



What the Uniform Guidance Says about Procurement

Uniform Guidance Procurement Regulations



A FRAMEWORK FOR FEDERAL GRANTS MANAGEMENT

Whether a federal grant program serves students, veterans, or individuals with disabilities, one key regulation governs its fiscal management: the Uniform Guidance.



GENERAL PROCUREMENT STANDARDS

The non-Federal entity must have and use documented procurement procedures, consistent with State, local, and tribal laws and regulations and the standards of this section, for the acquisition of property or services required under a Federal award or subaward. The non-Federal entity's documented procurement procedures must conform to the procurement standards identified in §§ 200.317 through 200.327.

RESPONSIBLE SPENDING

The Uniform Guidance includes a number of mandates and suggestions encouraging agencies to be economical and responsible with their spending, including:

- avoiding acquisition of unnecessary or duplicative items
- considering consolidating or breaking out procurements to obtain a more economical purchase
- considering lease options in lieu of purchasing
- investigating options for entering into state and local intergovernmental agreements or inter-entity agreements for procurement or use of common or shared goods and services
- using Federal excess and surplus property in lieu of purchasing new equipment
- using value engineering clauses in contracts (for construction projects of sufficient size) to offer reasonable opportunities for cost reductions

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.

PROCUREMENT 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 §§ 200.321, 200.322, and 200.323 and ensure that every purchase order or other contract includes any clauses required by § 200.327. All other non-Federal entities, including subrecipients of a State, must follow the procurement standards in §§ 200.318 through 200.327.

CONFLICTS OF INTEREST UNDER THE UNIFORM GUIDANCE

The Uniform Guidance requires both Federal agencies and non-Federal entities to establish conflict of interest policies relating to the award or receipt of federal funds. Such policies regarding the selection and administration of contracts supported by the Federal award govern the conduct of the following parties:

- An employee
- An officer
- An agent
- Their partner
- Their immediate family member
- An organization which employs or is about to employ any of these parties.
- An organization that is the parent, affiliate, or subsidiary organization of a non-Federal entity, which is not a state, local government, or Indian tribe

None of these parties may:

- Participate in the selection, award, or administration of a contract if they have an interest, financial or otherwise, or stand to benefit, personally or tangibly, from a firm considered for a contract
- Solicit or accept gratuities, favors, or anything of monetary value from contractors or parties to the subcontracts

Under the Uniform Guidance, non-Federal entities must:

- Disclose any potential conflicts of interest to the Federal awarding agency and/or pass-through entities
- Use their own discretion to set standards for situations in which the financial interest is not substantial, or the gift is an unsolicited item of nominal value
- Discipline offending parties should standards of conduct be violated

COMPETITIVE BIDDING REQUIREMENTS

All procurement transactions for the acquisition of property or services required under a Federal award must be conducted in a manner providing full and open competition consistent with the standards of § 200.319 and 200.320.

Some of the situations considered to be restrictive of competition include but are not limited to:

- Placing unreasonable requirements on firms in order for them to qualify to do business;
- Requiring unnecessary experience and excessive bonding;
- Noncompetitive pricing practices between firms or between affiliated companies;
- Noncompetitive contracts to consultants that are on retainer contracts;
- Organizational conflicts of interest;
- Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement; and
- Any arbitrary action in the procurement process.

The non-Federal entity must also 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. Some architectural and engineering services may be exempt from this requirement.

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.**



WHAT DOES THE UNIFORM GUIDANCE SAY ABOUT CONTRACTORS?

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.

Contracts must be award only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement.

Consideration should be given to such matters as:

- contractor integrity,
- compliance with public policy,
- record of past performance, and
- financial and technical resources.

Awards, subawards, and contracts cannot be awarded to parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs or activities (§ 200.214).

Entities awarding a time-and-materials type 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.

Contracting with Small and Minority Business (SMB), Women's Business Enterprises (WBE), and Labor Surplus Area Firms

Non-Federal entities must take all necessary affirmative steps to assure that small and minority businesses (SMB), women's business enterprises (WBE), and labor surplus area firms are used when possible.

These steps must include:

- (1) Placing SMBs and WBEs on solicitation lists;
- (2) Assuring such firms are solicited whenever they are potential sources;
- (3) Dividing requirements (when economically feasible) into smaller tasks or quantities to permit maximum participation by SMBs and WBEs;

- (4) Establishing delivery schedules (where the requirement permits) which encourage participation by SMBs and WBEs;
- (5) Using the services and assistance, as appropriate, of organizations such 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 above.

Prequalified Bidders

All prequalified lists of persons, firms, or products used in acquiring goods and services must be 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.

Giving Preference to Domestic Businesses

As appropriate and to the extent consistent with law, the non-Federal entity should, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). See 2 CFR 200.322(b) for specific definitions of the underlined terms.

These requirements must be included in all sub-awards, including all contracts and purchase orders for work or products under the award.

WHAT DOES THE UNIFORM GUIDANCE SAY ABOUT PROCUREMENT SOLICITATIONS?

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. In competitive procurements, the description must not 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.

(2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

SPECIAL COMPLIANCE REQUIREMENTS FOR RECOVERED MATERIALS

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.

WHAT DOES THE UNIFORM GUIDANCE SAY ABOUT CONTRACTS?

The non-Federal entity's contracts must contain the applicable provisions described in Appendix II of Part 200.

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.

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.

Cost and Price

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.

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.

Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent described in Subpart E of Part 200. The non-Federal entity may reference its own cost principles provided they comply with the Federal cost principles.



The "cost plus a percentage of cost" and "percentage of construction cost" methods of contracting must **not** be used.

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 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.
- A performance bond on the part of the contractor for 100 percent of the contract price.
- A payment bond on the part of the contractor for 100 percent of the contract price.

See § 200.326 for specific definitions of the underlined terms.

PROCUREMENT METHODS

The non-Federal entity must have and use documented procurement procedures, consistent with the standards of §§ 200.317 - 200.320 for any of the following methods of procurement used for the acquisition of property or services required under a Federal award or sub-award:

Formal Methods

When the value of the procurement for property or services under a Federal financial assistance award exceeds the SAT, or a lower threshold established by a non-Federal entity, formal procurement methods are required.

Formal procurement methods require following documented procedures. Formal procurement methods also require public advertising unless a non-competitive procurement can be used.

Formal procurement methods include:

Sealed bids: Bids are publicly solicited and a firm fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid is the lowest in price. This is the preferred method for construction procurement. For a detailed list of requirements, consult 2 CFR 200.320(b)(1).

Proposals: A fixed price or cost-reimbursement type contract is awarded. Proposals are generally used when conditions are not appropriate for the use of sealed bids. For a detailed list of requirements, consult 2 CFR 200.320(b)(2).

Informal Methods

When the value of the procurement for property or services under a Federal award does not exceed the simplified acquisition threshold (SAT), as defined in § 200.1, or a lower threshold established by a non-Federal entity, formal procurement methods are not required.

The non-Federal entity may use informal procurement methods to expedite the completion of its transactions and minimize the associated administrative burden and cost.

Informal procurement methods include:

Micro-purchases: a purchase of supplies or services, the aggregate amount of which does not exceed the micro-purchase threshold (consult 48 CFR 2.101 "Micro purchase threshold" for amounts).

Small purchases: The acquisition of property or services, the aggregate dollar amount of which is higher than the micro-purchase threshold but does not exceed the simplified acquisition threshold. The non-Federal entity is responsible for determining an appropriate simplified acquisition threshold based on internal controls.



Non-Competitive Methods

There are specific circumstances in which noncompetitive procurement can be used. Noncompetitive procurement can only be awarded if one or more of the following circumstances apply:

- (1) The acquisition of property or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold;
- (2) The item is available only from a single source;
- (3) The public exigency or emergency for the requirement will not permit a delay resulting from publicizing a competitive solicitation;
- (4) The Federal awarding agency or pass-through entity expressly authorizes a noncompetitive procurement in response to a written request from the non-Federal entity; or
- (5) After solicitation of a number of sources, competition is determined inadequate.

WHAT DOES THE UNIFORM GUIDANCE SAY ABOUT FEDERAL AWARDING AGENCY OR PASS-THROUGH ENTITY REVIEWS?

The Federal agency that awarded the grant, as well as pass-through entities overseeing subrecipients, may request the technical specifications on proposed procurements in order to ensure that the item or service specified is the one being proposed for acquisition. The non-Federal entity must make this information available for review upon request.

This review typically takes place prior to the time the specification is incorporated into a solicitation document. However, non-Federal entities may request a delay until after the solicitation has been developed, subject to approval by the pass-through entity or Federal agency.

In order to facilitate the review, the non-Federal entity must provide the reviewing agency with any relevant procurement documents, such as requests for proposals, invitations for bids, or independent cost estimates, when:

- (1) The non-Federal entity's procurement procedures or operation fails to comply with required procurement standards;
- (2) The procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition; or
- (3) Only one bid or offer is received in response to a solicitation;



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

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

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

The non-Federal entity is exempt from the pre-procurement review if the Federal awarding agency or pass-through entity determines that its procurement systems comply with required standards.

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.

The non-Federal entity may also choose to self-certify its procurement systems (this does not limit the Federal awarding agency's right to conduct a review). It must provide assurances, in writing, of compliance with required procurement 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.

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, 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.

(C) Equal Employment Opportunity. Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of "federally assisted construction contract" in 41 CFR Part 60-1.3 must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and implementing regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

(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.

(I) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352) - Contractors that apply or bid for an award exceeding \$100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.

(J) See § 200.323.

(K) See § 200.216.

(L) See § 200.322.

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