

Interim Policy on Procurement Standards

Reference:

The Workforce Innovation and Opportunity Act (WIOA), Section 102, 107, 121, 123, 184; 29 CFR Parts 95, 97, and 98; State Workforce Investment Plan; [Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards Final Rule](#); 2 CFR § 2900; [WIOA Notice of Proposed Rulemaking](#), 20 CFR §§ 683.200, 683.230, 683.500, 683.510, 683.520, 683.540; and Neb. Rev. Stat. §§ 4-108, 4-114, 73-501 to 73-509, 81-153, 81-161.03; [TEGL 38-14](#).

Changes from Preliminary Policy:

- DOL requires intellectual property developed under a competitive federal award process to be licensed under a Creative Commons Attribution license
- Changes to Workforce Investment Act Service Provider Agreements.
- Additions under the Pay-for-Performance Contract subheading

Background:

All entities that received **funds issued on or after December 26, 2014**, 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 Guidance).

All entities that received **funds issued prior to December 26, 2014, and** which will have funding actions, allotments, or incremental funding actions taking place after December 26, 2014, are bound by the procurement requirements of the Uniform Guidance for the **new funds only**.¹

All entities that received **funds issued prior to December 26, 2014, and which will not** have additional funding actions taking place after December 26, 2014, may continue to follow the terms and conditions as outlined in their award documents, including the procurement requirements of 29 CFR 95 and 97.²

The State, each local area, and every provider receiving funds under Title I of WIOA shall comply with the appropriate uniform administrative requirements for grants and agreements applicable for the type of entity receiving the funds.³

¹ <http://doleta.gov/grants/UniformGuidance.cfm>

² *Id.*

³ WIOA Section 184(a)(3)(A)

Standards have been established to ensure fiscal accountability and prevent waste, fraud, and abuse in all programs administered under the Act. In addition, the Act introduced changes in the way services for youth workforce development activities are obtained.

Action:

After a 10 day review period, this Policy will be considered final. Questions and comments should be submitted in writing to the WIOA Policy Mailbox: ndol.wioa_policy@nebraska.gov.

Policy:

Definitions

“Non-Federal entity” means a State, local government, Indian tribe, institution of higher education, foreign public entity, foreign organization or non-profit organization that carries out a Federal award as a recipient or subrecipient.⁴ [The City of Omaha, City of Lincoln, State of Nebraska, Heartland Workforce Solutions \(HWS\), and Goodwill Industries, as subrecipients of WIOA funds, are considered “non-Federal entities.”](#)

“Pass-through entity” means a non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program.⁵ [If the non-Federal entity for the local area provides a subaward to a subrecipient to carry out part of a Federal program, the subrecipient is considered a “pass-through entity.” The State of Nebraska, the City of Omaha, and HWS are pass-through entities.](#)

“Subrecipient” means a non-Federal entity that receives a subaward from a pass-through entity to carry out part of a federal program. A subrecipient may also be a recipient of other federal awards directly from a federal awarding agency.⁶ [HWS, as a non-Federal entity that receives a subaward from the City of Omaha, is a subrecipient. Goodwill Industries, as a non-Federal entity that receives a subaward from HWS, is also a subrecipient.](#)

“Subaward” means an award provided by a pass-through entity to a subrecipient for the subrecipient 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. A subaward may be provided through any form of legal agreement, including an agreement that the pass-through entity considers a contract.⁷

“Contractor” means an entity that receives a legal instrument (i.e., contract) by which a non-Federal entity purchases property or services needed to carry out the

⁴ 2 CFR § 200.69, 2 CFR § 2900.4
⁵ 2 CFR § 200.74, A-133 § _____.105
⁶ 2 CFR § 200.93
⁷ 2 CFR § 200.92

project or program under a Federal award. The term as used in this part does not include a legal instrument, even if the non-Federal entity considers it a contract, when the substance of the transaction meets the definition of a Federal award or subaward.⁸ [Goodwill Industries, as an entity with which HWS contracts in order to purchase services to carry out workforce development activities, is a contractor.](#)

Subrecipient/Contractor Determination

The non-Federal entity may concurrently receive Federal awards as a recipient, a subrecipient, and a contractor, depending on the substance of its agreements with Federal awarding agencies and pass-through entities. Payments received for goods or services provided as a contractor are not federal awards.⁹ Therefore, a pass-through entity must make case-by-case determinations whether each agreement it makes for the disbursement of Federal program funds casts the party receiving the funds in the role of a subrecipient or a contractor. The Federal awarding agency may supply and require recipients to comply with additional guidance to support these determinations provided such guidance does not conflict with this section.¹⁰

Characteristics which support the classification of the non-Federal entity as a subrecipient include when the non-Federal entity:	Characteristics indicative of a procurement relationship between the non-Federal entity and a contractor are when the non-Federal entity receiving the Federal funds:
Determines who is eligible to receive what Federal assistance	Provides the goods and services within normal business operations
Has its performance measured in relation to whether objectives of a Federal program were met	Provides similar goods or services to many different purchasers
Has responsibility for programmatic decision making	Normally operates in a competitive environment
Is responsible for adherence to applicable Federal program requirements specified in the Federal award	Provides goods or services that are ancillary to the operation of the Federal program
In accordance with its agreement, uses the Federal funds to carry out a program for a public purpose specified in authorizing statute, as opposed to providing goods or services for the benefit of the pass-through entity. ¹¹	Is not subject to compliance requirements of the Federal program as a result of the agreement, though similar requirements may apply for other reasons. ¹²

⁸ 2 CFR § 200.22 and 200.23

⁹ 2 CFR § 200.330, 2 CFR § 200.501(f)

¹⁰ 2 CFR § 200.330

¹¹ 2 CFR § 200.330(a)

¹² 2 CFR § 200.330(b)

In determining whether an agreement between a pass-through entity and another non-Federal entity casts the latter as a subrecipient or a contractor, the substance of the relationship is more important than the form of the agreement. All of the characteristics listed above may not be present in all cases, and the pass-through entity must use judgment in classifying each agreement as a subaward or a procurement contract.¹³

General Administration

Procurement Processes by Non-Federal Entities Other than the State

For funds received **prior to December 26, 2014**, the contract procurement and subgrant requirements for local government can be found in the Unified Administrative Requirements for procurement by governmental entities as codified at 29 CFR 97.36 (procurement) and 97.37 (subgrants). For all non-governmental organizations, the procurement standards can be found at 29 CFR 95.40 through 95.48. These provisions require that grantees and subgrantees/non-Federal entity use their own procurement procedures which must follow applicable State and local laws and regulations, provided that the procurements conform to the applicable Federal laws and the stated administrative standards.

A basic tenet of the standards found at 29 CFR 95.42 and 97.36(b)(2) is that the procurement be a process that provides for full and open competition and avoids even the appearance of a conflict of interest (either individually or organizationally). Procurement actions must be conducted in a manner that provides for full and open competition and prevents the existence of conflicting roles that might bias judgment and cause unfair competitive advantage. Such actions must assure separation of those who develop or issue solicitation, or are involved in the selection process, from those who bid upon it. Accordingly, an identifiable sub-unit of the local government or non-governmental organization may not submit a bid or an offer on a grant or contract solicitation if that sub-unit is involved in the development of the solicitation, the review, evaluation and selection process, or the ongoing post award administration (including oversight) of the award. If the existing governmental structure does not have capabilities to exclude the sub-unit from the solicitation process, it must move the selection process to a higher-level governmental unit with oversight authority. Using guidelines set forth in this policy, the local grant recipient must document its competitive selection process.

For funds received **on or after December 26, 2014**, the contract procurement requirements for grantee or subgrantee/non-Federal entities (other than States), including subrecipients of a State, can be found in sections 200.318 through 200.326 of the Uniform Guidance.¹⁴ These provisions require that grantees and subgrantees/non-Federal entities use their own procurement procedures which must meet or exceed applicable State, local, and tribal laws and regulations applicable to the grantee/non-Federal entity, provided that the procurements conform to the applicable Federal laws and standards identified in the Uniform Guidance.¹⁵

¹³ 2 CFR § 200.330(c)

¹⁴ 2 CFR § 200.317

¹⁵ 2 CFR § 200.318(a)

In addition to the requirements found in sections 200.317 through 200.326 of the Uniform Guidance (as appropriate), all procurement contracts between local boards and units of state or local governments must be conducted only on a cost-reimbursement basis.¹⁶

Changes to Local Service Provider Contracts under WIOA

Note: As of July 1, 2015, all existing contracts must comply with WIOA requirements.

Local areas commonly enter into two-year agreements with their service providers which allow them to serve participants for the duration of the two-year cycle. Although we consider the contract to be obligated at the time of execution, expenditure of those funds is dependent on the enrollment of participants. As such, the contracts must be modified or amended, to the extent the contract terms allow, to ensure that enrollment into WIA program services ceases on June 30, 2015, and enrollment using WIOA requirements begins July 1, 2015.¹⁷

Current contracts do not need to be automatically terminated. Local areas may terminate current contracts in order to compete a new contract under WIOA, assuming the current contract permits taking this action. Local areas may also consider modifications to current contracts if they contain clauses to allow for changes to be made to conform to new legislation or regulations. If current contracts include multiple or option years, WIOA requirements must be incorporated by amending or modifying the option years of the contract. If, after July 1, 2015, a service provider refuses to comply with the new WIOA requirements, the awarding entity must take immediate corrective action, up to and including termination.¹⁸

In competing new contracts, ETA encourages local areas to employ one-year contracts with additional option years, rather than multi-year contracts. Given how resource-intensive the Request for Proposals (RFP) process can be, option year contracts are a strategy to ensure maximum flexibility while final regulations are published and program guidance is issued.¹⁹

Contracts and Agreements

Administration System

Grantees and subgrantees/non-Federal entities shall maintain oversight which ensures that contractors perform in accordance with the terms, conditions, and specification of their contracts or purchase orders.²⁰ Awards shall be made only to responsible contractors possessing the ability to perform successfully under the terms and conditions

¹⁶ 20 CFR § 683.200(c)(4)

¹⁷ TEGL 38-14

¹⁸ Id.

¹⁹ Id.

²⁰ 2 CFR § 200.318(b)

of a proposed procurement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.²¹ Subgrantees/non-Federal entities shall conduct and document oversight of contractor activity to ensure compliance with procurement standards.

Records

The grantee and subgrantee/non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to:

- Rationale for the method of procurement,
- Selection of contract type,
- Contractor selection or rejection, and
- The basis for the contract price.²²

Financial records, supporting documents, statistical records, and all other grantee or subgrantee/non-Federal entity records pertinent to a Federal award must be retained for a period of three years from the date of submission of the final expenditure report or, for Federal awards that are renewed quarterly or annually, from the date of the submission of the quarterly or annual financial report, respectively, as reported to the Federal awarding agency or pass-through entity in the case of a subrecipient. Federal awarding agencies and pass-through entities must not impose any other record retention requirements upon grantee or subgrantee/non-Federal entities. The only exceptions are:

- If any litigation, claim, or audit is started before the expiration of the 3-year period, the records must be retained until all litigation, claims, or audit findings involving the records have been resolved and final action taken
- When the grantee or subgrantee/non-Federal entity is notified in writing by the Federal awarding agency, cognizant agency for audit, oversight agency for audit, cognizant agency for indirect costs, or pass-through entity to extend the retention period.
- Records for real property and equipment acquired with Federal funds must be retained for 3 years after final disposition.
- When records are transferred to or maintained by the Federal awarding agency or pass-through entity, the 3-year retention requirement is not applicable to the grantee or subgrantee/non-Federal entity.
- In some cases recipients must report program income after the period of performance. Where there is such a requirement, the retention period for the records pertaining to the earning of the program income starts from the end of the grantee or subgrantee/non-Federal entity's fiscal year in which the program income is earned.
- Indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

²¹ 2 CFR § 200.318(h)

²² 2 CFR § 200.318(i)

- *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the pass-through entity) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.
- *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the pass-through entity) for negotiation purposes, then the 3-year retention period for the proposal, plan, or computation and its supporting records starts from the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.²³

Affirmative Steps

All necessary affirmative steps shall be taken to assure that small and minority firms, and women's business enterprises are used whenever possible.²⁴

Affirmative steps shall include:

- Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
- Assuring that small and minority businesses and women's business enterprises are solicited whenever they are potential sources;
- Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses and women's business enterprises;
- Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses and women's business enterprises;
- Using the services and assistance of the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and
- Requiring the prime contractor, if subcontracts are to be let, to take affirmative steps.²⁵

Code of Conduct/Conflict of Interest

Issues Related to Employees

The grantee and subgrantee/non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent may 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. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and

²³ 2 CFR § 200.333

²⁴ 2 CFR § 200.321(a)

²⁵ 2 CFR § 200.321(a) & (b)

agents of the grantee and subgrantee/non-Federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, grantees and subgrantees/non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the grantee or subgrantee/non-Federal entity.²⁶

Issues Related to Parent, Affiliate, or Subsidiary Organizations

If the grantee and subgrantee/non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the grantee and subgrantee/non-Federal entity 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 grantee and subgrantee/non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.²⁷

Issues Related to Board and Council Members

Every state or local Workforce Development Board member in Nebraska, regardless of occupation, is considered a public official. Consequently, they are subject to certain sections of the Nebraska Political Accountability and Disclosure Act. Those circumstances that would constitute a conflict of interest for all members of the state and local boards would include hiring of immediate family members, soliciting or accepting something of value, use of a public position for personal gain, use of public resources, and interests in contracts.

A state board member, a local board member, or a standing committee 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 the member's immediate family.²⁸

Neither membership on the state board, local board, or standing committee, nor receipt of WIOA funds to provide training and related services, by itself, violates these conflict of interest provisions.²⁹

Issues Related to Grant Recipients and Subrecipients

In accordance with § 200.112 of the Uniform Guidance, recipients of federal awards must disclose in writing any potential conflict of interest to the Department of Labor. Subrecipients must disclose in writing any potential conflict of interest to the recipient of grant funds.³⁰

²⁶ 2 CFR § 200.318(c)(1)

²⁷ 2 CFR § 200.318(c)(2)

²⁸ 20 CFR § 683.200(c)(5)(i)

²⁹ 20 CFR § 683.200(c)(5)(ii)

³⁰ 20 CFR § 683.200(c)(5)(iii)

Competition

All procurement transactions shall be conducted in a manner providing full and open competition.³¹ In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:

- Placing unreasonable requirements on firms in order for them to qualify to do business.
- Requiring unnecessary experience and excessive bonding.
- Noncompetitive pricing practices between firms or between affiliated companies.
- Noncompetitive awards to consultants that are on retainer contracts.
- Organizational conflicts of interest.
- Specifying only a “brand name” product instead of allowing “an equal” product to be offered.
- Overly restrictive specifications.
- Any arbitrary action in the procurement process.³²

The grantee and subgrantee/non-Federal entity will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed State, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section [§ 200.319 of the Uniform Guidance] preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.³³

Written selection procedures shall be used for procurement transaction to ensure that all solicitations:

- Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product, or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specification should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equal” description may be used as a means to define the performance or other salient requirements of a

³¹ 2 CFR § 200.319(a)

³² Id.

³³ 2 CFR § 200.319(b)

procurement. The specified features of the named brand which must be met by offerors shall be clearly stated; and

- Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.³⁴

The grantee and subgrantee/non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the grantee or subgrantee/non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.³⁵

Confidentiality and Non-Disclosure

The obtaining of confidential procurement information not made available to all offerors is strictly prohibited. In addition, improper communication with staff or board members to influence procurement decisions is not allowed.

Construction

WIOA Title I funds must not be spent on construction, purchase of facilities or buildings, or other capital expenditures for improvements to land or buildings except with prior approval from the Secretary of Labor.³⁶ WIOA Title I funds can be used for construction only in limited situations, including meeting obligations to provide physical and programmatic accessibility and reasonable accommodation; funding Youthbuild Programs under Sec. 177(c)(2)(A)(i) of WIOA; funding disaster relief projects under Sec. 170(d) of WIOA; and funding other projects the Secretary of Labor determines necessary to carry out WIOA as described under Sec. 189(c) of WIOA.³⁷

Contract Provisions

In addition to other provisions required by the Federal agency or grantee or subgrantee/non-Federal entity, all contracts made by the grantee or subgrantee/non-Federal entity under WIOA must contain provisions covering the following, as applicable:

- Compliance with WIOA – contracts shall contain provisions requiring compliance with WIOA, its implementing regulations, and State WIOA policies including those pertaining to reporting.
- Compliance with Neb. Rev. Stat. § 4-108 Lawful Presence in the U.S. – all contracts shall certify that the contractor has registered with and is using a federal immigration verification system as defined in Neb. Rev. Stat. § 4-114(1)(a) to determine the work eligibility status of all employees physically performing services within the State of Nebraska.³⁸ Upon reasonable notice, the contractor shall provide documentation to the Department of Labor which proves that the contractor is or was at all times during the term of the agreement in compliance with this provision. If the contractor is an individual or sole proprietorship, the

³⁴ 2 CFR § 200.319(c)

³⁵ 2 CFR § 200.319(d)

³⁶ 2 CFR § 200.439(b)(3), 20 CFR § 283.230

³⁷ WIOA NPRM p. 233

³⁸ [Neb. Rev. Stat. § 4-114](#)

contractor shall complete the [U.S. Citizenship Attestation Form](#), available at www.das.state.ne.us. If the contractor indicates on such attestation form that he or she is a qualified alien, the contractor shall agree to provide the U.S. Citizenship and Immigration Services documentation required to verify the contractor's lawful presence in the U.S. using the Systematic Alien Verification for Entitlements (SAVE) Program. The contractor understands and agrees that lawful presence in the U.S. is required and the contractor may be disqualified if such lawful presence cannot be verified.³⁹

- Contracts for More than The Simplified Acquisition Threshold (set at \$150,000) – all contracts must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.⁴⁰
- Termination for Cause and Convenience – all contracts in excess of \$10,000 shall contain suitable provisions for termination by the grantee or subgrantee/non-Federal entity including the manner by which it will be effected and the basis for settlement.⁴¹
- Termination for Default – all contracts shall contain a suitable provision under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.
- Equal Employment Opportunity – except as otherwise provided under [41 CFR Part 60](#), all contracts that meet the definition of “federally assisted construction contract” in 41 CFR Part 60-1.3 must:
 - Include the equal opportunity clause provided under 41 CFR 60-1.4(b),⁴² and
 - Assure compliance with the nondiscrimination and equal opportunity provisions of WIOA, Section 188 and its implementing regulations.
- Copeland Anti-Kickback Clause – all contracts and subcontracts for construction or repair shall include a provision for compliance with the Copeland “Anti-Kickback” Act (18 USC 874) as supplemented in Department of Labor regulations (29 CFR, Part 3). This Act provides that each contractor and subcontractor shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which such person is otherwise entitled.⁴³
- Labor Standard Provision – On-the-job training construction contractors and other construction contractors involving the use of WIOA funds shall have provisions requiring adherence with the Davis-Bacon Act and Sections 103 and 107 of the Contract Work Hours and Safety Standards Act as supplemented by the Department of Labor regulations.⁴⁴

³⁹ [Neb. Rev. Stat. § 4-108](#)

⁴⁰ Appendix II to 2 CFR Part 200 (the 2 CFR)

⁴¹ [Id.](#)

⁴² [Id.](#)

⁴³ [Id.](#)

⁴⁴ [Id.](#)

- Contract Work Hours and Safety Standards Act (40 USC 3701-3708) - Where applicable, all contracts awarded by the grantee or subgrantee/non-Federal entity in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.⁴⁵
- Rights to Inventions Made Under a Contract or Agreement - If the Federal award meets the definition of “funding agreement” under 37 CFR §401.2(a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency.⁴⁶
 - The term “funding agreement” means any contract, grant, or cooperative agreement entered into between any Federal agency, other than the Tennessee Valley Authority, and any contractor for the performance of experimental, developmental, or research work funded in whole or in part by the Federal government. This term also includes any assignment, substitution of parties, or subcontract of any type entered into for the performance of experimental, developmental, or research work under a funding agreement as defined in the first sentence of this paragraph.⁴⁷
 - The Department of Labor requires intellectual property developed under a competitive Federal award process to be licensed under a Creative Commons Attribution license. This license allows subsequent users to copy, distribute, transmit and adapt the copyrighted work and requires such users to attribute the work in the manner specified by the grantee.⁴⁸
- Copyrights – Contracts shall provide notice of the following:
 - *For grant funds received **prior to December 26, 2014***: The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal government purposes (a) the copyright in any work

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ 37 CFR § 401.2(a)

⁴⁸ 2 CFR § 2900.13

developed under a grant, subgrant, or contract under a grant or subgrant; and (b) any rights of a copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.⁴⁹

- *For grant funds received on or after December 26, 2014:* The grantee and subgrantee/non-Federal entity may copyright any work that is subject to copyright and was developed, or for which ownership was acquired, under a Federal award. The Federal awarding agency reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.⁵⁰
- Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended – Contracts and subgrants of amounts in excess of \$150,000 must contain a provision that requires the grantee or subgrantee/non-Federal entity to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).⁵¹
- Debarment and Suspension (Executive Orders 12549 and 12689) – A contract award (see 2 CFR § 180.220) must not be made to parties listed on the governmentwide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), “Debarment and Suspension.” SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.⁵²
- Byrd Anti-Lobbying Amendment (31 U.S.C. 1352) – Contractors that apply or bid for an award exceeding \$100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal entity. Such disclosures are forwarded from tier to tier up to the grantee or subgrantee/non-Federal entity.⁵³
- Access to Contractor’s Records – all negotiated contracts awarded by the grantee or subgrantee/non-Federal entity shall include a provision to the effect that the subgrantee/non-Federal entity, State of Nebraska, the Office of Inspector General of the United States, the U.S. Department of Labor, or any other duly authorized representatives, shall have access to any books, documents, papers, and records

⁴⁹ 29 CFR § 97.34

⁵⁰ 2 CFR § 200.315(b)

⁵¹ Appendix II to 2 CFR Part 200 (the 2 CFR)

⁵² Id.

⁵³ Id.

of the contractor which are directly pertinent to the specific contract for the purpose of making an audit, examination, excerpts, copies or transcriptions. Reasonable access to personnel for purposes of interviews and discussions related to such documents shall be permitted.⁵⁴

- Recovered Materials – contracts between a State agency or agency of a political subdivision of a State and its contractors shall recognize mandatory standards and policies relating to section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.⁵⁵
 - Maintenance of Records – a provision shall be included in the contract which shall require the contractors to maintain all required records for three (3) years after the grantees or subgrantees/non-Federal entities make final payment and all other pending matters are closed.⁵⁶ The records shall be sufficient enough to detail the significant 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.⁵⁷
- Damages – contracts for more than the Simplified Acquisition Threshold (set at \$150,000) shall contain provisions or conditions which will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate.⁵⁸

Time and Materials Type Contracts

A grantee and subgrantee/non-Federal entity may use a time and materials type contract 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. Time and materials type contract means a contract whose cost to a grantee or subgrantee/non-Federal entity is the sum of the actual cost of materials; and direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.⁵⁹

Since this formula 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.

⁵⁴ 2 CFR § 200.336(a)

⁵⁵ 2 CFR § 200.322

⁵⁶ 2 CFR § 200.333

⁵⁷ 2 CFR § 200.318(i)

⁵⁸ 2 CFR § 200.326, Appendix II to 2 CFR Part 200

⁵⁹ 2 CFR § 200.318(j)(1)

Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the grantee or subgrantee/non-Federal entity 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.⁶⁰

Cost Analysis

The grantee and subgrantee/non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold (set at \$150,000) including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the grantee or subgrantee/non-Federal entity must make independent estimates before receiving bids or proposals.⁶¹

The grantee or subgrantee/non-Federal entity must 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 must 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.⁶²

Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the grantee or subgrantee/non-Federal entity under Subpart E—Cost Principles of the Uniform Guidance. The grantee or subgrantee/non-Federal entity may reference its own cost principles that comply with the Federal cost principles.⁶³

The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.⁶⁴

Debarred and Suspended Parties

The grantee and subgrantee/non-Federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.⁶⁵ Grantees and subgrantees/non-federal entities and contractors are subject to the non-procurement debarment and suspension regulations implementing Executive Orders 12549 and 12689, 2 CFR Part 180. These regulations restrict awards, subawards, and contracts with certain parties that are debarred, suspended, or otherwise

⁶⁰ 2 CFR § 200.318(j)(2)

⁶¹ 2 CFR § 200.323(a)

⁶² 2 CFR § 200.323(b)

⁶³ 2 CFR § 200.323(c)

⁶⁴ 2 CFR § 200.323(d)

⁶⁵ 2 CFR § 200.318(h)

excluded from or ineligible for participation in Federal assistance programs or activities.⁶⁶ No contracts or subcontracts shall be made at any time to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in federal assistance programs.

Documentation and Awarding Agency Review

The grantee and subgrantee/non-Federal entity must make available, upon request of the Federal awarding agency or pass-through entity, technical specifications on proposed procurements where the Federal awarding agency or pass-through entity 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 and subgrantee/non-Federal entity desires to have the review accomplished after a solicitation has been developed, the Federal awarding agency or pass-through entity may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.⁶⁷

The grantee and subgrantee/non-Federal entity must make available upon request, for the Federal awarding agency or pass-through entity pre-procurement review, procurement documents, such as requests for proposals (RFPs) or invitations for bids, or independent cost estimates, when:

- The grantee or subgrantee/non-Federal entity's procurement procedures or operation fails to comply with the procurement standards in the Uniform Guidance;
- The procurement is expected to exceed the Simplified Acquisition Threshold (set at \$150,000) and is to be awarded without competition or only one bid or offer is received in response to a solicitation;
- The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a "brand name" product;
- 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
- A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.⁶⁸

The grantee and subgrantee/non-Federal entity is exempt from the pre-procurement review described above if the Federal awarding agency or pass-through entity determines that its procurement systems comply with the standards of the Uniform Guidance. The grantee or subgrantee/non-Federal entity may request that its procurement system be reviewed by the Federal awarding agency or pass-through entity 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. The grantee and subgrantee/non-Federal entity

⁶⁶ 2 CFR § 200.212

⁶⁷ 2 CFR § 200.324(a)

⁶⁸ 2 CFR § 200.324(b)

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 and subgrantee/non-Federal entity that it is complying with these standards. The grantee or subgrantee/non-Federal entity must cite specific policies, procedures, regulations, or standards as being in compliance with these requirements and have its system available for review.⁶⁹

All steps of the procurement process must be documented including solicitations, selection process, contract negotiations and award.

In addition, all documents (e.g., proposal review forms, cost analysis work papers, etc.) developed during the procurement process must be maintained as required in the record keeping and maintenance provisions of the Uniform Guidance. If a procurement requires state approval, a copy of that approval must also be retained. For competitive procurement through RFPs the following must be documented:

- The name and title of the individual initiating the procurement process;
- The date the procurement process began (i.e., the date of decision to procure);
- Information relating to the amount and source(s) of available funds;
- The description of the supplies, property, or services to be procured;
- A list of service providers who received direct solicitations, and any publications which were made, or for Requests for Quotation where verbal solicitations were conducted, the name of the individual contacted and the name of the individual making the contact;
- The prices or proposals received;
- For RFPs, a copy of the request which was released, a copy of all proposals received and the evaluations of proposals received;
- The name(s) of the offeror(s) selected for award;
- When the lowest offer is not accepted, additional justification for the selection; and
- The name, title, and signature of the individual with final approval authority.

Bonding Requirements

For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the grantee or subgrantee/non-Federal entity provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

- A bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.

⁶⁹ 2 CFR § 200.324(c)

- A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.
- A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.⁷⁰

Economies and Efficiencies

Proposed procurement shall be reviewed to avoid acquisition of unnecessary or duplicative items. Consideration shall be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.⁷¹

To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal Government, the grantee or subgrantee/non-Federal entity is encouraged to enter into State and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common goods and services.⁷² When feasible, Federal excess and surplus property shall be used in lieu of purchasing new equipment and property, when such use reduces project costs.⁷³

When contracting for construction projects, value engineering clauses shall be considered for appropriateness in reducing costs. Value engineering is systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.⁷⁴

Methods of Procurement

Micro-Purchase Procedures

Micro-purchase means a purchase of supplies or services using Simplified Acquisition Procedures, the aggregate amount of which does not exceed the micro-purchase threshold. Micro-purchase procedures comprise a subset of a grantee or subgrantee/non-Federal entity's small purchase procedures. The grantee or subgrantee/non-Federal entity uses such procedures in order to expedite the completion of its lowest-dollar small purchase transactions and minimize the associated administrative burden and cost. The micro-purchase threshold is set by the Federal Acquisition Regulation at 48 CFR Subpart 2.1 (Definitions). It is \$3,000 except as otherwise discussed in Subpart 2.1 of that regulation, but this threshold is periodically adjusted for inflation.⁷⁵

⁷⁰ 2 CFR § 200.325

⁷¹ 2 CFR § 200.318(d)

⁷² 2 CFR § 200.318(e)

⁷³ 2 CFR § 200.318(f)

⁷⁴ 2 CFR § 200.318(g)

⁷⁵ 2 CFR § 200.67

Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (§ 200.67 Micro-purchase). To the extent practicable, the grantee or subgrantee/non-Federal entity must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the grantee or subgrantee/non-Federal entity considers the price to be reasonable.⁷⁶

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 at \$150,000). If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.⁷⁷

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 price.⁷⁸

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

- A complete, adequate, and realistic specification or purchase description is available;
- Two or more responsible bidders are willing and able to compete effectively and for the business; and
- 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.⁷⁹

If sealed bids are used, the following requirements apply:

- 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 bids;
- The invitation for bids, which will include any specification and pertinent attachments, shall define items or services in order for the bidder to properly respond;
- All bids will be publicly 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 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

⁷⁶ 2 CFR § 200.320(a)

⁷⁷ 2 CFR § 200.320(b)

⁷⁸ 2 CFR § 200.320(c)

⁷⁹ 2 CFR § 200.320(c)(1)

the low bid when prior experience indicates that such discounts are usually taken advantage of; and

- Any or all bids may be rejected if there is a sound documented reason.⁸⁰

Competitive 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:

- 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;
- Proposals will be solicited from an adequate number of qualified sources;
- The grantee or subgrantee/non-Federal entity will have a written method for conducting technical evaluations of the proposals received and for selecting recipients;
- Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and
- The grantee or subgrantee/non-Federal entity may use competitive proposal procedures for qualifications-based procurement of 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.⁸¹

Noncompetitive Proposals

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

Procurement by noncompetitive proposals may be used only when the award of contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and one of the following circumstances applies:

- The item is available only from a single source;
- The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
- The awarding agency authorizes noncompetitive proposals; or
- After solicitation of a number of sources, competition is determined inadequate.⁸²

⁸⁰ 2 CFR § 200.320(c)(2)

⁸¹ 2 CFR § 200.320(d)

⁸² 2 CFR § 200.320(f)

Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.

The awarding agency may require the proposed procurement be submitted for pre-award review.

Monitoring of Local Procurement Practices

The State shall conduct on an annual basis onsite monitoring of each local area to ensure compliance with the uniform administration requirements for grants and agreements applicable for the type of entity receiving the funds according to the circulars of the Office of Management and Budget. If problems are identified, corrective action will be required.

Protest Procedures

The grantee or subgrantee/non-Federal entity 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. These standards do not relieve the grantee or subgrantee/non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the grantee or subgrantee/non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction.⁸³

Pay-for-Performance Contracts

A pay-for-performance contract is a type of performance-based contract, and may only be entered into when it is part of pay-for-performance contract strategy described below.⁸⁴ In accordance with 2 CFR § 200.323, the use of cost-plus percentage contracts is prohibited.⁸⁵

Pay-for-performance contracts must be in compliance with this Procurement Standards Policy.⁸⁶

Pay-For-Performance Contract Strategy

“Pay-for-performance contract strategy” means a procurement strategy that uses pay-for-performance contracts in the provision of training services described in sec.134(c)(3) or 129(c)(2) of WIOA and includes:

- Contracts, each of which shall specify a fixed amount that will be paid to an eligible service provider (which may include a local or national community-based organization or intermediary, community college, or other training provider, that is

⁸³ 2 CFR § 200.318(k)

⁸⁴ 20 CFR § 683.510(a) and (b)

⁸⁵ 20 CFR § 683.510(c)

⁸⁶ 20 CFR § 683.540(c)(3)

an eligible provider of training services or of youth workforce development activities, as appropriate) based on the achievement of specified levels of performance described in 116(b)(2)(A) for target populations as identified by the local board (including individuals with barriers to employment), within a defined timetable, and which may provide for bonus and/or incentive payments to such service provider.

- Bonus payments for achieving outcomes above and beyond those specified in the contract may be used by the service provider to expand capacity to provide effective training.
- Incentive payments must be consistent with incentive payments for performance-based contracting as described in the Federal Acquisition Regulations (FAR);
- A strategy for independently validating the achievement of performance described above; and
- A description of how the state or local area will reallocate funds not paid to a provider because the achievement of performance did not occur, for further activities related to such a procurement strategy, subject to Sec. 189(g)(2)(D) of WIOA, which states that funds used to carry out pay-for-performance contract strategies by local areas shall remain available until expended.⁸⁷

A pay-for-performance contract strategy has four distinct characteristics:

- It is a strategy to use WIOA pay-for-performance contracts;
- It must include the identification of the problem space and target populations for which the local area will pursue a WIOA pay-for-performance contract strategy; the outcome the local area would hope to achieve through a pay-for-performance contract relative to baseline performance; the acceptable cost to government associated with implementing such a strategy; and a feasibility study to determine whether the intervention is suitable for a WIOA pay-for-performance contracting strategy;
- It must include a strategy for independently validating the performance outcomes achieved under each contract within the strategy prior to the payment occurring; and
- It must include a description of how the state or local area will reallocate funds to other activities under the contract strategy in the event a service provider does not achieve performance benchmarks under a WIOA pay-for-performance contract.⁸⁸

Funding to Support Pay-For-Performance Contract Strategies

For pay-for-performance contract strategies providing adult and dislocated worker training services, funds allocated under Sec. 133(b)(2)-(3) of WIOA can be used. For pay-for-performance contract strategies providing youth activities, funds allocated under Sec. 128(b) of WIOA can be used.⁸⁹

⁸⁷ WIOA Section 3(47) , 20 CFR § 683.510

⁸⁸ 20 CFR § 683.500(a)

⁸⁹ 20 CFR § 683.520(a)

No more than 10 percent of the total adult and dislocated worker allotments can be expended on the implementation of pay-for-performance strategies for adult training services described in Sec. 134(c)(3) of WIOA. No more than 10 percent of the local youth allotment can be expended on the implementation of WIOA pay-for-performance contract strategies for youth training services and other activities described in Sec. 129(c)(1)-(2) of WIOA.⁹⁰

Designation and Certification of One-Stop Operators

Process

An entity (which may be a consortium of entities) shall be designated or certified as a one-stop operator through:

- A competitive process; and
- Shall be an entity (public, private, or nonprofit), or consortium of entities (including entities that, at a minimum, includes 3 or more of the required one-stop partners) of demonstrated effectiveness, located in the local area, which may include:
 - An institution of higher education;
 - An employment service agency established under the Wagner-Peyser Act on behalf of the local office of the agency;
 - A community-based organization, nonprofit organization, or intermediary;
 - A private for-profit entity;
 - A government agency; and
 - Another interested organization or entity, which may include a local chamber of commerce or other business organization.⁹¹

Exception

Elementary schools and secondary schools shall not be eligible for designation or certification as one-stop operators, except that nontraditional public secondary schools and area vocational education schools shall be eligible for such designation or certification.⁹²

Youth Workforce Development Activities: Competitive Selection Requirements

Competitive Selection Requirements

A local board shall award grants or contracts on a competitive basis to providers of youth workforce development activities identified based on the State Plan (including such quality criteria as the Governor shall establish for a training program that leads to a recognized post-secondary credential) and taking into consideration the ability of the providers to meet performance accountability measures established in Sec. 116.⁹³

Exception

⁹⁰ 20 CFR § 683.520(b)

⁹¹ WIOA Section 121(d)(2)(A)

⁹² WIOA Section 121(d)(3)

⁹³ WIOA Section 123(a)

A local board may award grants or contracts on a sole-source basis (i.e., through a noncompetitive process) if it determines that there is an insufficient number of eligible providers in the local area involved (such as a rural area) to accommodate competitive selection requirements.⁹⁴

Criteria in the State Plan

The State will expect the local areas to include criteria to be used by the local boards in awarding grants for youth workforce development activities and describing how the local boards will take into consideration the ability of the providers to meet performance accountability measures as described in Sec. 116(b)(2)(A)(ii).⁹⁵ Such criteria will be determined by the local Workforce Development Board and standing committees, if appropriate, but should include, but not be limited to:

- Success rates based on enrollments and completions;
- Provisions of accommodations for special needs populations;
- Involvement of local employers, business, and community resources;
- Consideration of assessed needs;
- Attainment of employment and academic credentials;
- Leading to credentials, diplomas, and equivalents;
- Improving educational and skill competencies;
- Ensuring youth of opportunities for positive mentoring experiences;
- Providing training opportunities to eligible youth;
- Strengthening leadership, youth developments, decision-making, citizenship, and community service.

In addition, the local Workforce Development Boards shall identify eligible providers of youth workforce development activities by awarding grants or contracts on a competitive basis (subject to the exception above).⁹⁶ The primary consideration in selecting agencies or organizations shall be the effectiveness of the agency or organization in delivering comparable or related services based on demonstrated performance. This determination shall be in writing and take into consideration such matters as whether the organization has:

- The ability to meet the program design specifications at a reasonable cost, as well as the ability to meet performance goals;
- Adequate financial resources or the ability to obtain them;
- A satisfactory record of past performance (in job training, basic skills training, youth activities), including demonstrated quality of training and reasonable dropout rates;
- The ability to provide, or arrange for, appropriate supportive services as specified in the individual employment plan;
- The ability to provide services that can lead to the achievement of competency standards for participants with identified deficiencies;
- A satisfactory record of integrity, business ethics, and fiscal accountability;
- The necessary organization, experience, accounting, and operation controls, and

⁹⁴ WIOA Section 123(b)

⁹⁵ WIOA Section 102(b)(2)(D)(i)(V)

⁹⁶ WIOA Section 107(d)(10)(B)

- The technical skills to perform the work.

Waiver Authority for In-House Programs

Except under waiver authority no local board (or its staff) may provide training services. However, local boards may submit a proposed request for a waiver of training prohibition to the Governor to become an eligible provider of training services. The local board's request must include:

- Satisfactory evidence that there is an insufficient number of eligible providers of such training services to meet the demand in the local area;
- Information demonstrating that the board meets the requirements as an eligible provider of training services; and
- Information demonstrating that the program of training services prepares participants for an occupation that is in demand in the local area.⁹⁷

The local board must also make the proposed request available to eligible providers of training services and other interested member of the public for a public comment period of not less than 30 days. The local board must then submit the request with the information and evidence listed above, as well as information from the public comments received.⁹⁸ Local boards may apply for a waiver that does not exceed the duration of the local plan if they meet the requirements listed above.⁹⁹

The waiver may be revoked if the Governor determines that the waiver is no longer needed or that the local board involved has engaged in a pattern of inappropriate referrals to training services operated by the local board.¹⁰⁰

Disclaimer:

This interim policy is based on NDOL's reading of the statute along with the Notice of Proposed Rulemaking released by USDOL. This policy may be subject to change as additional federal regulations and TEGs are released. This policy is not intended to be permanent and should be viewed as a placeholder until final federal regulations are released in early 2016.

⁹⁷ WIOA 107(g)(1)(B)

⁹⁸ Id.

⁹⁹ WIOA 107(g)(1)(C)

¹⁰⁰ WIOA 107(g)(1)(D)