

Industry Insights



The Time Is Now to Implement Uniform Guidance Procurement Requirements

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Author: [Lindsey Oakley](#)

Please note that the Micro - \$10,000 and SAT - \$250,000 purchase thresholds were updated in June 2018 by OFM Memorandum M-18-18.

The Office of Management and Budget (OMB) issued Title 2 U.S. *Code of Federal Regulations*, Part 200, *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (Uniform Guidance) in December 2013. Uniform Guidance is applicable to state and local governments, American Indian tribes, higher education institutions and not-for-profit organizations for all federal awards or funding increments to existing awards made on or after December 26, 2014. Due to significant changes in the Uniform Guidance procurement requirements, OMB delayed the requirement to implement those Uniform Guidance provisions for a full three years from the effective date. For example, if a nonfederal entity has a June 30 year-end, the first year the procurement standards under Uniform Guidance would be applied is fiscal year 2019 (July 1, 2018, through June 30, 2019).

While there's a delay in the required implementation date, the effective date is drawing near. Nonfederal entities need to implement written policies and procedures that align with the regulations to prevent potential noncompliance. Policies shouldn't simply reference the Uniform Guidance requirements, but should be specific to the nonfederal entity. For example, the sealed bids and competitive proposal procurement methods require an "adequate" number of bids/proposals. It's up to each nonfederal entity to define what "adequate" is for its organization and document that in its procurement policies.

In addition, Appendix II of Uniform Guidance includes certain provisions that must be included in all contracts made by the nonfederal entity, as applicable. Nonfederal entities should review these requirements and adopt policies to ensure the requirements are included in the applicable contracts.

The procurement standards included in Subpart D, Section 200.317–200.326 of Uniform Guidance apply to procurement of goods and services directly charged to a federal award; the standards don't apply to indirect costs or payroll. The standards have a strong emphasis on procurement methodology to achieve the goals of increased accountability and competition. The language in the procurement standards has largely been taken from OMB Circular A-102, *Grants and Cooperative Agreements with State and Local Governments*, making much of it familiar to state and local governments. However, those previously governed by OMB Circular A-110, *Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations*, will see these standards as more specific and prescriptive. OMB Circular A-102 was stricter in its procurement regulations, while OMB Circular A-110 was vague and used phrases such as "to the extent practical," "where appropriate," "some form" and "whenever possible." The new regulations will use language such as "must" or "should." In these situations, "must" means required and "should" indicates a best practice.

In reviewing the general procurement standards (§200.318 and §200.319), here are some key items that **must** be followed:

- **Competition** – A nonfederal entity must provide for full and open competition in procuring goods and services. This means situations must be avoided that may prevent competition, such as placing unreasonable requirements on firms to qualify noncompetitive pricing practices between firms or affiliated companies or specifying only a "brand name."
- **Documented policies** – Nonfederal entities must document procurement procedures and policies. If procedures aren't currently documented, nonfederal entities must make this a priority. If policies already are documented, entities should review those policies and ensure they incorporate and follow applicable regulations. These procedures must ensure all solicitations clearly and accurately describe the requirements of the goods or services to be procured and identify all requirements that bidders must fulfill and the factors used in evaluating bids. In addition, if policies include a prequalified list of persons, firms or products used in procuring goods and services, the list should be current and include enough qualified sources to ensure open competition.

- **Oversight** – A nonfederal entity must monitor contractors to ensure they perform in accordance with the terms, conditions and specifications of their contracts or purchase orders. This requirement supplements a similar requirement in which contracts only are awarded to those that use funds responsibly and in accordance with the agreement's terms.
- **Conflicts of interest** – A nonfederal entity must have written policies about conduct of its employees involved in the selection, award and administration of contracts. These policies must cover both organizational and personal conflict of interest to prevent unfair or noncompetitive awards being provided. These policies also must include disciplinary actions for any violations of the conflict-of-interest standards.
- **Necessary purchases** – A nonfederal entity must avoid unnecessary or duplicative purchases. To this end, an entity should consider the most efficient and effective approach to purchases, e.g., bulk purchasing, lease versus purchase, agreements for use of common or shared goods and services, use of federal excess and surplus property as opposed to purchasing new equipment, etc.
- **Use of state, local or tribal geographical preferences** – Unless federal statutes specifically mandate or encourage geographical preference, a nonfederal entity must prohibit using statutorily or administratively imposed state, local or tribal geographical preferences when conducting procurements.
- **Records** – A nonfederal entity must maintain documentation to support the history of the procurement, i.e., rationalization for method used, contractor selection or rejection, basis for contract price, etc.

After considering the general requirements for procurement, Uniform Guidance specifically outlines five allowable methods (§200.320):

- **Micropurchases** – This method is for purchases in which the **aggregate** dollar amount doesn't exceed the micropurchase threshold—currently \$3,500, adjusted periodically for inflation, or \$2,000 for construction subject to the Wage Rate Requirements. Purchases may be made without cost or price analysis or soliciting any quotes or bids if the nonfederal entity considers the price to be reasonable. Under this method, the entity is encouraged to distribute these purchases among qualified suppliers. For example, when purchasing supplies, a nonfederal entity might consider rotating purchases between vendors that offer similar rates. When applying the micropurchase threshold, a nonfederal entity should note the threshold applies to the **aggregate** purchase amount rather than the cost of individual items. For instance, if a purchase is made for multiple kinds of office supplies (computer paper, pens, pencils, ink cartridges, etc.) and the total price is \$5,000, this method would not be applicable, because the threshold must be applied to the overall purchase total and not the price of individual types of supply items purchased.

There have been some recent developments in the federal government that could affect the micropurchase threshold for some nonfederal entities. The *National Defense Authorization Act for Fiscal Year 2016* and the *American Innovation and Competitiveness Act* could potentially increase the micropurchase threshold to at least \$10,000 for certain nonfederal entities. OMB is in the process of evaluating how these acts affect the Uniform Guidance procurement standards and are expected to issue guidance in the future.

- **Small purchase** – This method is for purchases above the micropurchase threshold but below the Simplified Acquisition Threshold (SAT) as defined by the Federal Acquisition Regulation—currently \$150,000, adjusted periodically for inflation. Price or rate quotations **must** be obtained from more than one qualified source. This doesn't mean formal bids and solicitations for quotes must be made—these procedures are meant to be simple and informal. Quotes may be obtained from a variety of simple sources, e.g., internet search, vendor price listing, verbal quotes, etc. Similar to the micropurchase method, no cost or price analysis is required. As with the micropurchase examples, if a nonfederal entity purchases a variety of office supplies that total \$5,000, this would require consideration for quotes. A nonfederal entity may compare pricing based on an internet search between a local supply store versus a national chain and select a vendor based on these quotes.
- **Sealed bids (formal advertising)** – This method is for purchases greater than the SAT. Bids are publicly solicited, and a firm fixed-price contract is awarded to a **responsible** bidder who has the lowest price and conforms to all the material terms and conditions of the invitation for bid. Price is a significant factor in this method and generally is the preferred method for procuring construction. This method is used if bids may be solicited from an adequate number of suppliers (two or more), a complete and realistic specification or purchase description is available, the purchase results in a firm fixed-price contract and the selection may be made based on price. A cost and price analysis must be performed for these purchases, and the entity must make independent estimates before receiving bids or proposals.
- **Competitive proposals—requests for proposal (RFP)** – This method is for purchases greater than the SAT in situations where sealed bids aren't appropriate. This may be the case when price isn't the only factor in awarding a

contract. In general, this results in a fixed-price or cost-reimbursement type contract. Under this method, the following requirements apply:

- RFPs must be publicized and identify all evaluation factors and their relative importance
- Proposals must be solicited from an adequate number of qualified sources
- The entity must have a written method for evaluating and selecting recipients
- Contracts must be awarded to a responsible firm

Similar to sealed bids, a cost and price analysis must be performed for these purchases.

- **Noncompetitive proposals** – This method results in solicitation from a sole source and may be used if one or more of the following conditions apply:
 - Item is available from only one source
 - Public emergency won't permit a delay resulting from competitive solicitation
 - Awarding agency authorizes noncompetitive proposals in response to a written request from the nonfederal entity
 - After soliciting a number of sources, competition is determined to be inadequate

Sole-source purchases are applicable at any level when one of the aforementioned criteria is met.

With any of the above methods, the procurement standards also emphasize contracting with small and minority businesses, women's business enterprises and labor surplus area firms (§200.321). A nonfederal entity **must** use these firms when possible. Methods for inclusion include placing these businesses on the vendor list, soliciting pricing from them when they're potential sources, breaking up projects or orders into smaller tasks to permit participation by these firms or requiring contractors to follow these guidelines for subcontracts.

As previously mentioned, regardless of what method is used and decision made, documentation of the procurement must be kept, *e.g.*, maintaining printouts of internet searches for quotes or documenting in a memo the reasons for acceptance or rejection of bidders in sealed bids or competitive proposals.

The Uniform Guidance procurement standards are very prescriptive and may be new for many nonfederal entities. Now's the time to start implementing the new requirements. Nonfederal entities need to review the standards, align current practices with those standards and provide training to those involved in procurement to help nonfederal entity employees understand the required regulations. A variety of informational resources are available, including the full [Uniform Guidance text](#) and [Frequently Asked Questions](#).

If you have any questions or concerns about how these provisions may affect your organization, [contact Lindsey](#) or your trusted BKD advisor.