

# Additional Purchasing Requirements When Using Federal Funds

This policy establishes standards and guidelines when using federal funds for the procurement of supplies, equipment, construction, professional services and other purchases to ensure they are obtained economically through an open and fair competitive process and that contracting decisions are made using sound business judgment.

Federal Office of Management and Budget (OMB) rules in [2 CFR 200](#) require the District and other entities to establish procurement guidelines for purchasing with federal funds that are at least as restrictive as the OMB regulations and thresholds and that those making procurement decisions are free of conflict of interest (see specific rules below). The rules require:

1. The District follow the six OMB required provisions in taking all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible (200.321, see green chart below). Affirmative steps must include placing qualified small and minority businesses and women's business enterprises on solicitation lists, assuring that small and minority businesses and women's business enterprises are solicited whenever they are potential sources and four additional requirements.
2. Adherence to 10 contract content requirements (Appendix II to 2 CFR 200, see green chart below) including that "Contracts for more than the simplified acquisition threshold (currently set at \$250,000) . . . must address administrative, contractual or legal remedies in instances where contractors violate or breach contract terms and provide for such sanctions and penalties as appropriate."
3. The District ensures contracts of \$25,000 or more are not made to entities that are debarred or suspended. This is done by checking those entities at [www.sam.gov](http://www.sam.gov) and/or by certifying the entity is not debarred or suspended either by a special certification or by language in the contract itself.

## 1. FEDERAL PROCUREMENT TYPES AND THRESHOLDS

These thresholds must be followed when purchasing with federal funds.

<b>Procurement Category</b>	<b>District Policy</b>	<b>OMB Requirements</b>
<p><b>Micro-purchases</b> Approved personnel can make purchases without price comparisons</p>	<p>Allowed up to \$999 for general, \$4,999 public works purchases and up to \$10,000 for professional services.</p>	<p>Allowed up to \$10,000.</p>
<p><b>Small Purchase Procedures</b>  Price comparisons</p>	<p><u>General Purchases \$1,000 to \$99,099</u></p> <ol style="list-style-type: none"> <li>For general purchases of \$1,000 to \$4,999 at least three documented informal price comparisons are required.</li> <li>For general purchases of \$5,000 to \$99,099 at least three documented written quotes are required.</li> </ol> <p><u>Public Works:</u></p> <ol style="list-style-type: none"> <li>\$1,000 to \$4,999 at one documented informal price is required.</li> <li>\$5,000 to \$59,999 at least three documented written quotes are required.</li> <li>\$60,000 to \$199,999 informal bid process required</li> </ol> <p><u>Professional Service Purchases \$10,001 to \$250,000</u></p> <ol style="list-style-type: none"> <li>At least three documented price comparisons are required.</li> </ol>	<p>“If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.”</p>
<p><b>Sealed bids</b> The usual approach for construction contracts, also often used for major purchases of goods and supplies.</p>	<p>District policy requires formal bids at \$99,100 and above for general purchases and \$200,000 and above for public works projects. District policy does not require that professional services be competitively bid, but to comply with the Uniform guidance, formal bids will be required above \$250,000.</p> <p>Low bid that meets specs and qualifications wins.</p>	<p>“Bids publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all material terms and conditions of the bid invitation, is the lowest in price.”</p>

<p><b>Competitive bids</b> The usual approach for professional services and other purchases when conditions are not appropriate for sealed bids.</p>	<p>This is an alternative to formal bids when formal bids are not appropriate using the following thresholds: General purchases: \$99,100 Public Works \$200,000 Professional Services \$250,000.</p> <p>Winning bidder is the most advantageous to the program based on price and other considerations, such as qualifications or ability to provide specialized services</p>	<p>“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 . . . Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered.</p>
<p><b>Non-competitive procurement</b> (sole source purchases)</p>	<p>The District has provisions that allow sole source purchases in accordance with OMB rules. Other procurement approaches are encouraged unless sole source justification is clear and strong. Use of sole source should be the exception, not the standard practice.</p>	<p>Allowed in four circumstances: 1) Item is available only from a single source 2) Public emergency will not permit a delay 3)The awarding agency expressly authorizes sole source; or 4) Solicitation results in inadequate competition.</p>

All purchases and procurements will be reasonable and necessary. The intent of these policies is to emphasize a high-level accountability, minimize organizational risk and provide for efficient and effective approaches to deliver quality services in a timely manner.

Purchases for professional services will meet OMB cost principle requirements in 2 CFR 200.459 regarding reasonableness, appropriateness, and other factors (reprinted at the end of this section). District officers and employees cannot also serve as contractors paid with federal funds.

In accordance with the OMB Super Circular (2 CFR 200) the District uses five categories of purchasing when using federal funds as summarized above and detailed as follows:

**1. Micro-purchases (up to \$999 for general, \$4,999 public works and \$10,000 for professional services):**

Competitive bids are not required. To the extent practicable, the District will distribute micro-purchases equitably among qualified suppliers.

**2. Small purchases (\$1,000 to \$99,099 for general purchases, \$5,000 to \$59,999 for public works, and \$10,001 to \$250,000 for professional services):**

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 Thresholds set herein at up to \$99,099 for general purchases, \$59,999 for public works and \$250,000 for professional services. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources. The District has three competitive approaches and one non-competitive approach to these purchasing situations:

For general purchases of \$1,000 to \$4,999 and professional services purchases of \$10,001 to \$250,000 at least three documented price comparisons are required. The quotes can be obtained through phone, internet, provided by the seller, or obtained through some other reasonable manner.

For general purchases from \$5,000 to \$99,099 and public works purchases from \$5,000 to \$59,999, three documented written quotes will be solicited.

A non-competitive purchase (sole or single-source) is allowed only if it meets the OMB requirements in 2 CFR 200.320 and summarized in item “5” below.

**3. Sealed (Formal) bids:**

These are generally required under District policy for general purchases of \$99,100 or more and public works purchases of \$60,000 or more. The sealed bid process is not typically used for professional services (see Competitive Proposals below). The procurement process will be conducted in accordance with the OMB requirements detailed at the end of this procurement section and in 2 CFR 200.320. This is the usual approach to construction purchases and is also

the preferred approach to the purchase of goods and general services. Sealed bids may include the creation of a committee to oversee the process and the creation of request for bid documents. The committee may also involve representatives from partner agencies and the general community. The low bidder that meets specifications and qualifications wins the contract. Communication with funders is highly recommended to confirm that procurement approaches meet grant agreement requirements and funder preferences.

#### **4. Competitive proposals:**

When sealed bids are not appropriate, the District will use the technique of competitive proposals for the following thresholds:

- a. General purchases of \$99,100 or more
- b. Public works purchases of \$60,000 or more
- c. Professional Services purchases of \$250,001 or more

This is the normal approach to the purchase of professional services. The process is normally conducted with more than one source submitting an offer, and either a fixed price or cost reimbursement type contract is awarded. The procurement decision can be based on factors besides price, although reasonableness in pricing is always required. Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered. A scoring or ranking system is highly encouraged. The process will meet the OMB requirements detailed at the end of this procurement section and in 2 CFR 200.320.

#### **5. Non-competitive proposals** (also known as sole or single-source procurement):

Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source. The process will meet the OMB requirements detailed in 2 CFR 200.320. Communication with funders is highly recommended to confirm a consensus regarding this approach. It may be used only when one or more of the following circumstances apply:

- a) the item is available only from a single source;
- b) the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
- c) the Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity;  
or
- d) after solicitation of a number of sources, competition is determined inadequate.

The District will make efforts to comply with all OMB procurement requirements, specifically those regarding the following issues detailed in the OMB Super Circular:

- 1) **General procurement standards**, such as those regarding documentation, contractor oversight, standards of conduct and maintenance of records. (OMB 2 CFR 200.318, see below).
- 2) **Competition requirements**, for example bidders will not be allowed to participate in the drafting or control of procurement approaches (OMB 2 CFR 200.319, see below).
- 3) **Methods of procurement** (summarized above, with additional details in 2 CFR 200.320, see below).
- 4) **Contracting with small and minority businesses**, women's business enterprises, and labor surplus area firms whenever possible (required under 2 CFR 200.321, see below).
- 5) **Contract cost and price** analysis requirements regarding District purchases of more than \$250,000. Purchases above this threshold require independent estimates of cost before receiving bids or proposals. (in OMB 2 CFR 200.324, see below).

## **2. OMB COMPETITION REQUIREMENTS**

The OMB Uniform Guidance includes specific provisions regarding conflict of interest and competition in procurement situations. These rules, summarized in the next two paragraphs, are in addition to the District's conflict of interest policies (Board Policy 8631).

“No employee, officer or agent may 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.” (For additional guidance see OMB 200.318 below).

“All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work or invitations for bids or requests for proposals must be excluded from competing for such procurements.” (For additional guidance see OMB 200.319 below).

### **3. FULL TEXT OF OMB PROCUREMENT RELATED RULES**

**OMB Procurement Standards (from 2 CFR 200.318 through 200.324, includes “professional service cost requirements” from 2 CFR 200.459 )**

**§200.318 General procurement standards.**

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

(b) Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions and specifications of their contracts or purchase orders.

(c)(1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts. No employee, officer or agent may participate in the selection, award or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees and agents of the non-Federal entity may neither solicit nor accept gratuities, favors or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees or agents of the non-Federal entity.

(2) If the non-Federal entity has a parent, affiliate or subsidiary organization that is not a state, local government or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

(d) The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives and any other appropriate analysis to determine the most economical approach.

(e) To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.

(f) The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(g) The non-Federal entity is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(h) The non-Federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance and financial and technical resources. See also §200.212 Suspension and debarment.

(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.



(1) The non-Federal entity may use a time and materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and materials type contract means a contract whose cost to a non-Federal entity is the sum of:

(i) The actual cost of materials; and

(ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses and profit.

(2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

(k) The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state or Federal authority having proper jurisdiction.

**§200.319 Competition.**

(1) (a) All procurement transactions for the acquisition of property or services required under a Federal award must be conducted in a manner providing full and open competition consistent with the standards of this section and §200.320.

(2) (b) In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:

(3) placing unreasonable requirements on firms in order for them to qualify to do business;

(4) requiring unnecessary experience and excessive bonding;

(5) noncompetitive pricing practices between firms or between affiliated companies;

(6) noncompetitive contracts to consultants that are on retainer contracts;

(7) organizational conflicts of interest;

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

any arbitrary action in the procurement process.

(c) The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local or tribal 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.

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

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

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

(e) 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.

(f) Noncompetitive procurements can only be awarded in accordance with §200.320(c)

[78 FR 78608, Dec. 26, 2013, as amended at 79 FR 75885, Dec. 19, 2014]

§200.320 Methods of procurement to be followed.

The non-Federal entity must have and use documented procurement procedures, consistent with the standards of this section and §§200.317, 200.318, and 200.319 for any of the

following methods of procurement used for the acquisition of property or services required under a Federal award or sub-award.

(a) Informal procurement methods. When the value of the procurement for property or services under a Federal award does not exceed the simplified acquisition threshold (SAT), as defined in §200.1, or a lower threshold established by a non-Federal entity, formal procurement methods are not required. The non-Federal entity may use informal procurement methods to expedite the completion of its transactions and minimize the associated administrative burden and cost. The informal methods used for procurement of property or services at or below the SAT include:

(1) Micro-purchases—(i) Distribution. The acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (See the definition of micro-purchase in §200.1). To the maximum extent practicable, the non-Federal entity should distribute micro-purchases equitably among qualified suppliers.

Micro-purchase awards. Micro-purchases may be awarded without soliciting competitive price or rate quotations if the non-Federal entity considers the price to be reasonable based on research, experience, purchase history or other information and documents it files accordingly. Purchase cards can be used for micro-purchases if procedures are documented and approved by the non-Federal entity.

Micro-purchase thresholds. The non-Federal entity is responsible for determining and documenting an appropriate micro-purchase threshold based on internal controls, an evaluation of risk, and its documented procurement procedures. The micro-purchase threshold used by the non-Federal entity must be authorized or not prohibited under State, local, or tribal laws or regulations. Non-Federal entities may establish a threshold higher than the Federal threshold established in the Federal Acquisition Regulations (FAR) in accordance with paragraphs (a)(1)(iv) and (v) of this section.

Non-Federal entity increase to the micro-purchase threshold up to \$50,000. Non-Federal entities may establish a threshold higher than the micro-purchase threshold identified in the FAR in accordance with the requirements of this section. The non-Federal entity may self-certify a threshold up to \$50,000 on an annual basis and must maintain documentation to be made available to the Federal awarding agency and auditors in accordance with §200.334. The self-certification must include a justification, clear identification of the threshold, and supporting documentation of any of the following:

- (A) A qualification as a low-risk auditee, in accordance with the criteria in §200.520 for the most recent audit;
- (B) An annual internal institutional risk assessment to identify, mitigate, and manage financial risks; or,
- (C) For public institutions, a higher threshold consistent with State law.

(v) Non-Federal entity increase to the micro-purchase threshold over \$50,000. Micro-purchase thresholds higher than \$50,000 must be approved by the cognizant agency for indirect costs. The non-federal entity must submit a request with the requirements included in paragraph (a)(1)(iv) of this section. The increased threshold is valid until there is a change in status in which the justification was approved.

Small purchases—(i) Small purchase procedures. The acquisition of property or services, the aggregate dollar amount of which is higher than the micro-purchase threshold but does not exceed the simplified acquisition threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources as determined appropriate by the non-Federal entity.

(ii) Simplified acquisition thresholds. The non-Federal entity is responsible for determining an appropriate simplified acquisition threshold based on internal controls, an evaluation of risk and its documented procurement procedures which must not exceed the threshold established in the FAR. When applicable, a lower simplified acquisition threshold used by the non-Federal entity must be authorized or not prohibited under State, local, or tribal laws or regulations.

Formal procurement methods. When the value of the procurement for property or services under a Federal financial assistance award exceeds the SAT, or a lower threshold established by a non-Federal entity, formal procurement methods are required. Formal procurement methods require following documented procedures. Formal procurement methods also require public advertising unless a non-competitive procurement can be used in accordance with §200.319 or paragraph (c) of this section. The following formal methods of procurement are used for procurement of property or services above the simplified acquisition threshold or a value below the simplified acquisition threshold the non-Federal entity determines to be appropriate:

(1) Sealed bids. A procurement method in which 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 bids method is the preferred method for procuring construction, if the conditions.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively for the business; and

(C) 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.

(ii) If sealed bids are used, the following requirements apply:

(A) Bids must be solicited from an adequate number of qualified sources, 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;

(B) 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;

(C) 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;

(D) 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

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

(2) *Proposals.* A procurement method in which either a fixed price or cost-reimbursement type contract is awarded. Proposals are generally used when conditions are not appropriate for the use of sealed bids. They are awarded in accordance with the following requirements:

(i) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Proposals must be solicited from an adequate number of qualified offerors. Any response to publicized requests for proposals must be considered to the maximum extent practical;

(ii) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and making selections;

(iii) Contracts must be awarded to the responsible offeror whose proposal is most advantageous to the non-Federal entity, with price and other factors considered; and

(iii) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby offeror's qualifications are evaluated and the most qualified offeror 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 that are a potential source to perform the proposed effort.

(c) *Noncompetitive procurement.* There are specific circumstances in which noncompetitive procurement can be used. Noncompetitive procurement can only be awarded if one or more of the following circumstances apply:

(1) The acquisition of property or services, the aggregate dollar amount of which does not

exceed the micro-purchase threshold (see paragraph (a)(1) of this section);

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

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

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

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

[78 FR 78608, Dec. 26, 2013, as amended at 79 FR 75885, Dec. 19, 2014]

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

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

(b) Affirmative steps must include:

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

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

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

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

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

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

### **§200.322 Domestic preferences for procurements.**

(7) (a) As appropriate and to the extent consistent with law, the non-Federal entity should, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). The requirements of this section must be included in all subawards including all contracts and purchase orders for work or products under this award.

(8) (b) For purposes of this section:

(9) (1) “Produced in the United States” means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

(10) (2) “Manufactured products” means items and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.

### **§200.323 Procurement of recovered materials.**

A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

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### **§200.324 Contract cost and price.**

(a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

(b) The non-Federal entity must negotiate profit as a separate element of the price for each

contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance and industry profit rates in the surrounding geographical area for similar work.

(c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under Subpart E—Cost Principles of this part. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.

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

**§200.325 Federal awarding agency or pass-through entity review.**

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

The non-Federal entity must make available upon request, for the Federal awarding agency or pass-through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when:

- (1) the non-Federal entity's procurement procedures or operation fails to comply with the procurement standards in this part;
- (2) the procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;
- (3) the procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a “brand name” product;
- (4) the proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or
- (5) a proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.



(c) The non-Federal entity is exempt from the pre-procurement review in paragraph (b) of this section if the Federal awarding agency or pass-through entity determines that its procurement systems comply with the standards of this part.

(1) The non-Federal entity may request that its procurement system be reviewed by the Federal awarding agency or pass-through entity to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews must occur where there is continuous high-dollar funding and third party contracts are awarded on a regular basis.

(2) The non-Federal entity may self-certify its procurement system. Such self-certification must not limit the Federal awarding agency's right to survey the system. Under a self-certification procedure, the Federal awarding agency may rely on written assurances from the non-Federal entity that it is complying with these standards. The non-Federal entity must cite specific policies, procedures, regulations, or standards as being in compliance with these requirements and have its system available for review.

#### **§200.326 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 bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” must consist of a firm commitment such as a bid bond, certified check or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.

(b) A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(c) A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

#### **§200.327 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.

**§200.459 Professional service costs.**

(a) Costs of professional and consultant services rendered by persons who are members of a particular profession or possess a special skill, and who are not officers or employees of the non-Federal entity, are allowable, subject to paragraphs (b) and (c) when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Federal government. In addition, legal and related services are limited under §200.435 Defense and prosecution of criminal and civil proceedings, claims, appeals and patent infringements.

(b) In determining the allowability of costs in a particular case, no single factor or any special combination of factors is necessarily determinative. However, the following factors are relevant:

(1) The nature and scope of the service rendered in relation to the service required.

(2) The necessity of contracting for the service, considering the non-Federal entity's capability in the particular area.

(3) The past pattern of such costs, particularly in the years prior to Federal awards.

(4) The impact of Federal awards on the non-Federal entity's business (i.e., what new problems have arisen).

Whether the proportion of Federal work to the non-Federal entity's total business is such as to influence the non-Federal entity in favor of incurring the cost, particularly where the services rendered are not of a continuing nature and have little relationship to work under Federal awards.

(6) Whether the service can be performed more economically by direct employment rather than contracting.

(7) The qualifications of the individual or concern rendering the service and the customary fees charged, especially on non-federally funded activities.

(8) Adequacy of the contractual agreement for the service (e.g., description of the service, estimate of time required, rate of compensation, and termination provisions).

(c) In addition to the factors in paragraph (b) of this section, to be allowable, retainer fees must be supported by evidence of bona fide services available or rendered.

## 4. CHECKING FOR DEBARMENT AND SUSPENSION OF CONTRACTORS

The District will comply with federal requirements detailed in OMB 2 CFR 180 regarding debarment and suspension of contractors. Simply stated, this OMB circular prohibits contracting with debarred and suspended vendors when making “covered transactions”. The District meets this requirement through the use of contract/purchase order language that includes certification by the contractor that they are not debarred or suspended by the federal, or any state or local government.

OMB 2 CFR 180 is available at the link below. This section takes a question and answer format, and two of the more important questions are stated directly below the link:

<https://www.gpo.gov/fdsys/granule/CFR-2012-title2-vol1/CFR-2012-title2-vol1-part180>

### **OMB §180.220 Are any procurement contracts included as covered transactions?**

(a) Covered transactions under this part--

(1) Do not include any procurement contracts awarded directly by a Federal agency; but

(2) Do include some procurement contracts awarded by non-Federal participants in nonprocurement covered transactions.

(b) Specifically, a contract for goods or services is a covered transaction if any of the following applies:

(1) The contract is awarded by a participant in a nonprocurement transaction that is covered under §180.210, and the amount of the contract is expected to equal or exceed \$25,000.

(2) The contract requires the consent of an official of a Federal agency. In that case, the contract, regardless of the amount, always is a covered transaction and it does not matter who awarded it. For example, it could be a subcontract awarded by a contractor at a tier below a nonprocurement transaction, as shown in the appendix to this part.

(3) The contract is for Federally-required audit services.

(c) A subcontract also is a covered transaction if, -

(1) It is awarded by a participant in a procurement transaction under a nonprocurement transaction of a Federal agency that extends the coverage of [paragraph \(b\)\(1\)](#) of this section to additional tiers of contracts; and

(2) The value of the subcontract is expected to equal or exceed \$25,000.

**§180.300 What must I do before I enter into a covered transaction with another person at the next lower tier?**

When you enter into a covered transaction with another person at the next lower tier, you must verify that the person with whom you intend to do business is not excluded or disqualified. You do this by:

- (a) Checking SAM Exclusions; or
- (b) Collecting a certification from that person; or
- (c) Adding a clause or condition to the covered transaction with that person.

## 5. CONTRACT CONTENT REQUIREMENTS

The Office of Management Budget Super Circular contains requirements for contracts in Appendix II. These requirements are summarized below and this quick list can be used by District staff members to identify issues that must be addressed in a specific contract. The full content of OMB 2 CFR 200 Attachment II follows this quick list.

### **At a glance: summary of OMB required content in contracts**

- A) Contracts in excess of \$250,000 must address **administrative, contractual or legal remedies** in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate
- 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 Employment** content is required in all contracts.
- D) **Davis Bacon Act requirements** apply to construction and renovation contracts of \$2,000 or more.
- E) **Contract work hours and safety standards** apply to all contracts in excess of \$100,000 that involve the employment of mechanics or laborers.
- F) **Rights to Inventions** content is required when applicable in contracts and "funding agreements."
- G) **Clean Air Act.** 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.

H) <b>Debarment and Suspension</b> District purchase orders include certification by the contractor that they are not debarred or suspended, proposed for debarment or declared ineligible for award of contracts by any Federal, State or local Agency.
I) <b>Byrd Anti-Lobbying Amendment</b> (31 U.S.C. 1352) Contractors that apply or bid for an award exceeding \$100,000 must file the required certification.
J) See §200.323 Procurement of recovered materials.
K) See §200.216 Prohibition on certain telecommunications and video surveillance services or equipment.
L) See § 200.322 Domestic preferences for procurements.

Following are the complete contract provision requirements from the OMB Super Circular:

**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 Part 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, 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.

(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 government wide 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 contain 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 §200.323 Procurement of recovered materials.

(K) See §200.216 Prohibition on certain telecommunications and video surveillance services or equipment.

(L) See § 200.322 Domestic preferences for procurements.