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## MEMORANDUM

**DATE:** February 12, 2015  
**TO:** TechMIS Subscribers  
**FROM:** Charles Blaschke, Suzanne Thouvenelle, and Cheryl Sattler  
**SUBJ:** Special Report on New OMB Guidance on Conflict of Interest and District Procurement Methods Having Implications for Many TechMIS Subscribers

The enclosed Special Report identifies the likely impact of the new Office of Management and Budget Uniform Guidance (OMB/UG) on LEAs, which has implications for many TechMIS subscribers, regarding conflict of interest and procurement methods to be used by districts to purchase products and services with Federal formula funds from programs such as Title I and IDEA. We are fortunate to partner with Ethica, LLC, whose President, Cheryl Sattler, prepared a detailed side-by-side analysis of changes from previous OMB Uniform Guidance. We have identified specific areas and their most likely impact on school districts' conflict of interest policies/practices and district procurement methods used for purchasing products and negotiating profits/incentives for firms selling products and services to them (Appendix A). This report identifies possible implications for many TechMIS subscribers based upon discussions regarding these newly proposed requirements which we have had with you, other firms, district officials, several association officials, and other knowledgeable, interested parties.

TURNKEY has partnered with Dr. Sattler and submitted initial comments and requested "clarifications" in most of the critical areas, which have implications for many TechMIS clients. These critical areas are fully highlighted in Dr. Sattler's Appendix and discussed in more depth in this report. In our comments and request for clarification, we have asked OMB/USED to provide examples of allowable performance-based measures, which can be used to justify levels of profit in negotiating performance-based contracts. We are seeking types/examples of performance-based measures acceptable to you (and most likely to districts) which we will use in our ongoing discussions with OMB/USED officials.

In the meantime, this report with Appendix A (a key reference document which we will update) should help TechMIS subscribers review existing internal policies regarding procurement methods, contracts, profits level, etc., as you respond to changes/requests which districts will be required to follow. Additionally, subscribers should review the enclosed report to inform districts, which are not aware of new monitoring and oversight requirements, about how your solutions can assist LEAs (and reduce LEA burden) meet their oversight and monitoring

requirements, designed to ensure that Federally-funded contracts are conducted in the most efficient manner and reasonable profits are justified.

If anyone has specific questions, please contact me or Dr. Sattler directly. Her contact information is:

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**Special Report:**  
**The New Office of Management and Budget (OMB) Uniform Grant  
Guidance Published in the Federal Register December 19, 2014 Has  
Likely Implications Impacting Both Local Education Agencies and  
Many Contractors/TechMIS Subscribers, Particularly For-Profit  
Organizations Selling to LEAs Products/Services Purchased With  
Federal Formula Program Funding -- Especially in the Areas of  
“Conflict of Interest” and Alternative Procurements Methods**

*A Technology Monitoring and Information Service (TechMIS)  
in Partnership with Ethica, LLC  
Special Report*

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*February 12, 2015*

The December 19<sup>th</sup> OMB Uniform Grant Guidance replaces several prior OMB circulars, (e.g., OMB A-87) and several EDGAR regulatory provisions, particularly in two areas – conflict of interest and procurements by school districts using Federal formula funding, including Title I and IDEA (direct grants such as i<sup>3</sup> are under separate guidance). The new OMB Uniform Grant Guidance is applied to all agencies unless certain sections are overridden by specific program statutes in the law. New provisions and strengthening of older provisions related to conflict of interest apply primarily to school district personnel, although as most TechMIS subscribers are aware, in the majority of such cases, apparent “conflicts of interest” eventually impact firms current and future business in spite of efforts by some firms which seek to minimize such conflicts. These conflict of interest provisions go into effect immediately (or most likely July 1 when FY 2015 funds are allocated).

The procurement policy changes and new provisions will impact many districts which are operating under older procurement policies using Federal funds and most TechMIS subscribers. Some of these changes can be positive if firms take them into account in positioning products, submitting proposals/bids, and otherwise communicating with districts. Changes in procurement methods and purchasing equipment, particularly “digital devices” and related components, could have implications for most TechMIS subscribers. The effective date for these procurement changes is December 2015, even though some districts (e.g., in New York) may implement such guidance earlier. The December 19<sup>th</sup> Uniform Grant Guidance is considered “interim final regulations,” allowing individual agencies to “comment” and seek possible agency-specific clarifications by February 17, 2015.

Below, Appendix A of this report presents a side-by-side comparison of the important changes, especially related to conflict of interest and procurements using Federal formula education funds; and possible impact on many districts which have some implications which could impact TechMIS subscribers. This report should provide guidance to help TechMIS clients review their policies, procedures, pricing arrangements, and ways of positioning products in approaching districts for potential sales.

Identification of important new OMB guidance which strengthen or make changes from current policy and the probable impacts on LEAs was prepared for TURNKEY by Dr. Cheryl Sattler, President Ethica LLC, and widely-recognized expert on Federal regulatory policy (especially Title I) and other aspects of the Federal education “legal framework,” particularly affecting districts in areas ranging from conflict of interest to auditing. TURNKEY staff jointly prepared the possible impact upon and implications for TechMIS subscribers in this report.

Dr. Sattler and Charles Blaschke conducted a session during the December 9, 2014 SIIA summit in New York City where the implications, particularly for for-profit organizations, were delineated during a session presentation and in follow-up Q&A, which generated interest in other SIIA summit sessions that day and the next, but also articles in Education Week.

Based on our discussions over the last month and a half with many TechMIS subscribers, several association officials, district officials and other interested parties, we prepared and sent to USED/OMB comments and requested clarifications which would be very helpful in providing operational guidance to both LEAs and TechMIS subscribers. The issues and/or activities on which clarifications were sought are discussed/described in the remainder of this report. Of particular importance to TechMIS subscribers, we requested examples and clarifications on types of procurement and guidance on issues such as sole source justifications, profit negotiations, and requested examples which would be acceptable to USED/OMB as performance measures in performance-based contracts between firms and districts. We have also requested specific examples of performance-based contracting measures which firms would recommend based on their previous experience that would be acceptable to them and districts based upon past experience. Such information and examples could be used in subsequent offline discussions with appropriate USED officials which will likely publish final regulation and guidance in EDGAR and during the summer.

### **Implications and Likely Impact Upon TechMIS Subscribers**

#### **A. Ref.: Section 200.318 General Procurement Standards (C) (1), 200.112 Conflict of Interest**

In this section of the report, we identify the need for clarifications on some specific requirements which have been changed that will likely impact most LEAs and many TechMIS subscribers. Details of the references are included in Appendix A which Dr. Sattler prepared specifically for this report. Clarifications on critical issues below are being requested from OMB/USED.

As a general rule, vendors should request a copy of a district’s conflict of interest policy if such a policy is not included in the “boilerplate” included in an RFP, RFI, statement of work, or other written document. It should describe any activity undertaken by or in conjunction with the

district by a potential vendor or contractor that could have a “real” or “apparent” conflict of interest violation. In section 200.112, the OMB Uniform Guidance requires the “Federal awarding agency” (USED) to establish conflict of interest policies for Federal awards and the non-Federal entity (LEA or school) must disclose in a report potential conflict of interest violations to the Federal awarding agency and for the state educational agency. If the LEA does not have a written policy statement regarding conflict of interest, then the firm should become familiar with the Federal awarding agency (USED) conflict of interest policy (e.g., Q&A Fact Sheets which should be updated by USED after February 17, 2015).

In addition to districts having to report on the commonly-used possible conflict of interest “situations” and district officials involved (required under Section 200-112), individuals who have a “tangible personal benefit” from a firm considered for a contract must also be covered by conflict of interest policies. However, as Dr. Sattler observed, districts may set standards for situations for which the financial interest is “not substantial,” or the gift is unsolicited item of “nominal” value. However, districts must define what is “not substantial” or “items of nominal value.”

The new or strengthened conflict of interest provisions in the OMB Uniform Grant Guidance might call into question a number of rather commonly-used practices and some activities initiated by firms or otherwise jointly conducted by school district staff and contractor staff, as noted below. One general commonly-used practice used by many firms is to conduct a “customers’ dinner” or other event at a national or regional conference where the company pays for the event. In certain cases, companies may invite potential clients to such an event or potential clients could be invited to a separate dinner or other company-sponsored event. Or, the company may “okay” an existing customer’s request to bring to the event other district officials possibly interested in future purchases of the company’s products/services.

Another practice sometimes used by firms is to have one or more districts purchase for “free” or at a substantial discount a product for use in a pilot program where district officials provide feedback to the company for improvement purposes, after which time districts could have the option to purchase the product for expanded use at a substantial discount or provided at no cost. Or, in some cases, a firm has created a consortia of districts to co-develop a product which in turn, if taken to market results in sales; the district or consortia of districts would then receive a 15-25 percent royalty or other payment to the district or the district’s foundation. In both of these instances, firms and districts have argued that these are generally cost-effective ways to ensure practitioners are involved in developing products for “the real world,” and in certain instances, firms have agreed to pay for travel and conference registration costs for a district staff “user” to present at the conference about the product.

A similar practice is sometimes used by firms/contractors with associations (which receive direct competitive or sole source grants from USED), whereby the association using its staff or individual state or district members agrees to help a firm either develop or field-test a product or assist in marketing. The firm, in turn, provides a sales royalty or other payment directly to the association’s foundation, which accepts such funds.

## **Miscellaneous Changes**

In section 200.20 regarding “computing devices” as we alerted TechMIS clients over a year ago when drafts of the Uniform Guidance were first being circulated, the Guidance separates “computing devices” from computing “equipment.” According to Dr. Sattler, “This implies that computing devices do not need to be inventoried and tracked (as this requirement applies only to equipment). It further negates the question of individual versus group cost, as the definition within the Uniform Guidance does not reference cost in its definition of computing devices.” As we noted last year, by including “computer devices” under “instructional materials and supplies” in Title I proposed budget, for example, the district would no longer have to track inventory, provide insurance, and dispose devices as they have done for “equipment,” which can be a significant burden for Title I staff. Hence, vendors of such devices or TechMIS subscribers which include devices as part of a service or “software bundle” with the devices should make districts aware of this change and possibly modify pricing arrangements. “Computing devices” which cost \$5,000 or less, or a level established by the district if lower, is a relevant benchmark.

The Uniform Guidance includes some changes regarding the district use of equipment, several of which have direct implications for some firms and the pricing arrangement which they propose to use. Section 200.313 states that equipment purchased with Federal funds “must” be made available to other federally-funded projects in the district unless such other use would be detrimental to the project for which equipment was initially purchased. This change provides even greater flexibility than the “incidental use” provision in IDEA and Title I, which allows equipment and products purchased, for example, using IDEA funds to be used by non-special education students or teachers if the price is the same regardless of the number of students or teachers using the product, additional maintenance costs are not affected; and no special education student or teacher is denied access. This “incidental use” provision resulted in a dramatic increase in the use of “schoolwide licenses” as a pricing arrangement which meets such conditions, especially if IDEA funds are used for such purchases.

Another change which provides greater flexibility than under the “incidental use” provision is in non-Federally funded projects and programs operated by the district which can also use such equipment purchased with Federal funds. However, the district may charge a user fee at the “going rate” if a contractor provides the service (e.g., tutoring). This would allow, for example, a tutoring company to use Federally-purchased equipment – computers to provide tutoring service such as SES. However, the tutoring company would have to reimburse the district for a “user fee.”

One implication is that firms should consider proposing districts purchase, for example, a bundle of instructional software or product line or license to take into account the possibility of different uses over time by other Federally-funded projects, as well as those not receiving Federal funds.

Another important change is to allow districts to continue using equipment purchased with Federal funds by the district if Federal funding for a specific project or program is curtailed. This option would more likely occur under Federally-funded direct grant projects which may be funded only for a limited time. It may also apply to unique instances in programs such as Title I. For example, under the ARRA stimulus program, many districts purchased equipment with Title I funds to be used in newly-funded Title I schools or higher level grades in a Title I school.

When such ARRA funding was terminated, the equipment could remain at such schools and grade levels. This regulation (see September 15, 2009 TechMIS Special Report) would now be included as part of the Uniform Guidance.

### **Promote Greater Competition**

In section 200.319, a number of changes are designed to promote greater competition in order to reduce cost, minimize conflict of interest, and provide opportunities for more firms to compete for district contracts using Federal funds, particularly Federal formula funds such as Title I versus “direct grants.” One provision would exclude contractors that develop “statements of work” specifications, requirements, and RFPs from bidding on such procurements. This requirement differs from the August 13, 2013 EDGAR requirements initiated by Secretary Duncan (see August 2013 TechMIS Washington Update). Those EDGAR provisions would allow entities, particularly non-profit organizations, which draft proposals for direct grant competitions such as Race to the Top to receive sole source contracts, to become for example “external partners” should states/districts receive such Race to the Top grants. Also, entities which develop evaluation designs for i<sup>3</sup> grants, for example, could receive sole source contracts to implement the evaluation design for those selected i<sup>3</sup> grantees. This allowed entities, including a number of non-profit organizations which supported the priorities and intent of the respective “flagship” direct grant competitions, to participate in implementing grant activities for successful grantees. Evidently, fidelity of “implementation” of grants was more important than fostering competition.

Another provision designed to increase competition in procurements using Federal funds is the prohibition against use of state or local geographical preferences as a requirement or criterion in selecting contractors. As Dr. Sattler notes, this prohibition could present a problem or confusion at the least, if the funding source for procurement includes not only Federal funds, but also state funds where state laws can mandate geographical preferences. For firms that rely on local dealers and/or reps which provide on-call support during implementation, this may present a problem and could create the need for alternative sales channels.

### **Procurement Methods and Policies**

Some of the most important implications for many TechMIS subscribers and other firms could be created by section 200.320 Methods of Procurement, especially in districts which have policies which require significant changes. In section 200.320 (b), new language states that districts must use one of five methods of procurement.

For purchases of supplies or services costing less than \$3,000, referred to as “micro purchases,” the district has significant flexibility in selecting a supplier and can generally follow its current written policy. However, it must consider, to the extent practical, other suppliers with similar products. Bids are not required.

For small purchases which are between \$3,000 and \$149,000, price quotes must be requested and received from an “adequate” number of qualified sources, according to Dr. Sattler’s analysis. For purchases of \$150,000 or more, the district may use sealed bids, RFP competitive solicitations, or sole source contracts in limited situations.

The OMB Uniform Guidance discourages the use of “time and material” contracts; however, if used they would have to include a “ceiling price” and justification that it is the most suitable type of contract for the service. More and more firms are selling “services” which include software, digital devices, follow-up support, and other components which heretofore were likely sold separately. As an alternative, such firms providing such contract services should consider a performance-based fixed price contract with incentives (i.e., profits) based on performance criteria or benchmarks which are included in RFPs or can be negotiated under a sole source contract (see below).

For most TechMIS subscribers, the procurement methods which are allowable and used often are RFPs and other forms of competitive bids. The OMB guidance emphasizes that for contract costs over the “simplified acquisition threshold” of \$150,000, RFPs must be solicited from an adequate number of qualified sources, and according to Dr. Sattler, “must have a written method for evaluation and full and open competition.” Moreover, “any response to publicized requests for proposals must be considered,” which is a stronger requirement in previous language stating “to the extent practical,” and such responses “shall be honored.”

The other procurement method is sole source non-competitive negotiated contracts which can be used for “small purchases” and those over \$150,000. Sole source contracts may only be used if one or more of several conditions apply. The product or service is available from only one source or possibly only one source has the right to sell their product because of the copyright or other protections and/or dealer contracts. However, limiting sole source contracts to firms with a “brand name” are not an adequate justification. In her analysis, Dr. Sattler noted that a district cannot specify only a “brand name product” instead of allowing “an equal” product to be offered for districts to justify a “sole source” contract. Sole source can be justified in emergency situations where timing is critical, thus precluding a competitive bidding process. Another condition is that the Federal awarding agency or pass through entity (e.g., the SEA or state agency) “expressly authorizes non-competitive proposals in response to the written request from the local districts.” If a “pass through entity” (SEA) has an official list of products/services/firms, which the state’s evaluation or other process has approved as being qualified to perform certain activities in a Federally-funded program (SIG “evaluations” or SES tutors), a district could likely negotiate a sole source negotiated contract with firms on the lists. If so, it behooves TechMIS subscribers and other contractors to get approval by the state to be placed on official lists. This could save time, effort, and cost to both the district and the firm (e.g., allowing a school or district to negotiate a sole source contract without having to get District or Board approval). TechMIS clients should also review dealer agreements to ensure channel conflicts “do not affect sole source justifications.”

For contracts \$150,000 or more, and for larger “small purchases,” a cost analysis on the part of the district is required, although the details for conducting a cost analyses and prices analysis are unclear.

OMB now requires districts to negotiate the profit amount in any contract in which a cost analysis is required and/or for all sole source contracts. In negotiating a separate profit arrangement, Guidance states that, “to establish a fair and reasonable profit consideration must be given to the complexity of the work performed, the risk borne by the contractor, the



contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work." While the firm does not have a great deal of control over some of the criteria, such as industry profit rates in the geographical area for similar work, the firm can have much greater control over factors such as the risk borne by the contractor, its investment, and the quality of its record of past performance. In the preamble, the Uniform Guidance calls for "performance-based contracts" rather than "compliance contracts" as an overriding mission of the new guidance. To the extent that firms can propose performance-based measures, criteria, and benchmarks in its proposal and during implementation actually achieve those benchmarks, the risk for and by the contractor is greater and therefore should be able to justify a higher profit margin or incentives/bonuses to the extent that the performance benchmarks are met. This type of performance-based contract is increasingly recommended for district use and integration into its procurement policies and inclusion in RFPs and other solicitations or negotiated sole source agreements. Groups such as the Center for Reinventing Public Education, among others, have written extensively in this area which we will address in subsequent TechMIS report for clients to take into account in responding to district solicitations and RFPs which fall under the new OMB Uniform Guidance.