NATIONAL ASSOCIATION OF
Community Health Centers

Important Content Note:

This technical assistance resource was developed prior to the August 2017 release of the Health Center Compliance Manual by the Health Resources and Services Administration's (HRSA) Bureau of Primary Health Care (BPHC). The BPHC Compliance Manual, issued August 2017, indicates where PINS, PALs and other program guidance are now superseded or subsumed by the BPHC Compliance Manual.

See: https://bphc.hrsa.gov/programrequirements/pdf/healthcentercompliancemanual.pdf

NATIONAL ASSOCIATION OF Community Health Centers

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Information Bulletin #2

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The "Do's" and "Don'ts" of Contracting for Services

Section 330 of the Public Health Service Act allows health centers to provide required services (as well as any additional and/or specialty services that a particular center has included within its scope of project) either "through the staff and supporting resources of the center or through contracts or cooperative agreements." Policies and Program Requirements issued by Health Resources and Services Administration (HRSA) have further interpreted the statutory language to allow three service delivery methodologies: (1) directly; (2) by established written contract under which the health center pays another provider (organization or individual) to furnish services on behalf of the health center; or (3) by established written referral agreement under which the health center does not provide payment to the other provider.

The reasons for health centers to provide services through either contracts or referrals are numerous. Often, health centers will enter into arrangements with other providers in order to maximize the scope of available services within the community (but which the health center does not, or cannot, provide itself) and/or fill gaps in expertise or capacity, ultimately expanding and enhancing the services furnished to the health center's patients. Other arrangements provide enhanced access to services, or reduce the health center's costs of providing services by eliminating costly infrastructure (such as special equipment and space configuration) or reducing salary and benefit cost, especially if the health center does not have the need or demand for a full-time provider. Still other arrangements may be key elements in securing grants and other resources to facilitate the expansion of services.

This Information Bulletin provides an overview of using procurement contracts to accomplish the aforementioned goals. While procurement contracts can be valuable tools in supplementing services gaps and/or enhancing access and availability of services furnished to the health center's patients, careful construction is necessary to reduce uncertainty

Note that in all Information Bulletins:

The term **"health center"** refers to public or private nonprofit entities that: (1) receive grants under Section 330 of the Public Health Service Act (Section 330), including Sections 330(e), 330(f), 330(g) and 330(h) (collectively "Health Center Program Grantees"); and (2) entities that have been determined by the Department of Health and Human Services (DHHS) to meet the Section 330-Related Requirements to receive funding without actually receiving a grant ("health center look-alikes").

The term **"Section 330-Related Requirements"** refers to requirements set forth in:

- Health Center Program Statute: Section 330 of the Public Health Service Act (42 U.S.C. §254b),
- Program Regulations: 42 CFR Part 51c and 42 CFR Parts 56.201-56.604
- Health Center Program Requirements: http://www.bphc.hrsa.gov/programrequirements/index.html

The term **"Grant Requirements"** refers to Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards: 2 CFR Part 200, as adopted by DHHS at 45 CFR Part 75.

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and potential legal exposures. Drafting and/or negotiating sound contracts and otherwise conducting appropriate procurements (and, in particular, including various requirements that apply to health centers' contracting decisions by virtue of their receipt of federal grant funds) is key to the success of the agreement and the services provided therein.

The focus of this Information Bulletin is on health centers as purchasers (procurers) of goods and services. In particular, this Information Bulletin:

- Briefly explores the distinction between a sub-grant arrangement and a procurement (or "purchase/lease of services") contract
- Explores the definition of and general responsibilities under a procurement contract
- Addresses specific federal requirements and standards that must be observed when executing the procurement arrangement
- Provides common contractual terms that, as a matter of good practice, should be included in all agreements, focusing on elements that generally make up a "sound and complete" contract

Note that the discussion below concerning key contractual elements pertains as well to situations in which the health center is selling its services (or goods) to a third party. The health center, as the contractor, will be just as interested in ensuring that its contracts are accurate with respect to issues such as timing of payments and delivery as it will be when it is the purchaser of goods and services.

SUB-GRANT OR PROCUREMENT CONTRACT?

As a first step, the health center must decide whether a sub-grant or a procurement contract is most appropriate for the transaction. Note that the rules for "sub-recipients" (those entities receiving a sub-grant from a recipient of a federal award) differ somewhat from procurement standards. All federal statutory and regulatory requirements, including 45 C.F.R. Part 75 and ***Section 330-Related Requirements*** should be imposed via the sub-recipient agreement.

While there is no bright line test for determining whether an award of federal funds under a grant should take the form of a sub-grant or a procurement, guidance is set forth in 45 C.F.R. §75.351. In general, a sub-grant would be awarded when another entity **that itself would be eligible to receive the grant directly** (the sub-recipient) agrees to use the federal sub-award to carry out a project that fulfills the public purpose for which the health center was funded (typically in a specific location within the health center's service area).

A transaction is more likely to be a sub-recipient arrangement if the other entity:

- Determines who is eligible to receive assistance under the federal award
- Has its performance measured with respect to the objectives of the federal program
- Is responsible for making programmatic decisions
- Complies with all applicable federal program requirements specified in the federal award.

On the other hand, a procurement contract typically is issued in order to purchase goods or services for the direct benefit of the health center. A transaction is more likely to be a contract arrangement if the other entity:

- Provides the agreed upon goods or services within normal business operations
- Provides similar goods or services to multiple purchasers
- Operates in a competitive environment on a normal basis
- Provides goods or services that are ancillary to the operations of the federal program
- Is not subject to compliance requirements as a result of the agreement with the health center, although similar requirements may be applicable for other reasons

It is important to note that health centers must make a judgment call on a case-by-case basis for each transaction.

DEFINITION OF AND GENERAL RESPONSIBILITES UNDER A PROCUREMENT CONTRACT

Definition of a Procurement Contract

Under a procurement contract for goods or services, the health center would contract for specific services from a "contractor" (e.g., another health care provider located in the health center's community) and would pay the contractor an arm's length rate, reflecting fair market value, for the goods or services provided on behalf of or for the health center. For example, if a health center wants to enter into an arrangement with a local community mental health center (CMHC) under which the CMHC will furnish certain behavioral health services, on behalf of the health center, to health center patients served either at the health center's site or at the CMHC's facility, the arrangement would be executed through a procurement (or purchase of services) agreement because the CMHC is functioning as a contractor of services to the health center.

General Responsibilities under a Procurement Contract

In general, the health center is legally and financially responsible for the services required under the federal grant even when it procures goods and services from a contractor. Accordingly:

- The contractor would furnish all contracted services on behalf of the health center (i.e., the health center would be the provider of record for the services rendered under the arrangement). All patients to whom the contractor's employees furnish services would be the health center's patients, regardless of whether the health center: (1) contracts for the contractor's personnel to furnish services to health center patients served at the health center's site; or (2) arranges for the contractor to furnish services to patients "referred" to it by the health center and served at the contractor's facility.[1]

1 In situations where the health center does not provide a specific Section 330-required service itself, it is common to contract with another provider to provide such services for the health center's patients within its service area. In this type of arrangement, the other provider furnishes services to patients referred by the health center and bills the health center for the fair market value of such services.

- The health center would bill (in its own name) for any contracted services provided by the contractor[2], would retain the revenues generated, and would compensate the contractor for the provision of services based on a fair market, arm's length negotiated rate[3] (which would be incorporated, along with the specific payment methodology, into the written procurement contract).

- Any and all contracted services would be provided under the control of the health center, in accordance with the applicable and pertinent policies and procedures of the health center (as opposed to the contractor's policies and procedures) and in a manner that assures that the health center maintains appropriate oversight, accountability, and responsibility for the services provided to its patients.

Of great importance, the contractor generally does not have to meet governance and other ***Section 330-Related Requirements and Grant Requirements*** applicable to the health center, unless the health center chooses to include those terms in the contract. The procurement standards contained in 45 C.F.R Part 75 (which applies to nonprofits as well as state and local governments) specify that certain contractual provisions be included in procurement contracts entered into by recipients of federal grant funds (such as Section 330-funded health centers). However, those standards do not generally require that the contractors to such grantees comply with all requirements that apply to the grantees themselves. Nevertheless, the health center should retain flexibility to require the contractor to comply with certain grant-related requirements if deemed necessary by the health center. For example, the health center may require that the contractor prepare and furnish certain programmatic and financial reports (or, at a minimum, certain data), which, in turn, the health center is required to submit to HRSA as outlined in its Notice of Grant Award.

FEDERAL REQUIREMENTS AND STANDARDS FOR PROCUREMENT/ PURCHASE OF SERVICES AGREEMENTS

Organizational Structure and Governance

As noted above, a procurement contract generally does not impact the organizational or the governance structures of either party (i.e., the health center or the contractor).

- The health center and the contractor remain separate independent corporations, governed by separate Boards of Directors (as applicable), and operated by separate management teams.

- Except as discussed below, in the course of its normal business dealings, a contractor providing health services would not be required to comply with or operate under ***Section 330-Related Requirements and Grant Requirements***, nor would it be eligible for federal benefits available to FQHCs. For example, the health center should not provide payment to the contractor equal to the fair payment that the health center receives

2 It is important to note that some states may not allow health centers to bill for contracted services provided in the contractor's facility (i.e., services not provided within the "four-walls" of the health center). Thus, it is important that health centers review their respective state law billing requirements prior to determining whether the contracted services should be provided "in-house" at the health center site or at the contractor's facility.

3 Health center grantees may enter into agreements under which the payment provided to their contracting partners is less than fair market values without fear of prosecution under the federal anti-kickback law, as long as the agreement meets all of the requirements of the Health Center Grantee Safe Harbor set forth 42 CFR §1001.952(w)

to provide services to Medicaid and Medicare beneficiaries, but rather, would pay the contractor an appropriate rate based on fair market value. Further, the contractor and its personnel would not be eligible for malpractice coverage under the Federal Tort Claims Act (FTCA) unless the arrangements meets very specific requirements set forth in FTCA statutory, regulatory and policy requirements.

Federal Procurement Standards

The federal government has established certain requirements that all grant recipients must adhere to when procuring goods or services paid for, in whole or in part, with federal grant funds. These requirements apply when the cost of the item or service procured is treated as a direct cost of the grant award, e.g., consultant contracts, equipment purchases, purchase of services agreements. The federal procurement requirements were established by the Office of Management and Budget ("OMB") and codified in 2 C.F.R. Part 200 and DHHS has implemented these circulars in regulations codified at 45 C.F.R. Part 75. These regulations define the minimum administrative and procedural standards that health center grantees must follow when procuring goods and services with federal grant funds, and mandate that all procurement contracts contain certain clauses. Additional requirements apply when the procurement is expected to exceed the simplified acquisition threshold, which is currently set at $150,000.[4]

GENERAL REQUIREMENTS

In general, the federal procurement standards are intended to ensure that all procurement transactions are conducted in such a way as to provide "full and open competition." Essentially, the regulations require that health center grantees:

- Ensure that goods and services are acquired in an effective and efficient manner that is most advantageous to the grantee.
- Establish safeguards in order to protect itself, and therefore the government, from the inappropriate use of funds. Included in such safeguards are general rules pertaining to the manner by which the health center grantee solicits and reviews bids for contracts, e.g., requirements that procurements in excess the simplified acquisition threshold must include some form of cost or price analysis and that all analysis must be documented.

ADMINISTRATIVE REQUIREMENTS

In addition to the general requirements pertaining to the way in which health center grantees conduct the procurement process, the procurement standards require the grantee to have certain written policies and procedures in place for all procurements. Two important elements are the procurement standards of conduct and the procurement procedures including standards on contract administration and procurement records and files.

Standards of Conduct

The procurement standards require each health center grantee to establish, maintain and comply with written standards of conduct that address the actions of officers, employees, and agents engaged in the selection, award and administration of procurement contracts supported by federal funds. The regulations do not provide extensive guidance on the contents of the Standards but instead provide information

4 While the federal procurement standards apply solely to procurements paid for in whole or in part with federal funds, as a matter of "good contracting," it is advisable for all health centers (grantees and look-alikes) to consider utilizing such requirements (and including applicable provisions in their contracts) regardless of the source of funds used to provide payment.

regarding three areas that grantees must address. Standards must:

- Include a "conflict of interest" provision, which specifically prohibits anyone associated with the health center grantee (i.e., employees, contractors, agents, directors, officers) from participating in the procurement process if a real or apparent conflict of interest exists. A conflict of interest may arise when anyone associated with the grantee (and/or any of their immediate relatives or partners, or any organization that employs or is about to employ any of these individuals) has a financial or other interest in the firm or individual that is competing for or ultimately awarded the contract. Accordingly, the standards should include a definition of a conflict of interest and require that anyone associated with the grantee disclose such conflict and refrain from participating in the selection, award or administration of the particular contract.

- Prohibit anyone associated with the health center grantee from soliciting or accepting gratuities, favors, or anything of monetary value from contractors or parties to sub-agreements. The grantee may, however, set standards excluding situations where the financial interest is insubstantial or the gift is an unsolicited item of nominal value.

- Provide for specific disciplinary actions for violations of the standards. The level and extent of such actions can be determined by the individual health center grantee.

In addition, it is advisable to include a provision that prohibits a contractor that has developed or drafted the health center's specifications or statement of work for the contracted-for activity to compete for the procurement. Finally, if the health center grantee has a parent, affiliate or subsidiary organization, and the health center is not a state, local government or Indian tribe, the health center must also maintain written standard of conduct covering organizational conflicts of interest. Organizational conflicts of interest arise when as a result of the relationship with a parent, affiliate or subsidiary organization, the health center is unable to or appears to be unable to be impartial in conducting a procurement action with a related organization.

Procurement Procedures

The procurement standards require health center grantees to establish and implement written procurement procedures that contain provisions designed to avoid practices that may restrict or eliminate competition, thus enabling the health center to obtain the best quality of goods and services at the lowest cost. It is important that the health center's procurement procedures ensure that contract awards are made to the contractor or bidder that is most advantageous to the health center, taking into consideration piece, quality and other important factors.

At a minimum, a grantee's procurement procedures, therefore, should include provisions that require that the grantee will:

- Avoid purchasing unnecessary items.

- Award contracts to capable contractors who have not been debarred or suspended by the federal government (taking into account factors such as contractor integrity, past performance, and resources available).

- Analyze lease versus purchase alternatives to determine which would be most economical and practical.

- Define the manner by which the health center grantee will determine the type of contract to utilize (i.e., a fixed price contract, cost reimbursable contract, purchase order, or incentive contract),

taking into consideration which contract is most appropriate to the particular procurement and promotes the best interests of the program and/or project involved.

- Maximize competition. Unless a particular contractor is uniquely qualified, or sole source procurement can be otherwise justified (as discussed in detail below), health centers should seek competing bids in response to clear and accurate requests for proposals. As such, the health center's procurement procedures must also address the information to be provided in solicitations, which serve as notice and invitation to potential contractors, informing them that the health center grantee is in the market for certain goods and services, and would like them to submit applicable proposals. Consequently, a health center grantee's solicitations should contain:
  - A clear and accurate description of the goods and/or services desired by the health center;
  - Expectations regarding the contractor and the product/service; and
  - As applicable, whether the health center: (i) requires a brand name or its equivalent (and, if so, why); (ii) will accept goods and/or services that use the metric system; and (iii) is promoting a clean environment through this procurement.

  While not required, it is advisable to include an option permitting the health center, in its sole discretion, to reject all bids if it is the health center's best interests to do so.

- Use the appropriate procurement method based on the dollar amount of the purchase.
  - Micro-Purchase for purchases less than $3,000: obtain a reasonable price without the need for competitive solicitation.
  - Small Purchase Procedures for purchases greater than $3,000 and less than $150,000: informal procedure in which the grantee obtains competitive price quotations from an "adequate number of qualified sources."
  - Competitive Proposal for purchases greater than $150,000, typically used for fixed price or cost reimbursement contracts.
  - Sealed Bid, when feasible, for purchases greater than $150,000, typically used for construction projects or when price is a major factor.

- Refrain from using the "sole source" or "noncompetitive" procurement method for procurements of any dollar amount unless one of the following conditions is present:
  - The item / service is available only from a single source;
  - There is a public exigency or emergency that precludes a bid process;
  - The federal awarding agency has approved the sole source or noncompetitive method; OR
  - After solicitation of a number of sources, the competition is determined inadequate.

- In selecting a contractor, evaluate bidders based on the following criteria:
  - The estimated total cost/ price of the submitted bid (including travel expenses);
  - The appropriateness and accuracy of the bidder's response to the specific description of the services sought and the other elements of the health center's solicitation; and
  - The bidder's qualifications/ experience, or in the case of goods, the quality of the goods.

- Make "necessary and affirmative steps" to ensure the use of small and minority or women owned businesses to the fullest extent practicable. The health center grantee must, among other things, provide information on upcoming procurement opportunities and arrange convenient times for purchases and contracts.

System of Contract Administration

An important component of the procurement policies and procedures are the provisions on contract administration. Since the federal procurement standards do not make the federal government a party to the contract, the contract will not affect a health center grantee's overall responsibility for the grant-supported project or its accountability to the federal government for the proper use of federal grant funds. Accordingly, each health center grantee must maintain a system for contract administration that allows it to:

- Track the contractor's performance and accountability.
- Ensure that contractors comply with all terms, conditions and specifications of the purchase agreement and that there is adequate and timely follow up of all purchases.
- Evaluate and document the contractor's performance. For contracts over the simplified acquisition threshold, health center grantees are required to include provisions relating to contract disputes, i.e., how they are processed, settled, etc.

Procurement Records and Files

The federal procurement standards require that health center grantees maintain records sufficient to detail the significant history of a procurement, including, but not limited to, documenting the rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price. It is also advisable to include in the records: (i) a detailed description of the scope of the contracted services (see below for additional information on developing the scope of services); and (ii) an analysis and justification pertaining to the cost/price of the contract and, if competitive bids are not obtained, a justification for the lack of competition consistent with the "sole source" standards discussed above.

Procurement records must be made available for inspection upon request by DHHS if:

- The health center did not comply with its own procurement procedures in making the procurement
- The procurement exceeded the simplified acquisition threshold and was awarded without competition
- The procurement is expected to exceed the simplified acquisition threshold and specifies a brand name
- The procurement was awarded to a contractor that did not have the apparent lowest bid under a sealed bid procurement
- A proposed contract change causes the contract price to exceed the simplified acquisition threshold OR
- When DHHS otherwise deems it necessary to review the proposed specifications of goods or services to be procured

REQUIRED CONTRACT PROVISIONS

In addition to requirements regarding the procurement process, the federal procurement standards require that all contracts and sub-contracts for the procurement of goods and services contain certain provisions. In general, all contracts must include provisions that define a "sound and complete" contract (the sections below on BPHC Standards and Common Contractual Terms address many of these provisions). Other provisions vary depending upon the amount and type of contract. Specifically, procurement contracts should contain the following provisions when applicable based on the contract type and amount:

- The contractor's record keeping and reporting responsibilities
- The contractor's obligation to notify and receive prior approval from the health center grantee in the event that there is a material change in the approved scope of work or the approved budget for such services
- Remedial actions available to the health center grantee (administrative, contractual or legal remedies) in instances where the contractor violates or breaches the terms of the contract for contracts in excess of $150,000
- Circumstances under which the health center grantee can terminate the contract for cause and for convenience, including for default and circumstances beyond the control of the contractor for contracts in excess of $150,000
- A statement that the health center, DHHS, the U.S. Comptroller General, and any of their duly authorized representatives, shall have access to any of the contractor's books, documents, papers, and records which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions for contracts in excess of $150,000
- Assurance of the contractor's compliance with certain specified laws:
  - Non-Discrimination/Equal Employment Opportunity requirements found in Executive Order 11246, as amended by Executive Order 11375, and as supplemented by regulations at 41 C.F.R. Part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor;"
  - Copeland "Anti-Kickback" Act (for construction or repair projects over $2000);
  - Davis-Bacon Act (if required by the authorizing statute);
  - Rights to Inventions Made Under Contract or Agreement;
  - Contract Work Hours and Safety Standards Act (for construction projects of $100,000 or more);
  - Clean Air Act and Federal Water Pollution Control Act (for contracts of $150,000 or more);
  - Byrd Anti-Lobbying Amendment (for contracts of $100,000 or greater);
  - Debarment and Suspension provisions (for contracts for audit services or contracts of $25,000 or more); and
  - Minimum bonding guarantee standards (for construction projects).

HEALTH CENTER PROGRAM REQUIREMENTS

As noted above, ***Section 330-Related Requirements*** specifically permit health centers to provide required and "in-scope" additional/specialty services by contract. When doing so, however, the health center must include certain provisions in its contracts to ensure that it maintains accountability for the services provided to the health center's patients. BPHC contract guidance can be found in several documents.

Health Center Program Requirements Related to Contracting for Services

Health Center Program Requirement #2 addresses certain clinical aspects of contracted services. In particular, Program Requirement #2 requires all contracts for services include provisions that address:

- How the service will be documented in the health center's patient records
- How the health center will pay and/or bill for the services
- How the health center's policies and procedures will apply to the contracted service

Health Center Program Requirement #10 addresses the health center's legal responsibility to maintain appropriate oversight and monitoring over the contracted services, including provisions to monitor and evaluate the contractor's performance. Further, Program Requirement #10 specifically requires assurances that the health center's contracts will not:

- Limit the health center's autonomy or
- Compromise the health center's compliance with all ***Section 330-Related Requirements*** in terms of corporate structure, governance, management, finance, health services and clinical operations

Examples of the types of provisions that could satisfy the aforementioned requirements are discussed below.

Health Center Affiliation Guidance

Generally, health centers directly employ their key management staff and the majority of their primary care clinicians. Notwithstanding, affiliation standards set forth in Policy Information Notice (PIN) #97-27 and PIN #98-24 allow health centers to contract for those positions, provided that the health center can demonstrate "good cause" to do so. Accordingly, whenever a health center considers leasing capacity from another organization to fill the aforementioned positions (or for that matter, when it considers leasing any level or type of clinical/administrative service capacity), it should first consider whether it is more beneficial for it to contract for the services rather than to perform such services directly (e.g., if the work cannot be performed directly on a more efficient basis).

If a health center can demonstrate that a proposed lease of capacity for key management staff and/or the majority of their primary care clinicians will result in programmatic benefit and that the health center will maintain sufficient accountability for 1) the operation of the grant-approved project, 2) the expenditure of funds, and 3) the services provided through the contracted provider(s), BPHC might approve a "good cause" exception to its direct staffing preference. Similar to other contracts, health centers must establish appropriate monitoring and oversight of the contractor's performance and retain ultimate authority with respect to who provides the services and the manner in which they are provided.

PIN #97-27 and PIN #98-24[5] address certain "criteria" of accountability, including, but not limited to:

- Maintenance by the health center's governing Board of autonomous decision-making with respect to the health center's policies and procedures, such as financial, health care and personnel policies (set forth more specifically in 42 C.F.R. '51c.304(d)), which are applicable to the provision of services to the health center's patients by the contracted personnel.
- Maintenance by the health center's Executive Director of the ultimate authority to select and dismiss the contracted personnel.
- The health center's reservation of sufficient rights and control to maintain overall responsibility for the direction of the Section 330 project, as originally funded.
- The implementation of appropriate systems and processes to assure satisfactory performance by the contracted personnel, in accordance with Section 330 requirements.
- The execution of a written agreement that complies with current DHHS administrative requirements (set forth in Part 75).

As noted above, Health Center Program Requirements do not specify the contractual provisions that would address and comply with the accountability criteria; however, in general, the following types of provisions should be sufficient to assure accountability and should be included within the purchase of services agreement between the health center and the contractor.

Performance-Related Assurances and Representations by the Contractor

As noted above, all agreements under which health centers purchase the services provided by non-health center clinical personnel should contain certain provisions ensuring that the health center maintains appropriate oversight, accountability and responsibility for the services provided to its patients through the purchased capacity. In particular, the agreement should contain assurances and representations that the contractor (and, as applicable, its personnel) will:

- Ensure services that are available and accessible, promptly, as appropriate, and in a manner that assures continuity of care;
- Furnish services in compliance with the terms of the agreement and all relevant laws, regulations, and generally accepted principles and practices (including Section 330, its implementing regulations and related program requirements and policies);
- Furnish services consistent with the health center's policies, procedures and standards related to clinical services, including, but not limited to clinical guidelines and protocols, productivity and quality assurance/improvement standards, HIPAA privacy and security policies, and preparation of

5 Please note that, the health center is not required to obtain a formal exception to the direct staffing model if it purchases or leases less than a majority of its primary care clinicians; however, in all circumstances, it should maintain accountability for the services provided by contracted clinicians. While the affiliation policies apply solely to community and migrant health centers, the requirements are derived from Section 330-Related Requirements and Grant Requirements. Therefore, it is advisable for all grantees to consider implementing these or similar safeguards when contracting for substantive programmatic work and/or certain key personnel.

medical records (without regard to any contrary policies, procedures, or protocols established by the contractor);[6]

- Act in accordance with other applicable health center policies and procedures, such as standards of conduct and patients' rights and responsibilities;
- Recruit, hire, and retain sufficient staff and contracted personnel, qualified by training and experience, to provide the services required by the agreement;
- Satisfy certain health center professional standards, including, but not limited to:
  - Licensure, certification and/or other qualifications, and credentialing and privileging requirements set forth in the health center's credentialing and privileging policy and procedure, consistent with BPHC PIN #2001-16 and PIN #2002-22 (collectively, the credentialing and privileging policies)[7]
  - Be (and remain) eligible to participate in federal and state health care programs, including the Medicaid and Medicare programs
  - Not engage in any action that may adversely affect the ability of such personnel to provide services under the agreement
- Develop, maintain, and furnish to the health center certain programmatic and financial records and reports that pertain to the services provided, and provide appropriate access to such reports (as discussed in greater detail in the "Common Contractual Terms" section below).

Oversight, Evaluation and Monitoring by the Health Center

In addition to the assurances and representations provided by the contractor, the health center should retain certain rights in order to fulfill its oversight responsibilities. It is important both legally and pragmatically that the health center maintain the right to monitor the course of performance and the contractor's compliance with its obligations under the contract. In particular, the health center should retain:

- All authority placed in it by law or customary practice, as well as all permits, licenses, certifications and approvals necessary to operate the health center.
- The authority to establish and implement all policies and procedures for the operation of the health center, consistent with the board's authorities and the health center's scope of project. The agreement should also establish which of the policies developed by the Board (including those listed above) will apply to the contractor's personnel providing services to health center patients, and that the health center will determine the work schedules of all contracted personnel (taking into account input from the contractor).

6 If the Contractor will maintain a separate practice in which it will provide the services not furnished by the health center under its scope of project and the health center intends to refer patients to the Contractor for the provision of such services (in addition to the services provided by the Contractor on behalf of the health center), the health center and the Contractor may want to develop a method by which they can share referral records and notes or have access to each other's medical records to make entries and for other purposes

7 It is important to note that both PIN #2001-16 and PIN #2002-22 apply equally to contractors, thus requiring health centers to credential and privilege contracted providers as it would employees.

- The right to exercise general oversight authority over the performance of services by the contractor's personnel, and the right to monitor and evaluate whether the contractor and its personnel are performing satisfactorily and are in compliance with applicable policies, procedures, operational standards and professional qualifications, as specified by the contractor's assurances and representations.

- The right to receive documentation from a contractor to achieve a level of confidence in the information provided by the contractor such as having the right to related data and documentation obtained from a credentials verification organization when verifying information, such as of clinical staff.

- The right to terminate the contract (if the contract is with an individual provider), or to require removal and replacement of personnel (if the contract is with a contractor entity) in the event that the contractor (or, as applicable, the individual providing services):
  - Fails to comply with applicable policies, procedures and/or standards;
  - Fails to meet the health center's professional qualifications;
  - Becomes ineligible to participate in federal and state health care programs, including the Medicaid and Medicare programs; or
  - Performs in an unsatisfactory manner;
  - Or in the event that the health center determines, in good faith, that the health, safety and welfare of patients may be jeopardized by the continuation of services.

- The right to receive notification from the contractor if it or any of its personnel fail to meet insurance or licensure requirements (or other criteria required by the health center) and/or engage in any actions that could result in the revocation, termination, suspension, limitation or restriction of such licensure, certification, or qualification to provide such services, and the right to require removal and replacement under such circumstances.

Freedom to Contract

In general, BPHC has voiced concern regarding "exclusive" arrangements under which health centers are not permitted to contract with other parties under any circumstances (whether for the same or for different services), or that grant contractual partners absolute rights to provide other services to the health center without requiring that the health center first comply with federal procurement standards (i.e., procedures that maximize competition by offering multiple parties notice and opportunity to bid and requiring a fair and objective analysis of all bids received).

To avoid exclusivity concerns, the health center should explicitly retain the ability to contract with other contractors of health care services:

- If, and to the extent that, it determines that such contracts are necessary to implement the Board's directives with respect to scope, location, and hours of service;

- As may otherwise be necessary to assure appropriate collaboration with other local providers (as required by Section 330 (k)(3)(B)); and/or

- As necessary to enhance patient freedom of choice, accessibility, availability, quality, and comprehensiveness of care.

COMMON CONTRACTUAL TERMS THAT MAKE UP A "SOUND AND COMPLETE" CONTRACT

In addition to the terms described above, there are certain terms that are common to all contractual arrangements that, as a matter of good practice, health centers should include in procurement contracts.

Description of Services and/or Products

Describing the subject of the contract (the services at issue) with clarity and precision is one of the most important parts of any contract. Do not assume that the health center's expectations concerning the services are understood by the contractor. Rather, a complete and accurate expression of the parties' expectations will show that there is a true "meeting of the minds."

In developing the description of services (the "Scope of Work"), it is critical to provide as much detail as possible under the circumstances. There will, or course, be situations in which the health center will prefer to retain flexibility, for example, by generally authorizing performance while indicating that a detailed list of services will be negotiated with the contractor at a later date (or as the need for such services arises). However, putting expectations on paper, in detail, is an important means to avoid disputes and potential lawsuits. The following topics should, as relevant, be addressed in the Scope of Work:

- Detailed description of services provided under the purchase agreement;
- Amount or units of services (i.e., by specific service, number of hours of service provision);
- Time schedules for performance (and be prepared to monitor and enforce such deadlines);
- Key persons whom the health center wishes either to perform or supervise the work (if known);
- As applicable, any particular qualifications (skills, educational degrees, licensure, credentials, etc.,) that the contractor must possess to perform the work; and
- Equipment or supplies furnished by the health center.

If the contractor will maintain its own practice in which it will provide services not furnished by the health center under its scope of project and the health center intends to refer patients to the contractor for the provision of such services (in addition to the services provided by the contractor on behalf of the health center), the parties also may want to agree upon:

- Specific services that will be excluded from the purchase agreement, but will be available from the contractor separately;
- Appropriate referral mechanisms that ensure that the services are both available and accessible to the health center's patients, that the patients themselves follow-up on appointments;
- Tracking mechanisms that ensure that once the patient is seen, the referring provider receives follow-up communication on the consult requested; and
- Case management and consultation systems (including, but not limited to, the sharing of medical records and notes for treatment purposes, in accordance with applicable privacy and confidentiality requirements) to ensure continuity of care and the provision of proper follow-up care.

Payment Terms

Contracts for services should provide for unambiguous payment provisions. In particular, the contract should specify a ceiling on how much the health center will pay for the services (unless the contract is for a fixed price), or require prior approval before payment reaches a certain level. If the contractor's proposal included a proposed budget, the budget and related rates and/or schedules (after negotiation and agreement of the health center) should be incorporated in the contract. Further, the contract should require the health center's prior written approval for any expenditure that exceeds the ceiling/budget, as well as any significant changes to the budget.

Timing and Method of Payment

The contract should include provisions indicating the type and timing of payments (e.g., prospective payment, monthly invoices paid retrospectively), as well as documentation required for payment (e.g., proof of satisfactory progress on the work, invoices for expenses, time records). If the contract includes a budget, payment should be conditioned upon a demonstration that the amounts billed are within the budget and, if relevant, allowable in terms of other restrictions that may apply, e.g., federal cost principles, hourly rates. Finally, if possible, it is advisable to make payment contingent on the health center's receipt of grant funds.

Recordkeeping and Reporting

The contract should specify the programmatic and financial records and reports that the health center requires the contractor to prepare and maintain, as well as the timeframe for preparation and submission. These reporting requirements should be structured so as to assure that the health center is able to meet all of the reporting requirements related to its ***Section 330-Related Requirements and Grant Requirements*** (as well as any reporting requirements under other federal, state and/or private grant awards). In turn, the health center should require submission by the contractor of all information that the center may require to comply with these obligations.

In addition to financial and programmatic records and reports, progress reports may be useful as a means of ensuring that the contractor is performing satisfactorily. If the contractor is not performing as expected, progress reports provide an early warning signal, allowing the parties time to agree on corrective action or signaling that termination may be warranted before more time is lost and money spent.

With respect to retention requirements, it is important to keep in mind that ***Grant Requirements*** require grantees to retain financial records, supporting documents, statistical records, and all other records pertinent to the federal grant award for a period of three years from the final expenditure report (or a later date if an audit, claim, litigation, or a financial management review is started before, and continues after, the end of the three-year period). Please note that other service-related federal laws (such as Medicare), state laws, or private foundation grant awards may require longer retention periods. As such, prior to determining a specific records retention period for the contract, the health center should review all applicable retention periods to ensure that the agreement sets forth that which is the longest. In turn, the health center should require the contractor to keep the records for the same period of time, so that if a dispute arises with a government agency or foundation, the health center will be able to produce all relevant records.

Access to Records

The contract should include a provision allowing health center representatives access to the contractor's records pertaining to the contract, upon reasonable notice and at reasonable times. As noted above, the federal procurement standards require all contracts in excess of $150,000 to include a provision allowing representatives of the health center, DHHS and the U.S. Comptroller General access to the contractor's records. Additionally, other federal state and/or private grant fuds may have similar provisions. Further, the right to access should also encompass the right to timely and reasonable access to the contractor's personnel for the purpose of interview and discussion related to the records.

Patient Freedom of Choice and Provider Judgment

To the extent that the contract is executed between the health center and any other health care provider, it is always advisable to include a "freedom of choice" provision that specifies that:

- All health care professionals employed by or under contract with either party retain sole and complete discretion to refer patients to any and all providers that best meet the health care requirements of such patients, subject to any limitations imposed by participation in managed care; and
- Each patient will be advised of such and may request referral to any provider of their choosing, subject to any limitations imposed by participation in managed care.

Confidentiality of Patient Information

If the contractor will have access to personal information about health center patients, the contract should include provisions requiring the contractor to protect information from unauthorized disclosure, in accordance with currently applicable laws, including, but not limited to the privacy standards required under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). In addition to HIPAA, there may be other federal and state laws and regulations that protect the privacy and confidentiality a patient's individual health care information with respect to the provision of behavioral health services. Accordingly, each health center should review such requirements prior to executing a purchase agreement for health services and incorporate relevant standards into the written agreement.

Confidential and Proprietary Business Information

If the contractor will have access to confidential / proprietary information of the health center, the contract should include a provision requiring the contractor to use such information only for purposes pf preforming the contract. Further, the contractor should be prohibited from disclosing or releasing the confidential and/or proprietary information to third parties without the health center's prior written approval (or unless required by law) and required to return all information upon expiration, termination or non-renewal of the contract.

Contract Term

The contract term should be explicitly stated and renewals should be permitted only upon mutual written consent of the parties (after re-negotiation of key terms, as necessary). It is advisable to avoid unduly long terms. This will allow the health center to re-compete periodically so as to ensure that it is getting reasonable terms and complying with federal procurement requirements.

Suspension and Termination

The contract should clearly define suspension and termination provisions. Suspension is the temporary withdrawal of a contractor's authority to proceed under the contract during the contract period. Termination is the permanent withdrawal of such authority.

Regarding suspension, a health center may wish to reserve the right to suspend a contract immediately (without prior notice to the other party) in the event of an emergency or a gross breach of significant contract terms (the contractor is behind in delivery in a contract in which time is of the essence or the contractor is a health care professional who appears to be endangering the health or safety of the center's patients). Suspension allows the health center to make a determination whether to terminate the contract or require corrective action, while prohibiting the contractor from continuing to provide services during the time that the health center is weighing its options and, as applicable, during the corrective action process. The health center should retain sole discretion to make this decision.

There are several approaches to termination clauses.

- ***Termination "without cause"*** permits either party to terminate for any or no reason with a certain amount of prior notice to the other party. While this approach may provide an easy "out" for the health center, the health center should consider whether it could afford to allow the contractor to walk away midstream.

- ***Termination "with cause"*** permits either party to terminate the contract upon the occurrence of certain circumstances set forth in the contract and written notice by the terminating party of the existence of such a circumstance. The contract may or may not provide the alleged breaching party with a period of time to correct its performance before the contract is terminated.

- ***Termination "for convenience"*** permits the parties to terminate at any time, when both parties agree that there is nothing to be gained by proceeding with the contract.

Finally, each health center should include a provision allowing automatic suspension or termination if its grant is suspended or terminated or if the health center determines, in good faith, that the health, safety and/or welfare of its patients may be jeopardized by the continuation of contracted services.

Post-termination provisions should address two important areas in the event that the contract is terminated:

- Continuity of care of patients served by the contractor: Some patients served by the contractor may be in ongoing treatment. The contract should include a provision requiring the contractor to continue treatment of any patient for whom clinically appropriate continuation of care has not been arranged, until such patient is either discharged or transferred from the contractor's care within a specified time period, provided that the health center reasonably determines that such continuing treatment will not jeopardize the health, welfare and/or safety of such patient. This provision should also state how the contractor will be compensated for such "post-termination" services.

- Payment requirements: There may be some unavoidable costs that were incurred by the contractor up to and including the effective date of termination. The health center may wish to retain the discretion to offset those costs with the costs it may incur in hiring a second contractor to perform the work or having the center's own staff perform the work in-house. Additionally, the health center may wish to provide for the ability to demand immediate payment of any funds that were advanced to the contractor that were not applied to approved costs.

Insurance

It is advisable to include requirements that the contractor secure and maintain professional and general liability insurance coverage in specified amounts, as well as provide evidence of coverage for verification purposes. If the contract also specifies the health center's obligations vis-à-vis insurance, it should be clear that, if the health center is deemed eligible for professional coverage under the Federal Tort Claims Act (FTCA), such coverage will be accepted by the contractor in lieu of malpractice insurance.

Indemnification

It is also advisable to include a comprehensive indemnification provision stating that the contractor will defend and hold the health center harmless for any and all claims or losses, including attorneys' fees, expenses and disallowances by federal/state officials and agencies, incurred by the health center and/or any third party, arising out of the contractor's failure to perform, negligent performance, or violation of any of its obligations under the contract.

Note that the contractor may insist that a parallel provision be included in the contract requiring the health center to indemnify the contractor for claims or losses caused by the health center. If so, prior to agreeing to such term, the health center should consult its general liability policy to determine whether it covers indemnification (indemnification is not covered under FTCA coverage).

Governing Law

If the health center and the contractor are located in different states, it is important to specify which state's law governs the legal interpretation of the contract, and where it will be enforced. Typically, it is preferable to provide that the health center's state law governs and, of equal importance, that disputes between the parties regarding the contract may be brought only in that state. It also is advisable to include a provision in the contract making it subject to all applicable federal statutes and regulations.

Assignment

It is advisable to include a provision in the contract stating that the contract cannot be assigned or transferred to another party without the health center's prior written consent, to ensure performance by the contractor, rather than an unknown third party.

Entire Agreement (Integration Clause), Amendments, Severability

The contract should state that the terms of the written document constitute the entire agreement between the parties with respect to the subject matter of the contract and that no prior agreements or verbal communications have effect. Similarly, the contract should provide that no amendment to the contract is valid unless it is in writing and signed by both parties. Finally, the contract also should state whether any or all of its provisions will remain in effect if one or more is found by a court to be invalid ("severability").

CONCLUSION

In today's health care market, health centers are experiencing unprecedented growth in their health care programs, including services within their scopes of project that previously had been provided through referral arrangements with other community-based providers. However, expansion opportunities also present numerous challenges with respect to the development of infrastructure and the securing of critical capacity and related resources (financial, administrative, clinical, and otherwise).

To overcome such challenges, health centers must learn how to choose and implement arrangements most appropriate for their particular circumstances. One of the most common methods by which a health center can obtain necessary infrastructure and resources to achieve its expansion goals is the procurement (purchase of service) contracts, which involves the health center's purchase of goods and/or services from a third party to be used by the health center in providing services to its patients. These types of purchases should be made pursuant to a written procurement or purchase of services contract drafted in accordance with certain federal standards and containing other "smart" contracting terms.

In order to ensure appropriate implementation and operation of health care services and programs and to maintain the health center's accountability and liability under a workable approach, it is critical that health centers understand when and how to utilize a procurement contract. Ultimately, the health center's ability to manage its contractual and third party agreements will impact its ability to provide cost-effective, quality care in accordance with its mission and goals.

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