Is Your Purchasing Manual Up To Date?

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RAUL V. BRAVO + ASSOCIATES, INC.

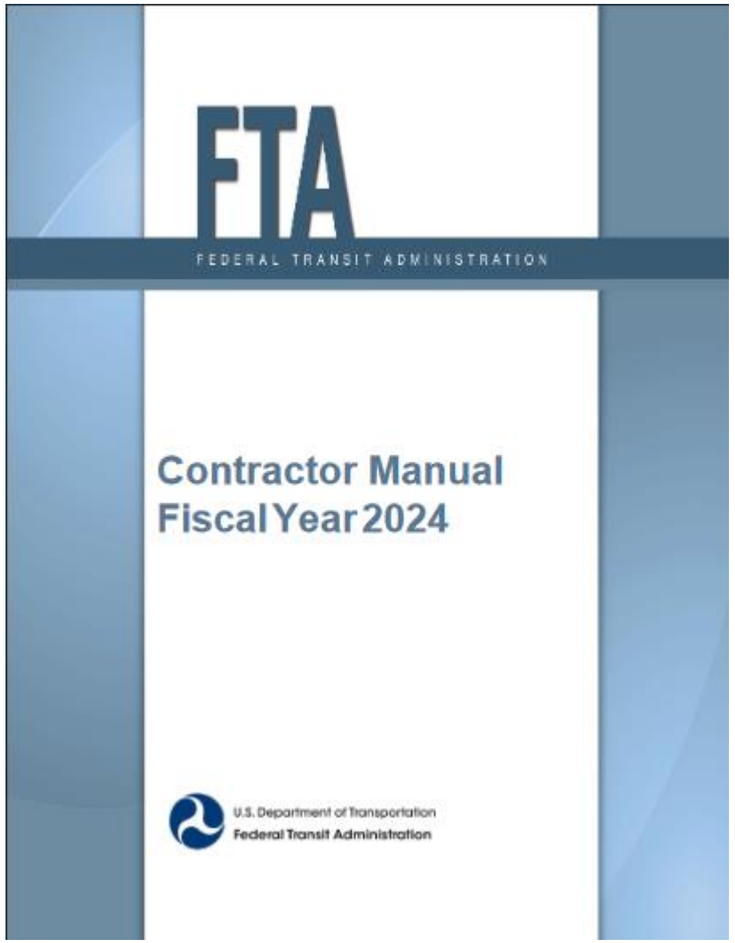
TRANSPORTATION PLANNERS AND ENGINEERS

Who is Out There?

- Where are you from?
- What is your role at the agency?
- Are you responsible for keeping the procurement manual current?
- How do you keep up with new developments?

Where to Start?

- Contractor Manual Fiscal Year 2024
  - https://www.transit.dot.gov/sites/fta.dot.gov/files/2024-03/Fiscal-Year-2024-Contractor-Manual_0.pdf



Contractor Manual

- Chapter 9 – Procurement
- Question 1 “Does the recipient have written procurement policies and procedures that include required state, local, and Federal provisions?”
  - “Policies and procedures must explain how the recipient will ensure compliance with the standards and requirements identified in 2 CFR 200.318 (General Procurement Standards) through 200.327 (Contract Provisions)

General procurement standards

- Contract oversight: Recipients must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

- Standards of conduct: Recipients must maintain written standards of conduct covering conflicts of interest and governing the performance of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent must participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity. If the recipient has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the recipient must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the recipient is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

- Unnecessary or duplicative items: The recipient's procedures must avoid the acquisition of unnecessary or duplicative items.

- Award to responsible contractors: The recipient must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement.

- Procurement history: The recipient must maintain records sufficient to detail the history of the procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

- Time and Material contracts: The recipient may use time and material type contracts only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Since this contract type generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the recipient awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

- Contract dispute resolution: The recipient alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims.

Contract Oversight

- “Ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts.”
  - Contract administration
    - i. DBE compliance – 49 CFR 26.11(d)
    - ii. Prompt payment to subcontractors – 49 CFR 26.29
    - iii. Davis Bacon (prevailing wage) compliance – Certified payrolls
    - iv. Buy America (and BABA) monitoring – Training the workforce, training the contractor community, creating and using a new certification – all the while remembering the older BA rules and practices remain in force
    - v. Avoid unnecessary or duplicative purchases – centralized tracking to identify duplication, annual planning for recurring requirements

Standards of Conduct

- “Maintain written standards of conduct covering conflicts of interest and governing the performance of its employees engaged in the selection, award and administration of contracts”
  - How do we avoid individual conflicts of interest?
    - i. Selection, award, and oversight of contractors
    - ii. Real or apparent conflicts – identifying potential conflicts!
    - iii. Provision of discipline
    - iv. Gifts

Awards to responsible contractors

- How do we check and document responsibility?
  - What makes a contractor responsible”
    - Financial resources to perform the work
    - Appropriate administrative, technical, equipment/facility/production and personnel
    - Ability to comply with required schedule
    - Satisfactory past performance record
    - Record of integrity and ethics
    - Compliance with license and tax law
  - Have a checklist to document your findings

Procurement History

- Chapter III, paragraph 3.d (*Record Keeping*), subparagraph (1) *Procurement History*
  - Rationale for the method of procurement
  - Selection of contract type
  - Contractor selection or rejection criteria
  - Basis for contract prices

Time and Materials Contracts

- “No other contract is suitable.”
- Not to exceed amount
- Oversight – “reasonable assurance that the contractor is using efficient methods and effective cost controls.”

Dispute Resolution

- Protest procedures
- Dispute procedures
- Claim procedures

Full and Open Competition

- Avoiding
  - Unfair competitive advantage (e.g., SOW drafting)
  - Unreasonable requirements
  - Excessive experience or bonding
  - Noncompetitive pricing among affiliates
  - Noncompetitive consultant retainers
  - Organizational conflict of interest
  - Brand name specifications without salient characteristics

Full and Open Competition

- Avoiding
  - Arbitrary actions
  - Geographic preferences (except A&E under the Brooks Act)
- Procurement procedures
  - Clear and concise scopes of work
  - Not “exclusionary”
  - Recitation of selection criteria
- Prequalification practices

Methods of Procurement

- Micro purchases
- Small purchases
- Invitation for Bids
- Request for Proposals
- Non-competitive procedures
  - Sole source!

Contract Cost and Price

- Every procurement about $250,000 (watch if required internally below that level)
  - Include contract modifications
  - ICE and cost/price analysis
  - Profit negotiated separately
- Modifications
- Where there is no price competition
- Always when a cost analysis is done
- Allowable costs
- Cost plus percentage of cost forbidden

Bonding

- Only required for construction contracts
- 2 CFR 200.325 allows FTA to accept grantee policies
- Default is 100% performance and 100% payment bonds
- 4220.1F requires 100% performance but a sliding scale on payment bonds
- 4220.1F also contemplates accepting grantee policies for reduced bonding

Clauses

- Keep that clause matrix updated!
- Highlighted in the Contractors Manual
- A few potential problem areas
  - Recovered materials - 40 CFR part 247
  - Tax compliance and felony convictions certification
  - *McCain Act* compliance (certification)

Themes

- Repeated emphasis
  - DBE
  - BABA/Buy America
  - Limits on competition

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