

Module 9

Procurement

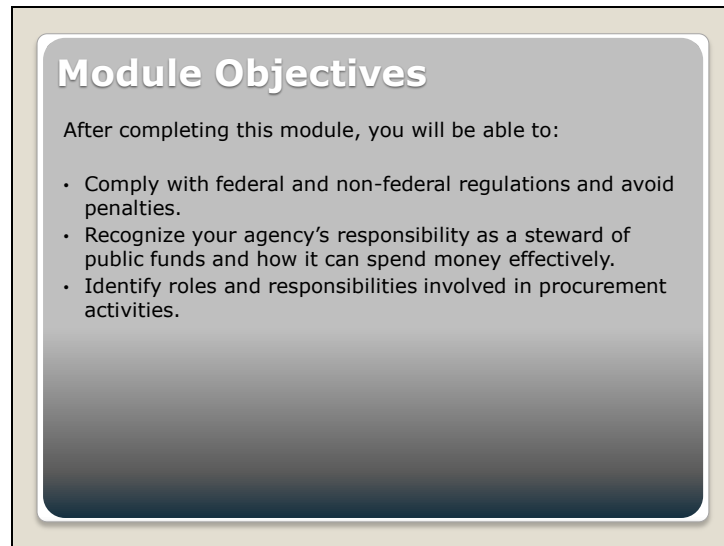


Welcome to the Procurement module in the TFLEX Guide for Transit Newbies.

In the transit industry, before considering price, volume, quality, etc., procurement must first satisfy Federal Transit Administration regulations. This module will take you through some of these regulations.

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A graphic with a light beige border and a dark blue gradient background. It contains the title "Module Objectives" in white, followed by the text "After completing this module, you will be able to:" and a bulleted list of three objectives.

Module Objectives

After completing this module, you will be able to:

- Comply with federal and non-federal regulations and avoid penalties.
- Recognize your agency's responsibility as a steward of public funds and how it can spend money effectively.
- Identify roles and responsibilities involved in procurement activities.

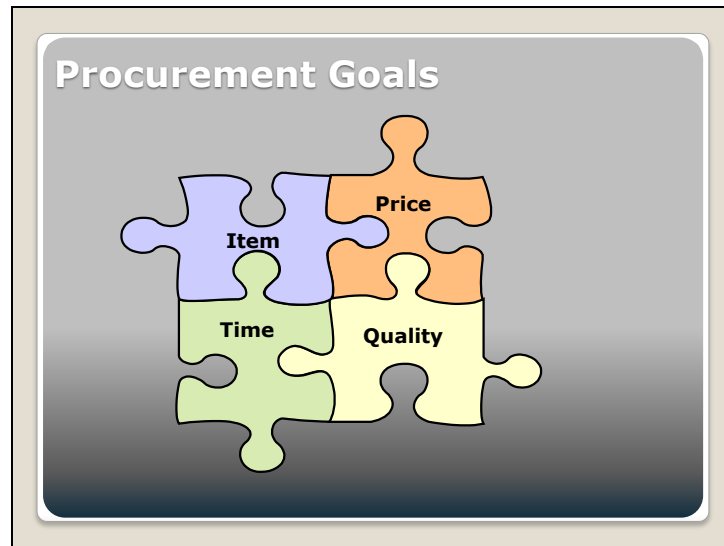
Learning Objectives

After completing this module, you will be able to:

- Comply with federal and non-federal regulations and avoid penalties.
- Recognize your agency's responsibility as a steward of public funds and how it can spend money effectively.
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Procurement Goals

The procurement function seeks to enable the agency to obtain goods and services needed to fulfill its mission, using the four Rs:

- Right item
- Right price
- Right time
- Right quality

Another criterion that must be satisfied is adherence to Federal, State, and local guidelines. Let's talk about these next.

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Federal Acquisition Regulations (FAR)

As part of the U.S. Department of Transportation, the Federal Transit Administration (FTA) requires grantees to adhere to the Federal Acquisition Regulations for all federally funded projects. See the FTA website for the latest information: www.fta.dot.gov

Buy America Requirements

Included in the Code of Federal Regulations, Code 49 at part 661, are Buy America rules outlining the requirement for "Construction Contracts and Acquisition of Goods or Rolling Stock (valued at more than \$100,000)."

The Buy America requirements apply to all contracts for rolling stock, steel, iron, or manufactured products with a value greater than \$100,000. For these contracts, the grantee must obtain a certification of compliance or non-compliance with the Buy America requirements with each bid or offer.

Purchases under \$100,000

Purchases under \$100,000 (including options) are not subject to the Buy America requirements, as provided in paragraph (e) of Appendix A to 49 C.F.R. 661.7; therefore, no Buy America certificate is necessary. Grantees are not permitted to break up procurements in order to stay under this threshold amount.

Penalties

Penalties for false certification of Buy America compliance or other noncompliance include fines, criminal charges, and loss of funding for a particular project. Agencies and their contractors can also be permanently debarred from federally funded projects.

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Federal Acquisition Regulations (FAR) – Waivers

Waivers from Buy America provisions are sometimes granted.

Grantees must review all Buy America certifications before contract award and request a waiver, if one is necessary, before the award in order to ensure FTA participation in the contract. Whether the situation is a sealed bid or a request for proposal, the award must go to a party who certified compliance unless the grantee requests and receives a waiver from FTA. The FTA website describes waivers that have been granted:

<https://www.transit.dot.gov/buyamerica>.

FTA will not be in a position to grant a waiver unless certain conditions are satisfied.

Price differential

It is established that the low domestic bid/proposal for the end product is 25 percent more than the low foreign bid/offer.

The Administrator may waive the Buy America requirements if the Administrator finds that a domestic product will cost more than 25 percent of an equivalent foreign product. The 25 percent applies to the cost of an end product, not the cost of the contract. The preamble to the Rule states, "the price differential is not to be applied to the overall contract between the grantee and its supplier, but to the comparative costs of each individual item (end product) being supplied." Therefore, if the inclusion of a domestic component increases the cost of a bus by more than 25 percent over that if a foreign-manufactured component were used, then a waiver may be given.

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Federal Acquisition Regulations (FAR) – Waivers (cont.)

Nonavailability of Materials

It is established that the item or items being procured are not available in the U.S.

The Administrator may waive the Buy America requirements if the Administrator finds that the item for which a waiver is being requested is not produced in the United States in sufficient and reasonably available quantities and of satisfactory quality. This waiver will be granted if no responsive and responsible bids are received offering the item in the United States. It will also be granted in the case of sole source procurements.

If a component or subcomponent is granted this waiver, the component or subcomponent is considered to be of domestic origin and its entire cost may be used for the purposes of calculating the domestic content requirement.

Inconsistency With the Public Interest

It is established that there is a public interest in waiving the national policy embodied in the Buy America provisions.

The Administrator may waive the Buy America requirements if the Administrator finds that compliance with the requirements would be inconsistent with the public interest. This includes waivers for prototype vehicles and first time items being produced by foreign firms relocating facilities to the United States. This waiver may be granted for end products, as well as for components and subcomponents. If a component or subcomponent is granted this waiver, the component or subcomponent is considered to be of domestic origin and its entire cost may be used for the purposes of calculating the domestic content requirement.

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Guidance on Other FAR Rules

There are a few other important clauses affecting transit contracts, including your contractors, listed with a short excerpt of the FTA guidelines. You can see a full list of all 31 clauses on page 1 of the FTA's Best Practices Procurement Manual, Appendix A (included at the end of this module just before the glossary.

Let's look at a few now.

Fly America

The Contractor agrees to comply with 49 U.S.C. 40118 (the "Fly America" Act) which provide that recipients and subrecipients of Federal funds and their contractors are required to use U.S. Flag air carriers for U.S Government-financed international air travel and transportation of their personal effects or property, to the extent such service is available, unless travel by foreign air carrier is a matter of necessity, as defined by the Fly America Act.

Civil Rights

The following requirements apply to the underlying contract:

(1) Nondiscrimination – The Contractor agrees that it will not discriminate against any employee or applicant for employment because of race, color, creed, national origin, sex, age, or disability. In addition, the Contractor agrees to comply with applicable Federal implementing regulations and other implementing requirements FTA may issue.

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Guidance on Other FAR Rules (cont.)

(2) Equal Employment Opportunity - the Contractor agrees to comply with all applicable equal employment opportunity requirements of U.S. Department of Labor (U.S. DOL) regulations, specifically regarding:

- (a) Race, Color, Creed, National Origin, Sex
- (b) Age
- (c) Disabilities

Disadvantaged Business Enterprises

The Department of Transportation's Disadvantaged Business Enterprise (DBE) program provides guidance to grantees on the use of overall and contract goals, requirement to include DBE provisions in subcontracts, evaluating DBE participation where specific contract goals have been set, reporting requirements, and replacement of DBE subcontractors. Additionally, the DBE program dictates payment terms and conditions (including limitations on retainage) applicable to all subcontractors regardless of whether they are DBE firms or not.

The DBE program applies to all DOT-assisted contracting activities. A formal clause such as shown in the FTA's Best Practices Procurement Manual, Appendix A must be included in all contracts above the micro-purchase level.

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Guidance on Other FAR Rules (cont.)

Drug and Alcohol Testing

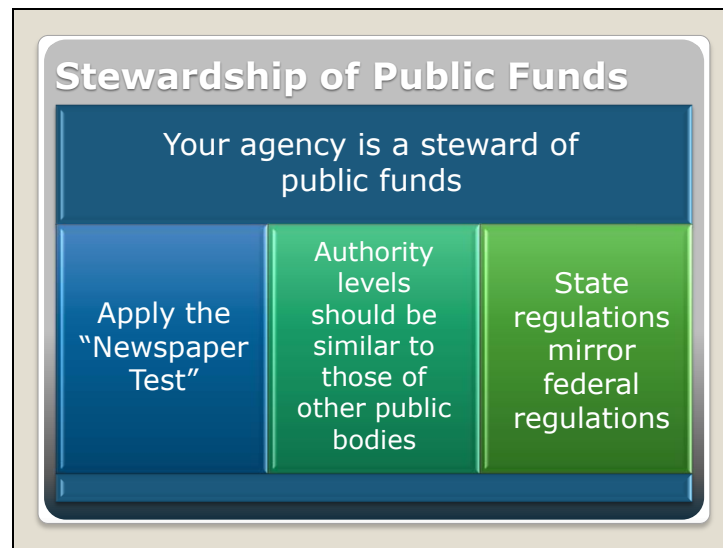
The Drug and Alcohol testing provisions apply to operational service contracts. Anyone who performs a safety-sensitive function for the recipient or subrecipient is required to comply with 49 CFR 653 and 654. They require recipients to ensure that any entity performing a safety-sensitive function on the recipient's behalf (usually subrecipients and/or contractors) implement a complex drug and alcohol testing program that complies with Parts 653 and 654. The rules do not specify how a recipient ensures that its subrecipients and/or contractors comply with them – providing contract clause options for the recipient to ensure the contractor's compliance with the rules.

Note

As you can see by these examples, compliance with “federal clauses” requires a significant amount of effort. Caution must be exercised when contractors request that the agency enter into a contract without federal clauses.

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Remember, no matter what your role in the organization, you are affected by this fact:
Your agency is a steward of public funds.

- The so-called "newspaper test" applies here: How would it look if you had palatial office space or frequent trips abroad in the face of more pressing public priorities?
- Agency authority levels should be similar to those of other public bodies.
- State regulations mirror Federal regulations and are also closely watched. For example, the Dallas Area Rapid Transit (DART) is held to a "Full and Open Competition" Texas law, stating that the low-cost provider must be awarded a contract if not disqualified for another reason.

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Contract Types

Now we are going to look at contract types.

Fixed price: Buying X product or service at a given price.

Cost-reimbursement: Provides for payment to contractor of reasonable, allocable, and allowable costs incurred.

BPA: Blanket purchase agreement.

BPO: Blanket purchase order.

IDIQ: Indefinite delivery/indefinite quantity. Solicitation based on best estimate of quantity; results in a fixed unit price for estimated quantity with a minimum quantity guaranteed. This is a type of contract that provides for an indefinite quantity of supplies or services during a fixed period of time. IDIQ contracts are usually awarded for base years as well as option years. The agency places delivery orders (for supplies) or task orders (for services) against a basic contract for individual requirements. Minimum and maximum quantity limits are specified in the basic contract as either number of units (for supplies) or as dollar values (for services). The agency uses an IDIQ contract when it cannot predetermine, above a specified minimum, the precise quantities of supplies or services that will be required during the contract period.

Corporate cards: The use of a commercial credit card for purchasing goods and services under small-purchase procurement card system procedures, and agency procedures compliant with procurement regulations.

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Spending Big versus Spending Little

You can either spend big, or you can spend little. Let's take some time to learn the difference between the spending styles.

Spending Big

The goal of the purchasing process is to satisfy supply needs as economically and timely as possible while complying with statutory and regulatory requirements. While every agency has its own process, generally the purchasing/contracts department coordinates with Risk Management, Minority Affairs (for DBE issues), and the requestor to make the purchase action a success. Here is a high-level process that could help with this success:

- The user initiates the Purchase Requisition in a way that allows time to fill order.
- It is essential to permit the maximum competition.
- The user must document conditions dictating sole-source or brand name purchase.
- You then obtain the approval from the person with previously determined authority level.
- Procurement personnel can now act on the request according to internal guidelines. Contracts personnel prepare solicitation if required, addressing performance schedules, payment terms, and so forth.
- The Contracting Officer monitors the contract and closes it out when the work is complete. Closeout means that all claims and invoices are audited, and all pending issues are resolved.

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Spending Big versus Spending Little (cont.)

Spending Little

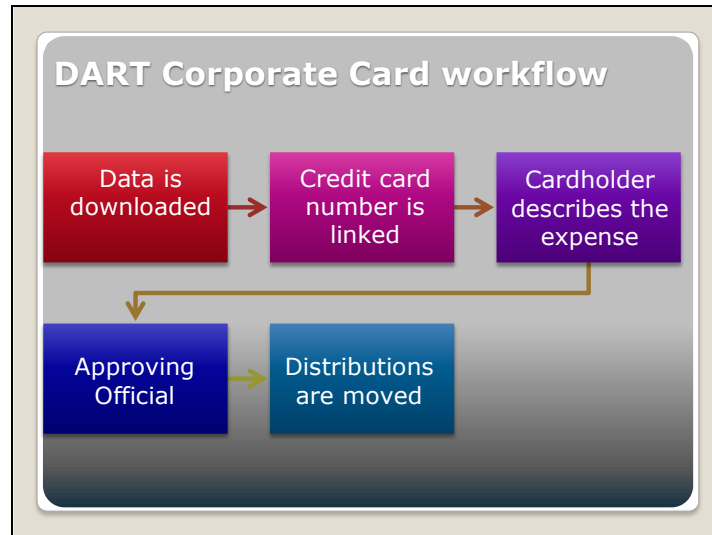
Purchasing cards are a way of streamlining procurement for goods under a fixed dollar amount (For example, P-cards are used at DART for goods and services under \$2,500.)

- Arrangements must be made with banks offering p-cards.
 - Be prepared to estimate annual dollar purchases, annual transactions, and number of cards.
 - Make sure the bank's records will mesh with yours - SIC code reporting, general ledger account reporting.
 - Make sure the bank can block certain types of purchases such as inventory items if you want it that way.
- P-card use frees up personnel time to focus on Spending Big Money.
- Without P-cards, the cost of making small-dollar purchases is greater than the purchase amount!
- P-card use must be monitored to avoid fraudulent use.

See the DART p-card workflow on the next page.

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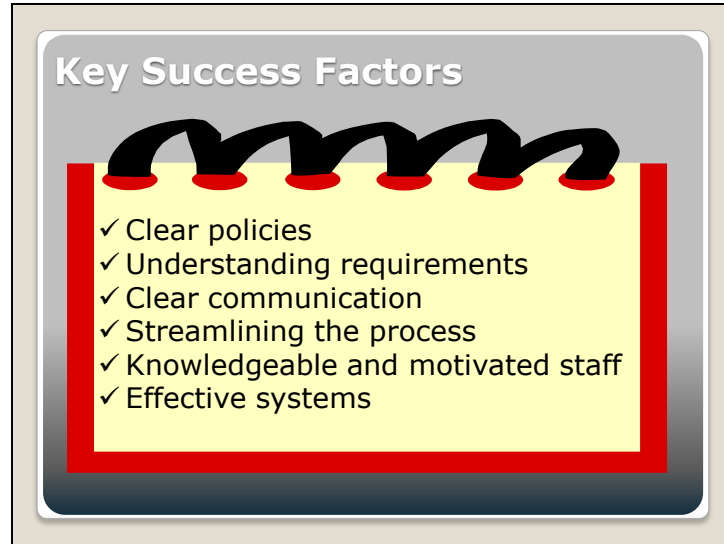
DART uses a web-based workflow application to lower the transaction cost for its corporate card purchases.

- First, the data is downloaded from the bank every week.
- Next, the credit card number is linked back to the cardholder using a database of card numbers, cardholders, and their approving officials. Each cardholder's cost center is charged in a suspense account for the amount of their transaction.
- Third, the cardholder, using his or her web browser, describe the expense, and distribute their charges to the correct general ledger account for each transaction.
- Fourth, each transaction is routed to the appropriate approving official, who reviews the transaction's description and charges, & then approves them with a mouse-click.
- Finally, the correct credit card cost distributions are moved from the suspense account into the general ledger account for each transaction, finishing the workflow.

Budget reports are very timely; most transactions are posted to their cost center's suspense account within a week of the purchase. All paperwork is kept by the cardholder, there is no paperwork handled by the procurement group. All transactions are stored electronically, with all pertinent information readily available for auditing and reporting.

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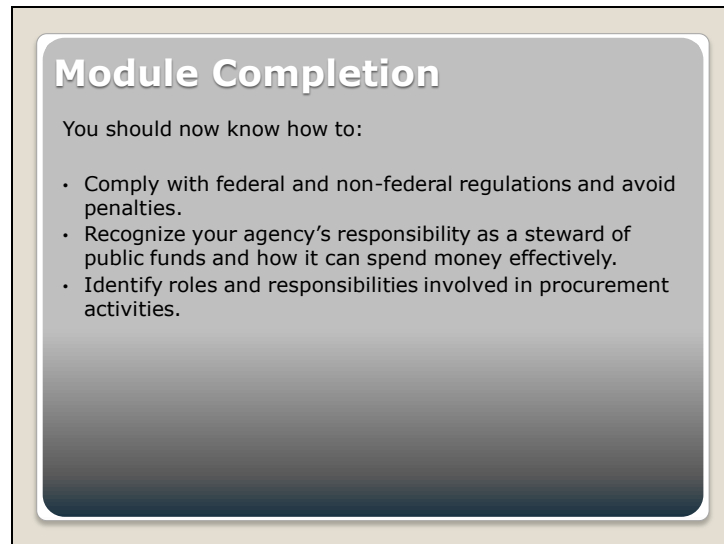
Success Factors

A survey was conducted with 10 transit agencies on what their particular success factors were when spending money. Here were their results:

- Having clear policies was number one on their list, followed by:
- Understanding the requestor's requirements,
- Having clear communication among the divisions,
- Streamlining the process to become user as well as vendor-friendly,
- Making sure the staff is knowledgeable about procurement regulations and motivated to make the process work,
- And finally, having effective systems to facilitate all of the above.

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Congratulations! You have completed the **Procurement** module. You should now know how to:

- Comply with federal and non-federal regulations and avoid penalties.
- Recognize your agency's responsibility as a steward of public funds and how it can spend money effectively.
- Identify roles and responsibilities involved in procurement activities.

The list of federally required contract clauses and glossary follow...

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**FEDERAL TRANSIT ADMINISTRATION
BEST PRACTICES PROCUREMENT MANUAL
TABLE OF CONTENTS (Appendix A - Governing Documents)**

A.1 - Federally Required and Other Model Contract Clauses

1. Fly America Requirements
2. Buy America Requirements
3. Charter Bus and School Bus Requirements
4. Cargo Preference Requirements
5. Seismic Safety Requirements
6. Energy Conservation Requirements
7. Clean Water Requirements
8. Bus Testing
9. Pre-Award and Post Delivery Audit Requirements
10. Lobbying
11. Access to Records and Reports
12. Federal Changes
13. Bonding Requirements
14. Clean Air
15. Recycled Products
16. Davis-Bacon and Copeland Anti-Kickback Acts
17. Contract Work Hours and Safety Standards Act
18. [Reserved]
19. No Government Obligation to Third Parties
20. Program Fraud and False or Fraudulent Statements and Related Acts
21. Termination
22. Government-wide Debarment and Suspension (Nonprocurement)
23. Privacy Act

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A.1 - Federally Required and Other Model Contract Clauses (cont.)

- 24. Civil Rights Requirements
- 25. Breaches and Dispute Resolution
- 26. Patent and Rights in Data
- 27. Transit Employee Protective Agreements
- 28. Disadvantaged Business Enterprises (DBE)
- 29. [Reserved]
- 30. Incorporation of Federal Transit Administration (FTA) Terms
- 31. Drug and Alcohol Testing

Excerpted from Procurement section of FTA website: www.transit.dot.gov.

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Procurement Glossary

Best and Final Offer

For negotiated procurements, a contractor's final offer following the conclusion of discussions.

Best value

Method of evaluating bids in which the contracting officer uses many criteria, including the capabilities of the bidder, to determine which offer is in the best overall interest of the buyer.

Blanket Purchase Agreement (BPA)

A simplified method of filling anticipated repetitive needs for services and products. BPAs are "charge accounts" that ordering offices establish with GSA Schedule contractors to provide themselves with an easy ordering tool.

Certified 8(a) Firm

A firm owned and operated by socially and economically disadvantaged individuals and eligible to receive federal contracts under the Small Business Administration's 8(a) Business Development Program.

Contract

A mutually binding legal relationship obligating the seller to furnish supplies or services (including construction) and the buyer to pay for them.

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Contracting

Purchasing, renting, leasing, or otherwise obtaining supplies or services from nonfederal sources. Contracting includes the description of supplies and services required, the selection and solicitation of sources, the preparation and award of contracts, and all phases of contract administration. It does not include grants or cooperative agreements.

Contracting Officer (CO)

A person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings.

Contracting Officer's Technical Representative (COTR)

Contracting Officer's Representative (COR) hold unique and important positions in government contracting. The COTR and COR are designated by the contracting officer to assist in administering specific aspects of a contract and normally have the initial and most continuous contact with the contractor and are the liaisons between the contractor and the contracting officer. Contracting officers rely on the expertise and background of the COTR and COR to ensure that the technical and financial aspects of the contract are accomplished.

Contractor

Entity that performs the service mandated by a contract with a federal agency. In some cases, the service will actually be performed by a subcontractor, subject to the approval of and conditions set by the contracting agency. In other cases, such subcontracting is not permitted under the contract. Contractors are usually for-profit companies, but they also include universities, independent nonprofits, hospitals, and other types of entities.

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Contractor Team Arrangement

An arrangement in which (a) two or more companies form a partnership or joint venture to act as potential prime contractor; or (b) an agreement by a potential prime contractor with one or more other companies to have them act as its subcontractors under a specified government contract or acquisition program.

Cooperative purchasing

The combining of requirements of two or more government units to obtain the benefits of volume purchases and/or reduction in administrative expenses.

Cost Plus Fixed Fee (CPFF)

A cost-reimbursement contract that provides payment to the contractor of a negotiated fee that is fixed at the inception of the contract. The fixed fee does not vary with actual cost, but may be adjusted as a result of changes in the work to be performed under the contract. This contract type permits contracting for efforts that might otherwise present too great a risk to contractors, but provides the contractor only a minimum incentive to control costs.

Fair and Reasonable Price

A price that is fair to both parties, considering the agreed-upon conditions, promised quality, and timeliness of contract performance. "Fair and reasonable" price is subject to statutory and regulatory limitations.

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Federal Fiscal Year

The federal government operates on a fiscal year that begins on October 1 and ends the following September 30. Fiscal years are notated with FYXXXX or FYXX. The year notates the calendar year when the fiscal year will end. For example, fiscal year 2015 (FY15) runs from October 1, 2014 through September 30, 2015

Formula grant

Allocations of money to States or their subdivisions in accordance with distribution formulas prescribed by law or administrative regulation, for activities of a continuing nature not confined to a specific project. (Examples of formula grant programs)

Full and Open Competition

With respect to a contract action, "full and open" competition means that all responsible sources are permitted to compete.

Grant

An award of financial assistance in the form of money, or property in lieu of money, by a funding agency. The grant is usually advertised through an RFA. The grantee is required to account for spending the money in the manner specified by the grantor. A federal grant is also an authorized expenditure to a non-federal entity for a defined public or private purpose in which services are not rendered to the federal government. This classification of spending comes in two types - "formula grants" and "project grants."

Grant Recipient

Any non-federal entity, usually a state or local government, or a private, usually non-profit organization, such as an educational or religious institution, a relief agency, or an individual.

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Indefinite Delivery Indefinite Quantity (IDIQ) Contracts

Also known as multiple award Indefinite Delivery Indefinite Quantity (IDIQ) task order contracts provides a broad range of IT support services and resources for administrative, research, development and operational activities.

Invitation For Bid (IFB)

An IFB is the method used for the sealed bid process. Typically, an IFB includes a description of the product or service to be acquired, instructions for preparing a bid, the conditions for purchase, packaging, delivery, shipping and payment, contract clauses to be included and the deadline for submitting bids

Multiple Award

Contracts awarded to more than one supplier for comparable supplies and services. Awards are made for the same generic types of items at various prices.

Negotiation

Contracting through the use of either competitive or other-than-competitive proposals and discussions. Any contract awarded without using sealed bidding procedures is a negotiated contract.

North American Industry Classification Code (NAICS code)

The NAICS (pronounced Nakes) is a unique, all-new system for classifying business establishments. Adopted in 1997 to replace the old Standard Industrial Classification (SIC) system, it is the industry classification system used by the statistical agencies of the United States. The NAICS codes are used as a categorization system within contracting data to give a higher level of detail about the type of economic or industrial output being done under a contract. These codes were created jointly by the United States, Canada, and Mexico, and are assigned by the federal government according to the NAICS.

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Program Manager

The Program Manager is usually not involved in contracting, but they are typically the “end- user”. They are the people who use your products or services in the process of doing their job. They are the scientists, technical staff, commissary staff, first-responders and any and all people involved in pursuing the agency’s mission. While they do not buy the products and services they do influence the specifications and choices. You do want to get to know your key “end-users”.

Project Grants

The funding, for fixed or known periods, of specific projects. Project grants can include fellowships, scholarships, research grants, training grants, traineeships, experimental and demonstration grants, evaluation grants, planning grants, technical assistance grants, survey grants, and construction grants.

Request for Application (RFA)

It is a formal announcement of an opportunity to apply for a grant. An RFA specifies the requirements for applying for the grant. RFAs are issued by governments and foundations.

Request for Bid (RFB)/Invitation to Bid

A solicitation in which the terms, conditions, and specifications are described and responses are not subject to negotiation.

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Request for Proposal (RFP)

A document outlining a government agency's requirements and the criteria for the evaluation of offers. When the value of a government contract exceeds \$100,000 and when it necessitates a highly technical product or service, the government may issue a Request for Proposal (RFP). In a typical RFP, the government will request a product or service it needs, and solicit proposals from prospective contractors on how they intend to carry out that request, and at what price. Proposals in response to an RFP can be subject to negotiation after they have been submitted.

Request for Quote (RFQ)

When the government is merely checking into the possibility of acquiring a product or service, it may issue a Request for Quote (RFQ). A response to an RFQ by a prospective contractor is not considered an offer, and consequently, cannot be accepted by the government to form a binding contract. The order is an offer by the government to the supplier to buy certain supplies or services upon specified terms and conditions. A contract is established when a supplier accepts the offer.

Requisition

An internal document that a program office sends to the purchasing department detailing products or materials needed to fulfill a specific need.

Sole Source

A sole source procurement is a procurement where only one source is practicably available for the goods or services required. Competition is not available in a sole source procurement thus distinguishing it from a proprietary procurement where the product is restricted to that of one manufacturer, but is sold through distributors and competition between them can be obtained.

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Solicitation

The process used to communicate procurement requirements and to request responses from interested vendors.

Statement of work (SOW)

A detailed statement describing the buyer's requirements, including, if necessary, what products, services and methods will be used to fulfill the need.

Subcontract

A contract between a prime contractor and a subcontractor to furnish supplies or services for the performance of a prime contract or subcontract.

Subcontract Commitment

A legal agreement between contractors establishing the value of goods and services required to fulfill a contract. The goods or services are provided by one contractor (called the subcontractor) to the contractor with the major or prime contract.

Subcontract Payment

A cash payment made by one contractor to another for supplies, services, or construction required by a prime contract.

Subcontractor

Federal Acquisition Regulations define "subcontractor" as 'any supplier, distributor, vendor or firm that furnishes supplies or services, to or for a prime contractor or another subcontractor.'

Supplier Diversity

Offices or departments within large companies tasked with ensuring supplier socio-economic class goals are met.

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Technical & Design Competition

Two or more offers were received and award was made to the offeror with the best overall technical and design proposal. Cost is one of the factors in the evaluation. Sources for most major weapon systems resulted from initial competition in the design and development stage.

Transactions

The issuance, renewal, or modification of a single contract between a contractor and the federal government for the performance of designated tasks. The number of transactions is not equal to the total number of contracts. One contract could have hundreds or thousands of transactions during the course of the contract.

Unsolicited Proposal

As defined in FAR 2.101, an unsolicited proposal is a written proposal for a new or innovative idea that is submitted to an agency on the initiative of the offering company (i.e. your company) for the purpose of obtaining a contract with the government, and that is not in response to an RFP, broad agency announcement, or any other government-initiated solicitation or program.

Woman-owned or Minority Business Enterprise (WMBE or WOB)

A small business that is at least 51% owned and controlled by a woman or minority. On a federal level Congress considers a minority owned business as generally anyone other than white. Specific criteria can be obtained through the SBA. The business must be owned and at least 51% controlled by one or more minorities. Women are not considered minorities.