

New Jersey

Workforce Innovation Notice 21-16(A)

TO: Workforce Development Board Directors

FROM: John Bicica, Chief
WIOA Technical Assistance and Capacity Building

SUBJECT: Competitive Selection of One-Stop Operators

DATE: April 27, 2017

Purpose

To provide local workforce development boards with the Workforce Innovation and Opportunity Act (WIOA) requirements regarding the competitive procurement of one-stop operators as it relates to:

- One-Stop Operator Eligible Entities
- Ensuring Full and Open Competition
- One-Stop Operator's Role
- Conflict of Interest
- State Merit Staff
- Transparency and Responsibility

Background

WIOA sec. 121(d)(2)(A) requires each local workforce development board (WDB), with the agreement of the chief elected official, to use a competitive process for the selection of the one-stop operator in their local area. No later than July 1, 2017, one-stop operators selected under the competitive process must be in place and operating the one-stop center. WIOA requires that this selection occur no less than every four years; though States may require, or a local WDB may implement, a competitive selection more than once every four years. The State Employment and Training Commission, through the New Jersey State Combined Plan, requires that competitive selection occur every two years. The United States Department of Labor Employment and Training Administration (ETA) issued Training and Employment Guidance Letter (TEGL) 15-16, which provides guidance related to one-stop operator procurement. This New Jersey Workforce Innovation Notice provides some of the key sections of this federal guidance, as well as pertinent State procurement law requirements. The full TEGL can be accessed here: https://wdr.doleta.gov/directives/attach/TEGL/TEGL_15-16.pdf

One-Stop Operator Eligible Entities (TEGL 15-16, pages 3-4, page 16)

One-stop operators must be an entity (**public, private, or nonprofit**) or a consortium of entities, that at a minimum includes a minimum of three or more of the one-stop partners of demonstrated effectiveness, located in the Local Area. Entities selected and serving as the one-stop operators are sub recipients of a Federal Award and thus are required to follow the Uniform Guidance. Such entities may include the following:

- Government agencies or governmental units, such as: Local or county governments, school districts, State agencies, and Federal WIOA partners;
- Employment Service State agencies under the Wagner-Peyser Act, as amended by title III of WIOA;
- Indian Tribes, tribal organizations, Alaska Native entities, Indian-controlled organizations serving Indians, or Native Hawaiian organizations (collectively referred to herein as “Indian Tribes”);
- Educational institutions, such as: institutions of higher education, nontraditional public secondary schools such as night schools, and area career and technical education schools (however, elementary and other secondary schools are not eligible to become a one-stop operator);
- Community-based organizations, nonprofit entities, or workforce intermediaries;
- Other interested organizations that are capable of carrying out the duties of the one-stop operator, such as a local chamber of commerce, other business organization, or labor organization;
- Private for-profit entities;
- Local WDBs, if approved by the Chief Elected Official (CEO) and the Governor as required in WIOA sec. 107(g)(2).

Local WDBs-Local WDBs must still compete to be the one-stop operator in the local area and meet mandatory competition requirements in 20 CFR 678.605(c) and 687.615(a). In situations in which the outcome of the competitive process is the selection of the local WDB itself as the one-stop operator, the Governor and the CEO must agree to the selection of the local WDB as required by WIOA Sec. 107(g)(2). The Final Rules at CFR 678.615(b) require the local WDB to have appropriate firewalls and conflict of interest policies and procedure in place which must conform to 20 CFR 679.430.

One way to avoid a conflict of interest is to establish effective conflict of interest policies and maintain appropriate firewalls that apply when the Local WDB competes to be the one-stop operator. This may include, for example, a requirement for an outside entity to conduct the competition. For example, the Local WDB could contract with a separate and independent outside entity to conduct the competition. Outsourcing the entire process (including development of requirements, drafting the RFP or IFB, evaluation of proposals/bids, and identification of best entity) to an alternate entity would be the best practice in this circumstance to avoid a conflict of interest. These costs and activities would be allowable under WIOA.

Alternatively, the State WDB or a State agency could conduct the competition where a Local WDB is competing to be the one-stop operator.

Outside Entity. If the Local WDB or State WDB chooses to have an outside entity conduct part of, or the entire one-stop operator competition, the outside entity must meet certain requirements. The outside entity must be an independent organization that is capable of exercising professional and ethical judgment. The outside entity must also be required to submit a conflict of interest statement. Payment for running the competition would be an allowable cost under WIOA.

Public Disclosure. The Local WDB or State WDB must publicly disclose any conflicts of interest, real or apparent, and any recusal by individuals or organizations with real or apparent conflicts of interest. Regular public disclosure provides transparency to stakeholders in the procurement process for the selection of the one-stop operator. Best practice, consistent with the public disclosure requirements of WIOA secs. 107(e) and 20 CFR 679.390, is to publicly disclose any conflicts of interest and recusals on the Local WDB's website, or, if the Local WDB lacks a website, the State WDB's website. Additional methods, such as publication in newspapers, may also be used to ensure full and regular public disclosure.

Uniform Guidance-Procurement Standards(TEGL 15-16, page 6)

As subrecipients of federal funds, the one-stop operator must follow the Uniform Guidance at 2 CFR part 200, including the contractual provisions in 2 CFR 200.326 and 2 CFR part 2900. Once the local WDB has competitively selected a one-stop operators, the local WDB and the operator must execute legally binding agreement, which may take the form of a written contract or a memorandum of agreement.

Full and Open Competition (TEGL 15-16, pages 7-8)

All procurement transactions must be conducted using full and open competition (2 CFR 200.319(a)). Written procedures must allow for sufficient time for all phases of the procurement process to be carried out in a manner that would not unduly restrict competition. Pre-qualified lists must be current and include enough qualified sources to ensure open and free competition and must not preclude bidders and offerors from qualifying during the solicitation period. Additionally, the following conditions apply:

a. Procurements that are in excess of the simplified acquisition threshold (currently set at \$150,000 by 48 CFR 2.1) require a procurement process by means other than a small purchase procurement. Two such permissible procurement methods are the use of sealed bids (formal advertising) and competitive proposals. These procurement methods must be outlined in a written procurement policy, so that all parties involved in any stage of the process are familiar with their roles, functions, and responsibilities.

b. Entities performing a competitive procurement must ensure that the proposed costs of the one-stop operator are allowable, meaning that they are reasonable, necessary, and allocable, as required in the Uniform Guidance at 2 CFR part 200.

c. As stated in the Uniform Guidance at 2 CFR 200.319(a), 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 contracts 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 and describing the performance or other relevant requirements of the procurement; and
- Any arbitrary action in the procurement process.

For example, although WIOA requires the one-stop operator to be located in the Local Area, unnecessarily limiting the bids/proposals to companies or businesses located in a certain zip code would restrict competition. For example, a RFP or IFB may specify the addresses of the American Job Centers in which the one-stop operators will be located, but it could not specify that bids/proposals may only come from companies physically located in those same zip codes.

Additional Mechanisms to Provide for Full and Open Competition (pages 17-18)

There are additional steps that local WDBs and State WDBs can take in the furtherance of a full and open competition for a one stop operator:

Examination of competition by and outside party-Retain an outside party to conduct an objective review of the competition process, or parts of the process, such as whether the RFP/IFB was unduly restrictive or whether the selection process was properly and fairly conducted.

Documentation-Section 200.318(i) of the Uniform Guidance requires the maintenance of records sufficient to detail the history of the procurement. This requires the local WDB to carefully document its decision to select or not select offerors or bidders.

Revision of the original procurement solicitation or re-competition of the one-stop operator. If the entity conducting the competition determines there were defects in the competition process, the entity must re-compete the selection of the one-stop operator. Defects in the competition process include violation of the WIOA Joint Final Rule, Uniform Guidance, and/or failure to follow the Local WDB’s procurement policies and procedures. The competition process may also be defective if the policies and procedures do not provide for a full and open competition, or if the procurement solicitation issued was inadequate to generate full and open competition. However, if the entity conducting the competition identifies defects in the procurement solicitation before the conclusion of the solicitation period, the entity must revise the procurement solicitation and extend the timeframe for the solicitation.

Methods of Procurement for Competitions (TEGL 15-16, page 7)

Non-Federal entities (such as Local WDBs), are required to use the methods of procurement described at 2 CFR 200.320 when selecting a one-stop operator. The method selected will vary

by the particular circumstances of the Local WDB. The following methods of procurement are permissible to select a one-stop operator through a competitive process:

- a. Sealed bids (formal advertising), such as an invitation for bids (IFB) (2 CFR 200.320(c)); and
- b. Competitive proposals (2 CFR 200.320(d)), such as a request for proposals (RFP).

In addition, where certain criteria are met, a one-stop operator may be selected by noncompetitive proposals (sole source) (2 CFR 200.320(f)).

Sole Source Procurement (noncompetitive proposals) (TEGL 15-16, page 10)

The Uniform Guidance identifies procurement by noncompetitive proposals as permissible in certain circumstances discussed below. As noted in 20 CFR 678.605(c), the Department interprets references to “noncompetitive proposals” in the Uniform Guidance at 2 CFR 200.320(f) to be read as sole source procurement for purposes of competitively selecting a one-stop operator.

Non-Federal entities, including subrecipients of a State (such as Local WDBs) may select a one-stop operator through sole source selection when consistent with local procurement policies and procedures which conform to the Uniform Guidance set forth at 2 CFR 200.320.

The Uniform Guidance states, at 2 CFR 200.320(f), that procurement by noncompetitive (sole source) proposals is procurement through solicitation of a proposal from only one source which may be used only when one or more of the following circumstances apply:

- a. The item or service is available only from a single source;
- b. The public exigency or emergency for the item or service will not permit a delay resulting from competitive solicitation;
- c. The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or
- d. After solicitation of a number of sources, competition is determined inadequate, whether for reasons of number or quality of proposals/bids

Use of extraordinary unspecifiable services (NJSA 5:34-2.1)

NJSA. 40A:11-5(1)(a)ii and 18A:18A-5a(2) permit contracting units to award contracts without competitive bidding for extraordinary unspecifiable services. The application of this exception for extraordinary unspecifiable services shall be construed narrowly in favor of open competitive bidding wherever possible.

Avoiding Conflicts of Interest (TEGL 16-16, page 15)

A Conflict of interest can arise when actions are taken or may appear to be taken by any entity involved in more than one role, such that the performance of that entity in one role affects its interest in its other role, thereby making it difficult for the entity to perform the procurement process objectively and impartially. Therefore, proper firewalls must be in place to ensure the transparency and integrity of the procurement process and demonstrate to the public and to the Department that the selection process was impartial and that no preferential treatment was given to the awardee.

The possibility that a conflict of interest may arise is inherent when entities are performing, or seeking to perform, multiple functions within the workforce development system. Listed below

are some possible ways to avoid certain conflicts of interest that can arise in the one-stop operator competition process.

Recusal of Members of the Local WDB – Consistent with the Local WDB’s recusal policies and WIOA sec. 107(h), the Local WDB must recuse individuals who have conflicts of interest from the one-stop operator competition. Such individuals must include those individuals with financial or other interests in the entities applying to be the one-stop operator. Recusal of individuals with conflicts of interest is a way to avoid conflicts of interest when a small number of decision makers have conflicts of interest. However, if the number of members who must be recused deprives the Local WDB of quorum, the Local WDB must follow an alternative process and outsource the selection to an outside entity or to a State agency or the State WDB.

The State and Local WDBs must ensure that, in carrying out WIOA programs and activities, one-stop operators:

- (1) Disclose any potential conflicts of interest arising from the relationships of the operators with particular training service providers or other service providers (further discussed in § 679.430 of this chapter);
- (2) Do not establish practices that create disincentives to providing services to individuals with barriers to employment who may require longer-term career and training services; and
- (3) Comply with Federal regulations and procurement policies relating to the calculation and use of profits, including those at 20 CFR 683.295, the Uniform Guidance at 2 CFR 200, and other applicable regulations and policies.

One-Stop Operator Roles and Prohibited Functions

The basic role of a one-stop operator is to coordinate the service delivery of participating one-stop partners and service providers. At a minimum, States and Local WDBs must ensure that in carrying out this role, one-stop operators do the following:

- Disclose any potential conflicts of interest arising from the relationships of the one-stop operators with particular training service providers or other service providers, including but not limited to, career services providers;
- In coordinating services and serving as a one-stop operator, refrain from establishing practices that create disincentives to providing services to individuals with barriers to employment who may require longer-term services, such as intensive employment, training, and education services; and
- Comply with Federal regulations, and procurement policies, relating to the calculation and use of profits.

Local WDBs may establish additional roles for the one-stop operator, including the following: being the primary provider of services within the center; providing some of the services within the center; coordinating service providers within the center and across the one-stop system; and coordinating service delivery in a multi-center area, which may include affiliated sites. The role of the one-stop operator must be clearly articulated in all phases of the procurement process, as well as in the legally binding agreement between the Local WDB and the one-stop operator.

The competition for a one-stop operator must clearly articulate the role of the one-stop operator. A one-stop operator may not perform the following functions:

- Convene system stakeholders to assist in the development of the local plan
- Prepare and submit local plans
- Be responsible for oversight of itself
- Manage or significantly participate in the competitive selection process for one-stop operators select or terminate one-stop operators, career services, and youth providers
- Negotiate local performance accountability measures; or
- Develop and submit budget for activities of the Local WDB in the local area

An entity serving as a one-stop operator, that also serves a different role within the one-stop delivery system, may perform some or all of these functions when it is acting in its other role, if it has established sufficient firewalls and conflict of interest policies and procedures. The policies and procedures must conform to the specifications in 20 CFR 679.430 of this chapter for demonstrating internal controls and preventing conflict of interest. **(20 CFR 678.620)**

State Merit Staff(20 CFR. 678.630)

State merit staff can continue to perform functions and activities in the one-stop center. The Local WDB and one-stop operator must establish a system for management of merit staff in accordance with State policies and procedures. Continued use of State merit staff for the provision of Wagner-Peyser Act services or services from other programs with merit staffing requirements must be included in the competition for and final contract with the one-stop operator when Wagner-Peyser Act services or services from other programs with merit staffing requirements are being provided.

Transparency and Responsibility.

The entire procurement process must be performed under a process that promotes transparency and responsibility from the planning phase to the closeout phase.

Sunshine Provisions. Information about the selection and certification of the one-stop operators must be made available to the public on a regular basis through electronic means and open meetings (WIOA secs. 101(g) and 107(e)) and made available to auditors and Federal reviewers. Such information may include minutes from Board meetings in which the decision on selection and certification is made. This provides an opportunity for public comment and participation in the process as appropriate. Making information available to the public includes regularly posting information to a website and responding promptly to written or electronically submitted requests for information.

The information that Local WDBs are required to make available to the public includes, but is not limited to, the Local WDB's written conflict of interest policy, the Local WDB's written procurement policies, the procurement solicitation itself, a listing of the entities that have submitted bids or proposals, an abstract of those bids or proposals, the identity of the selected one-stop operator, and total award amount and duration of the contract with the one-stop operator.

Required Action: Each local WDB must ensure that the local one-stop operator has been competitively selected by July 1, 2017.

References and Links: Uniform Guidance at 2 CFR 200 http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title02/2cfr200_main_02.tpl

Authority

New Jersey Department of Labor and Workforce Development	X
State Employment And Training Commission	X

Questions

For questions regarding this guidance, contact John Bicica, Chief, WIOA Technical Assistance and Capacity Building at john.bicica@dolnj.gov