

U.S. DEPARTMENT OF ENERGY (DOE)

OFFICE OF ACQUISITION MANAGEMENT (OAM)

An Acquisition Guide for Executives



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AN ACQUISITION GUIDE FOR EXECUTIVES

The Department of Energy

ACQUISITION SYSTEM

An Acquisition Guide for Executives

U.S. Department of Energy
Office of Acquisition Management

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AN ACQUISITION GUIDE FOR EXECUTIVES

The Department of Energy (DOE) obligates over \$30 billion dollars per year to obtain supplies and services from the private sector to support its mission. DOE's contracts run the gamut from providing routine supplies and services to the production of nuclear weapons, environmental remediation, construction and operation of one-of-a-kind chemical processing facilities, and acquisition of world-class scientific research and development.

In carrying out its mission, DOE manages a vast array of science, energy, and nuclear programs and a nationwide complex of headquarters and field organizations, national laboratories, power marketing administrations, and special purpose offices. Contracting is critical to DOE's mission accomplishment.

The Federal Government has a fiduciary responsibility to ensure that taxpayer funds are spent prudently. The Federal acquisition system established to manage the expenditures of federal funds is very different in some respects from commercial buying practices for transactions between private parties. This guide provides information to help you understand the Department's acquisition system and how to use the system effectively, and provides information to help you avoid ethical and conflict of interest problems.

This guide covers the following subjects:

1. What is Acquisition?
2. Purpose and Primary Functions of the Department's Acquisition System
3. Key Organizations in Acquisitions
4. Legal Framework
5. Key Players in Acquisitions
6. Acquisition Process
7. Acquisition Thresholds and Award Types
8. Contracts versus Grants
9. Standards of Conduct
10. Disclosing Acquisition Information
11. List of Practical Suggestions
12. Contacts

1. WHAT IS ACQUISITION?

Within the Federal Government, the terms “procurement,” “contracting,” and “acquisition” are often used interchangeably. Acquisition is the process the Department uses to enter into a contract with another party. The other party may be a private industry (both for-profit and non-profit), other Government agencies, or educational institutions. The primary purpose of these contracts is to obtain supplies and services needed to support the accomplishment of the DOE’s mission.

Unlike commercial contracts which rely on the Uniform Commercial Code, Federal Government acquisitions are subject to federal statutes and regulations. The Federal Acquisition Regulation, better known as the “FAR,” governs the process by which Federal agencies acquire supplies and services. The FAR promotes uniform policies and procedures for acquisition of supplies and services for all federal agencies.

In addition, agencies have the ability to supplement the FAR to establish regulatory requirements to address unique requirements. The DOE’s supplement is the DOE Acquisition Regulation, “DEAR,” which, like the FAR, has the force and effect of the law.

2. PURPOSE AND PRIMARY FUNCTIONS OF THE DEPARTMENT'S ACQUISITION SYSTEM

PURPOSE:

The purpose of the Federal and Departmental acquisition system is to:

- Deliver on a timely basis the best value product or service to support achievement of the DOE's mission by:
 - Maximizing the use of commercial products and services.
 - Using responsible contractors that have a track record of successful past performance or demonstrate a current superior ability to perform.
 - Promoting competition.
 - Awarding contracts that minimize risk for the Government.
- Maintain the public's trust by conducting business with integrity, fairness, transparency, and compliance with statutory and regulatory requirements.
- Fulfill public policy objectives, such as:
 - Protecting the environment through the promotion and purchase of energy efficient and recycled products.
 - Promoting opportunities for small and socio-economically disadvantaged businesses.
 - Using contract types that facilitate performance, excellence, and cost savings while minimizing risk.

PRIMARY FUNCTIONS OF OAM:

For DOE, the Office of Acquisition Management (OAM) is responsible and accountable for managing the DOE's acquisition system. In fulfilling this responsibility, OAM performs the following primary functions:

- Manages all acquisition activities of the DOE.
- Develops, issues, maintains and interprets acquisition regulations, policies and guidance.
- Manages acquisition training and certification programs for the acquisition workforce.

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- Provides assistance and oversight for all DOE acquisition activities.
- Manages all acquisition-related information technology systems.
- Provides operational acquisition services to DOE program and staff organizations.
- Manages the DOE's Category Management and Strategic Sourcing Programs.

3. KEY ORGANIZATIONS IN ACQUISITIONS

The President establishes Government-wide acquisition policies and procedures through such vehicles as executive orders.

The Congress authorizes and appropriates funds and passes laws that govern the Federal acquisition system. Obligations made by Federal agencies are legally binding commitments, in such instruments as contracts and grants, made by Federal officials that lead to cash outlays.

The Office of Federal Procurement Policy, in the Office of Management and Budget, provides Government-wide direction for the Federal acquisition system, directs the Federal Acquisition Institute in training opportunities, and advises the President and Congress on acquisition matters. The Administrator, along with the heads of the Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration, comprise the **Federal Acquisition Regulatory (FAR) Council**, which issues and maintains the Federal Acquisition Regulation. The council is supported by the Civilian Agency Acquisition Council, of which DOE is a member, and the Defense Acquisition Regulation Council.

Regulatory agencies, such as the Department of Labor and the Small Business Administration interpret and implement statutory requirements related to small business, labor relations, and other matters assigned to them.

The Government Accountability Office is a part of the legislative branch which, among other duties, investigates agency contract management and hears protests of agency contract award decisions.

DOE's Inspector General independently reviews DOE programs and acquisition management, investigates potential fraud and other criminal activities, and audits DOE's Management and Operating contracts.

Chief Acquisition Officer advises and assists the head of the executive agency and other agency officials to ensure that the mission of the executive agency is achieved through the management of the agency's acquisition activities.

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The Secretary of Energy has delegated acquisition authority to the **Senior Procurement Executive** (SPE). The DOE SPE is the Director, Office of Acquisition Management (OAM). NNSA has its own SPE. The SPE further delegates acquisition authority to the Heads of Contracting Activities (HCAs). These officials also oversee the exercise of acquisition authority within DOE and further delegate specific written acquisition authority to Contracting Officers.

4. LEGAL FRAMEWORK

In 1831, the Supreme Court declared that the Federal Government, based on sovereignty, has inherent power to contract (U.S. vs. Tingley). However, the Government's broad constitutional authority to contract is limited by statutes, common law, and administrative law.

Numerous statutes govern Federal acquisition. Among the basic statutes are:

- The Federal Property and Administrative Services Act (40 U.S.C. 101 et seq.).
- The Armed Services Procurement Act (10 U.S.C. 2301 et seq.).
- The Small Business Act (15 U.S.C. 631 et seq.).
- The Office of Federal Procurement Policy Act (41 U.S.C. 1101 et seq.).
- The Federal Grant and Cooperative Agreement Act (31 U.S.C. 6301-6308).
- The Anti-Deficiency Act (31 U.S.C. §§ 1341(a), 1342, and 1517(a) et seq.)
- The Federal Information Technology Acquisition Reform Act (40 U.S.C. 11319, 44 U.S.C. 3601, 41 U.S.C. 1704, and 41 U.S.C. 3301)
- Annual Appropriation Acts

Common law comes from decisions of courts of law.

Administrative law includes:

- Executive orders.
- Decisions of the Civilian Board of Contract Appeals, the Comptroller General, and other administrative bodies.

The Federal Acquisition Regulation (FAR) (48 CFR Ch. 1) is a single, uniform regulation that applies to most executive agencies, including DOE.

The Department of Energy Acquisition Regulation (DEAR) (48 CFR Ch. 9) implements and supplements the FAR for DOE's unique needs.

Internal agency policies and procedures are also issued by the SPE via Acquisition Letters and the Department of Energy Acquisition Guide.

The DOE Directives System contains orders that affect procurement management systems and, through the unique DEAR “Laws, Regulations, and DOE Directives” clause, imposes programmatic requirements on DOE’s Management and Operating contractors, and other select contractors.

5. KEY PLAYERS IN ACQUISITIONS

Contracting Officers

Contracting Officers are the Government's agents for acquiring supplies and services. Only Contracting Officers have the authority to execute, modify, or terminate a contract. Moreover, Contracting Officers may bind the Government only to the extent of the authority delegated in writing to them.

Contracting Officers are responsible for ensuring:

- The appropriateness of source selections and awards.
- The Government obtains value from contracts.
- All requirements of law and regulation are met prior to executing an action.
- Sufficient funds are available for obligation.
- Contractors receive impartial, fair, and equitable treatment.
- Both parties comply with terms of the contract.

Independence. Contracting Officers often request advice from specialists in audit, law, engineering, and other fields. However, the contracting officer is solely responsible for all decisions pertaining to the award and administration of contracts. The recommendations and counsel of contributing specialists are advisory.

Other Federal Acquisition Officials

Depending on such factors as the dollar value of the acquisition, Contracting Officers may request or receive considerable advice and assistance from the following officials.

Contract specialists may either serve as Contracting Officers or support them. Contract specialists are trained in acquisition policies and in such related business skills as market research, source selection, cost and price analysis, negotiation, and contract administration.

Program managers are responsible for project planning, organizing, staffing, leading, and executing assigned projects.

Project managers are responsible for project management activities of one or more projects, to include:

- Defining project objectives, scope, cost and schedule.
- Allocating project funding and authorizing work activities.
- Overseeing design, construction, environmental, safety, and health efforts.

Contracting Officer Representatives are designated by Contracting Officers and delegated limited authority for such responsibilities as monitoring contractor performance and alerting Contracting Officers to problems, recommending any necessary contract changes, and inspecting and accepting deliverables.

Attorneys review proposed awards for legal sufficiency, advise Contracting Officers on protests and disputes, and interpret acquisition law.

Competition advocates are responsible for identifying and removing barriers to competition. For this purpose, they review draft acquisition plans, statements of work, and justifications for other than full and open competition.

Office of Small and Disadvantaged Business Utilization ensures that a fair portion of awards are made to small businesses (to include various disadvantaged, woman-owned, veteran-owned, and HUBZone small businesses) and other targeted categories of contractors in accordance with current laws and regulations. This office also provides assistance and counseling to small business firms.

Small business advocates identify opportunities for placing contracts with firms owned by socially and economical disadvantaged persons or other firms under various Small Business Administration preference programs.

Auditors and accountants perform such functions as:

- Auditing cost and pricing data provided by an offeror and recommending positions on proposed elements of cost.
- Reviewing contractor accounting and cost-estimating systems.

6. ACQUISITION PROCESS

The acquisition process is typically divided into four phases: pre-solicitation, solicitation and evaluation, award, and contract administration.

The pre-solicitation phase lays the groundwork for soliciting offers and awarding a contract. In this phase, the following tasks are generally performed:

- Identifying the need for products or services and planning to meet the need.
- Conducting market research to, among other things, identify qualified vendors that can provide the required supplies or services.
- Preparing a performance work statement with measurable performance standards and a quality assurance assessment plan.
- Determining the extent of competition for potential award (e.g., full and open, non-competitive, small business set-aside).
- Establishing technical, price-related, and other evaluation criteria for competitive acquisitions.
- Determining the method of acquisition (invitation for bid or negotiation) and type of contract (fixed price or cost reimbursement, and appropriateness of various incentives for the contractor).
- Committing sufficient funds to acquire the deliverable.
- Drafting the solicitation.

In the solicitation and evaluation phase, the following tasks are generally performed:

- Publicizing the proposed acquisition.
- Answering inquiries from potential offerors and conducting pre-proposal conferences.
- Evaluating bids or proposals based on the evaluation plan for the acquisition and the criteria in the solicitation.
- Setting the competitive range and discussing proposals with offerors, if necessary.
- Determining the responsibility of the potential awardee.
- Providing advance notification of certain pending awards to Congress.

In the award phase, the following tasks are generally performed:

- Awarding of the contract.
- Conducting debriefings with successful and unsuccessful offerors.
- Responding to protests of the award by unsuccessful offerors.

In the contract administration phase, the following tasks are generally performed:

- Monitoring the contractor's performance and compliance with the terms of the contract.
- Inspecting and accepting contract deliverables.
- If problems arise, determining whether to stop work, extend delivery dates for excusable delays, or apply formal contractual remedies (e.g., rejection of work or issuance of cure or show cause notices).
- Determining the timing and amount of payments to contractors, based on the contract terms.
- Modifying or terminating contracts, as necessary.
- Responding to contractor claims, if any, for additional money or other contract adjustments.
- Closing out the contract.

7. ACQUISITION THRESHOLDS AND AWARD TYPES

These are some of DOE's more commonly used acquisition thresholds and tools:

Micro-purchases means an acquisition of supplies or services using simplified acquisition procedures, the aggregate amount of which does not exceed the micro-purchase threshold (currently \$10,000 for most supplies and services, but see FAR 2.101, Definitions, as this threshold is increased periodically). The Government Purchase Card is the primary method used to acquire supplies and services that are valued less than the micro-purchase threshold. Authority for use of the purchase card is often delegated to the end-user outside of the procurement office.

Simplified Acquisitions means the acquisition of supplies or services using simplified acquisition procedures, the aggregate amount of which is between the micro-purchase threshold and \$250,000 (but see FAR 2.101, Definitions, as this threshold is increased periodically).

For acquisitions above the simplified acquisition threshold (currently \$250,000, but see FAR 2.101, Definitions, as this threshold is increased periodically), Contracting Officers use one of three methods:

- Invitations for Bid which require the submission of sealed bids, publicly opened, with award to the low, responsive, responsible bidder.
- Competitive Negotiation which provides for publicizing and issuing a request for proposals, discussing proposals with offerors in the competitive range (i.e., those with a reasonable chance of award, if applicable), and awarding based on the evaluation criteria in the solicitation.
- Noncompetitive Negotiation is permitted only when it meets statutory exceptions to competition, such as urgency or lack of any other responsible source.

Management and Operating Contracts (M&Os). DOE's acquisition system is unique in its award of contracts for the management and operation of laboratories and certain other major facilities and sites. M&O contracts were initially used

by the Army Corps of Engineers during World War II for the Manhattan Project.

Ultimately, M&O authority was codified in the Atomic Energy Act of 1946 so that M&Os could be established to manage program objectives in concert with the operation of a government-owned facility (e.g., National Laboratory). Under an M&O, DOE and the contractor form a “partnership” rather than an “arms-length” relationship found in the majority of other government contracts.

The DEAR has special provisions for the award and administration of M&Os. For example, Government-owned or controlled facilities are used in contract performance rather than a contractor’s facility; all are cost reimbursement with advance understandings negotiated in the contract for personnel costs; work is performance-based for a broad spectrum of long-term or continuing activities; contract length is typically five years, with competitions or extensions in five-year increments; funding is through a letter of credit; the work is substantially separate from the contractor’s other business, but the contractor is expected to use commercial experience and practices; and the books of account are Government-owned and integrated into DOE’s system of accounts.

Use of Other Agency Contracts – Requirements for supplies and services may also be acquired using General Services Administration schedules, which are also referred to as Multiple Award Schedules (MAS) and Federal Supply Schedules (FSS), Government Wide Acquisition Contracts (GWACS) that help agencies meet their technology requirements and Interagency Agreements pursuant to the Economy Act.

8. CONTRACTS VERSUS GRANTS

There are distinct differences between a contract and grant.

Contract - A contract is a legally enforceable agreement between two or more competent parties, is mutually binding, and obligates one party to furnish something of value and the other party to provide consideration. Contracts benefit the government.

Grant - A statutory award of financial assistance in the form of money or other things of value (e.g., a contractor's services as in kind assistance) by the Federal Government to an eligible recipient. The term does not include technical assistance provided by Federal employees or contractors or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, or insurance. Unlike cooperative agreements, the Federal Government is not "substantially involved" in the assisted project under a grant. Neither grants nor cooperative agreements may be used to obtain services or products for the direct use or benefit of the Federal Government.

9. STANDARDS OF CONDUCT

Standards of conduct are the rules which apply to Government employees and individuals dealing with the Government. In addition to the applicable procurement and acquisition rules, Federal employees are bound by the Standards of Ethical Conduct, (5 CFR part 2635), and the conflicts of interest statutes in Title 18. Government business must be conducted with complete impartiality, and except as authorized by statute or regulation, preferential treatment provided to none. This includes:

- Avoiding any conflict of interest or even the appearance of conflict or lack of impartiality.
- Avoiding making Government decisions outside official procedures or without authority.
- Conducting actions as though full public disclosure is expected.

Prohibited conduct for all personnel involved in the acquisition process:

- Unauthorized disclosure or acquisition of contractor proposal or bid information or source selection information.
- Taking bribes or soliciting or accepting certain gratuities.
- Discussing future employment or business opportunities with a bidder or offeror without promptly reporting the contact in writing and either executing a recusal or rejecting the possibility of non-Federal employment.
- Using an official position or non-public information to advance private or personal interests.
- Participating in any particular matter in which the employee, spouse, minor children, general partner, or organization in which the employee serves as an officer, director, trustee, general partner, or employee has a financial interest. This includes specific party matters as well as matters of general applicability, such as a bid proposal.
- Conspiring to defraud the Government.
- Making false statements.

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- Contracting with Government employees or members of Congress.
- Contracting on a sole source basis with a former DOE employee within one year after his or her departure, unless a waiver has been granted.
- Seeking or engaging in outside employment or activities with a contractor or other person whose financial interests may be affected by or conflict with the performance of one's official duties.
- Engaging in certain post-employment representations to the Government on the same specific party matter, and under certain circumstances for certain people (as described in the Procurement Integrity Act), receiving compensation from a contractor as an employee, officer, director, or consultant of the contractor.

10. DISCLOSING ACQUISITION INFORMATION

Contractor bid or proposal information or source selection information may not be obtained or disclosed before or after contract award, except as authorized by law. “Source Selection Information” means any of the following information that is prepared for use by the Department for the purpose of evaluating a bid or proposal to enter into a procurement contract, if that information has not been previously made available to the public or disclosed publicly. Such information includes:

- Bid prices submitted in response to an Invitation For Bids or lists of those bid prices before bid opening.
- Proposed costs or prices submitted in response to a solicitation or lists of those proposed costs or prices.
- Source selection plans.
- Technical evaluation plans.
- Technical evaluations of proposals.
- Cost or price evaluations of proposals.
- Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract.
- Rankings of bids, proposals, or competitors.
- Reports and evaluations of source selection panels, boards, or advisory councils.
- Generally any other information marked as “Source Selection.”

Sanctions: Employees who engage in prohibited conduct may be subject to administrative sanctions, civil penalties, or criminal penalties such as fines, and/or incarceration. In addition, such conduct may result in the cancellation of the procurement or rescission of a contract, causing delays and interrupted procurements for supplies and services.

11. LIST OF PRACTICAL SUGGESTIONS

- Be an active advocate for complying with statutory or regulatory requirements, particularly the requirements for competition and urgency. “Advance source selection,” or comments such as “this company is the best to do the work” or “they know what we want” or “I need it right away and I know a company who can give me what I want now,” are not statutory or regulatory requirements for making a selection.
- Do not provide advance information not generally made available to the public to companies or individuals regarding planned acquisitions that would, in fact or appearance, provide an unfair competitive advantage. This includes not discussing acquisition related business outside the office. There are criminal and civil penalties for release of unauthorized information.
- Ensure that appropriated funds are available to pay for an acquisition.
- Support the mandatory acquisition of products and services from non-profit agencies employing people who are blind or severely disabled under the Javits-Wagner-O’Day Act.
- Request that the appropriate contracting officer make commitments to contractors, companies, or individuals or orders/requests for them to perform work. Do not sign (execute) contractual instruments or modifications, whether or not dollars are involved, or memoranda or letters that appear to have the effect of contractually binding the Government. A Federal/Departmental employee without actual authority who makes an unauthorized commitment may be subject to personal liability.
- Consult immediately with the Designated Agency Ethics Official, local ethics counselor and the contracting officer if you are provided information regarding or asked to be involved in any acquisition activities for which you or your family members have financial interests or other holdings in a contractor, subcontractor, or potential offeror or bidder. DOE Headquarters employees should contact the Office of the Assistant General Counsel for Ethics and Personnel Law at 202-586-1522 or standardsofconduct@hq.doe.gov.

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NNSA employees who are duty-stationed at Headquarters should contact NNSA's Office of General Counsel at 202-586-8514. Employees who are duty-stationed in the field should contact their local site counsel.

- As soon as an acquisition need is identified, contact the contracting officer to obtain advice and initiate early planning strategies. This is particularly important for acquisitions with urgent time requirements. Early planning can also significantly shorten acquisition lead times for complex, large acquisitions.
- Be knowledgeable of the procurement integrity requirements and other ethical considerations before discussing any acquisition with a member of the public or any Department employee not involved in the acquisition.
- Use care in working with support contractors including administrative/clerical support, to avoid the appearance of an employer/employee relationship. Do not direct contractors to perform any tasks. The contractors are not DOE employees. Federal employees are not authorized to direct or influence contractor staffing decisions.
- Start and end every meeting with contractor representatives by making it clear that you do not have authority to make contracting decisions.
- Ensure contractor space is clearly marked and contractor personnel wear contractor badges.
- Do not use contractors for inherently governmental functions. "Inherently governmental function" means, as a matter of policy, a function that is so intimately related to the public interest as to mandate performance by Government employees. An inherently governmental function includes activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: the act of governing, i.e., the discretionary exercise of Government authority, and monetary transactions and entitlements.
- Do not allow contractors to participate as members of internal Department

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Committees.

- Do not suggest promotion, bonus, hiring, or firing of contractor personnel.
- Do not allow contractors to make DOE or policy decisions.
- Support the small and small disadvantaged business programs.
- Do not make contractor source selections or otherwise participate or influence source selections (e.g., as an evaluator or advisor) unless you have been delegated authority to do so in writing.
- Do not accept any gift from contractors or potential contractors that is worth more than \$20. Also, don't accept gifts worth more than \$50 in a year from that same source.
- If you have a meal with a contractor, we strongly encourage you to pay for your own meal and recognize the appearance issues. Any gift, including a meal, may not exceed the \$20 threshold.
- Do not discuss, ask for, or encourage, either orally or in writing, the submission of unsolicited proposals. All unsolicited proposals must be referred or forwarded to the DOE National Energy Technology Laboratory (NETL).
- You can provide letters of recommendation that refer to your official title and position for people you know from your Federal service (which could include contractors or subordinates) or for people who are applying for Federal positions. OGC/Ethics prefers that employees not use DOE letterhead for personal recommendations. Remember that you can't evaluate the performance of contractors outside of the established process and can't recommend contractors for any promotions or bonuses.

12. CONTACTS

For additional information on how to purchase supplies or services or find specific points of contact for questions, please visit the OAM internet website at <https://www.energy.gov/management/office-management/operational-management/departments-energy-guidance-acquisition-financial>.

For additional information on standards of conduct: DOE Headquarters employees should contact the Office of the Assistant General Counsel for Ethics and Personnel Law at 202-586-1522 or standardsconduct@hq.doe.gov. NNSA employees who are duty-stationed at Headquarters should contact NNSA's Office of General Counsel at 202-586-8514. Employees who are duty-stationed in the field should contact their local site counsel.

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