

Federal Uniform Guidance Procurement Requirements & ARPA Update

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A Few Important Disclaimers...

- AOS must maintain independence under *Generally Accepted Government Auditing Standards*.
- This training is intended to serve as a practical reference, it is not intended to be, nor does it provide or constitute legal advice.
- Adherence to, application of, or use of this document with regard to a procurement subject to federal award funds does not guarantee the legal sufficiency of any procurement.
- Local governments should refer all legal questions concerning the sufficiency of a procurement in terms of federal procurement standards to their legal counsel.

Relevant Statutes

2 CFR §200.317 – Procurements by States

2 CFR §200.318 - .327 – General Procurement Requirements (*applicable to local governments*)

2 CFR §200 – Other Uniform Guidance Requirements, including Single Audit

Also must comply with all applicable federal terms and conditions and state and local laws/regulations.

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2 CFR §200.318 General Procurement Standards

- a) Documented policies and procedures;
- b) Contract oversight;
- c) Written standards of conduct covering conflicts of interest;
- d) Avoid unnecessary or duplicative items (e.g., lease vs. purchase analysis);
- e) Encourages state and local intergovernmental agreements;
- f) Encourages uses of Federal surplus property instead of buying new;
- g) Encourages use of value engineering clauses;
- h) Award contracts only to responsible contractors;
- i) Maintain procurement records;
- j) Limit use of time-and-materials contracts; and
- k) Settle issues arising out of procurements

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Subpart D, Procurement 2 CFR §200.318-.319:

- **Documented policies** –must document procurement procedures and policies consistent with state and local laws and regulations and conform to the Procurement rules in 2 CFR §200.317 through §200.327.
 - Procedures must ensure all solicitations clearly and accurately describe the technical requirements of the goods or services to be procured and identify all requirements that bidders must fulfill and the factors used in evaluating bids.
 - In addition, if policies include a prequalified list of persons, firms, or products used in procuring goods and services, the list should be current and include enough qualified sources for open competition.

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Subpart D, Procurement 2 CFR §200.303 & §200.319:

- **Competition** – must provide for full and open competition in procuring goods and services. This means situations must be avoided that may prevent competition, such as placing unreasonable requirements on firms to qualify noncompetitive pricing practices between firms or affiliated companies or specifying only a “brand name.”
- **Internal controls**– UG emphasizes written, effective internal controls. 2 CFR §200.303 requires each recipient establish and maintain effective internal control to provide reasonable assurance that federal awards comply with all federal regulations and terms and conditions.

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Uniform Guidance Procurement

Subpart D, Procurement 2 CFR §200.302-.318:

- **Oversight** –must monitor contractors to ensure they perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
 - Examples of oversight include making sure contractors adhere to the contractual obligations regarding scope of work, invoices are accurate for the work performed, and services are delivered in a timely manner.
 - Certain contracts, as discussed later, are inherently more risky and require careful oversight.

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Uniform Guidance Procurement

Subpart D, Procurement 2 CFR §200.302-.318:

- **Oversight** –
 - If a local government lacks qualified personnel within its organization to undertake such oversight as required by 2 CFR § 200.318(b), the Federal government expects the local government to acquire the necessary personnel to provide the oversight.
 - Contractors selected to perform procurement functions on behalf of the local government are subject to the Uniform Rules and are precluded from bidding on contracts they oversee.

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Subpart D, Procurement 2 CFR §200.302-.318:

- Conflicts of interest –
 - Must have written policies about conduct of its employees involved in the selection, award, and administration of contracts.
 - Policies must cover both organizational and personal conflict of interest to prevent unfair or noncompetitive awards being provided.
 - Policies must prohibit participation if conflict exists.

Uniform Guidance Procurement

- Conflicts of interest –
 - Conflicts arise when an 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 may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts.
 - Local governments 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 local govt.

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Subpart D, Procurement 2 CFR §200.302-.318:

- **Necessary purchases** – must avoid unnecessary or duplicative purchases. To this end, a local govt. should consider the most efficient and effective approach to purchases, e.g., bulk purchasing, lease versus purchase, agreements for use of common or shared goods and services, use of federal excess and surplus property as opposed to purchasing new equipment, etc.
 - Must have documented procurement actions using strategic sourcing, shared services, and other similar procurement arrangements to support competition.

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What About Breaking Out Procurements?

Local govts. may break down procurements to obtain a more economical purchase or permit maximum participation by small and minority businesses, women's business enterprises, and labor surplus area firms, when economically feasible.

However, local governments are not allowed to break down procurements in an effort to avoid the additional procurement requirements that apply to larger purchases.

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What About Breaking Out Procurements?

Scenario –

County X solicited and received unit price quotes from 13 debris removal contractors for various types of debris removal work.

- Contractor A submitted the lowest bid for removing and disposing of vegetative debris.
- Contractor B submitted the lowest bid for removing and disposing of construction and demolition debris.
- Contractor C submitted the lowest bid for both tasks combined. Although the combined total was the lowest bid, the unit price quotes for vegetative debris and construction and demolition debris (each elements of the combined bid) were actually higher than Contractors A and B, respectively.

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What About Breaking Out Procurements?

Scenario –

County X considered the bids submitted and realized that it would be able to obtain a more economical purchase if it broke up these purchases into separate procurement actions awarded to Contractor A and B. The County awarded the vegetative debris removal work to Contractor A and the construction and demolition debris removal work to Contractor B.

Is County X in compliance with the federal procurement under grant rules by breaking up their procurement in order to obtain a more cost-effective purchase?

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What About Breaking Out Procurements?

Answer: Yes, the County broke up their procurement into two activities and awarding two contracts (one for vegetative debris removal work and another for construction and demolition debris removal work) to contractors that had the lowest bid for each of the two tasks. This decision resulted in a more economic purchase overall. By awarding two separate contracts, the County saved costs that would otherwise be unnecessary.

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What does it mean to Procure Unnecessary Items?

Scenario -

- This year, the Island of X experienced widespread power outages due to a Super Typhoon striking the region. In particular, the Island's airport lost power for weeks. A functioning airport is essential for Island residents because they rely on imported goods and supplies to function. The airport requires four generators to restore power. However, this is the third year in a row that the Island of X suffered a Typhoon and the third consecutive year that the airport lost power for an extended period of time. To get the airport up and running, and to prepare for potential damage from future Typhoons, the Island procured eight generators using PA funds.
 - Did the Island of X comply with the federal procurement regulations?

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What does it mean to Procure Unnecessary Items?

Answer -

No. Pursuant to 2 C.F.R. § 200.318(d), the Island is prohibited from procuring unnecessary or duplicative items. In this case, the Island needed only four generators to meet its current requirement of restoring power to the airport. The federal procurement regulations do not allow for the acquisition of duplicative items or stockpiling items for future use. Therefore, the Island of X violated the federal procurement regulations.

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Subpart D, Procurement 2 CFR §200.318:

- **Time-and-Materials Type Contracts**– May use **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.
 - **Definition:** A contract whose cost to a local government is the sum of:
 - The actual cost of materials; &
 - Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

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Uniform Guidance Procurement

Subpart D, Procurement 2 CFR §200.318:

- Time-and-Materials Type Contracts—
 - 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. Each contract must set a ceiling price that the contractor exceeds at its own risk. Requires high degree of oversight to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

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Subpart D, Procurement 2 CFR §200.318:

- Intergovernmental agreements encouraged where appropriate for procurement or use of common or shared goods and services.
 - Competition requirements will be met with documented procurement actions using strategic sourcing, shared services, and other similar procurement arrangements.
- Use of Federal excess and surplus property also encouraged when feasible and reduces project costs.
- Use of Value-Engineering clauses in contracts for construction projects of sufficient size to offer opportunity for cost reductions.

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Subpart D, Procurement 2 CFR §200.318-.319:

- **Prohibited use of state or local geographical preferences** – Unless federal statutes specifically mandate or encourage geographical preference, must prohibit using statutorily or administratively imposed state or local geographical preferences when conducting procurements.
- **Records** – must maintain documentation to support the history of the procurement, rationale for procurement decisions and method used, contractor selection or rejection, basis for contract price, etc.
 - Due consideration should be given in a shared service/intergovernmental arrangement.

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Subpart D, Non-Competitive Procurement 2 CFR §200.320(c):

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

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Non-Procurement - Steps to Take in Emergency or Exigent Circumstance:

- Write a justification to describe the emergency or exigent circumstances.
- Provide a brief description of the goods or services: Justify the need for the specific good or service being contracted to address the emergency or exigency circumstance.
- Estimate the expected dollar amount of the goods or services: A cost or price analysis is required for all procurement transactions above \$250,000.
- Describe any known conflicts of interests and efforts made to identify possible conflicts of interests. If no efforts were made, explain why.
- Define and justify the period of emergency or exigency for the specific situation:
- Transition to a competitively bid contract as soon as the emergency or exigent period ends: Failure to plan for transition to a competitively bid contract cannot be the basis for continued use of the emergency or exigency exception.

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Non-Procurement – Additional Rules when Sole-Sourcing:

- Contracts must include the required contract clauses.
- Contract must include the federal bonding requirements if the contract is for construction or facility improvement.
- Contract must be awarded to a responsible contractor.
- Must complete a cost or price analysis to determine that the cost or price of the contract is fair and reasonable.
- Contract must not be a cost-plus-percentage-of-cost contract type.
- When using a time-and-materials contract, must comply with the applicable rules.
- Document any known conflicts of interest and any efforts that were made to identify possible conflicts of interest before the sole-sourced contract was awarded.

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What does reasonable cost mean?

- A cost is reasonable if it meets the prudent person test. Considerations:
- Whether the cost is generally recognized as ordinary and necessary.
- The restraints or requirements imposed by such factors as: sound business practices; arm's-length bargaining; federal, state, local, and other laws and regulations; and terms and conditions of the federal award.
- Market prices for comparable goods or services for the geographic area.
- Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the local government, its employees, the public at large, and the federal government.
- Whether the local govt. significantly deviates from its established practices and policies regarding the incurrence of costs, which may unjustifiably increase the federal award's cost.

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Subpart D, Procurement:

- **What about Ohio Competitive Bidding Laws?**– Most restrictive laws and regulations apply. For example, if State law is more restrictive than Federal Procurement law, State law applies.
- Certain costs may be exempt from State Competitive Bidding laws but are not exempt under Federal Procurement Rules (e.g., professional services, text books, motor vehicles, fuel, cost-sharing contracts).
 - Must meet one of the exemptions under **2 CFR §200.320(c)**; these are the only exceptions to Procurement Rules.

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Subpart D, Procurement:

What about State Term Purchasing / Joint Contracting / Intergovernmental Agreements?

- Local governments are encouraged to collaborate on procurement actions for goods and services where the result will lead to cost savings.
- **However, proceed with caution** - Procurement Rules applicable to states differ from those applicable to local governments - *more on this soon!*
- Full and open competition must be maintained.
- Local governments wishing to utilize intergovernmental agreements, etc. must be able to demonstrate that the procurements complied with **all** applicable federal procurement under grant rules before undertaking.

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Differing State vs. Local Government Procurement Rules ...What?

- State entities will always follow the procurement standards found at 2 C.F.R. §200.317, which directs them to utilize their own procurement standards, comply with applicable guidelines regarding procurement of recovered materials as set forth in 2 C.F.R. § 200.322, and include all necessary contract provisions required by 2 C.F.R. § 200.326.
- Conversely, local governments must adhere to their own procurement policies and procedures, applicable state and/or local laws, and the federal procurement under grant requirements found at 2 C.F.R. §§ 200.318-326.

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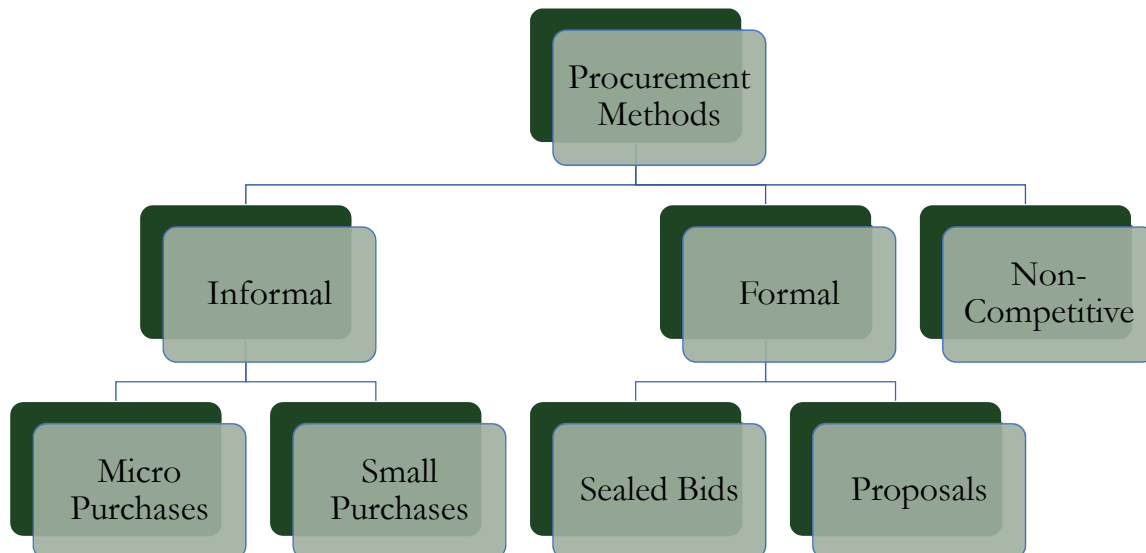
Differing State vs. Local Government Procurement Rules ...What?

- Further, as it relates to local governments, the federal procurement under grant standards at 2 CFR § 200.319(b) prohibit the use of statutorily or administratively imposed local, state, and/or local geographic preferences in the evaluation of bids or proposals, except in those cases where applicable federal statutes expressly mandate or encourage geographic preferences.
- However, because the state is not subject to regulation at 2 CFR §200.319, the regulation bears no applicability to the question presented in this scenario. If Ohio law requires the State to comply with geographic preferences in Procurement, the State can allowably do so under 2 CFR §200.317.

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Procurement – Methods 2 CFR § 200.320



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Procurement – Informal (2 CFR §200.320(a))

Micro Purchase

- May be awarded **without** competitive rate quotes if price considered reasonable based on **documented** research, experience, purchase history, etc.
- Distributed equitably among qualified suppliers
- Purchase cards may be used with approved, written procedures

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Procurement – Informal (2 CFR §200.320(a))



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Procurement – Informal (2 CFR §200.320(a))

Small Purchase

- Aggregate dollar amount greater than micro-purchase threshold, less than simplified acquisition threshold (currently \$250k).
- Must obtain **and document** price or rate quotations from adequate number of qualified sources.

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Procurement – Informal (2 CFR §200.320(a))

Simplified Acquisition Threshold (SAT)

- Determined by non-Federal entity based on internal controls, risk evaluation, and documented procurement procedures.
- Cannot exceed \$250,000 FAR threshold.
- Must perform cost or price analysis in connection with every procurement action in excess of the SAT, including contract modifications.

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Procurement – Formal (2 CFR §200.320(b))

Sealed Bids

- Publically Solicited
- Firm, fixed-price contract awarded to responsible bidder with lowest price
- Must meet requirements in 2 CFR §200.320(b)(1)
- Must **document** cost and price analysis

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Procurement – Formal (2 CFR §200.320(b))

Proposals

- Conditions not appropriate for sealed bids (generally because cost is not the only factor)
- Either fixed-price or cost-reimbursement contract awarded
- Must meet requirements in 2 CFR § 200.320(b)(2)
- Must **document** cost and price analysis.

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Procurement – Additional Uniform Rules

Ensure contractor is not suspended, debarred, or excluded on SAM.gov (2 CFR §200.214; 2 CFR §200 Part 180)

When possible, must use minority businesses, women's business enterprises, and labor surplus area firms (2 CFR §200.321)

Buy American (2 CFR §200.322)

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Procurement – Additional Uniform Rules

Prohibition on certain telecommunications and video surveillance services or equipment (2 CFR §200.216) (e.g., Huawei Technologies Company)

Never contract with the enemy (2 CFR §200.215 & 2 CFR Part 183).

Various other contract provisions as outlined in Appendix II to 2 CFR Part 200 – these are items your statutory legal counsel should assist with.

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What about Prepositioned Contracts?

Local government must ensure –

- The contract was procured in compliance with the applicable procurement under grant rules for its entity type (state or non-state entity rules);
- The work to be performed falls within the scope of work of the prepositioned contract and the new work does not create a **cardinal change** to the prepositioned contract.
- The contract's scope of work must adequately encompass the type and extent of future work.

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DOCUMENT!!! DOCUMENT!!! DOCUMENT!!!

- Must maintain detailed records to support the history of the Procurement, 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 the contract price;
- Acquisition planning information and other pre-solicitation documents;
- The statement of work/scope of services;
- A list of sources solicited;
- Copies of published notices of proposed contract action;

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DOCUMENT!!! DOCUMENT!!! DOCUMENT!!!

- Copies of the solicitation documents, as well as any addenda or amendments;
- The notice to unsuccessful bidders or offers and a record of any debriefing;
- A record of protests, disputes and claims;
- Copies of bid, performance, payment, and other bond documents;
- The notice to proceed; and
- Steps taken to comply with the affirmative socioeconomic steps required by 2 CFR § 200.321.

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What happens if the Federal Procurement Rules are not followed?

Treasury has authority to take any of the remedies outlined in 2 CFR §200.339, including:

- Temporarily withhold cash payments until the deficiency is corrected;
- Disallow, or deny the use of, the grant funds or any matching credit for all or part of the activity that is deficient;
- Suspend or terminate the federal grant award;
- Initiate suspension or debarment proceedings;
- Withhold any further federal awards for the project or program; or
- Take other remedies that may be legally available.

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Resources

Full Uniform Guidance Text

www.ecfr.gov



Code of Federal Regulations

A point in time eCFR system



eCFR ■

Auditor of State - Refer to COVID-19 Resources

www.ohioauditor.gov

US Department of the Treasury

home.treasury.gov

System for Award Management (SAM) Suspended/Debarred Parties Search

SAM.gov | [Exclusions](#)

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Resources

Federal Procurement Bear Claw Info. Graphic

[Procurement Claw.pdf \(ohioauditor.gov\)](#)

Federal Emergency Management Procurement Resources

[Contracting with Federal Funds for Goods and Services Before, During and After Disasters | FEMA.gov](#)

Environmental Protection Agency's Procurement for Drinking Water and Wastewater Utilities

[Prepare for Funding: Develop Emergency Procurement Policies and Procedures for Drinking Water or Wastewater Utilities | US EPA](#)

Environmental Protection Agency's Comprehensive Procurement Guideline

[Comprehensive Procurement Guideline \(CPG\) Program | US EPA](#)

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Questions?

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