



LEGAL UPDATES

For Up-to-Date News on Laws and Regulations Relevant to the Appalachian Regional Commission

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NEW PROCUREMENT REGULATIONS

Revisions to governmentwide grant regulations at 2 CFR Part 200 became effective for all grants signed on or after November 12, 2020. Substantive changes to procurement requirements include grouping procurement methods in three categories, and allowing flexibility to establish different micropurchase and simplified acquisition thresholds. This newsletter discusses the new requirements. It replaces the newsletter issued in June 2017.

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I. NEW REGULATIONS

Where can I find the new regulations?

The most up-to-date source is the Electronic Code of Federal Regulations at www.ecfr.gov. It is updated daily. Scroll to find the grant regulations at Title 2, Subtitle A, Chapter II, Part 200. The table of contents is hyperlinked.

Which grants do the new regulations apply to?

The new regulations apply to all non-federal entities with a grant signed on or after November 12, 2020.

What if a grant was signed on November 11, 2020?

All grants that were signed on or before November 11 must follow former OMB regulations.

Where can I find the regulations effective before November 12?

The former OMB regulations are on ARC's website: <https://www.arc.gov/omb-grant-regulations/>.

Are the citations the same as before?

Some of the citations are the same, but not all. The definitions are now all located at 2 CFR 200.1, and several new regulations such as 2 CFR 200.322 changed subsequent citations.

II. BASIC REQUIREMENTS

Who is required to follow OMB grant regulations?

The regulations at Title 2 of the Code of Federal Regulations, Part 200 (2 CFR Part 200) apply to all grants, subgrants, and cooperative agreements. See 2 CFR 200.101, *Applicability*.

Does everyone follow the same requirements?

No, it depends on whether the NFE is a state agency or not. States follow the same policies and procedures they use for procurements using non-federal funds. See 2 CFR 200.317. All other entities, including subrecipients/ subgrantees of a state, must have and use documented procurement procedures consistent with state, local, and tribal laws; federal law; and procurement regulations at 2 CFR 200.318-327.

Do states have to follow any of the federal regulations?

Yes. All contracts made by states under a federal award must include the contract provisions listed in 2 CFR Part 200, Appendix II. See 2 CFR 200.327. In addition, states (and state contractors) must comply with three other regulations that apply to all NFEs: §200.321 *Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms*; §200.322 *Domestic preferences for procurements*; and §200.323 *Procurement of recovered materials*.

How do I know if a regulation is required or if it is “best practice”?

When the word “must” is used, it is required. When the words “should” or “may” are used, this indicates a best practice or recommended approach rather than a requirement, and permits discretion. See 2 CFR 200.101(b)(1).

Do the regulations apply to match/cost share?

The requirements apply to all costs related to ARC awards, including match.

How do I know whether to use a contract or subaward?

See 2 CFR 200.331 and Legal Updates Newsletter Volume IV, *Subgrant versus Contract*, for information to help make this important decision.

What factors must be considered when awarding a contract?

Contracts may only be made with responsible contractors. NFEs must consider contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. See 2 CFR 200.318(h). See also §200.214 *Suspension and debarment*.

What policies or procedures are required?

NFEs are required to maintain and use written procurement procedures that comply with OMB regulations, and federal, state, local, and/or tribal law if applicable. See 2 CFR 200.319(d). NFEs are also required to maintain written standards of conduct covering conflicts of interest. See 2 CFR 200.318(c) and ARC Legal Updates Newsletter, Vol. III.

What kinds of records must be kept?

NFEs must keep records that detail the history of procurement, including the rationale for the method, selection of contract type, contractor selection or rejection, and the basis for the contract price. See 2 CFR 200.318(i) and ARC Legal Updates Newsletter, Vol. II.

III. METHODS

What are the methods of procurement available?

Procurement methods are now grouped into three categories: (1) informal (micropurchase and small purchase); (2) formal (sealed bids and proposals); and (3) noncompetitive (sole source). See 2 CFR 200.320.

How does an NFE know which method of procurement to use?

The aggregate cost of the procurement determines the method.

GLOSSARY



What is a non-federal entity (NFE)?

A state or local government, Indian tribe, institute of higher education, or non-profit organization that carries out a federal award as a recipient or subrecipient.



What is a recipient?

A non-federal entity that receives a federal award directly from a federal awarding agency to carry out an activity under a Federal program. Also called “grantee.”



What is a subrecipient?

A non-federal entity that receives a subaward from a pass-through entity to carry out part of a federal program. Also called “subgrantee.”



What is OMB?

The Office of Management and Budget is the largest office within the Executive Office of the President of the United States (EOP). OMB implements the President’s vision across the executive branch.

May an NFE procure using a pre-qualified list?

Yes, an NFE may rely on prequalified lists of persons, firms, or products used to acquire goods and services. However, the list needs to be current and include enough qualified sources to ensure maximum open and free competition. Also, the solicitation must not have prevented potential bidders from qualifying from the list. *See* 2 CFR 200.319(e).

A. INFORMAL METHOD

When can an NFE use “informal” procurement methods?

When the value of the procurement for property or services does not exceed the simplified acquisition threshold (SAT). *See* 2 CFR 200.320(a).

What is the simplified acquisition threshold (“SAT”)?

Defined at 2 CFR 200.1, the SAT is the threshold that determines whether informal or formal procurement procedures must be used. Currently, it is \$250,000.

Can an NFE establish a different simplified acquisition threshold?

Yes, the new regulations allow an NFE to establish a different threshold based on internal controls, an evaluation of risk, and its documented procurement procedures. However, it cannot be higher than the dollar value established in the Federal Acquisition Regulation (currently \$250,000). *See* 2 CFR 200.320(a)(2)(ii).

1) MICROPURCHASES

What is the micropurchase threshold?

Defined at 2 CFR 200.1, the micropurchase threshold is the dollar amount that differentiates micropurchases from small purchase procedures. *See* 2 CFR §200.320(a). Currently, it is \$10,000.

What are the requirements for making micro-purchases?

Micro-purchases may be awarded without soliciting competitive price or rate quotations, if the NFE considers the price to be reasonable based on research, experience, purchase history or other information. *See* 2 CFR 200.320(a)(1).

Can an NFE procure use a different micropurchase threshold?

Yes, the new regulations authorize NFEs to establish a micropurchase threshold up to \$50,000 based on certain conditions that include a requirement to self-certify and maintain records. *See* 2 CFR 200.320(a)(1)(iv). The new regulations also allow NFEs to seek approval from the cognizant agency for indirect costs to raise the micropurchase threshold above \$50,000. *See* 2 CFR 200.320(a)(1)(v).

Can ARC serve as a cognizant agency for indirect costs?

No.

2) SMALL PURCHASE PROCEDURES

When are small purchase procedures used?

Small purchase procedures are used when purchasing goods or services for an aggregate amount between the micro-purchase threshold and simplified acquisition threshold. *See* 2 CFR 200.320(a)(2).

What do small purchase methods require?

Small purchases still require obtaining quotes from an “adequate number of qualified sources.” However, the new regulations clarify that the NFE determines the adequacy and qualifications of the sources, as appropriate. *See* 2 CFR 200.320(a)(2).

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VOLUME II—Record Retention & Access

VOLUME III—Conflicts of Interest

VOLUME IV—Subgrant versus Contract: Getting it Right

VOLUME V—Equipment

VOLUME VI—ARC Code Chapter 8, Grant Administration

VOLUME VII—Residential Infrastructure Grants



B. FORMAL METHOD

When are “formal” procurement methods required?

When the value of the procurement for property or services is higher than the simplified acquisition threshold (or a lower threshold established by the NFE), formal procurement methods must be used. *See* 2 CFR 200.320(b).

What do formal methods require?

Formal procurement methods require following documented procedures, advertising publicly, and procurement by either “sealed bid” or “proposal.” In addition, a cost or price analysis is still required with every procurement over the Simplified Acquisition Threshold. *See* 2 CFR 200.324(a).

How do NFEs procure using sealed bids or proposals?

The new regulations did not substantially change the procedures for sealed bids or proposals. Sealed bid procedures are described at 2 CFR 200.320(b)(1). Proposal procedures are described at 2 CFR 200.320(b)(2).

Which method is the preferred method for procuring construction?

Procuring with sealed bids. *See* 2 CFR 200.320(b)(1).

What do I need to know about contracting architectural or engineering (A/E) services?

Competitive proposal procedures may be used for qualifications-based procurement of A/E professional services. However, this method—where price is not used as a selection factor—cannot be used to purchase other types of services, even when A/E firms perform the work. *See* 2 CFR 200.320(b)(2)(iv). In addition, geographic location may be a selection criterion for A/E services, unlike other procurements. *See* 2 CFR 200.319(c).

C. SOLE SOURCE

I understand that sole source or noncompetitive procurement is a rare exception. What are the circumstances when it may be used?

According to the regulations, noncompetitive procurement may only be done according to 2 CFR 200.320(c), i.e. when one or more of these circumstances are present:

- The aggregate dollar amount falls below the micropurchase threshold;
- There is only one source for the product or service;
- There is an emergency that can’t permit a delay;
- It is expressly authorized in response to a written request; or
- After trying, competition was “inadequate.”

May a grantee decide unilaterally to award a sole source contract?

No. ARC must approve in writing.

GLOSSARY

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What is a cost or price analysis?

A cost analysis breaks down the total price into individual cost elements, such as labor, equipment, and material, and reviews and evaluates each individual element.

A price analysis examines the total price under consideration as the single pricing factor, and compares the total price to comparable measures/units. It is used to determine that the overall price is reasonable.

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How is a cost or price analysis conducted?

The method and degree of analysis depends on the facts surrounding the particular procurement, but as a starting point, the NFE must make independent estimates before receiving bids or proposals.

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What if an NFE needs to procure something that is uncommon or hard to find, but not only available from one source?

ARC (or the pass-through entity) must approve in writing any request to award a sole source contract. Unless the item or service is truly only available from one source, the request likely will be denied.

What if an NFE receives only one bid in response to an RFP?

Again, ARC must be consulted and approve in writing any request to award a sole source contract. If an NFE receives only one bid, ARC will advise the NFE to republish or resolicit the procurement opportunity to seek more bids, which may involve expanding the contractor pool or advertising on other forums.

IV. PROHIBITIONS

Can a non-federal entity award a contract to a contractor on retainer?

No, regulations prohibit awarding a noncompetitive contract to a contractor on retainer. However, there is no direct prohibition on awarding *competitive* contracts to contractors on retainer. See 2 CFR 200.319(b).

What other practices are prohibited?

In addition to prohibited noncompetitive contracts to contractors on retainer, these practices are also prohibited by the regulations (see 2 CFR 200.319(b)) because they restrict competition:

- Requiring something unreasonable to qualify;
- Requiring unnecessary experience and excessive bonding;
- Allowing noncompetitive pricing between firms or affiliates;
- Requiring a “brand name” product; or
- Acting arbitrarily

Can a contractor or consultant help draft a statement of work or RFP, and then bid on the procurement?

No. Contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or RFPs “must be excluded from competing for such procurements.” See 2 CFR 200.319(b).

What if an NFE would like a certain contractor to bid on a project?

The NFE should not allow the contractor to help draft specifications, requirements, or other details relating to the RFP. The NFE should rely on other entities to do this preliminary work.

Are any contracting methods or types forbidden?

Yes. Cost plus a percentage of cost and percentage of construction cost methods of contracting are prohibited. See 2 CFR 200.324(d). In addition, a “time and materials” contract may only be used if (1) no other contract is suitable and (2) it includes a ceiling price that the contractor exceeds at its own risk. See 2 CFR 200.318(j).

Questions?



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