Navigating OMB’s New Rules for Purchasing With Grant Funds

Tuesday, August 18, 2015

2:00 – 3:30 Eastern time
1:00 – 2:30 Central time
12:00 – 1:30 Mountain time
11:00 – 12:30 Pacific time

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About the Speaker

BOB LLOYD is principal of Federal Fund Management Advisor™ and a recognized authority on policies and practices affecting the award, administration and oversight of federal grants and contracts. He has more than 40 years of experience in federal award implementation. Prior to starting his management consulting practice in Washington, D.C., in 1982, he served as the executive director of the Grants Management Advisory Service and held staff positions in two large federally funded organizations. Since then, he has been a consultant, trainer or advisor to award and audit units in sixteen federal award-making departments and agencies, and to recipient and subrecipient organizations and their professional advisors located in all 50 states, the District of Columbia, several U.S. territories and 18 foreign countries. He is the principal author of several reference works on federal grants management and audits.


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• Introductions/Administrative Reminders
• Approximately 60 Minutes of Presentation
• Approximately 30-Minute Q&A Session

Note: The question and answer session will normally last until half past the hour or until questions are exhausted, whichever comes first. If there are a considerable number of questions left in the queue at half past the hour, we’ll try to make arrangements to accommodate more but may have to suggest that you contact Bob directly at (864) 235-8680 (preferred) or consultlloyd@aol.com.

WEBINAR MATERIALS

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Presentation by Robert Lloyd.........................................................page 1

Supplemental Material

2 CFR 200.317-326 and 2 CFR 200, Appendix II..............................page 25
COFAR FAQs on Procurement ..........................................................page 32
OMB 2015 Compliance Supplement, Part 3.2-I....................................page 34

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Navigating OMB’s New Rules for Purchasing With Grant Funds

Webinar • August 18, 2015 • 2:00-3:30 p.m. Eastern time

Presenter:
Robert M. Lloyd
Principal, Federal Fund Management Advisor™

Moderator:
Darla Fera
Managing Editor, Federal Grants News

Webinar Outline

Part 1: Presentation

Part 2: Q&A

Questions may be submitted in two ways:
(1) To send a question from the Webinar page, go to the Chat Pod located in the lower left corner of your screen at any time during the Webinar. Type your question into the dialog box at the bottom and then click on the blue send button or
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Federal Award Relationships

- **Federal Government**
  - **Procurement**
  - **Assistance**
    - **Pass-Through Entity**
      - **Grantee**
        - **Subgrant**
          - **Pass-Through Entity**
            - **Subgrantee**
              - **Subrecipient**
            - **Contractor**
              - **Subcontract**
        - **Contractor**
          - **Subcontract**
      - **Contractor**
        - **Subcontractor**
      - **Vendor**

Nature of a Contract Under a Grant

- Purchase of Goods and/or Services
  - Buy, acquire, purchase, procure
- Case-by-Case Determination of Nature of Lower Tier Relationship (2 CFR 200.330)
- Factors Influencing the Decision
- REMINDER: *Federal Acquisition Regulation* Does Not Apply to Contracts under Grants
- 2 CFR 200.317-326 Instructs Recipients and Subrecipients How to Enter into the Transaction
Implementation of OMB’s Recipient Procurement Policies

● Policy Components
   ➢ 2 CFR 200.317-326* and 2 CFR 200, Appendix II*
     — Issued 12/26/13
     — Revisions issued 12/19/14
     — Collectively effective 12/26/14
   ➢ COFAR FAQ (Issued in installments during 2014)
     — One-year grace period for IHEs and nonprofit organizations*
   ➢ Applicable …
     — To new awards issued by federal agencies after 12/26/14
     — To old awards if modified by federal agencies after 12/26/14

*Included as part of the webinar materials.
Requirements for State Governments

- Rely on State Law and Procedure
- Why? ABA Model Procurement Code for State and Local Governments
- Carry-over from OMB Circular A-102, Common Rule, Section ____ .36
- However, include Contract Provisions (2 CFR 200.326 and Appendix II)
All Other Recipients

- Reliance on Own Written Procurement Policies Provided They Meet the Standards (2 CFR 200.318 and .319(i))
- Recipient and Subrecipient Responsibility
  — Privity of Agreement
- Contracting with Responsible Parties with Ability to Perform
- Possible Federal Agency Review of Recipient Procurement Procedures or Transactions (2 CFR 200.324)
Standards of Conduct

- Prohibit Individual Conflicts of Interest
- Prohibit Solicitation or Acceptance of Gratuities (except Minor Items)
  — New disclosure requirement (2 CFR 200.113)
- Impose Disciplinary Procedures
- Address Organizational Conflict of Interest
Acquisition Planning

- Manage the “Supply Chain”
- Conduct Market Research
- Avoid Unnecessary Purchasing
- Consider “Bundling” or “Breaking Out”
- Consider Lease and Purchase Alternatives
- Conduct Joint Purchasing
  — Permitted and encouraged
- Use Federal Excess and Surplus Property
- Conduct “Value Engineering”
Selection of Responsible Contractors

- 2 CFR 200.318(h)
- Factors to Consider
  - Contractor integrity
  - Past performance
  - Compliance with public policy
  - Financial and technical resources
- Contrast to Subawards (Subgrants) of Federal Financial Assistance
  - Awards often include factors such as “need for the funds”
  - Awards to “high risk” subrecipients are possible (2 CFR 200.207)
Competition

- Free and Open
- Alert to Actions that Restrict Competition — 2 CFR 200.319(a)(1-7)
- Contractor Involvement in Preparing Solicitation (IFB, RFP) Prohibited
- General Prohibition Against Geographic Preference
- Solicitation of SBE, MBE, WBE and Labor Surplus Area Firms (2 CFR 200.321) [“Affirmative Steps”]
Solicitation

- IFB and RFP
- Contents
  - Clear description of technical features
    - Specifications or statement of work
  - Limited use of “brand name or equal”
  - Identification of essential requirements
- Prequalified Bidders Lists Permitted
Acceptable Procurement Methods

- Micro Purchases
- Small Purchases
- Competitive Sealed Bids
- Competitive Negotiation
- Noncompetitive Negotiation
- Time and Materials Contracts
Micro Purchases

- Purchases of $3,000 or Less
- Davis-Bacon Act Exception
- No Need to Solicit Competition
- Determination of Reasonable Price by Recipient or Subrecipient
Small Purchase Procedures

- Role of the Federal Simplified Acquisition Threshold (Currently $150K)
- Role of the Small Purchase Threshold of the Recipient or Subrecipient
- Solicitation of Quotations from an “Adequate Number of Sources”
Competitive Sealed Bids

- Formal Advertising
- Results in Firm Fixed Price Contract (Lump Sum or Unit)
- “Preferred” for Construction
- Conditions Required for Use (2 CFR 200.320(c)(1) and (2))
Competitive Proposals

- More than One Source Expected to Make Offer
- Either Fixed Price or Cost-Type Contract Anticipated
- RFP Must Be Publicized
- Solicitation Identifies Evaluation Factors and Relative Importance
- Written Procedures Required for Conduct of Technical Evaluation
- Award to Most Advantageous Offer with Price and Other Factors Considered
- Procedure Must Be Used for A/E Services and Price Cannot Be Used as a Selection Criterion (AKA “Brooks Bill”)
Noncompetitive Negotiation

- Sole Source
- Justification
  - Only available from a single source
  - Public exigency or emergency
  - Federal awarding agency authorization
  - Inadequate competition
- “JOFOC”
Time and Materials Contracts

- 2 CFR 200.318(j)
- Use Limited — Permitted Only When No Other Contract Type Is Suitable
- Ceiling Price Must Be Stated
- Recipient or Subrecipient Must Exercise Oversight to Assure Contractor Efficiency and Cost Control
Cost or Price Analysis

- Required in All Procurements Above the Simplified Acquisition Threshold
- Required Independent Estimate Prior to Solicitation
- Separate Negotiation of Profit
- Subpart E Cost Principles Apply
- Cost Plus Percentage of Cost or Percentage of Construction Cost Contracts Prohibited
Contract Award

● What’s It Called?
● Issue a Sound, Complete and Enforceable Agreement — Clauses that Make Sense
● Required Clauses
  — Appendix II of 2 CFR 200
Contract Administration

- 2 CFR 200.318(b)
- Criteria
  - Performance
  - Compliance
- What Tools Are Available?
  - For fixed price contracts
    - Supplies and equipment
  - For cost-type contracts
    - Services and construction
Procurement Records

- “History of the Procurement”
  - Rationale for procurement method
  - Selection of contract type
  - Basis for selection of successful offeror
  - Basis for contract cost or price

- Audit Readiness
  - OMB 2015 *Compliance Supplement*
    — Part 3.2-I*

*Included as part of the webinar materials.
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Cost Allowability 2.0 —
OMB’s New Federal Award Cost Principles, September 1

Recordings Available

- OMB’s New Rules on Disclosure
- Dealing With Subrecipients’ Indirect Costs
- Deep Dive Into the Administrative Requirements
- Navigating the New Pre-Award Landscape
- How to Write Subaward Agreements
- Closing Out Your Federal Grant
- Rethinking Your Federal Grant Internal Controls
- Managing Human Resources Under Grant Reform
- Subrecipient or Contractor?
- OMB’s New Federal Award Cost Principles
- Effectively Treating Grant Audit Findings
- What Flows Through?
- Effectively Treating Grant Audit Findings
- Managing Grant-Acquired Property
- Demystifying Matching and Cost Sharing
- Time and Effort Reporting on Your Federal Grants: The Way Forward
- Making Sense Out of OMB’s New Indirect Cost Recovery Policies
- Grants Reform Fundamentals for Program Staff
- Making the Single Audit Transition
- Getting Together at Federal Expense
- What HR Managers Need to Know
- OMB’s 2015 Compliance Supplement for Single Audits
- Practical Subrecipient Monitoring Under OMB Grant Reform
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2 CFR Part 200—Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards

PROCUREMENT STANDARDS

§200.317 Procurements by states.

When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with §200.322 Procurement of recovered materials and ensure that every purchase order or other contract includes any clauses required by section §200.326 Contract provisions. All other non-Federal entities, including subrecipients of a state, will follow §§200.318 General procurement standards through 200.326 Contract provisions.

§200.318 General procurement standards.

(a) The non-Federal entity must use its own documented procurement procedures which reflect applicable State, local, and tribal laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this part.

(b) Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(c)(1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.

(2) If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

(d) The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(e) To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal Government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.

(f) The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(g) The non-Federal entity is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(h) The non-Federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. See also §200.213 Suspension and debarment.

(i) The non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.
(j)(1) The non-Federal entity may use a time and materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and materials type contract means a contract whose cost to a non-Federal entity is the sum of:

(i) The actual cost of materials; and

(ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

(2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

(k) The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction.


§200.319 Competition.

(a) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:

(1) Placing unreasonable requirements on firms in order for them to qualify to do business;

(2) Requiring unnecessary experience and excessive bonding;

(3) Noncompetitive pricing practices between firms or between affiliated companies;

(4) Noncompetitive contracts to consultants that are on retainer contracts;

(5) Organizational conflicts of interest;

(6) 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

(7) Any arbitrary action in the procurement process.

(b) The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(c) The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations:

(1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equivalent” description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and

(2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.
(d) The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.


§200.320 Methods of procurement to be followed.

The non-Federal entity must use one of the following methods of procurement.

(a) Procurement by micro-purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (§200.67 Micro-purchase). To the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.

(b) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.

(c) Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (c)(1) of this section apply.

(1) In order for sealed bidding to be feasible, the following conditions should be present:

(i) A complete, adequate, and realistic specification or purchase description is available;

(ii) Two or more responsible bidders are willing and able to compete effectively for the business; and

(iii) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(2) If sealed bids are used, the following requirements apply:

(i) Bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids, for state, local, and tribal governments, the invitation for bids must be publically advertised;

(ii) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;

(iii) All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly;

(iv) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(v) Any or all bids may be rejected if there is a sound documented reason.

(d) Procurement by competitive proposals. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical;

(2) Proposals must be solicited from an adequate number of qualified sources;

(3) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;

(4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

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(5) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(e) [Reserved]

(f) Procurement by noncompetitive proposals. Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:

(1) The item is available only from a single source;

(2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or

(4) After solicitation of a number of sources, competition is determined inadequate.


§200.321 Contracting with small and minority businesses, women’s business enterprises, and labor surplus area firms.

(a) The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

(b) Affirmative steps must include:

(1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;

(4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

(5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

(6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.


A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired during the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.


§200.323 Contract cost and price.

(a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

(b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit,
consideration must be given to the complexity of the work to be 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.

(c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under Subpart E—Cost Principles of this part. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.

(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

§200.324 Federal awarding agency or pass-through entity review.

(a) The non-Federal entity must make available, upon request of the Federal awarding agency or pass-through entity, technical specifications on proposed procurements where the Federal awarding agency or pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the non-Federal entity desires to have the review accomplished after a solicitation has been developed, the Federal awarding agency or pass-through entity may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(b) The non-Federal entity must make available upon request, for the Federal awarding agency or pass-through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when:

(1) The non-Federal entity's procurement procedures or operation fails to comply with the procurement standards in this part;

(2) The procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;

(3) The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a "brand name" product;

(4) The proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.

(c) The non-Federal entity is exempt from the pre-procurement review in paragraph (b) of this section if the Federal awarding agency or pass-through entity determines that its procurement systems comply with the standards of this part.

(1) The non-Federal entity may request that its procurement system be reviewed by the Federal awarding agency or pass-through entity to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews must occur where there is continuous high-dollar funding, and third party contracts are awarded on a regular basis;

(2) The non-Federal entity may self-certify its procurement system. Such self-certification must not limit the Federal awarding agency's right to survey the system. Under a self-certification procedure, the Federal awarding agency may rely on written assurances from the non-Federal entity that it is complying with these standards. The non-Federal entity must cite specific policies, procedures, regulations, or standards as being in compliance with these requirements and have its system available for review.

§200.325 Bonding requirements.

For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the non-Federal entity provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

(a) A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.
(b) A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(c) A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

§200.326 Contract provisions.

The non-Federal entity's contracts must contain the applicable provisions described in Appendix II to Part 200—Contract Provisions for non-Federal Entity Contracts Under Federal Awards.


In addition to other provisions required by the Federal agency or non-Federal entity, all contracts made by the non-Federal entity under the Federal award must contain provisions covering the following, as applicable.

(A) Contracts for more than the simplified acquisition threshold currently set at $150,000, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

(B) All contracts in excess of $10,000 must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement.


(D) Davis-Bacon Act, as amended (40 U.S.C. 3141-3148). When required by Federal program legislation, all prime construction contracts in excess of $2,000 awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, “Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction”). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The non-Federal entity must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland “Anti-Kickback” Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States”). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency.

(E) Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708). Where applicable, all contracts awarded by the non-Federal entity in excess of $100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.
(F) Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of “funding agreement” under 37 CFR §401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency.

(G) Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended—Contracts and subgrants of amounts in excess of $150,000 must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

(H) Debarment and Suspension (Executive Orders 12549 and 12689)—A contract award (see 2 CFR 180.220) must not be made to parties listed on the governmentwide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), “Debarment and Suspension.” SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.


.110-6 Effective Dates and Grace Period for Procurement

Will the Federal government provide a grace period after the effective date for non-Federal entities to comply with the procurement standards in the Uniform Guidance?

Yes, for one full fiscal year after the effective date of the Uniform Guidance. In general non-Federal entities must comply with the terms and conditions of their Federal award, which will specify whether the Uniform Guidance applies. However, in light of the new procurement standards, for procurement policies and procedures, for the non-Federal entity’s first full fiscal year that begins on or after December 26, 2014, the non-Federal entity must document whether it is in compliance with the old or new standard, and must meet the documented standard. For example, the first full fiscal year for a non-Federal entity with a June 30th year end would be the year ending June 30, 2016. The Single Audit Compliance Supplement will instruct auditors to review procurement policies and procedures based on the documented standard. For future fiscal years, all non-Federal entities will be required to comply fully with the uniform guidance.

200.320

.320-1 Methods of Procurement – Micro vs Small vs Over Threshold

How are procurements of micro-purchase and small purchases under the simplified acquisition threshold less burdensome than those above it?

In summary, all purchases under the simplified acquisition threshold (including micro-purchases) require fewer terms and conditions, have a lesser competition standard than purchases over the simplified acquisition threshold, can be solicited informally, and do not require a cost or price analysis.

Section 200.320 describes the five methods of procurements – (1) micro-purchase (less than to $3,000), (2) small purchase (less than $150,000), (3) sealed bids purchases (more than $150,000), (4) competitive proposal purchases (more than $150,000), and (5) Noncompetitive purchases (special circumstances which are applicable for all purchase levels).

All five procurement types must comply with the Procurement Standards in section 200.318, which can be summarized generally as follows: (1) the purchase complies with the non-Federal entity’s documented procedures in place, (2) purchases are necessary, (3) open competition (to the extent required by each method), (4) conflict of interest policy and (5) proper documentation for the purchases.

Purchases of supplies or services under $3,000 are treated as “micro-purchases.” The purchase orders may be awarded without soliciting any competitive quotations if the non-Federal entity considers the costs to be reasonable. The non-Federal entity must, to the extent practicable, distribute these purchases equitable among qualified suppliers. For example, a purchase of computer paper in the amount of $2,000 can be treated as “a micro-purchase.” No rate competitive quotations are necessary for the purchase. A cost or price analysis is not required. However, in accordance with the non-Federal entity’s written policies, which may include strategic sourcing or bulk purchase arrangements as described in section 200.318 and addressed in FAQ .320-4, the non-Federal entity must consider whether to make the purchase from any one of a number of office supply stores. Such policies may dictate the purchase of computer paper to rotate among qualified suppliers if they offer the same rates.

Purchases under the simplified acquisition threshold are purchases for goods or services meeting the small purchase threshold (currently at $150,000). Therefore, all purchases between $3,000 and $150,000 can use the “small purchase procedures” stated in section 200.320 (b) which describes the procedures as “relatively simple and informal.” It states that “price or rate quotations must be obtained from an adequate number of qualified sources.” It leaves the discretion of the non-Federal entity written policy to determine the “adequate” number of qualified sources (i.e., any number greater than one) and the methods of methods of obtaining the price or rate quotations (e.g., it can be in writing, orally, vendor price list on website, or generated via online search engine). Section 200.323 also excludes the small purchases from any requirements for cost or price analysis.

For example, a purchase order for chlorine supplies in the amount $10,000 can treated a small purchase order. This purchase order requires a rate quote from at least two sources, which can be obtained in writing from two suppliers or research done on a public websites. A cost or price analysis is not required. In addition, if the chlorine is of special quality that is offered by only one company or only one company can deliver in the time frame required for the project, the purchase order can be made under the sole source purchase provision in section 200.320 (f).
For purchases over the simplified acquisition threshold (currently at $150,000), the more prescriptive methods of either sealed bids (if the non-Federal entity has very specific parameters for the purchase) or competitive proposals apply.

For a visual of this FAQ, see the Procurement Bearclaw attachment.

.320-2 Methods of Procurement- Sole Source for Research

Procurement by noncompetitive proposals: Frequently, researchers need to acquire items from a particular source for scientific reasons; would this constitute a valid reason for a procurement by noncompetitive proposals? Is this method of procurement available for procurements of any dollar amount?

Yes; this would be a valid reason, and yes this option is available at all dollar amounts, provided it complies with the general procurement standards under 200.318, including documentation requirements in 200.318 (i).

.320-4 Methods of Procurement and Strategic Sourcing and Shared Services

Do the requirements for competition in the methods of procurement apply to each individual item I purchase, or may I apply them to broader procurement decisions in order to leverage strategic sourcing agreements, shared services arrangements, or other practices that result in more efficient use of the funds?

Yes, the requirements for competition apply to broader procurement decisions. Section 200.318 General Procurement Standards paragraphs (d) and (e) explicitly encourage non-Federal entities to build into their procurement policies practices that consolidate procurements where appropriate to make most efficient use of Federal funds.

.320-5 Methods of Procurement and Charge Cards

Does the Uniform Guidance require non-Federal entities to limit charge card purchases to a particular threshold amount?

No. The Uniform Guidance provides requirements for the internal control framework that surround any purchase, but does not provide any guidance around whether the non-Federal entity uses cash, charge cards, checks, or any other payment medium for the transaction.

.320-6 Methods of Procurement and Indirect Costs

Does the Uniform Guidance procurement standards apply to procurements made for indirect costs (for example: would a non-Federal entity need to follow them when hiring a plumber to fix a broken pipe in the headquarters building?)

No. The Uniform Guidance procurement standards do not apply to procurements made in indirect cost areas. They apply to procurements for goods and services that are directly charged to a Federal award.
PART 3 – Compliance Requirements

I. PROCUREMENT AND SUSPENSION AND DEBARMENT

Procurement—Grants and Cooperative Agreements (3.2-I)

States

When procuring property and services, States must use the same policies and procedures they use for procurements from their non-Federal funds (2 CFR section 200.317).

Non-Federal Entities Other than States

Non-Federal entities other than States, including those operating Federal programs as subrecipients of States, must follow the procurement standards set out at 2 CFR sections 200.318 through 200.326. They must use their own documented procurement procedures, which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal statutes and the procurement requirements identified in 2 CFR part 200. A non-Federal entity must:

1. Meet the general procurement standards in 2 CFR section 200.318, which include oversight of contractors’ performance, maintaining written standards of conduct for employees involved in contracting, awarding contracts only to responsible contractors, and maintaining records to document history of procurement.

2. Conduct all procurement transactions in a manner providing full and open competition, in accordance with 2 CFR section 200.319.

3. Use the micro-purchase and small purchase methods only for procurements that meet the applicable criteria under 2 CFR sections 200.320(a) and (b). Under the micro-purchase method, the aggregate dollar amount does not exceed $3,000 ($2,000 in the case of acquisition for construction subject to the Wage Rate Requirements (Davis-Bacon Act)). Small purchase procedures are used for purchases that exceed the micro-purchase amount but do not exceed the simplified acquisition threshold. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable (2 CFR section 200.320(a)). If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources (2 CFR section 200.320(b)).

4. For acquisitions exceeding the simplified acquisition threshold, the non-Federal entity must use one of the following procurement methods: the sealed bid method if the acquisition meets the criteria in 2 CFR section 200.320(c); the competitive proposals method under the conditions specified in 2 CFR section 200.320(d); or the noncompetitive proposals method (i.e., solicit a proposal from only one source) but only when one or more of four circumstances are met, in accordance with 2 CFR section 200.320(f).

5. Perform a cost or price analysis in connection with every procurement action in excess of the simplified acquisition threshold, including contract modifications (2 CFR section 200.323(a)). The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used (2 CFR section 200.323(d)).

6. Ensure that every purchase order or other contract includes applicable provisions required by 2 CFR section 200.326. These provisions are described in Appendix II to 2 CFR part 200, “Contract Provisions for Non-Federal Entity Contracts Under Federal Awards.”

Procurement—Cost-Reimbursement Contracts

When awarding subcontracts, non-Federal entities receiving cost-reimbursement contracts under the Federal Acquisition Regulation (FAR) must comply with the requirements specified in 48 CFR part 03, 15, and 44; the clauses at 48 CFR section 52.244-2 (consent to subcontract), 52.244-5 (competition), 52.203-13 (code of business ethics), 52.203-16 (conflicts of interest), and 52.215.12 (cost or pricing data); and the terms and conditions of the contract. The FAR defines “subcontracts” as a contract, i.e., a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes, but is not limited to, purchase orders, and changes and modifications to purchase orders.

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Source of Governing Requirements – Procurement

The requirements that apply to procurement under grants and cooperative agreements are contained in 2 CFR sections 200.317 through 200.326, program legislation, Federal awarding agency regulations, and the terms and conditions of the award. The requirements that apply to procurement under cost-reimbursement contracts under the FAR are contained in 48 CFR parts 03, 15, 44 and the clauses at 48 CFR sections 52.244-2, 52.244-5, 52.203-13, 52.203-16, and 52.215-12; agency FAR Supplements; and the terms and conditions of the contract.

Compliance Requirements – Suspension and Debarment

Non-Federal entities are prohibited from contracting with or making subawards under covered transactions to parties that are suspended or debarred. “Covered transactions” include contracts for goods and services awarded under a non-procurement transaction (e.g., grant or cooperative agreement) that are expected to equal or exceed $25,000 or meet certain other criteria as specified in 2 CFR section 180.220. All non-procurement transactions entered into by a pass-through entity (i.e., subawards to subrecipients), irrespective of award amount, are considered covered transactions, unless they are exempt as provided in 2 CFR section 180.215.

When a non-Federal entity enters into a covered transaction with an entity at a lower tier, the non-Federal entity must verify that the entity, as defined in 2 CFR section 180.995 and agency adopting regulations, is not suspended or debarred or otherwise excluded from participating in the transaction. This verification may be accomplished by (1) checking the Excluded Parties List System (EPLS) maintained by the General Services Administration (GSA) and available at https://www.sam.gov/portal/public/SAM/, (2) collecting a certification from the entity, or (3) adding a clause or condition to the covered transaction with that entity (2 CFR section 180.300).

Non-Federal entities receiving contracts from the Federal Government are required to comply with the contract clause at FAR 52.209-6 before entering into a subcontract that will exceed $30,000, other than a subcontract for a commercially available off-the-shelf item.

Source of Governing Requirements – Suspension and Debarment

The requirements for nonprocurement suspension and debarment are contained in OMB guidance in 2 CFR part 180, which implements Executive Orders 12549 and 12689, “Debarment and Suspension;” Federal awarding agency regulations in Title 2 of the CFR adopting/implementing the OMB guidance in 2 CFR part 180; program legislation; and the terms and conditions of the award.

Most of the Federal agencies have adopted or implemented 2 CFR part 180, generally by relocating their associated agency rules in Title 2 of the CFR. Appendix II to the Supplement includes the current CFR citations for all agencies adoption or implementation of the nonprocurement suspension and debarment guidance.

Government-wide requirements related to suspension and debarment and doing business with suspended or debarred subcontractors under cost reimbursement contracts under the FAR are contained in 48 CFR section 9.405-2(b) and the clause at 48 CFR section 52.209-6.

Availability of Other Information

The COFAR’s Frequently Asked Questions include the following regarding compliance with the procurement requirements of 2 CFR part 200.

Will the Federal government provide a grace period after the effective date for non-Federal entities to comply with the procurement standards in the Uniform Guidance?

Yes, for one full fiscal year after the effective date of the Uniform Guidance. In general non-Federal entities must comply with the terms and conditions of their Federal award, which will specify whether the Uniform Guidance applies. However, in light of the new procurement standards, for procurement policies and procedures, for the non-Federal entity’s first full fiscal year that begins on or after December 26, 2014, the non-Federal entity must document whether it is in compliance with the old or new standard, and must meet the documented standard. For example, the first full fiscal year for a non-Federal entity with a June 30th year end would be the year ending June 30, 2016. The Single Audit Compliance Supplement will instruct auditors to review procurement policies and procedures based on the documented standard. For future fiscal years, all non-Federal entities will be required to comply fully with the uniform guidance.
Audit Objectives
1. Obtain an understanding of internal control, assess risk, and test internal control as required by 2 CFR section 200.514(c).
2. Determine whether procurements under Federal awards were made in compliance with applicable Federal regulations and other procurement requirements specific to an award or subaward.
3. For covered transactions determine whether the non-Federal entity verified that entities are not suspended, debarred, or otherwise excluded.

Suggested Audit Procedures – Internal Control
1. Using the guidance provided in Part 6, “Internal Control,” perform procedures to obtain an understanding of internal control sufficient to plan the audit to support a low assessed level of control risk for the program.
2. Plan the testing of internal control to support a low assessed level of control risk for procurement and suspension and debarment requirements and perform the testing of internal control as planned. If internal control over some or all of the compliance requirements is likely to be ineffective, see the alternative procedures in 2 CFR section 200.514(c)(4), including assessing the control risk at the maximum and considering whether additional compliance tests are required because of ineffective internal control.
3. Consider the results of the testing of internal control in assessing the remaining risk of noncompliance. Use this as the basis for determining the nature, timing, and extent (e.g., number of transactions to be selected) of substantive tests of compliance.

Suggested Audit Procedures – Compliance
(Procedure 1 applies only to States under grants and cooperative agreements.)
1. Test a sample of procurements to ascertain if the State’s laws and procedures were followed and that the policies and procedures used were the same as for non-Federal funds (2 CFR section 200.317).
(Procedures 2–5 apply to non-Federal entities other than States.)
2. Obtain the entity’s procurement policies and verify that the policies comply with the compliance requirements highlighted above.
3. Verify that the entity has written standards of conduct covering conflicts of interest and governing the performance of its employees engaged in the selection, award, and administration of contracts (2 CFR section 200.318(c) and 48 CFR sections 52.203-13 and 52.303-16).
4. Ascertain if the entity has a policy to use statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals. If yes, verify that these limitations were not applied to federally funded procurements except where applicable Federal statutes expressly mandate or encourage geographic preference (2 CFR section 200.319(b)).
5. Select a sample of procurements and perform the following procedures:
   a. Examine contract files and verify that they document the history of the procurement, including the rationale for the method of procurement, selection of contract type, basis for contractor selection, and the basis for the contract price (2 CFR section 200.318(i) and 48 CFR part 44 and section 52.244-2).
   b. For grants and cooperative agreements, verify that the procurement method used was appropriate based on the dollar amount and conditions specified in 2 CFR section 200.320.
   c. Verify that procurements provide full and open competition (2 CFR section 200.319 and 48 CFR section 52.244-5).
   d. Examine documentation in support of the rationale to limit competition in those cases where competition was limited and ascertain if the limitation was justified (2 CFR sections 200.319 and 200.320(f) and 48 CFR section 52.244-5).
   e. Ascertain if cost or price analysis was performed in connection with all procurement actions exceeding the simplified acquisition threshold, including contract modifications, and that this analysis supported the procurement action (2 CFR section 200.323 and 48 CFR section 15.404-3).

Note: A cost or price analysis is required for each procurement action, including each contract modification, when the total amount of the contract and related modifications is greater than the simplified acquisition threshold.)
f. Verify consent to subcontract was obtained when required by the terms and conditions of a cost reimbursement contract under the FAR (48 CFR section 52.244-2).

**Note:** If the non-Federal entity has an approved purchasing system, consent to subcontract may not be required unless specifically identified by contract terms or conditions. The auditor should verify the approval of the purchasing system is effective for the audit period being reviewed.

*(Procedures 6 and 7 apply to all non-Federal entities)*

6. Review the non-Federal entity's procedures for verifying that an entity with which it plans to enter into a covered transaction is not debarred, suspended, or otherwise excluded (2 CFR sections 200.212 and 200.318(h); 2 CFR section 180.300; 48 CFR section 52.209-6).

7. Select a sample of procurements and subawards and test whether the non-Federal entity followed its procedures before entering into a covered transaction.