

CHAPTER TEN FEDERAL GRANT FUND PURCHASES

PURPOSE:

The purpose of this policy is to outline the required procedures for City procurements as a non-federal entity using federal grants funds in compliance with the Uniform Guidance issued by the Office of Management and Budget. Through this policy the City is implementing the Uniform Guidance for procurements using Federal Grant money, specifically 2 CFR 200.317 through 2 CFR 200.326 and Appendix II to 200 (see enclosed).

PROCUREMENT METHODS FOR FEDERAL GRANT MONEY:

1. City departments should use procurement methods as established by the City of Manassas Policy #2017-01 and in accordance with 2 CFR 200.318, including:
 - i. Purchases between \$0 and \$3,000.00 shall be considered a micro purchase pursuant to 2 CFR 200.320; and
 - ii. Pursuant to City of Manassas Policy #2017-01, departments shall use the following competitive processes:
 - a. For purchases between \$3,000.00 and \$30,000.00, either the using agency or the purchasing division must solicit three (3) written quotes with at least one quote from a SWaM or DBE certified minority or woman business;
 - b. For purchases between \$30,000.00 and \$100,000.00, the purchasing division will obtain the quotes, unless the using agency is previously authorized by the Purchasing Manager or designee, and must solicit three (3) written quotes with at least one quote from a SWaM or DBE certified minority or woman business; and
 - c. Professional Services: Total estimated cost over \$60,000: Competitive negotiation as required by City Policy and conducted by the Purchasing Division shall be used to procure professional services. Competition may be sought by agency for less than \$60,000 wherever practicable. A purchase order will be issued by the Purchasing Division.
 - d. Transportation Related Construction: Total estimated cost over \$25,000: Competitive sealed bids to be obtained by Purchasing except competitive negotiation maybe used in instances as allowed by the VPPA. Competition may be sought by agencies for less than \$25,000 wherever practicable. A purchase order will be issued by the Purchasing Division.
 - iii. Purchasing will issue formal solicitations for purchases over \$100,000.00. Goods and non-professional services require, by statue in both the Virginia Public Procurement Act and the City of Manassas Public Procurement Policy, a competitive sealed bid or competitive negotiation process which must be conducted by the Purchasing Division. Departments shall enter the purchase requisition.

Purchasing Division will create the purchase order and Departments will issue to the vendor.

- iv. The originating department (in the case of a Departmental Purchase Order, DPO) or the Consolidated Procurement Department (CPOs) shall maintain records detailing the rationale for the method of procurement and the scope of work; quotes, bids, or proposals received; selection of contract type; evaluation for contractor selection or rejection; and the basis for the ultimate agreed upon contract price.
 - v. City departments shall draft a clear and accurate scope of work for all solicitations for goods or services to be procured with federal funds. This shall include clear and accurate descriptions of technical requirements and shall not contain requirements that unduly restrict competition.
2. **Before receiving bids or proposals, the City must make independent estimates for the cost of the work** to be used as comparable in its cost or price analysis after receiving costs from the vendor.
 3. City departments shall communicate to all vendors the requirements they must fulfill to be considered for the contract and the factors that will be considered in choosing a vendor.
 4. If a prequalification list is used, the department must ensure that the list is current and includes enough qualified sources to provide adequate competition. Further, vendors may not be denied if they haven't been prequalified and must be given the opportunity to prequalify during solicitation. The City will only generate a prequalification list pursuant to a formal request for qualifications (RFQ).
 5. For invitations to bid (ITB), the following requirements, in accordance with established City procurement policies and procedures, apply:
 - i. ITBs must contain all relevant specifications, legal requirements, and terms and conditions that will be applicable to the vendor.
 - ii. Bids must be solicited from an adequate number of known suppliers, providing them sufficient response time; two or more responsible bidders must submit bids.
 - iii. All bids must be opened at the time and place prescribed on the place for bids, in public.
 - iv. The lowest responsive and responsible bidder will be awarded the contract.
 - v. Any and all bids may be rejected with written documentation providing a permissible reason for rejection.
 6. For requests for proposals (RFP), in accordance with established City procurement policies and procedures, the following requirements apply:
 - i. Proposals must be publicized and identify all evaluation factors to be considered with their relative weighting.
 - ii. All responses to requests for proposals must be considered to the maximum extent possible.
 - iii. The evaluation committee must complete evaluation sheets specific to the request for proposal and must be retained in the procurement file.
 - iv. The contract must be awarded to the vendor whose proposal is most advantageous to the City, with price a factor to be considered.
 - v. Qualifications based procurement may only be used for architectural and

engineering services.

7. Noncompetitive methods may only be used in the following circumstances:
 - i. The good or service must be available from only one source.
 - ii. Public exigency or emergency inhibits the delay that would be caused by using competitive solicitation.
 - iii. The Federal awarding agency or pass-through entity authorizes noncompetitive proposals in response to a written request.
 - iv. After solicitation from a number of sources, competition is determined to be inadequate.

ETHICS IN PROCUREMENT AND CONTRACTING

The City of Manassas employees shall adhere to the City Employee Handbook Section 7.3 and Chapter 9 of the City's Procurement Manual to not solicit or accept any gratuities, etc., as well as the following specific to federal grant purchases:

- A. *Discipline for violations involving Federal Grant Money.* Violation of the ethics provisions for goods or services funded by Federal grants only shall result in the following disciplinary actions:
 1. For a first offense, a determination shall be made in writing by the Purchasing Manager or designee, detailing the violation made by the employee and placed in the employee's personnel file. The Purchasing Manager may take disciplinary action up to and including suspension of the employee without pay for one week.
 2. For a second offense, a determination shall be made by the Purchasing Manager or designee, detailing the violation made by the employee. The chief procurement officer may take disciplinary action up to and including termination of the employee.
- B. *Organizational Conflicts of Interest*
 1. The City of Manassas follows the guidelines at 48 CFR 9.5 regarding Organizational and Consultant Conflicts of Interest ("OCI") in regard to the use of Federal funds for the procurement of goods, services, and construction.
 2. The General rules of OCI, as stated in 48 CFR 9.505 state that an OCI exists with a contractor if it will:
 - i. Result in an unfair competitive advantage for the contractor either
 1. Because the contractor received proprietary information from its work with the City without proper authorization, or
 2. Received source selection information that would assist the contract in obtaining a contract; or
 - ii. Impair the contractor's objectivity in performing Federal contract work.
 3. OCIs shall be determined by the Purchasing Manager with the assistance of counsel.
 4. The following types of contracting relationships shall be prohibited under these rules:
 - i. Contractors who do not have overall responsibility for development,

integration, assembly and checkout for a system but provide system engineering (as defined in 48 CFR 9.505-1(b)) and technical direction shall not be awarded the contract to supply the system or its major components or act as a subcontractor to the supplier of the system or major components.

- ii. Contractors who prepare and furnish specifications for non-developmental items to be used in a competitive acquisition shall not be allowed to furnish the items at least for the duration of the initial production contract to avoid favoritism in products or capabilities. This prohibition shall not apply if:
 1. The materials are a sole source,
 2. The contractor has participated in the development work, or
 3. More than one contractor is involved in preparing the work statement.
 - iii. No contractor shall evaluate its own offerings or services or those of a competitor in offering contract services without the proper safeguards that ensure objectivity.
 - iv. No contractor shall use proprietary information provided by others to perform a contract utilizing Federal funds to gain an unfair competitive advantage. The contractor must enter into a nondisclosure agreement with the company providing proprietary information that states the contractor will protect the information, will not disclose it, and will use it only for the purpose for which it was obtained as long as it remains proprietary. Information is not proprietary if it is furnished voluntarily without limitations on its use or available to the City or contractor from a source other than the vendor.
5. If the Buyer determines that a particular purchase involves a significant potential organizational conflict of interest, before issuing the solicitation, the Buyer shall submit in writing to the Purchasing Manager:
- i. A written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict based on the general rules or another basis;
 - ii. A draft solicitation provision that references 48 CFR 9.5, states the nature of the potential conflict, states the nature of proposed restraint on future contract activities and depending on the nature of the purchase, states whether or not the terms of any proposed clause related to the conflict is subject to negotiation; and
 - iii. If appropriate, a proposed contract clause that restricts contractor participation on future projects that is consistent with the requirements of 48 CFR 9.507-2(b).
6. The Purchasing Manager shall:
- i. Review the analysis and recommended course of action, including any draft provisions or contract clauses;
 - ii. Consider the benefits and detriments to the City and proposed contractors; and
 - iii. Approve, modify, or reject the recommendations made by the

Buyer in writing.

7. If approved, the Buyer shall include the approved provisions/clauses in solicitation documents/contracts. The Buyer shall also:
 - i. Consider any additional information provided by prospective contractors in response to the solicitation or during negotiations; and
 - ii. Resolve any potential or real conflicts in a manner consistent with approval or other direction by the Purchasing Manager, before awarding the contract.

PURCHASING GUIDELINES

1. All purchases made with Federal funds shall be in the most economical way possible, taking into consideration not only departmental needs, but City-wide needs to promote efficiency in making procurements.
2. All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards set forth in 2 CFR 200.319.
3. Contractors that develop or draft specifications, requirements, statements of work or invitations for bids or requests for proposals must be excluded from competing for those procurements.
4. Restrictive competition requirements shall not be imposed, including, but not limited to:
 - i. Placing unreasonable requirements on firms in order for them to qualify to do business;
 - ii. Requiring unnecessary experience and excessive bonding;
 - iii. Noncompetitive pricing practices between firms or between firms or between affiliated companies;
 - iv. Noncompetitive contracts to consultants that are on retainer contracts;
 - v. Organizational conflicts of interest, as described above;
 - vi. Specifying only a brand name product instead of permitting an equal product to be offered and describing the performance or other relevant requirements of the procurement; and
 - vii. Any arbitrary action in the procurement process.
5. Where appropriate, the City should consider:
 - i. Whether a lease of goods may be more economical than purchasing goods.
 - ii. Possible joint agreements with other localities, use of cooperative agreements, or other sharing of resources with other localities.
 - iii. Use of Federal excess and surplus property in lieu of purchasing new goods or equipment.
6. In compliance with City procurement policies and procedures, the City shall only award contracts to responsible vendors who have the ability to perform the work required under the contract successfully. Determinations of responsibility shall include consideration of integrity, compliance with public policy, record of past performance and financial and technical resources.
7. Departments shall not give geographic preference to vendors unless an applicable Federal program requirement mandates or encourages geographic preference.
8. Contracts using Federal funds may not be awarded to parties listed on the government

wide excludes in the System for Award Management for debarment and suspension.

MINORITY BUSINESS PARTICIATION (2CFR 200.321)

1. The City shall include aspirational goals for subcontracting to minority and women businesses on all federal projects over \$100,000.00.
2. The City shall also take the following affirmative steps to assure minority, women and labor surplus firm participation:
 - i. Placing qualified small, women, and minority business enterprises on solicitations lists;
 - ii. Soliciting small, minority, and women businesses when they are potential sources;
 - iii. When economically feasible and appropriate, dividing total requirements into smaller tasks or quantities to permit maximum participation by small, minority, and women business enterprises;
 - iv. Establishing delivery schedules, when feasible, that encourage participation by small, minority, and women business enterprises;
 - v. Using the Small Business Administration and Minority Business Development Agency of the Department of Commerce to assist the City in engendering participation; and
 - vi. Requiring prime contractors who will let subcontracts for a project to follow the steps listed above.

GUIDELINES FOR CONTRACTS FUNDED BY FEDERAL GRANTS

1. City departments shall choose the appropriate type of contract for the services being provided to include:
 - i. Nonprofessional goods and services contract
 - ii. Professional service contract
 - iii. Construction contract
2. A time and materials contract may only be used after a determination that no other contract type is suitable; the contract must contain a ceiling price that the contractor exceeds at its own risk.
3. Cost plus percentage of cost contracts are not permitted.
4. The City must perform a cost or price analysis in connection with every purchase made above the simplified acquisition threshold currently \$150,000.00, including any contract modifications. (source: 2 CFR 200.323 and Appendix II (A))
5. For contracts awarded where there is no price competition and in all cases where a cost analysis is performed, the City must negotiate profit as a separate element. To establish a fair and reasonable profit in negotiating price, consideration must be given to the complexity of the work, risk borne by the contractor, contractor investment, amount of subcontracting, quality of past performance, and geographical industry profit rates.
6. Preferred bonding requirements are guided by the Commonwealth of Virginia's best practices:
 - i. Bid bond in the amount of five percent (5%) of the bid price;
 - ii. Performance bond in the amount of one hundred percent (100%) of the contract price;

- iii. Payment bond in the amount of one hundred percent (100%) of the contract price.
7. Contract Provisions. All contracts must contain the provisions located at Appendix II to Part 200 (see enclosed) and must require contractor compliance with those provisions including:
 - i. For all contracts exceeding the simplified acquisition threshold, contracts must include administrative, contractual and legal remedies for instances where contractors violate or breach contract terms, including sanctions and penalties as appropriate.
 - ii. For all contracts over \$10,000.00, termination provisions for cause and convenience, including procedures for termination and settlement
 - iii. Federally assisted construction contracts must include the equal opportunity clause provided under 41 CFR 60-1.4(b)
 - iv. For prime construction contracts over \$2,000.00, the contract must include a provision covering compliance with the Davis-Bacon Act
 - v. For contracts in excess of \$100,000 under which the City is employing mechanics or laborers, a provision for compliance with 40 U.S.C. 3702 and 3704.
 - vi. Contracts with sub-recipients who are small businesses or nonprofit firms for the performance of experimental, developmental, or research work under funding agreements must contain a provision for compliance with 37 CFR 401 regarding rights to inventions made by nonprofit organizations and small business firms.
 - vii. For contracts and subgrants in excess of \$150,000.00, compliance with the Clean Air Act and Federal Water Pollution Control ActA requirement that for contracts in excess of \$100,000, contractors must file the required certification under the Byrd Anti-Lobbying Amendment at 31 U.S.C. 1352, and the City must obtain a copy and keep it in the Contract file.; and
 - viii. Compliance with Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act.
8. The City must ensure that no contractors have been debarred by the Federal government using the search tool for debars in the System for Award Management (“SAM”).

CONTRACT ADMINISTRATION

City Departments should monitor contractor performance to ensure contractor compliance with all terms and conditions of the soliciting documents, contracts, and any other City policies that apply to the performance of the contract.

**PART 200 – UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES,
AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS**

[2 CFR 200.317 to 200.326, and Appendix II to 200, as amended]

source: www.ecfr.gov dated 10/3/18; check online for the most current clauses and language

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.

[78 FR 78608, Dec. 26, 2013, as amended at 79 FR 75885, Dec. 19, 2014; 80 FR 43309, July 22, 2015]

§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.

[78 FR 78608, Dec. 26, 2013, as amended at 79 FR 75885, Dec. 19, 2014]

§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 local, and tribal governments, the invitation for bids must be publicly 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

(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.

[78 FR 78608, Dec. 26, 2013, as amended at 79 FR 75885, Dec. 19, 2014; 80 FR 54409, Sept. 10, 2015]

§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.

§200.322 Procurement of 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.

[78 FR 78608, Dec. 26, 2013, as amended at 79 FR 75885, Dec. 19, 2014]

§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.

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.

(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 §200.322 Procurement of recovered materials.