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- Scott is a Partner at Feldesman Tucker Leifer Fidell.
- Counsels federal grant recipients on financial assistance administrative requirements and cost reimbursement.
- Assists grant recipients undergoing government audits and investigations, and represents them in disputes with federal agencies, including but not limited to cost disallowances.
- Assists government contractors with various contracting matters, including compliance, claims, small business matters, and disputes.
- Prior to joining Feldesman Tucker, Scott was a procurement attorney with the United States Navy, counseling Navy contracting officers and program managers on, among other things, federal acquisition laws and regulations, claims, and bid protests.

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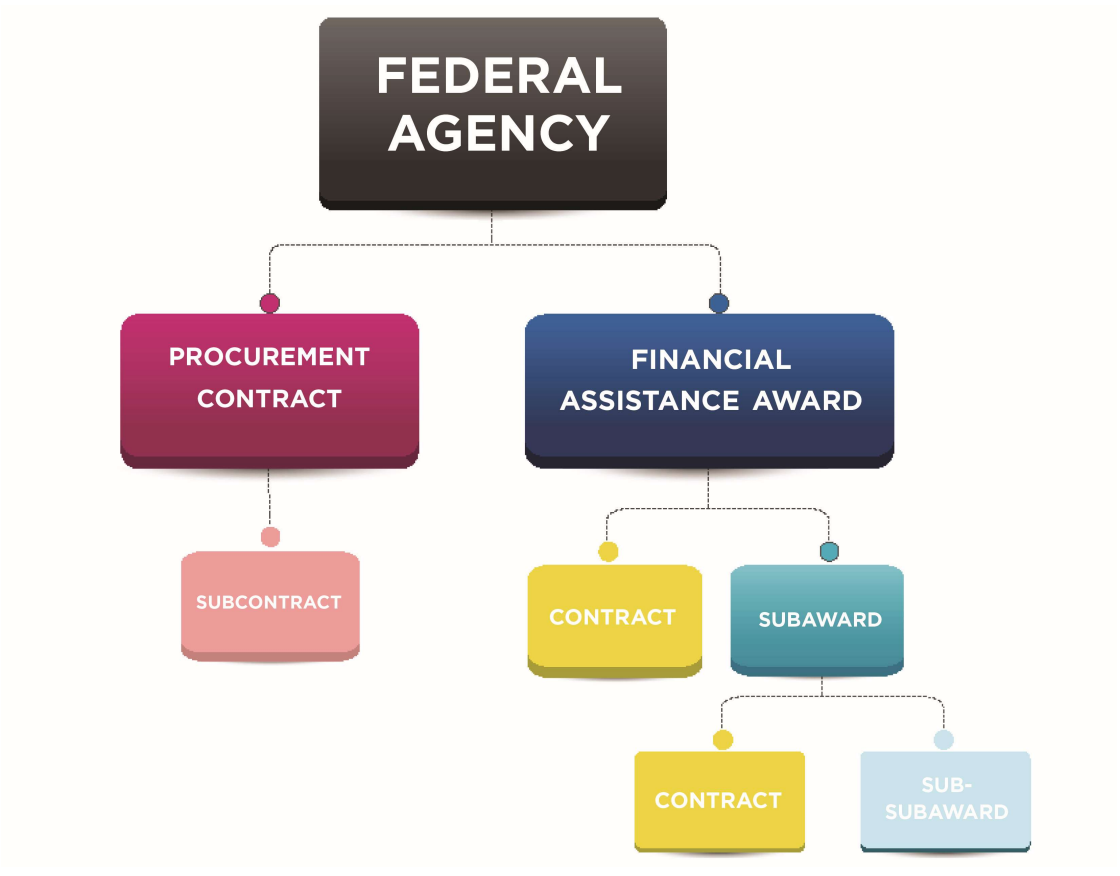
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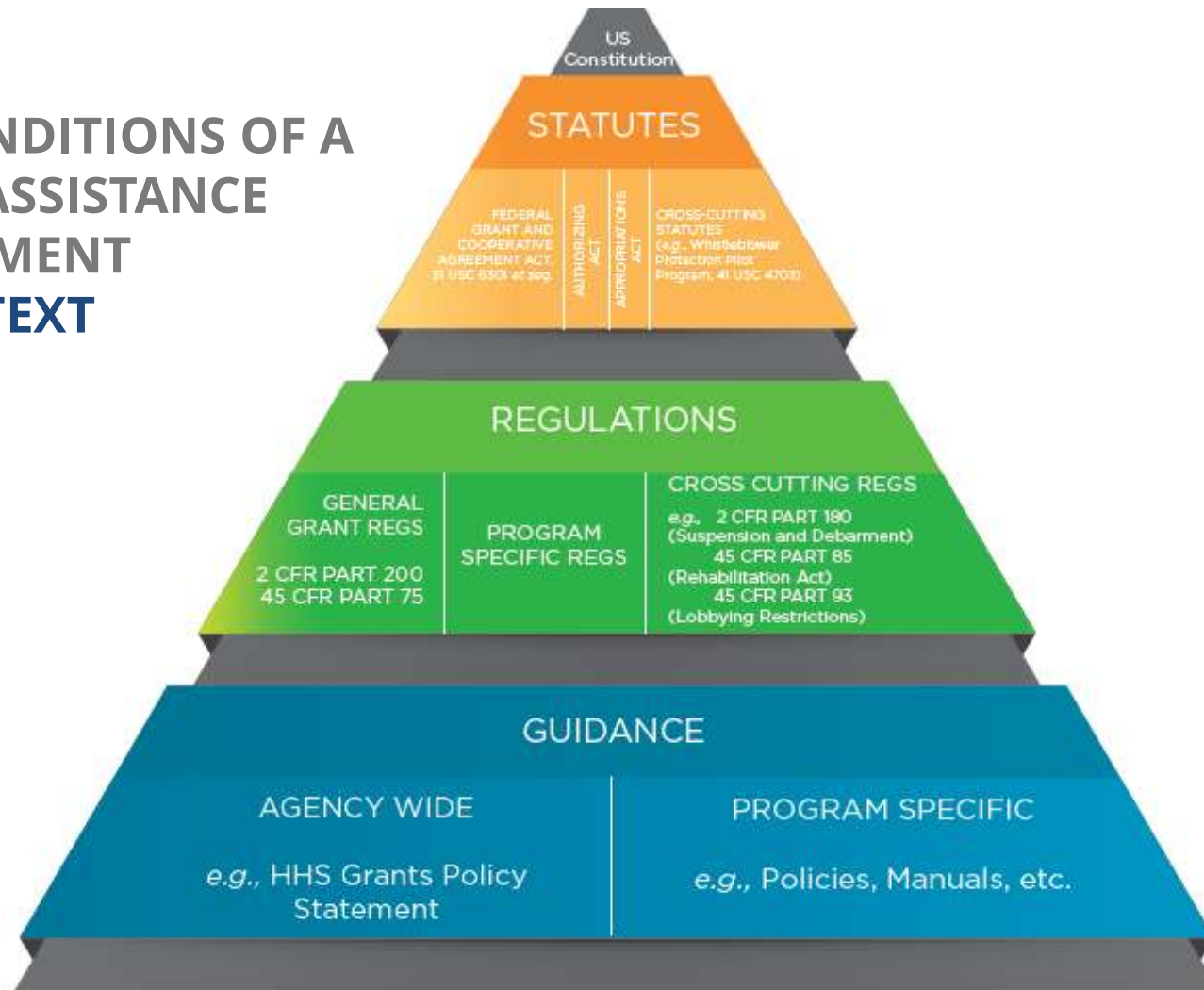
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FEDERAL FUNDING UNIVERSE CONTEXT



TERMS AND CONDITIONS OF A FINANCIAL ASSISTANCE AGREEMENT CONTEXT



CONTRACTS UNDER AWARDS



SYSTEMIC GOALS

Fundamental Purposes Behind the Rules

Competition

- The power of the marketplace

Integrity

- “Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none.” FAR 3.101-1

Transparency (Access)

- Clear rules and access to information about opportunities

Steven Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 P.P.L.R. 103 (2002)

THE REGULATORY FOCUS IS “FORMATION”

THE PROCESS OF ENTERING INTO THE CONTRACT

Uniform Guidance Procurement Standards

- 2 CFR § § 200.317-200.327:
 - There is a general requirement that “[NFEs] must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts . . .” § 200.318(b).
 - BUT THE FOCUS in the Uniform Guidance is on the procedures used to enter into the contract.
 - Goal is that financial assistance recipient acquires property or service that is most advantageous to the program, with price and other factors considered.
- There is a lot in the Procurement Standards. We are going to focus on:
 1. Applicability
 2. Competition
 3. Sole Source Restrictions
 4. Documentation
 5. No State or Local Geographic Preferences
 6. Required Contract Terms

Applicability

APPLICABILITY STATE VS. LOCAL

Procurement Standards apply to procurements of “property or services” when the resulting contract will be paid for with federal funds. 2 CFR § 200.317.

- “Property” is defined under the Uniform Guidance as “real property or personal property.”

Exception: States are permitted to use their own procurement procedures. **Local governments (counties and municipalities) are required to follow the Procurement Standards. Result is rules very similar to those applicable under A-102.**

Exception: When the contract will be paid out of an indirect cost pool, the Procurement Standards do not apply. CFO Council Part 200 FAQs, Item 93.

Baseline Competition Considerations

HOW DO YOU KNOW WHAT YOU NEED TO BUY?

- Procurement Standard Requirements:
 - Must eventually evaluate price, so develop and IPE
 - Must say what you require and what factors are most important
 - § 200.319(d) / § 75.328(c)
 - No unduly restrictive criteria (and “brand name or equal”)
 - § 200.319(b) / § 75.328(a)
 - Sole source requests
 - Very limited circumstances - § 200.320(c) / § 75.329(f)
 - Pre-approved vendor lists
 - Cannot be an unreasonable barrier to competition - § 200.319(e) / § 75.328(d)
 - Promotion of small business participation “when possible”
 - § 200.321 / § 75.330
 - Domestic sourcing of materials “to the greatest extent possible” (plus flow down into contracts)
 - § 200.322

Competition-Oriented Procedures

2 CFR § 200.320

\$10,000 and below (micro purchases):

- No detailed procedural requirements. Must document your costs. § 200.403(g). Must spread around the purchases. § 200.320(a).

\$250,000 and below (small purchases):

- Informal method
- Price quotes from “an adequate number of qualified sources.”
 - Usually three (3) will be an adequate number (compare FAR 13.104(b)).
 - *Note: this is a lot like the prior A-110 standard.*

2 CFR § 200.320

Above \$250,000:

- Formal Competition.
- Must publicize request for proposals and evaluation factors.
- Must solicit proposals from “an adequate number of qualified sources . . .”
- Must have “written method for conducting technical evaluations . . . and for selecting recipients.” (e.g., a source selection plan).

Sole Source Restrictions

SOLE SOURCE

Sole Source only permitted when:

- Under the MPT (no competition requirement)
- Item available only from one source
- Public Emergency
- Expressly authorized by agency or PTE
- “After solicitation of a number of sources, competition is determined inadequate.”
2 CFR § 200.320(c).

If purchase by Sole Source, **must evaluate profit separately**. 2 CFR § 200.324(b).

Must **document your justification** (remember the broad/enhanced documentation requirements above).

Documentation

2 CFR § 200.318(i)

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

Local Preference Limitations

2 CFR § 200.319(c)

NO STATE OR LOCAL GEOGRAPHIC PREFERENCE

“The [NFE] must 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. . .”

- Remember, this only applies to local governments.
- What if mixed funding, or if passed through the state?
- Check state “small business” definitions – often have a geographic component. Small business participation is otherwise encouraged by the UG (*see* 2 C.F.R. §200.325).

“Soft” Small Business and Domestic Sourcing Preferences

2 CFR § § 200.321 & 200.322

§200.321:

Must use small businesses, labor surplus area concerns, minority-owned businesses, and women's business enterprises "when possible."

§200.322:

"As appropriate and to the extent consistent with law . . . to the greatest extent practical under a Federal award" apply domestic preferences for "goods, products, or materials"

Now, by Statutory Mandate:

- Section 889 "Huawei ban" – August 13, 2020
- Build America Buy America – Per the IIJA of Nov. 15, 2021, currently undergoing initial implementation (though agency approaches vary)

PROHIBITION ON CERTAIN TELECOMMUNICATIONS EQUIPMENT AND SERVICES

§ 200.216 Prohibition on certain telecommunications and video surveillance services or equipment:

Recipients and subrecipients are prohibited from obligating or expending loan or grant funds to procure or obtain; extend or renew a contract to procure or obtain; or enter into a contract (or extend or renew a contract) to procure or obtain equipment, services, or systems that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.

Note: Implemented also by reference in 2 C.F.R. Part 200, Appendix II, but the source is not a limitation in the procurement standards. So this applies to state agencies as well.

COVERED TELECOMMUNICATIONS EQUIPMENT DEFINITION

UG Preamble Cites to Statutory Definition of “Covered Telecommunications Equipment”:

- Telecommunications **equipment** produced by **Huawei Technologies Company** or **ZTE Corporation** (or any subsidiary or affiliate of such entities)
- For the purposes of *public safety, security of government facilities, physical security surveillance* of critical infrastructure, and other national security purposes, video surveillance and telecommunications **equipment** produced by **Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company** (or any subsidiary or affiliate of such entities)
- Telecommunications or video surveillance services provided **by such entities or using such equipment**
- Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense . . . reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of [the People’s Republic of China].

BABA

Infrastructure Investment and Jobs Act, Pub. L. 117-58 (Nov. 15, 2021)

- Sec. 70914 sets government-wide baseline standard for fed-funded infrastructure:

“Not later than 180 days after the date of enactment of this Act, the head of each Federal agency shall ensure that none of the funds made available for a [Federal financial assistance program for infrastructure](#), including each deficient program, [may be obligated for a project](#) unless [all of the iron, steel, manufactured products, and construction materials](#) used in the project are produced in the United States.

- Material Categories and Statutory Definitions of “Produced in the United States” (Sec. 70912(6)):

- All [iron and steel](#):

“. . . all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States”.

- Material Categories and Statutory Definitions of “Produced in the United States” (Sec. 70912(6)):

- All [manufactured products](#):

(i) The manufactured product was manufactured in the United States; and

(ii) The cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation . . .”

- All [construction materials](#):

“. . . All manufacturing processes for the construction material occurred in the United States.”

Required Terms

2 CFR § 200.327 AND APPENDIX II

Note: This Applies to States Too

2 CFR Part 200, Appendix II lists terms and conditions that are required in certain contracts

Whether to include in a particular contract depends primarily on the type and value of the contract

Examples:

- Terms for Termination for Cause and Convenience
 - All contracts over \$10,000
- Huawei Ban (all procuring entities, including States)
- Davis-Bacon Act clause
 - All contracts for “construction” over \$2000 when Davis Bacon application is required by the financial assistance program’s authorizing statute
- Clean Air Act and Federal Water Pollution Control Act requirements
 - All contracts (and subgrants) over \$150,000

Conflict of Interest

“STANDARD” CONFLICT OF INTEREST

2 CFR § 200.318(c)(1)

- Written Standards of Conduct.
- No employee, officer, or agent may participate in selection of contractor (or management of a contract) if he or she has a conflict of interest. Conflict of Interest arises if person or immediate family member has potential for financial gain.
- Officers, employees, and agents may **neither solicit nor accept** gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. An organization’s written Standards of Conduct may provide an exception for gifts or gratuities of *de minimis* value (e.g., \$20).

What do you do:

- Mitigate conflicts
 - Screen conflicted individuals from the particular procurement actions.

“ORGANIZATIONAL” CONFLICT OF INTEREST

2 CFR § 200.318(c)(2)

“If the NFE has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the [NFE] 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 [NFE] is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.”

- Biased Ground Rules, Impaired Objectivity, Unequal Access to Information
- Not too hard to apply within governments. Can be awkward in private organizations where the rules do not fit well.

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