

**U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**  
Office of Community Planning and Development  
Community Development Block Grant Program

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# BUYING RIGHT

## **CDBG–DR and Procurement: A Guide to Recovery**

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September, 2017



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## **CDBG-DR and Procurement:**

### **A Guide to Recovery**

U.S. Department of Housing and Urban Development  
Office of Community Planning and Development  
Community Development Block Grant Program

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## **Chapter 1: CDBG-DR Procurement Toolkit Introduction**

### **1.1 Background**

Community Development Block Grant disaster recovery (“CDBG-DR”) grantees and subrecipients procuring goods and services with their grant funds must ensure that they are following all program procurement statutory and regulatory requirements. The urgency in post-disaster recoveries often leads state and local officials to work to quickly restore infrastructure, public services, and help private companies and citizens make repairs. However, grantees and subrecipients that do not follow all CDBG program requirements may be forced to repay Federal funds.

This HUD Toolkit provides guidance to CDBG-DR grantees and subrecipients on how to comply with these requirements while also moving as quickly as possible to recover from a disaster.

### **1.2 Federal Resources**

The Community Development Block Grant program is authorized under Title I of the Housing and Community Development Act of 1974. Program regulations are codified at 24 CFR Part 570.

When a disaster occurs, Congress may appropriate supplemental CDBG-DR grant funds to be awarded to States and local governments to carry out long-term recovery. Congressional appropriations for disaster recovery funds are not guaranteed and can come either early or later in the recovery effort. When Congress appropriates CDBG-DR funding, it usually also grants HUD the authority to issue statutory and regulatory waivers and alternative requirements. These are then published in a Federal Register Notice. HUD may also provide guidance on the CDBG-DR program through CPD Notices.

Grantees and subrecipients should be familiar with all CDBG statutory and regulatory requirements, including any waivers and alternative requirements that HUD may issue in the Federal Register.

The CDBG-DR funds supplement other federal recovery programs including programs administered by the Federal Emergency Management Agency (FEMA), the Small Business Administration (SBA) and the U.S. Army Corps of Engineers (USACE).

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The website <https://www.hudexchange.info/cdbg-dr/cdbg-dr-laws-regulations-and-federal-register-notice> contains further links to the laws, regulations and Federal Register notices affecting CDBG-DR.

### 1.3 Procurement

**Deploying CDBG-DR Resources.** For many state and local governments that are CDBG-DR Grantees, the infusion of hundreds of thousands, millions or even hundreds of millions of dollars in disaster recovery funds – and the work associated with recovery – can be overwhelming. In these situations, there is an urgency to use funds to catalyze physical, natural and economic recovery. As fast as communities want to deploy resources to procure necessary goods and services, it is important to know and understand what laws and regulations apply to procurement.

**Application of Federal Regulations to States.** Local Government Grantees must follow the procurement regulations set forth in 2 CFR 200.318 – 200.326. State Grantees, however, must demonstrate compliance by establishing policies and procedures, and may do this by following their own State laws and regulations, or adopting the federal regulations either in whole or in part. Whatever set of requirements States choose to implement in their policies and procedures, they must ensure that the procurement process involves fair and open competition. This difference, between State and Local Grantees, must be emphasized. This Toolkit refers to the federal regulations, principally in 2 CFR Part 200. Therefore, this Toolkit mostly focuses on local governments and those State Grantees that choose to follow the federal regulations.

**Throughout this toolkit, reference to Grantees shall mean Local Government Grantees and those States that have chosen to adopt the federal regulations.**

**Importance of Procurement.** If CDBG-DR funds are available to help your state or community address disaster recovery needs, it is critically important to plan procurement for goods and services with the following high-level requirements in mind:

- At minimum, grantees must understand and adhere to the current regulations and associated advisories governing procurement when utilizing CDBG-DR funds.

### RECENT EVENTS

Congress has appropriated tens of billions of dollars in CDBG-DR funds since the World Trade Center disaster in 2001, as follows:

- Louisiana Floods and Other 2016 Events
- Hurricane Joaquin, Hurricane Patricia, and Other Flood Events Occurring 2015
- Hurricane Sandy and Other Disasters Occurring in 2011-2013
- Multiple Disasters – 2011
- Severe Storms and Flooding – March-May 2010
- Multiple Disasters-2008
- Hurricanes Katrina, Rita, Wilma – 2005
- Multiple Disasters – September 2003-September 2004
- World Trade Center- 2001

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- When state and local procurement requirements exceed the minimum provisions for CDBG-DR procurement – the grantee should comply with the more stringent state or local procurement standards.
- The grantee should understand any additional requirements established through the appropriations act associated with each grant of CDBG-DR funds.

Appropriations acts funding CDBG-DR grants often provide HUD with broad powers to waive certain regulations that may impede recovery efforts. In other cases, such as with PL 113-2 for Sandy-related recovery efforts and subsequent appropriations acts, additional – unwaivable – procurement requirements were enacted. For example, PL 113-2 included the following requirements relating to procurement:

*Provided further,* That as a condition of making any grant, the Secretary shall certify in advance that such grantee has in place proficient financial controls and procurement processes and has established adequate procedures to prevent any duplication of benefits as defined by section 312 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5155), to ensure timely expenditure of funds, to maintain comprehensive websites regarding all disaster recovery activities assisted with these funds, and to detect and prevent waste, fraud, and abuse of funds:

*Provided further,* That the Secretary shall provide grantees with technical assistance on contracting and procurement processes and shall require grantees, in contracting or procuring these funds, to incorporate performance requirements and penalties into any such contracts or agreements: *Provided further,* That the Secretary shall require grantees to maintain on a public website information accounting for how all grant funds are used, including details of all contracts and ongoing procurement processes:

While this Public Law stresses that procurement requirements must be met and requires an enhanced transparency of the process and results through a public website, it also provided for additional resources via technical assistance to support procurement. Over the years, HUD has provided guidance on procurement through webinars, memoranda, toolkits and technical assistance on a broad range of issues associated with the use CDBG-DR funds for disaster recovery.

Notice that for HUD to be able to certify to the proficiency of a Grantee's financial controls and procurement processes, the Grantee must demonstrate to HUD that its controls and processes are in fact proficient. This means that the responsibility for having proficient financial controls and procurement processes ultimately lies with the Grantee.

**Updates that Streamline and Consolidate.** In recent years, Federal administrative requirements and cost principals governing grants – including procurement requirements– was consolidated and codified at 2 CFR Part 200. As a result, CDBG-DR guidance issued prior to



the issuance of Part 200 reference regulations and OMB circulars that have been superseded by Part 200. The vast majority of the requirements of prior regulations and circulars were fully incorporated into Part 200 – but a few important changes were made.

## **1.4 How to Use This Toolkit**

This Toolkit reviews procurement regulations, processes, and documentation and organized into four sections:

- Section I offers a basic introduction to procurement, and includes the following chapters:

Chapter 1: Introduction

Chapter 2: Procurement Basics and Specific Methods

- Section II discusses the basic procurement issues in the following chapters:

Chapter 3: Pricing, the Contract, Executing and Making Payments

Chapter 4: Prohibited Practices

Chapter 5: Procurement Road Map

- Section III provides detailed information on specific procurement methods in the following chapters:

Chapter 6: Micro Purchases

Chapter 7: Small Purchase

Chapter 8: Sealed Bids

Chapter 9: Competitive Bids

Chapter 10: Non-Competitive Proposals

- Section IV contains an appendix, which lists an annotated version of Part 200 of the regulations, offering plain language explanations and cross-referencing prior regulations that Part 200 superseded.

Appendix: 2 CFR Part 200: Text and Guidance

Grantees may read this Toolkit from front to back, but the organization of the document is meant to help readers find those sections that are most relevant and valuable to their procurement issues. At a minimum, readers should read the introductions (Chapters 1-2), the basic elements of procurement (Chapters 3-5) and the procurement method(s) chapter(s) that pertain to their specific situation and become familiar with contract administration and documentation (Chapters 6-10).

Finally, this Toolkit provides resources to assist with procurement, but it does not substitute for the regulations. The Appendix gives Grantees some additional information, but when in doubt, they should consult the regulations directly.

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#### 1.5 Quick Resource List

HUD has many existing resources in place to help understand CDBG-DR laws, regulations and practices. Below is a quick listing of resources that are accessible, relevant, and valuable

##### PowerPoint Presentations and Webinar Slides

CDBG-DR Resources	URL links to CDBG-DR Resources
<b>Framework for CDBG funds in disaster relief efforts</b>	<a href="https://portal.hud.gov/hudportal/documents/huddoc?id=cdbg_training_2_2_13.pdf">https://portal.hud.gov/hudportal/documents/huddoc?id=cdbg_training_2_2_13.pdf</a>
<b>CDBG-DR Program Overview</b>	<a href="https://www.hudexchange.info/course-content/2016-overview-of-cdbg-dr-webinar/2016-Overview-CDBG-DR-Webinar-Slides-2016-03-15.pdf">https://www.hudexchange.info/course-content/2016-overview-of-cdbg-dr-webinar/2016-Overview-CDBG-DR-Webinar-Slides-2016-03-15.pdf</a>
<b>CDBG-DR Procurement Requirements</b>	<a href="https://www.hudexchange.info/onecpd/assets/File/2015-CDBG-DR-Training-Procurement-Requirements.pdf">https://www.hudexchange.info/onecpd/assets/File/2015-CDBG-DR-Training-Procurement-Requirements.pdf</a>
<b>CDBG-DR Subrecipient and Recordkeeping</b>	<a href="https://www.hudexchange.info/course-content/2016-cdbg-dr-subrecipient-management-and-recordkeeping-webinar/2016-CDBG-DR-Subrecipient-Management-and-Recordkeeping-Webinar-Slides-2016-05-16.pdf">https://www.hudexchange.info/course-content/2016-cdbg-dr-subrecipient-management-and-recordkeeping-webinar/2016-CDBG-DR-Subrecipient-Management-and-Recordkeeping-Webinar-Slides-2016-05-16.pdf</a>
<b>Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards</b>	<a href="https://www.hudexchange.info/resource/4444/notice-sd201501-transition-to-2-cfr-part-200-uniform-administrative-requirements-cost-principles-and-audit-requirements-for-federal-awards-final-guidance/">https://www.hudexchange.info/resource/4444/notice-sd201501-transition-to-2-cfr-part-200-uniform-administrative-requirements-cost-principles-and-audit-requirements-for-federal-awards-final-guidance/</a>
<b>Additional Transition and Implementation Guidance on 2 CFR 200</b>	<a href="https://www.hudexchange.info/resource/4990/notice-cpd-16-04-additional-transition-and-implementation-guidance-for-recipients-of-community-planning-and-development-cpd-funds-for-2-cfr-part-200-uniform-administrative-requirements-cost-principles-and-audit-requirements-for-federal-award/">https://www.hudexchange.info/resource/4990/notice-cpd-16-04-additional-transition-and-implementation-guidance-for-recipients-of-community-planning-and-development-cpd-funds-for-2-cfr-part-200-uniform-administrative-requirements-cost-principles-and-audit-requirements-for-federal-award/</a>
<b>Federal Register regarding various regulations that have changed for HUD programs</b>	<a href="https://www.gpo.gov/fdsys/pkg/FR-2015-12-07/pdf/2015-29692.pdf">https://www.gpo.gov/fdsys/pkg/FR-2015-12-07/pdf/2015-29692.pdf</a>
<b>Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards, Final Rule</b>	<a href="https://www.gpo.gov/fdsys/pkg/FR-2013-12-26/pdf/2013-30465.pdf">https://www.gpo.gov/fdsys/pkg/FR-2013-12-26/pdf/2013-30465.pdf</a>

## **Chapter 2: Procurement Basics and Specific Methods**

This Toolkit is based upon federal regulations in 2 CFR Part 200. The Appendix lists these regulations in detail, and offers “plain English” interpretations to help clarify the technical language for readers. While the Toolkit uses the federal regulations as its base, the information contained herein is written in a certain sequence and with highlighting to express the concepts clearly and to guide Grantees from pre-award through post-award, and reporting and administration.

So, before buying goods and services with CDBG-DR funds to assist in recovery efforts, Grantees should keep the following in mind:

- Uses of funds must respond to need

Grantees must first identify and document a need for goods and services before undertaking procurement. CDBG-DR Grantees need to make clear the connection between disaster relief, recovery and related investments in housing, infrastructure and those made to businesses in support of the local economy.

- Price and Cost Analysis

Grantees should also conduct a price and/or cost analysis to make sure that costs are reasonable and necessary. States must follow their own guidelines that ensure full and open competition, or they may follow the Federal guidelines in 2 CFR Part 200.

- Written system of contract administration

Grantees must have a system of contract administration in place, which will be based upon the management of federal funds, but may reflect additional state and local laws and regulations.

- Is there a list of prequalified contractors/vendors?

Preferably, Grantees have created these lists prior to any CDBG-DR appropriation to accelerate procurement. The Grantee should open the list again when the Grantee has notice of CDBG-DR appropriations to allow additional qualified vendors to join the list. Even with such a list, the non-Federal entity must accept proposals from qualified bidders not listed.

- Disaster Recovery Reporting

Grantees report CDBG-DR funds through the Disaster Recovery Grant Reporting (DRGR) system, which is different from the Information Disbursement Information System (IDIS) used to manage regular CDBG funds. HUD grantees should have staff trained on DRGR prior to managing CDBG-DR funds.

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- Federal Appropriations

The Federal government awards CDBG-DR funds through congressional appropriations. In addition to setting award amounts, those appropriations impose additional requirements or conditions on awardees using CDBG-DR funds. Grantees and subrecipients receiving CDBG-DR funds should review and understand the relevant appropriations to make sure they understand any additional requirements, including any procurement-related waivers or alternative requirements established by HUD in a Federal Register Notice.

## 2.1 State Grantees of CDBG-DR funds

CDBG disaster recovery funds are subject to the State CDBG regulations unless HUD provides a waiver or alternative requirement by Federal Register Notice. The State CDBG regulations on procurement are found at 24 CFR Part 570.489(g).

**§570.489(g) Procurement.** When procuring property or services to be paid for in whole or in part with CDBG funds, the state shall follow its procurement policies and procedures. The state shall establish requirements for procurement policies and procedures for units of general local government, based on full and open competition. Methods of procurement (e.g., small purchase, sealed bids/formal advertising, competitive proposals, and noncompetitive proposals) and their applicability shall be specified by the state. Cost plus a percentage of cost and percentage of construction costs methods of contracting shall not be used. The policies and procedures shall also include standards of conduct governing employees engaged in the award or administration of contracts. (Other conflicts of interest are covered by § 570.489(h).) The state shall ensure that all purchase orders and contracts include any clauses required by Federal statutes, executive orders and implementing regulations. The State shall make subrecipient and contractor determinations in accordance with the standards in 2 CFR 200.330.

This is fundamentally different from the requirements placed upon local governments that are CDBG-DR Grantees such as County or local governments, which must follow 2 CFR 200.318-200.326.

Because states are required to establish policies and procedures that are based on full and open competition, for themselves and for their subgrantees, they may demonstrate compliance with this requirement through one of the following options, as documented in their policies and procedures:

1. Follow the existing procurement requirements of their state
2. Adopt some but not all procurement requirements in 2 CFR 200.318-200.326, effectively creating a new set of procurement criteria which combine State and Federal regulations

3. Adopt 2 CFR 200.317 to apply all of the procurement requirements in 2 CFR 200.318-200.326 to itself and its subgrantees.

As stated above, the State should review the relevant Federal Register Notice to determine which procurement requirements they must follow and include it within their policies and procedures.

This Toolkit primarily focuses on the procurement requirements in 2 CFR Part 200. It does not address individual State procurement laws, and all their variations, and includes the following reminder throughout:

**REMINDER:** States may choose to adopt 2 CFR Part 200 or to follow their own State laws and regulations regarding procurement. This Toolkit is based upon 2 CFR Part 200 and related Federal regulations. The Toolkit thus applies to Grantees (who must use 2 CFR Part 200) and States which have adopted these federal regulations.

## **2.2 Understanding the Basics**

Chapters 3 through 5 cover the basics of procurement.

- Chapter 3 discusses fair and reasonable practices, providing details on themes of cost and price analysis, as well as contract documentation.
- Chapter 4 presents “prohibited practices.” Here, the Toolkit concentrates on areas of practice where past Grantees have often had trouble.
- Chapter 5 offers a road map and where Grantees sometimes detour.

The Toolkit uses text boxes and color highlights to emphasize certain themes for readers.

## **2.3 Procurement Methods**

Chapters 6 through 10 discuss the individual procurement methods to be used with CDBG-DR:

- Chapter 6 - Micro Purchases
- Chapter 7 - Small Purchase
- Chapter 8 - Sealed Bids
- Chapter 9 - Competitive Bids
- Chapter 10 - Non-Competitive Proposals

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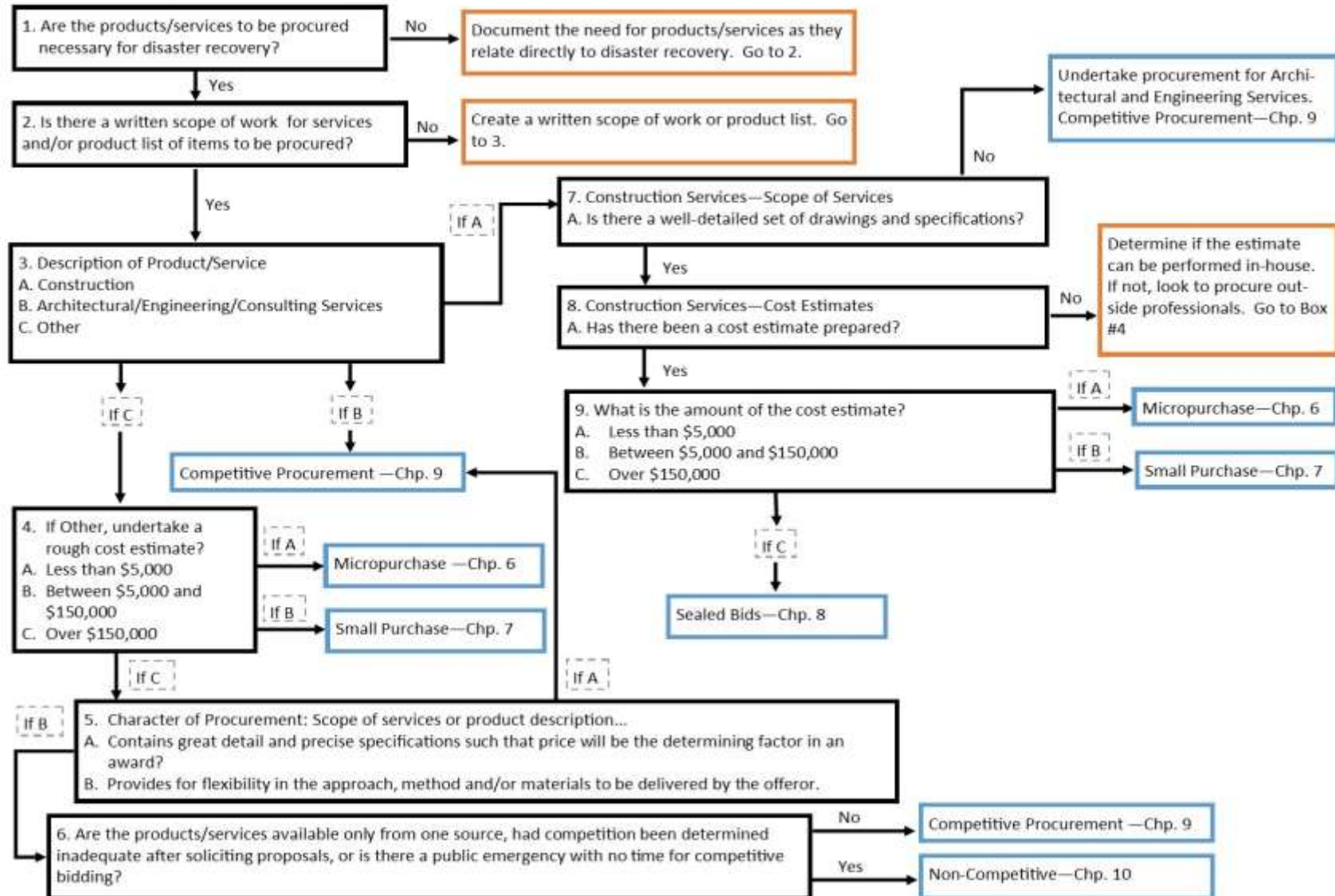
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The following “scenario planning” diagram offers a way of thinking about the different procurement methods and the questions to ask in order to sort through procurement options. The diagram is meant to guide, and not to dictate. Hopefully, as readers consult the below diagram, they will then be able to refer to the particular chapter on the specific procurement method.

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#### METHODS OF PROCUREMENT—SCENARIO PLANNING



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In any given situation, a Grantee may find itself using more than one of these methods. Therefore, it is important to become familiar with all of them. Each chapter in the section on procurement will follow the same outline:

- Definition and explanation
- Process
- Pre-Award Cost/Price Analysis
- Post-Award Issues
- Documentation

The following page also contains a table comparing each of the methods of procurement, as a reference tool. The table can be used in conjunction with the above diagram to help guide readers to the relevant chapters in this Toolkit.



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**METHODS OF PROCUREMENT**

<b>Procurement Type</b>	<b>Cost Methodology Reasonableness</b>	<b>Contract Type</b>	<b>Solicitation Method</b>	<b>Applications</b>	<b>Dollar Thresholds if applicable</b>
Micro Purchases	<ul style="list-style-type: none"> <li>• Price Analysis</li> </ul>	<ul style="list-style-type: none"> <li>• Fixed Order</li> <li>• Fixed Price</li> </ul>	<ul style="list-style-type: none"> <li>• No solicitation required</li> </ul>	<ul style="list-style-type: none"> <li>• Supplies</li> <li>• Produced items</li> <li>• Single-task service</li> </ul>	<ul style="list-style-type: none"> <li>• Under \$2,000 for construction</li> <li>• Under \$3,500 for all other purchases</li> </ul>
Small Purchase	<ul style="list-style-type: none"> <li>• Price Analysis</li> </ul>	<ul style="list-style-type: none"> <li>• Fixed Order</li> <li>• Fixed Price</li> </ul>	<ul style="list-style-type: none"> <li>• Quotations</li> <li>• Submitted Bids</li> </ul>	<ul style="list-style-type: none"> <li>• Produced Items</li> <li>• Single-task Service</li> <li>• Supplies</li> </ul>	<ul style="list-style-type: none"> <li>• \$150,000 or less for produced items</li> <li>• \$150,000 or less for non-construction services</li> </ul>
Sealed Bid Formal Advertising	<ul style="list-style-type: none"> <li>• Price Analysis</li> <li>• Cost Analysis</li> </ul>	<ul style="list-style-type: none"> <li>• Fixed Price</li> </ul>	<ul style="list-style-type: none"> <li>• Submitted Bids</li> </ul>	<ul style="list-style-type: none"> <li>• Construction Items</li> <li>• Produced or Designed Items</li> </ul>	<ul style="list-style-type: none"> <li>• All construction contracts-including less than \$150,000</li> <li>• Produced or designed items over \$150,000</li> </ul>
Competitive Proposals	<ul style="list-style-type: none"> <li>• Price Analysis</li> <li>• Cost Analysis</li> </ul>	<ul style="list-style-type: none"> <li>• Cost Reimbursement</li> <li>• Fixed Price</li> <li>• Time &amp; Materials</li> </ul>	<ul style="list-style-type: none"> <li>• Submitted Proposals</li> </ul>	<ul style="list-style-type: none"> <li>• Professional Services</li> <li>• Multi-Task Services</li> <li>• Designed Items</li> </ul>	<ul style="list-style-type: none"> <li>• Professional Services and/or; Multi-task Services over \$150,000</li> <li>• Designed Items over \$150,000 when Sealed Bid is not appropriate</li> </ul>
Non-competitive Proposals	<ul style="list-style-type: none"> <li>• Cost Analysis</li> </ul>	<ul style="list-style-type: none"> <li>• Cost Reimbursement</li> <li>• Fixed Price</li> <li>• Time &amp; Materials</li> </ul>	<ul style="list-style-type: none"> <li>• Submitted Proposals</li> </ul>	<ul style="list-style-type: none"> <li>• Produced Items</li> <li>• Single-task Service</li> <li>• Professional Services</li> <li>• Multi-task Services</li> <li>• Designed Item</li> </ul>	<ul style="list-style-type: none"> <li>• No particular threshold, but may only be used when other methods are not feasible</li> </ul>

## **Chapter 3: Pricing the Contract, Executing and Making Payments**

One of the key requirements for ensuring CDBG funds are utilized appropriately is to follow procedures that result in the purchase of goods and services at a fair and reasonable price. Failure to complete cost and price analysis and failure to document cost and price analysis are the most common audit findings of CDBG-DR grantees. This is true for small purchases like hand tools and for large construction contracts. Keeping this principal in mind and following written procurement procedures will ensure that federal funds are used appropriately and minimize questions after the purchase. However, the effort put into cost and price analysis will vary based on the size of the purchase and the method of procurement - the larger the purchase, typically the more up front analysis needs to be undertaken. The regulations governing Cost and Price Analysis are found at 2 CFR 200.323.

### **3.1 State Procurement**

The rules are different for states receiving CDBG-DR funds directly from HUD, compared with the rules for local governments receiving their funds directly from HUD; however, the overarching principals of ensuring full and open competition remain the same. States must follow the same procedures they use for other procurements in a written Procurement Policy. States must also establish procurement policies and procedures for their local governments and ensure their compliance. In addition, if a State is utilizing its existing procurement policies, it must ensure that all procurements follow those procedures.

At a minimum, State procurement policies and procedures must include these principles: (see 24 CFR 570.489(g) and 24 CFR 570.489(h):

- Ensure open and full competition;
- Not utilize cost plus a percentage of cost method of contracting;
- Not utilize a percentage of construction costs methods of contracting;
- Include any clauses required by Federal statutes, Executive orders, and implementing regulations;
- Include standards of conduct for employees;
- Prohibit conflicts of interest;
- Obtain certification from any transaction participant that neither it nor its principals are currently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation.

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The remaining part of this chapter addresses the rules governing grantees receiving their CDBG-DR funds directly from HUD or for local governments and subgrantees receiving their funds from a state grantee that has established policies and procedures implementing 2 CFR Part 200 procurement standards.

### **3.2 Local Government Procurement**

Local government grantees receiving CDBG-DR funds directly from HUD must follow the requirement detailed in 2 CFR Part 200 which include developing and following written procurement policies and procedures which meet applicable state or local laws and regulations.

**REMINDER:** States may choose to adopt 2 CFR Part 200 or to follow their own State laws and regulations regarding procurement. This Toolkit is based upon 2 CFR Part 200 and related Federal regulations. The Toolkit thus applies to Local Grantees (who must use 2 CFR Part 200) and States which have adopted these federal regulations.

### **3.3 Contract Administration**

When considering any procurement, the grantee should keep in mind that using public funds subjects the procurement to added scrutiny. Purchases must be made using an effective, efficient and fair process that is documented from the identification of the need, through final payment for the goods or services. Whether purchasing occasional office supplies or contracting for large construction projects, the requirements governing the purchasing process are designed to ensure that grantees:

- Follow a full and open competitive process in securing those products or services.
- Properly document purchasing activities and decisions.
- Observe the special rules for particular kinds of purchases (micro-purchases, small purchases, competitive sealed bids, competitive proposals, and sole source procurements)

In addition to price, the grantee must consider contractor responsibility, as with all methods of procurement. That is, contractors must have the ability to perform successfully under the terms and conditions of the proposed procurement. Consideration should be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

### **3.4 Cost/Price Analysis**

The following information is provided from the HUD Guide [Quick Analysis to Cost and Price Analysis for HUD Grantees and Funding Recipients](#) and updated to reflect the changes found in

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2 CFR Part 200. Cost or Price Analysis is required when procuring goods or services with federal funds in excess of the Simplified Acquisition Threshold, including contract modifications. An independent cost estimate serves as a yardstick for evaluating the reasonableness of the contractor's proposed costs or prices. An independent cost analysis consists of evaluating the separate elements (for example, labor, materials, etc.) that make up a contractor's total cost proposal to determine whether they are allowable, directly related to the requirement, and reasonable.

- **Price Analysis** – Price analysis is essentially price comparison. It is the evaluation of a proposed price (i.e., total sum) without analyzing any of the separate cost elements.
- **Cost Analysis** - Cost analysis is the evaluation of the separate elements (e.g., labor, materials, profit, etc.) that make up a contractor's total cost proposal or price to determine if they are allowable, directly related to the requirements and ultimately, reasonable. Cost Analysis should apply to both new contracts and contract modifications or change orders.

The basic document in the grantee's efforts to evaluate cost and price is an "independent analysis" based on the procedures described below. The "independent analysis" can be done by grantee staff, by third party consultants, or by examination of existing price lists and product catalogs, but it is not based on bids received. The analysis is done prior to receipt of bids or review of proposals. This is the area where most findings have occurred historically, because the analysis was not independent or it was not documented prior to receipt of bids or proposals.

### **3.5 Types of Procurement**

While the method and degree of analysis depends on the facts surrounding the particular procurement, the following illustrates some of the cost and price analyses that may be performed in certain procurement situations.

- **Micro Purchases** – Micro purchases require simple price analysis prior to receiving bids or proposals. They do not require a cost analysis.
- **Small Purchases** – For routine commercial purchases, comparing price or rate quotes obtained from an adequate number of vendors is a sufficient form of price analysis. If the Small Purchase is for professional or technical services, or the grantee needs to evaluate factors other than price, then a limited cost analysis would be appropriate. In either case, the grantee should review the proposed prices from offerors to prices paid for the same or similar services. Catalog or market prices of products sold to the general public can suffice for cost estimates for equipment and supply purchases.
- **Sealed Bid** – Formal advertising for the purchase of goods or services is the preferred method for the purchase of equipment and construction services. However, the grantee should always prepare their own cost estimate and compare it to the low competitive bid

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received. If they are significantly different, the grantee will need to evaluate its initial estimate, compare it to the bids received, and identify the appropriate price.

- Competitive Proposals –This method is typically used to contract for professional consulting, architectural or engineering services. To determine the reasonableness of proposed costs, the grantee will need to obtain cost breakdowns showing all the elements of the scope of work and perform a cost analysis using the appropriate set of principles.
- Non-competitive Proposals (Sole Source) –Non-competitive proposals are appropriate only if one of the following situations exists:
  - The item is available only from a single source;
  - The disaster emergency will not permit a delay resulting from competitive solicitation;
  - The Federal agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the Grantee; or
  - After solicitation of a number of sources, competition is determined inadequate.

Grantees should obtain a breakdown of proposed costs and perform a cost analysis on those costs.

The following are special circumstances involving contracts and Cost Analysis requirements:

- Cost Reimbursement Contracts – A Cost Analysis using cost principles must be performed on a Cost Reimbursement Contract.
- Architecture and Engineering Contracts - Cost Analysis is required in determining if the cost portion of an A/E contract is fair and reasonable.
- Construction Contracts – Construction contracts awarded using Sealed Bids do not require Cost Analysis. However, an estimate of market costs should be made prior to awarding the contract. Construction Contracts awarded using any other method of procurement require Cost Analysis. Some grantees will contract out cost analysis to independent architect or engineering firms. Other grantees have used costing programs like Marshall and Swift, RSMeans, Xactimate, or similar products.

In addition, changes to the contract will require cost analysis in the following situations:

- Contract Modifications – If a grantee is negotiating a modification or change order to a contract that changes the scope and/or impacts the price or estimated cost, the grantee should perform further cost analysis. The only exception to this is if the modification is based on pricing already established in the contract. A contract where the scope is reduced and the contract price remains the same, will still require further cost analysis to determine that the change is fair and reasonable.

- Contract Terminations – If a grantee terminates a contract for convenience, the grantee must use cost analysis and the appropriate cost principles, to negotiate the final amount of termination settlement. If the grantee is terminating a cost re-imbursement contract for cause, the grantee should use cost analysis and the appropriate cost principles to negotiate the final amount of termination settlement.

In addition, contracts must include termination language in the contract when they are over \$10,000, as described in Appendix II of 2 CFR Part 200.

### **3.6 Price Analysis**

Micro Purchase and Small Purchase procurement methods require Price Analysis when selecting vendors and suppliers. There are a variety of ways of analyzing price, some of which are illustrated below, but the method and degree of analysis grantees used is dependent on the facts surrounding the particular procurement situation. Price Analysis should be documented in the procurement file.

- Compare competitive prices received in response to the solicitation to each other.
- Compare proposed prices to prices on existing contracts or contracts proposed in the recent past. Be sure to factor in any changing conditions, including market, inflation, material price changes.
- Apply rough approximations and review significant inconsistencies, which may require a deeper look at prices to determine if the items are truly comparable. The types of approximations might include price per pound, per square foot, per hour or other typical unit pricing mechanism.
- Review price lists, catalogs or market prices of similar products to determine the market prices generally available to the public.

### **3.7 Cost Analysis**

Cost Analysis includes the review and evaluation of the separate cost elements, including labor, supplies, equipment, profit, overhead and general conditions. Grantees should prepare an independent Cost Analysis before receiving bids, proposals and contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation.

An independent estimate must be made before receiving bids or proposals if one of the following applies:

- When evaluating competitive proposals
- When there is a sole source or non-competitive proposal

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- When only one bid is received after soliciting bids, the grantee does not have enough data to establish cost reasonableness and the grantee is considering awarding the contract to the single bidder.
- When negotiating modifications to contracts that impact the price or estimated cost.
- When terminating a contract and the contractor is entitled to payment of reasonable costs incurred.
- When awarding a cost-reimbursement contract.

The major categories of costs include both direct costs (direct labor, equipment, supplies, travel and per diem, subcontractors and other direct costs) and indirect costs (overhead, general and administrative expenses and profit). In the process of analyzing costs, profit should be analyzed separately, based on complexity of the work, risk to the contractor, investment required, amount of subcontracting involved, and typical profit in the industry.

The process for completing a Cost Analysis includes verifying cost data and evaluating the elements of the project as described below. Costs that can be charged against the award are the allowable direct costs and the allocable indirect costs, less any applicable credits.

- Allowable. (2 CFR 200.403) Costs must meet the following general criteria to be Allowable:
  - Be necessary and reasonable (see further definition of Reasonable below);
  - Meet the requirements of the Federal award;
  - Be consistent with Policies and Procedures and applied uniformly to purchases made from Federal and non-Federal funding;
  - Be determined in accordance with Generally Accepted Accounting Principles (GAAP), except for state and local governments and Indian tribes, where exceptions have been made in 2 CFR Part 200;
  - Not be included as a cost, cost sharing or matching of any other federally funded project; and
  - Be adequately documented.
- Reasonable. (2 CFR 200.404) For a cost to be allowable, it must also be reasonable. This term is generally defined as what a prudent business would pay in a competitive marketplace. A cost can be allowable and allocable, and still not be what a prudent businessperson would pay (e.g., \$100 for a standard hammer). When determining what is a reasonable cost, the following issues should be considered:

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- Is the cost ordinary and necessary for completion of the activity?
- What are the current market prices for the good or service in the area?
- Are there any restraints or requirements that impact pricing, such as sound business practices, governmental requirements, arm's length bargaining or the terms of the federal award?
- Has the staff exercised sound judgement in making the purchase?
- Are the same procedures followed for Federally funded and non-Federally funded procurement?
- Allocable. (2 CFR 200.405) The costs should be related to, or required for the performance of the contract. Many costs may be allowable but not related to the work required under the contract, and therefore not allocable.
- Is the cost incurred specifically for the CDBG-DR grant?
- Does the cost incurred benefit both the CDBG-DR project and other projects and can the cost be allocated pro-rata across the relevant funding sources?
- Has an indirect cost plan been approved to allocate indirect costs?

The process for applying cost and price analysis should include the following due diligence review.

- Check the accuracy of the cost and pricing information submitted, and evaluate:
  - The necessity for proposed cost items. A cost may be allowable under the cost principles and even allocable to the type of work to be performed, but still not be necessary for the specific contract.
  - The application of audited or pre-negotiated indirect cost rates, labor and fringe benefit rates, or other factors.
  - The effect of the vendor's bid approach on potential future costs. Does the vendor have a track record of containing costs (completing contracts at or "under cost")? Do they frequently have cost overruns?
  - The projection of the vendor's cost trends. Is there any indication that the vendor's costs are likely to increase or decrease over the life of the contract?
- Compare costs proposed by the vendor with:



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- Actual costs previously incurred by the same contractor for the same or similar work. Apply any appropriate inflation factors for past work.
- Actual costs of the same or similar work performed by other contractors.
- Previous cost estimates from the vendor or others for the same or similar items.
- The methods proposed by the vendor with the requirements of the solicitation (i.e., do the costs reflect the technical approach proposed and the work required?).
- The grantee's independent cost estimate, either created by grantee staff or for the grantee by an independent architect, engineer, appraiser, etc.
- Verify that the vendor's cost submissions comply with the appropriate set of cost principles.

### 3.8 Contract Award and Execution

- Separation of Duties - One method for minimizing the potential for fraud and abuse in the procurement process is to have different individuals handling different parts of the process. For example, where one individual awards the contract or orders the goods or services, a separate individual will review the goods or services for performance and/or delivery. An easy guide for compliance is that employees who handle the money, the mail or the goods purchased should be different from employees managing the bookkeeping and financial accounts. This practice can be difficult in small cities, small departments or organizations with few employees, but a method of oversight should be established to avoid fraud and unnecessary purchases.
- Documentation - Each step in the procurement process should be documented, from the initial decision to purchase through final inspection of goods and services and final payment. The records should include, but are not limited to, files on the rationale for selecting the methods of procurement used, selection of contract type, the contractor selection/rejection process, and the basis for the cost or price of a contract. The records should also include a justification for lack of competition when competitive bids or offers are not obtained, and the basis for the award cost or price.

Documentation does not end at contract signing, but should continue through the delivery of goods and services to record payments, inspection, change orders and cost/price analysis of the change order. Monitoring the performance of the vendor should be documented through inspections and review of performance and delivery. Reports should include:

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- A **spending map**, a periodic plan for what is to be purchased.
- A **contracts register** of vendors, contractors, and subcontractors by date and type of procurement (micro purchases, small purchases, requests for proposals, and sole-source and competitive bids), funding source, and amount of the contract, along with a brief description. This register should be available on the website for the Disaster, which may be required by the specific Disaster appropriation.
- A **Summary of change orders** by contract.
- A report that **cross-checks** vendor addresses and phone numbers with those of employees.
- A report of any **purchases lacking invoices**.

Records relating to the procurement of goods and services must be maintained for a minimum of three years from the date of final closeout of the CDBG-DR award.

- Checklist - Developing a Contract Checklist in the Procurement Policies and Procedures is a useful tool, to avoid mistakes in the procurement process. The checklist should cover all of the stages in the process, including:
  - Identification of Need and description of goods and/or services to be procured
  - Cost/price analysis
  - Documentation of Type of Procurement anticipated
  - Bid, Requests for Proposals, Requests for Qualifications documents and process
  - Documentation of contractor eligibility
  - Contract documents, including relevant clauses
  - Contract Execution
  - Contract change orders and cost/price analysis
  - Project completion and inspection
  - Payment tracking and invoicing management

Included in the Sample Documents are a **contract checklist** and a list of the **required contract clauses**. Each contract will follow different procedures, based on the type of procurement (micro purchase, sealed bid, etc.) and the type of service (construction, architectural services, etc.). In addition, not every contract will require all of the clauses because some are required only under specific circumstances- for example the Davis

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Bacon clauses that are required for construction and machinery and equipment installation.

- Contract Monitoring and Payment - Most of the grantee's administrative work takes place prior to purchasing goods and/or services and prior to executing the contract. However, sound financial management also requires the grantee to review the purchases and document the purchase prior to making payment. Contracts should include performance requirements for timing of delivery, quality of work, payment of subcontractors (and related lien waivers if appropriate), and delivery of reports. This review forms part of the procurement process and should be carried out prior to payment made to the vendor. Receiving and filing documentation of the work performed (invoices, pay requests, inspections) is part of the procurement and financial management record keeping process.

## **Chapter 4: Prohibited Practices**

CDBG procurement regulations identify explicitly prohibited procurement practices, such as “cost plus a percentage of cost” and “percentage of construction costs” methods of contracting. Grantees should not carry out these methods of procurement with their CDBG-DR grant funds.

**REMINDER:** States may choose to adopt 2 CFR Part 200 or to follow their own State laws and regulations regarding procurement. This Toolkit is based upon 2 CFR Part 200 and related Federal regulations. The Toolkit thus applies to Local Grantees (who must use 2 CFR Part 200) and States which have adopted these federal regulations.

### **4.1 Prohibition on Cost Plus a Percentage of Cost (CPPC) Pricing**

The regulation 2 CFR 200.323 addresses “Contract cost and price” requirements and specifically prohibits CPPC pricing. The regulation 2 CFR 200.323(d) provides:

(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

Federal procurement requirements do allow for **Time and Material (T&M)** type contracts – but only after a defensible and properly documented determination has been made that:

- No other contract is suitable; and,
- The contract includes a ceiling price that the contractor exceeds at its own risk.

Specifically, Section 2 CFR 200.318(j) provides:

(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 Grantee 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.

## **4.2 Prohibition on Practices that Restrict Full and Open Competition**

2 CFR 200.319 identifies a range of prohibited practices that can unacceptably restrict full and open competition. The regulation provides:

### **§ 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;
  - (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.

While the regulation clearly states that there can be situations other than those listed that can be restrictive of competition, the following section breaks down each the provisions of 200.319(a) and (b) and provides examples for each:

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- **Prohibition:** § 200.319(a) 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.
- **Rationale / Examples:**
  - A contractor with knowledge of forthcoming a bid solicitation, gained through a role in preparing the solicitation, has an unfair advantage over other bidders in terms of time to prepare a response and familiarity with the associated specifications and requirements with the solicitation.
- **Prohibition:** § 200.319(a)(1) Placing unreasonable requirements on firms in order for them to qualify to do business.
- **Rationale / Examples:**
  - To ensure that the pool of eligible bidders is as broad as possible, placing unnecessary restrictions is not allowed.
  - Example: The City of Lakeside has completed three housing rehabilitation projects with CDBG funds using the same firm and publishes an RFP that seeks “A firm with 10 permanent employees that has previously worked with the City of Lakeside to administer no less than three housing rehabilitation projects with CDBG funds.”
- **Prohibition:** § 200.319(a)(2) Requiring unnecessary experience and excessive bonding;
- **Rationale / Examples**
  - **Unnecessary Experience Requirements:** The experience level required of bidders should match the type of work described in the RFP. For example, the local government should not require a contractor to have \$100 million in commercial construction experience when the RFP is for the repair of 10 single-family homes.
  - **Excessive Bonding Requirements:** The purpose of bid, performance and payment bonds is as follows:
    - The **Bid Bond** reduces the participation of frivolous bidders in procurement processes. The successful bidder enters into a contract and provides the required performance and payment bonds. If the bidder fails to honor its commitments, the grantee, entitlement or subrecipient is protected, up to the amount of the bid bond - usually for the difference between the low bid and the next higher responsive bid.
    - The **Performance Bond** secures the contractor’s promise to perform the contract in accordance with its terms and conditions, at the agreed upon price, and within the time allowed.
    - The **Payment Bond** protects certain laborers, material suppliers and subcontractors against nonpayment.

Section 200.325 governs bonding requirements, including minimum bonding:

Section 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.

- **Prohibition:** § 200.319(a)(3) Noncompetitive pricing practices between firms or between affiliated companies.
- **Rationale / Examples:** The goal of this regulation is to prevent CDBG-DR procurements from allowing two or more firms to coordinate the bid (i.e. “bid rigging”) through noncompetitive pricing practices.
- **Prohibition:** § 200.319(a)(4) Noncompetitive contracts to consultants that are on retainer contracts.
- **Rationale / Examples:** These noncompetitive contracts are awarded without going through full and open competition and therefore are restrictive or competition. Additionally, the number of consultants and firms interested and qualified to deliver the required services may differ substantially at the time the CDBG-DR procurement is authorized compared to when the grantee first entered into the noncompetitive retainer contract.

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§ 200.319(d) requires the following:

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.

- **Prohibition:** § 200.319(a)(5) Organizational conflicts of interest;  
**Rationale / Examples:** Procurement regulations require that local governments and subrecipients 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. 2 CFR 200.318(c)(2) provides the following regarding organizational conflicts of interest:

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.

#### *Example*

*For example, the City of Lakewood has received a CDBG-DR grant and has identified the Lakewood Housing Authority, an affiliate organization of the City, as a sub-recipient. The Lakewood Housing Authority must also have a conflict of interest policy in the award of contracts utilizing the CDBG-DR funds.*

- **Prohibition:** § 200.319(a)(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.
- **Rationale / Examples:** A brand name description is a title, term, symbol, design, or any combination thereof used to describe a product and its producer by a unique identifier. The use of brand name descriptions have the advantage of reducing the time needed to develop specification, clearly communicate what the solicitor is seeking and allows for the standardization of items like vehicles, power equipment, etc. – they typically overly restrict competition. The specification of only a brand name product – without allowing



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for equivalent items – can result in the unfair exclusion of alternative brands and increased costs for necessary goods.

§ 200.319(c)(1) and (2) require Grantees to have written procedures for procurement transactions to 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.

- **Prohibition:** § 200.319(a)(7) Any arbitrary action in the procurement process.
- **Rationale / Examples:** This clause is the catchall for any arbitrary actions in procurement that would end up giving priority to a specific bidder. Some of the things that are not mentioned specifically, but are not good practices include:
  - Awarding a contract without requiring compliance with advertised requirements, specifications, etc.
  - Acceleration of bid or proposal submission times and dates
  - Allowing a single bidder additional time to submit their response and not allowing all bidders the same additional time.
  - Announcing the lowest bidder without a public opening of the bids
- **Prohibition:** § 200.319(b) The grantee 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.

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- **Rationale / Examples:**
  - To ensure that the pool of eligible bidders is as broad as possible, geographic restrictions on eligible bidders are generally not allowed.
  - However, there are exceptions to this prohibition. For example, given the nature and size of the project, solicitations for A/E services can be restricted to firms in a specific state or in a designated multi-state metropolitan area, but not if this eliminates all but one or two eligible firms and excludes multiple firms with appropriate licenses from just across a river or state line.

## **Chapter 5: Procurement Road Map**

### **5.1 Procurement Policy**

The first step in managing the procurement process is developing and implementing a written Procurement Policy. A Procurement Policy must meet federal guidelines, but also meet state and local policy as well, where they exceed federal minimum requirements. The requirements for state grantees is different from that of units of local governments that receive funding directly from HUD, as described below. However, the essence of “good procurement” for all grantees can be summarized as follows:

- Identify and clearly specify standards for the goods or services the grantee or subrecipient wants to obtain;
- Seek competitive offers to obtain the best possible quality at the best possible price;
- Use a written agreement that clearly states the responsibilities of each party;
- Ensure the fair and equitable treatment of all bidders and potential bidders;
- Keep good records; and
- Have a quality assurance system that helps the grantee or subrecipient get what it pays for.

A Procurement Policies and Procedures manual should be adopted prior to soliciting bids or pricing, incurring costs and entering into any contracts.

### **5.2 Differences between State and Entitlement Grantees**

**REMINDER:** States may choose to adopt 2 CFR Part 200 or to follow their own State laws and regulations regarding procurement. This Toolkit is based upon 2 CFR Part 200 and related Federal regulations. The Toolkit thus applies to Local Grantees (who must use 2 CFR Part 200) and States which have adopted these federal regulations.

As with all CDBG regulations, states are allowed “maximum feasible deference” in the implementation of their program. As discussed previously, one of the way in which a state may demonstrate compliance with the procurement requirement, is to utilize the states own policies and procedures. Minimum standards must include the following:

- Promote full and open competition.

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- Specify the types of procurement allowed and procedures that are followed. Cost plus percentage of costs and percentage of construction cost methods is NOT ALLOWABLE.
- Include standards of conduct for employees engaged in award or administration of state CDBG-funded contracts.
- Ensure that all purchase orders and contracts include any clauses required by Federal statutes, Executive orders, and implementing regulations, and the authorities listed in Appendix II of 2 CFR Part 200.
- Make subrecipient and contractor determinations in accordance with the standards in 2 CFR 200.330.
- Obtain certification from any transaction participant that neither it nor its principals are currently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation.

Depending on the relevant appropriations act, Grantees may be required to submit their Procurement Policies to HUD for review as a condition of receiving a CDBG-DR grant.

### **5.3 Full and Open Competition**

A Procurement Policy should provide for full and open competitions among prospective vendors and bidders. Competition should ensure that the pricing is fair and the Grantee is getting a reasonable price for the goods or services procured. In addition, free and open competition should reduce the potential for conflicts of interest and collusion on bids between potential bidders and the Grantee.

### **5.4 Documentation**

Each step in the procurement process should be documented, from the initial decision to purchase through final inspection of goods and services and final payment. The records should include, but are not limited to, files on the rationale for selecting the methods of procurement used, selection of contract type, the contractor selection/rejection process, and the basis for the cost or price of a contract. The records should also include a justification for lack of competition when competitive bids or offers are not obtained, and the basis for the award cost or price.

Documentation does not end at contract signing, but should continue through the delivery of goods and services to record payments, inspections, change orders and cost/price analysis of the change order. Monitoring the performance of the vendor should be documented through inspections and review of performance and delivery. Reports should include:

- A spend map (a periodic plan for what is to be bought).

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- A register of procurements using CDBG-DR that includes the name of the vendor, contractor, and/or subcontractor, the date and type of procurement (micro purchases, small purchases, requests for proposals, and sole-source and competitive bids), funding source, amount of the contract and a brief description of the procured goods or services. This register should be available on the grantee's website for the Disaster, which may be required by the specific Disaster appropriation. (See Contract Template found in the Sample Documents)
- A summary of change orders by contract.
- A report that crosschecks vendor addresses and phone numbers with those of employees.
- A report of any purchases lacking invoices.

Records relating to the procurement of goods and services must be maintained for a minimum of three years from the date of final closeout of the CDBG-DR award.

#### *Example of Poor Record Keeping*

*A state receiving CDBG-DR funds failed to follow Federal regulations in its procurement and contracting for services in selecting a firm to market the state to bring tourism back to pre-storm levels. The state has adopted 2CFR Part 200.317-326 for its procurement policies for disaster procurement. The state selected a contractor following acceptable procurement procedures through a competitive bid process, but did not maintain adequate documentation of cost/price analysis. In addition, the state did not request from the contractor timesheets as evidence of the work done by staff of the contractor. In addition, the contract required the contractor to seek bids for advertising time from radio, television and other media services. The state had the authority to waive this bidding requirement, but failed to document the waiver in the contract. As a result, the Office of the Inspector General questioned \$23 million in services and contractor labor, which were procured inappropriately or not adequately documented.*

## 5.5 Bonding and Insurance

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 Grantee 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 are:

- A bid guarantee from each bidder equivalent to 5 percent of the bid price. The "bid guarantee" must be a firm commitment in the form of a bid bond, certified check, or other negotiable instrument as assurance that the bidder is prepared to execute a contract within the time specified for the bid amount.

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- A performance bond from the (sub)contractor for 100 percent of the contract price to secure the (sub)contractors' fulfillment of all obligations under the contract.
- A payment bond from the (sub)contractor for 100 percent of the contract price to assure payment of all persons supplying labor and materials under the contract.

Note: if state or local procurement policies require higher or additional bonding and insurance requirements – they must be followed for CDBG-DR procurement.

## **5.6 Utilize Local Businesses and Small, Minority Contractors**

Grantees should make every effort to include local business firms and contract with small, minority-owned and/or women-owned businesses in the procurement process. Steps that will facilitate contracting with small and minority contractors include adding these businesses to solicitation lists, sizing (splitting, dividing, etc.) contracts so that smaller businesses can participate and utilizing organizations that work with minority and woman owned businesses and labor surplus firms. These methods should also be required of prime contractors.

Specifically, a grantee is encouraged to take affirmative steps to use small firms, minority-owned firms, women-owned firms, or “labor surplus area” firms in its CDBG-financed activities. The efforts include the following suggestions:

- Incorporating such businesses in solicitation lists whenever they are potential sources. Solicitation lists should be kept current and updated on a periodic basis.
- Using organizations such as the Minority Small Business Development Agency, the Small Business Administration, or other similar organizations to assist in development of a solicitation list.
- Ensuring that these businesses are solicited when identified as potential sources.
- Dividing procurement requirements, when economically feasible, to permit maximum participation of these businesses.
- Requiring prime contractors, when subcontracts are solicited, to take affirmative steps to select these firms.

In addition, Section 3 of the Housing and Community Development Act of 1968, requires to the greatest extent feasible, contracts be awarded to eligible business concerns located in or owned by residents of the target area. Section 3 was enacted to ensure that the employment and other economic opportunities generated by Federal financial assistance for housing and community development programs shall, to the greatest extent feasible, be directed toward low- and very low-income persons, particularly those who are recipients of governmental assistance for housing.

Included in the Sample Documents section are examples of Procurement Procedures that will increase participation to meet the Section 3 requirements.

## **5.7 Dealing with Subrecipients**

CDBG-DR grantees may carry out activities through their staff or they may utilize a subrecipient to carry out those activities. Generally, a subrecipient is a public or private nonprofit agency, authority, or organization that administers an activity on behalf of the grantee. A contractor is not considered a subrecipient. For state grantees, the state is funding local governments and will monitor compliance of the local government entity. The local government that is a subgrantee of a state may use a subrecipient to implement the activity for which they applied for funding. For entitlement cities, the city could award funds to a nonprofit and that nonprofit operates the program or project. The Grantee and the subrecipient jointly share the responsibility for carrying out the program, and the Grantee is responsible for reporting to HUD.

Even if a Grantee uses a subrecipient, the Grantee is ultimately responsible for ensuring that CDBG-DR funds are used in accordance with all program requirements, including procurement. The use of designated subrecipients does not relieve the grantee of this responsibility. The grantee is also responsible for determining the adequacy of performance under subrecipient agreements (and procurement contracts) and for taking appropriate action when performance problems arise.

Subrecipients can be selected by a variety of methods, including:

- A formal application process, where applications are evaluated according to specific criteria.
- A limited application process where the Grantee is often more involved in shaping the project and revising project details.
- A Request for Qualifications (RFQ) from qualified organizations.
- Allowing for unsolicited applications throughout the year.
- A combination of some of the above approaches.

## **5.8 Separation of Duties**

One of the checks and balances to limit fraud in procurement is through the separation of duties of staff. The person delegated to order the goods or manage the procurement process should be different from the person receiving and accepting the goods and the person paying for the order. When this is not possible due to the limited size of staff, additional rules should be used, such as limiting dollar authorizations and periodic reviews by an independent individual. The grantee should ensure that only designated individuals have the authority to make binding contracts. If

the grantee or subrecipient has a small staff, another method must be developed to provide for independent oversight. The procurement procedures should outline:

- The positions involved in the procurement process and the responsibilities of each person.
- A formal system of authorization and review
- Separation of duties

The rule of thumb should be that if an employee touches the money, mail, or goods purchased, he or she should not touch the books.

## **5.9 Conflict of Interest**

HUD requires that a written code of standards be included in the grantee's procurement policy, and many State and local governments also have conflict of interest requirements for their staff. The procedures should require that the grantee bar those in positions of trust from personally gaining from transactions and that the procurement process is fair to all seeking to do business with the grantee or subrecipient. A common problem is the lack of understanding of what constitutes an "appearance of conflict." Too often, managers believe that indirect or noncash gifts are not considered a conflict of interest. However, vendor or contractor donations to employee fund-raising drives, event tickets, meals, or gifts could be considered potential conflicts of interest.

## **5.10 Debarred Contractor Review**

Grantees must not make any award to any contractor or organization which is debarred or suspended or is otherwise excluded from participation in Federal assistance programs. The Grantee must comply with all requirements relating to debarments and suspensions codified in 2 CFR Parts 180 and 2424. The General Services Administration maintains a list of all debarred contractors through the System Award Management (SAM). This applies to CDBG-assisted contracts at any tier in the process. To determine if a proposed contractor is debarred, Grantees can check the federal SAM database at <https://www.sam.gov>. In addition to checking the name of the contracting firm, the name of the president and owner of the firm should also be checked. Staff should also review any state and local debarment lists. Website printouts should be placed in the file to document compliance.

## **5.11 Contract Administration**

Most of the Grantee's administrative work takes place prior to purchasing goods and/or services and prior to executing the contract. However, sound financial management also requires the



grantee to review the purchases and document the purchase prior to making payment. Contracts should include performance requirements for timing of delivery, quality of work, payment of subcontractors (and related lien waivers, if appropriate), and delivery of reports. This review forms part of the procurement process and should be carried out prior to payment being made to the vendor. In addition, all invoices should include sufficient detail that allows the grantee to determine if the work performed conforms to the terms of the executed contract. Receiving and filing documentation of the work performed (invoices, pay requests, inspections) is part of the procurement and financial management record keeping process.

The need for procuring goods and services, especially after a disaster, can change over time. Frequently, a grantee may not know the full extent of damage to facilities until a re-construction project is underway. Because of this and other factors, the work that was originally described in a Scope of Work, may need to be modified. This will either require a change order to the contract or, in some cases, the revised project must be procured again because of substantial changes to the scope. A change order requires that cost/price analysis be performed again to identify reasonable costs for the type of work to be performed or the good procured.

In some disaster declarations, grantees are required to maintain a contract template and make public all solicitations and public procurement actions. HUD has developed a Contract Template and a copy of the template has been included in the Sample Documents.

## **5.12 Public Website**

In recent appropriations acts, Congress has required that a website be developed and maintained that provides information to the public on proposed purchasing with CDBG-DR funds and the status of those actions. This provides transparency to the public and allows for maximum accountability on the work performed, contractor selected and status of the work. The types of information that should be available on the website include:

- The grantees procurement policies
- The status of procurements projected, underway and completed
- A copy of the solicitation
- A copy of the executed contract that grantees have procured directly
- The contract template described above is a good tool to maintain and keep current on the public website.

## **5.13 Wrong Turns Off the Road to Good Procurement (Common Pitfalls in the Procurement Process)**

Grantees that follow the Road Map outlined at the beginning of this section – and the regulations and requirements discussed throughout this Toolkit - should be able to avoid wrong turns that

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can lead to adverse audit findings and even the repayment of CDBG-DR funds. These wrong turns can be categorized as follows:

- Use of Prohibited Cost Plus Percentage of Cost Contracting
  - Cost Plus Percentage of Cost (CPPC) contracts are not allowed at any time for any reason when using CDBG-DR funds. This applies to States, Entitlements and Sub-Recipients.
  - See 2 CFR 200.323 and discussion in Chapter 4 – Prohibited Practices.
- Failure to prepare independent cost estimates prior to receiving bids or proposals
  - Planning to use the bids to establish the estimate is unacceptable. What does not work with this approach is that estimate cannot be prepared PRIOR to receiving the bids if they – the estimates and bid - are treated as the same thing. Moreover, **INDEPENDENT** should always be interpreted to mean independent from the bidders.
  - See 2 CFR 200.323(a) and discussion on Cost and Price Analysis in Chapter 3.
- Failure to conduct and document a cost or price analysis
  - A lack of familiarity with how to conduct and document a cost and/or price analysis for each procurement, if the purchase is in excess of the Simplified Acquisition Threshold, is not an excuse for not meeting this requirement.
  - See 2 CFR 200.323(a) and discussion on Cost and Price Analysis in Chapter 3.
- Failure to review contract modifications or change orders for cost and price analysis
  - Even if the original procurement for a good or service complied with this requirement, the same analysis and documentation is required for contract modifications and/or change orders to the original procurement and associated agreement.
  - See 2 CFR 200.323(a) and discussion on Cost and Price Analysis in Chapter 3.
- Inclusion of non-competitive practices/requirements in procurement documents
  - This chapter opens with a reminder that a primary goal of all procurement policies should be to promote fair and open competitions among prospective vendors and bidders. Chapter 4 of this Toolkit explores prohibited, anti-competitive practices – such as most geographic restrictions on bidders, excessive bonding requirements, etc. – in greater depth.

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- See 2 CFR 200.319(a) and (b).
- Understanding differences between procurement requirements for states, local governments, and subrecipients
  - As discussed above in this chapter, local governments can and often do set higher standards (e.g., competitive bidding for construction required for contracts over \$20,000 rather than the Simplified Acquisition Threshold), and in these cases, the higher standards must be applied for CDBG-DR procurement as well. Where Federal requirements do not apply to them, States may set their own standards, which may or may not exceed Federal requirements.
- Inadequate monitoring of sub-recipients
  - As pointed out early in this chapter, grantees – whether a State or Entitlement - and its subrecipients often jointly share the responsibility for carrying out disaster recovery programs. Nevertheless, the grantee is ultimately responsible for ensuring that the subrecipient’s procurement actions comply with federal requirements and the grantees procurement policies. Only through sustained and adequate monitoring can the grantee ensure that procurements are compliant.
- Reliance on “emergency services” language to expand contract scope without following requirement procurement requirements
  - Disasters are, by definition, emergencies for the states and communities that they devastate. However, expanding the scope and compensation of a contract for goods or services executed before the disaster is not an allowable short cut if CDBG-DR grant funds are involved.
  - Follow the Procurement Decision Tree in Chapter Two to determine how best to start a fresh procurement action for the needed products and services consistent with your procurement plan.

Given the urgency of disaster recovery responsibilities and a lack of familiarity with minimum federal procurement standards, HUD’s Office of Inspector General (OIG) has published audit reports that have been critical of procurement practices using CDBG-DR funds. The following table summarizes the findings of some of these audit findings and can provide all grantees with examples of how to avoid similar mistakes.

### 5.14 Examples of Procurement Audit Findings

Finding	Audit Report	Finding	Notes
<b>Missing – Improper procurement method initially – or at the time of substantial and/or material amendment</b>	State of Texas, 2012-FW-1005	<p>Finding #1. “The State improperly increased its project management services contract’s scope of services and cost when it entered into its fourth contract amendment.”</p> <p>“The State did not follow its own guidance when it executed this contract change. The Texas Contract Management Guide stated, “any contract amendments are required to be within the scope of the original contract and the competitive process underlying the original contract.”</p> <p>As the changes enacted were both material and substantial, the State could not provide assurance that it properly performed the \$75.01 million contract amendment.</p>	

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<b>Finding</b>	<b>Audit Report</b>	<b>Finding</b>	<b>Notes</b>
<b>Prohibited Cost Plus Percentage of Cost Contracting</b>	State of Texas, 2012-FW-1005	#2. The State’s contracts and contract amendments contained ineligible cost plus a percentage of costs provisions. The two contracts budgets included a 10% mark-up on direct expenses and subcontractors costs.	HUD CDBG rules prohibit a CPPC payment type: 570.489(g)
<b>Prohibited Cost Plus Percentage of Cost Contracting</b>	Harris County Housing Authority, 2013-FW-1006	#3. The Authority used a prohibited CPPC contract for its Cypresswood Estates housing development. According to the contract, the Authority funded the development with \$5 million in CDBG-DR program funds, \$4 million in NSP funds and \$1.9 million in non-Federal funds.	24 CFR 85.36(f)(4) (now 200.323(d)) prohibits grantees and subgrantees from using CPPC contracting methods.
<b>Failure to prepare independent cost estimates prior to receiving bids or proposals.</b>	State of Texas, 2012-FW-1005	#1. Did not follow federal and state requirements and its best practices to ensure that it procured its two professional services contracts at fair and reasonable prices. The Texas Contract Management Guide required that the State adequately plan its procurements and show how it determined a fair and	HUD Staff: “Many small grantees believe – or justify errors on this regulation – with the explanation that the bids received provide them with the estimate.”

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Finding	Audit Report	Finding	Notes
		reasonable price before performing the actual procurement	
<b>Failure to prepare independent cost estimates prior to receiving bids or proposals.</b>	City of New Orleans, 2015-FW-1002	Finding #1: The City did not always prepare cost estimates or cost analyses...(f)or its demolition and grant contracts, the City did not have documentation showing that it performed cost estimates before the bidding process to establish a basis for the contract prices.	
<b>Failure to prepare independent cost estimates prior to receiving bids or proposals.</b>	State of NJ, 2015-PH-1003	The State did not prepare an independent cost estimate and analysis before awarding the (disaster management) system contract to the only responsive bidder	
<b>Failure to prepare independent cost estimates prior to receiving bids or proposals.</b>	State of NY, 2015-NY-1011	(State) executed a subrecipient agreement with DASNY to provide, either directly or through the agency's subrecipients or subcontractors, inspection-related construction management services...(h)owever, neither (the State) or DASNY	24 CFR 85.36(f)(1)

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Finding	Audit Report	Finding	Notes
		conducted a cost analysis or independent cost estimate for the inspection-related construction management and environmental review services.	
<b>Failure to prepare independent cost estimates prior to receiving bids or proposals.</b>	City of Minot, 2015-KC-1003	The City did not always prepare cost estimates before receiving bids or proposals for two grant administration and project delivery services contracts and the five amendments to those contracts, or for the change orders for four construction projects	24 CFR 85.36(b-i)
<b>Failure to conduct and document a cost or price analysis.</b>	City of New Orleans, 2015-FW-1002	Finding #1: The City did not always prepare cost estimates or cost analyses...(f)or its demolition contractor, the City did not perform adequate cost analyses for 10 of 41 properties demolished.	
<b>Failure to conduct and document a cost or price analysis.</b>	State of NJ, 2015-PH-1003	The State did not prepare an independent cost estimate and analysis before awarding the (disaster management) system contract to the only responsive bidder	

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<b>Finding</b>	<b>Audit Report</b>	<b>Finding</b>	<b>Notes</b>
<b>Failure to conduct and document a cost or price analysis.</b>	State of NY, 2015-NY-1011	(State) executed a subrecipient agreement with DASNY to provide, either directly or through the agency's subrecipients or subcontractors, inspection-related construction management services...(h)owever, neither (the State) or DASNY conducted a cost analysis or independent cost estimate for the inspection-related construction management and environmental review services.	
<b>Failure to conduct and document a cost or price analysis.</b>	City of Minot, 2015-KC-1003	Regulations at 24 CFR 85.36(f) and the City's federal grant program procurement policy require a cost or a price analysis in connection with every procurement action, including contract modifications.	24 CFR 85.36(f)
<b>Failure to review contract modifications or change orders for cost and price analysis.</b>	City of New Orleans, 2015-FW-1002	Finding #2: Perform a cost analysis when negotiating a modification, including change orders, to any type of contract if the modification the work authorized under the contract and the price or total estimated	24 CFR 85.36(f)(1), and Quick Guide to Cost and Price Analysis for HUD Grantees



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Finding	Audit Report	Finding	Notes
		costs, either upward or downward.	
<b>Inclusion of non-competitive practices/requirement in procurement documents.</b>	State of NY, 2015-NY-1011	Finding #3: Price and Adequate Competition Not Considered When Procuring Contractors: ...State agency selected 7 contractors from among 33 firms (before CDBG-DR grant was executed) in accordance with its own procurement standards. These standards were based up on qualification factors with subsequent negotiation of hourly labor costs...However, regulations at 24CFR 85.36(d)(3) and section 302(l)(f) of HTFC's procurement policy provide that only architectural or engineering professional service contractors may be selected on the basis of qualification without regard to price. In addition, HUD CDBG procurement guidelines in Basically CDBG, dated July 2012, require that the full request for proposal method be used if an architectural or engineering firm is hired to	24CFR 85.36(d)(3)

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Finding	Audit Report	Finding	Notes
		provide non-architectural or non-engineering services. Further, it specifically provides that construction and grant management services are not considered architectural or engineering services.	
<b>Understanding differences between requirements for state, state sub-recipient, entitlement, and non-profit procurement.</b>	Harris County Housing Authority, 2013-FW-1006	Finding #2: The Authority did not have an adequate contract administration system in place. Specifically, it did not implement and maintain a contract administration system sufficient to record and track the significant history of each procurement action as required by federal and State procurement requirements and its own internal policies.	Not a difference – applies to all levels/types of grantees and subrecipients.
<b>Understanding differences between requirements for state, state sub-recipient, entitlement, and non-profit procurement.</b>	CPD, Certification of State Disaster Grantee Procurement Processes, 2016-PH-0005		Drives home the point that there really is only one set of minimum standards – and that the States have to document equivalency when they do not adopt 84.36 or today – 200.317-326.

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Finding	Audit Report	Finding	Notes
Inadequate monitoring of sub-recipients.	State of NY, 2015-NY-1011	(State) executed a subrecipient agreement with DASNY to provide, either directly or through the agency's subrecipients or subcontractors, inspection-related construction management services...(h)owever, neither (the State) or DASNY conducted a cost analysis or independent cost estimate for the inspection-related construction management and environmental review services.	

## **Chapter 6: Micro-Purchases**

### **6.1 What are micro-purchases?**

Micro-purchases are acquisitions of products or services where the aggregate acquisition price does not exceed the micro purchase threshold. Micro-purchase is defined at 2 CFR 200.67 where it is noted that the micro purchase threshold is set by the Federal Acquisition Regulation at 48 CFR Subpart 2.1 (Definitions) and is subject to change. For CDBG funds, including CDBG-DR funds, that threshold is currently \$3,500, except as otherwise discussed in 48 CFR Subpart 2.1.

If the acquisition is \$3,500 or less, the Grantee may use the micro purchase method.

If the procurement is for construction and the amount surpasses the micro-purchase threshold, the Grantee must follow wage requirements found in 40 U.S.C. chapter 31 subchapter IV where prevailing wages are discussed. The micro-purchase threshold is currently \$2,000.

The full regulation (§200.320(a)) for this section reads as follows:

Procurement by micro-purchases.

Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (§200.67 Micro-purchase). To the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers. Micro-purchases must be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.

### **6.2 Process**

**REMINDER:** States may choose to adopt 2 CFR Part 200 or to follow their own State laws and regulations regarding procurement. This Toolkit is based upon 2 CFR Part 200 and related Federal regulations. The Toolkit thus applies to Local Grantees (who must use 2 CFR Part 200) and States which have adopted these federal regulations.

The micro purchases method does not require the solicitation of competitive bids or proposals. The micro purchase process is designed to minimize the administration components and paperwork. The Grantee may select a vendor/provider as long as the it considers the price to be reasonable.

As with all procurements, Grantees must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

### **6.3 Price Reasonableness**

Non-federal entities should *plan* and *document* how much or how many products (or services) will be required prior to executing a procurement strategy. The failure to plan may result in making multiple purchases of the same item, and exceeding the micro purchase threshold.

- **Reasonable Prices**

Under the cost principle that must be used in determining the allowable costs of work performed by the non-Federal entity under Federal awards, a cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. A reasonable price is reflective of the market price, without special considerations, surge pricing or other premiums. Researching market prices to have two or more quotes before making a micro purchase will help assure that the acquisition price is reasonable.

In some instances, such as purchasing a widely available product, the market research may be as simple as looking on the internet to compare prices from, for example, Costco, Walmart and Sam's Club. This is a little different than Price Analysis, which is the determination that a certain price is fair. While Grantees are required to undertake a price or cost analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications, micro purchases fall below this threshold and neither a price nor a cost analysis is required.

To the extent practical, non-Federal entities should distribute micro purchases equably among qualified distributors.

#### Consolidating and Breaking out procurements

Grantees must be careful of intentionally "splitting" larger purchases to circumvent the dollar threshold limitations just so they take advantage of streamlined procurement procedures under the micro purchase method of procurement. Grantees should, however, give consideration to consolidating or breaking out procurements to obtain a more economical purchase (2 CFR 200.318(d)). Additionally, Grantees must divide total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises (2 CFR 200.321(b)(3)).

Nevertheless, micro purchase procurement tends to be for very small items such as office supplies or simple equipment.

- Section 3

Section 3 of the Housing and Urban Development Act of 1968 and its implementing regulations at 24 CFR Part 135 apply to the use of CDBG-DR funds. Grantees must comply with these requirements, and they must ensure that employment and other economic opportunities generated by certain CDBG-DR funds shall, to the greatest extent feasible, and consistent with existing Federal, State and local laws and regulations, be directed to low- and very low-income persons, particularly those who are recipients of government assistance for housing, and to business concerns which provide economic opportunities to low- and very low-income persons. The application of Section 3 requirements is not limited to micro purchase nor CDBG-DR but to many different HUD funding sources. More information on Section 3 requirements is provided in Chapter 5, on pricing, executing and administering contracts.

- Micro Purchase for Construction

The Micro-Purchase procurement method could theoretically be used for construction, but it is highly unusual for any construction project to be less than \$3,500. When used for construction in cases where Davis-Bacon wages apply, the micro purchase threshold is currently \$2,000.

## **6.4 Post-Award Issues**

With micro-purchases, amendments, change orders, and other requests that might affect the amount of the purchase are not expected. If circumstances require the purchase of additional materials and services, subsequent micro-purchases may be used.

## **6.5 Documentation**

Documentation is required, even for small acquisition dollar amounts, as under the micro purchase method.

- Pre-Award
  - Document the “Need” – that is, assure that the items or services to be procured are actually needed for disaster recovery work, and not another project or initiative.
  - Document the rationale for the micro-purchase method of procurement.

- Document the market research or other means by which the prices were determined to be reasonable.
- Document the efforts to distribute micro purchase contracts among qualified suppliers.
- Document marketing and outreach efforts to include minority and women-owned businesses among interested suppliers. (This initiative may be broader than just for suppliers under the micro purchase method, and should be for all disaster related procurement).

- **Post-Award**

Post-Award documentation will depend on the administrative method for procurement (i.e. purchase order) and whether the micro procurement involved construction. Non-federal entities will also have locally established procedures for contract administration.

- **Purchase of Items/Services Other Than Lowest Price**

If the non-Federal entity has purchased an item or services which does not reflect the lowest price among the researched items/services, it must document the reasons why it made this decision.

- **Purchase Order**

The issuance of a Purchase Order (PO) by the non-Federal entity and its acceptance by the vendor (through either performance or signature on the PO) constitute a contract. For this reason it is critical that the PO clearly specify the item(s) or service(s) being purchased and the terms and conditions of the purchase.

All federally funded contracts must contain the required federal clauses and certifications. Incorporation of required contract clauses can be in the form of reference or as an attachment to the contract. See Section 7.11.

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- **Procurement Cards**

Many government entities provide purchase or government sponsored credit cards to Procurement or Contracting Officers to simplify the paperwork and the process to acquire goods and services that fall below the micro purchase threshold. Making purchases with a procurement card still requires following CDBG-DR regulations. Instead of using a purchase order, the credit card statement showing the itemized procurement will become part of the documentation, as well as the documentation showing how the credit card bill is paid.

#### *Example #1*

*City Y needs to buy two portable printer/copier machines to place in two mobile office trailers that are located on-site in a disaster area. They need to have “Wi-Fi” printing capability and handle high production copying. The machines should also be able to print color photos with reasonable quality. City Y has traditionally purchased Canon printer/copiers and learns that these are at comparable prices to other brands. City Y researches the kind of machines that have this functionality by looking at numerous electronics and office supplies websites, including Best Buy, Office Max, Staples, and a few others. City Y learns that that prices range from \$300-400 dollars from different vendors. All this information is documented on a form created by City Y for micro purchases. City Y creates a Purchase Order, takes it to the vendor and buys the two copier machines. The City Y Procurement Office takes the Purchase Order and accompanying documentation and provides copies to the staff person responsible for documenting the procurement records.*

The micro-purchases method and documentation of price analysis applies even in those instances where a product had previously been procured, and more is needed. The example below illustrates this scenario:

#### *Example #2*

*Staff in the Public Works Department from City Z have been installing plastic safety barrier fencing to seal off properties damaged and deemed unsafe from recent flooding. They have run out of fencing, but learned that it can be found inexpensively from local suppliers. Public Works determines how much more fencing is needed and checks prices at Home Depot, Lowe’s and several local hardware stores. It finds and documents the least expensive providers and buys \$2,000 of additional materials to complete the fencing.*



## **Chapter 7 – Small Purchase**

### **7.1 What Are Small Purchases?**

Small purchases are acquisitions of products or services where the aggregate acquisition price does not exceed the Simplified Acquisition Threshold, which is set by the Federal Acquisition Regulation at 48 CFR Subpart 2.1 and in accordance with 41 U.S.C. 1908. For CDBG funds, including CDBG-DR funds, that threshold is currently \$150,000 for goods and services, however, the threshold is periodically adjusted for inflation. Additionally, different federal programs and departments may have different threshold amounts.

**REMINDER:** States may choose to adopt 2 CFR Part 200 or to follow their own State laws and regulations regarding procurement. This Toolkit is based upon 2 CFR Part 200 and related Federal regulations. The Toolkit thus applies to Local Grantees (who must use 2 CFR Part 200) and States which have adopted these federal regulations.

As with all CDBG-DR procurements, the procurement must be conducted in a manner providing full and open competition consistent with the standards of **§200.319(a)**. As with all procurement, Grantees must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

The full regulation (**§200.320(b)**) for this section reads as follows:

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.

### **7.2 Process**

The small purchase method requires price or rate quotations to be obtained from an adequate number of qualified sources. Different from the micro purchase process where no solicitation is required, the small purchase method, although a simple and relatively informal procedure, requires the grantee to obtain price or rate quotations from qualifying companies. Using this method, the grantee should document every step in the procurement process to show compliance with federal regulations.

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- **Pre-Award Cost Determination**

Grantees should *plan* and *document* how much or how many products (or services) will be required prior to executing a procurement strategy. The failure to plan may result in making multiple purchases of the same item, or the purchase may exceed the simplified acquisition threshold and thus be ineligible for the small purchase method.

- Use as many of the following techniques as applicable and appropriate:
  - Compare competitive prices received in response to the solicitation to one another. This assumes you receive a large enough number of competitively priced offers from the current marketplace.
  - Compare proposed prices with prices under existing contracts and with prices proposed in the past for the same or similar items/services. Be sure to factor in any market changes (e.g., commodity price changes) or other influences (e.g., inflation).
  - Apply rough yardsticks (e.g., dollars per pound, per square foot, per hour, etc.) to compare prices and highlight significant inconsistencies that warrant additional pricing inquiry.
  - Compare competitive price lists, published catalog or market prices of commodities and products, similar indices and discount or rebate arrangements.
  - Compare proposed prices with your independent (i.e., in-house) cost estimates

While Grantees must still satisfy CDBG-DR requirements, and maintain records sufficient to detail the history of procurement, price or cost analyses are not required for procurements by small purchase procedures.

#### What is the Simplified Acquisition Threshold?

**From §200.88:** Simplified acquisition threshold means the dollar amount below which a non-Federal entity may purchase property or services using small purchase methods. Non-Federal entities adopt small purchase procedures in order to expedite the purchase of items costing less than the simplified acquisition threshold. The simplified acquisition threshold is set by the Federal Acquisition Regulation at 48 CFR Subpart 2.1 (Definitions) and in accordance with 41 U.S.C. 1908. As of the publication of this part, the simplified acquisition threshold is \$150,000, but this threshold is periodically adjusted for inflation.

### **7.3 The Solicitation**

The regulations at 2 CFR 200.320 do not mandate a specific method of obtaining price or rate quotations, so quotations for small purchases may be obtained in writing (hard copy or email), orally, by fax, via catalogs, by letter, through electronic means, e.g., the Internet, through paid advertisement, or by displaying the solicitation in a public place. The grantee should document its basis for determining that it has obtained quotations from an adequate number of qualified sources. Often a grantee will request quotations from a list of pre-qualified vendors and the list should be inclusive and up to date.

The method should be appropriate to the purchase (e.g., obtaining price quotes by phone for a commercially available supply item). Grantees should establish in their written Procurement Policies which methods are preferred and any other requirements for the use of written and oral solicitations. Written solicitations are used when it is necessary to provide vendors with detailed information that cannot be conveyed orally (e.g., by phone), or with detailed quotation evaluation information.

### **7.4 Negotiation**

Small purchases procedures are not sealed bidding. Contracting Officers may negotiate price and other terms of purchases where appropriate.

### **7.5 Environmental Assessment**

Keep in mind that prior to beginning construction work with CDBG-DR, projects will require an environmental assessment in keeping with the National Environmental Protection Act.

### **7.6 Breaking down larger contracts and consolidating work across jurisdictions**

There are certain circumstances where a Grantee may break down a larger contract into smaller quantities, or where Grantees may collaborate across political jurisdictions to take advantage of scale and economy. Grantees must divide total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises. Grantees are also 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.

***EXAMPLE***

*Following a large-scale disaster, security fencing is needed to protect real estate assets for a multitude of properties across many neighborhoods in a large city. The Grantee decides that expediency is important because it wants to start the work at the same time in all affected neighborhoods. It also decides that it will be economically feasible to break down the work into smaller components to enable the participation of small, minority and women owned enterprises. It records these decisions in meeting minutes. The Grantee then takes the scope of work and divides it into geographic sub-sections to help elicit bids from small, local contractors.*

***EXAMPLE***

*A tornado touched down several times over a 75-mile stretch in a single state, causing severe damage in 11 different cities and town, comprising three Grantee jurisdictions. Temporary construction work is needed to make sure roofs and walls that are compromised do not collapse, causing further damage. Grantees negotiate an inter-governmental agreement allowing them to coordinate the procurement process .*

## **7.7 Post-Award Issues**

With small purchases, amendments, change orders, cancellations and other requests might affect the amount of the purchase. Grantees should be aware of circumstances which might cause the total amount of the procurement to exceed the small purchase Simplified Acquisition Threshold. If a contract modification causing the amount to exceed this threshold, the Grantee must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications.

Grantees should also be prepared to provide documentation to HUD where such contract modifications result in a total contract price which exceeds the Simplified Acquisition Threshold (2 CFR 200.324(b)(5)).

## **7.8 Documentation**

Documentation is required for all procurement under the small purchase method.

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- Pre-Award
  - Document the rationale for the procurement method chosen.
  - Document the “Need” – that is, assure that the items or services to be procured are actually needed for disaster recovery work, and not another project or initiative.
  - Document the basis for the contract price.
  - Document the basis for determining that price or rate quotations were obtained from an adequate number of qualified sources.
  - Document efforts to solicit from minority and women’s business enterprises when they are potential sources.
  - Document the process of soliciting bids and the vendors contacted through the solicitation

- Post-Award

Post-Award documentation will depend on the administrative method for procurement (i.e. purchase order, construction contract, etc.). Grantees will also have locally established procedures for contract administration.

- Purchase Order

The issuance of a Purchase Order (PO) by the Grantee and its acceptance by the vendor (through either performance or signature on the PO) constitute a contract. For this reason, it is critical that the PO clearly specify the item(s) or service(s) being purchased and the terms and conditions of the purchase.

All federally funded contracts must contain the required federal clauses and certifications. Incorporation of required contract clauses can be in the form of reference or as an attachment to the contract. *SEE LIST OF CLAUSES AT SECTION 7.9.*

*Example – City A*

*The City of Whoville’s Office of Community Development (OCD) has determined that they need to purchase silt fencing to stabilize banks along the French Broad River that were recently damaged by Hurricane Patricia. Funding will come from the CDBG-DR and removing silt from the river will protect the City’s water source. OCD staff needed to contract with an outside vendor to purchase the materials that will be installed by City staff. Their review of pricing in the market has identified the price of materials at \$50/100 linear feet, or an anticipated total price of \$5,000, which meets the small purchase method of procurement. The City determines that they will need to purchase 10,000 linear feet. They have completed their review of prices from available price lists and catalogs. The City requests quotes by email from five local vendors having determined that this is an adequate number and received quotes from three firms, ultimately selecting the company that provided the best material at the lowest price.*

## **7.9 Clauses to be Included in Small Purchase Contract**

(i) Contract provisions. A grantee's and subgrantee's contracts must contain provisions covering the following, as applicable:

*(A) Contracts for more than the simplified acquisition threshold currently set at \$150,000, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.*

*(B) All contracts in excess of \$10,000 must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement.*

*(C) Equal Employment Opportunity. Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of “federally assisted construction contract” in 41 CFR 60-1.3 must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, “Equal Employment Opportunity” (30 FR 12319, 12935, 3 CFR Part 1964-1965 Comp., p. 339), as amended by Executive Order 11375, “Amending Executive Order 11246 Relating to Equal Employment Opportunity,” and implementing regulations at 41 CFR Part 60, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.”*

*(D) Davis-Bacon Act, as amended (40 U.S.C. 3141-3148). When required by Federal program legislation, all prime construction contracts in excess of \$2,000 awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act*

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*(40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, “Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction”). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The non-Federal entity must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland “Anti-Kickback” Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States”). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency.*

*(E) Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708). Where applicable, all contracts awarded by the non-Federal entity in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.*

*(F) Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of “funding agreement” under 37 CFR §401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency.*

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*(G) Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended—Contracts and subgrants of amounts in excess of \$150,000 must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).*

*(H) Debarment and Suspension (Executive Orders 12549 and 12689)—A contract award (see 2 CFR 180.220) must not be made to parties listed on the governmentwide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR Part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), “Debarment and Suspension.” SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.*

*(I) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)—Contractors that apply or bid for an award exceeding \$100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.*

*(J) See §200.322 Procurement of recovered materials.*



## **Chapter 8 – Sealed Bids**

### **8.1 What is the sealed bid procurement process?**

In a sealed bid process, the Grantee publishes a detailed scope of work, inviting qualified candidates to submit bids that are then publicly opened and announced with the award going to the lowest priced, responsible bidder. This is the method most often used for construction services. Because bid instructions often include very detailed scopes of work (for construction, the design and specifications) the bid submissions do not generally vary on timing, quality of materials, method of delivery and the like. Price then becomes the major factor determining which contractor receives the award.

The full regulations concerning sealed bids has three subparts as follows:

**§200.320(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.

**§200.320(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.

**§200.320(c)(2).** If sealed bids are used, the following requirements apply:

- (i) Bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids, for local, and tribal governments, the invitation for bids must be publicly advertised;
- (ii) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;
- (iii) All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly;
- (iv) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts,

transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(v) Any or all bids may be rejected if there is a sound documented reason.

## **8.2 Process**

**REMINDER:** States may choose to adopt 2 CFR Part 200 or to follow their own State laws and regulations regarding procurement. This Toolkit is based upon 2 CFR Part 200 and related Federal regulations. The Toolkit thus applies to Local Grantees (who must use 2 CFR Part 200) and States which have adopted these federal regulations.

The process in a sealed bid procurement involves a bit more work up front, as the goal is to define the scope of work (or design and specifications in a construction job) in sufficient detail as to leave little doubt to potential bidders about the Grantee's request. The section under 2 CFR 200.320(c)(2)(ii) states that "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."

For construction in particular, the initial step will likely be the procurement of an architect/engineer to design the project, followed by the procurement of the contractor to build the project. Keep in mind that architectural and engineering services are frequently secured through the Competitive Procurement process.

If the undertaking is indeed a construction project, then the process of invoicing and payment will also be different from a procurement involving the simple delivery of a manufactured product, or a service whose scope is small enough that payment is made upon completion. Contractors typically submit monthly requisitions, whose approval requires inspection of the work performed by qualified professionals.

## **8.3 Price Reasonableness**

Grantees should *plan* and *document* how much or how many products (or services) will be required prior to executing a procurement strategy. For various kinds of construction projects, this early work usually involves some kind of inspection of damaged sites and/or structures to determine a basic scope of work. The challenge for construction work is that often before an accurate cost/price analysis can be performed, the project must be designed. Note that in **§200.320(c)(2)(ii)** the regulations make it clear that the invitation for bids "which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to respond properly." This essentially requires that professional design work precede sealed bids for construction in all but simplest repair jobs.

The sealed bid process for awarding a construction contract does not require a price or cost analysis, unless the procurement action is in excess of the Simplified Acquisition Threshold, although it is a good idea for Grantees to undertake a cost estimate, to serve as a point of reference against which the sealed bids could be compared, upon opening. There may also be circumstances where a cost estimate is warranted. One instance might be when the Grantee has limited CDBG-DR funds, and must “size” the project according to the funds available. In another possible scenario, the Grantee may be evaluating options for construction, choosing between simple repair, a larger replacement project or even an expansion, and thus would find it helpful to have an estimate of costs.

## **8.4 The Invitation For Bids**

The solicitation, or Invitation For Bids (IFBs), under a sealed bid procurement process has special requirements, designed to promote transparency, participation and ensure fairness to all bidders.

The regulation in 2 Part 200.320(c)(2)(i) states that: “Bids must be solicited from an adequate number of known suppliers, providing them sufficient respond time prior to the date set for opening the bids, for local, and tribal governments, the invitation for bids must be publicly advertised.”

The regulations do not specify but many Grantees will typically publish an IFB in one or more newspapers with distribution across the municipality, tribal lands or county as the case may be. Some Grantees take this one step further by including the IFB in trade journals, community newspapers and newsletters.

Oftentimes, the IFB publication runs at least once a week for two consecutive weeks. Grantees should be sure to consult specific State and local laws which may have more detailed or more extensive requirements.

Grantees should be sure to keep a list of qualified, responsible bidders on hand, and to distribute notice of a Sealed Bid procurement to the list. Grantees must also accept bids from any qualified and responsible bidder not on an existing pre-qualified list.

## **8.5 Pre-Bid Conference**

Although not covered in 2 CFR 200, Grantees may choose to hold a pre-bid conference. After the IFB is issued and before bids are due, the Contracting Officer may hold a pre-bid conference with prospective contractors to discuss the project requirements and details of the IFB. The conference should be attended by the Contracting Officer and supporting technical staff. A pre-bid conference is normally conducted for large or complex procurements. Notice of any scheduled conference should be included in the IFB. The timing of the conference should allow

bidders enough time to review the IFB before the conference and adequate time to prepare or revise their bids before the bid opening. At the conference, the Contracting Officer should state that nothing said at the conference will change any of the terms of the IFB unless a subsequent written amendment to the solicitation is issued. A written summary of the conference should be made available to anyone requesting it. The summary should also be provided to all those who submitted IFBs or solicitations, not just those who attended the pre-bid conference. Attendance by offerors at the pre-bid conference, while desirable, should not be mandatory, and non-attendees should not be deemed non-responsive.

## **8.6 Handling the Bids**

All bids received should be time and date stamped by the Grantee, to demonstrate that they were received prior to deadline. Grantees should then keep bids in a lock box or other secure place to ensure that they are not opened or mishandled before opening.

Bids received after the deadline – as noted by the date and time stamp - should be kept separate and unopened.

## **8.7 Opening the Bids**

Grantees should open bids in public at the time and place as stated in the IFB, with anyone invited to attend. The Grantee's Contracting Officer should open the bids, note the name of the bidder and the price offered. The Grantee should not indicate at that time any commitment or statement regarding the award of the contract.

The list of bidders and bid amounts should be recorded and made available to the public.

## **8.8 Reviewing the Bids**

Bids must make clear the costs of materials and labor, as well as the amount of overhead and profit. Bids should be in the form of a firm fixed price contract (lump sum or unit price).

The Grantee must review the bids to make sure the offerors did not make mistakes or omit components from the scope of work.

### **WHAT IS MEANT BY “QUALIFIED” AND “RESPONSIBLE?”**

“Qualified” and “responsible” generally means that the contractor has the capacity to complete the work and has the availability to undertake the construction in a timely and professional manner. Although Grantees have discretion as to what constitutes qualified, they should document their process and decisions.

“Responsible” has a more specific regulatory reference to means 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.

Grantees must also ensure that the bid conforms to the material terms and conditions of the IFB. It is unacceptable for the Grantee to accept from any bidder a substitute of alternative materials or changes in design that differ from the IFB.

In general, bidders should not be permitted to change a bid after bid opening.

**The Contracting Officer should produce a written review of each bid submitted, noting any errors or omissions, or if the bid appears to be responsive and complete.**

## **8.9 Withdrawal of a Bid**

A bidder may also be permitted to withdraw a low bid if the bidder submits written evidence that clearly and convincingly demonstrates that a mistake was made.

## **8.10 Award of Contract**

The Grantee must make a firm fixed price contract award 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.

**The Sealed Bid process is not subject to negotiation. The Grantee should choose the lowest responsive bid from a responsible bidder.**

## **8.11 Environmental Assessment**

Keep in mind that prior to beginning construction work with CDBG-DR, projects will require an environmental assessment in keeping with the National Environmental Protection Act.

## **8.12 Post-Award Issues**

With the Sealed Bid procurement, amendments to the contract, change orders, cancellations and other requests might affect the amount of the purchase. Post award, any modification of the contract should trigger a cost or price analysis if the procurement action is in excess of the Simplified Acquisition Threshold. This includes a change order with an increase in construction contract price, or a change order that removes elements of the project regardless of price change.

## **8.13 Documentation**

Documentation is required for all procurement methods.

- Pre-Award
  - Documentation how a determination was made for the particular procurement method
  - Document the “Need” – that is, assure that the items or services to be procured are actually needed for disaster recovery work, and not another project or initiative.
  - Document the drafting of the IFB, including participation from anyone other than Grantee staff
  - If necessary, document the cost or price analysis.
  - Document the efforts to publish the IFB
  - Document efforts to solicit from minority and women’s business enterprises when they are potential sources.
  - Document the process of receiving bids, opening bids, and a written review of each bid received.
- Post-Award

Post-Award documentation will depend on the administrative method for procurement (i.e. purchase order, construction contract, etc.). Grantees will also have locally established procedures for contract administration.
- Special Construction Issues
  - Were price or rate quotations obtained from an adequate number of sources?
  - Does the solicitation include Davis-Bacon determinations and clauses?
  - Have the Copeland “Anti-Kickback” Act compliance clauses been included in the contracts?
  - Does the contract include Section 3 clauses?

### **IMPORTANT**

Documentation of each step in the Sealed Bid process is critical.

## **8.14 Contract Provisions Requirements**

### ***Appendix II to Part 200 - Contract Provisions for Non-Federal Entity Contracts Under Federal Awards***

*In addition to other provisions required by the Federal agency or non-Federal entity, all contracts made by the non-Federal entity under the Federal award must contain provisions covering the following, as applicable.*

*(A) Contracts for more than the simplified acquisition threshold currently set at \$150,000, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.*

*(B) All contracts in excess of \$10,000 must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement.*

*(C) Equal Employment Opportunity. Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of “federally assisted construction contract” in 41 CFR 60-1.3 must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, “Equal Employment Opportunity” ( 30 FR 12319, 12935, 3 CFR Part 1964-1965 Comp., p. 339), as amended by Executive Order 11375, “Amending Executive Order 11246 Relating to Equal Employment Opportunity,” and implementing regulations at 41 CFR Part 60, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.”*

*(D) Davis-Bacon Act, as amended (40 U.S.C. 3141- 3148). When required by Federal program legislation, all prime construction contracts in excess of \$2,000 awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 3141- 3144) as supplemented by Department of Labor regulations ( 29 CFR Part 5, “Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction”). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The non-Federal entity must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland “Anti-Kickback” Act ( 40 U.S.C. 3145), as supplemented by Department of Labor regulations ( 29 CFR Part 3, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or*

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*Grants from the United States”). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency.*

*(E) Contract Work Hours and Safety Standards Act ( 40 U.S.C. 3701- 3708). Where applicable, all contracts awarded by the non-Federal entity in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations ( 29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.*

*(F) Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of “funding agreement” under 37 CFR § 401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency.*

*(G) Clean Air Act ( 42 U.S.C. 7401- 7671q.) and the Federal Water Pollution Control Act ( 33 U.S.C. 1251- 1387), as amended - Contracts and subgrants of amounts in excess of \$150,000 must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act ( 42 U.S.C. 7401- 7671q) and the Federal Water Pollution Control Act as amended ( 33 U.S.C. 1251- 1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).*

*(H) Debarment and Suspension (Executive Orders 12549 and 12689) - A contract award (see 2 CFR 180.220) must not be made to parties listed on the governmentwide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 ( 3 CFR Part 1986 Comp., p. 189) and 12689 ( 3 CFR Part 1989 Comp., p. 235), “Debarment and Suspension.” SAM Exclusions contains the names of*



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*parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.*

*(I) Byrd Anti-Lobbying Amendment ( 31 U.S.C. 1352) - Contractors that apply or bid for an award exceeding \$100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.*

*(J) See § 200.322 Procurement of recovered materials.*

## **Chapter 9 – Competitive Bids**

### **9.1 What are competitive bids?**

The competitive bid process invites the submission of proposals from applicants through a Request for Proposals. Competitive bids differ from sealed bids in several important ways. It is important to note that:

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 (2 Part 200.320(d)).

In the sealed bid process the Grantee publishes a detailed scope of work and requests bids that are then opened publicly with the award going the lowest responsive and responsible bid.

Competitive bids must include price as a factor, with one exception, in the evaluation of proposals. The Grantee 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. Grantees commonly use competitive bids to procure architectural and engineering professional services where qualifications, as opposed to a specific designs or pricing, serves as the key factor to determine an award. All other contracts procured by competitive proposals must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered. The procurement of a software product or license is an example of competitive procurement where price should be among the evaluation criteria.

The regulations concerning competitive bids are as follows:

**§200.320(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:

**§200.320(d)(1)** Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicize requests for proposals must be considered to the maximum extent practical;

**§200.320(d)(2)** Proposals must be solicited from an adequate number of qualified sources;

**§200.320(d)(3)** The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;

**§200.320(d)(4)** Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

**§200.320(d)(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.

## **9.2 Process**

**REMINDER:** States may choose to adopt 2 CFR Part 200 or to follow their own State laws and regulations regarding procurement. This Toolkit is based upon 2 CFR Part 200 and related Federal regulations. The Toolkit thus applies to Local Grantees (who must use 2 CFR Part 200) and States which have adopted these federal regulations.

To determine that a competitive bid is the appropriate procurement method, the Grantee should ensure that other methods do not apply. This resembles a process of elimination (See Decision Tree in Chapter 2). Grantees should always consult their own written procurement policies when moving through this process.

For procurement by competitive proposals, the Grantee must draft and publish a Request for Proposals ("RFP"). The RFP, its publication and the process to ensure open and free competition requires several steps, explained in the following sections.

## **9.3 Pre-Award Cost/Price Analysis**

Grantees should *plan* and *document* how much or how many products (or services) will be required prior to executing a procurement strategy. The failure to plan may result in making multiple purchases or having to modify an acquisition contract with modifications and cost increases.

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The grantee should prepare an estimate of costs to compare to the bids submitted and maintain this documentation. Grantees may need to determine prior to publishing an RFP whether they are capable of undertaking a cost estimate with internal staff, or whether a contract is needed with a third-party professional to generate a cost estimate. The following are a series of issues to consider when making that decision:

- Does the Grantee have prior experience with this scope of work?
- Can the Grantee draw upon previous contracts for similar work to help create a cost estimate?
- Is the scope of work very technical and/or beyond the capacity of staff, such that an expert is necessary to evaluate costs?
- Will hiring a third-party for a cost estimate lead to a refined RFP?

As part of a cost analysis of an overall proposal, Grantees may look at the price of certain commodities or products within the proposal, but really that forms an element of the overall cost analysis.

The Grantee must award contracts to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered.

If the Grantee intends to use competitive procurement 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, it does not have to use price as a selection factor.

## 9.4 The Solicitation

The contents of the RFP should 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

### NOTE:

Per 2 CFR 200.323(a), Grantees “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.

offers must be clearly stated (2 CFR 200.319(c)). Furthermore, the Grantee must identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

Prior to the publication of the RFP, Grantees “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 (2 CFR 200.319(d)).”

The RFP should be published through widely subscribed or distributed media to ensure that an adequate number of qualified sources are informed of the Grantee’s request.

The Grantee must publish its RFP through media with wide and thorough distribution. Like all procurements subject to 2 CFR 200.319, the Grantee must ensure that the procurement is conducted in a manner providing full and open competition. Grantees are encouraged give ample time for the RFP to circulate and for proponents to assemble their submission – an RFP that anticipates more detailed, collaborative, and lengthy proposals needs to make sure that the RFP allows sufficient time to solicit proposals from an adequate number of qualified sources. The RFP may ask for detailed breakdown on the cost components, where applicable. The breakdown could include details for different staff members, fringe benefits, overhead and profit so that the cost analysis can review all of the elements of the proposal.

## **9.5 The Proposal and its Evaluation**

Grantees should request written proposals conforming to the format and substance as published in the RFP, and any response to a publicized proposal must be considered to the maximum extent practical. Proposals must be solicited from an adequate number of qualified sources.

The Grantee’s RFP must identify all evaluation factors and their relative importance, and contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered. For example, it might create a point or scoring system such as follows:

- 25 points - Overall Capacity of Firm
- 25 points - Previous Experience with Specific Product/Service
- 10 points - Price
- 20 points - Proposed Method of Delivery
- 20 points - Schedule for Delivery

The above scoring system is an example only and is meant as an illustration. If a Grantee uses a scoring system, ideally each category will have detailed components. For example, under the “Overall Capacity of Firm” section (valued at 25 points), perhaps the Grantee will break that category into smaller components, each with its own points. For example:

- 10 points - Experience of principals
- 10 points – Experience of team assigned to Grantee
- 5 points – Has this team worked together before (yes or no?)

The sum of these totals 25 points, the maximum awarded points for Overall Capacity of Firm. Again, this is just an example. Each Grantee will have to configure its own evaluation criteria, and scoring system, if it chooses to use that method depending on its priorities. The scoring system helps to promote transparency in the procurement process. It also tilts the evaluation toward a more quantitative approach, which is more readily understood by both participants and outside observers. It may also be valuable when an evaluation committee has several people, to establish a common, unified platform for the evaluation.

A scoring system may be more difficult to implement when the evaluation criteria are not clear or the priorities of the Grantee are in flux.

## **9.6 Environmental Assessment**

When Grantees use competitive procurement to hire architects and engineers, they should keep in mind that prior to beginning construction work with CDBG-DR, projects will require an environmental assessment in keeping with the National Environmental Protection Act. The point about architects and engineering services is that the design work itself may depend upon factors identified in the Environmental Assessment and so Grantees should keep this in mind before design and engineering work is finalized.

## **9.7 Post-Award Issues**

When a competitive procurement process leads to a contract based primarily on the qualifications of the firm, and not on price or a specified product, Grantees should expect that the scope of work will change as the work product or service itself becomes more defined. For example, an architect hired through a competitive procurement will need to work with the Grantee to gather information about the project to be designed – How large? What materials? What programming? Until these elements are defined in greater detail, the scope of work for an architect will be difficult to define.

In those instances where the work product/service needs to be further defined, but a Grantee needs the input of a procured professional to create a complete scope, the Grantee can segment or phase the work. This method will avoid the Grantee having to make large change orders in a contract to expand the work to fit the newly defined scope.

*Example #1*

*A tornado has destroyed the public marketplace in a Mid-Western town, and the municipal Grantee wants to rebuild the marketplace but also add several components to expand the project into a mixed-use development. It published an RFP following rules for competitive procurement to contract with an architect to help determine what the program of the rebuilt marketplace will contain and to create conceptual drawings. This initial RFP emphasized the experience of the firm in public marketplace design. The Grantee then obtained public input on the program that emphasized the residential and commercial uses as well and came to the conclusion that an architect with more experience in complex multi-use buildings would be preferable. The Grantee then issued a second RFP to complete design and supervise construction of the mixed-use project.*

The phasing of a project can take many different forms. Projects may be divided according to size and scope, necessary expertise, emergency work vs. permanent projects, among others. Below is another example:

*Example #2*

*A flood has severely damaged a long stretch of urban coastline. Buildings and infrastructure have collapsed and will need to be rebuilt. Much of the land belonged to the Grantee, who decides to use CDBG-DR funds to help create a new masterplan for the area. The Grantee uses competitive procurement to solicit architectural, engineering and planning services. The scope of work in the RFP refers to preliminary planning to locate and size infrastructure, building lots, and public spaces. Subsequent to this work the Grantee will create a new RFP for architectural and engineering work related to the construction of specific project components. The firm selected for the initial scope is not allowed to participate in the second RFP to eliminate an unfair competitive advantage.*

It is not a reasonable practice to issue a competitive RFP for preliminary architectural and/or engineering services and then create a change order in the contract to give the full scope of design and specifications to the firm initially awarded.

Sometimes, changes in the scope of work do emerge from the process of working with a vendor or service provider outside of architecture and engineering. Grantees may organize contracts into phases to allow the work to proceed, with milestones and opportunities to change, pause or cancel the contract.

*Example #3*

*Through a competitive procurement, a Grantee selects a certain software provider to create a grants management program that will enable the Grantee to use CDBG-DR proceeds to make small business loans to those affected by a natural disaster. The Grantee structures the contract in several phases, each with a due date, deliverable and compensation amount. By working for several weeks with the software provider, the Grantee comes to realize that the program it needs will be three times as large and sophisticated as it had originally conceived, and as it had published in its RFP. Fortunately, because the Grantee organized the contract in phases, it has the software provider finish Phase One, deliver the report on the proposed software program. The Grantee also pays the software provider for Phase One and terminates that contract, per clauses that allow the Grantee to do so. The Grantee then issues a new RFP for the larger, more sophisticated and more defined software program that is needed. The initial contract recipient may submit a proposal, but the RFP is open again to all qualified firms, to promote fairness, transparency and competition. In the new RFP, the Grantee must ensure that the contractor on Phase One does not have an unfair competitive advantage over other firms.*

## **9.8 Documentation**

Documentation is required for all procurement under the competitive purchase method.

- Pre-Award
  - Document the rationale for selected of the competitive procurement method.
  - Document the “Need” – that is, assure that the items or services to be procured are actually needed for disaster recovery work, and not another project or initiative.
  - If necessary, document the cost and price analysis process as relevant through independent analysis.
  - Document the process of soliciting bids and the vendors contacted through the solicitation.
  - Document efforts to solicit from minority and women’s business enterprises when they are potential sources.
  - Document the evaluation criteria and process of contractor selection.
  - Document the selection of contract type.



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- Award.
  - Document the receipt of all proposals.
  - Document evaluation according to the selection criteria.
  - Document the cost analysis of the proposals, if required.
  - Document any price negotiation with the winning proposer.
- Post-Award.

Grantees must have locally established procedures for contract administration that enable them to maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contract or purchase orders. Grantees will typically use fixed price or cost reimbursement contracts for competitively procured products/services. As indicated above in the section on Post-Award issues, in many instances the full scope of work and/or specifications have yet to be defined. In those cases, Grantees should consider how to segment or phase work so that they can create an RFP and contract:

- To gain the input of contracted, experienced professionals to fully define the scope of work or product specifications, followed by a subsequent RFP which takes advantage of the full scope, or;
- Create an RFP and contract with milestones and deliverables which enable the Grantee to pause, modify or cancel the contract once the scope has been more fully understood.

## Chapter 10 – Non-Competitive Proposals

### 10.1 What are non-competitive proposals?

Procurement through non-competitive proposals occurs when the Grantee solicits proposals from only one source. This method 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.. Choosing to procure through a non-competitive proposal does not relieve the Grantee from following the general procurement standards (§200.318). Furthermore some of the subparts in (§200.319) on competition are still relevant.

The regulations on non-competitive proposals follow:

Procurement Standard	Procurement Regulation Description
§200.320(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:
§200.320(f)(1)	The item is available only from a single source;
§200.320(f)(2)	The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
§200.320(f)(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
§200.320(f)(4)	After solicitation of a number of sources, competition is determined inadequate.

## 10.2 Process

REMINDER: States may choose to adopt 2 CFR Part 200 or to follow their own State laws and regulations regarding procurement. This Toolkit is based upon 2 CFR Part 200 and related Federal regulations. The Toolkit thus applies to Local Grantees (who must use 2 CFR Part 200) and States which have adopted these federal regulations.

A Grantee may only use non-competitive procurement if one or more of the four circumstances in §200.320(f) are met. Proving that these circumstances exist requires extensive documentation.

§200.320(f)(1) The item is only available from a single source

Most products and services can be secured from more than one source. A Grantee *might* find only one source if a Grantee:

- Needs a very specialized product to replace or repair a technical piece of machinery or equipment
- Needs a custom built item within a narrow field of expertise

To substantiate that the product or service is only available from a single source, the Grantee must document how it came to that conclusion and why factors it considered are relevant given the nature of the acquisition.

- What research was undertaken to locate sources?
- What communications were made to inquire about sources?
- What alternative products/services were investigated?
- Which experts were consulted to analyze the issue and determine what kind of product/service would be best suited to resolve or improve the situation?

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

Following a disaster, Grantees are trying to recover as quickly as possible. However, this circumstance cannot be invoked without due process and cause.

### NOTE:

§200.319(a)(6) states that “specifying only a “brand name” product instead of allowing “an equal” product to be offered” is a prohibited, non-competitive practice.

### NOTE:

Grantees who use this regulation sub-part as a shortcut to non-competitive procurement may have audit findings including the misuse of federal funds.

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What are the circumstances where there is “public exigency or emergency?” Imminent threat to:

- Human life
  - Example: An earthquake has collapsed buildings and persons are trapped. Emergency services determines that specially trained dogs are needed immediately to help find victims. The Grantee solicits services from a single source which it knows can arrive on site within hours.

or

- Extraordinary damage or destruction of property
  - Example: A hurricane has severely damaged a large hydroelectric dam, and there are concerns that it will break, unleashing millions of gallons of water and destroying hundreds of homes. The Grantee procures engineering services to identify and make any emergency repairs. If possible, longer term and larger scale repairs will be procured competitively.

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

Any Grantee that requests permission to use noncompetitive proposals should be prepared to document why this method is preferred over other procurement methods; what information it used to reach this conclusion; and how it will ensure that costs are reasonable and justifiable.

Requests to use noncompetitive proposals should be sent by the Grantee to the CPD Representative and the assigned HUD Field Office.

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

This regulation means that the Grantee has undertaken other procurement methods and has requested proposals or bids from multiple sources. If the Grantee determines that the competition was *inadequate*, it is most likely because the Grantee issued an RFP at least two times and received:

- A single response from the same provider in each and every occasion that proposals were submitted
- No responses

### **10.3 Pre-Award Cost/Price Analysis**

Grantees must have written procedures for all procurement transactions, including non-competitive procurement. Cost analysis under this method should be the same as the other procurement methods.

The grantee should prepare a scope of work as part of an RFP. With that scope, the Grantee should prepare an estimate of costs. Prior to publishing an RFP, a Grantee may need to determine whether they are capable of undertaking a cost estimate with internal staff, or whether a contract is needed with a third-party professional to generate a cost estimate. Grantees should consider the following items when selecting who will perform the cost estimate:

- Does the Grantee have prior experience with this scope of work?
- Can the Grantee draw upon previous contracts for similar work to help create a cost estimate?
- Is the scope of work very technical and/or beyond the capacity of staff, such that an expert is necessary to evaluate costs?
- Will hiring a third-party for a cost estimate lead to a refined RFP?

As part of a cost analysis of an overall proposal, Grantees may look at the price of certain commodities or products within the proposal. However, that analysis is an element of the overall cost analysis.

Even when the Grantee uses non-competitive procurement, the regulations from **§200.319** on competition apply, including the following:

- Any contractor involved in the RFP documents or process cannot submit a proposal
- Grantees cannot place unreasonable requirements (including unnecessary experience or excessive bonding) on firms in order for them to qualify to do business
- Grantees cannot award a contract to a consultant already on a retainer contract
- Grantees must avoid conflicts of interest
- Grantees must avoid geographical preference, except where Federally mandated

### **10.4 The Solicitation**

With a non-competitive procurement, Grantees must prepare a scope of work and an RFP even when they intend to offer the RFP to a single vendor.

## **10.5 Negotiation**

Grantees should be prepared to negotiate cost in a non-competitive procurement, using the cost analysis research conducted prior to the award as a framework for understanding reasonable costs. The Grantee should document the negotiation details, including agreements that may differ from the offeror's proposal, and which lead to a final contract. Profit should always be negotiated as a separate element.

## **10.6 Post Award**

If a Grantee substantially modifies the scope of work in a non-competitive procurement post award, the Grantee should cancel the contract and re-issue an RFP with the modified scope.

## **10.7 Documentation**

Documentation under non-competitive procurement is similar to other procurement methods.

- Pre-Award.
  - Document the rationale for selected of the competitive procurement method.
  - Document the “Need” – that is, assure that the items or services to be procured are actually needed for disaster recovery work, and not another project or initiative.
  - If necessary, document the cost and price analysis process as relevant through independent analysis.
  - Document the process of soliciting bids and the vendors contacted through the solicitation.
  - Document efforts to solicit from minority and women's business enterprises when they are potential sources.
  - Document the evaluation criteria and process of contractor selection.
  - Document the selection of contract type.
- Award
  - Document the receipt of all proposals, even if only one proposal is submitted.
  - If applicable, document the evaluation of the proposal to determined that it meet the Grantee's requirements.
  - Document any price negotiation with the vendor.

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- Post-Award
  - Grantees are encouraged have locally established procedures for contract administration that enable them to maintain oversight to ensure that contractors perform in accordance with the terms, conditions and specifications of their contracts or purchase orders (See 2 CFR 200.318(b)). Grantees will typically use fixed price or cost reimbursement contracts for non-competitively procured products/services.

## **Appendix – 2 CFR Part 200: Text and Guidance**



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This appendix reviews 2 CFR 200.317-326. It provides the specific language from the regulation, an “interpretation” or simple language version in the “What it means” section, and some important items to keep in mind.

Of note, the Appendix begins with 2 CFR 200.317 Procurement by States. In fact, however, 24 CFR Part 570.489(g) takes precedence over Part 200. The regulation in 24 CFR 570.489(g) is found immediately below in the “Keep in Mind” section for 2 CFR 200.317.

#### *§200.317 – Procurement by States*

Regulations in this section note how states, separate from other non-Federal entities, must follow the procurement standards it uses for non-Federal (i.e. State funded) awards.

#### §200.317

**Previous Regulation / Circulars:** See 85.36(a). Program Administrative Requirements for States 24 CFR 570.489 is still required.

**What it means:** A State will follow its own established policies and procedures, which may not be exactly the same as the Federal regulations. But all other public jurisdictions, such as Counties and Municipalities, must follow the Federal procurement standards.

#### **Keep in Mind:**

- When it comes to procurement with CDBG funds, States are subject to different regulations than Counties and Municipalities.
- States should have written policies. Below is the citation from 24 CFR 489(g)
  - (g) Procurement. When procuring property or services to be paid for in whole or in part with CDBG funds, the State shall follow its procurement policies and procedures. The State shall establish requirements for procurement policies and procedures for units of general local government, based on full and open competition. Methods of procurement (e.g., small purchase, sealed bids/formal advertising, competitive proposals, and noncompetitive proposals) and their applicability shall be specified by the State. Cost plus a percentage of cost and percentage of construction costs methods of contracting shall not be used. The policies and procedures shall also include standards of conduct governing employees engaged in the award or administration of contracts. (Other conflicts of interest are covered by 24 CFR 570.489(h).) The State shall ensure that all purchase orders and contracts include any clauses required by Federal statutes, Executive orders, and implementing regulations. The State shall make subrecipient and contractor determinations in accordance with the standards in [2 CFR 200.330](#).
- CDBG program rules require that the State establish policies and procedures for fair and open competition
- State must ensure that all purchase orders and contracts include clauses required by Federal statutes, executive orders and implementing regulations (24 CFR 570.489(g))

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§200.317

- State must obtain certification from any transaction participant that neither it nor its principals are currently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation (24 CFR 570.489(l))
- P.L. 113-2 created opportunities for grantees to petition HUD for waivers of regulations following Hurricane Sandy. The waivers granted, and published in the Federal Register, apply specifically and only to funds appropriated through P.L. 113-2 and supplementary appropriations, which altogether totaled over \$13 billion.

*§200.318 – General Procurement Standards*

This section presents regulations on general standards, noting the importance of written standards and a documentation of procurement history; avoiding duplicative purchases; and issues regarding efficient practices and ensuring quality work.

**§200.318**

**General procurement standards.**

**Previous Regulation / Circulars:**

1. Paragraphs (d), (e), and (f) require non-Federal entity's procurement procedures to avoid duplicative purchases and encourage non-Federal entities to enter into inter-entity agreements for shared goods and services.
2. Raises the threshold for small purchase procedures to \$150,000 to be consistent with the simplified acquisition threshold in the Federal Acquisition Regulation (FAR).
3. All A-110 language on procurement is replaced by A-102 section .36 Procurement, with the exception of A-102 section .36 (3) on Codes of conduct which is replaced by A-110 section .42 Codes of conduct.

**§200.318(a)**

The non-Federal entity must use its own documented procurement procedures that reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

**Previous Regulation / Circulars:** See 85.36(b)

**What it means:** States and municipalities must have their own written procurement procedures, and cannot simply rely on the Federal regulations.

**Keep in Mind:** Some State and Local laws place additional requirements on the procurement process, and all three (Federal, State and Local) must be followed as applicable.

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#### §200.318(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.

**Previous Regulation / Circulars:** See 85.36(b)(2)

**What it means:** Grantee and subgrantees should have a system in place for supervising contractors

**Keep in Mind:**

- The system for overseeing contractors needs to be in place and staff need to be trained on its proper use. It may also be helpful to provide orientation to contractors, so they can provide the necessary information to conform to the requirements, and to be paid in an expedient manner.

#### §200.318(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 agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.

**Previous Regulation / Circulars:** See 85.36(b)(3)

**What it means:** States and municipalities must have their own written policies governing conflicts of interest.

**Keep in Mind:**

- States and municipalities may have additional requirements regarding real or perceived conflicts of interest, as well as their own penalties and sanctions for any violations.

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#### §200.318(c)(1)

- Making an award where there is a potential for conflict of interest:  
The municipality is in receipt of CDBG-DR funds and wants to award funds for reconstruction of a bridge. A potential contractor for this job has a senior employee who is the husband of one of the municipal's city council members. That council member must recuse herself from all parts of the selection and administration of the award, if the contractor wishes to be eligible to submit a bid.

#### §200.318(c)(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.

**Previous Regulation / Circulars:** See 85.36(b)(3)(iv)

**What it means:** Just as conflicts of interest can arise when there are individual relationships between public officials or staff at the non-Federal entity and employees or beneficiaries of an awarded contract entity, there is also potential for a conflict of interest when the non-Federal entity has organizational links to potential awardees.

**Keep in Mind:**

- Examples of organizations “related” to a non-Federal entity might be a local housing authority, a local or statewide economic development corporation, or an industrial development agency. If there is a relationship, it does not prohibit the non-Federal entity from contracting with the related entity, but there must be State and/or local policies which guide that decision.
- It is possible for the non-Federal entity to make an award to the related organization, so long as that process follows the written standards of conduct which the non-Federal entity adopts.

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#### §200.318(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.

**Previous Regulation / Circulars:** See 85.36(b)(4)

**What it means:** Carefully plan what is needed for recovery. Understand what other federal resources/agencies will provide and what is best suited for CDBG-DR. There may be various ways to organize procurement, so be flexible about how to proceed.

**Keep in mind:**

- Different approaches to achieve greater economies:
  - Analyze the different components of what needs to be procured. Are they best packaged together? Separated into individual items? This will depend on the market and the components themselves. It may be that an exercise (documented for reporting and audit purposes) looking at various options will yield the best path forward.
  - Example where separation might be best: City Y is preparing a Bid package for inspection services. The City is seeking services for inspections of buildings to determine their code compliance, some for single family homes and some for historic buildings in the City's downtown core. Specific skills and experience are needed for the work on historic properties that may not be needed on the single family homes and pricing would vary dramatically between these structural types. In this case separation of the RFQs may result in the best approach.
  - Example where consolidation might be best: City Z needs to purchase a front end loader and pallet fork. The City may chose to consolidate these items because often the vendor will give a better price when the items are purchased together.

#### §200.318(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.

**§200.318(e)**

**Previous Regulation / Circulars:** See 85.36(b)(5)

**What it means:** Consider the region affected by the disaster and those recovery issues that run across the region, as opposed to isolated items that are geographically (and politically) limited to a single non-Federal entity. Look at neighboring states, counties and municipalities and look to where an inter-entity agreement could result in scaled purchases and savings.

**Keep in Mind:**

- What recovery items/issues might run across political boundaries?
  - Damage to roads and highways caused by floods, tornadoes or hurricanes
  - Damage to bridges/tunnels shared by municipalities or under control of a multi-jurisdictional authority (e.g. NY/NJ Port Authority)
  - Shorefront beach and coastal damage
  - Utilization of a regional landfill for demolition waste may be more cost effective than developing a separate facility for a single unit of local government.

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#### §200.318(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.

**Previous Regulation / Circulars:** See 85.36(b)(6)

**What it means:** Check if there are federal resources deemed excess or surplus before buying new equipment or property.

**Keep in Mind:**

- Where do you find out about excess/surplus Federal property or equipment?
  - The General Services Administration oversees surplus real and personal property. Typically, non-federal entities may obtain properties before they are made available to the public. The main website is <https://www.gsa.gov/gsexcess>.

#### §200.318(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.

**Previous Regulation / Circulars:** See 85.36(b)(7)

**What it means:** Draft language to insert into every construction contract where the contractor must participate in value-engineering exercises to attempt to secure lower cost items with the same necessary and sufficient functionality as higher costs products.

**Keep in Mind:**

- The scope of work and the design/specifications of the project will determine how much flexibility there will be for value engineering.
- Sometimes value engineering is used to conform a project to a specific budget. Other times, project managers use it simply to achieve cost savings measures with contractors.



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#### §200.318(g)

- Items that are out of sight may not need to be aesthetically pleasing. Items that are used infrequently or places that are accessed only by limited personnel (i.e. attics, basements, and storage) may be candidates for value-engineering.

#### §200.318(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.

**Previous Regulation / Circulars:** See 85.36(b)(8)

**What it means:** Awards must consider multiple factors beyond price. Track record, quality of product/service, and financial capacity should be considered as well.

**Keep in Mind:**

- This regulation speaks directly to the RFQ/RFP process and document.
  - The RFQ/RFP must indicate that consideration for awards will not be based solely on price, but may consider other critical factors.
  - The RFQ/RFP should be specific as to what other factors will be evaluated, what the minimum thresholds will be, how much weight different factors will be given, and the process for selecting the contractor.

#### §200.318(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.

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**§200.318(i)**

**Previous Regulation / Circulars:** See 85.36(b)(9)

**What it means:** Document every step of procurement from deciding upon the method of procurement to the selection/rejection of the contractor.

**Keep in Mind:** Documentation may consist of meeting minutes, resolutions from governing bodies, publications of RFPs and RFQs, as well as internal documents such as ranking and scoring sheets. Anticipate that everything will be made public, and then transparency becomes paramount.

**§200.318(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:

**§200.318(j)(1)(i)**  
**§200.318(j)(1)(ii)**

(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.

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#### §200.318(j)(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.

**Previous Regulation / Circulars:** See 85.36(b)(10)(i-ii)

**What it means:** Time and material contracts are the last option. Even with this contract, there must be an upper limit where if the contractor finds it takes longer or materials were more expensive than budgeted, the contractor runs the risk, and cannot file for a change order.

**Keep in Mind:**

- Before choosing this kind of contract, non-Federal entities should document the process by which they determined that a time and materials contract was the only choice.
- The cost of materials, as well as the fixed hourly rates should be checked against estimates and market rates to determine their reasonableness.
- It may be effective to break down larger tasks/projects into smaller pieces once a non-Federal entity determines that the time and materials contract is the only form available because it may be easier to monitor contractors and help ensure the most efficient methods and processes.

#### §200.318(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.

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#### §200.318(k)

**Previous Regulation / Circulars:** See 85.36(b)(11)(12)(i-ii)

**What it means:** Any interpretation and application of Federal laws for issues of procurement are the responsibility of the non-Federal entity. The non-Federal entity cannot shift responsibility to the Federal government for any of its contractual issues.

**Keep in Mind:** Recipients of federal funds are responsible to the Federal government for the eligible and proper use of those funds, including when funds are passed through to subrecipients. Contractual disputes that lead to delays or improper use of funds are the responsibility of the non-Federal entity, even if the subrecipient may be a source of the dispute.

*§200.319 – Competition*

This section of the regulations provides elements to be incorporated into the protocols and procedures used to create a competitive procurements process. It discusses conflicts of interest, consultants currently on contract who compete for further work, preferential treatment and other areas that might impede fair and open competition.

**§200.319**

**Competition.**

Where there is a conflict between state or tribal law and this guidance as implemented in regulation with respect to the administration of a Federal award, this Federal guidance prevails

**Previous Regulation / Circulars:**

**What it means:** Federal statute and law prevail over State and Tribal law for administration of Federal funds.

**Keep in Mind:** State and Tribal Law may place additional requirements on top of Federal law, but they cannot be in conflict with Federal law.

**§200.319(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:

**Previous Regulation / Circulars:** See 85.36(c)(1)

**What it means:** Any contractor involved in helping in developing the process or the documents for procurement cannot compete for any such procurements.

**§200.319(a)**

**Keep in Mind:**

- It is important to communicate this issue up front to be clear with any contractor that volunteers, is hired, or otherwise participates in the process of developing procurement processes and documents that s/he may not be able to compete.
- This situation extends to contractors who may sit on boards of other organizations or committees where such organization is participating to organize a procurement process.
  - For example: A contractor sits on the Mayor's Emergency Taskforce which is helping to determine how best to prioritize certain recovery tasks. That contractor must recuse him/herself from participating in any discussion of procurement if s/he wishes to compete for such procurement.

**§200.319(a)(1)**

Placing unreasonable requirements on firms in order for them to qualify to do business;

**Previous Regulation / Circulars:** See 85.36(c)(1)(i)

**What it means:** Qualifications and requirements cannot be so strict as to favor some firms or limit competition.

**Keep in Mind:** What may be reasonable in some circumstances may not be reasonable in others. Some contracting scopes of work require a technical expertise that few contractors possess (i.e. repairing damage to nuclear reactors). Consult with persons with field expertise about what requirements would be reasonable. Requirements should not allow only one brand of product to steer the contract to a specific vendor when multiple brands would be equally effective.

**§200.319(a)(2)**

Requiring unnecessary experience and excessive bonding;

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**§200.319(a)(2)**

**Previous Regulation / Circulars:** See 85.36(c)(1)(ii)

**What it means:** Require necessary experience and link it to the scope of work. Bonding can be expensive and needs to reflect the scale and complexity of the work.

**Keep in Mind:**

- Note the phrase “excessive bonding.” This does not mean that no bonding is required, but that it should be appropriate to the work.
- States and municipalities may have laws about bonded contractors conducting public work – check on this before determining bond requirements.

**§200.319(a)(3)**

Noncompetitive pricing practices between firms or between affiliated companies;

**Previous Regulation / Circulars:** See 85.36(c)(1)(iii)

**What it means:** Two companies, related or not, cannot communicate with each other to plan to submit noncompetitive proposals or bids that otherwise do not reflect what they would submit independently.

**Keep in Mind:** Coordination of services between or among companies which then submit a single competitive proposal would be allowed.

**§200.319(a)(4)**

Noncompetitive contracts to consultants that are on retainer contracts;

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**§200.319(a)(4)**

**Previous Regulation / Circulars:** See 85.36(c)(1)(iv)

**What it means:** A consultant that is already on a retainer contract with a non-Federal entity which then has its work extended or scope amended to include recovery work would not be allowed.

**Keep in Mind:** A consultant on retainer would have to submit a separate competitive proposal, evaluated against others given the same opportunity.

**§200.319(a)(5)**

Organizational conflicts of interest;

**Previous Regulation / Circulars:** See 85.36(c)(1)(v)

**What it means:** An organization which has a relationship with the non-Federal entity cannot compete for procurement if its participation conflicts with its existing relationship.

**Keep in Mind:**

- Organizational conflicts of interest exist when work performed by a contractor may: (a) result in an unfair competitive advantage for the contractor; or (b) impair the contractor's objectivity in performing federal contract work.
- The Contracting Officer of the Non-Federal Entity is responsible for identifying and resolving potential conflicts of interest.

**§200.319(a)(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



**§200.319(a)(6)**

**Previous Regulation / Circulars:** See 85.36(c)(1)(vi)

**What it means:** Non-Federal entity cannot insist a contractor use or provide a brand name product.

**Keep in Mind:**

- Proposals may include references to brand name products, but the evaluation of such products should must refer to the relevant requirements and scope of work, and not rely on the brand name.
- A contractor who proposes a brand name product, is selected for a contract, may substitute the brand named product so long as the contract allows for it, and that the substitute product will perform equally as well at the same or lower cost.

**§200.319(a)(7)**

Any arbitrary action in the procurement process.

**Previous Regulation / Circulars:** See 85.36(c)(1)(vii)

**What it means:** Procurement decisions should not be deemed “arbitrary” under any circumstances. Contracting Officers must use common sense and sound judgment as they making procurement decisions, which should be transparent and documented.

**Keep in Mind:** A planned and documented process for procurement will typically avoid “arbitrary” decisions.

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#### §200.319(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.

**Previous Regulation / Circulars:** See 85.36(c)(2)

**What it means:** Non-Federal entities cannot impose geographical preferences that limit competition, except where the Federal government dictates otherwise.

**Keep in Mind:** There may be circumstances where urgent responses and mobilization are needed, and firms with a local or regional presence will have an advantage because of their proximity.

#### §200.319(c)

The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations:

**Previous Regulation / Circulars:** See 85.36(c)(3)

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#### §200.319(c)(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

**Previous Regulation / Circulars:** See 85.36(c)(3)(i)

**What it means:** Describe the product or service needed in detail, but avoid product specifications which may limit contractors choices or otherwise limit competition.

**Keep in Mind:** If the product specification is written so narrowly that only a select few providers offer it, this write-up would limit the competition and thus be disallowed. For example, a Request for Proposals that details specifications for the purchase of a 40 hp tractor to include the paint color of the item so that only one vendor is qualified would violate this regulation.

#### §200.319(c)(2)

Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals

**Previous Regulation / Circulars:** See 85.36(c)(3)(ii)

**What it means:** Describe clearly all the components of a proposal, and the factors or scoring criteria that will be used to evaluate proposals.

**Keep in Mind:**

- Even when non-Federal entities put detailed scoring criteria in place, some judgment will have to be exercised.

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#### §200.319(c)(2)

- Having scoring criteria will be helpful, but does not eliminate the need to have evaluators who have experience with the particular scope of work and/or products and services.
- The group of persons which evaluated the procurement proposals should be identified as having the requisite experience and knowledge to perform their task.

#### §200.319(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.

**Previous Regulation / Circulars:** See 85.36(c)(4)

**What it means:** If there is a prequalified list, the list has to be current and large enough to enable competition. Potential bidders need to be allowed to qualify during the solicitation.

**Keep in Mind:**

- Even though bidders may qualify during the solicitation, it may still be a good idea to have a prequalified list to ensure that during solicitation there are enough qualified bidders.

*§200.320 – Methods of Procurement to be Followed*

This section of the regulations details the different methods of procurement that may be utilized, including micro-purchases (under \$3,000), small purchases (\$3,000-\$149,999), sealed bid, competitive proposals, and sole source procurement. This section follows the format of the tables above, but note that Section 3-7 below provide more detail on each of these procurement methods. For that reason, the Keep in Mind items are brief here, but expanded later.

**§200.320**

Methods of procurement to be followed.

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

**§200.320(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.

**Previous Regulation / Circulars:** New form of procurement

**What it means:**

- If the total amount of the acquisition is \$3,000 or less (\$2,000 for construction related work subject to Davis-Bacon), the micro purchase method may be chosen.
- Non-Federal entity must make an effort to distribute contract for micro-purchases among qualified suppliers.
- Competitive proposals are not required.

**Keep in Mind:**

- The Non-Federal Entity should have an estimate of costs (see chapters on cost and price analysis) and high levels of confidence that the acquisition will be under the appropriate threshold to enact the micro-purchase approach.
- Taking larger services and breaking them into smaller pieces so that they might qualify under the micro-purpose approach is not an allowable procurement practice.

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#### §200.320(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.

**Previous Regulation / Circulars:** See 85.36(d)(1)

**What it means:** The small purchase procedure can be used when the amount of the products or services falls below the Simplified Acquisition Threshold.

**Keep in Mind:**

- The Simplified Acquisition Threshold (SAT) amounts are different depending on what products or services are being procured.

#### §200.320(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.

**Previous Regulation / Circulars:** See 85.36(d)(2)

**What it means:** This is the traditional sealed bid method often used for construction contracting. The contract is awarded to the lowest priced, qualified bidder meeting all the required terms and conditions.

**Keep in Mind:**

- For this procurement method, it is critical that the scope of work and, particularly for construction, the design and specifications are as detailed and complete as possible. By publishing incomplete or cursory information on which contractors are to bid, non-Federal entities can open themselves to change orders, significant increases in the contract amounts, and claims from contractors not selected. See below 200.320(c)(1).

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**§200.320(c)**

- Sealed bid procurement is the most typical means of securing contractors for construction work.
- Procurement using sealed bids must follow all of the requirements detailed below.

**§200.320(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.

**Previous Regulation / Circulars:** See 85.36(d)(2)(i)(A-C)

**What it means:** Straightforward – see above

**Keep in Mind:** The seal bid works when contractors can reliably complete the scope of service without modifications, which enables the non-Federal entity to concentrate on price as the key factor in making an award. If there needs to be flexibility in the scope, or specifications, a sealed bid does not work well.

**§200.320(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.

**Previous Regulation / Circulars:** See 85.36(d)(2)(ii)(A-E)

**What it means:** Straightforward – See above

**Keep in Mind:**

- From §200.320(c)(2), an “adequate number” of known suppliers means at least two. In practice, non-Federal entities should strive to have more than two bidders.
- See below Section for information on payment discounts, transportation costs, and life cycle costs.
- A sound reason for rejecting all the bids may be that through the submission of proposals, the non-Federal entity realizes that significant modifications to the scope of work are necessary.



**§200.320(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:

**Previous Regulation / Circulars:** See 85.36(d)(3)

**What it means:** Competitive proposals are an alternative to sealed bids.

**Keep in Mind:** Non-federal entities should document the meeting minutes and series of decisions taken to choose the method of procurement.

**§200.320(d)(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;

**Previous Regulation / Circulars:** See 85.36(d)(3)(i)

**What it means:** The RFP and the evaluation factors must be published, and all responses must be given consideration.

**Keep in Mind:** Often an evaluation system that uses points to score responses can reduce the occasions when respondents challenge the awards.

**§200.320(d)(2)**

Proposals must be solicited from an adequate number of qualified sources;

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**§200.320(d)(2)**

**Previous Regulation / Circulars:** See 85.36(d)(3)(ii)

**What it means:** At least two and preferably more proposals must be solicited.

**Keep in Mind:** Researching and identifying potential qualified sources can take time. Non-Federal entities should preferably have a list on hand prior to any disaster taking place, or as soon as possible thereafter.

**§200.320(d)(3)**

The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;

**Previous Regulation / Circulars:** See 85.36(d)(3)(iii)

**What it means:** Straightforward

**Keep in Mind:** The non-Federal entity must then follow its own written method.

**§200.320(d)(4)**

Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

**Previous Regulation / Circulars:** See 85.36(d)(3)(iv)

**What it means:** Selection must use price and other factors to consider which proposal is best.

**§200.320(d)(4)**

**Keep in Mind:** The other factors which are considered in selection will vary according to the product or service procured.

**§200.320(d)(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.

**Previous Regulation / Circulars:** See 85.36(d)(3)(v)

**What it means:** It is possible to procure an architectural or engineering firm based upon its qualifications, without taking into consideration what the cost of the work will be, as long as the negotiated compensation is fair and reasonable. No other services may be procured without price as a selection factor.

**Keep in Mind:** Competition for architectural and engineering services are often a product of the size (and cost) of the project.

**§200.320(e)**

[Reserved]

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**§200.320(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:

**Previous Regulation / Circulars:** See 85.36(d)(4)(i)

**What it means:** One of more of the below conditions must be met in order to procure without an open competition.

**Keep in Mind:** Conditions below must be met, and documented.

**§200.320(f)(1)**

The item is available only from a single source;

**Previous Regulation / Circulars:** See 85.36(d)(4)(i)(A)

**What it means:** Straightforward

**Keep in Mind:** Rarely will an item or a service be available from a single source. If this justification is used, documentation must be maintained that there is only one source available.

**§200.320(f)(2)**

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

**Previous Regulation / Circulars:** See 85.36(d)(4)(i)(B)

**What it means:** Straightforward

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**§200.320(f)(2)**

**Keep in Mind:** The urgent nature of disaster recovery is a given. Non-Federal entities cannot invoke this regulation as the reason for choosing a non-competitive procurement method.

**§200.320(f)(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

**Previous Regulation / Circulars:** See 85.36(d)(4)(i)(C)

**What it means:** Straightforward

**Keep in Mind:** There must be compelling reasons to make a request for noncompetitive proposals.

**§200.320(f)(4)**

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

**Previous Regulation / Circulars:** See 85.36(d)(4)(i)(D)

**What it means:** Inadequate competition may mean a sole qualified proposal or perhaps none.

**Keep in Mind:** Typically, a Grantee must contact multiple sources to try and secure competitive bids. Only after several attempts can the Grantee declare competition to be inadequate. Documentation will be key to substantiate this claim.

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#### *§200.321 – Contracting with Small and Minority Businesses, Women’s Business Enterprises, and Labor Surplus Area Firms*

This section of the regulations requires grantees and subrecipients to take action to assure that Minority Businesses, Women Businesses and Labor Surplus Firms are utilized in contracts when possible. Steps that will facilitate include adding these businesses to solicitation lists, sizing contracts so that smaller businesses can participate and utilizing organizations that work with minority and woman owned businesses and labor surplus firms. These methods should also be passed on to prime contractors.

#### **§200.321**

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

#### **§200.321(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.

**Previous Regulation / Circulars:** See 85.36(e)(1)

#### **§200.321(b)**

Affirmative steps must include:

**Previous Regulation / Circulars:** See 85.36(e)(2)

#### **§200.321(b)(1)**

Placing qualified small and minority businesses and women’s business enterprises on solicitation lists;

**Previous Regulation / Circulars:** See 85.36(e)(2)(i)

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**§200.321(b)(1)**

**What it means:** Straightforward

**Keep in Mind:** Solicitation lists should be developed prior to the disaster and kept current.

**§200.321(b)(2)**

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

**Previous Regulation / Circulars:** See 85.36(e)(2)(ii)

**What it means:** Straightforward

**Keep in Mind:** The non-Federal entity should make a point of noting those instances when small and minority businesses, and women's business enterprises would not be potential sources. Otherwise, they should be solicited.

**§200.321(b)(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;

**Previous Regulation / Circulars:** See 85.36(e)(2)(iii)

**What it means:** If there are not economies of scale that would result in less expensive unit costs, or more efficient delivery of services, then non-Federal entities should look to break down tasks or quantities into amounts that would enable small businesses to compete for contracts.

**Keep in Mind:** Examples of products and services where breaking down tasks or quantities may make sense:

- Boarding up of abandoned houses, broken down geographically into smaller quantities

**§200.321(b)(3)**

- Splitting demolition contracts into single family residential and larger structures, assuming smaller contractors would not have the heavy equipment necessary for larger buildings.

**§200.321(b)(4)**

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

**Previous Regulation / Circulars:** See 85.36(e)(2)(iv)

**What it means:** As above, examine the service delivery schedule for ways to make it easier for small businesses to compete.

**Keep in Mind:** This may be applicable in a scenario when a non-Federal entity can allow the work to be carried out over a longer period of time, so small contractors can complete the services with their existing workforce.

**§200.321(b)(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

**Previous Regulation / Circulars:** See 85.36(e)(2)(v)

**What it means:** Straightforward

**Keep in Mind:**

- Small Business Development Centers and Minority Business Development Centers often have relationships with minority owned small businesses.



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**§200.321(b)(5)**

- SBA is one of several Federal agencies with resources specific to disaster recovery. See <https://www.sba.gov/loans-grants/see-what-sba-offers/sba-loan-programs/disaster-loans>

**§200.321(b)(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.

**Previous Regulation / Circulars:** See 85.36(e)(2)(vi)

**What it means:** Straightforward

**Keep in Mind:** Construction work beyond basic repair will likely involve the use of subcontractors.

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*§200.322 – Procurement of Recovered Materials*

This section requires state and local governments to encourage the purchase of materials that maximize the use of recovered and recycled materials. In addition, the procurement of waste disposal services should maximize energy and material recovery.

**§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 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.

**Previous Regulation / Circulars:**

Reiterates non-Federal entities' obligations under section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act.

**What it means:** Generally, the non-Federal entity must seek waste management services that maximize the use of recycled materials and have processes to recycle sold waste where appropriate and practical.

**Keep in Mind:** The technical references for the Solid Waste Disposal Act and the guidelines of the EPA are found respectively at:

<https://environmental.ksc.nasa.gov/EMS/documents/6002RCRA.pdf>

<https://www.law.cornell.edu/cfr/text/40/part-273>

*§200.323 – Contract Cost and Price*

Prior to any procurement, the contracting entity must review the goods and/or services to be procured and estimate cost based on market prices and independent estimates if the purchase is in excess of the Simplified Acquisition Threshold. In addition, the contracting agency should perform a cost analysis for any change orders or modifications to the contract. In cases where there has not been a price competition, profit must be negotiated with the contracting agency. Cost plus a percentage of cost is not allowed for construction contracts.

**§200.323**

**Contract cost and price.**

**§200.323(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.

**Previous Regulation / Circulars:** See 85.36(f)(1)

**What it means:** When the non-Federal entity expects the procurement amount be above the Simplified Acquisition Threshold, it must undertake cost and/or price estimates of products and/or services to be procured.

**Keep in Mind:**

- The non-Federal entity will obtain price or cost estimates based on the type of procurement used.
- Businesses contracted to provide estimates may not compete for the contracts where they provided such estimates.

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#### §200.323(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.

**Previous Regulation / Circulars:** See 85.36(f)(2)

**What it means:** Profit must be negotiated where price was not a factor in contractor selection.

**Keep in Mind:**

- This regulation may seem to conflict with §200.323(d) which states that cost plus percentage of cost contracts are not permitted. This regulation applies where there is no price competition, whereas the majority of construction contracts will be based in part upon price.
- Professional services of architects and engineers may be secured without price competition.
- Below is a link to a HUD webpage on price and cost analysis:  
[https://portal.hud.gov/hudportal/HUD?src=/program\\_offices/cpo/grantees/cstprice](https://portal.hud.gov/hudportal/HUD?src=/program_offices/cpo/grantees/cstprice)

#### §200.323(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.

**Previous Regulation / Circulars:** See 85.36(f)(3)

**What it means:** A separate section of 2 CFR 200, Subpart E covers Cost Principles which must be followed by non-Federal entities.

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**§200.323(c)**

**Keep in Mind:** The link to 2 CFR 200 is found below:

<https://www.gpo.gov/fdsys/pkg/CFR-2014-title2-vol1/pdf/CFR-2014-title2-vol1-part200-subpartE.pdf>

**§200.323(d)**

The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

**Previous Regulation / Circulars:** See 85.36(f)(4)

**What it means:** Straightforward

**Keep in Mind:** Profit can be a portion of a contractor's bid, but profit should be negotiated with the bidder. The level of profit will vary based on the size, risk and complexity of the project.

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#### *§200.324 – Federal Awarding Agency or Pass-through Entity Review*

This section covers the review of the contracting process by HUD, to determine if goods and/or services acquired by the grantee are necessary, are reasonable in cost and have been acquired in a process that allows for open competition. To avoid federal review of the technical aspects of procurement prior to acquisition of the goods or services, the non-Federal Agency can either submit their procurement policies to HUD for approval or they can self-certify that their policies meet the required standards. It also lists instances when HUD may identify non-compliance or a questionable practice and request procurement documents.

#### §200.324

Federal awarding agency or pass-through entity review.

#### §200.324(a)

The non-Federal entity must make available, upon request of the Federal awarding agency or pass-through entity, technical specifications on proposed procurements where the Federal awarding agency or pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the non-Federal entity desires to have the review accomplished after a solicitation has been developed, the Federal awarding agency or pass-through entity may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

**Previous Regulation / Circulars:** See 85.36(g)(1)

**What it means:** Non-Federal entities must respond to requests from HUD or other Federal agencies for technical specifications on procurements prior to solicitation.

**Keep in Mind:** If the non-Federal entity has a complicated situation or is otherwise unsure of its procurement of a particularly technical service or product, it should take advantage of Federal resources to review any concerns prior to the solicitation.

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**§200.324(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:

**Previous Regulation / Circulars:** See 85.36(g)(2)

**§200.324(b)(1)**

The non-Federal entity's procurement procedures or operation fails to comply with the procurement standards in this part;

**Previous Regulation / Circulars:** See 85.36(g)(2)(i)

**What it means:** Straightforward

**§200.324(b)(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;

**Previous Regulation / Circulars:** See 85.36(g)(2)(ii)

**What it means:** Straightforward

**§200.324(b)(3)**

The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a “brand name” product;

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**§200.324(b)(3)**

**Previous Regulation / Circulars:** See 85.36(g)(2)(iii)

**What it means:** Straightforward

**§200.324(b)(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

**Previous Regulation / Circulars:** See 85.36(g)(2)(iv)

**What it means:** Straightforward

**§200.324(b)(5)**

A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.

**Previous Regulation / Circulars:** See 85.36(g)(2)(v)

**What it means:** Straightforward

**§200.324(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.



**§200.324(c)**

**Previous Regulation / Circulars:** See 85.36(g)(3)

**What it means:** Straightforward

**Keep in Mind:** A non-Federal entities must make the assessment that its policies and practices are in compliance before making the determination not to request a pre-procurement review. That assessment should be in writing.

**§200.324(c)(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

**Previous Regulation / Circulars:** See 85.36(g)(3)(i)

**What it means:** A non-Federal entity may request a review. HUD may, at its discretion, call for a review where the non-Federal entity manages a large quantity of federal funds and regularly procures products and services from third parties.

**Keep in Mind:** Where possible, non-Federal entities may choose to request a HUD review at the beginning of disaster recovery to prevent questions or possible compliance issues further into the recovery process.

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#### §200.324(c)(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.

**Previous Regulation / Circulars:** See 85.36(g)(3)(ii)

**What it means:** Self-certification is possible but the non-Federal entity is still open to HUD review. To self-certify, the non-Federal entity must prepare a package of materials demonstrating that it is in compliance and will remain so.

**Keep in Mind:** Many non-Federal entities will have additional procurement requirements in addition to the Federal requirements. It may be helpful to have counsel review any package of materials intended to provide support for self-certification, to ensure compliance with Federal law and any applicable State or local laws.

*§200.325 – Bonding Requirements*

This section of the regulations covers the type and amount of bonding requirements required for construction projects. There are two ways to meet the bonding requirements: either by following the regulations cited in Section 200.325 or by HUD approval of the Local Government's, Indian Tribe's, Insular Area or Sub-Recipient's bonding procedures.

**§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:

**Previous Regulation / Circulars:** See 85.36(h)

**What it means:** Straightforward

**§200.325(a)**

(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.

**Previous Regulation / Circulars:** See 85.36(h)(1)

**What it means:** This bid guarantee means that the contractor will honor the bid price and take the job if selected.

**Keep in Mind:** There are various financial instruments to accomplish this requirement. Bid guarantees are returned to those bidders not selected.

**§200.325(b)**

(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.

**Previous Regulation / Circulars:** See 85.36(h)(2)

**What it means:** A performance bond is a surety such that if the contractor fails to perform or finish the job, the non-Federal entity can make a claim against the performance bond and require the surety company to finish the work.

**Keep in Mind:** Smaller contractors may have difficulty securing performance bonds if they are “stretching” to bid for work beyond their typical job size. Performance bonds add cost to the overall budget, but provide important protection.

**§200.325(c)**

(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.

**Previous Regulation / Circulars:** See 85.36(h)(3)

**What it means:** A payment bond refers to payment by the contractors to sub-contractors and materials suppliers. The non-Federal entity may make a claim against the payment bond to ensure all subcontractors and material suppliers are paid, to avoid any liens against the project.

**Keep in Mind:** Payment and performance bonds are often paired, and supplied from the same surety company.

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*§200.326 – Contract Provisions*

This section of the regulations covers the contract provisions that must be included with each contract for goods or services. The provisions may not be required for contracts under a certain contract amount, which varies by different federal provision. The provisions cover a wide range of federal requirements, including Davis Bacon, Equal Opportunity, legal remedies and environmental regulations. Copies of the required provisions are included in the section on Model Documents.

**§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.

**Previous Regulation / Circulars:** See 85.36(i)(1-13)

**What it means:** The non-Federal entity must check the Federal list of debarred contractors (24 CFR 570.489(l)). The General Services Administration maintains a list of debarred all contractors through the System Award Management (SAM)

**Keep in Mind:** The link to the SAM program is <https://www.sam.gov>