



PROCUREMENT COMPLIANCE REQUIREMENTS FOR A NONPROFIT RECEIVING FEDERAL CSP DOLLARS

QUESTION

Evaluate whether a nonprofit, as the recipient of a grant from the U.S. Department of Education (“DoE”) is required to comply with any particular procurement requirements to retain consultants and other service providers and, if so, what steps must be taken for compliance.

SHORT ANSWER

A nonprofit grantee, having received DoE Grant PR/Award Number U282A180005 (the “Grant”), is required to comply with procurement procedures, including bidding processes, imposed by the language of the Grant itself and certain federal regulations. *See* Section II below. The steps for compliance vary by the amount of Grant money spent and are outlined specifically below.

BRIEF SUMMARY

Below is a short outline of the requirements. Please refer to the detailed legal analysis below for all of the regulations and requirements. References to certain sections of the detailed analysis are included in the outline for your assistance.

Before Soliciting or Awarding Contracts:

Prepare Written Procedures - prepare written procedures and standards for procurement

- **See Section I below** for the written procedure requirements
- Include Conflicts of Interest Policy (your current policy is sufficient but should be incorporated by reference into these written standards)

Hold a Board Meeting

- have the Board approve and adopt the written procedures
- have the Board designate the decision maker(s) for awarding contracts

Determine if the Service/Good You Intend to Procure is an Allowed Use of Grant Funds – funds for procurement can generally be used to cover direct costs as long as three criteria are met, and the cost is not expressly disallowed; the three considerations that govern whether a direct cost can be covered are that the cost:

- Is incurred specifically for the Federal award;

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- Benefits both the Federal award and other work of the non-Federal entity and can be distributed in proportions that may be approximated using reasonable methods; and
- Is necessary to the overall operation of the non-Federal entity and is assignable in part to the Federal award in accordance with the principles in this subpart.

The following costs are expressly disallowed:

- Use of funds (or equipment paid for by funds) for religious worship, instruction, or proselytization; and
- Use of funds for acquisition of real property or for construction unless specifically permitted by the authorizing statute or implementing regulations for the program.

Determine Contract Amount – the value of the contract to be awarded determines the process that you must follow. In each instance, you need to identify the total amount of Grant funds that will be spent on the contract.

Prepare Solicitation as Applicable – be sure to include additional required contract provisions as identified in Section III(9) below.

Procedure to Follow Based upon Contract Amount:

Contract of \$10,000.00 or Less (“Micro-Purchases”) – See Section I(2)(a)(i); Section III(3)(a), below

- Board must determine that the price is reasonable for the good or service in question
- To the extent practicable, the decision maker must distribute micro-purchases equally among qualified suppliers
- No solicitation or bid requirements
- No publication requirement
- For all procurements, regardless of size, efforts must be made to use small and minority businesses and women’s business enterprises where practicable (see Section I(2)(b); Section III(4), below)

Contract Between \$10,000.00 and \$250,000.00 (“Small Purchase Procedures”) – See Section I(2)(a)(II); Section III(3)(b), below

- Solicitation and at least three (3) bids from qualified sources required (unless not possible); 2 of which should be new sources

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- Solicitation must adequately describe the goods and/or services to be procured
- Solicitation cannot impose unreasonable requirements on potential sources
- No publication requirement
- Decisions regarding which bid to accept must be made in an impartial manner and on the basis of the criteria established in the solicitation (lowest bid is not required to be accepted)
- For all procurements, regardless of size, efforts must be made to use small and minority businesses and women's business enterprises where practicable (see Section I(2)(b); Section III (4), below))

Contracts in excess of \$250,000.00 (“Sealed Bid” or “Competitive Process”) – See Section I(2)(a)(iii); Sections III(3)(c)-(d), below

- Publication required
- Either a sealed bid process or other competitive process required (see Sections III and V(3) below for details of procedure)
- Generally, lowest bid must be accepted
- For all procurements, regardless of size, efforts must be made to use small and minority businesses and women's business enterprises where practicable (see Section I(2)(b); Section III(4), below)

Specialized Contracts - Single Source Procurement – Allowed only under the following circumstances (“Noncompetitive Proposal”) – See Section I(2)(a)(iv); Sections III(3)(e), below

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

Additional Requirements Applicable to Certain Contracts

The governing federal regulations impose a number of additional requirements in particular circumstances. The complete list of these unique requirements can be found in Section V (9)

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below, and most will not apply to grantee's contracts (i.e., Clean Air Act Provisions, requirements for prime construction contracts, etc.). Most likely to apply to the grantee are: that all contracts in excess of \$10,000 must address termination for cause and for convenience by grantee including the manner by which it will be effected and the basis for settlement; the grantee cannot procure from an entity having been debarred or suspended from accepting federal money (available <http://www.sam.gov>); and a source of procurements of over \$100,000.00 must provide a certification that it has not and will not use federal funds to lobby any election.



DETAILED LEGAL ANALYSIS

I. Requirements for Written Procurement Standards.

A complete summary of the requirements provided for procurements can be found below, but the following points address what {grantee name}'s written procurement standards must address, at a minimum.

1. GENERAL STANDARDS

- a. All procurements must be conducted in a manner that maximizes full and open competition and consistently with 2 C.R.F. §§ 318-326 and all other applicable rules, laws, and other governing authority.
- b. Procurements must be reviewed by at least one member of management (exclusive of the member making the procurement) to ensure compliance with written procedures and federal, state, and local regulations.
- c. No procurement may be made if it presents a real or apparent conflict of interest. The provision should contain language in substantially the following form:¹
 - No employee, officer, or agent may participate in the selection, award, or administration of a contract in furtherance of Grant PR/Award Number U282A180005 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.
 - {grantee name} Inc.'s officers, employees, and agents may neither solicit nor accept gratuities, favors, or anything of monetary value² from contractors or parties to subcontracts.
- d. Procurements must be made in a way that avoids acquisition of unnecessary or duplicative items. Consideration in procurement decision making should be given, among other

¹ We are not presently aware of any parent, affiliate, or subsidiary organization associated with [grantee name] that could present an organizational conflict of interest. If any such entities exist, Bluum's written conflict of interest procedures must contain an additional provision addressing any such possible conflict.

² If [grantee name] desires, it may allow for the acceptance of gratuities when the financial interest is not substantial or the gift is an unsolicited item of nominal value.

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efficiency considerations, to breaking out procurements to obtain a more economical purchase, and, where applicable, to lease versus purchase alternatives, and to any other appropriate analysis to determine the most economical approach.

- e. {grantee name}, encourages those making decisions regarding procurement to use federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.
- f. {grantee name}, encourages those making decisions regarding procurement 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.
- g. Contracts for procurement will only be awarded to those entities that have 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. Each entity to which a contract for procurement is awarded will be required to affirmatively represent that are not and have never been debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs or activities. No contract will be awarded to any entity that {grantee name} knows to have been debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.
- h. Records of every procurement and attempted procurement must be maintained and available at {grantee name}, 's corporate headquarters. Such records must contain, at a minimum, a record of the following things:
 - The rationale for the method of procurement;
 - The selection of contract type (i.e. why a particular type or form of contract was chosen over any other);
 - Whether and why any contractor considered was selected or rejected; and
 - The basis for the contract price (i.e. how the final price was arrived at).
- i. A contract in which the price to {grantee name}, is the sum of the actual cost of materials and the direct labor hours charged at hourly rates may only be entered after {grantee name}, 's corporate leadership determines that no other contract is suitable, and must include a ceiling price that the contractor assumes at its own risk.

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- j. All contractual and administrative issues arising out of procurements must be settled in accordance with good administrative practice and sound business judgment. Any employee, officer, or agent of {grantee name}, that becomes aware of any violation of law related to Grant PR/Award Number U282A180005 must refer said violation to the appropriate state, local, or federal authority as soon as he or she is practically able to do so.
- k. All procurement solicitations must 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 (defined below), contain features which unduly restrict competition such as specifying any particular brand. Procurement solicitations must further identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

2. PROCUREMENT CRITERIA

- a. To actually effect a procurement, the decision maker must use one of the methods identified below depending on the total aggregate value of the good and/or service to be procured
 - i. If the good and/or service is less than \$10,000.00 in aggregate value, procurement can be made by **micro-purchase** as follows:
 - The decision maker must determine that the price of the good and/or service is reasonable;
 - To the extent practicable, the decision maker must distribute micro-purchases equally among qualified suppliers; and
 - Soliciting competitive bids is not required.
 - ii. If the good and/or service is between \$10,000.00 and \$250,000.00 in aggregate value, procurement can be made by **small purchase procedures** as follows:
 - At least three (3) qualified sources for each contract must be considered if reasonably practicable.
 - Two (2) of the three qualified sources considered should not have been included in previous contract considerations when practicable.
 - The decision maker must document its decision-making process including the reasons for any source.
 - If requested, {grantee name}, must provide notification of rejection to any source considered.

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- If only one reasonable source is available, the decision maker must document as much and indicate the methods attempted to identify alternatives.
 - The decision maker must identify and record the taxpayer identification numbers for any source solicited.
 - Solicitations do not have to be public and do not need to be advertised.
 - The decision maker must find that the price is fair reasonable under the circumstances prior to awarding a contract.
 - Decisions regarding which bid to accept must be made in an impartial manner and on the basis of the criteria established in the solicitation.
- iii. If the good and/or service is greater than \$250,000.00 in aggregate value, procurement can be made by **sealed bid** or **competitive proposal** as follows:
- Sealed bid procedures will only be used when:
 - (1) A complete, adequate, and realistic specification or purchase description is available;
 - (2) Two or more responsible bidders are willing and able to compete effectively for the business; and
 - (3) 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.
 - Bids must be solicited for a firm and fixed lump sum price in accordance with the procedures set forth in 48 C.F.R. 14.201 et seq. but bids do not need to be publicly advertised as long as they are solicited from an adequate number of sources.
 - The decision make must award the contract to the responsible bidder (capable of performing the work and timely responsive) which conformed to all material terms and conditions of the solicitation that is the lowest in price.
 - Bids may be rejected for any sound documented reason.

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- All bids must be opened at a predefined time and place, in accordance with 48 C.F.R. 14.201 et seq., but bids do not need to be publicly opened.
- Competitive proposal procedures will be used when any of the three criteria for sealed bid procedures listed above are not met.
 - 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.
 - Proposals must be solicited from an adequate number of qualified sources.
 - The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients.
 - Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered.
 - Competitive proposal procedures may be used 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.
- iv. Procurement can sometimes be made by **noncompetitive proposal** where solicitation is sought from only a single source as long as the following criteria are met:
 - The item is available only from a single source;
 - The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

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- The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or
 - After solicitation of a number of sources, competition is determined inadequate.
- b. When possible, the decision maker must take the following steps in effecting the Grant’s purposes in order to use women’s business enterprises, minority businesses, and labor surplus area firms:
- i. Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
 - Federally approved solicitation lists and systems, as referenced in 48 C.F.R. § 13.102, can be found for use at https://www.acquisition.gov/Acquisition_Systems prior to October 26, 2018, and at <https://www.sam.gov> after October 26, 2018.
 - ii. Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
 - iii. 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;
 - iv. Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;
 - v. 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
 - vi. Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.

II. Summary of Source of Requirements in Grant and Code of Federal Regulations.

The language of the Grant requires {grantee name} to establish and follow procedures whenever it intends to procure goods and/or services for the Grant’s purposes” and further sets minimum requirements for those internal procedures as what is required by the Code of Federal Regulations (“CFR”). On the second page of the Grant, in Block 10, the Grant notes that a number

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of federal regulations are incorporated into the Grant agreement as express terms and conditions. 2 CFR Part 200 is one such regulation incorporated as part of the Grant’s terms and conditions. That Part of the CFR is called “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.” Part 200 imposes a significant number of requirements on federal grant recipients and is where the minimum procurement requirements are set forth. 2 CFR 200.317-326.

In Paragraph (3) of Block 10, the Grant acknowledges the procurement requirements created by Part 200 and raises the dollar amounts associated with certain of those requirements.

Finally, on page 4 of a Memorandum labeled “ENCLOSURE 1” to “Enclosure 3” of Grant Attachment 14, the Office of the CFO of the DoE, Risk Management Service provides guidance on specific topics in administering DoE grants. It notes:

Under 2 CFR Part 200.317, States are required to follow the procurement rules the States have established for purchases funded by non-Federal sources. When procuring goods and services for a grant’s purposes, all other grantees may follow their own procurement procedures, but only to the extent that those procedures meet the minimum requirements for procurement specified in the regulations. These requirements include written competition procedures and codes of conduct for grantee staff, as well as requirements for cost and price analysis, recordkeeping and contractor compliance with certain Federal laws and regulations. These regulations also require grantees to include certain conditions in contracts and subcontracts, as mandated by the regulations and statutes.

Because {grantee name} is not a state-actor, it is deemed a part of “all other grantees” described by the second sentence of that paragraph.

Therefore, the Grant does require {grantee name} to comply with particular procurement requirements whenever {grantee name} intends to procure goods and/or services in furtherance of the Grant’s purposes.

III. Summary of Regulations Relevant to Procurements.

2 CFR Part 200 imposes a number of procurement requirements by which {grantee name} must abide. For ease of reference, they are broken down by section below.

1. 2 CFR § 200.318 – General Procurement Standards.

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2 CFR § 200.318 lays out the general minimum requirements for procurements by non-federal entities such as {grantee name}.³ It is fully reproduced as Exhibit A to this memorandum, but its requirements are summarized as follows:

- a. {grantee name} must establish and adhere to documented procurement standards.
 - This means that {grantee name}'s standards must be developed in advance of decision-making and cannot change based on the person making the decision.
- b. {grantee name} oversee its contractors to ensure that the contracts, invoices, etc. are satisfied and performed.
- c. {grantee name} must maintain written standards preventing conflicts of interest for the administration of the Grant. These standards must provide for disciplinary actions for violations of the conflicts of interest's standards.
 - {grantee name}'s written standards must prohibit both real and apparent conflicts of interest. This means that a person making decisions for procurement cannot have any financial interest whatsoever in the entity contracted by {grantee name} to provide goods/services, including having an immediate family member, partner, officer, agent, with a financial or other tangible personal benefit from the contractor. Further, {grantee name}'s employees, agents, etc. must be prohibited from soliciting or accepting gifts of any kind from any of {grantee name}'s Grant contractors.⁴ This requirement extends to any parent, affiliate, or subsidiary organization of {grantee name}.
- d. {grantee name}'s procurement procedures must prevent acquiring unnecessary or duplicative items and must consider efficiency and strive to provide for the most economical approach to the task.
- e. {grantee name} is "encouraged" to collaborate with state and local governmental agencies where doing so would be efficient and beneficial.

³ 2 CFR § 200.69 provides that "Non-Federal entity means a state, local government, Indian tribe, institution of higher education (IHE), **or nonprofit organization** that carries out a Federal award as a recipient or subrecipient." (emphasis added).

⁴ Note that [grantee name] can develop provisions allowing for gifts of no or de minimis monetary value.

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- This is not an actual requirement but can be considered as an indicative factor if {grantee name}'s compliance comes into question.
- f. {grantee name} is “encouraged” to use excess federal property rather than purchasing new property wherever possible.
- This is not an actual requirement but can be considered as an indicative factor if {grantee name}'s compliance comes into question.
- g. {grantee name} is “encouraged” to use “value engineering clauses” in construction contracts where doing so would yield reasonable savings. 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.
- This is not an actual requirement but can be considered as an indicative factor if {grantee name}'s compliance comes into question.
- h. {grantee name} can only award contracts to contractors with the ability to perform successfully. To accomplish this, {grantee name}'s procurement procedures must account for things like the contractor's integrity, past record, and available resources.
- Note that this paragraph further references considerations codified in Executive Orders 12549 and 12689 which prohibit contracting with parties that have been debarred, suspended, excluded, or are otherwise ineligible for federal contracts.
- i. {grantee name} must maintain records for all procurements including, but not limited to, the rationale for the method of procurement, the selection of the contract type, the contractor selection or rejection, and the basis for any contract prices.
- j. {grantee name} cannot use “time and materials”⁵ types of contracts unless it has already determined that no other type of contract is realistically practical.
- Even if a time and material contract is deemed appropriate, {grantee name} must impose further limitations such as the contractor exceeding the ceiling provided at its own financial risk and asserting “a high degree of oversight” over the contractor.

⁵ This describes a contract that sets the cost to [grantee name] by the sum of the actual cost of materials and direct labor hours charged at fixed rates.

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k. {grantee name} is solely responsible for handling all contractual, administrative, and labor issues that arise out of any procurement, and must do so using good administrative practice and sound business judgment.

2. 2 CFR § 200.319 – Competition.

This section requires {grantee name} to conduct all procurements in a manner providing for full and open competition. The standard is general and not precisely defined, but a number of express prohibitions are set out:

- {grantee name} cannot place “unreasonable” requirements on firms for them to qualify for a contract.
- {grantee name} cannot require unnecessary experience or excessive bonding to qualify for a contract.
- {grantee name} cannot engage in noncompetitive pricing practices between firms or affiliated companies.
- {grantee name} cannot provide noncompetitive contracts to consultants on retainer contracts.
- {grantee name} cannot have any organizational conflicts of interest.
- {grantee name} cannot specify a brand name to be procured without allowing for “an equal” product to be considered describing pricing and performance.
- {grantee name} cannot engage in any arbitrary action in the procurement process.

In addition, the section prohibits {grantee name} from using any geographic preferences, even those imposed by state, local, or tribal rule or law, unless such preference is expressly mandated or encouraged by federal law. Note, however, that geographic location is a proper selection criterion for architectural and engineering services as long as there are still an appropriate number of available competitors.

As with general procurement procedures above, {grantee name} must create and maintain written procurement procedures for competitive contracts. Those written procedures must:

- (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

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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.

Finally, {grantee name} must ensure that, if it uses an existing list of persons, firms, products, or contractors to make its procurement decisions, the list is current and has enough qualified sources to encourage free and open competition, and it cannot preclude potential bidders from qualifying during the solicitation period.

3. 2 CFR § 200.320 – Procurement Methods {grantee name} Must Follow.

Section 200.320 lays out the requirements {grantee name} must follow when actually procuring goods and services to serve the Grant’s purposes. There are five different processes that must be followed based upon the situation.

- a. Procurement by micro-purchases.

Procurement can be made by micro-purchase when the goods and/or services do not exceed an aggregate value of \$10,000.00.⁶ Procurement by micro-purchase can be made without soliciting competitive bids, but {grantee name} must consider the price to be reasonable and must distribute micro-purchases equally among qualified suppliers to the extent practicable.

- b. Procurement by small purchase procedures.

Small purchase procedures can be used to procure goods and/or services totaling less than \$250,000.00 in aggregate value. Small purchase procedures are defined by Title 48 CFR Part 13, and are fairly involved. At a minimum, {grantee name} would have to consider at least three (3) qualified sources for each contract if reasonably practicable. Additionally, two (2) of those three qualified sources should not have been included in previous contract considerations when

⁶ 2 CFR § 200.320 sets the maximum value at \$3,000, but the Office of Management and Budget of the Executive office of the President of the United States has allowed grant recipients like [grantee name] to use next year’s limit during fiscal year 2018 pursuant to its Memorandum 18-18, which is attached hereto as Exhibit B.

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practicable. *See* 48 CFR § 13.106-2. Further, documentation must be filed and maintained, notification of rejections must be given if requested, explanations must be given if only one source is available, and taxpayer identification numbers must be obtained, even for oral solicitations.

c. Procurement by sealed bids.

Procurement by sealed bids is also called formal advertising and must be used for procurements totaling more than \$250,000.00 in aggregate value. Procurement by sealed bid must be based on a complete proposal of the goods and/or services needed to at least two reasonable bidders who are willing and able to compete effectively. Invitation for bids must be publicly advertised. All bids must be opened at a predefined time and place, and the winning bid must be chosen by selecting the lowest priced bid from among the responsive and responsible bidders. Bids may be rejected for any “sound documented reason.”

d. Procurement by competitive proposals.

Competitive proposals are typically employed when conditions are not appropriate for sealed bids (i.e. when two entities willing to compete cannot be found, when price cannot be the primary factor motivating the ultimate award, and when a complete recitation of the procurement sought cannot be set forth in the solicitation). Competitive proposals are subject to the following requirements:

- (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
- (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.

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e. Procurement by noncompetitive proposals.⁷

Procurement by noncompetitive proposals is only employed in rare circumstances such as the good or service being available from only a single source, a public emergency, or express permission. It constitutes procurement of a proposal from only one source.

4. 2 CFR § 200.321 – Consideration of Small, Minority, and Women’s Business Enterprises.

To the extent reasonably practicable, {grantee name} will be required to take affirmative steps to use women’s business enterprises, minority businesses, and labor surplus area firms. The minimum of affirmative steps that must be taken are:

- (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.

5. 2 CFR § 200.322 – Procurement of Recovered Materials.

⁷ This is referred to as paragraph “(f)” in the CFR section due to a typographical error.



This section does not apply to {grantee name}, as it applies only to state agencies or political subdivisions.

6. 2 CFR § 200.323 – Contract Cost and Price.

This section adds further requirements for procurements over \$10,000.00 in aggregate value. It requires recipients like {grantee name} to make independent estimates of the cost and price of goods and/or services procured prior to reviewing bids or proposals. It further requires that profit be negotiated as a separate element from the rest of the contract and must be negotiated based on considering “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.” The section sets more restrictions for contracts based on estimates and prohibits “costs plus a percentage of cost and percentage of construction cost” methods of contracting.

7. 2 CFR § 200.324 – Federal Review of Procurements.

Section 200.324 requires recipients like {grantee name} to make technical specifications of proposed procurements available to the DoE when the DoE deems it necessary. The complete pre-procurement review documents (requests for proposals, invitations for bids, independent cost estimates, etc.) must be provided for review by the DoE 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.

8. 2 CFR § 200.325 – Bonding Requirements.

This section imposes certain bonding requirements if the recipient intends to construct or improve facilities beyond \$10,000.00 in aggregate value. We understand this not to be {grantee name}'s intent and thus it is not applicable here.



9. 2 CFR § 200.326 – Required Contract Provisions.

This section requires that {grantee name} include the following provisions in all of its contracts made in furtherance of the Grant’s purposes:

(A) Contracts for more than the simplified acquisition threshold currently set at \$250,000 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 {grantee name} 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

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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

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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.