

Office of the State Controller

OMB Subrecipient Guidance

Issued: October 25, 2017

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Effective Date: July 1, 2018

On June 20, 2018, the Office of Management and Budget (OMB) issued Memorandum 18-18 (M-18-18) which addresses recent statutory changes set forth in the National Defense Authorization Act (NDAA) for Fiscal Years 2017 and 2018. This Memorandum authorizes the increase in the micro-purchase threshold under Federal financial assistance awards to \$10,000 and raises the threshold for simplified acquisition to \$250,000 for all recipients. These changes are not effective until implemented in the Federal Acquisition Regulation (FAR) at 48 C.F.R. Subpart 2.1 (Definitions). However, OMB is granting an exception allowing recipients to use the higher threshold of \$10,000 for micro-purchases and \$250,000 for simplified acquisitions in advance of revisions to the FAR at 48 C.F.R. Subpart 2.1 and the Uniform Guidance expected later this summer. Pursuant to 2 C.F.R. § 200.102 (Exceptions), OMB may allow exceptions to the Uniform Guidance when exceptions are not prohibited by statute. The exceptions take place as of the date of M-18-18 which was June 20, 2018. See memo [here](#).

Because the changes have not been adopted in the FAR, the exact Uniform Guidance language will not be updated in this guidance document at this time. Upon receipt of revised FAR and OMB, the OSC will update this document to reflect necessary changes. Until that time, the document has been updated to reflect only the higher threshold amounts in the figures. Please refer to the Memorandum referenced above.

OVERVIEW

Purpose of this document is:

To make the Subrecipient aware of actions required of the Subrecipient to achieve compliance per the terms of the Uniform Guidance (UG) related to procurement (spending of the federal based grant funds received from the State.) This Guidance document applies to grants that follow the UG; some federal agency grant programs may be exempt in part from the UG or they may have additional requirements beyond those identified in the UG. Subrecipients should consult with the State Agency awarding the grant funds if they have questions regarding the terms and conditions that are applicable to their award.

This Guidance document follows the workflow of a typical procurement. The Guidance includes questions so that the Subrecipient can consider whether or not they have taken steps to meet the requirement(s) of the UG for that portion of the procurement process. These questions guide the Subrecipient in understanding UG requirements.

The intended audience for the *Office of the State Controller (OSC) OMB Subrecipient Guidance* is Subrecipients at the following entities:

- Local Governments
- Nonprofits
- Private entities

State agencies that are Subrecipients of Federal funds should follow OSC Guidance and Policies for complying with UG, not this Guidance.

The *Office of the State Controller OMB Subrecipient Guidance* is the **primary guidance** to fulfill Federal OMB Subrecipient awareness requirements. All other resources in various formats are extra references only, intended to support this primary guidance but not to, in any way, replace *Office of the State Controller OMB Subrecipient Guidance*.

- In addition to this primary training manual are extra resources listed here for supplemental study but **not to replace this guidance**:
 - ✓ The Complete **OMB 200.317-200.326** document in its original form with complete citations and in its actual organizational order;
 - ✓ ***What to Expect from OMB Subrecipient Guidance*** – A brief introductory slide presentation to maximize the benefits of *Office of the State Controller OMB Subrecipient Guidance* through understanding of its design;
 - ✓ **OMB Subrecipient Guidance Job Aids** – Printable 1-page resources to post in the Subrecipient’s work area such as charts, tables, definitions, and steps that provide illustration and details for assistance.

The *Office of the State Controller OMB Subrecipient Guidance* follows this order:

- A typical procurement workflow that moves from pre-procurement, to procurement to post-procurement.
- In each of these phases, questions assist the Subrecipient in evaluating their compliance with requirements of the UG.
- An excerpt from the UG stated exactly as it appears in the UG follows each of these questions.
- The State OSC's Interpretation and/or examples of what the UG is actually saying in that specific excerpt of the UG are in a text box outlined in red.

The State has the right to, and may, add State requirements in addition to the Federal requirements found within the UG. Additional State requirements are not covered in this guidance document. Questions should be addressed to the State entity from which the Subrecipient received its funding.

If the *Office of the State Controller OMB Subrecipient Guidance* does not provide the answer to a question Subrecipients may have regarding the procurement process, please direct these questions to the State agency procurement office or the grant program of the department from which the Subrecipient received its award of federal funds.

“Non-federal entity” is a term used throughout the OMB guidance. In this document, “Subrecipient” is the term used in key questions. The two terms refer to the same entity – a local government, nonprofit or private entity.

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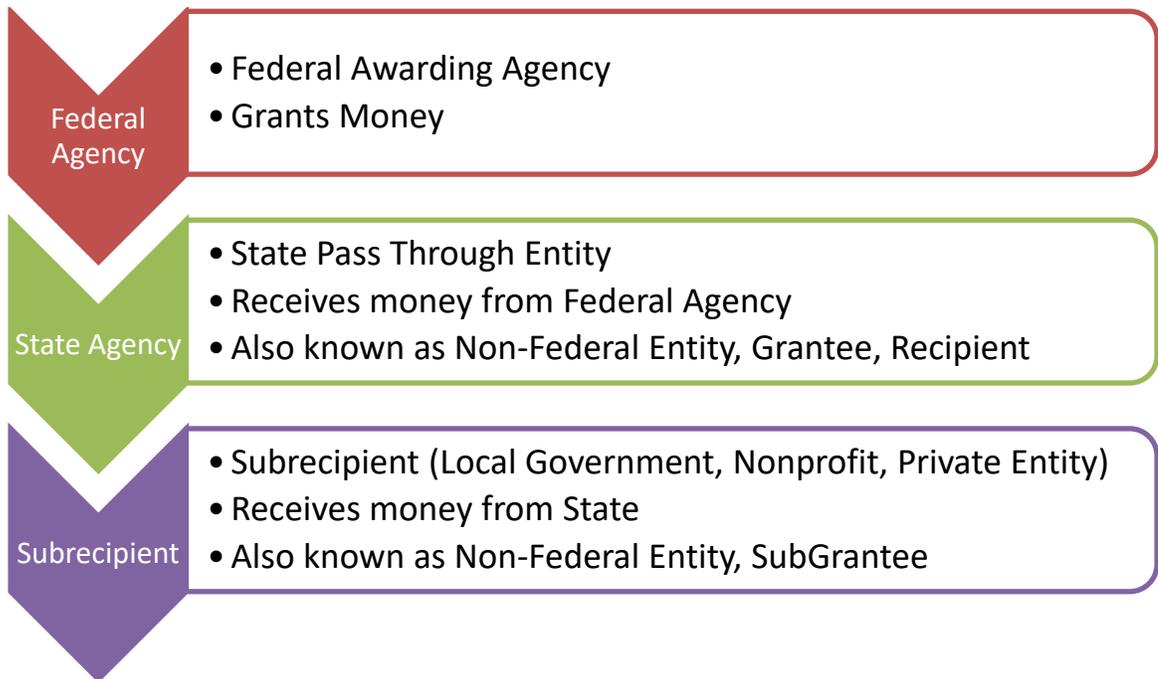
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PRE-PROCUREMENT PROCESS

Prior to starting a procurement:

- Subrecipients should read and understand the terminology found in the UG.
- Subrecipients should read and understand the materials presented in this guidance and associated materials.
- Subrecipients should understand the various roles illustrated in the graphic below:



The following questions help the Subrecipient evaluate their preparedness to comply with the UG procurement requirements.

1. Is Subrecipient using its own documented procurement procedures?
2. Do these documented procedures conform to the UG? See §200.318(a)

§ 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.*

Office of the State Controller (OSC) Interpretation:

- Prior to a non-Federal entity applying for grant funds, the non-Federal entity is required to have sufficient procurement procedures developed and documented.

3. Does Subrecipient have written standards of conduct regarding conflicts of interest? If so, has Subrecipient followed and maintained these written standards of conduct? See §200.318(c)(1)

§ 200.318 General procurement standards.

*(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 either 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.*

OSC Interpretation:

- “Financial interest” is the potential for gain or loss to the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization that employs or is about to employ any of these parties as a result of the particular procurement. The prohibited financial interest may arise from ownership of certain financial instruments or investments such as stock, bonds, or real estate, or from a salary, indebtedness, job offer, or similar interest potentially affected by the particular procurement.
- “Financial interest” is defined as any kind, which, in view of all circumstances, is substantial enough that it would, or reasonably could, affect an employee’s judgment with respect to transactions in which the State is a party and the employee has decision-making capacity or authority.
- An “apparent” conflict of interest exists where an actual conflict does not exist, but where a reasonable person with knowledge of the relevant facts would question the impartiality of the employee, officer, or agent participating in the procurement.
- For an example of disciplinary standards, the penalty for a Subrecipient’s employee may be dismissal, and the penalty for a contractor may be termination of the contract.
- For an example of a Conflicts of Interest Policy, please see the OSC policy at <https://www.colorado.gov/pacific/osc/omb-guidance>. This policy also addresses organizational conflicts of interest.

4. Does Subrecipient have a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe? If yes, does Subrecipient have written standards of organizational conflict of interest? See §200.318(c)(2)

§ 200.318 General procurement standards.

*(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.*

5. Does Subrecipient maintain records sufficient to detail the history of the procurement? See §200.318(i)

§ 200.318 General procurement standards.

*(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.*

OSC Interpretation:

- Document steps taken during the procurement process, which is much easier than trying to recall and collect information later for a procurement record.

6. Does Subrecipient understand that the Subrecipient, alone, **MUST** be responsible for the settlement of all contractual and administrative issues arising out of procurements? See §200.318(k)

§ 200.318 General procurement standards.

*(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.*

OSC Interpretation:

- The Subrecipient is singularly responsible for the contracts it enters into; neither the State nor the Federal Awarding agency is responsible.
- If any dispute arises during the Subrecipient's procurement process, the Subrecipient is expected to resolve the issue.

7. Does Subrecipient maintain oversight of the contractor(s) performance per the terms, conditions and specifications of their contracts? See §200.318(b)

§ 200.318 General procurement standards.

(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.

OSC Interpretation:

- *Oversight includes (from the business dictionary) “contract implementation, measurement of work completed, and computation of payments. It also includes monitoring contract relationship, addressing related problems, incorporating necessary changes or modifications in the contract, ensuring both parties meet or exceed each other's expectations, and actively interacting with the contractor to achieve the contract's objective(s). Also called contract administration.”*
- Subrecipient personnel shall identify whose responsibility it is to monitor progress of contractors hired. Subrecipient’s personnel shall inspect contractor’s deliverables before official acceptance of the good/service to ensure fulfillment of contract requirements. Progress reports should be required of the contractor who reports on the agreed-upon milestones.
- Subrecipient should review and confirm all invoicing by the contractor before payment is made.
- Costs included in the invoice **MUST** be reasonable, allowable, and in compliance with the contract’s terms. For additional guidance, see UG Subpart E – Cost Principles **§ 200.400 to 475**.
- Subrecipient should approve any requests for subcontracting by the contractor. This should be agreed upon in the contract before work begins.

8. Is Subrecipient prepared to make technical specifications available to State Agency or Federal Agency for review if asked? See §200.324(a)

§ 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 completed 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.*

OSC Interpretation:

- The UG makes it clear that a Subrecipient **MUST** be prepared to provide specifications, but they will only be shared when the State pass-through entity or Federal Awarding Agency requests to see them.
- It is not required of the Subrecipient to have specifications approved by either the State or Federal Agencies prior to conducting their solicitations.

9. Is Subrecipient prepared to 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, in the following instances? See §200.324(b), if the non-Federal entity's procurement systems are not determined compliant with the standards:

§ 200.324 Federal awarding agency or pass-through entity review.

*(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.*

OSC Interpretation:

- Subrecipient may be required to provide procurement documents to the State or Federal Awarding Agency, upon request, prior to conducting a procurement. This is more common when procurement will exceed \$250,000 AND: is a sole source solicitation; or specifies a brand name; or award is made to an entity in a sealed bid that was not the apparent low bidder; or a contract modification is made that will increase the contract amount over \$250,000.
- Additionally, if the Subrecipient has demonstrated failure to comply with the procurement standards, Subrecipient must be ready to provide procurement documents for review prior to conducting the procurement.

10. Does Subrecipient know it can be exempt from the pre-procurement review in paragraph 200.324(b) if the Federal awarding agency or pass-through entity determines that its procurement systems comply with the following standards? See §200.324(c)

§ 200.324 Federal awarding agency or pass-through entity review.

(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.*

OSC Interpretation:

- If a Subrecipient has received numerous grant awards from the State in the past and has detailed procurement procedures established, the Subrecipient can self-certify in writing that its procurement system meets the requirements of the UG.
- Self-certification means that the Subrecipient has in place policies, procedures, systems, and internal controls that provide reasonable assurance that the Subrecipient meets the requirements for procurement in UG § 200.300 to 345.
- Continuous high dollar funding means a history of high dollar, ongoing significant awards that justify a PTE process be reviewed.
- Subrecipient must obtain certification from each program that the Subreceptient applies for funds.

PURCHASING PROCESS

What needs to be purchased?

Prior to making a new purchase, has the Subrecipient answered the following key questions:

11. Has Subrecipient avoided buying unnecessary or duplicative items? See §200.318(d)

§ 200.318 General procurement standards.

*(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.*

OSC Interpretation:

- Per OMB's FAQ updated September 2015: The above language (200.318(d)) does not require any specific equipment screening procedures.

12. Has Subrecipient considered the option of entering into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services? See §200.318(e)

§ 200.318 General procurement standards.

(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.

OSC Interpretation:

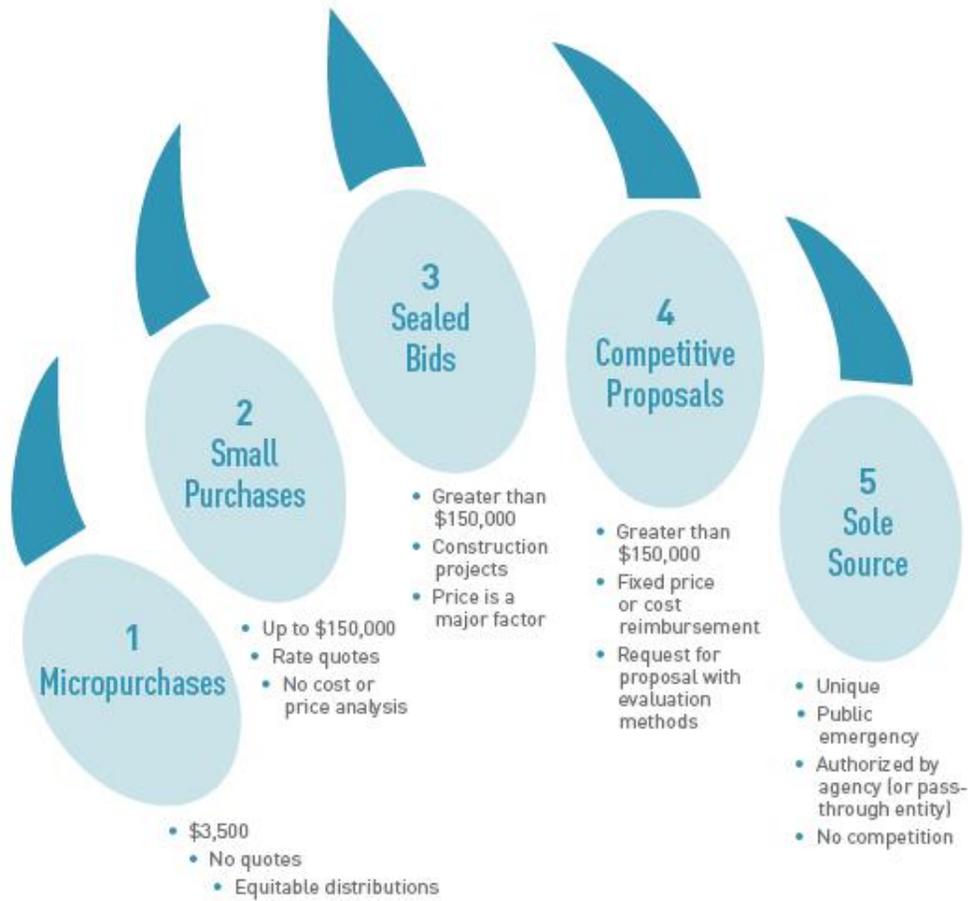
- Prior to soliciting for goods and services, non-federal entities should first consider procuring goods and services from governmental resources or from within the entity's own organization.

13. Has Subrecipient considered using Federal excess and surplus property in lieu of purchasing new equipment and property? See §200.318(f)

§ 200.318 General procurement standards.

(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.

Figure 1. Federal “Bear Claw” showing the five Procurement Methods available to Subrecipients

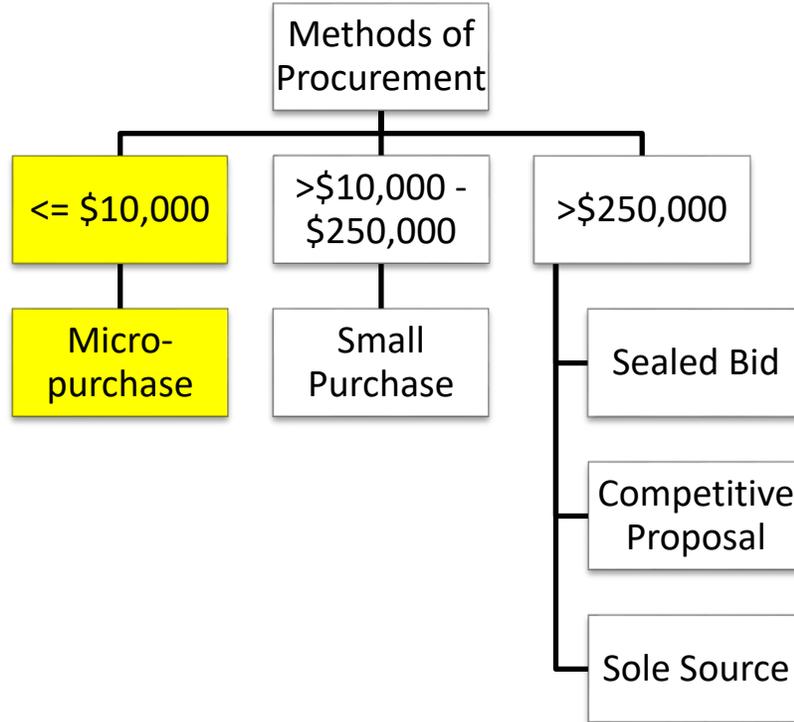


Source: “Frequently Asked Questions for the Office of Management and Budget’s Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards at 2 CFR 200,” published by the Council on Financial Assistance Reform (COFAR).

OSC Interpretation:

- Bear claw applies to any situation where the Subrecipient is entering into a grant or contract.

Figure 2. Micro-purchases (updated to show thresholds approved by M-18-18 on 6/20/18)



When ready to make a purchase within this dollar amount:

Purchases totaling less than or equal to \$10,000: Micro-purchase Method

Micro-purchase method. See §200.320(a)

§ 200.320 Methods of procurement to be followed.

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

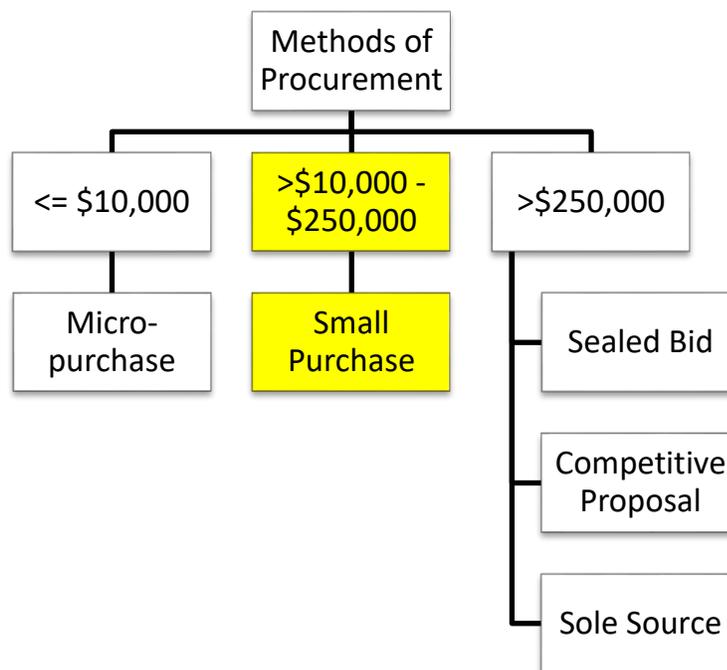
(a) Procurement by micro-purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed \$3,000 (or \$2,000 in the case of acquisitions for construction subject to the Davis-Bacon Act). To the extent practicable, the non-Federal 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. See OSC Interpretation below on dollar amounts.

OSC Interpretation:

- Buy what is needed if the price is reasonable.
- Equitable distribution means to purchase from various vendors. For example, If Subrecipient always purchases from Walmart, Subrecipient needs to purchase from both Walmart and comparable companies, such as Walgreens.

- The initial UG in the Code of Federal Regulations (CFR) includes a \$3,000 threshold for micro-purchases. However, the UG provides that the price can be reviewed and changed due to inflation. This became effective October 2015 when the micro-purchase threshold was raised to \$3,500. Effective June 2018, the micro-purchase threshold was raised to \$10,000 for all recipients.

Figure 3. Small Purchases (Updated to show thresholds approved by M-18-18 on 6/20/18)



When ready to make a purchase within this dollar amount:

>\$10,000 to \$250,000: Small Purchase Method

Small purchase method 200.320(b)

14. Has Subrecipient obtained price or rate quotes from two or more qualified sources? See §200.320(b)

§ 200.320 Methods of procurement to be followed.

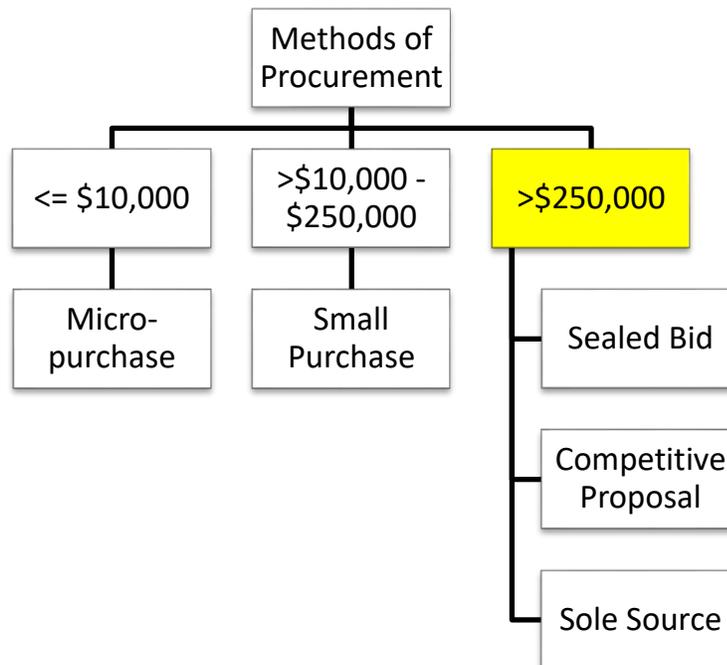
- b. Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If

small purchase procedures are used, price or rate quotations **MUST** be obtained from an adequate number of qualified sources.

OSC Interpretation:

- An adequate number of qualified sources means more than one source.
- Price or rate quotes may be obtained from vendors, phone calls, or internet searches.

Figure 4. Simplified Acquisition Threshold (Updated to show thresholds approved by M-18-18 on 6/20/18)



>\$250,000: Sealed Bid or Competitive Proposal (thresholds approved by M-18-18 on 6/20/18)

For purchases greater than \$250,000 (acquisition threshold), two selection methods exist:

1. Sealed Bid or
2. Competitive Proposal

Prior to selecting a method for any procurement greater than \$250,000, a cost or price analysis **MUST** be done.

Cost or Price Analysis

15. Is Subrecipient aware that a cost or price analysis is required for every procurement action in excess of \$250,000 (including modifications)? See §200.323

§ 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.

§ 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.

§ 200.323 Contract cost and price.

(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.

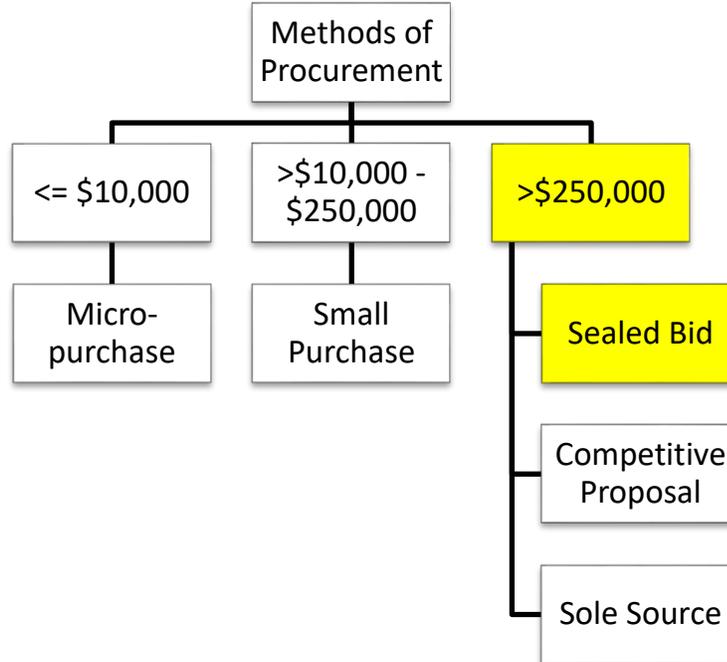
§ 200.323 Contract cost and price.

(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.

§ 200.323 Contract cost and price.

(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting **MUST NOT** be used.

Figure 5. Sealed Bid (Updated to show thresholds approved by M-18-18 on 6/20/18)



Competitive Sealed bid 200.320(c)

§ 200.320 Methods of procurement to be followed.

(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.

16. Does Subrecipient know sealed bids are the preferred method for procuring construction?

§ 200.320 Methods of procurement to be followed.

(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.

OSC Interpretation:

- If the answers to the following four questions are yes, then Subrecipient has a cost plus percentage of cost (CPPC) contract:
 - Will fee be paid based on a predetermined percentage fee rate instead of an identified dollar value?
 - Will the predetermined percentage fee rate be applied to actual future performance costs?
 - Is the contractor's fee entitlement uncertain at the time of contract pricing?
 - Will the contractor's fee entitlement increase as performance costs increase?
- Subrecipients MUST NOT enter into CPPC contracts. This is prohibited by UG **§ 200.323**.
- Subrecipients should have a sealed bid process already in place within their procurement methods which would include locations that Subrecipients would post solicitations (formally advertise) solicitations.

17. How does Subrecipient determine if sealed bidding is feasible? See §200.320(c)(1)(i-iii)

§ 200.320 Methods of procurement to be followed.

(c)(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.

OSC Interpretation:

- The non-federal entity must conduct a pre-procurement assessment to determine if it has sufficiently defined requirements, specifications, or scope to issue a bid. If it has, then a sealed bid process is appropriate. If the non-federal entity needs input from the bidding community to develop the requirements, specifications, or scope, then a sealed bid is not the appropriate method.
- As part of the pre-procurement assessment, the non-federal entity must also ensure the solicitation clearly states the specifications and/or description of what is being purchased; if there is a sufficient pool of two or more responsible bidders to respond that have bid for the sealed bid business; and whether the bid award would result in a firm, fixed price contract.

18. What requirements apply to an invitation for bid? See §200.320(c)(2)(i-v)

§ 200.320 Methods of procurement to be followed.

(c)(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.

OSC Interpretation:

- Subrecipient must follow (or incorporate) the Invitation for Bid (IFB) requirements into their procedures when conducting an IFB.
- Adequate number of suppliers means more than one.

19. NOTE -Per 200.320(c) -sealed bids are the preferred method for procuring construction.

§ 200.320 Methods of procurement to be followed.

(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.

OSC Interpretation:

- As with sealed bids for non-construction procurements, sealed bids are the preferred method as the specifications and scope are defined prior to issuing the sealed bid, and the award is based on the lowest price.
- Subrecipient shall follow (or incorporate) these procedures for construction solicitations.

Bonding requirements

20. When is bonding required? If conducting a sealed bid for construction or facility improvements -bonding is required. See §200.325

OSC Interpretation:

- When a solicitation is needed for construction or for facility improvements, bonding should be a requirement included in the solicitation.

21. What are the bonding requirements? See §200.325

§ 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.

22. Has the State Pass-Through entity or Federal awarding agency made a determination that Subrecipient’s bonding policy and bonding requirements adequately protect the Federal interest?

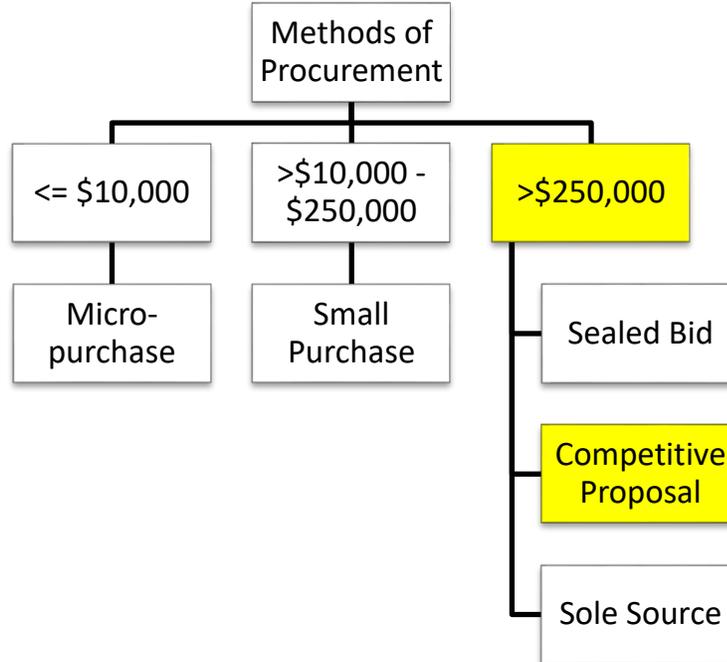
OSC Interpretation:

- If yes, follow the bonding policy and requirements of Subrecipient’s agency.
- If no, then the Subrecipient must follow the requirements in **§ 200.325 included above.**
- Bid Guarantee is a form of security assuring that the bidder will not withdraw a bid within the period specified for acceptance and will execute a written contract and furnish required bonds, including any necessary coinsurance or reinsurance agreements, within the time specified in the bid, unless a longer time is allowed, after receipt of the specified forms. A bid guarantee usually

consists of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder must, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.

- Performance Bond is an obligation, expressed in writing, to pay a fixed and liquidated sum on the happening or nonoccurrence of a specified condition or event. The term "bond" is conditioned on the performance of duties, or other obligations undertaken by the principal obligor in the bond or collateral things to be done by the principal obligor; and indemnity and fidelity bonds or undertakings to indemnify the obligee against loss from conduct of the principal. A performance bond guarantees the owner that the principal will complete the contract according to its terms including price and time.
- Payment bond is a bond conditioned upon the payment by the principal of money to persons under contract.

Figure 6. Competitive Proposal (Updated to show thresholds approved by M-18-18 on 6/20/18)



Competitive proposal 200.320(d)

§ 200.320 Methods of procurement to be followed.

(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.

OSC Interpretation:

- A competitive proposal method is typically utilized when the specifications and /or scope are difficult to define without the input of the contracting community.

23. What are the requirements for a Competitive Proposal? See §200.320(d)(1-5)

§ 200.320 Methods of procurement to be followed.

(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*

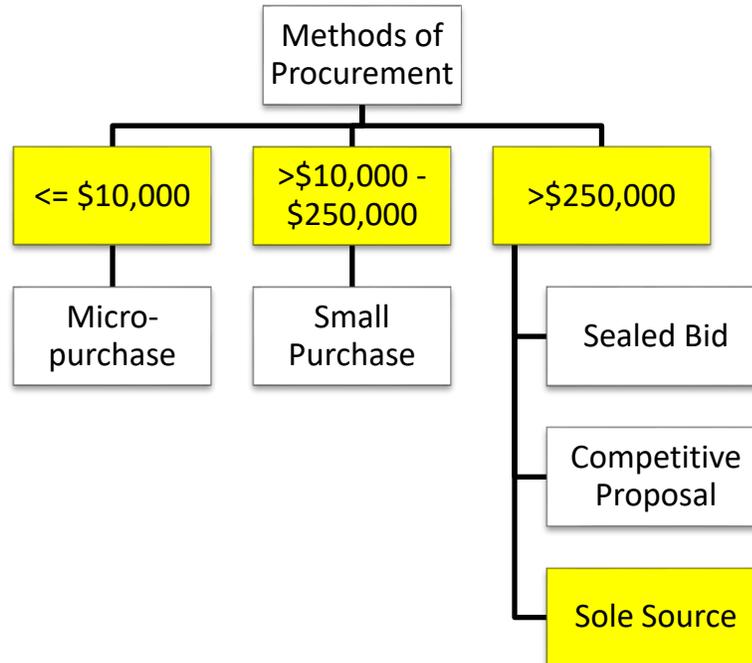
(5) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable 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.

OSC Interpretation:

- Competitive proposals are normally conducted with more than one source submitting an offer;
- Evaluation criteria must be developed and documented prior to issuance of the competitive proposals.
- Either a fixed price or a cost-reimbursement type of contract is awarded.

When the above methods don't seem to apply?: Non-competitive/Sole Source

Figure 7. Sole Source (Updated to show thresholds approved by M-18-18 on 6/20/18)



Noncompetitive Proposal/Sole Source See §200.320(f)

24. What circumstances are appropriate to use a sole source?

§ 200.320 Methods of procurement to be followed.

(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.*

OSC Interpretation:

- Subrecipients MUST seek pre-approval from the State prior to making a sole source selection.

Competition: Drafting specifications and/or Scope of Work

25. What are the specifications or Scope of Work for the purchase?

OSC Interpretation:

- Each project has its own set of specifications or scope of work. Subrecipients should not expect one template to cover all their needs.

26. Does it matter who drafts the specifications or scope of work? See §200.319(a)

§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.*

OSC Interpretation:

- Full and open competition means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.
- The Subrecipient cannot place unduly restrictive requirements such as those listed in points 1 to 7 in **§ 200.319**.
- If a contractor writes or participates in the creation of requirements for ANY method of procurement, including but not limited to specifications, statements of work, system requirements, that contractor **MUST** be excluded from competing for the procurement.

Creating a solicitation:

27. What information does Subrecipient need to include in a solicitation?

OSC Interpretation:

- The information needed is: statement of need, specs/SOW (if IFB) or identification of requirements and expected outcomes (RFP), bid opening date/time, conflict-of-interest, evaluation approach, payment methodology (firm, fixed price or cost reimbursement), terms and conditions, protest/appeals.

28. Has the Subrecipient included all necessary affirmative steps to include minority businesses, women's business enterprises and labor surplus area firms? See §200.321(a) If yes, what specific action are established in the affirmative steps? See §200.321(b)(1-6)

§ 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.

OSC Interpretation:

- Subrecipient MUST take the affirmative steps 1 to 5 included in § 200.321 to assure that minority businesses, women’s business enterprises, and labor surplus area firms are used when possible.
- The Subrecipient may find the following resources helpful in complying with these steps:
 - [Colorado Small Business Development Center Network](#)
 - [Colorado Minority Business Office](#)
 - [Colorado Procurement Technical Assistance Center \(PTAC\)](#)

Award of Contract

29. Is the Subrecipient making awards to only responsible contractors possessing the ability to perform the work successfully under the terms of the agreement? See §200.318(h)

§ 200.318 General procurement standards.

*(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.*

30. Has the Subrecipient checked System for Award Management (SAMS) to confirm the contractor is not identified as a party ineligible to receive federal funds?

OSC Interpretation:

- Subrecipient must check www.sam.gov prior to executing a contract.

Type of Contract

31. What type of contract is the Subrecipient awarding?

OSC Interpretation:

- Non-federal entity should determine the best contracting and payment methodology prior to issuing a competitive solicitation. Types of contracts include time and materials, firm fixed price, and cost reimbursement. These are explained below.

Time and Materials Contract

Time and materials contract can only be used if a determination has been made that no other contract is suitable and **MUST** have a ceiling amount that if the contractor exceeds, it will be at their own risk. See §200.318(j)

§ 200.318 General procurement standards.

(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.*

OSC Interpretation:

- The determination made by the Subrecipient to use a time and materials contract should be documented and made part of the contract file.

Firm fixed price

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. See §200.320(c)(iv)

§200.320 Methods of procurement to be followed.

*(2) (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*

Cost Reimbursement

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. See §200.320(d)

§200.320 Methods of procurement to be followed.

(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.*

Clauses needed in Contract

32. What specific clauses are Subrecipients required to include when writing a contract?

If the Subrecipient is a local government of the State, Procurement of Recovered Materials is required of the local government and its contractors: See §200.322

§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.*

OSC Interpretation:

- Only Political Subdivisions need to address this requirement of the UG.

Applicable provisions described in Appendix II to Part 200 See §200.326

§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.*

OSC Interpretation:

Contracts in excess of \$250,000 **MUST** address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

- Contracts >\$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.
- Equal Employment Opportunity (all federally assisted construction contracts).
- Davis-Bacon Act (prime construction contract >\$2,000).
- Contract Work Hours and Safety Standards (>\$100,000 where mechanics or laborers).
- Rights to Inventions Made Under a Contract or Agreement.
- Clean Air Act and Federal Water Pollution Control Act (>\$150,000).
- Byrd Anti-Lobbying Amendment (>\$100,000).
- Debarment and Suspension.

POST-AWARD PROCESS

After an award is made:

33. What does the Subrecipient need to know once the contract is in place and active?

The Subrecipient should maintain oversight of the contractor(s) performance per the terms, conditions and specifications of their contracts. See §200.318(b)

§200.318 General procurement standards.

*(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.*

OSC Interpretation:

- *Subrecipient needs to actively manage the contract and oversee the contractor's performance.*

Contract modifications:

34. Subrecipient **MUST** perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. See §200.323

§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.*

OSC Interpretation:

- In a competitive situation (IFB or RFP) the prices are bid competitively.
- In non-competitive situations where a modification is causing the value of the contract to exceed \$250,000, Subrecipient should keep documentation showing that prices charged are fair and reasonable. Internet searches can assist in providing this information.

35. For every modification to a contract, has the Subrecipient checked SAM to make sure the contractor is not identified as a party ineligible to receive federal funds?

OSC Interpretation:

- Subrecipient must check www.sam.gov prior to executing a contract amendment.

Non-Compliance Consequences

36. What if Subrecipients don't comply with the UG?

§200.338 Remedies for noncompliance.

If a non-Federal entity fails to comply with Federal statutes, regulations or the terms and conditions of a Federal award, the Federal awarding agency or pass-through entity may impose additional conditions, as described in §200.207 Specific conditions. If the Federal awarding agency or pass-through entity determines that noncompliance cannot be remedied by imposing additional conditions, the Federal awarding agency or pass-through entity may take one or more of the following actions, as appropriate in the circumstances:

- (a) Temporarily withhold cash payments pending correction of the deficiency by the non-Federal entity or more severe enforcement action by the Federal awarding agency or pass-through entity.*
- (b) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance.*
- (c) Wholly or partly suspend or terminate the Federal award.*
- (d) Initiate suspension or debarment proceedings as authorized under 2 CFR part 180 and Federal awarding agency regulations (or in the case of a pass-through entity, recommend such a proceeding be initiated by a Federal awarding agency).*
- (e) Withhold further Federal awards for the project or program.*
- (f) Take other remedies that may be legally available.*

OSC Interpretation:

- Subrecipient's failure to comply with the methods of procurement outlined in the UG can result in penalties ranging from the withholding of cash payments for work performed, to disallowing portion(s) of work performed, to suspension and/or disbarment of the Subrecipient from ever receiving federal funds again.