OGD Internet: EPA Subaward Policy Frequently Asked Questions

Version 1.5 Dated March 23, 2016

1. Transactions between recipients and Federal agencies

Reference: Subaward Policy, Section 7.0(b).

Q. May an assistance agreement recipient use EPA funds for transactions with another Federal agency?

Maybe. If the federal agency has statutory authority to provide services to non-federal entities on a reimbursable basis or otherwise receive and use funds from non-federal entities then assistance agreement recipients may finance these transactions with EPA funds. Examples of government-wide statutes that meet this criteria include the intergovernmental cooperation act which allows federal agencies to provide specialized services to state and local governments and the federal technology transfer act which authorizes cooperative research and development agreements. Some federal agencies have unique statutory authority to provide services to non-federal entities. GSs should obtain a citation to the statute for the grant files but EPA defers to other federal agencies' interpretations of their statutory authority.

Q. Is the transaction between the recipient and the Federal Agency a subaward or a procurement contract for the purposes of the Uniform Grant Guidance?

It is neither. The transaction is governed by the terms of the relevant federal statute and the instrument the federal agency uses to establish its legal relationship with the recipient. EPA does not consider a federal agency to be either a contractor or a subrecipient for the purposes of the Uniform Grants Guidance (UGG). The UGG does require that recipients maintain financial records to support expending EPA funds for the transaction with the federal agency so GS's should remind the recipient to properly account for payments made to the federal agency.

2. Subawards and Procurement Contracts

References:

Subaward Policy, Appendix A, *Distinctions Between Subrecipients and Contractor*.

EPA Order 5700.5A1, *Policy for Competition of Assistance Agreements,* Section 11b.

Q. What does EPA mean by "partner" in the context of competitive funding announcements?

While the term "partner" may have a specific meaning depending on the particular competitive announcement, the term generally refers to a mutually understood, documented relationship between an applicant and one or more third parties to collaboratively carry out a proposed project. A partner may contribute funds or in-kind resources to the joint effort and/or EPA funds may be used to finance the partner's activities. Any financial transactions between an applicant and a partner that involve EPA funds, however, must comply with the requirements in the UGG governing procurement contracts, subawards, or participant support costs depending on the nature of the relationship. Also, contributions of funds or in-kind resources that an applicant intends to use to meet a cost share on an EPA grant must comply with the UGG as well.

Q. Does EPA consider all "partnership agreements" that establish funding relationships to be subawards?

No. The uniform grant guidance, as with prior grant regulations, does not characterize financial transactions "partnership agreements". Transactions are either subawards, procurement contracts or intergovernmental/inter-entity agreements for purchases of shared goods or services. Characterizing the transactions consistently with the terms used in the UGG is important for determining what rules govern the agreement. It is the substance of the transaction and the financial structure of the "partnership" that matters for accurate characterization of the agreement. Some recipients refer to their contractors (particularly consultants) as "partners" so the label the recipient places on the transaction is not determinative.

Q. Are states subject to the competition requirements in the Uniform Grant Guidance when they procure services from commercial contractors?

No. As provided at 2 CFR 200.317 states follow the same procurement procedures as they do when acquiring goods and services with non-federal funds. The only federal requirements that apply to states are the *procurement of recovered materials* provision of 2 CFR 200.322 (which is based on section 6002 of RCRA), any clauses required by 2 CFR 200.436, and EPA's 40 CFR Part 33 rule on participation by disadvantaged business enterprises in EPA programs.

Q. What if the state agency/governmental unit calls an agreement a contract but EPA determines that the transaction is a subaward?

If the transaction is a subaward as defined/described in the UGG and Appendix A to the EPA Subaward Policy, EPA will characterize the proposed agreement as a subaward. The term a state agency/governmental unit uses for the agreement does not determine how EPA characterizes the transaction for grant purposes. Please refer to the definition of subaward at 2 CFR 200.92 which states "[a] subaward may be provided by any form of legal agreement, including an agreement the pass-through entity considers a contract." Also refer to questions .23-1 and .23-2 in OMB's September 2015 frequently asked questions on the uniform grant guidance.

Q. EPA's solicitation clauses provide that applicants for competitive funding must demonstrate that proposed subawards are proper under the criteria (2 CFR 200.330) in the UGG and that proposed contractors (including consultants) are selected in compliance with the UGG Procurement Standards for the Agency to consider subrecipient/contractor qualifications in the evaluation process. If the competitive applicant does not provide enough information for EPA's Project Officer to decide whether a proposed transaction is a proper subaward or a procurement contract that complies with regulatory requirements is it permissible for the PO to request additional information from the applicant?

Yes, project officers may offer applicants an opportunity to clarify whether a proposed transaction/relationship described in the proposal is a subaward or a contract as long as this does not result in any material revisions to the proposal. For example, if an applicant's selection process for a contractor is inconsistent with the UGG procurement standards the applicant may not revise its proposal to state that the activity the contractor would have carried out will be performed by the applicant's personnel.

Here are a few examples:

- A university applicant proposes to form a research consortium with other institutions of higher education and fund its partners' portions of a study. The financial transaction between the partners would be a proper subaward under 2 CFR 200.92 and 200.330. The applicant need not conduct a competition to make the subawards under the UGG. EPA would consider the qualifications of the research partners in evaluating the application.

- A consultant prepares an application for a non-profit organization or local government free of charge with the understanding that if EPA awards the applicant funds the consultant will receive a sole source contract in the amount of $100,000 for the EPA funded work. The application specifies that the consultant is a "project partner". As indicated in Section IV "partnerships, contracts and subawards" of EPA's standard announcement clauses EPA will neither consider the qualifications of the consultant nor accept a sole source justification based on the consultant's role in preparing a project. Consultants are contractors for the purposes of the procurement standards of the UGG. Consulting services are widely available in the commercial market place and there are no practical barriers to obtaining their services competitively. Arguments that the consultant is "uniquely familiar with our project" and therefore the only source for consulting services will not be persuasive under the circumstances described in this example.

- A non-profit organization or local government determines that it lacks in-house expertise to prepare a funding application and manage the project if the application is successful. The applicant asks three consulting firms for rate quotes/qualification statements to perform this work and sets a price ceiling of $150,000. This practice is acceptable to EPA. Under 2 CFR 200.320(b), recipients must obtain price or rate quotes from an ". . . Adequate number of qualified sources" for contracts that do not exceed the current $150,000 simplified acquisition threshold. EPA considers a competition among three consulting to firms to be consistent with the regulatory standard. If the applicant describes the process it followed to select the consultant as its project partner EPA will evaluate the consultant's qualifications as part of the grant competition. However, if any portion of the contract is attributable to proposal preparation costs those costs are normally treated as indirect as provided by 2 CFR 200.460.

- An applicant receives volunteer services from members of a local environmental group for a water quality monitoring project that the applicant will use to meet its match or cost share requirement for the SNEP grant. The volunteers will take samples from streams and lakes in the project area. One of the volunteers is a surgeon whose billing rate is $350 per hour. As provided at 2 CFR 200.306(e) the applicant may not use the surgeon's $350 per hour rate when valuing her services but must use the rate for its own employees who obtain samples for water quality

monitoring. If the applicants' own employees' do not conduct sampling, the applicant must perform labor market research to determine how to value the time volunteers spend sampling. One potential source for determining a reasonable value for volunteer sampling time would be the rate a state or local government pays employees or contractors for sampling work.

- Two small municipal applicants have private architect/engineering firms on retainer to provide a/e consulting services on an as needed basis. Municipality A does not conduct a competition to select the A/E firm. Municipality B hires its A/E firm competitively although qualifications rather than price is the determining factor in the selection.

* Municipality A may not use EPA funds in amounts over the $3,500 micro-purchase threshold to contract with the A/E firm on a sole source basis for design work for its project even if the municipality names the firm as a "partner" in the application. A/E services are widely available and the UGG at 2 CFR 200.319(a)(4) expressly states that noncompetitive contracting with consultants on retainer improperly restricts competition. Note also that Municipality A could not issue a series of $3500 purchase orders to the A/E firm to circumvent competition requirements. Under 2 CFR 200.320(a) recipients must distribute micro purchases equitably among qualified sources.

* Municipality B may use EPA funds to contract with the A/E firm in amounts over the $3,500 micro-purchase threshold provided the municipality negotiates a fair and reasonable price for the EPA funded work. Under 2 CFR 200.318(d)(5), recipients may use qualifications based selection criteria for A/E firms. Provided the competition was properly conducted under state/local laws EPA will accept the results of Municipality B's selection process. Note, however, that Municipality B may not award an EPA funded contract to the A/E firm for both the design and construction work for the project. Construction services provided by A/E firms are not covered by the exemption from price competition at 2 CFR 200.318(d)(5).

- A nonprofit organization proposes an EPA funded project that requires the use of a specific pollution control technology that a firm has patented. The nonprofit may contract with the patent holder on a sole source basis to acquire the technology. Under 2 CFR 200.320(f)(1) the nonprofit may legitimately determine that the item is available from only one source. EPA will consider

the firm's qualifications if the nonprofit names it in the application and explains why the firm's patented technology is necessary for successful implementation of the project.

- A municipality proposes an EPA funded project that is based on a partnership with a community organization, a builder's association, and a union to implement "best management practice" (BMP) systems to protect wetlands from runoff from construction sites. The project involves stakeholder meetings for design charrettes. The municipality may use EPA funds to support the partners' participation in the project through noncompetitive subawards since the nature of the transaction is characteristic of financial assistance; none of these organizations will be providing services to the municipality on commercial terms. If successful implementation of the BMP requires training for construction managers and workers, reasonable training stipends to encourage attendance at training sessions would be allowable as a participant support cost under 2 CFR 200.74 and 200.456. These authorities also authorize stipends to be paid to community members who actively participate in the charrettes. The municipality should ensure that its proposal clearly describes the stipends and that there are adequate accounting records to document stipend payments particularly if the payments are made in cash.

- A municipality ("A") applies for EPA funding to restore a river that passes through two other municipalities ("B" and "C"). Municipality A proposes to partner with B and C on a comprehensive restoration project and to fund their participation in the project through subawards. The project partners determine that implementation of the project would be more effective if a single A/E firm designed and managed the project. However, A's ordinances do not allow the municipality to award a construction contract for work that will be performed outside of its jurisdiction. B and C have similar laws. Under 2 CFR 200.318(e), the project partners could enter into an intergovernmental agreement that would allow A to competitively select an A/E firm that would be awarded separate contracts by the three municipalities as long as that practice does not violate A, B or C's ordinances.

- A state awards contracts to several firms for environmental consulting services. The terms of the state's contracts provide that the consultants may also provide services to municipalities in the state under the same terms as those the state has negotiated as long as the municipality agrees

to pay the consulting fee. A municipality proposing an EPA funded project may include one of the state's consultants in its application as a project partner without conducting a competition. EPA considers arrangements a state makes to procure services for municipalities to be intergovernmental agreements under 2 CFR 200.318(e). EPA defers to state procurement policies and procedures as required by 2 CFR 200.317. Note, however, that the consultant fees charged to EPA grants must still be reasonable and comply with the limitations on EPA participation in compensation for individual consultants at 2 CFR 1500.9 and 69 Fed. Reg. 18380 (April 7, 2004). The consultant may not charge fees on federally funded projects that are higher than the state pays with its own funds.