



# LEGAL UPDATES

For Up-to-Date News on Laws and Regulations Relevant to the Division of Community Investment

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## PROCUREMENT

***This is the first in a series of newsletters aimed at providing easy access to the law and regulations relevant to our work. We chose to start with the topic of procurement because of several recent developments. A law passed in December 2016 that raised the threshold for purchases not requiring competition. And in May 2017, OMB extended the time that non-federal entities have to comply with the new requirements.***

### Where can I find the new regulations?

The most up-to-date source is the Electronic Code of Federal Regulations at [www.ecfr.gov](http://www.ecfr.gov). It is updated daily. You can find the grant regulations at Title 2, Subtitle A, Chapter II, Part 200, and scroll through the table of contents.

### Are there different requirements based on the type of non-federal entity?

Yes. The distinction is between states and non-states. In general, states follow the same policies and procedures they use for procurements using non-federal funds. 2 CFR 200.317. All other entities, including subrecipients of a state, must adhere to 2 CFR 200.318-326.

### Do states have to follow any of the regulations?

Yes. As with contracts made by all other non-federal entities, all contracts made by states under a federal award must include the contract provisions listed in 2 CFR Part 200, Appendix II. In addition, states (and state contractors) must comply with 200.322 (*Procurement of recovered materials*). 2 CFR 200.317.

### Do the procurement regulations apply to subawards, too?

Yes, as discussed in 2 CFR 200.101 (*Applicability*), the regulations flow down to subawards, as do most of the provisions in 2 CFR Part 200.

### When did the new regulations become effective?

December 26, 2014. However, OMB allowed a "grace period" to comply with the procurement regulations.

## GLOSSARY

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### What is a non-federal entity?

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

### What is a recipient?

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

### What is a subrecipient?

A non-federal entity that receives a subaward from a pass-through entity to carry out part of a federal program. Does not include an individual that is a beneficiary of such program. Previously called "subgrantee."

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## How long do non-federal entities have to comply with the new procurement regulations?

As of today, three full fiscal years starting December 26, 2014. OMB originally allowed an extension of one full fiscal year, which it later extended to two fiscal years. On May 17, 2017, OMB extended the procurement grace period for another fiscal year to December 25, 2017. This means that if a non-federal entity's fiscal year ends on June 30, the entity has until Jun 30, 2018, to adopt the new regulations.

## Does a non-federal entity need to do anything to take advantage of the extension?

Yes. It needs to document the decision in its internal procurement policies; continue to follow former OMB circulars; and begin preparing to implement the new regulations before the end of this extension.

## Will all non-federal entities benefit from the extension?

Yes, but non-profits, hospitals, and universities have more to gain. States and local governments are already familiar with stringent procurement requirements because the new regulations track the former OMB circular that governed their procurements (OMB Circular A-102). However, the OMB circular that previously applied to non-profits, hospitals, and universities (OMB A-110) did not contain many of these stringent requirements.

## What kinds of changes were made to OMB A-110?

OMB Circular A-110 allowed applicants to name consultants or contractors in their proposals and, once awarded, hire those named in the proposals under noncompetitive terms. This is no longer allowed. Similarly, applicants under the former OMB Circular A-110 would often engage a consultant or contractor they wished to hire in the writing and preparing of the proposal. Now, contractors that develop or draft specifications, requirements, statements of work, or requests for proposals are excluded from competing from the procurement. 2 CFR 200.319(a).

## Does this prohibition apply to recipients and subrecipients of an award, too?

No, it applies just to contractors that received contracts, not recipients or subrecipients of an award or subaward.

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

No. This is considered a restriction on open and free competition, which the regulations specifically prohibit.

## Are there other prohibited restrictions on competition?

Yes. Other restrictions prohibited by the regulations (at 2 CFR 200.319(a)) include:

- Placing unreasonable requirements in order to qualify
- Requiring unnecessary experience and excessive bonding
- Allowing noncompetitive pricing between firms or affiliates
- Requiring a "brand name" product
- Acting arbitrarily

## Is competition always required?

No. Procurements under the new “micro-purchase” threshold do not require competition or price quotes.

## What is the micro-purchase threshold?

For most non-federal entities, the micro-purchase threshold is set by the Federal Acquisition Regulation, which is currently \$3,500. However, for universities and other research institutions, the threshold was recently increased to (1) \$10,000 or (2) a higher threshold as determined by the federal agency (consistent with clean single audit findings, an internal institutional risk assessment, or state law).

## What other methods of procurement are there?

There are five procurement methods: micro-purchases, small purchases, sealed bids, competitive proposals, and sole source/noncompetitive proposals. 2 CFR 200.320.

## How does a non-federal entity know which method of procurement to use?

The method is determined by the price, except for architectural/engineering (A/E) professional services. For A&E services, qualification is the determining factor, subject to a “fair and reasonable” price. (Careful: This method of selection—where price is not used as a selection factor—cannot be used to purchase other types of services, even when A&E firms perform the work.) The chart below shows the price cut-offs. For details on how to comply with each of the methods, see 2 C.F.R. 200.320.

Method	Amount	General Information
Micro-purchases	Under \$3,500/\$10,000	<ul style="list-style-type: none"><li>• No need for quotes</li><li>• Retain receipts for accounting</li></ul>
Small purchases	Up to \$150,000 (Simplified Acquisition Threshold)	<ul style="list-style-type: none"><li>• Price or rate quotations from an “adequate number of qualified sources”</li><li>• No cost or price analysis</li><li>• Document the selection</li></ul>
Sealed bids	Greater than \$150,000	<ul style="list-style-type: none"><li>• Publicly solicited</li><li>• Firm fixed price contract awarded to “responsible” bidder with lowest bid</li><li>• Preferred for construction</li><li>• Must have complete specification/description</li><li>• Two or more bidders willing to compete</li></ul>
Competitive proposals	Greater than \$150,000	<ul style="list-style-type: none"><li>• When conditions not appropriate for sealed bids</li><li>• Normally more than one source submits offer</li><li>• Fixed price or cost reimbursement contract</li></ul>
Sole source/ noncompetitive proposals		<ul style="list-style-type: none"><li>• Item truly available from only one source</li><li>• Public exigency or emergency</li><li>• Authorized by agency</li><li>• When competition is inadequate after solicitation</li></ul>

## Are pre-qualified lists acceptable?

Yes. A non-federal entity may rely on prequalified lists of persons, firms, or products used to acquire goods and services. However, the list needs to be current and include enough qualified sources to ensure maximum open and free competition. Also, the solicitation must not have prevented potential bidders from qualifying from the list. 2 CFR 200.320(d).

## When is a cost or price analysis required?

A cost or price analysis is required with every procurement over the Simplified Acquisition Threshold, currently \$150,000. 2 CFR 200.323(a).

## What is a cost or price analysis?

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

A cost analysis breaks down the total price into individual cost elements (e.g., labor, equipment, material), and reviews and evaluates each individual element. It is performed only when justified by the nature of the situation and/or significant dollar values.

## What if an applicant's key employee or owner seems to be related to a proposed contractor? Is this a problem?

Yes, this would present a conflict of interest. The regulations require each non-federal entity to maintain written standards of conduct covering conflicts of interest related to the actions of its employees who select, award, and administer contracts. Real and apparent conflicts of interest are prohibited. 2 CFR 200.318(c).

## What is a conflict of interest?

This is when an employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization that employs—or is about to employ—any of these parties, 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 are not allowed to accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts.

## DID YOU KNOW?



Federal regulations at 2 CFR Part 200 synthesize and supersede eight OMB Circulars: A-21, A-87, A-110, A-122, A-89, A-102, A-133, and the guidance in A-50 on Single Audit Act follow-up.

## SUGGESTIONS?

Please send your suggestions for future newsletters to Nancy Eyl, Assistant General Counsel, at [neyl@arc.gov](mailto:neyl@arc.gov)