Ohio Department of Transportation
Office of Transit
FTA Procurement Procedures
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Presented by:
Rich Garrity, Senior Associate

Background

♦ ODOT Was Subject to an FTA Procurement Systems Review in 2014
♦ Final Report Issued September 2014

Background

♦ Issues
  ○ Sound and Complete Agreements
    ▪ Lack of Definition in Term of Contract
    ▪ Wrong Use of Procurement Terms
    ▪ Improper Termination Clauses
    ▪ Lack of Referenced Attachments
  ○ Adequate Competition
    ▪ Lack of Competition
    ▪ Lack of Documentation
  ○ Organizational Conflicts of Interests
  ○ Independent Cost Estimates
  ○ Award to Responsible Contractors

Background

♦ ODOT Committed, as One of the Remedial Actions, to Provide Training to Subrecipients
- **Issues**
  - Solicitation from an Adequate Number of Sources
    - Inadequate Documentation
  - Public Bid Openings
    - Lack of Protocols/Procedures
    - Lack of Documentation

- **Issues**
  - Evaluation Factors Used in Award
    - Failure to Define Role of Price vis-à-vis Other Factors
    - Lack of Details in Documenting Price Evaluation
  - Cost or Price Analysis
    - Failure to Conduct a Cost or Price Analysis for Every Procurement (over Micro-Purchase Threshold)

- **Issues**
  - Third Party Contracting Capacity
    - Lack of Written History
  - Exercise of Options
    - Failure to Evaluate Price
  - Piggybacking
    - Fair and Reasonable Determinations

- **Issues**
  - Price Negotiations Under Brooks Act Covered Procurements
    - Failure to Document Negotiation
  - Clauses
    - Really Redundant with Third Party Contracting Capacity Finding
      - Lack of Correct Clauses in Agreements
Session Coverage

1. Overview of Applicable Standards
2. General Grantee Responsibilities
3. General Procurement Guidelines
4. Methods of Procurement
5. Competition, Evaluation, and Award of Contracts
6. Protests and Disputes
7. State Contracts, Joint Procurements, Piggybacking

Module 1

OVERVIEW/APPLICABILITY OF FEDERAL STANDARDS

Relevant Documents

- FTA Circular 9040.1G, “Nonurbanized Area Formula Grant Program”
- FTA Circular 4220.1F, “Third Party Contracting Requirements”
- 2 CFR part 200.300 (the “Super Circular”)
  - Replaces the “Common Rule”
    - 49 CFR part 18
    - 49 CFR part 19
- FTA’s Best Practices Procurement Manual (BPPM)

Relevant Documents

- ODOT Procedure No. ADM-9
- Chapter VII, Rural Transit Manual
Applicability

♦ States
  ○ States Follow Their Own Procedures for Acquisition of Goods and Services
  ○ Subrecipients of the State
    • Public Entities – Permitted to Follow State Procedures
      - ODOT Requires Compliance with Federal Requirements Unless Local Procedures are More Strict
    • Nonprofit Entities – Must Follow Common Rule and Provisions of the FTA Circular

♦ States/Governmental Subrecipients
  ○ Must Meet Some Federal Requirements
    • Contract Term Limitations for Revenue Vehicle Purchases
    • Competition
    • Prohibitions Against Geographic Preferences
    • Brooks Act for A/E Services
    • Awards to Responsible Contractors

Applicability

♦ Joint Funded Projects
  ○ When a Grantee Uses Both FTA Funding and Funding from Another Federal Program, All Applicable FTA Provisions as Well as the Third Party Contracting Requirements of the Other Funding Source

Coverage

♦ Purchase, Lease, or Acquisition of Property, Supplies, Equipment, or Services Financed in Whole or in Part by an FTA Grant
Conflicts

♦ Conflicts Between Federal and State Procurement Regulations
  ○ Recipients and Subrecipients Will Use Their Own Procurement Procedures That Comply with Applicable State and Local Laws and Regulations
  ○ Must Also Comply with Applicable Federal Laws and Regulations
  ○ Conflicts – Must Notify ODOT/FTA

Overview

♦ Written Standards of Conduct
♦ Technical Capacity

Written Standards Of Conduct

♦ Every Grantee Must Maintain Written Standards of Conduct
  ○ Applies to Officers, Employees, Agents, Board Members, or by Contractors or Subrecipients or Their Agents, Immediate Family Members
  ○ Personal Conflicts of Interest
  ○ Gifts
  ○ Violations
Technical Capacity

♦ General Requirement
  ● Grantees Must Undertake Its Procurements Effectively and Efficiently in Compliance with Applicable Federal, State, and Local Requirements

Technical Capacity – Specific Requirements

♦ Written Procurement Procedures
  ● Solicitations
    ▪ Clear Descriptions
    ▪ Nonrestrictive Specifications
    ▪ Quality Requirements
    ▪ Performance Specifications
    ▪ Brand Name or Equal

♦ Written Procurement Procedures
  ● Necessity
  ● Lease vs. Purchase
  ● Metric Usage
  ● Environmental and Energy Efficiency Preferences

Technical Capacity – Specific Requirements

♦ Inclusion of All Third Party Contract Provisions in Lower Tier Contracts
♦ Caution Regarding Industry Contracts
Technical Capacity – Specific Requirements

- Written Procurement History
  - Method
  - Contract Type
  - Contractor Selection
  - Cost/Price Analysis
  - Documentation
- Access To Records

Technical Capacity – Specific Requirements

- Electronic Commerce
  - Permissible, With Stipulations

Other Requirements

- Procurement Methods Employed
- Legal Restrictions
- Sources
- Resolution of Issues

Module 3

GENERAL GUIDELINES
General Requirements

♦ Must Be Eligible Under FTA Guidelines
♦ Must Be Necessary
  ○ Avoid Acquisition of Unnecessary Items
    • Unnecessary Reserves
    • Purchase for Assignment Purposes
      • Does Not Preclude Joint Procurement
      • Recipient May Contract Only For Its Current and Reasonably Expected Public Transportation Needs

General Requirements

♦ Economical Purchase
  ○ Joint Procurements
  ○ Consideration of Breaking Purchases Into Smaller Procurements
    • Economy
    • Create Opportunities for DBEs

General Requirements

♦ Options
  ○ An Option Is a Unilateral Right in a Contract By Which, For a Specified Time, a Recipient May Acquire Additional Equipment, Supplies, or Services Than Originally Procured

General Requirements

♦ Lease vs. Purchase
  ○ To Obtain the Best Value, the Recipient Should Review Lease Versus Purchase Alternatives for Acquiring Property and, if Necessary, Should Obtain an Analysis to Determine the More Economical Alternative
  ○ Specific FTA Regulations Governing Lease
    • 49 CFR part 639
♦ Specifications Should Not Be:
  ○ Exclusionary
  ○ Discriminatory
  ○ Unreasonably Restrictive
  ○ In Violation of Federal Laws or Regulations

♦ Award to Responsible Vendors
  ○ Contractors Capable of Successfully Performing Under the Terms and Conditions of the Proposed Contract
  ○ Contractor Integrity
  ○ Compliance with Public Policy
  ○ Record of Past Performance
  ○ Financial Resources
  ○ Technical Resources

♦ Debarment
  ○ Applicable to All Awards in Excess of $25,000
  ○ Cannot Award to Debarred Contractors

♦ Excluded Parties
  ○ GSA Listing
  ○ Cannot Award to Excluded Parties

♦ Organizational Conflicts of Interest
  ○ Lack of Impartiality
  ○ Impaired Objectivity
  ○ Unfair Competitive Advantage
General Requirements

♦ Establishing Periods of Performance
  ○ Must Be Reasonable
  ○ Consistent with Federal Limitations
    • Five Years on Rolling Stock/Replacement Parts
  ○ Time Extensions
    • "Cardinal" Changes Require Sole Source Justification

♦ Advance Payments
  ○ Not Permitted Under FTA Programs Without Prior Written Concurrence
  ○ A Grantee May Use Local Funds for Advance Payments
    • Local Fund Payments Made Before a Grant Award or a Letter of No Prejudice (or Other Pre-Award Authority) Are Ineligible

♦ Progress Payments
  ○ Periodic Payments to Contractors May Be Made for Costs Incurred in the Performance of the Contract
  ○ Title to Project Property or Alternative Security Arrangement Must Be In Place to Protect the Grantee's Interest

♦ Protection Against Performance Difficulties
  ○ Change Orders
  ○ Remedies
    • Liquidation Damages
    • Violations or Breaches
    • Suspension of Work
    • Termination
General Requirements

♦ Socio-Economic Requirements
  ○ Labor
    • Wage and Hour Requirements
    • Fair Labor Standards
  ○ Civil Rights
  ○ Environmental Protections
  ○ Energy Conservations
  ○ Buy America

♦ Some Technical Restrictions
  ○ Intelligent Transportation Systems (ITS)
    • Must Conform to National ITS Architecture Standards
  ○ Metric Measurements
  ○ $1 Coinage

♦ Rolling Stock
  ○ Accessibility
  ○ Manufacturer DBE
  ○ Minimum Service Life
  ○ Spare Ratio Standards
  ○ Pre-Award/Post Delivery Reviews
  ○ Bus Testing

♦ Architectural/Engineering Services
  ○ Qualifications Based Procurement (Brooks Act)
  ○ Limited to Program Management, Construction Management, Feasibility Studies, Preliminary Engineering, Design, Architectural, Engineering, Surveying, Mapping, or Related Services
  ♦ FTA Does Not Permit this Method of Procurement for Other Professional Services
General Requirements

♦ Construction
  ○ Bid Guarantee – Five (5%) of Bid Price
  ○ Performance Bond – 100% of Contract Price
  ○ Payment Bond
  ○ Other Requirements

Methods of Procurement

Overview

♦ Procurement Types
  ○ Special
    • Shared Use
    • Joint Procurements
    • State/Local Purchasing Schedules (State Contract)
    • Federal Excess/Surplus Property
  ○ Open Market Procurements

Special Procurement Types

♦ Shared Use
  ○ Procurements Where Equipment, Property or Good Is Shared Among Transit and Other Governmental Uses
  ○ FTA/ODOT Must Determine Pro Rata Share for Establishing Level of Federal Participation
    • Must Be Done Before Commencement of the Project
Special Procurement Types

- Joint Procurements
  - Procurements Where Equipment, Property, or Good is Procured by Two or More Entities

- Assignment
  - Entity Specifies Quantities Above That Needed by the Grantee/Subrecipient for the Sole Purpose of Assigning Purchasing Rights to Another Entity
  - Sometimes Referred to as “Piggy-Backing”
  - All FTA Requirements Apply

Special Procurement Types

- State Local Purchasing Contracts
  - A Widely Used Practice in the Section 5311 Programs
  - ODOT Acquisition of Vehicles on State Purchasing Schedules

Special Procurement Types

- Excess Property
  - FTA Encourages Recipients to Use Federal Excess and Surplus Property Managed by the GSA When Permitted

Special Procurement Types

- Precluded Actions
  - Improper Contract Expansions
    - Expanding Scope, Ordering Greater Quantities, or Negotiating Options Outside Those Needed by the Grantee/Subrecipient
    - Establishing Additional Quantities Primarily to Permit Assignment of Those Contract Rights to Another Entity
**Special Procurement Types**

♦ Precluded Actions
  ○ Cardinal Changes
    • A Significant Change in Contract Work (Property or Services)
    • Major Deviation from the Original Purpose of the Work
    • Methods of Achievement of the Work Scope
    • Causes a Revision of Contract Work So Extensive, Significant, or Cumulative That, In Effect, the Contractor Is Required to Perform Very Different Work from That Described in the Original Contract

**General Principles**

♦ Full and Open Competition
  ○ Actions Not Consistent with Full and Open Competition
    • Excessive Qualifications
    • Unnecessary Experience
    • Improper Pre-Qualifications
    • Retainer Contracts
    • Excessive Bonding
    • Brand Name Only Specifications
    • Geographic Preferences
    • Organizational Conflicts of Interest

♦ Disclosure of Evaluation Factors
  ○ Regardless of Procurement Type, the Purchaser Has the Obligation to Disclose the Factors on Which the Purchase Decision Will Be Made
Contract Types

- Two Common Types
  - Fixed Price
  - Cost Reimbursement
- Prohibited Types
  - Cost Plus a Percentage of Cost
- Restricted Types
  - Time and Materials

Open Market Procurements

- Micro Purchases
- Small Purchases
- Sealed Bids
- Competitive Proposals
- Two-Step
- A/E Services (Brooks Act)

Micro Purchases

- Those Purchases Which Do Not Exceed $3,000 (Federal Threshold)
- Purchases Below That Threshold May Be Made Without Obtaining Competitive Quotations if the Grantee Determines That the Price Is Fair and Reasonable and This Practice Is Permitted By State and Local Laws

Micro Purchases

- Exempt from Buy America
- Davis-Bacon Prevailing Wage Requirements, However, Apply to Construction Contracts Exceeding $2,000, Even Though the Recipient Uses Micro-Purchase Procurement Procedures
Micro Purchases

♦ Other Factors
  ○ Distribute Micro Purchases Among Qualified Suppliers
  ○ Division or Break-Down of Purchases to Meet Micro Purchase Thresholds Not Permitted
  ○ Maintain Documentation That Price Is Fair and Reasonable and How That Determination Was Reached

Small Purchases

♦ Designed to Provide Relatively Simple Procedures for Small Purchases (Under $150,000 – Federal Threshold)
  ♦ Exempt from Buy America
    ○ Note:
      • Federal Small Purchase Threshold Has Risen to $150,000 on December 26, 2014
      • FTA Says Continue to Use $100,000 as Buy America Threshold

Small Purchases

♦ Most Entities Have Much Lower Thresholds
♦ Must Follow Local or State Thresholds
♦ Ohio
  ○ Formal Purchase Threshold: $25,000

Small Purchases

♦ Procedures
  ○ The Grantee Must Obtain Price or Rate Quotations from an Adequate Number of Qualified Sources
  ♦ Division or Break-Down of Purchases to Meet Small Purchase Thresholds Not Permitted
Sealed Bids

♦ Bids Are Publicly Solicited, and a Firm Fixed Price Contract (Lump Sum Or Unit Price) Is Awarded to the Responsible Bidder Whose Bid, Conforming to All the Material Terms and Conditions, Is Lowest in Price

Sealed Bids

♦ Appropriate Uses of Sealed Bid Method
  ◦ A Complete, Adequate, and Realistic Specification or Purchase Description Is Available
  ◦ Two or More Responsible Bidders Are Willing and Able to Compete Effectively for the Business

Sealed Bids

♦ Appropriate Uses of Sealed Bid Method
  ◦ The Procurement Lends Itself to a Firm, Fixed Price Contract and the Selection of the Successful Bidder Can Be Made Principally on the Basis of Price
  ◦ No Discussion with Bidders Is Needed (Does Not Preclude Pre-Bid Meeting)

Sealed Bids

♦ Methods
  ◦ The IFB Must Be Publicly Advertised and Bids
  ◦ Must Be Solicited from an Adequate Number of Known Suppliers
  ◦ Adequate Specification (Detailed)
    • The IFB Must Define the Items or Services Sought in Order for the Bidder to Properly Respond
  ◦ Sufficient Time Allowed to Prepare Bids Prior to the Date Set for Opening the Bids
  ◦ Public Opening
Sealed Bids

♦ Methods
  ○ Public Opening
    • Time, Place Should Be Included in Advertisement, Solicitation Documents (IFB)
    • Document Attendees, Bids Received by Firm, Bid Price
    • Use a Bid Tabulation Sheet

♦ Methods
  ○ Concurrence
    • ODOT Requires Three Approvals
    • Subrecipients Jeopardize Federal Participation Without the Required Approvals

Sealed Bids

♦ Contract Type
  ○ A Firm Fixed Price Contract Is Usually Awarded In Writing to the Lowest Responsive and Responsible Bidder
    • Must Be Specified in the Bidding Documents
    • Factors Such as Transportation Costs and Life Cycle Costs Affect the Determination of the Lowest Bid

Competitive Proposals

♦ Appropriate Uses of Competitive Proposals
  ○ The Nature of the Procurement Does Not Lend Itself to Sealed Bidding
  ○ Grantee Expects That More Than One Source Will Be Willing and Able to Submit an Offer or Proposal
  ○ The Need for Discussions With Prospective Offerors Is Anticipated
  ○ The Basis for Contract Award Is on Factors Other Than Price
  ○ Uncertain Number of Sources
Competitive Proposals

- Methods
  - The Request for Proposals is Publicly Advertised
    - Depending Upon Available Suppliers, Be Prepared to Broaden Your Notification/Advertisement Procedures
    - Including Urbanized Area Newspapers
    - Passenger Transport
  - All Evaluation Factors and Their Relative Importance Are Specified in the Solicitation
    - Numerical or Percentage Ratings or Weights Need Not Be Disclosed

- Methods
  - Proposals Are Solicited from an Adequate Number of Qualified Sources
  - A Specific Method Is Established and Used to Conduct Technical Evaluations of the Proposals to Determine the Most Qualified Offeror
  - An Award Is Made to the Responsible Offeror Whose Proposal Is Most Advantageous to the Grantee
    - Price and Other Factors Considered

- Methods
  - Award to the Offeror Whose Proposal Provides the Greatest Value to the Grantee
    - Document HOW You Determined This!
  - The Grantee’s Solicitation Must Inform Potential Offerors That the Award Will Be Made On A “Best Value” Basis And Identify What Factors Will Form the Basis For Award

- Methods
  - The Evaluation Factors for a Specific Procurement Should Reflect the Subject Matter and the Elements That Are Most Important to the Grantee
  - Examples:
    - Technical Design
    - Technical Approach
    - Length of Delivery Schedules
    - Quality of Proposed Personnel
    - Past Performance
    - Management Plan
Two-Step Procurements

♦ Applicable to Both Sealed Bids and Competitive Negotiations
  ○ Step 1 – Review of the Technical Qualifications
  ○ Step 2 – Review of Bids or Proposals of Offerors Deemed Most Qualified

A/E Services

♦ Special Qualifications-Based Process (Brooks Act)
♦ Can Be Used Only for Procurements of
  ○ A&E Services
  ○ Program Management
  ○ Construction Management
  ○ Feasibility Studies
  ○ Preliminary Engineering
  ○ Surveying, Mapping, and Related Services

A/E Services

♦ FTA Regulations Prohibit the Use of a Qualifications-Based Approach for Other Types of Services
♦ Only the Construction Related Items Can Be Procured in this Manner

A/E Services

♦ Methods
  ○ Qualifications Only are Used to Determine the Top Ranked Offeror
  ○ Price Is NOT a Factor In this Evaluation
  ○ Negotiations Are First Conducted With Only the Most Qualified Offeror
  ○ Only After Failing to Agree on a Fair and Reasonable Price May Negotiations Be Conducted With the Next Most Qualified Offeror, Etc.
A/E Services

♦ Possible Exceptions
  ○ If a State Has Adopted Qualifications-Based Selection Procedures Prior to August 10, 2005, then Brooks Act Procedures Do Not Apply

♦ Confidentiality of Cost Data
  ○ Grantee Must Keep Cost Data Confidential Even in the Face of a State Law Prohibits Such Action
  ○ The Confidentiality Requirements of 49 U.S.C. 5325(b)(3)(D) Cannot Be Waived, Even if They Conflict with State Law or Regulations

Procurement Issues

♦ Procurements With Less Than Full and Open Competition
  ○ Allowable Only When Other Types of Procurement Are Deemed Inappropriate
  ○ Item Available from a Sole Source
    • Unique Concept
    • Patents or Restricted Data Rights
    • Substantial Duplication Costs
    • Unacceptable Delay

♦ Note: Associated Capital Maintenance Items Are No Longer Considered Sole Source Items
  ○ Competition Required

Module 5
COMPETITION, EVALUATION, AND AWARD OF CONTRACTS
Procurement Issues

♦ Procurements With Less Than Full and Open Competition
  ○ Single Bid or Proposal
    • Grantee Receives Only One Response
    • Requires Grantee Action
      - Documentation of Market Conditions Beyond the Control of the Grantee
      - Review of Specifications (Restrictiveness)

♦ Procurements With Less Than Full and Open Competition
  ○ Unusual and Compelling Emergency

Cost and Price Analysis

♦ The Common Grant Rules Require the Grantee to Perform a Cost or Price Analysis in Connection with Every Procurement Action, Including Contract Modifications

♦ Cost Analysis
  ○ Required When
    • When an Offeror Submits Cost Elements Such as Labor, Overhead, Materials, etc. of the Estimated Cost (Typical of Professional Consulting and A&E Contracts)
    • When Price Competition Is Inadequate
    • When Only a Sole Source Is Available
    • In the Event of a Change Order
  ○ Not Necessary if Grantee Can Justify Price Reasonableness Based on a Catalog or Market Price of a Commercial Product Sold in Substantial Quantities to the General Public or Based on Prices Set By Law or Regulation
Cost and Price Analysis

♦ Cost Analysis – Techniques
  ○ Assess Cost Allowability
  ○ Examine Approved Federal Overhead Rate
    • Contracts Less Than $5 Million
      • Accept Rates
    • Contracts Over $5 Million
      • Contractor Must Have Defense Contract Audit Agency, Another Federal cognizant Audit Agency, or an Accounting Firm Approved By the Federal Government to Perform Audits For the Federal Government, Must Verify the Contractor’s Rates

♦ Price Analysis
  ○ Acceptable When Competition Is Deemed Adequate
  ○ Scalable – Minimal Effort Required for Micro or Small Purchases
  ○ Based on Catalog Prices, Market Price Documentation, Recent Procurement Results

♦ Cost Analysis – Techniques
  ○ Profit – Negotiated on All Contracts Without Competition or All Contracts that Require a Cost Analysis
    • Complexity of the Contract
    • Risk Undertaken by the Contractor
    • Contractor’s Investment
    • Amount of Subcontracting
    • Industry Rates

♦ Help on Conducting Cost or Price Analyses
  ○ FTA’s Best Practices Procurement Manual (Chapter 5)
Evaluation of Bids/Proposals

♦ Must Consider All Factors Listed in Bid Documents
♦ Must Consider Only Listed Factors
♦ Grantees Cannot Change Factors After Opening of Solicitations
♦ Suggested Use of Experienced Evaluators with Knowledge of Goods/Services Being Procured or Auditors/Financial Experts

Award of Contracts

♦ Contracts Can Only Be Awarded to Responsible Bidders or Offerors
  ○ Contractors Possessing the Ability, Willingness, and Integrity to Perform Successfully Under the Terms and Conditions of the Contract
  ○ Responsibility Is a Procurement Issue That Is Determined By the Recipient After Receiving Bids or Proposals and Before Making Contract Award

Award of Contracts

♦ Contractor Responsibility
  ○ Meets Ethics and Integrity Standards
  ○ Is Not Debarred or Suspended
  ○ In Compliance with Civil Rights and DBE Requirements
  ○ In Compliance with Public Policy Requirements

Award of Contracts

♦ Contractor Responsibility
  ○ Possesses the Administrative and Technical Capacity to Perform
    • Organization, Experience, Accounting, and Operational Controls, and Technical Skills, or the Ability to Obtain Them, In Compliance with 49 U.S.C. Section 5325(j)(2)(d)
  ○ Holds the Necessary Licenses and Is Compliant with Applicable Tax Laws
  ○ Has the Financial Resources to Perform the Contract
Award of Contracts

♦ Contractor Responsibility
  ○ Has, or Can Obtain, the Necessary Production, Construction, and Technical Equipment and Facilities
  ○ Is Able to Comply with Timelines for the Project
  ○ Has a Performance Record
    ▪ Satisfactory Performance Record
    ▪ Past Performance Record
      • Sufficient Resources
      • Past Experience
      • Circumstances Beyond Control of Contractor

♦ Other Considerations

♦ Both Governmental and Non-Governmental Entities Possess the Right to Reject Any and All Bids or Proposals if It Is Your Best Interest to Do So

Federal Position

♦ The Super Circular (2 CFR part 200.318(k)) Assigns Sole Responsibility to the Non-Federal Entity (the Grantee) for Resolving All Contractual and Administrative Issues Arising Out of Third Party Procurements
  ♦ Includes
    ○ Source Evaluation and Selection
    ○ Protests Of Awards
    ○ Disputes
Protests

♦ Minimum Requirements
  ○ Subrecipients Must Notify ODOT Upon Notice of Protest
  ○ ODOT Must Notify FTA
  ○ Access to Information
    ▪ FTA Reserves the Right to Require the Grantee to Provide Copies of a Particular Protest or All Protests, and Any or All Related Supporting Documents as Deemed Necessary

♦ Requirements for the Protester
  ○ A Party Must Qualify as an “Interested Party”
    ▪ A Party That Is an Actual or Prospective Bidder or Offeror Whose Direct Economic Interest Would Be Affected By the Award or Failure to Award the Third Party Contract at Issue
    ▪ Subcontractors Do Not Qualify as an Interested Party
  ○ Party Must Exhaust Administrative Remedies (e.g., the Grantee’s Protest Process) Before Filing a Protest
  ○ Must File Within Five Days After a Grantee’s Final Decision

♦ Role of IDOT/FTA in Protests
  ○ Grantee’s Failure to Have or Follow Its Own Protest Procedures
  ○ There Was a Violation of Federal Law
  ○ There Was a Violation of Ohio Law

Module 7
STATE CONTRACTS, JOINT PROCUREMENTS, ASSIGNMENT, AND “PIGGYBACKING”
♦ Piggybacking
  ○ Definition
    • “Piggybacking” is an Assignment of Existing Contract Rights To Purchase Supplies, Equipment, or Services

♦ Piggybacking
  ○ The Common Grant Rules Require the Recipient to Establish Procedures to Avoid the Purchase Of Unnecessary Property and Services it Does Not Need
    • Including Duplicative Items and Quantities or Options It Does Not Intend to Use or Whose Use Is Unlikely

♦ Assignment
  ○ The Recipient May Contract Only For Its Current and Reasonably Expected Public Transportation Needs, and May Not Add Quantities or Options To Third Party Contracts Solely to Permit Assignment to Another Party At a Later Date

♦ Assignment
  ○ These Limits on Assignments, However, Do Not Preclude Joint Procurements That Are Entered Into Simultaneously By Two or More Parties to Obtain Advantages Unavailable For Smaller Procurements
Permissible Assignment

♦ Inadvertent Quantities
  ○ Sometimes a Grantee Has Acquired Contract Rights In Excess of Its Needs
  ○ Changes in Circumstances Over Life of a Purchase Contract
  ○ Assignment or Piggybacking is Permitted in this Circumstance With Some Conditions

♦ Conditions
  ○ The Assigned Party Has Determined that the Contract Price Remains Fair and Reasonable
  ○ The Original Contract Contained All Required Federal Provisions
  ○ Additionally
    - The Assigned Party Must Ensuring the Contractor’s Compliance With Buy America
    - Execution of All the Required Pre-Award, Post-Delivery, and Buy America Review Certifications

Best Practices

♦ Assignment or Piggybacking
  ○ The Original Solicitation and Contract Include An Assignability Clause
    - All or Part of the Specified Deliverable Items
  ○ The Quantities to Be Ordered Were Included in the Original Bid and Evaluated as Part of the Contract Award Decision

♦ Assignment or Piggybacking
  ○ The Contract Being Accessed By the Piggybacking Procedure Contains the Clauses Required By Federal Regulations
  ○ The Contractor Has Submitted the Certifications Required By Federal Regulations With Its Original Bid/Proposal
  ○ The Procurement In Other Respects Meets Federal Requirements
Best Practices

♦ When In Doubt About the Allowability of Piggybacking
  ○ Go to the BPPM, Appendix B-16
  ○ Piggybacking Worksheet
    • Poses 12 Questions or Conditions for Piggybacking

Joint Purchases

♦ Assignment vs. Joint Purchase
  ○ Joint Procurements Occur When Two or More Recipients Enter Into a Single Procurement at the Same Time to Obtain Advantages Unavailable For Smaller Procurements
  ○ Joint Purchases Encouraged
    • FTA Seems to Favor Joint Procurements Over Assignment
      • Better Opportunity to Obtain Goods Consistent with Local Specifications

Purchase Options

♦ The Recipient’s Contracts May Include Options
  ○ An Option Is a Unilateral Right in a Contract By Which, For a Specified Time, a Recipient May Acquire Additional Equipment, Supplies, or Services Than Originally Procured
    • An Option May Also Extend the Term of the Contract
    • Ensures Future Availability of Property or Services
    • The Recipient Must Justify Options as Needed for Its Public Transportation or Project Purposes

♦ Conditions
  ○ Consistency with Underlying Contract
  ○ Price
  ○ Potential for Classification of Sole Source Award
    • Recipient Must Evaluate Options as Part of Original Award Decision
    • Price Must Be Based on Original Award
State Indefinite Quantity Contracts

♦ Definition
  ○ An Indefinite-Quantity Contract Is One That Provides for an Indefinite Quantity of Supplies or Services, Within Limits, That Are Stated in the Contract, to Be Provided During a Time Period That Is Fixed in the Contract
  ○ Such Contracts Are Permissible

♦ FTA:
  ○ State GSA Type Contracts Awarded Competitively for the Benefit of all State Agencies
    • Not Considered "Piggybacking/IDIQ"
    • Do Not Require Minimum And Maximum Quantities or Assignability Clauses
  ○ Conditions
    • Grantees May Use These Contracts If All FTA Required Clauses and Certifications Are Included With Your First Purchase Order
    • If You Are Buying a Product That Is Other Than the Lowest Offered Price For That Product Under All State Contracts, the Grantee Must Document the File as to Why the Higher Priced Product Must Be Purchased
    • Grantees Must Also Determine That the State Contracts Were Awarded With Full and Open Competition And Were Not Subject To Geographical Preferences (Posted: January, 2013)

State Indefinite Quantity Contracts

♦ Advantages
  ○ Minimum Inventory Levels of Supplies Can Be Maintained
  ○ Shipments Can Be Directed to Users in Various Locations
  ○ They Permit Flexibility in Both Quantities and Delivery Scheduling
  ○ Supplies or Services Can Be Ordered After Requirements Become Known
  ○ The Purchaser’s Obligation Is Limited to the Minimum Quantity Specified in the Contract

♦ Best Practices
  ○ Include Minimum and Maximum Quantities in the Purchase Specifications
  ○ Never Totally “Open-Ended”
  ○ Specify the Time Period for the Contract
  ○ Use Options if it Is Believed Additional Quantities May Be Required
    • Follow Best Practices for Options in This Circumstance
State Indefinite Quantity Contracts

- **Multiple Awards**
  - The State May Make More Than One Award
  - Ensure the Quality or Timeliness of Deliveries By Not Limiting the Grantee to a Single Supplier Who May Not Perform According to the Grantee’s Expectations or Needs
  - May Work to Ensure Peak Delivery Requirements

- **Best Practices in Multiple Award Contracts**
  - If Multiple Awards are Made, Grantees Must Advise Prospective Bidders of the Procedures That Will Be Used in Issuing Orders to the Contractors Selected For Award, Including the Criteria That Will Be Used to Provide the Selected Contractors With a Fair Opportunity to Be Considered For Each Order Issued

Other Critical Items

- **Improper Contract Expansion**
- **Cardinal Changes in the Scope of Work**

Improper Contract Expansion

- **Definition**
  - A Contract Has Been Improperly Expanded When
    - It Includes a Larger Scope, Greater Quantities, or Options Beyond the Recipient’s Reasonably Anticipated Needs
    - Excess Capacity Has Been Added Primarily to Permit Assignment of Those Contract Rights to Another Entity
Cardinal Changes

♦ Definition
○ A Significant Change in Contract Work (Property Or Services) That Causes a Major Deviation from
  • The Original Purpose of the Work
  • Intended Method of Achievement
○ Or Causes a Revision of Contract Work So Extensive, Significant, or Cumulative That, in Effect, the Contractor Is Required to Perform Very Different Work from That Described in the Original Contract

♦ Subjective Nature
○ Guidance
  • The Nature and Extent of the Work to Be Performed
  • The Amount of Effort Involved
  • Whether the Change Was Originally Contemplated at the Time the Original Contract Was Entered Into
  • Cumulative Impact on the Contract’s Quantity, Quality, Costs, and Delivery Terms

♦ Additional Guidance
○ FTA Website – Procurement Q & A
  http://www.fta.dot.gov/13057_7622.html
○ While Clearly Oriented Toward Large Urbanized Areas, There Is Some Useful Guidance

Cardinal Changes

Rich Garrity, Senior Associate
RLS & Associates, Inc.

Corporate:
3131 S. Dixie Highway, Suite 545
Dayton, OH 45439
(937) 299-5007

Rich:
801 S. Shore Drive
Surf City, NC 28445
(910) 328-5770
richg@cris.com