PURPOSE
To provide policy guidance to Local Workforce Development Boards (LWDB), One-Stop Career Center Operators and other local workforce investment partners with respect to the state’s policy regarding procurement and contracting requirements.

REFERENCES
- Workforce Innovation and Opportunity Act of 2014, Sections 184(a)(3)(A)
- 2 CFR Part §200.303
- 2 CFR Part §200.404 - 405
- NMSA 1978 Procurement, 13-1-1 through 13-1-99
- GSA-State Purchasing Department 1.4.1.1 NMAC, 2.40.2 NMAC

BACKGROUND
Section 184 of WIOA requires that each State (including the Governor of the State), local area (including the chief elected official for the area), and providers receiving funds under Title I of WIOA to comply with applicable uniform cost principles, and the appropriate uniform administrative requirements for grants and agreements applicable to the type of entity receiving WIOA Title I funds. In addition, all entities that receive federal funds are bound by the procurement requirements of 2 CFR Part 200 Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards Final Rule (Uniform Grant Guidance). These procurement and contracting requirements establish standards to ensure open and fair competition exists for prospective providers, and federally funded programs obtain goods and services in the most cost effective manner. It is recommended that all local area boards utilize www.ecfr.gov to ensure current Uniform Grant Guidance is followed.

The Uniform Guidance, 2 CFR 200.318 requires general standards for procurement which include but are not limited to the items below:

- Every non-federal entity receiving federal awards must have documented procurement procedures that reflect federal law, Uniform Grant Guidance standards, and any state regulations.
- Entities should focus on the most economical solution during the procurement process, and must avoid using federal funds for the acquisition of unnecessary items. Organizations are encouraged to consider the use of shared services and intergovernmental agreements to foster greater economy and efficiency.
- Written conflict-of-interests policies are required. No employee or agent of the entity may participate in the selection, award or administration of a contract funded by federal grant dollars if he or she has an actual or apparent conflict of interest.
- The organization must document the procurement steps and activities required to be completed. This includes the basis for the type of procurement, contract type, and the basis for the contractor selection and price.
- Ultimately, the recipient of federal awards must maintain an appropriate level of oversight to ensure that contractors perform in accordance with the terms of their contract.
The Uniform Guidance outlines five methods of procurement:

- **Micro-purchase - Goods and services $3,000 or less**: Procurement within this threshold is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold of $3,000. To the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.

- **Small purchase - Goods and services $3,001 to $149,999**: For procurements within this threshold, small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold ($150,000). The procuring entity’s written procedural guidance must ensure documentation of price or rate quotes, procurement method and justification for the selection from among an adequate number of competitive providers.

- **Simplified Acquisition Threshold - Goods and services above $150,000**: Procurements at this threshold level are subject to formal bid/proposal solicitation requirements such as sealed bids and competitive or non-competitive proposals.

- **Sealed bids**: Used for purchases over the Simplified Acquisition Threshold. Under this purchase method, formal solicitation is required, and the fixed price (lump sum or unit price) is awarded to the responsible bidder who conformed to all material terms and is the lowest in price. Bids must be solicited from an adequate number of known suppliers, providing sufficient response time prior to the date set for opening bids. Must be publically advertised. All bids must be opened at the time and place prescribed in the invitation for bids. A firm fixed price contract award will be made in writing to the lowest responsible and responsible bidder. This method is the most common procurement method for construction contracts.

- **Competitive proposals**: Used for purchases over the Simplified Acquisition Threshold. This procurement method requires formal solicitation, fixed-price or cost-reimbursement contracts, and is used when sealed bids are not appropriate. Request for proposals (RFP) must be publicized and identify all evaluation factors and their relative importance. Proposals must be solicited from an adequate number of qualified sources. The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients. The contract should be awarded to the responsible firm whose proposal is most advantageous to the program, with price being one of the various factors.

- **Noncompetitive or Sole Source proposals**: Also known as sole-source procurement, this may be appropriate only when specific criteria are met. Examples include when an item is available only from one source, when a public emergency does not allow for the time of the competitive proposal process, when the federal awarding agency authorizes, or after a number of attempts at a competitive process, the competition is deemed inadequate.

The New Mexico Department of Workforce Solutions (NMDWS), as a pass-through entity responsible for WIOA Title I Adult, Dislocated Worker, and Youth funds, is required to have written procurement procedures in place to ensure all programs and services delivered in partnership with the local workforce development boards (LWDBs) are procured in accordance with these established federal, state and local guidelines. This policy outlines the requirements for procurement and contracting for all funds provided through the New Mexico Department of Workforce Solutions (NMDWS), including, but not limited to, Workforce Innovation and Opportunity Act (WIOA). This Guidance Letter includes attachments that provide additional information and examples for developing and conducting solicitations, contracting and monitoring of contracts, and checklists for procurement and contract files.
DEFINITIONS

Allocation - The process of assigning a cost, or a group of costs, to one or more cost objective(s), in reasonable proportion to the benefit provided or other equitable relationship.

Award - A contract, grant, sub-contract, sub-grant, or other type of legal instrument that conveys funds.

Awardee Types –

- **Grantee** – The direct recipient of grant funds from the Department of Labor under a grant or grant agreement. The State with NMDWS designated by the Governor as the State Administrative Entity for the administration of WIOA funds.

- **Sub-grantees** – An award provided by a pass-through entity to carry out part of a Federal award received by the pass-through entity. It does not include payments to a contractor or payments to an individual that is a beneficiary of a Federal program. The legal entity to which an award is made and which is accountable to the recipient for the use of the funds provided. For WIOA purposes, characteristics of a sub-grantee include items such as: determining eligibility of applicants, enrollment of participants, performance measured against meeting the objectives of the program, responsibility for programmatic decision making, responsibility for compliance with program requirements, and use of the funds awarded to carry out a WIOA program or project. Local Workforce Development Boards (LWDBs) are considered sub-grantees, not contractors.

- **Sub-recipient** - Any public agency, private nonprofit organization, or private-for-profit entity that delivers services to participants, also known as a service provider. Sub-recipients determine eligibility, has performance measured in relation to objectives of program, has responsibility for programmatic decision making and uses Federal funds to carry out a program for a public purpose. Awards to service providers may be made by contract, sub-contract, or other legal agreement.

- **Contractor** - An entity responsible for providing generally required goods or services. These goods or services may be for the sub-recipient’s use or for the use of program participants. Characteristics of a vendor contractor include items such as: providing goods and services within normal business operation, providing similar goods or services to many different purchasers, and operating in a competitive environment. Service providers are considered sub-recipients, not contractors.

Chief Procurement Officer (CPO) - Person within a local public entity’s Central Purchasing Office who is responsible for the control of procurement of items of tangible personal property, services or construction and is registered as such on the New Mexico General Services Department CPO List.

Contract - Legal instrument by which an entity purchases property or services needed to carry out the project or program under a Federal award.

Contracting Officer – Authorized individual to procure goods and services for a non-Federal entity.

Cost Analysis - The examination of the estimated or actual cost of contract performance to determine the probable cost to the contractor.

Cost Types –

- **Administrative Costs** – Personnel and non-personnel, direct and indirect costs that are associated with the administrative functions of WIOA, as incurred by the local board, fiscal agent, and/or one-stop operator. Examples: accounting, budgeting, financial, and cash management functions. Payroll functions, personnel management functions, and development of systems and procedures required for administrative functions. Travel cost to carry out administrative activities or the overall management of the WIOA system.
• **Direct Participant Training Cost** - Tuition or instruction payments for participants. Examples: Individual Training Accounts (ITA’s), On-the-Job Training (OJT), or contracted services for customized training.

• **Program Costs** – Local board personnel and non-personnel, direct and indirect costs that are associated with the programmatic functions of WIOA, as incurred by the local board. Examples: Program personnel and related non-personnel cost, tracking or monitoring of participant and performance information, performance and program cost information on eligible providers of training services, youth activities, and appropriate education activities.

• **Service Provision Costs** - Service Provider personnel and non-personnel, direct and indirect, costs associated with the provision of services to participants. Examples include: Case management of participants in career services and training services.

• **Supportive Services Costs** - Costs for services that are necessary to enable an individual to participate in activities authorized under the WIOA. Examples include: transportation, child care, dependent care, housing, and needs related payments.

• **System Costs** - Costs necessary for the functioning of the workforce system. Examples include: office supplies, rental and maintenance of office space, rental or purchase of equipment, and utilities, and other maintenance services.

**Disallowed Costs** - Charges to a Federal award that the Federal awarding or pass-through entity determines to be unallowable, in accordance with the applicable Federal statutes, regulations, or the terms and conditions of the Federal award.

**Disbursement** - The transfer of cash from the grantee to a sub-grantee or other payee, either by check, voucher or an electronic transfer issued to the entity often through an electronic payment system.

**Equipment** - Tangible personal property (including information technology systems) having useful life of more than one year and a per-unit acquisition cost which equals or exceeds the lesser of the capitalization level established by the non-Federal entity for financial statement purposes, or $5,000.00.

**Expenditures** - Charges made by a non-Federal entity to a project or program for which a Federal award was given.

**Immediate Family Member** - Includes one party with any of the following relationship to another party: (i) Spouse and parents, (ii) Children, and spouses, (iii) Parents, and spouses, (iv) Siblings and spouses, (v) Grandparents and grandchildren, and spouses, (vi) Domestic partner and parents including domestic partners of any individual in 2 through 5 of this definition, and (vii) Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.

**Local Administrative Entity** – The entity designated by the local workforce development board (LWDB) for the administration of WIOA in the local area.

**Local WDB** – A Local Workforce Development Board (LWDB) established under WIOA section 107, to set policy for the local workforce development system.

**Obligation** - The amount of orders placed, contracts and sub-grants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period. Obligation is a term that references actions where a legal commitment to pay exists. An obligation may occur at the time the services are rendered, or before services are rendered when a binding agreement has been entered into. Obligations are legal requirements, not plans, budgets, or encumbrances.

**Procurement** - The process that leads to the purchase of goods and services as determined under Uniform Guidance 2 CFR 200.318-327. This includes the formal and informal process. The formal process is required when the procurement value is more than $150,000 and is...
solicited through a competitive Request for Proposal (RFP) process or Invitation to Bid (IFB). The informal process is used when the value of purchase is less than $150,000 and is called the “small purchase threshold” and requires a competitive minimum of three price quotes. A non-competitive procurement is a “single source” or “sole source” procurement and is only awarded under strict circumstances.

COMPETITION

(1) According to (2 CFR §200.319), the procuring entity must establish procurement procedures which promote and maximize the competitive procurement process.

(2) At a minimum, the procurement process must:

(a) appropriately target resources based on approved job training plans;
(b) be made impartially;
(c) be based upon demonstrated performance;
(d) include a determination of cost/price reasonableness;
(e) be in compliance with all related federal and state laws, regulations and policy.

(3) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of §200.319. Some of the situations considered to be restrictive of competition include but are not limited to:

(a) placing unreasonable requirements on entities in order for them to qualify to do business,
(b) requiring unnecessary experience and excessive bonding,
(c) noncompetitive pricing practices between entities or affiliated companies,
(d) noncompetitive awards to consultants that are on retainer contracts,
(e) organizational conflicts of interest,
(f) specifying only a "brand name" product instead of allowing an "equal" product to be offered and describing the performance of other relevant requirements of the procurement, and
(g) any arbitrary action in the procurement process.

(4) Grantees and subgrantees must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference.

(5) Grantees and subgrantees will ensure that all pre-qualified lists of persons, firms, or products which are used in acquiring goods and services are current and include sufficient qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

PROCUREMENT STANDARDS

(1) When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with 2 CFR §200.322 Procurement of Recovered Materials and ensure that every purchase order or other contract includes any clauses required by 2 CFR §200.326 Contracting Provisions.

(2) Grantees and subgrantees must establish their own procurement procedures which must conform to applicable State and local laws and regulations.

(3) Grantees and subgrantees must maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
(4) Code of Conduct and Conflicts of Interest.

(a) Grantees and subgrantees must maintain a written code of conduct governing the performance of their employees engaged in the selection, award and administration of contracts.

(b) No employee, officer or agent of the grantee or subgrantee shall participate in any way (including discussion, review and/or voting) in the selection, or in the award or administration of a contract supported by Federal or State funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when the following individuals and/or entities has a financial or other interest in the firm selected for award:

   (i) the employee, officer or agent,
   (ii) any member of his immediate family,
   (iii) his or her partner, or
   (iv) an organization which employs, or is about to employ, any of the above,

(c) The grantee's or subgrantee's officers, employees or agents must neither solicit nor accept gratuities, favors or anything of monetary value from contractors, or potential contractors.

(d) Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value, based on the Commonwealth’s Ethics Rules.

(e) To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantees and subgrantees, officers, employees, or agents, or by contractors or their agents.

(f) The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(g) A State Board member or a Local Board member must neither cast a vote on, nor participate in any decision-making capacity, on the provision of services by such member (or any organization which that member directly represents), nor on any matter which would provide any direct financial benefit to that member or a member of his/her immediate family. Neither membership on the State Board, the Local Board nor the receipt of WIOA funds to provide training and related services, by itself, violates these conflict of interest provisions.

None of the funds made available under Title I or II or under the Wagner-Peyser Act (29 U.S.C. 49 et seq.) may be expended by a grantee or subgrantee unless the expense complies with sections 8301 through 8303 of title 41, United States Code (commonly known as the “Buy American Act”).

(5) Grantee and subgrantee procedures must provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis must be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(6) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(7) Grantees and subgrantees are encouraged to use Federal excess/surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(8) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for
cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(9) Grantees and subgrantees must only make awards to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration must be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(10) Grantees and subgrantees must maintain records sufficient to detail the significant history of a procurement. These records must 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.

(11) Grantees and subgrantees are 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. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Violations of law must be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees must have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the state or Federal agency. Reviews of protests by the Federal agency are limited to:

   (a) violations of Federal law or regulations and the standards at 2 CFR §200.317 (violations of State or local law will be under the jurisdiction of State or local authorities) and,
   (b) violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest.

Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

PROCUREMENT METHODS
The methods of procurement to be followed as provided in 2 CFR §200.320 are dependent on the threshold levels as previously stated. The non-Federal entity must use one of the following methods of procurement. The New Mexico thresholds are stated below.

Threshold Levels
Small purchases as defined by New Mexico state procurement code are broken down into tangible goods, services, and professional services. (2.40.2 NMAC)

(1) Procurement levels for tangible goods:
   (a) Less than $10,000 for small purchase (Best obtainable price)
   (b) $10,000 to $20,000 for Informal Procurement (3 valid quotes)
   (c) $20,000 or greater for the Formal process

(2) Procurement levels for services are:
   (a) Less than $10,000 for Small Purchase (Best obtainable price)
   (b) $10,000 to $20,000 for Informal Procurement (3 valid quotes)
   (c) $20,000 or greater for the Formal process

(3) Procurement levels for professional services are:
   (a) Less than $50,000 for Small Purchase
   (b) $50,000 or greater for the Formal Process
NOTE: Governmental entities and other organizations subject to more restrictive state or local procurement thresholds and requirements must comply with the more restrictive policy.

TYPES of COMPETITIVE PROCUREMENT

According to 2 CFR §200.319, procurement transactions should be conducted to ensure adequate competition and reasonable price. Non-competitive procurement should be used only in the circumstances outlined below in Section II, Non-Competitive Procurement. The types of competitive procurement include the following:

1. Procurement by Micro-purchase procedures. Micro-purchase procedures is the purchase of supplies or services using simplified acquisition procedures, the aggregate amount of which does not exceed the micro-purchase threshold ($10,000). Micro-purchase procedures comprise a subset of a grantee’s and subgrantee’s small purchase procedures. The micro-purchase threshold is set by the Federal Acquisition Regulation (FAR) at 48 CFR Subpart 2.1. It is $10,000 except as otherwise discussed in Subpart 2.1 of that regulation, but this threshold is periodically adjusted for inflation.

2. Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the simplified acquisition threshold set by the Federal Acquisition Regulation (FAR) at 48 CFR Subpart 2.1 (currently set at $250,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

3. Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming to all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (i) of this section apply.

   (i) In order for sealed bidding to be feasible, the following conditions should be present:

   (A) A complete, adequate, and realistic specification or purchase description is available;
   (B) Two or more responsible bidders are willing and able to compete effectively and for the business; and
   (C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

   (ii) If sealed bids are used, the following requirements apply:

   (A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;
   (B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;
   (C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;
   (D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such
discounts are usually taken advantage of; and
(E) Any or all bids may be rejected if there is a sound documented reason.

(4) Procurement by competitive proposals (Request for Proposals). The technique of
competitive proposals is normally conducted with more than one source submitting an
offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is
generally used when conditions are not appropriate for the use of sealed bids. If this
method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and
their relative importance. Any response to publicized requests for proposals shall be
honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical
evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most
advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for
qualifications-based procurement of architectural/engineering (A/E) professional
services whereby competitors' qualifications are evaluated and the most qualified
competitor is selected, subject to negotiation of fair and reasonable compensation.
The method, where price is not used as a selection factor, can only be used in
procurement of A/E professional services. It cannot be used to purchase other types
of services though A/E firms are a potential source to perform the proposed effort.

(5) Individual Training Accounts. The process of choosing a provider to train a participant
through an Individual Training Account is an exception to the RFP process.

NON-COMPETITIVE PROCUREMENT

Procurement by noncompetitive proposals is procurement through (1) solicitation of a proposal
from only one source, or (2) after solicitation of a number of sources, competition is determined
inadequate.

(1) Sole Source Procurements.

(a) This method may be used only when the award of a contract is infeasible under
small purchase procedures, sealed bids or competitive proposals and one of the
following circumstances applies:

(i) the item is available only from a single source;

(ii) the public emergency for the requirement will not permit a delay
resulting from competitive solicitation;

(iii) the awarding agency or pass-through entity expressly authorizes
noncompetitive proposals in response to a written request; or

(iv) after solicitation of a number of sources, competition is determined to be
inadequate or a failed competition, where the solicitation has resulted in
fewer than two responsive and responsible bids.

(b) According to NMAC 1.4.1.57, the procuring entity must retain the records for a
minimum of three years. The record of each such procurement must be a public
record and must contain:

(i) the contractor's name and address;

(ii) the amount and term of the contract;
(iii) listing of the services, construction, or items of tangible personal property procured under the contract and
(iv) The justification for the procurement method which shall include any written determinations and written approvals required by any provision of 1.4.1.53 through 1.4.1.57 NMAC of this rule.

(c) Prior written approval by the NM Department of Workforce Solutions must be obtained for any actual sole source or emergency award, which is in excess of $250,000. All such awards must be justified and documented, and will not be approved retroactively. Requests for approval must include the following information:

(i) copy of the offerors proposal;
(ii) copy of the cost/price analysis;
(iii) copy of related local board meeting discussion minutes;
(iv) copy of the non-competitive/award justification;
(v) cover letter requesting approval; and
(vi) failed competition analysis

Such procurements which initially do not require NMDWS approval, but which are to be modified to an amount which exceeds $150,000, must be submitted for NMDWS approval prior to the execution of the modification. Failure to obtain required prior approvals may result in questioned costs.

Although such awards in an amount below $150,000 need not be submitted to NMDWS for approval, the procuring entity must internally document and justify these awards below this level.

When a Procuring Entity conducts a formal solicitation process and receives only one qualified proposal, the award process must be justified and documented. A Failed Competition Analysis must be performed.

Program Operators/Service Providers should address the following questions:

A. Was there a weakness in the solicitation specifications?
   • Was the statement of work clear?
   • Was the statement of work too narrowly defined?
   • Were the administrative requirements too cumbersome?
   • Was there an excessive amount of experience required?
   • Was the cost the entity was willing to pay too low?
   • Was there adequate time to prepare proposals?

B. Was the solicitation advertised in an adequate number of locations?

C. Are the services/training being sought really only available from one offeror?

Prior to awarding the contract, the procuring entity must address these issues and document that the process was not flawed and that in fact only one vendor can provide the services being sought, a cost/price benefit analysis must be completed prior to awarding the contract.

SOLICITATIONS

Frequency of Solicitations. Solicitation must occur at a minimum of every two years to promote and encourage competition. Solicitation of audit services must occur at a minimum of every five years.

Multi-year Funding. Multi-year funding of contractors must be consistent with the conditions of the approved RFP and award. In addition, subsequent year funding is to be retained as the
option of the procuring entity only and must be subject to successful performance and formal, documented contract negotiations.

PROCUREMENT AUTHORITY
The local board’s procurement policy and procedural guidance must identify the positions of individuals in the organization that have the authority to take the following actions:

(1) Allocate funds to procure services.
(2) Approve procurement plans.
(3) Determine if a non-competitive or sole-source procurement has to be pursued.
(4) Approve the issuance of the solicitation package.
(5) Approve the selection of contractors or service providers.
(6) Sign contracts (the policy must include appropriate certification by the LWDB that this individual has legal authority to sign contracts and must be consistent with the signatory on file at NMDWS)
(7) Approve and sign contract modifications.
(8) Issue notices of contract termination.

Where individuals of the procuring entity have joint responsibility to approve contract actions, the procurement policy must delineate and describe respective roles and authority. Authorizations should be reviewed on an annual basis and revised, if necessary.

1. PROCUREMENT DOCUMENTATION

The local’s board’s procurement policy and written procedural guidance must require the maintenance of organized and centralized procurement files. Procedures must require files to contain sufficient documentation to track the significant history of each procurement. Files must contain all documentation related to each procurement including, but not limited to:

(1) procurement planning records,
(2) the solicitation,
(3) notices of public advertisement,
(4) bidder’s conference minutes,
(5) all proposals submitted with records of their receipt,
(6) all proposal evaluation documentation (including sign-off and certifications),
(7) all proposal negotiation documentation, and
(8) all related meeting/committee minutes to document the contract(s) review, evaluation and award.

A Sample Procurement File Checklist is contained in Attachment A.

PROCUREMENT REVIEW – 2 CFR §200.324

(1) The subgrantee must make available, upon request of the Federal awarding agency or NMDWS as the pass-through entity, any and all documents related to proposed procurements where the Federal awarding agency or NMDWS believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the grantee desires to have the review accomplished after a solicitation has been developed, the Federal awarding agency or NMDWS may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.
(2) The grantee must make available upon request, for the Federal awarding agency or NMDWS pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when:

(a) the grantee’s procurement procedures or operation fails to comply with the procurement standards in this policy;
(b) the procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;
(c) the procurement, which is expected to exceed the Simplified Acquisition threshold specifies a “brand name” product;
(d) the proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or
(e) a proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.

(3) The grantee is exempt from pre-procurement review if the Federal awarding agency or NMDWS determines that its procurement systems comply with the standards of this policy.

(a) The grantee may request that its procurement system be reviewed by the Federal awarding agency or NMDWS to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews must occur where there is continuous high-dollar funding, and third party contracts are awarded on a regular basis.
(b) The grantee may self-certify its procurement system. Such self-certification must not limit the Federal awarding agency’s right to survey the system. Under a self-certification procedure, the Federal awarding agency may rely on written assurances from the grantee that it is complying with these standards. The grantee must cite specific policies, procedures, regulations or standards as being in compliance with these requirements and have its system available for review.

CONTRACTING PROVISION – 2 CFR §200.326

(1) Contracting with small and minority firms, women’s business enterprises and labor surplus area firms. The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women’s business enterprises, and labor surplus area firms are used when possible. Affirmative steps shall include:

(a) placing qualified small and minority businesses and women’s business enterprises on solicitation lists;
(b) assuring that small and minority businesses, and women’s business enterprises are solicited whenever they are potential sources;
(c) dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women’s business enterprises;
(d) establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women’s business enterprises;
(e) using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and
(f) requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in this section.

(2) **Contract cost and price 2 CFR §200.323**

(a) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition threshold, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of its estimated cost, e.g., under professional, consulting, and architectural engineering services contracts, or whenever a line item budget is submitted. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(b) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(c) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles.

(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

(e) All procurement contracts between local boards and units of State or local governments must be conducted on a cost reimbursement basis. No provision for profit is allowed.

**ACTION REQUIRED**

1. Each Local Administrative Entity is required to have one designated state-certified Chief Procurement Officer (CPO) who has completed required training and is registered on the New Mexico General Services CPO List. This requirement is included as part of the local board certification process and will be reviewed as a component of the annual monitoring policy.

2. All local boards must develop a local policy on procurement in compliance with state and federal policy as stated in this guidance. The policy, at a minimum, must have the following elements:
   a. Designate a registered Chief Procurement Officer as required by the New Mexico General Services Department;
   b. Include a Conflict of Interest clause;
   c. Include a Buy American Clause and required federal assurances;
   d. Include a timeline for procurement which results in contract awards finalized at a minimum of two months prior to the date contract is to be executed;
   e. Include requirements for review committee procedures that include independent reviewers who are convened as a group to finalize, rank, and discuss proposal scores prior to making final recommendations for consideration.
3. The attachments included with this policy are provided as additional guidance. Local boards are encouraged to adopt these or similar guidelines and incorporate them into their respective policies.

INQUIRIES:
For inquiries please contact the LWDB liaison at NMDWS.

Yolanda Montoya-Cordova, WIOA SAE
New Mexico Department of Workforce Solutions
ATTACHMENT A - PROCUREMENT FILE CHECKLIST

Solicitation Name: Total Funding: $______ Funding Source: ______ Funding Period:_______

___ Procurement Planning Records (meeting minutes, etc.)
___ Copy of Solicitation Document (RFP, RFQ, IFB)
___ Original Public Notice(s)/Ad(s) (tear sheets)
___ Copy of Solicitation Mailing List(s)
___ List of Entities which requested a proposal
___ Records of Bidders Conference Attendance
___ Minutes from Bidders Conference
___ Copy(s) of Q & A's sent to proposers
___ Copy(s) of amendments to solicitation
___ Log of proposals submitted
___ Copies of proposals submitted (with date stamp & time)
___ Minutes of Review team/committee meeting(s)
___ Signed proposal rating sheets
___ Cost/Price analysis documentation
___ Signed review team non-conflict statements
___ Written recommendations of review team/committee
___ Documentation of proposal/contract negotiation(s)
___ Amended/Last and Final Proposals
___ Misc. proposal clarification documents/correspondence
___ Minutes of Award/Selection meetings and votes
___ Copies of Approval/Award/Rejection letters
___ Required certifications (debarment & suspension, etc.)
ATTACHMENT B - CONTRACT FILE CHECKLIST

Contract Name: __________ Contractor: __________ Contract Number: __________
Contract Amount: $________ Contract Period: __________ Funding Source: __________

____ Signed/Executed copy of the contract
____ Signed copy(s) of subsequent contract modifications
____ Contract/Mod. cost/price analysis & justification
____ Proposal or other documents incorporated by reference
____ Required certifications (debarment & suspension, etc.)
____ Pre-award surveys or other review data
____ Copy(s) of contract negotiation data
____ Subcontract/sub-agreement approval documentation
____ Copy(s) of required insurance/bonds
____ Copy(s) of Agency/Contractor correspondence
____ Monitoring Reports/Corrective Actions/Follow-up documents
____ Invoice/billing records of payment
____ Records of cash advances/on-hand and liquidation of funds
____ Property/Equipment acquisition and disposition records
____ Documentation of Termination actions
____ Contractor report(s) of deliverables provided
____ Contract Close-out/Cash settlement/Program Income Reports
____ Copies of required audit reports/review & resolution
ATTACHMENT C

GUIDANCE ON DEVELOPMENT OF FORMAL SOLICITATIONS AND THE STATEMENT OF WORK (SOW)

This Attachment contains information on the development of formal solicitations and the statement of work. LWDBs/Program Operators may utilize this in lieu of developing their own procedures.

1. SOLICITATIONS

The solicitation is the document that the Procuring Entity issues to elicit offers from proposers or bidders. The formal solicitation using the RFP method is the document that invites offers from potential service providers.

A. Request for Proposals (RFP)

The LWDB/Program Operator should ensure that RFPs include:

1) **Statement of Work or Specifications.** The Statement of Work (SOW) is the document that clearly describes the services that are being acquired. (SOW requirements are addressed later in this document).

2) **A description of the requirements for time, place and methods or performance of services.** This will be included within the SOW, however, it is beneficial to state these requirements in a separate section to summarize the work to be completed with dates and places for delivery of services.

3) **Contract clauses that will be included in any resulting contract.** Standard "boilerplate" clauses should be made available to bidders. This may be accomplished by inclusion in the RFP or by information to the bidders that the boilerplate is available for review at the WDB/Program Operator.

4) **Assurances, certifications and representations.** Any assurances, certifications and representations that the bidder will be required to execute should be included in the RFP, and may require a statement from the offerors that they will comply with any regulatory requirement established by the funding source.

5) **Detailed information on how to prepare and submit the proposal.** The RFP should provide clear direction on the proposal format; the number of copies to submit; the location where the proposal should be submitted and the submission closure time and date. The RFP should also establish any minimum responsiveness requirements that must be met for a proposal to be considered.

6) **Description of how price or cost will be utilized as a factor affecting proposal awards decisions.**
7) **Criteria and evaluation developed to review proposals for award decisions.**
   The RFP should include a description of the criteria and evaluation to be utilized.

8) **Solicitation provisions.** The RFP should clearly state the provisions that govern the solicitation process and clearly describe how the procurement process will be managed. For example, this may include logging in of proposals, expected time frame for notification of award/non-award and what appeals process is available to bidders, time frames and levels of in-house and LWDB committee reviews; when the full LWDB will review and vote on recommendations; etc. The RFP may also include a description of the process which will be followed if the RFP is amended, e.g., if the Bidder's conference results in clarification needed or if changes/decisions are made which affect the services being procured.

9) **Budget Instructions.** The RFP should request a full line item budget which identifies the basis for all costs by cost category, and should provide detailed instructions as to what constitutes a complete budget. A budget narrative should also be required.

10) **Summary or cover sheet.** The RFP may request a summary or cover sheet.

11) **Other.** The RFP should also include:

   (i) Reservation of the Procuring Entity's right to reject any or all proposals.

   (ii) Statement of the proposer's rights of protest and appeal.

   (iii) If a competitive range or other narrowing of offerors is to be used, the decision criteria, which may include a minimum threshold, should be described.

   (iv) Information regarding whether amended or "best and final" proposals will be requested and evaluated.

2. **STATEMENT OF WORK**

   The Statement of Work (SOW) is the section of the solicitation (RFQ, IFB, RFP) that specifically describes the scope of work; the materials necessary to complete the work and the services to be procured. A well-structured SOW will serve as the framework of the contract.

   The SOW should include:

   a. **Background Information.** The solicitation should include information on:

      i. The audience for which this solicitation is being prepared.

      ii. Funding source and authorization.
iii. Procuring Entity implementation and responsibilities.

iv. Information on previous LWDB/Program Operator/Program Operator sponsored training programs.

v. Definitions and terminology.

vi. References to LWDB plans; labor market surveys and any other relevant background.

b. **Purpose.** The solicitation should include information on the overall program objectives (and their relationship to this solicitation); the purpose of the contract (what services are being procured); and the target groups the program will serve. Focus should be on outcomes, allowing flexibility on how to achieve the goals.

c. **General Responsibilities.** The SOW should include requirements for information on management, staffing and the direction of programs; location and facilities; hours of operation; coordination with the LWDB/Program Operator; administrative procedures; component budget; and, if applicable, minimum staff qualifications.

d. **Demonstrated Performance.** The solicitation should require the offeror to document its record of demonstrated performance in the past delivery of employment & training or related services.

e. **Services to be Performed.** The solicitation should be very specific in describing the services to be performed, carefully identifying what is to be accomplished as opposed to how it should be accomplished. When procuring for employment and training services, this section should identify which career services, and training services are being sought.

f. **Standards of Performance.** This section identifies how well the offeror must perform, including criteria to determine satisfactory performance. This section should reference: program outreach; recruitment goals (e.g., target groups); intake; program design standards; and program performance outcome standards.

g. **Administrative Requirements.** This section specifies what specific actions must be taken to comply with Federal, State and Local regulations, policies and procedures. At a minimum, this section should include: requirements for maintenance of applicant/participant records; fiscal management and reporting; program status records and reports; a list of any Procuring Entity furnished property or space; allowability of subcontracting; grievance procedures; and performance and submission of single audits by public/non-profit organizations awarded contracts within 9 months of the end of the program, if applicable. Financial risk assessment procedures for each applicant prior to award as required by Federal Regulations 2 CFR §200.205.
h. Exhibits. This section should include any materials to be provided to offeror as exhibits. These exhibits may include, but are not limited to: standard forms and reports; standardized procedures; maps and flow diagrams; proposal evaluation format; and organizational charts.

1) REVIEW/EVALUATION OF SOLICITATIONS

The LWDB/Program Operator should have written procedures which:

A. Contain a description of the procedures used to review proposals and select contractors, including:
   1. The application of the technical rating criteria and evaluation factors contained in the solicitation;
   2. Identification of what type of staff or others who will review and score or rate technical proposals;
   3. The roles of staff in the review of proposals, including how and when these roles are to be executed.

B. Describe the procedures for conducting and documenting cost and price analysis.

C. Specify that for all procurements, a procurement file be developed that documents all actions up to and including the awarding of contracts, including required file content.

D. Include a method for allowing and evaluating offerors' protests of contract awards and/or other aspects of the procurement process.

E. Describe the appeal/protest process, including the:
   1. name of the individual with whom the protest must be filed,
   2. time limits for the filing of protests,
   3. procedure for the handling of protests, and
   4. nature of offeror's appeal rights, including appeal of the WDB/Program Operator decision to the state funding agency.

2) RECEIPT OF PROPOSALS

A log of incoming proposals should be kept which contains the name of the offeror, and the date and time of receipt of proposals. The log should not be visible to offerors who hand-deliver their proposals.

Names and the number of offerors submitting proposals is confidential until the solicitation process has been completed. Incoming proposals should also be dated stamped. If proposals are late and it has been specified in the solicitation that late submissions will not be accepted, the proposals should still be logged in and then returned to the offeror specifying that the requirements of the solicitation were not satisfied.
Proposals should be opened and the content of proposals reviewed at a specified time and place. If the solicitation specified that incomplete submissions will constitute a non-responsive proposal, then this procedure is critical. A checklist should be developed to review proposals for completeness, utilizing the solicitation specifications.

All proposers should be treated equally. If one proposal is rejected for incompleteness, then all other proposals which were not complete must be rejected.

3) TECHNICAL EVALUATION

Consideration should be given based upon demonstrated performance in the delivery of comparable services, in terms of the likelihood of meeting performance goals, cost, quality of training, the characteristics of the clients, and consideration to demonstrated performance in making appropriate supportive services and child care available.

I. Minimal Evaluation Factors

Criteria tailored to the specific solicitation requirements should be developed. Cost/price should be included. Other factors which can be included are:

1. Cost Realism (Can the services and the performance goals be delivered for the budgeted cost?)
2. Time Table (Can the services and performance goals be met in the projected time table?)
3. Technical Content
4. Management/Fiscal Capability
5. Qualifications of staff assigned to the project
6. Experience in delivering comparable services
7. Demonstrated Performance
8. Anything else the agency deems important in making its decision.

The solicitation must specify the criteria that will be used in evaluating proposals. While it does not have to specify the weight of each criteria, it should discuss their relative importance.

II. Rating the Proposals

Factors for rating proposals, whether numerical or qualitative, must ultimately be weighted by total points. In general, the relative weight of criteria should be consistent with the goals of the annual plan or proposal. Rating sheets should direct the reviewer to the relevant sections of the solicitation which is the basis for assignment of points. Rating standards should be constructed in a graduated fashion to prevent an all or nothing
decision for a particular criteria. Establishing pass/fail standards such as weeks of training, cost per participant, etc., weakens the impartiality, competitiveness, and cost reasonableness of the process.

III. Proposal Evaluation Conduct

In assigning review membership, it should be clear that all members are expected to read all competing proposals. Sections of proposals should not be subdivided among different committees. Rating sheets should be completely filled out, signed and certified (no conflicts) by the reviewers. The rating sheets should be retained in the procurement file as an audit trail supporting the reliability, objectivity and impartiality of the review process.

The ratings should be summarized and aggregated. The results of the evaluation should then be forwarded in writing by the chair of the committee to the next level of review. Documented minutes should be maintained.

If multiple levels of review occur, the results of each should be separately recorded and documented.

IV. Contract Price and Cost Analysis, Independent Estimates, Cost Classification

Contracts must be awarded to the offeror that presents the best services at the most favorable price. Price and cost analysis also demonstrate the offeror’s understanding of the services to be provided and their commitment of the needed resources to get the work done. Such analysis is usually separate from program analysis.

A cost or price analysis must be performed in connection with every procurement action in excess of the Simplified Acquisition Threshold ($150,000), including contract modifications. Each offeror should be required to certify that to the best of its knowledge and belief, the cost data is accurate, complete, and current at the time of agreement on price.

• Price Analysis

Price analysis is the process of examining and evaluating a price without looking at the cost elements and the proposed profit of the offeror. This involves:

a. Comparison of competitive price quotations.

b. Appropriate comparison of historical or current prices for similar items which have been competitively procured or formally determined as reasonable based on price and/or cost analysis.

c. Appropriate use of measures to point out differences such as price per training hour, price per slot or price per placement among essentially similar services.
d. Appropriate comparisons of prices on published price lists with published market prices together with discount or rebate schedules.

e. Comparison of proposed prices with independent estimates (see above) developed by the contracting entity.

- **Cost Analysis**

  Cost analysis is the review and evaluation, element by element of the line item budget included in the proposals to establish the reasonableness of proposed costs.

  Cost analysis is not always necessary. It is used to establish the basis for negotiating a contract price where price comparison is not adequate or is lacking altogether or where price analysis does not ensure the reasonableness of prices.

- **Elements of Cost Analysis**

  All offerors should be required to submit a detailed line item budget. Offerors should be required to also submit a narrative describing the assumptions and rationale for arriving at these cost estimates.

  Reviewers must then verify the cost and pricing data and evaluate them by:

  a. Judging whether costs are reasonable.

  b. Evaluating the cost trends on the basis of current or historical cost data.

  c. Conducting an appraisal of the estimated labor, materials, etc.

  d. Evaluating negotiated or federally audited rates, if indirect charges are included. In conducting such a review, reviewers may reference federal indirect cost rate circulars. Some universities have approved indirect cost rates which may be based upon research or other grant data and would not necessarily apply in the realm of employment and training grants. The rate basis should be clear.

  e. Reviewers should also compare costs proposed with any other data available including what the offeror proposed in the past, has delivered or is delivering now, and other proposals.

  f. Reviewers should also verify that the proposed costs are in accordance with applicable cost limitations. For instance, if the solicitation states that administration or indirect costs may not exceed 10 percent, then all proposals must be reviewed for compliance with this requirement.

- **Independent Estimates**

  The method and degree of analysis depends on the facts surrounding the particular procurement and pricing situation, but at a minimum, the awarding agency should make independent estimates before receiving bids or proposals. LWDBs/Program Operators/Service Providers must develop independent estimates of the cost elements of the service(s) utilizing budget line item costs and prices developed from
past experience, contractor financial reports, etc., to estimate what the likely costs and price of the procurement will be. This provides a yardstick for the comparison of the costs and prices of an offeror. Estimates may be developed in the form of acceptable ranges for price and cost elements to be measured against the bases of cost/price data during proposal review.

• **Classification of Costs**

  LWDBs/Program Operators/Service Providers should require offerors to submit proposals utilizing the appropriate cost categories so that a determination may be made whether costs comply with cost limitations and whether costs are properly classified, if necessary.

  The reviewers must be certain that offerors do not include the same services as both direct and joint/indirect charges. If possible, costs should be budgeted as direct charges. If the offeror has budgeted indirect charges, the rate must be one approved by a cognizant federal agency or based upon a written cost allocation plan approved by the Procuring Entity. Further, the Procuring Entity is not required to allow the offeror an approved rate if sufficient funds are not available or if the administrative cost limitation would be exceeded.

  Awards to subrecipients or contractors that are solely for the performance of administrative functions are classified as administrative costs. Personnel and related non-personnel costs of staff that perform both administrative functions as defined in the applicable and programmatic services or activities must be allocated as administrative or program costs to the benefiting cost objectives/categories based on documented distributions of actual time worked or other equitable cost allocation methods. Except for awards that are solely for the performance of administrative functions, all costs incurred for functions and activities of subrecipients and contractors are program costs.

• **Analyzing Proposed Costs**

  Reviewers need to know the basis for the estimated costs, whether historical data, quotes, catalogs or price data was used. Reviewers also need to determine if proposed resources are sufficient, though not excessive, to achieve objectives, including reasonableness of staffing patterns and salary rates. Finally, reviewers must verify that costs will not violate laws, regulations and policy and solicitation requirements and restrictions. Costs must be necessary and reasonable.

• **Documenting Conclusions and Concerns**

  Reviewers must document their conclusions and concerns, including the cost analysis, particularly if the Procuring Entity intends to negotiate with the offeror. Documentation is critical if offeror protests are filed and is helpful in the monitoring and administration of the contract.
• **Analysis Of Specific Costs**

Each element of cost should be reviewed separately to determine whether it is reasonable and necessary. For example, staffing costs should be reviewed to determine if the staffing pattern and number of staff are appropriate, whether the compensation is appropriate, etc. For all items, reviewers must determine if the proposal is including a fair share of the costs, and whether there is a less costly way of providing the same services. For equipment, lease versus purchase should be considered. LWDBs/Program Operators/Service Providers need not allow the purchase of equipment. The reviewer needs to analyze the client supportive services proposed to verify whether those costs are necessary to enable eligible clients to participate in the training.

a. **Subcontracts**

When an offeror includes a subcontract, it should be clearly identified, described and justified. The reviewer needs to perform price and cost analysis of subcontracts as well. The reviewer should analyze how the prime offeror will monitor subcontracts, review reports, etc.

b. **Indirect costs**

As stated above, in some cases, the RFP may permit offerors to include indirect costs. These costs must conform to state and local guidelines. The reviewer needs to analyze these costs to ensure that the charges included in the rate are not duplicated in the direct charges. If the indirect rate is not an audited or federally approved one, a cost allocation plan should be submitted by the offeror. The reviewer needs to ascertain whether this contract can support the rate and whether it is appropriate for the proposed services.

c. **Profit, Program Income or Fee**

In the federal procurement system, profit may only be earned by For-Profit organizations. Non-Profit organizations are required to treat any profit earned as Program Income, and are required to reprogram these funds according to state policy. Procurements shall not permit excess profit or program income. If profit or program income is included in the price, the Procuring Entity shall negotiate profit or program income as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed.

There is no fixed guideline for the identification of excess profit. The Procuring Entity is encouraged to establish a limit (for example, 5%) which may be based on the current market/industry standard/rate of profit for similar work.

Any figure which exceeds a Procuring Entity's established limit must be clearly documented as justified, or reduced to that established limit. To establish a fair and reasonable profit or program income, consideration shall be given to
the complexity of the work; the risk borne by the contractor; the contractor’s investment; the amount of subcontracting; the quality of the contractor’s record of past performance; industry profit rates in the surrounding geographical area for similar work; and, market conditions in the surrounding geographical area.

Procuring Entity contracts which provide for profit or program income should require that the provider submit a certification of revenue earned in excess of contract expenses through contract financial close-out reporting.

Contracts between governmental entities may not include profit or program income.

d. Second Year Costs

Solicitations which also seek services for a second year must be subjected to review and evaluation consistent with that of the original awarding year’s review. Costs may be less in the second year in the absence of start-up costs. Other costs may rise due to inflation, salary or cost-of-living increases for staff assigned to the contract. All costs must be analyzed and documented as necessary and reasonable in the second/subsequent year.
ATTACHMENT D

GUIDANCE ON CONTRACTING

• Contract Negotiation And Award

The Procuring Entity should include in their procurement and contracting policy the authority and responsibility for proposal negotiation, final contract negotiation and award, as well as the method and scope of elements subjected to negotiation for proposals and contracts.

A. Competitive Range

A "competitive range" may be defined to establish a pool of negotiable proposals after the initial technical and cost/price evaluation has been completed. Procurement policies should clearly state the criteria for inclusion in the "competitive range", and should not exclude any proposal that may have a reasonable chance of being selected for award based on the initial proposal evaluation/review. Proposal negotiation discussions with offerors should be restricted to indications of proposal deficiencies and requests for additional technical or cost/price information.

Upon completion of proposal negotiations, offerors must submit revised proposals which must be reviewed again for technical and cost/price evaluation prior to award.

B. Final Contract Negotiation

Written procedures should determine the method and authority for final negotiation of contracts and should establish the scope/range of negotiable contract aspects. Contract negotiations should not significantly alter the technical or cost/price aspects of the proposals. If they do, they make it necessary for the proposal to be resubmitted for award consideration prior to contract execution.

C. "High-Risk" Contractors

A contractor may be considered "high-risk" if a LWDB/Program Operator determines that the contractor is otherwise responsible but:

• Has a history of unsatisfactory performance;
• Is not financially stable;
• Has a management system which does not meet required management standards; or
• Has not conformed to terms and conditions of a previously awarded contract or agreement.

When a contractor is considered "high-risk", special funding restrictions to address the "high-risk" status may be included in the agreement. Such restriction may include, but are not limited to:

1. Making payment on a reimbursement basis;
2. Requiring additional and/or more detailed financial or performance reports;
3. Performing additional monitoring;
4. Requiring the contractor to obtain specific technical or management assistance; and/or
5. Establishing additional prior approvals.

Should the LWDB/Program Operator impose such funding restrictions, the contractor must be notified in writing as early as possible, of:

1. The nature of the funding restrictions;
2. The reason(s) for imposing the restrictions;
3. Any corrective actions which must be taken before the restrictions will be removed, and the time allowed for completing the corrective actions; and
4. The method of requesting reconsideration of the restrictions imposed.

• Selection of Contract Type

LWDBs/Program Operators may choose from several types of contracts, depending on the circumstances. Examples are:

a. Cost Reimbursement
   WIOA Regulations require that agreements between governmental units must be on a cost-reimbursement basis, including agreements with community colleges and Vocational Technical schools. This contract type may be required for funding of "high-risk" contractors.

b. Fixed Unit Price
   Requires payment of a specified price for specified deliverables irrespective of actual costs incurred.

c. Combination Cost Reimbursement And Fixed Unit Price
   Utilized when some elements of performance are clear and definitive while other performance specifications are more uncertain. Provides shared risk.

d. Letter Contracts/Limited Agreements
   LWDBs/Program Operators/Service Providers may use Letter Contracts/Limited Agreements to expedite entry into an agreement with a contractor only in emergency or unique situations. Letter/Agreements must include the specific time line of the agreement and the extent of WIB/Program Operator/Service Provider financial and other liability. The agreement must include the signatures of all parties required as authorized signature for the full contract document, and may not obligate the
Procuring Entity to enter into the final/full contract, should contract negotiations fail. Such agreements should include the following minimum provisions:

1. Specific deliverables required by, and within the time frame of the limited agreement. This may be achieved through reference to the contract proposal.

2. Ceiling price of the limited agreement and the anticipated ceiling price of the final/full contract pending.

3. Limit of Procuring Entity liability pending finalization of full contract document, including a provision that the limited agreement does not imply obligation to enter into a final/full contract.

4. Incorporate the Procuring Entity standard terms and conditions boilerplate.

5. Agreement active time period and execution date with all required authorized signatures.

Such agreements should not be used as, or in place of, full contract documents.

Justification or explanation of the nature of the emergency or unique situation requiring the use of Letter Contracts/Limited Agreements should be maintained in the contract file.

e. Subcontracts/Sub-Agreements

The LWDB/Program Operator/Service should have written policy and procedural guidance that addresses the provision of subcontracts/sub-agreements between primary and secondary service providers. Such agreements are allowable. They must be consistent and in compliance with all related Federal, State and Local procurement and contracting laws, regulations and policies.

f. Retroactive Contracting (after-the-fact) for new contracts or for active contract change/modifications is not allowed.

• Contract Elements

Contracts must include all elements necessary to fully delineate the Procuring Entity’s and contractor’s responsibilities. These should be clearly documented through a combination of standard boilerplate and specific contract provisions. Proposals may be incorporated, in part or whole, by reference in the contract document.

The development and inclusion of specific contract elements will be effected by the determination of the service provider’s status as a subrecipient or a contractor. Aspects of the contract affected by this status may include, but are not limited to: cost classification, audit, and the general requirement to comply with WIOA and funding source regulation and policy. Although service providers may be considered subrecipients or contractors, all costs of contracts that are not exclusively for the provision of administrative functions are program costs.
**Subrecipient** is defined as a legal entity to which a subgrant/contract is awarded and which is accountable to the Procuring Entity (or higher tier subrecipient) for use of the funds provided. Distinguishing characteristics of a subrecipient include items such as: developing and operating programs specifically designed for a federal program which may include determining eligibility of applicants, enrollment of participants, performance measured against meeting the objectives of the program, responsibility for programmatic decision making, responsibility for compliance with program requirements, and use of the funds awarded to carry out a program or project as compared to providing "end-line" goods or services for use by a program or project (contractor). Subrecipient contracts/agreements identify the source of funds (e.g., WIOA) and require compliance with all related regulations and policy, including but not limited to, appropriate identification and classification of all costs incurred and coverage under required audits.

**Contractor** is defined as an entity that receives a contract, is responsible for providing generally required "end-line" goods or services to be used by the program or project. These goods or services may be for the subrecipient’s own use or for the use of participants in the program/project. Distinguishing characteristics of a contractor include items such as: providing the goods and services within normal business operation; providing similar goods or services to many different purchasers, including purchasers outside of the program; and operating in a competitive environment. Contractors are not subject to compliance requirements of the Federal program as a result of the agreement, though similar requirements may apply for other reasons.

**Required Contract Elements**
Contracts should contain the following elements, where applicable:
1. names of responsible parties and organizations
2. type of contracting organization
3. type of contract
4. amount of contract obligation
5. source of contract funds
6. training site(s)
7. contract effective time period
8. number of participants to be served
9. signature of authorized officials
10. document execution date(s)
11. statement of work/deliverables including goal statement/objectives, target group, justification for services products/outcomes/performance required outreach/intake and assessment program design/curriculum frequency of participant contact, activity time line, and follow-up
12. cost reimbursement line item budget data by cost category
13. payment and delivery terms/invoice forms and procedures
14. termination for cause/default/de-obligation/convenience
15. audit and record access and examination rights
16. record retention requirements
17. compliance with related federal state and local laws, regulations, and policies
18. conflict of interest and code of conduct requirements
19. debarment and suspension certification
20. anti-lobbying disclosure
21. provision against assignment/unauthorized subcontracting
22. procedures for changes/modifications
23. definitions of key terms
24. staff qualifications
25. reporting requirements - program and fiscal
26. table of contents
27. AA/EEO/non-discrimination
28. contractor insurance liability/bonding
29. grievance procedures for termination and non-payment
30. monitoring/corrective action/sanctions procedures
31. equipment and property allowance/disposition
32. severability provision
33. hold harmless clause
34. maintenance of effort clause
35. program income or work product requirements
36. individual authorized to sign invoices/request payment
37. operational plan - participant activity/expense schedule
38. protests/disputes/claims clause
39. subcontracting clause
40. Pell Grant/cost reduction clause
41. fund advance/reconciliation & recapture clause
42. contract close-out requirements
43. single audit or other audit requirement
44. program income or profit requirements

• **Contract Administration**
The Procuring Entity should establish written policy and procedural guidance to address contract administration. The primary purpose of Contract Administration is to ensure subrecipient/contractor compliance with all contractual obligations; including, but not limited to, program performance and financial considerations. Policy and procedural guidance should include:

a. provisions to ensure payments consistent with contract terms,

b. provision for inspecting/monitoring work performed to ensure consistency with the contract terms,

c. procedures to provide technical assistance to contractors,

d. criteria and procedures for contract change/modification,

e. procedures for the review, approval and monitoring of sub-agreement procurements and contract documents,

f. procedures to execute termination provisions as stipulated in contract documents,

g. procedures to resolve contract protests/disputes/claims as stipulated in contract documents,
h. procedures to develop and monitor corrective actions as stipulated in contract
documents,
i. required contract file documentation and retention procedures, and
j. procedures to close-out contracts and related reporting requirements.

Procuring Entity policy and written procedural guidance should provide for centralized
contract files which include the following (See Attachment B for Contract File Checklist):

a. A copy of the contract with original signatures
b. Copies of any subsequent modifications with original signatures
c. Contract cost/pricing data
d. Contract proposal, if incorporated by reference
e. Pre-award surveys or review data
f. Subcontract/Sub-agreement approvals
g. Copies of required insurance policies and bonds
h. Copies of any SDA/SSA/Service Provider or Contractor correspondence
i. Monitoring reports/corrective actions/follow-up records
j. Invoice/Billing and records of payment documentation
k. Records of Cash advances and liquidation of funds
l. Equipment acquisition and property disposition records
m. Documentation related to termination actions
n. Contractor reports on deliverables provided
o. Contract close-out reports and related documentation

• Contract Monitoring
Procuring Entity policy and procedural guidance should address contract monitoring,
including systems for both program and financial monitoring to ensure contractor
compliance with all elements of the contractual agreement. Monitoring documentation
should include:
• the method of identification of deficiencies
• results of monitoring reviews
• written notice to contractors regarding deficiencies
• corrective action plans
• follow-up and resolution of corrective actions.
Monitoring must be performed on-site at least once each program year. Financial monitoring must ensure that auditable records of financial activity are maintained and retained. Formal financial monitoring procedures should include the use of a monitoring tool and system sampling. The monitoring process should encompass guidelines from the United States current compliance supplement and any United States Department of Labor monitoring guides. The items listed below are a sample of the items that will be monitored and do not encompass all guidelines as specified above.

**Fiscal Monitoring** should include:

1. review of allowable costs
2. cost classification and allocation
3. general ledger and records management
4. invoicing and cash receipts
5. cash disbursements
6. cash reconciliations
7. analysis of cash advances/cash on hand
8. subcontract/sub-agreement review
9. property/equipment management
10. purchasing/procurement systems
11. matching funds procedures and documentation
12. determination of program income/profit
13. compliance with all related Federal, State and Local laws, regulations, policies and contractual requirements
14. determination that financial performance is commensurate with program performance.

**Program monitoring** should address the following areas:

1. Provision of quality services.
2. Performance monitoring to ensure achievement of contract objectives/contractual obligation.
3. Compliance monitoring to ensure satisfaction of contractual and regulatory requirements.

**Program performance monitoring** should include:

1. quality of participant enrollment/intake
2. quality/quantity of participant counseling
3. quality of participant orientation
4. quality of training provision
5. quality of case management records and systems
6. quality of job development and placement activity
7. quality/allow ability of participant support services
8. contractors personnel systems
9. termination and follow-up
10. level of outcome performance
11. subcontract/sub-agreement program/performance review
12. achievement of other specific contractual objectives
13. compliance with all related Federal, State and Local laws, regulations, policy and contractual requirements

• Contract Corrective Action

LWDBs/Program Operators/Service Providers should have systems to document and resolve contract corrective actions as stipulated in the contract document. Procedures should designate authority and responsibility for development, monitoring and follow-up of corrective action plans. The corrective action plan should define the deficiency, state all resolution actions required, provide a time line for resolution, and include follow-up verification.

• Contract Close-Out

Procuring Entity should document contract close-out. Contractors should be required to close-out agreements in a timely manner (consistent with close-out reporting requirements). Close-out reports should include the following minimum items:

• Statement of Subcontract/Sub-agreement termination.
• Statement of Status of Cash accounts and liquidation of advances.
• Statement of settlement of all contract related financial or other liabilities.
• Statement releasing Procuring Entity from any further liability.
• Assignment of any refunds, rebates, or credits due.
• Statement of program income/profit and its disposition.
• Final Invoice for payment.
• Reason for termination (completion or other).
• Any other reports required by the contract document.