

# Procurements and Contracts

# Overview

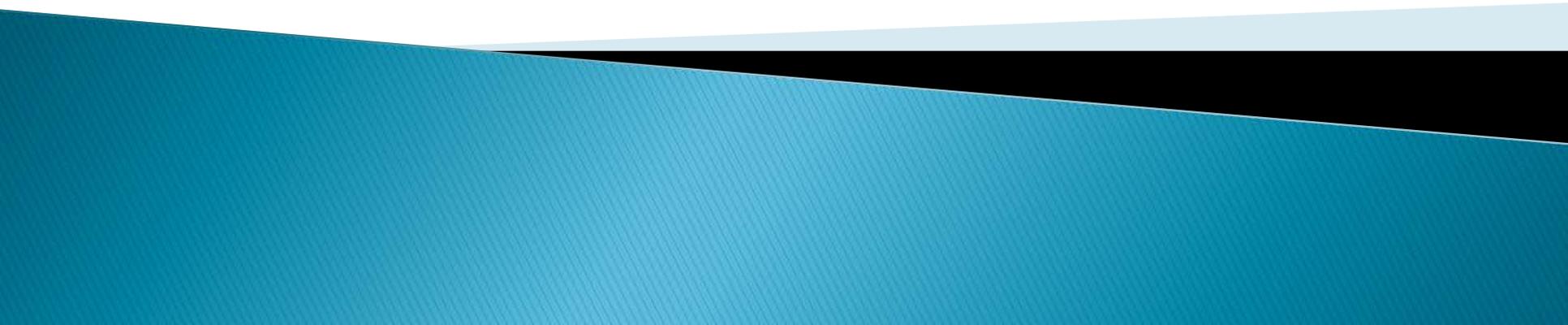
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# Procurements



# Procurement Models

- Open competition for each procurement
- Master state contract
- Task orders
- Multiple agency procurement vehicles
- Sole source, single source
- Interagency agreements or cooperative agreements

# Federal Procurement Standards

- Federally-funded acquisitions are now permitted to follow procurement standards in 45 CFR Part 92 now, not Part 74
- Acquisitions must be conducted in a manner that provides, to the maximum extent practicable, open and free competition.
- Situations considered to be restrictive of competition include but are not limited to:
  - Placing unreasonable requirements on firms in order for them to qualify to do business
  - Requiring unnecessary experience, and excessive bonding
  - Noncompetitive pricing practices between firms or affiliated companies
  - Organizational conflicts of interest
  - Specifying “brand names” product instead of allowing “an equal” product to be offered

# Procurement Practices

- With APD Reform, OCSE now defers to state procurement laws
- State can request exemption from prior approval if adequately described in the APD Update or As-Needed APD with an Acquisition Summary.
- With competitive procurement documents, the state can self-attest open competition and meeting federal requirements by using the Acquisition Checklist in IM 05-03.
- OCSE retains authority to provide greater oversight if a state's procurement policy increases costs or risks of failure.

# Prior Approval Considerations

- The Acquisition Document has to be Submitted for Prior Approval If:
  - The Acquisition Deviates from the Acquisition Summary
  - If the Acquisition is the Initial Acquisition for a High Risk Activity, Such as Software Development
- For projects with enhanced funding, Acquisition Documents not specifically exempted, must be submitted for prior approval if the estimated cost will exceed \$500,000.
- States can be required to submit Acquisition Documents on an *exception basis*, if the procurement strategy is not otherwise adequately described and justified in an APD.

# Prior Approval Exemptions

- State can request exemption from prior approval if adequately described in the APD Update or As-Needed APD.
- For each contract, state must provide the following information in the APD:
  - Type (e.g. firm fixed price, time & materials)
  - Scope (e.g. M&O, development, service agreement)
  - Procurement Strategy (open competition, sole source, master services contract)
  - Estimated cost
  - Timeframe of contract
  - A statement that the procurement complies with all applicable State and Federal requirements or the State must submit an acquisition checklist for the procurement

# Request for Waiver

## Waiver Request:

Upon approval of this AAPDU, the state requests a waiver of federal prior approval for future task orders for contractual services for activities and programming related to CSE applications development, FSA and PRWORA compliance, certification compliance, and other developmental, maintenance and support activities. Pertinent documentation related to any task order will promptly be forwarded to your office for your files. Funding for such services and any other additional costs incurred will be reported and requested in Annual APDUs that will be provided on a regular basis. If these costs exceed the requested thresholds, As Needed APDUs will be provided prior to the annual update reporting. [The list of current contracts and the additional (new) contracts requested is found on pages ....]

# Prior Approval Exemption – Exceptions

- States must submit justifications for sole source procurements over \$1 million in addition to the acquisition document, but State procurement policies now otherwise govern. (Sole source procurements in the Acquisition Summary must certify that the State's sole source procurement laws are being followed.)
- Independent Verification and Validation (IV&V) procurements can not be exempted from prior approval regardless of the dollar value
  - Regardless if it is obtained from a contractor via competitive procurement or from a State Agency

# Acquisition Checklist

- Checklist is optional for the state to certify that all state and federal regulations and policies are being met by the procurement vehicle
- 45 CFR 95.611 allows federal departments to grant an exemption from prior approval of acquisition documents (RFP, RFQ, ITB etc.), contracts and contract amendments with favorable responses to the checklist questions
- The Checklist cannot be used to replace the APD
- Refer to IM-05-03

# Acquisition Checklist (Cont'd)

- The State Provides Project Information
  - Project Name, Acquisition Name
  - Acquisition Description Including Scope and Life Span
  - Release Date to Vendors, Number of Days to Respond
  - Estimated Cost
- And Answers Eleven Questions
  - Free and Open Competition
  - Federal Regulations
  - Acquisition Standards (Federal, State and Territorial)
  - Ownership Rights
  - Statement of Work, Terms and Conditions
  - Evaluation Criteria
  - Staff Responsibilities, Change Order Process and Documentation Requirements

# Prior Approval Process

- If the procurement is not exempted in the APD, and the acquisition checklist is not submitted, then the State can submit the actual procurement document for approval:
  - Procurement document submitted to OCSE prior to release (RFP, ITN, ITB, RFQ)
  - OCSE has 60 days to review
  - The document could be approved, conditionally approved, or deferred
  - Conditionally approved, then changes made prior to release or via addendum
  - Released copy must be provided to OCSE
  - Prior approval is “reflected in a record” now instead of a “written” approval to allow for electronic submissions and approvals.

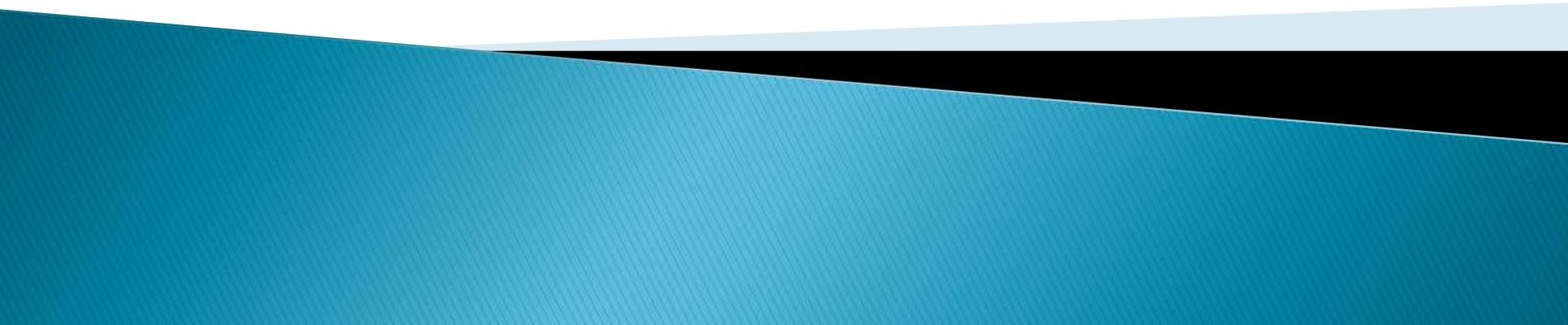
# Key RFP Sections

- Statement of Work (SOW) and/or product specification
  - Detailed technical requirements must be defined
  - Deliverables defined including acceptance criteria
- Authorities and responsibilities of state and contractor
- Evaluation and selection criteria with relative importance such as technical and cost proposal scoring and weighting, and proposal ranking and selection criteria
- Period of Performance
- Require documentation of:
  - Past performance
  - Proof of personnel experience
  - Proof of corporate experience

# Key RFP Clauses

- Ownership – state and federal
- Federal Funding – contingent on state and federal funding
- Access to records
- Federal clauses (Clean Air and Clean Water Acts, Davis Bacon Act (labor rates), Copeland Act (anti-kickbacks), EEO, etc.)

# Contracts



# Contract Practices

- The State can request exemption from prior approval if adequately described in the APD Update or As-Needed APD
- The state can self-attest open competition and meeting federal requirements by using the Acquisition Checklist in IM 05-03.
- OCSE retains authority to provide greater oversight if a state's procurement policy increases costs or risks of failure.

# Prior Approval Considerations

- For Contracts the State can:
  - Request Exemption from Prior Approval if Adequately Described in the APD Update or As-Needed APD, or
  - Submit an Acquisition Checklist
- The Contract has to be Submitted for Prior Approval If:
  - The Contract Deviates from the Acquisition Summary, or
  - The Contract is not specifically exempted and it exceeds a Threshold
- For projects with enhanced funding, contracts not specifically exempted, must be submitted for prior approval if the estimated cost will exceed \$500,000.
- For projects with enhanced funding, contract amendments not specifically exempted, must be submitted if cost increases exceed \$500,000 or a time extension of more than 60 days.

# Prior Approval Thresholds

- If waiver for prior approval not received, or acquisition checklist not submitted, prior approval is based on thresholds:
  - Prior approval thresholds are based on risk as well as dollar threshold (higher thresholds for lower risk)
  - Maintenance and Operations (M&O) – very low risk – there are no prior approval requirements for M&O procurements, contract and contract amendments.
  - Hardware and COTS Software Upgrades – low to medium risk – threshold is \$20 million
  - Software Development – high risk – \$6 million threshold for prior approval,
  - Contract Amendments – up to 20% of base contract of increased funding (cumulative) if increases are within scope of original contract.
    - Base contract includes option years but not amendments.

# Prior Approval Thresholds (cont'd)

- If waiver for prior approval not received, or acquisition checklist not submitted, prior approval is based on thresholds:
  - Sole source contracts – over \$1 million for Software Development, Hardware and COTS Software.
  - Hybrid acquisitions – contract combines different types of activities then the lower threshold applies
    - For example, an M&O contract that also contains development will be governed by the thresholds for software development
- Thresholds are defined in federal regulations at 45 CFR 95.611(b)

# Prior Approval Exemptions and Exceptions

- State can request exemption from prior approval if adequately described in the APD Update or As-Needed APD. Same as procurements with use of waiver.
- Independent Verification and Validation (IV&V) contracts can not be exempted from prior approval regardless of the dollar value
- Regardless if it is obtained from a contractor via competitive procurement or from a State Agency
- Must demonstrate that the proposed IV&V provider is
  - Technically qualified and
  - Managerial independent from the state's CSE agency, system development organization, and in most cases the Title IV-D program's umbrella agency of department

# Contract Prior Approval Process

- If waiver for prior approval not received, or acquisition checklist not submitted then:
  - Contracts are submitted to OCSE prior to their execution
  - Contracts need to be signed by the contractor, but not the state, prior to OCSE submission
  - OCSE has 60 days to review
  - OCSE can approve, conditionally approve, defer a decision, or disapprove a State's contract
  - Changes can be required to be made prior to execution
  - Executed copy must be provided to OCSE

# Consequences of Not Obtaining Prior Approval

- Federal funding is not available for activities undertaken (or work performed) prior to the date of federal approval.
  - If the State executes a contract before it is approved and costs are incurred, those costs incurred prior to federal approval are not eligible for Federal Financial Participation (FFP).
- If the state does not get prior approval, the state has an option to request retroactive prior approval in accordance with Action Transmittal OSSP-AT-00-01.

# Sole Source and Single Source

- Criteria for Sole Source Approval:
  - Single Source for product or service
  - Solicitation attempted, but failed to garner reasonable competition
  - Federal agency authorization, or
  - Emergency situation or circumstance
- State rules and regulations have to be followed for sole source and single source awards

# Sole Source Contract

- State's own procurement laws must support the use of a sole source contract
- A solid justification document supporting the need for sole source is required (usually citing a public exigency)
- All other federal and state regulatory requirements must be followed (APD's, contract clauses etc.)

# Cost Reasonableness

- If competitive procurement results in only one proposal or the state single-sources a purchase:
  - State may be required to perform a cost reasonableness study and submit this to OCSE along with other justifications
    - Define the methodology used
    - Define reasonableness in regard to the procurement
    - Compare negotiated price to independent, metric or comparative estimates, based on market conditions
    - Consider risks
    - Compare to state master contract rates if applicable
    - Demonstrate reasonableness of cost and approach

# Federal Financial Participation (FFP) in an Emergency

- If the State has an emergency situation, the State can receive FFP by....
  - Submitting a written request to HHS containing:
    - A brief description of the acquisition & cost;
    - A brief description of the emergency situation;
    - A description of the State's harm
- The Emergency Request must be submitted before the State acquires the relevant ADP equipment/services

# FFP in an Emergency (Cont'd)

- Emergency situation:
  - State must demonstrate immediate need to continue operation of the program, and
  - State must clearly document that this need could not have been anticipated or planned for, and that the State was prevented from following prior approval requirements by the emergency situation

# FFP in an Emergency (Cont'd)

- HHS will provide a written response to the respective state request within 14 calendar days
- The Response will either:
  - Agree that an emergency exists, in which case the state can proceed with the project immediately, on condition that it submit an APD for approval within 90 days, or
  - An emergency situation warranting waiver of the prior approval does not exist. The state must submit an APD for prior approval (and may need an OSSP-AT-00-01 reconsideration request submission).

# Open and Free Competition

- Has the state provided for maximum open and free competition?
- Master Contracts and task orders require competition offered to three or more vendors.
- Regulatory requirements for full and open competition can be found in regulations at 45 CFR 92.36(c) and 95.613(a) regardless of dollar value
- Why? Competition reduces cost, and improves performance and thus value to the state and federal governments

# Contract Clauses, Terms and Conditions

- In addition to clauses required in the RFP, the following contract clauses are also required:
  - Any mandatory state contract terms and conditions
  - Order of precedence
  - Liability, and failure of performance
  - Termination for cause, convenience
  - Notices, disputes
  - Damages, remedies
  - Value not-to-exceed and contract type
  - Period of Performance

# Mandatory Contract Terms

- Access to Records (*45 CFR 92.42 & 95.615*)
  - The awarding agency shall have the right of access to any pertinent books, documents, papers, or other records of grantees and sub-grantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.
  - The rights of access must not be limited to the required retention period but shall last as long as the records are retained.
  - Records must be retained for three years from the close of the subject grant or end of any litigation, claim or audit.

# Mandatory Contract Terms (Cont'd)

- Software Ownership (*45 CFR 92.34 and 95.617(a)*)
  - State or local governments must include a clause in all procurement instruments that provides that the state or local government will have all ownership rights in software or modifications thereof and associated documentation designed, developed or installed with FFP
- Federal License (*45 CFR 92.34 and 95.617(b)*)
  - The Department reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use and to authorize others to use for federal government purposes, such software, modifications, and documentation.

# Mandatory Contract Terms (Cont'd)

- Proprietary Software (*45 CFR 95.617(c)*)
  - Proprietary operating/vendor software packages (e.g., DB2, Oracle, ADABAS, etc.,) which are provided at established catalog or market prices and sold or leased to the general public shall not be subject to the ownership provisions in §95.617.
  - FFP is not available for proprietary application software developed specifically for the public assistance programs covered by and subject to the regulations at 45 CFR Part 95.

# IT Services From Another Agency

- Memorandum of Understanding (MOU)
- Interagency Agreement (IA)
- Cooperative Agreement
- Service Agreement
- What's required for development or maintenance and operations:
  - Described in the AAPDU or OAPDU
  - An approved cost allocation plan

**Any Questions?**