. This method is the solicitation of a proposal from a single source, or, after solicitation of a number (more than one) of sources, competition is determined inadequate to fulfill the requirements of the funding agency. If this method is used, the following requirements apply:

- The award is infeasible under one of the methods discussed above, *and* one of the following conditions apply:
 - The item is available from only one source,
 - Public emergency precludes delay (for example, a flood at the local day care center requires the immediate acquisition of additional services),
 - The awarding agency authorizes the specific non-competitive procurement (upon a formal request for approval), *or*
 - Competition is determined inadequate. This usually occurs after a competitive process has been used and there are insufficient bidders.
 - A cost analysis is required. This entails verification of the proposed cost data and evaluation of the specific elements of costs and profits. Profit must be separately negotiated in the award, and cost plus a percentage of cost agreements are not allowable.

Subgrantees may be required to submit the proposed non-competitive procurement to their awarding agency (i.e., the State for local area grantees, the competitive grantee, or the DOL for direct recipients) for approval.

Non-competitive procurements are allowable under part 97.36, but they are considered to be a “last resort” option and only used when there is a documented reason for sole source selection. Grantees should exercise caution when using non-competitive procurements and ensure that the competitive process is open and fair.

Example. A local area grantee solicits proposals for a specialized comprehensive community services program in a rural area, and only one bid is received. Rather than change the specifications and re-issue the RFP, the organization may enter into an agreement with the single bidder. Documentation to support the decision will be required, i.e., a cost analysis and a determination by the awarding agency that the proposal will meet a critical need for services in the community. If required by the awarding agency, such an agreement would have to be approved prior to execution.

NONGOVERNMENTAL GRANTEES AND SUBGRANTEES

Institutions of higher education, hospitals and other nonprofits, and commercial organizations that receive grants and subgrants under the WtW must follow the procurement standards of 29 CFR

Part 95. The procurement standards are found at 29 CFR 95.40-48. These standard are slightly different from the standards imposed on States and governmental grantees. The requirements for nongovernmental grantees are discussed in the following subsections.

Procurement Policies and Procedures

The standards to be employed under Part 95 are listed in 29 CFR 95.41-47. The standards are described as follows:

- # Each recipient/subrecipient must maintain written standards of conduct, including conflict of interest provisions and disciplinary actions for violations.

- # Each recipient must maintain a system that provides for open and full competition whenever practicable and possible. Awards should be made on the basis of the most responsive bid or offer and the one most advantageous to the recipient after consideration of price, quality, and any other factors contained in the solicitation.

- # Each recipient/subrecipient must establish written procurement procedures that provide for:
 - No purchases of unnecessary items
 - Analysis of lease vs. purchase options to determine the most “economical and practical” procurement.

- # All solicitations must provide for the following:
 - Clear and accurate descriptions of the goods or services being procured. The description must not contain features which restrict competition.
 - All requirements that must be fulfilled and all other factors used in evaluating bids or proposals
 - Technical requirements described in terms of functions to be performed or performance required, and including a range of acceptable or minimum acceptable standards
 - Specific features of “brand-name or equal” descriptions if included in the solicitation
 - If procuring goods or certain types of services, the acceptability of metric measurements

 - Preference for ecologically sound and energy efficient products.

Recipients are also responsible for the resolution of all contractual and administrative issues arising out of the procurements unless the issues concern violations of statute. Those matters are to be referred to the proper Federal, State, or local authority as may have jurisdiction.

In addition, recipient procurement practices should encourage the utilization of small businesses, minority-owned firms, and women's business enterprises whenever possible.

Procurement Methods

29 CFR Part 95 does not prescribe specific methods for procurement as does 29 CFR Part 97. The regulations do require that procurements be conducted in a manner designed to provide full and open competition. However, the four methods described earlier in this chapter are appropriate methods to procure both goods and services under the provisions of Part 95, with certain exceptions:

- # The small purchase threshold for Part 95 grantees and subgrantees is \$100,000. This also applies to subgrants or subawards made. [29 CFR 95.2(ii)] Grantees are again cautioned that the small purchase threshold applicable to their organization may be lower.

- # While there is no requirement for prior approval from the awarding agency for non-competitive procurements, any such procurements are always subject to review by the awarding agency. [29 CFR 95.44(e)]

REQUIRED CONTRACT CLAUSES

The type of agreement entered into by a grantee or subgrantee may be fixed price or cost reimbursement, depending on the method of procurement and goods or services being procured. Each agreement funded by WtW must contain the specific clauses referred to in 20 CFR 645.230(a)(3), 29 CFR 97.36(i), 29 CFR 95.48, and Part 95, Appendix A. They are listed below:

- For contracts or vouchers for job placement services, a provision requiring that a minimum of one-half of the payment occur after the participant has been in the workforce for six months. This provision only applies to placement in unsubsidized jobs.

- For all contracts in excess of the small purchase threshold, administrative, contractual, or legal remedies where contractors violate or breach contract terms. The clause must also provide for sanctions or penalties, as appropriate.

- Termination for cause and for convenience by the awarding agency, including the process for exercising the clause and any basis for settlement (applies to contracts in excess of \$10,000)

- Access to records by the awarding agency, the grantee, DOL, or the Comptroller General of the United States for the purposes of audit, examination, excerpts, and transcriptions (for other than small purchase transactions)

- Notice of awarding agency requirements and regulations related to reporting

- Notice of awarding agency requirements and/or regulations related to patent rights, copyrights, and rights in data
- Record retention requirements as specified in 29 CFR 97.42 or 95.53
- A provision requiring compliance with Equal Employment Opportunity provisions in Executive Order (E. O.) 11246, as amended by E. O. 11375 and supplemented by the requirements of 41 CFR Part 60. These are codified for DOL programs at 29 CFR 33 and 34.
- Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) (all contracts in excess of \$2,500 that involve employment of mechanics or laborers).
- Compliance with the applicable standards, orders, or requirements issued under Section 306 of the Clean Air Act, Section 508 of the Clean Water Act, E. O. 11738, and Environmental Protection Agency regulations (40 CFR part 15) (applies to contracts, subcontracts, and subgrants in excess of \$100,000).
- Mandatory standards and policies related to energy efficiency, which are contained in the state energy conservation plan issued in compliance with the Energy Policy Conservation Act (Public Law 94-163)
- A provision requiring compliance with the Byrd Anti-Lobbying Amendment (31 U.S.C. 1352). This requirement is also found in 29 CFR Part 93.
- A provision requiring compliance with the debarment and suspension requirements (E.O. 12549 and 12689). This requirement is also found in 29 CFR Part 98.

Grantees and subgrantees must also use the contract provisions to include other requirements of the WtW program. These include provisions related to the following:

- Applicability of WtW regulations
- Audit requirements of 29 CFR Part 96 and Part 99.

FIXED-PRICE/PERFORMANCE-BASED CONTRACTS

There are a number of issues surrounding the use of fixed-price/performance-based contracts (FP/PBCs) that may impact their suitability as agreements under the WtW program. The following discussion is intended to provide guidance to grantees and subgrantees on the appropriate use of and accounting for these types of agreements.

FP/PBCs are structured so that payments are earned only with delivery of the agreed, precisely-defined, measurable outcome(s). Under FP/PBCs there is no obligation to pay the awardee unless satisfactory delivery is achieved, unlike cost reimbursement contracts. The cost reimbursement agreements contain line item budgets and base their cost claims on “best efforts” to attain the intended results. The attraction of FP/PBCs stems not only from this no-results/no-payment feature, but also from the fact that risk, responsibility, and approach are primarily the burden of the contractor, thereby lessening the amount of required grantor oversight. Efficient, effective delivery would be expected to enhance the margin of earnings in excess of the awardee’s costs, while poor performance could mean the awardee would experience a significant financial loss.

WTW and its regulations are silent on the topic of performance contracting. However, the procurement requirements of 29 CFR Parts 95 and 97 require that

- For costs to be allowable, they be reasonable and necessary
- Procurements be competitive (and that qualifying exceptions to full and open competition be justified) and not reflect conflict of interest
- Documentation of the procurement process include bases for source selection and pricing.

In addition, costs incurred under WTW are required to be allocated among the specified WTW cost categories in accordance with benefits received. Equitable assignment of costs among benefitting cost categories has historically been a challenge for most fixed-price agreements.

One solution to the problems of how to ensure reasonable pricing and proper allocation of costs among the cost categories for FP/PBCs would require the following:

- Thorough cost/price analysis in accordance with Parts 95 and 97. Such analysis would be done from a line item budget provided by the offeror that (a) reflected resource inputs distributed among cost categories, and (b) resulted in a reasonable cost/price analysis conclusion by the grantor, including the assignment of resource inputs to proper cost categories.
- This cost/price analysis would be documented and subject to review.
- The offeror would have certified in writing that its cost and pricing data were accurate, complete, and current to the best of its knowledge at the time of submission.

Costs incurred under such an agreement would then be allocated among the benefitting cost categories based on the ratios established in the cost/price analysis. As stated, this is a proper solution to the problems associated with allocating costs. There may be other solutions available to the grantee; however, caution must be exercised to ensure adherence to the procurement requirements of Parts 95 and 97 as well as the cost principles contained in the appropriate OMB circulars.

FP/PBCs for the purchase of training services are vulnerable to several kinds of problems. Grantor agencies that choose to use this form of agreement should be alert to avoid some of the more common hazards:

Benchmarks. To moderate what otherwise might be an unacceptably high risk potential faced by FP/PBC awardees, these contracts are frequently structured to provide separate payment points, each compensating for some documented unit or increment of progress toward achievement of the ultimate contract objective. The dollar value assigned to each of these payment points should ensure that the contractor cannot recoup its costs before the final objective is achieved. Furthermore, the work should be benchmarked so that sufficient funds are held back to encourage full performance, including adherence to the holdback clause provision. The performance being rewarded should focus on the participant's achievement. Thus, the process of enrolling a participant should not be identified as an incremental payment point if enrollment is primarily an achievement of the contractor, not the participant. Finally, it should be recognized that fragmenting the units of delivery into smaller and smaller increments diminishes the risk which is presumed to exist when pricing this form of agreement.

Example. Successfully reaching mid-point of a training course (documented by mid-term grades) is defined in the contract as a partial or incremental payment point; with completion of the training defined as another incremental payment point, and training-related placement, still another. Additional compensation is sometimes paid for placements into jobs paying wage rates above prescribed levels. In this example, the benchmarks are structured to reward achievement by the participant. In addition, the provisions related to hold-back clauses would apply.

Umbrella Contracts. Similar performance can frequently be attained from very different levels of effort or forms of program intervention. Recognition of this possibility should result in clearly listing and separately pricing performance outcomes attributable to different methods of delivery. When an agreement structures delivery under such an umbrella of opportunities, it is imperative that each kind of intervention be separately recognized and separately priced.

Example. An agency compensates all placements at a fixed amount (\$800 each). The agency should be prepared to receive varying results if it has written an "umbrella" contract that permits placements to result from different program activities. If the contract includes OJT, job search assistance (JSA), customized maturity skills/pre-vocational class-size training, and post-secondary individual

referral slotting into vocational training, and each of these activities could result in placement of individuals enrolled in them, then the structuring of delivery in this manner encourages primarily the short-term, low-cost forms of intervention. So, while the grantor agency might think it had priced delivery to reflect success from a balanced mix of activities, the inducement for the contractor seeking to maximize profit would be to overload enrollment in the two-week JSA course in order to ensure the lowest cost-per-placement possible.

Example. If provision of supportive services had been part of the mix in the above example, there may be additional consequences. Supportive service needs are unique for each individual participant, and the extent of their needs is difficult to forecast. Therefore, it would be a mistake to attempt to predict and build into the \$800-per-placement rate an average supportive service cost per participant served. The inducement generated by such an action would be for the contractor to avoid enrolling anyone who might be expected to need supportive services. So, instead, the grantor should provide a separate pool of funds to cover estimated supportive services needs, available on a cost reimbursement basis only. Similar analysis for employer costs of providing OJT leads to a similar conclusion, that because the number of OJT opportunities, kinds of jobs, and rates of pay cannot be forecast, only the cost reimbursement form of compensation should be provided for recoupment of employer OJT costs.

Control of the Applicant Pool. Performance-based contracts should entail sufficient risk to justify performance as the basis for compensation. Efforts to include reasonable performance risk in the contract can be nullified if the contractor is permitted to end-run the risks by recruiting and enrolling the most job-ready among the eligible population. Therefore, it is essential to include as part of the contract a profile of the kinds of individual educational, skill, and experience *deficiencies* that the grantor agency seeks to target and overcome in order to ensure delivery of real added value benefit. (Notice that profiling applicant deficiencies as a guide to enrollment selection is different from profiling demographic characteristics.)

Example. An agency enters into a fixed-price contract to provide job readiness activities. As part of the contract, the agency specifies that participants must meet the eligibility requirements of 20 CFR 645.212. In this way, the agency has assured that the hard-to-employ participants will be receiving the specified services.

Causation. FP/PBCs can foster innovative delivery approaches and significant cost savings. However, care must be taken to ensure the likelihood that the activities being paid for are principally responsible for the delivery sought.

Example. An agency contracted for weekly delivery of not fewer than five bona fide job vacancies suitable for participants completing the training program. After paying for delivery over several months, the grantor began to notice a coincidence between what it was buying and Want Ads in local Sunday newspapers. In fact,

it was paying premium prices for information otherwise available in the public domain. The resources the grantor had thought would be necessary for this project were not, in fact, meaningfully involved in causing delivery under the FP/PBC.

- # **Third-Tier Delivery.** The core of work identified for delivery under performance contracts should be consistent with participant objectives intended to be achieved and compensated under the award. It is desirable that the core of the work be delivered directly by the awardee rather than permitting the awardee to broker the work through subagreements with other agencies (brokering OJT with employers is an exception). Additionally, if multiple tiers are enlisted, and each sub-tier absorbs resources, fund availability may be so depleted at the level where the core activity is actually provided that only short-term training intervention would be possible.

Example. An agency enters into an agreement to provide JSA and placement to participants. The subgrantee then enters into a number of subagreements for placements. The agreements are structured so that payments are made only for completion of the primary activity, i.e., JSA and placement in unsubsidized employment. The agreements are subject to the holdback clause provision.

For-profit enterprises are entitled to retain earnings above costs attributable to their FP/PBCs. Profits should be allocated among the costs categories in proportion to the allocation of costs among the cost categories. For governmental and nonprofit agencies, however, earnings above costs are regarded as program income subject to reprogramming or remittance as provided by 29 CFR 95.24 or 29 CFR 97.25. Consequently, a provision is often included in FP/PBCs for limiting recovery of costs to the lesser of actual costs incurred, or the cumulative increments earned for less than full performance.

Auditing of FP/PBCs focuses on verification that the delivery for which costs were claimed and paid was sufficiently documented to justify its compensation, i.e., documentation of participant achievement is the primary object of verification.

ADDITIONAL WtW CONSIDERATIONS

Program Activities

The Act and the regulations specify that the program activities of job readiness services and employment activities be provided either through vouchers issued to WtW participants or through contracts with public or private service providers. The acquisition of these services and contractual documents should adhere to the program operator's procurement requirements and include the contract clauses listed in this chapter and the appropriate regulatory requirements.

Holdback Clauses

The WtW program has specific criteria related to payment made for job placement services of participants. The requirement is found in 20 CFR 645.230(a)(3) and requires that agreements with service providers contain a holdback clause. The clause must require that no less than one-half of the payment made for unsubsidized employment on behalf of a participant be withheld until the participant has been in the workforce for six months following placement. This requirement also applies to payments made through a voucher.

Example. The local area grantee has a contract for job placement services with a nonprofit community-based agency that also provides training services. The contract calls for a unit payment of \$400 per participant for unsubsidized job placement. The payment provision would require that \$200 of each payment be held until the participant had been in the workforce for six months, at which time the payment(s) would be released to the community organization.

Subrecipients and Vendors

Appendix F to this TAG provides the distinguishing characteristics of subrecipients and vendors and a side-by-side comparison of characteristics to aid grantees/subgrantees to make the appropriate designation of subrecipients and vendors.