Craft Solid Agreements Upfront When Preparing Subcontracts

The extent and nature of the responsibilities that colleges and universities have with respect to subawards depends on whether a subaward creates a “subcontract” or “subrecipient” relationship. An article in last month’s Federal Grants News (p. 1) explored the importance of distinguishing between a subaward to a subrecipient of federal assistance funds and a contract award to a vendor, often referred to as a purchase order. This article outlines the requirements a grantee should follow when issuing a vendor contract to be paid with federal funds. Preparation of the subaward agreement for a subgrantee will be covered in an upcoming issue of FGN. The requirements for vendor or procurement contracts are governed by §§__.40–__.48 and Appendix A of OMB Circular A-110. These instruments are referred to as subcontracts or contracts under grants or purchase orders, which are typically generated by an institution’s purchasing office. These procurement standards set forth a number of requirements that must be a part of any “procurement” paid for with federal funds and include the following:

- **Standards of Conduct.** The institution must have a written code or set of standards of conduct governing the performance of its officers, employees or agents who are engaged in the awarding and administration of contracts with federal funds. At a minimum, the code must provide that no such employee, officer or agent of the institution may participate in the selection, award or administration of a contract supported by federal funds where there is a real or apparent conflict of interest. A-110 states that such a conflict would arise if any of the officers, employees or agents — or their immediate family, partners or an organization employing or about to employ any of these individuals — has a financial interest in the firm selected for an award. The code must prohibit officers, employees or agents from soliciting or accepting gratuities, favors or anything of monetary value from contractors or potential contractors. It must include disciplinary actions for violations.

- **Open and Free Competition.** Procurement transactions must be conducted in a manner that provides, “to the maximum extent practical,” open and free competition. There should be no organizational conflicts of interest or noncompetitive practices among contractors to restrict or eliminate competition. Institutions must disqualify from any award contractors that prepare specifications, requirements, statements of work, invitations for bids, requests for proposals or the like. Awards must be made to a bidder/offeror whose bid/offer is responsive and is most advantageous to the institution, with price and other factors considered. Solicitations must clearly set forth all requirements to be fulfilled. Institutions must reserve the right to reject bids or offers when it is in their interest to do so.

- **Clear and Accurate Descriptions.** Institutions must establish procurement procedures that, at a minimum, provide for procedures that avoid unnecessary or duplicative purchasing and that ensure that solicitations for goods and services are based on clear and accurate descriptions of the requirements. There also must be positive efforts to utilize small businesses, minority-owned firms and women-owned business enterprises and to allow such businesses the maximum feasible opportunity to compete.

- **Appropriate Procurement Instruments.** The type of instrument used, including fixed-price contracts, cost reimbursement contracts, purchase orders and incentive contracts, must be appropriate for the procurement. The “cost-plus-a-percentage-of-costs” or “percentage-of-construction cost” approach may not be used.

- **Responsible Contractors.** Contracts may be made only with responsible contractors with the ability to perform. In this connection, the institution must consider contractor integrity, record of past performance, financial and technical resources, among other factors. Consideration must be given to whether potential contractors have been debarred or suspended from participating in federal contracts. Appendix A to A-110 prohibits contracts with parties listed on the General Services Administration’s Excluded Parties List System (http://epls.arnet.gov).
• **Agency Review.** The federal awarding agency has discretion to request and review procurement documents (among other circumstances specified in the circular) if (1) the procurement is expected to exceed the small purchase threshold and is to be awarded without competition or only one bid is received; or (2) the contract, which exceeds the small purchase threshold, is awarded to other than the apparent low bidder.

• **Price or Cost Analysis.** Some analysis of cost or price reasonableness must occur and be documented with each and every procurement action.

• **Records to Substantiate Decisions.** For procurements in excess of an institution’s small purchase threshold, if appropriate, there must be records on file that describe the basis for selecting the proposed awardee (i.e., superior price/cost, superior technical proposal, superior past performance). (The federal small purchase threshold is currently $100,000.)

• **Contract Administration.** A system must be maintained to ensure that contractors perform within the terms and specifications of the contract and to ensure adequate and timely follow-up of all purchases.

**Everything Should Be in Writing**

• **Written Agreement.** Finally, there must be a written contract between the institution and the subcontractor, which not only defines a sound and complete agreement but also includes the following provisions, which may be standard provisions in an institution’s purchase order:
  
  o Legal remedies in the event that the contractor breaches contract terms, for all contracts in excess of the small purchase threshold.
  
  o Suitable provisions for termination by the recipient, including conditions under which a default termination may be taken, for all contracts in excess of the small purchase threshold.
  
  o Contracts for construction or facility improvement shall provide for the recipient to follow its own requirements relating to bid guarantees, performance bonds and payment bonds. However, if such contract exceeds $100,000, the federal awarding agency may accept the bonding policy and requirements of the recipient, provided that the federal agency has determined that the federal government’s interest is adequately protected. If such a determination has not been made, the minimum requirements of A-110 include a bid guarantee, performance bond and payment bond.
  
  o Requirements to comply with Executive Orders 11246 and Executive Order 11375 pertaining to equal employment opportunity.
  
  o For contracts of more than $2,000 for construction or repair, a provision for compliance with the Copeland “Anti-Kickback Act.”
  
  o If required by the specific grant program legislation, for construction contracts in excess of $2,000, provision for compliance with the Davis-Bacon Act and supplemental Labor Department regs, 29 CFR Part 5.
  
  o For contracts of more than $2,000 for construction and in excess of $2,500 (HHS sets the level at more than $100,000) and for other contracts involving the employment of mechanics and laborers, provision for compliance with sections 103 and 107 of the Contract Work Hours and Safety Standards Act and supplemental Department of Labor regs (29 CFR Part 5).
  
  o For contracts that have as their principal purpose the creation or development or improvement of products, processes or methods, or exploration in a field that directly concerns public health, safety or welfare, or are in a field of science or technology in which there has been little significant experience outside of work funded by federal assistance, a requirement providing for the rights of the federal government and the recipient in any resulting invention in accordance with 37 CFR Part 401, “Rights to Inventions under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency.
For negotiated contracts of more than $100,000, provision for the agency whose funds are involved, as well as the Comptroller General of the United States or any authorized representative of either, to have access to all books, records, documents or papers of the contractor directly pertinent to the contract in order to allow the making of audits, examinations, excerpts or transcriptions.

For contracts of more than $100,000, provision for the contractor to comply with applicable standards, orders or regs issued pursuant to the Clean Air Act of 1970 and the Federal Water Pollution Control Act.

Contractors who apply or bid for an award of $100,000 or more must file the certification required by Byrd Anti-Lobbying Amendment, 31 USC 1352.