

2 CFR Part 200
Series #4 – Changes in Procurement Requirements

Series one (1) through three (3) were on changes from the old OMB circulars to the new 2 CFR Part 200 and new citations in the new “*Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Grants*”. This is the fourth (4th) of this series which will discuss the revised procurement requirements found in Subpart D Post-Federal Award Requirements. If you need financial technical assistance on this subject or other financial grant related topics, please contact Mark Hernandez at mhernandez@taasa.org or (737) 333-9941 or send questions to financial@taasa.org for additional information.

Grace Period:

The revision of the 2 CFR Part 200 procurement requirements is so significant for nonprofit organizations that all non-Federal entities have a two (2) year grace period to implement the new procurement requirements. For example if your organization’s year end is August 31, the new procurement requirements must be implemented by August 31, 2017. Even though there is a 2 year grace period, all organizations must currently document whether the organization is in compliance with the old or new standard, and must meet the documented standard.

Synopsis of Changes:

The major revision to the procurement requirements are that there five (5) methods of procurement with dollar thresholds associated to each method of procurement. Section 200.320 found below describes the five methods of procurements:

- 1) **Micro-purchase** (less than to \$3,000),
- 2) **Small purchase** (less than \$150,000),
- 3) **Sealed bids purchases** (more than \$150,000),
- 4) **Competitive proposal purchases** (more than \$150,000), and
- 5) **Noncompetitive purchases** (special circumstances which are applicable for all purchase levels).

All five procurement types must comply with the Procurement Standards in section 200.318, also found below, which can be summarized generally as follows:

- the purchase complies with the organization’s documented procedures in place,
- purchases are necessary,
- open competition (to the extent required by each method),
- a conflict of interest policy and
- proper documentation for the purchases.

In section 200.88 simplified acquisitions threshold is used to describe small purchases and micro-purchases. Simplified acquisition threshold means the dollar amount below which an organization may purchase property or services using small purchase methods (less than \$150,000). Since micro-purchases are less than to \$3,000, micro-purchases can also use the simplified acquisition threshold. All purchases under the simplified acquisition threshold (including micro-purchases) require:

- fewer terms and conditions,
- have a lesser competition standard than purchases over the simplified acquisition threshold,
- can be solicited informally,
- and do not require a cost or price analysis.

For example, purchases of supplies or services under \$3,000 are treated as **micro-purchases**. If the organization entity considers the costs to be reasonable, the purchase orders may be awarded without soliciting any competitive quotations. No rate competitive quotations are

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necessary for the purchase. A cost or price analysis is also not required. The organization must, to the extent practicable, distribute these purchases equitable among qualified suppliers.

All purchases between \$3,000 and \$150,000 the **small purchase** procedures can be used and is stated in section 200.320 (b) which describes the procedures as relatively simple and informal.

- It states that “price or rate quotations must be obtained from an adequate number of qualified sources.”
- It leaves the discretion of the organization’s written policy to determine the “adequate” number of qualified sources (i.e., any number greater than one) and the methods of obtaining the price or rate quotations (e.g., it can be in writing, orally, vendor price list on website, or generated via online search engine).
- Section 200.323 also excludes the small purchases from any requirements for cost or price analysis.
 - For example, a purchase order for supplies in the amount \$10,000 can be treated as a small purchase order.
 - This purchase order requires a rate quote from at least two sources, which can be obtained in writing from two suppliers or research done on a public website. A cost or price analysis is not required.
 - In addition, if the chlorine is of special quality that is offered by only one company or only one company can deliver in the time frame required for the project, the purchase order can be made under the sole source purchase provision in section 200.320 (f).

For purchases greater than the simplified acquisition threshold of \$150,000, either **sealed bids** or **competitive proposals** purchases apply. The sealed bid method is the preferred method for procuring construction and is not a typical procurement method for local centers. **Sealed 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,
- and is the lowest in price.
- For detail information please review the information below in section 200.320 Methods of procurement to be followed.

Competitive proposals are used to solicit multiple offers and can be awarded either a fixed price or cost-reimbursement type contract. Competitive proposals are for bids over \$500,000 and is generally used when conditions are not appropriate for the use of sealed bids. Requests for proposals (RFPs) are typically used for competitive proposals. For competitive proposals where qualification of the vendor is more important than the price of the service a request for qualification (RFQ) may be more appropriate. For detail information please review the information below in section 200.320 Methods of procurement to be followed.

The final method of procurement is the sole source method. This procurement method is noncompetitive and should only be used for the following types of procurement:

- Unique type of service or product that can only be provided by a specific vendor,
- Public emergency where the service and product must be performed or produced without delay.
- Upon the written request by the organization, the federal awarding agency or pass-through entity expressly authorized sole sourcing, or
- After solicitation of a number of sources, competition is determined to be inadequate.

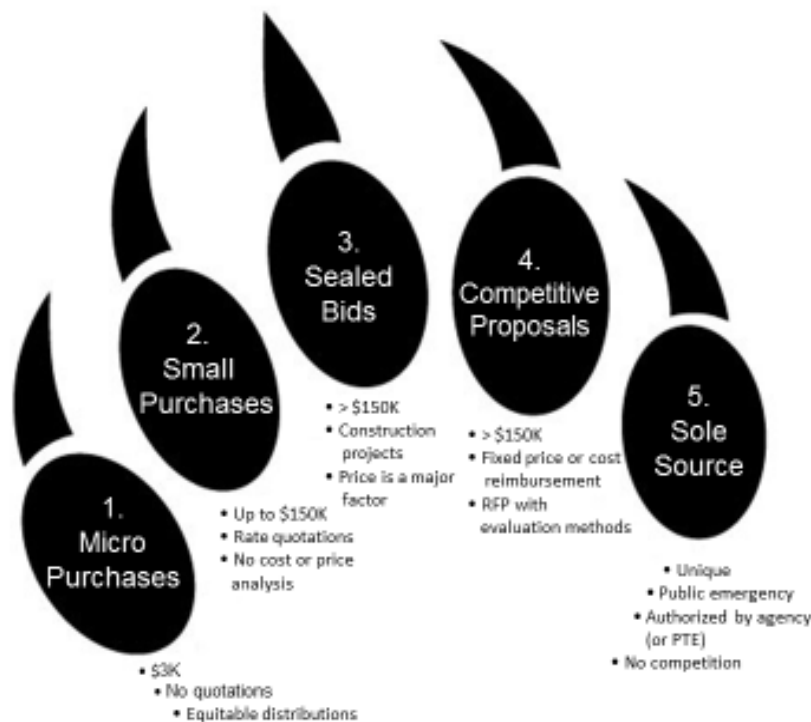
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Finally, to promote cost-effective and efficient procurement, organizations are encouraged to use shared services by entering into state/local intergovernmental agreements, or inter-entity agreements. This method is appropriate for common procurement or shared goods and services. An example of a local intergovernmental agreement is TIPS (The Inter-local Purchasing System) <https://www.tips-usa.com/>, with the lead agency being Region 8 Education Service Center (ESC). Organizations should review the website using the link above and determine if TIPS is beneficial for the organization to join.

The chart below is a visual representation of the new procurement regulations, which can be found on the internet as the procurement Bearclaw. Provided below in direct quotations are from 2 CFR Part 200 Subpart D Post-Federal Award Requirements citations 200.317 through 200.323.

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Procurement “Claw” (Section 200.320)



2 CFR Part 200 Subpart D Post-Federal Award Requirements -Procurement Standards (Direct quotes)

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

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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 and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.
- (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 performance of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent must 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 must 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.

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- (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.
- (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 time and material type contracts 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 material type contract means a contract whose cost to a non-Federal entity is the sum of:
 - (i) The actual cost of materials; and
 - (ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.
- (2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.
- (k) The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction.

200.319 Competition.

- (a) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, and 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;

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- (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 or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.
- (c) The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations:
- (1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equivalent” description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and
 - (2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.
- (d) The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

200.320 Methods of procurement to be followed.

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

- (a) Procurement by micro-purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed \$3,000 (or \$2,000 in the case of acquisitions for construction subject to the Davis-Bacon Act). 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

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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) The invitation for bids will be publicly advertised and 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;
- (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 publicly opened at the time and place prescribed in the invitation for bids;
- (iv) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and
- (v) Any or all bids may be rejected if there is a sound documented reason.

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

- (1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical;
- (2) Proposals must be solicited from an adequate number of qualified sources;
- (3) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;
- (4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

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

(e) [Reserved]

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

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

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

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

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

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

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

(b) Affirmative steps must include:

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

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

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

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

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

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

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

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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 by the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

200.323 Contract cost and price.

- (a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.
- (b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.
- (c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under Subpart E—Cost Principles of this part. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.
- (d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.