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PROCUREMENT'S ROLE IN THE USE OF NON-EMERGENCY FEDERAL FUNDS

BACKGROUND

While federal grants often permit local entities to accomplish far more than they could with just their own resources, the path to obtaining such funds is far from smooth. It is important for local entities to thoroughly understand the procurement process and their role in it before accepting federal grants that entail procurement activities.

All entities should thoroughly read a grant and understand its requirements to make a fully informed decision. To that end, all parties should fully comprehend:

- The requirements of the Uniform Guidance
- The special requirements imposed by the granting agency
- Local procurement policies that may or may not comply with federal requirements

Procurement should be involved throughout the grant lifecycle to ensure compliance with all applicable laws and grant requirements. Procurement staff should possess the professional skills and judgment necessary to identify the information needed to ensure the timely expenditure of grant funds.

Not all federal grants require that funds be spent via procurement. Sometimes, a department other than procurement will administer funds. Other federal grants are intended for subrecipients. This document does not address procurement best practices for funds that are passed directly to a sub-recipient.



Note: Many federal grants will trigger procurement activity requiring compliance with federal standards. This establishes best practices for procurement's role, function, and activities for the entity's use of federal non-emergency funds once they have been awarded to ensure compliance; efficient, effective, and rapid implementation; and equitable use. Although this practice is primarily directed to procurement professionals, the guidance is applicable for:

- End-user client departments
- Finance departments
- Grant officers (from entity)
- Elected officials

Throughout this practice, we refer to the Uniform Guidance, i.e., the Office of Management and Budget's Uniform Guidance, which is also known as 2 CFR 200.

Note: In this practice, we adhere to the NIGP Dictionary of Procurement Terms and use the term "supplier" when referring to a vendor before a project is awarded. However, the Uniform Guidance uses the term "contractor" to refer to vendors both before and after a solicitation period. Please refer to the definitions provided in the documents with which you must comply.

For compliance with FEMA emergency grants, please see the global best practice on "Procurement's Role in the United States Federal Emergency Management Compliance."

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Guidance 1: Procurement staff must read the details of all grant requirements to identify the parts relevant for procurement and incorporate them into the procurement plan.

When awarding funding, the U.S. government enters into a binding agreement (i.e., obligation with the state or local government entity) in which the entity promises to spend the money, either immediately or in the future, in compliance with the conditions stated in the grant. Complying with federal grant requirements means obligating and expending federal funds within:

- Uniform Guidance requirements
- Grantor/Agency requirements
- Grant-specific requirements

These requirements, including standards of conduct, (i.e., ethics to which the entity must adhere) must be considered and followed as procurement develops its plan. Noncompliance may result in the entity having to repay or return grant funds.

Federal Grants Overview

Federal grants are written in legal language and may be lengthy. Some grant documents do not include all program requirements; rather, they may reside in the Uniform Guidance. Procurement professionals should consult with the project manager to ensure they understand all grant requirements. Procurement professionals must—at a minimum—read, understand, and apply the requirements of the grant application and award relevant funds to the procurement function. These requirements will be incorporated into the procurement plan.

In addition to the requirements of the grant application and award, the following items must also be considered when creating the procurement plan:

The federal government's program goal for the grant such as:

- Reducing homelessness
- Reducing tobacco addiction
- Increasing job readiness
- Increasing literacy

The federal government's goals for the target population of the grant, including:

- Minority business enterprises (MBEs), small business enterprises (SBEs), disadvantaged business enterprises (DBEs), and historically underutilized businesses (HUBs)
- Veterans
- Senior citizens
- Infants

Timing issues:

- When must funds be obligated?
- When must funds be expended?
- Is there a possibility of requesting an extension to obligate funds?
- Is there a possibility of requesting an extension to expend funds?
- What are the reporting deadlines?



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Other important items to consider when developing a procurement plan include:

- The identification of allowed and prohibited procurement methods (e.g., micro purchases, simplified acquisitions, sealed competitive solicitations)
- The use of the grant funds through:
 - Cooperatives
 - Sole or single source
 - MBEs, SBEs, DBEs, HUBs, or labor surplus area firms. In these cases, procurement professionals should:
 - Take all necessary affirmative steps to ensure such businesses are used whenever possible
 - Flow down (i.e., agreements and clauses included in subsequent contracts to contractors, subcontractors, and subrecipients)
 - Required determination (if federal surplus or shared use of existing public entity resources can be used in lieu of new solicitations for the necessary goods or service).
 - Any requirement to review/approve the proposed procurement plan before implementation. Must make the subrecipient and contractor determinations (2 CFR 200.331), which impacts:
 - Responsibility for appropriate use of funds
 - Reporting requirements
 - Contract language (Subrecipient agreements require that clauses including the primary contract also be included in the subcontractor's contract.)
 - Required documentation, e.g., procurement decisions, rationale for selected processes, cost estimates
 - Any unique procurement requirements related to the grant
 - Financial requirements:
 - Ability to track grants and expenditures/program accounting
 - Reporting ability
 - Property/capital asset tracking
 - Contracting requirements, including requirements that may need to be included in solicitations and flow downs from the supplier to subcontractors
 - Delivery/acceptance/inspection requirements/criteria, including required documentation and supporting evidence
 - Payment requirements
 - Reporting requirements
 - Risk assessment and mitigation plan
 - Practices for economical purchases (consolidate or break down as appropriate)
 - Lease v. purchase

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Uniform Guidance Requirements

In 2014, the federal government issued the Uniform Guidance (2 CFR 200) to combine all requirements applicable to the expenditure of federal dollars into one document. Federal, state, and local entities must now comply with the Uniform Guidance, inclusive of:

- 2 CFR 200 Appendix II (required clauses)
- 2 CFR 200.300-200.346

In addition to the Uniform Guidance, entities must comply with applicable guidance and laws when using federal funds such as federal legislative award requirements (e.g., American Rescue Plan Act (ARPA), Infrastructure Investment and Jobs Act, etc.). Some of those enactments (Acts) will incorporate requirements from other Acts, such as American Iron & Steel, Davis-Bacon prevailing wages, or Buy American.

Procurement staff must ensure that they include Uniform Guidance requirements, reporting requirements, and compliance clauses (e.g., Equal Employment Opportunity) in the solicitation (pre-award phase) and contract (post-award phases). These requirements may influence the type and nature of the procurement process.



Guidance 2: When planning for a solicitation (pre-award phase), procurement staff must consider how to source needed goods or services in compliance with the Uniform Guidance.

For example, before issuing a solicitation, the grant recipient (i.e., the entity) must determine, if necessary, if the supplies necessary to complete the terms of the grant are available in federal or state surplus. If they are, the entity should obtain the necessary supplies through surplus sources rather than purchase them new.

Regarding shared use, before issuing a solicitation, the grant recipient (i.e., the entity) must determine if the services and equipment necessary to complete all or some of the grant work already exist. If so, entities should consider using these existing resources before awarding new contracts. For example, if the county surrounding a small city that is receiving a grant has a public works department that can efficiently pave roads, and the city's grant is for paving ten miles of roads, then the city should consider hiring the county to perform the work.

Choosing a Procurement Method

Not all procurement methods are permitted in a grant. When selecting a method for a given project, consider that:

- Procurement methods must meet the grant's competitive requirements.
- Grants may restrict the use of cooperatives and "piggybacking" (i.e., a cooperative purchase in which an entity extends the pricing and terms of a contract to other entities).
- A rationale for selection may be required and must be documented in the procurement file.

- Grants may be threshold-based, using the more restrictive of the federal or local entity thresholds. This may apply to:
 - Micro purchases
 - Small purchases
 - Sealed Bids/Simplified Acquisition Thresholds
 - Competitive proposals
 - Non-Competitive procurement
- A qualifications-based selection (QBS) process, as described by the Brooks Act, must only be used for procurements of architect or engineering services.
- An independent cost estimate (ICE) is required prior to solicitation when the estimated cost exceeds the simplified acquisition threshold. (This threshold amount may change periodically.) Note: A federal agency may require an ICE for all procurements.
- Flow-down requirements and flow downs from the supplier to subcontractors may need to be included in solicitations.

Complying With Flow Downs

Before issuing a solicitation, develop a template of the requirements you must include to comply with the flow downs that may be a condition of the grant. For example, your solicitation may need to address:

- Ethics (individual and corporate)
- Contract administration requirements
- Engineering
- Interlocal agreements
- The use of responsible contractors
- The importance of well-maintained procurement records relative to the procurement size and complexity
- The entity's written procedures
- Relevant bonding requirements
- 2 CFR Appendix II to Part 200—Contract Provisions for Non-Federal Entity Contracts Under Federal Awards (Some clauses apply based on the dollar amount or type of contract, such as for construction.)

Also consider any potential requirements for contracting with small and minority-owned businesses, women's business enterprises, and labor surplus area firms. You must take all necessary affirmative steps to ensure you contract with such businesses whenever possible. Additional laws you should account for in your solicitation's clauses may include:

- [Davis-Bacon and Related Acts \(also known as Prevailing Wage requirements\)](#)
- [Clean Air Act](#)
- [Clean Water Act](#)
- [Residential Lead-Based Paint Hazard Reduction Act of 1992](#)
- [Byrd anti-lobbying amendment \(31U.S.C. 1352\)](#)

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Regulations you should account for in your solicitation's clauses may include:

- [Procurement of recovered materials](#)
- [Domestic preferences for procurements](#)
- [Termination of contracts](#)
- [Suspension and debarment](#)
- [Subrecipient performance measurements](#)

Enabling Fair Competition

Solicitations must adhere to fair and open competition guidelines. For example, entities using federal funds must:

- Stipulate that the suppliers helping draft specifications cannot submit an offer.
- Prohibit unreasonable or overly restrictive requirements.
- Require that equivalent products or services be permitted.
- Not permit geographical preferences unless specifically noted in the Uniform Guidance or agency rules (e.g., Architectural/Engineering (A/E) Services and food items in the School Nutrition Program)
- Require that additions to the suppliers list be permitted (to avoid a static list).
- Identify the evaluation criteria and relative weight in the solicitation document.

During the evaluation process, procurement staff should consider:

- The respondent's responsibility (exclusions, capabilities, etc.)
- The required cost/price analysis of the award:
 - For bids, price analysis is often sufficient. Compare the low bid to the ICE and to other bids for reasonableness.
 - For proposals and noncompetitive awards, conduct a cost analysis to examine the component pieces of the total cost. (This may also be required if a bid is publicly solicited, but only one response is received.)



Guidance 3: Once an award is made to a supplier (post-award phase), the Uniform Guidance requires additional actions to ensure compliance and reporting.

This phase requires documentation, planning, and forethought. While not inclusive, required actions in this phase may include:

- Contract administration
 - Monitoring spend/performance
 - Preparing/providing information for audit by the federal agency

- Complying with federal documentation rules if they are stricter than the entity's own policy and practices. Keep in mind that:
 - Federal agencies and programs, e.g., HUD, FTA, ARPA, may have additional document retainage requirements.
 - There must be a mechanism to encourage reporting of suspected fraud or funds misuse.
 - The entity should determine its ability to use other funds in conjunction with federal funds.

Most federal programs allow grant money to supplement (increase) an entity's funding from additional resources (such as local programs). However, federal programs generally do not permit their funds to supplant (replace) an entity's other designated (existing) funds. Nevertheless, because there are some exceptions, funded entities must determine if the funds from their specific program can be supplanted by other money from other resources. For example, if supplanting is allowed, an entity already providing 50,000 hours per year of law enforcement activity could use the grant to fund 10,000 of the 50,000 hours.

- **Required reporting.** They are a variety of rules that entities must follow when reporting to their granting agency:
 - An entity must have a mechanism in place to capture the information necessary to report any requested information to the granting agency.
 - The Federal Funding Accountability and Transparency Act (FFATA) requires that entities report back to the federal government on all contracts awarded at a certain stated threshold.
 - Supplier status determination (subcontractor vs. supplier) guides reporting requirements.
 - Most granting agencies require the entity to report demographic information about the suppliers used to expend the grant funds. This will likely include reporting the supplier's minority, small business, woman-owned business, or other characteristics as defined by the funding agency.
- **Contract closeout.** When it is time to close out a contract, an entity must:
 - File all required notices and reports with the grantor agency
 - Release bonds and retainage
 - Document that all work is completed
 - Properly dispose of any surplus property that was funded by the federal grant:
 - Entities may include specific processes for the disposal of surplus property above and beyond local requirements (e.g., require scrapping of vehicles vs. selling via them auction, put restrictions on the use of funds from sale of surplus).
 - Some federal programs may require that the proceeds from the sale of surplus items be returned to the federal agency if they exceed thresholds established by the program.

Grantor/Agency Requirements

The various federal agencies, in addition to the Uniform Guidance requirements, will likely include requirements unique to the agency in their grants. It is essential to understand and plan for these requirements in the procurement process. Procurement's involvement from the beginning of the grant lifecycle helps ensure the entity complies with all requirements. Examples of special requirements based on the granting authority include:

- The process for obtaining waivers and approvals

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- Agency-specific requirements (e.g., US Department of Housing and Urban Development (HUD) Section 3, Federal Transit Administration (FTA) Circular 4220.1f)
- FTA grants that require compliance with the Buy American Act
- FTA grants that stipulate special requirements for rolling stock purchases
- School nutrition grants that allow for local preference (The Uniform Guidance, in general, prohibits this)
- American Rescue Plan Act of 2021 (ARPA), which does not require that federal prevailing wages be paid on projects less than \$10 million (General federal grants do require this.)
- Federal Aviation Administration (FAA) grants that may require Small Business Enterprise (SBE) preferences
- Reporting/documentation requirements in grants from the various federal agencies that may vary from the Uniform Guidance requirements
- Federal agencies, which typically have regional headquarters across the country, that may impose additional requirements or interpret requirements differently than other regions

Grant-Specific Requirements

In addition to the requirements set forth by the Uniform Guidance and the requirements specific to federal agencies, procurement must also adhere to the unique requirements of each individual grant. Federal agencies typically have numerous grant opportunities, and each one may have a unique focus and specific requirements. Some examples include:

- The Department of Education requires that the provision at 3452.204-71, "Notice to Offerors of Contractor Security Vetting Requirements" be included in certain solicitations.
- HUD's Community Development Block Grants (CDBG) require certain forms that HUD's grants to Public Housing Authorities (PHAs) do not require.
- HUD's funding to PHAs is governed by the Uniform Guidance and HUD's Procurement Handbook for PHAs.
- The Department of Justice states, "Specific post-award approval is required to use a noncompetitive approach in a procurement contract (if contract would exceed \$250,000)."



Guidance 4: The entity's procurement policies, procedures, and regulations must comply with federal grant requirements.

Entities must establish written policies that will guide the expenditure of federal funds to ensure compliance and adhere to local laws and policies. An entity will generally use its own existing policies and procedures, provided they are compliant with the Uniform Guidance. The Uniform Guidance requires entities to have a written procurement policy in place that addresses compliance with federal requirements, including:

- Standards of Conduct:
 - Conflicts of interest
 - Gift bans
- Protest procedure
- Affirmative outreach to small, minority-, and women-owned businesses

The Uniform Guidance requires entities to follow local procurement policies, provided they do not conflict with federal requirements. In general, *the entity must follow the more restrictive of either federal or local procurement laws*. Local laws and policies may require certain items or procedures that the federal guidance does not allow, such as:

- Local preference policies
- Other preference policies imposed by the local government, unless they comply with the Uniform Guidance
- Usage of Request for Quotes (RFQ) for non-Architectural/Engineering (A/E) services
- Local prevailing wage requirements (federal requirements must be used)

If the local policies applicable to a federally funded project include requirements that the Uniform Guidance does not allow, the enabling legislation must include provisions that allow entities to bypass the local requirements in question. Conversely, if local policies do not require all the items that the Uniform Guidance requires, the entity's policies must allow an exemption to meet federal requirements. For example, if the local procurement policy does not allow for bid protests, the entity must still allow them if federal funds are involved.



Guidance 5: Procurement professionals must use their professional skills and judgment to gain necessary information when using federal funds.

Procurement professionals must know what information is necessary to comply with federal grant requirements and where to find that information. Failure to do so places the entity at risk of losing or having to refund grant money. While some entities rely on consultants, procurement professionals may use their network, knowledge, expertise, experience, and communication and research skills to access information and resources. Some of these resources may include:

- Professional colleagues (e.g., NIGP NSite communities)
- NIGP Global Best Practices
- NIGP webinars and classes
- Trade associations, such as the [Grant Professionals Association](#), [The National Association of Housing and Redevelopment Officials](#), and the [National Grants Management Association](#), and the [National Association of State Budget Officers](#)
- Federal agencies, such as [The White House Information and Guidance](#), [US Department of Labor](#), and [Federal Acquisition Regulations](#)
- Funding agency websites (for the most recent information)

If in doubt, reach out to the grant program contact and document any guidance received. If further clarity is necessary, reach out to the funding agency. Local entities may consider hiring a consultant to assist with a grant, although that is not always necessary. The decision to hire a consultant versus managing the grant in house may depend on:

- Size, dollar amount, and complexity of the procurement/grant
- Whether or not the entity has the necessary expertise, capabilities, capacity, and experience
- Availability of qualified consultants
- Current entity workload

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When undertaking a project, an entity may have several goals that it must balance, including:

- Assisting the citizenry
- Maintaining funding
- Using internal controls
- Maintaining best practices

It is essential that procurement staff possess the professional skills and judgment necessary to identify the information required to ensure the timely and successful expenditure of grant funds. Entities should be able to balance the satisfaction of compliance and reporting requirements with the timely completion of a project. For example, an entity may slow the process by focusing too much on the eventual reporting requirements and not enough on moving ahead with the actual procurement. Conversely, an entity may be tempted to expedite the procurement by not taking into account eventual reporting needs. An imbalance in either direction may jeopardize the procurement.

Procurement must understand the terms and conditions of a federal grant to effectively conduct procurement activities within its constraints. All parties involved should fully understand the requirements of the Uniform Guidance, any specific requirements imposed by the granting agency, and relevant local procurement policies that may or may not comply with federal requirements. Procurement should be involved throughout the grant lifecycle to ensure compliance with all applicable laws and grant requirements.

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