



ESSER & Uniform Guidance Procurement Requirements OASBO April 2022

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A Few Important Disclaimers...

- AOS must maintain independence under *Generally Accepted Government Auditing Standards*.
- This training is intended to serve as a practical reference, it is not intended to be, nor does it provide or constitute legal advice.
- Adherence to, application of, or use of this document with regard to a procurement subject to federal award funds does not guarantee the legal sufficiency of any procurement.
- Schools should refer all legal questions concerning the sufficiency of a procurement in terms of federal procurement standards to their legal counsel.

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Daniel J. Schroer pleaded guilty to Tampering with Records, Theft in Office, Filing a False Disclosure Statement, and Representation by Public Official or Employee.

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COVID-19 Resources

Resources for Local Government

The Auditor of State (AOS) is working to help local governments manage the financial impact of COVID-19. The resources on this page are a response to the questions and concerns Auditor Faber has heard from our local partners, and we hope they will help our clients better understand and use available resources.

Helpful Tips
What can you do?

Auditor of State Bulletins related to COVID-19

- Bulletin 2021-006 – Hourly Billing Rates and Allocation of Audit Costs
- Bulletin 2021-004 – Separate Accountability for Federal Programs Authorized by the American Rescue Plan Act of 2021
- Bulletin 2020-007 – Bureau of Workers' Compensation (BWC) COVID-19 Rebates/Dividends
- Bulletin 2020-001 – Fraud Hotline

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ESSER Authorized Uses of Funding

- Inspection, testing, maintenance, repair, replacement, and upgrade projects to **improve the indoor air quality** in school facilities, including mechanical and non-mechanical heating, ventilation, and air conditioning systems, filtering, purification and other air cleaning, fans, control systems, and window and door repair and replacement.
- School facility **repairs and improvements** to enable operation of schools to reduce risk of virus transmission and exposure to environmental health hazards, and to support student health needs.
- Any allowable use of funds under Impact Aid, including but not limited to **new construction**.
- LEAs should consider how to balance construction investments with other priorities in order to ensure the LEA is broadly addressing the academic, social, emotional and mental health needs of students.

Supporting Safe and Healthy Schools

- Examples of when LEAs might use ESSER funding:

An HVAC project?

- CDC guidance for safe school operations include improving indoor air quality as a COVID-19 prevention strategy, and many LEAs are considering ventilation upgrades.

Renovations?

- Renovation could enable LEAs to utilize additional space for in-person instruction while maximizing social distancing.

New construction?

- When renovating an existing building would not be cost-effective due to the poor overall condition of the existing building.
- Some LEAs may also choose to use ESSER funds to support a portion of a new construction project, such as its design.

USDE FAQs: Construction

B-6. May ESSER... funds be used for construction?

Yes. Construction is authorized under Title VII of the ESEA (Impact Aid) and therefore is an allowable use of ESSER funds under sections 18002(c)(3) and 18003(d)(1) of the CARES Act, sections 312(c)(3) and 313(d)(1) of the CRRSA Act, and section 2001(e)(2) of the ARP Act. The broad Impact Aid definition of “construction” includes new construction as well as remodeling, alterations, renovations, and repairs under which many activities related to COVID-19 would likely fall. These types of activities are also subject to a number of additional Federal requirements, as detailed in the following slide(s).

Note: Slides throughout this presentation may be paraphrased for presentation purposes. The Use of Funds Guidance, which applies to ESSER and GEER awards, can be found here:

https://oese.ed.gov/files/2021/05/ESSER.GEER_FAQs_5.26.21_745AM_FINALb0cd6833f6f46e03ba2d97d30aff953260028045f9ef3b18ea602db4b32b1d99.pdf and additional HVAC guidance can be found here:

https://oese.ed.gov/files/2021/06/HVAC_Use-of-funds-F06-17-2021.pdf

USDE FAQs: Additional Federal Requirements

It is the responsibility of an SEA, LEA, or other subgrantee to assure that:

- 1) individual costs comply with the Cost Principles in 2 CFR Part 200, subpart E (e.g., the cost must be “necessary and reasonable” (2 CFR §§200.403-200.404);
- 2) Individual costs meet the overall purpose of the CARES Act, CRRSA Act, or ARP Act programs, which is “to prevent, prepare for, and respond to” COVID-19;
- 3) individual costs are consistent with the proper and efficient administration of those programs. Under these general principles, any construction activities, including renovations or remodeling, that are necessary for an LEA to prevent, prepare for, and respond to COVID-19 could be permissible, though the burden remains on grantees and subgrantees to maintain the appropriate documentation that supports the expenditure;
- 4) construction projects obtain the required **prior written approval** by an LEA’s SEA (or the Department for State projects) (See Title VII of the ESEA and 2 CFR §200.439(b).); and
- 5.) approved construction projects comply with **applicable Uniform Guidance requirements, Davis-Bacon prevailing wage requirements**, and all of the Department’s applicable regulations regarding construction at 34 CFR §§76.600 and 75.600-75.618.

USDE FAQs: Renovation & HVAC Projects

B-7. May ESSER...funds be used for renovation, including for such projects as making improvements to a school facility to improve indoor air quality (such as heating, ventilation, and air conditioning (HVAC) systems), and projects that would promote social distancing and safe in-person instruction?

Yes. ESSER funds may be used to make necessary improvements, for example to improve air quality and support social distancing, so that teachers and students may safely return to and continue in-person instruction. This might include renovations that would permit an LEA to clean effectively (e.g., replacing old carpet with tile that could be cleaned more easily) or create a learning environment that could better sustain social distancing (e.g., bringing an unused wing of a school into compliance with fire and safety codes in order to reopen it to create more space for students to maintain appropriate social distancing).

If an LEA uses funds for HVAC systems, the Department's regulation at 34 CFR §75.616(c) requires the use of American Society of Heating, Refrigeration and Air Conditioning Engineers (ASHRAE) standards. A State, SEA, or LEA might also consider using ESSER funds to establish a program for assessing and improving HVAC systems. Such a program could also require verification that proper ventilation is occurring, such as through the use of carbon dioxide (CO₂) monitors.

USDE FAQs:

The EPA and CDC also have a variety of publications that can assist education leaders in improving indoor air quality in schools:

[Air Cleaners, HVAC Filters, and Coronavirus \(COVID-19\) | US EPA](#)

[Ventilation in Buildings | CDC](#)

ODE determines the process schools must use for granting prior approval to use ESSER for capital projects.

[ODE CCIP ESSER Assurances \(state.oh.us\)](#) – Preapproval for construction and renovation projects

USDE FAQs: Prior Approval and Bidding

Is SEA prior approval required before LEA bidding is advertised?

- No. SEA prior approval is not required before LEA bidding is advertised under applicable Department requirements.
- The provisions in 34 CFR §§ 75.600-617 are “as applicable” and every provision does not apply to every project. Some have cited 34 CFR § 75.605, which states in relevant part that: “Before construction is advertised or placed on the market for bidding, the grantee shall get approval by the Secretary of the final working drawings and specifications.”
- This provision applies to direct construction projects that require approval from the Department, not those that require approval under the Uniform Guidance from an SEA. Therefore, an LEA ESSER project that an SEA is approving and has been initiated or is already underway should not have to be rebid.

ODE Prior Approval Process

What does ODE require?

- Must budget all capital outlay expenditures in the CCIP.
- ODE's approval of the CCIP application constitutes approval of the capital activity.
- ESSER I looked a little different than ESSER II and ESSER III applications, which require completion of additional information and questions about the capital expenditures and projects.

Uniform Guidance (UG) Act 2 CFR 200

Subpart A, 200.XX Acronyms & Definitions

Subpart B, 200, 1XX - General

Subpart C, 200.2XX – Pre Award - Federal

Subpart D, 200.3XX - Post Award - Recipients

Subpart E, 200.4XX – Cost Principles

Subpart F, 200.5XX – Audit

11 Appendices

Relevant UG Procurement Statutes

2 CFR §200.317 – Procurements by States

2 CFR §200.318 - .327 – General Procurement Requirements (*applicable to all local subdivisions, schools, ESCs, community schools, etc.*)

2 CFR §200 – Other Uniform Guidance Requirements, including Single Audit

Also must comply with all applicable federal terms and conditions and state and local laws/regulations.

2 CFR §200.318

General Procurement Standards

- a) Documented policies and procedures;
- b) Contract oversight;
- c) Written standards of conduct covering conflicts of interest;
- d) Avoid unnecessary or duplicative items (e.g., lease vs. purchase analysis);
- e) Encourages state and local intergovernmental agreements;
- f) Encourages uses of Federal surplus property instead of buying new;
- g) Encourages use of value engineering clauses;
- h) Award contracts only to responsible contractors;
- i) Maintain procurement records;
- j) Limit use of time-and-materials contracts; and
- k) Settle issues arising out of procurements

Procurement "Claw" (Sections 200.317-326)



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Uniform Guidance Procurement

What does reasonable cost mean?

- A cost is reasonable if it meets the prudent person test. Considerations:
- Whether the cost is generally recognized as ordinary and necessary.
- The restraints or requirements imposed by such factors as: sound business practices; arm's-length bargaining; federal, state, local, and other laws and regulations; and terms and conditions of the federal award.
- Market prices for comparable goods or services for the geographic area.
- Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to school district, its employees, the public at large, and the federal government.
- Whether the school district significantly deviates from its established practices and policies regarding the incurrence of costs, which may unjustifiably increase the federal award's cost.

Uniform Guidance Procurement

Subpart D, Procurement 2 CFR §200.302-.318:

- **Necessary purchases** – must avoid unnecessary or duplicative purchases. To this end, a school districts 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.
 - Must have documented procurement actions using strategic sourcing, shared services, and other similar procurement arrangements to support competition.

Uniform Guidance Procurement

Subpart D, Procurement 2 CFR §200.318-.319:

- **Documented policies** –must document procurement procedures and policies consistent with state and local laws and regulations and conform to the Procurement rules in 2 CFR §200.317 through §200.327.
 - Procedures must ensure all solicitations clearly and accurately describe the technical 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 for open competition.

Uniform Guidance Procurement

Subpart D, Procurement 2 CFR §200.303 & §200.319:

- **Competition** – 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.”
- **Internal controls**– UG emphasizes written, effective internal controls. 2 CFR §200.303 requires each recipient establish and maintain effective internal control to provide reasonable assurance that federal awards comply with all federal regulations and terms and conditions.

Uniform Guidance Procurement

Subpart D, Procurement 2 CFR §200.302-.318:

- **Oversight** –must monitor contractors to ensure they perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
 - Examples of oversight include making sure contractors adhere to the contractual obligations regarding scope of work, invoices are accurate for the work performed, and services are delivered in a timely manner.
 - Certain contracts, as discussed later, are inherently more risky and require careful oversight.

Uniform Guidance Procurement

Subpart D, Procurement 2 CFR §200.302-.318:

- Oversight –

- If a school district lacks qualified personnel within its organization to undertake such oversight as required by 2 CFR § 200.318(b), the Federal government expects the school district to acquire the necessary personnel to provide the oversight.
- Contractors selected to perform procurement functions on behalf of the school district are subject to the Uniform Rules and are precluded from bidding on contracts they oversee.

Uniform Guidance Procurement

Subpart D, Procurement 2 CFR §200.302-.318:

- Conflicts of interest –

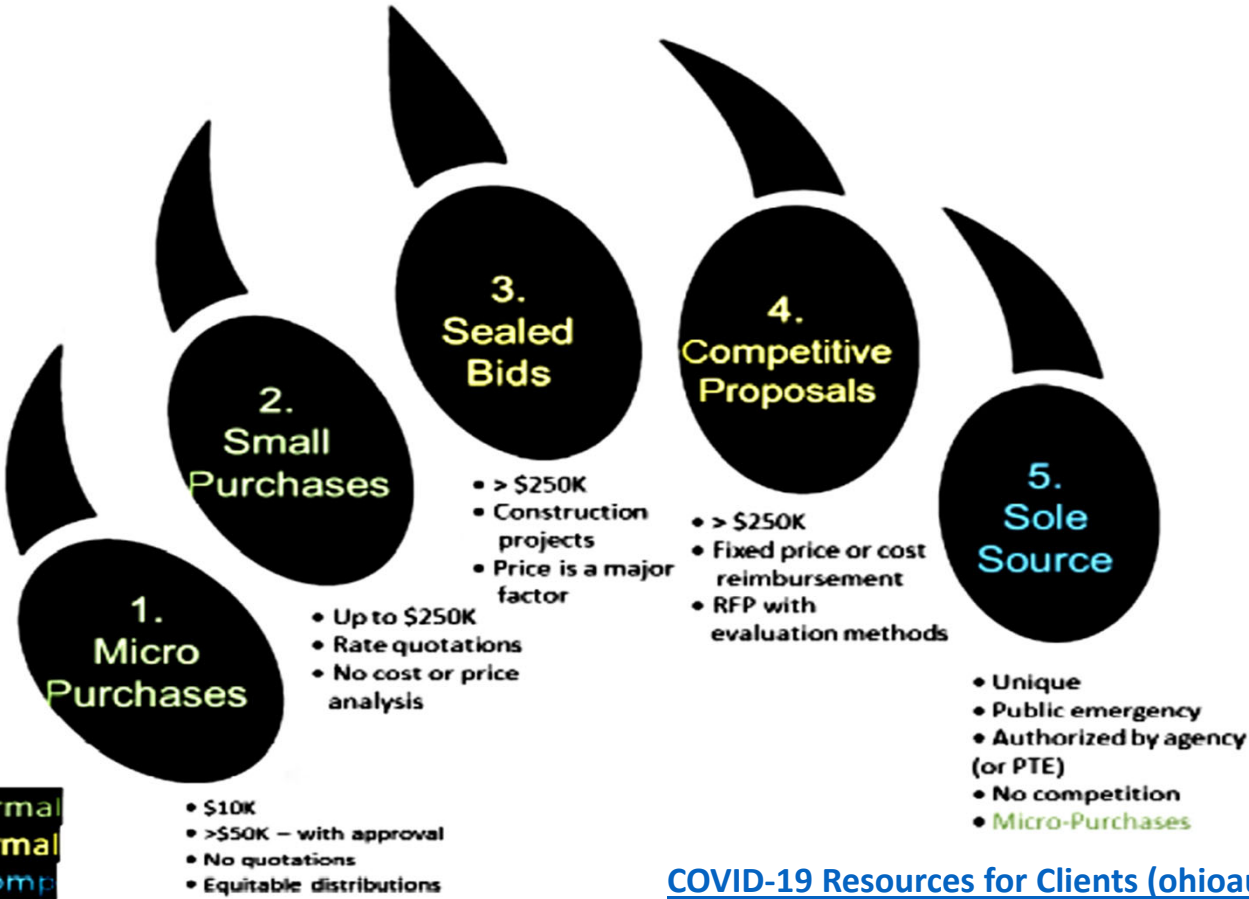
- Must have written policies about conduct of its employees involved in the selection, award, and administration of contracts.
- Policies must cover both organizational and personal conflict of interest to prevent unfair or noncompetitive awards being provided.
- Policies must prohibit participation if conflict exists.

Uniform Guidance Procurement

• Conflicts of interest –

- Conflicts arise when an 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 may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts.
- School districts 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 district.

Procurement “Claw” (Section 200.320)



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Procurement – Informal (2 CFR §200.320(a))

Micro Purchase

- May be awarded **without** competitive rate quotes if price considered reasonable based on **documented** research, experience, purchase history, etc.
- Distributed equitably among qualified suppliers
- Purchase cards may be used with approved, written procedures

Procurement – Informal (2 CFR §200.320(a))

Micro-Purchase
Threshold \$10,000 (or
\$2,000 if subject to
Davis-Bacon Act)

If certain conditions
are met*, with **Annual
Self-Certification**,
Increase Up to \$50,000

With Federal Cognizant
Agency Approval,
Increase Above
\$50,000

*Must include justification, clear identification of the threshold and supporting documentation of **any** of the following:

- A qualification as low-risk auditee for most recent audit
- Annual internal institutional risk assessment to identify, mitigate, and manage financial risks, or
- For public institutions, a higher threshold consistent with state law

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Procurement – Informal (2 CFR §200.320(a))

Small Purchase

- Aggregate dollar amount greater than micro-purchase threshold, less than simplified acquisition threshold (currently \$250k).
- Must obtain **and document** price or rate quotations from adequate number of qualified sources.

Procurement – Informal (2 CFR §200.320(a))

Simplified Acquisition Threshold (SAT)

- Determined by non-Federal entity based on internal controls, risk evaluation, and documented procurement procedures.
- Cannot exceed \$250,000 FAR threshold.
- Must perform cost or price analysis in connection with every procurement action in excess of the SAT, including contract modifications.

Procurement – Formal (2 CFR §200.320(b))

Sealed Bids

- Publically Solicited
- Firm, fixed-price contract awarded to responsible bidder with lowest price
- Must meet requirements in 2 CFR §200.320(b)(1)
- Must **document** cost and price analysis

Procurement – Formal (2 CFR §200.320(b))

Proposals

- Conditions not appropriate for sealed bids (generally because cost is not the only factor)
- Either fixed-price or cost-reimbursement contract awarded
- Must meet requirements in 2 CFR §200.320(b)(2)
- Must **document** cost and price analysis

Uniform Guidance Procurement

What About Breaking Out Procurements?

School districts may break down procurements to obtain a more economical purchase or permit maximum participation by small and minority businesses, women's business enterprises, and labor surplus area firms, when economically feasible.

However, school districts are not allowed to break down procurements in an effort to avoid the additional procurement requirements that apply to larger purchases.

Uniform Guidance Procurement

Subpart D, Procurement 2 CFR §200.318:

- **Time-and-Materials Type Contracts**– (aka: Open-ended contract price) May use **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.
 - Definition - contract where cost to a school district is the sum of:
 - The actual cost of materials; &
 - Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

Uniform Guidance Procurement

Subpart D, Procurement 2 CFR §200.318:

- Time-and-Materials Type Contracts—

- 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. Each contract must set a ceiling price that the contractor exceeds at its own risk. Requires high degree of oversight to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

Uniform Guidance Procurement

Subpart D, Procurement 2 CFR §200.318:

- **Intergovernmental agreements encouraged** where appropriate for procurement or use of common or shared goods and services.
 - Competition requirements will be met with documented procurement actions using strategic sourcing, shared services, and other similar procurement arrangements.
- **Use of Federal excess and surplus property** also encouraged when feasible and reduces project costs.
- **Use of Value-Engineering clauses** in contracts for construction projects of sufficient size to offer opportunity for cost reductions.

Uniform Guidance Procurement

Subpart D, Procurement 2 CFR §200.318-.319:

- **Prohibited use of state or local geographical preferences** – Unless federal statutes specifically mandate or encourage geographical preference, must prohibit using statutorily or administratively imposed state or local geographical preferences when conducting procurements.
- **Records** – must maintain documentation to support the history of the procurement, rationale for procurement decisions and method used, contractor selection or rejection, basis for contract price, etc.
 - Due consideration should be given in a shared service/intergovernmental arrangement.

Uniform Guidance Procurement

Subpart D, Non-Competitive Procurement 2 CFR §200.320(c):

- Can only be used if one or more apply:
 1. The acquisition of property or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold;
 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.

Uniform Guidance Procurement

Non-Procurement - Steps to Take in Emergency or Exigent Circumstance:

- Write a justification to describe the emergency or exigent circumstances.
- Provide a brief description of the goods or services: Justify the need for the specific good or service being contracted to address the emergency or exigency circumstance.
- Estimate the expected dollar amount of the goods or services: A cost or price analysis is required for all procurement transactions above \$250,000.
- Describe any known conflicts of interests and efforts made to identify possible conflicts of interests. If no efforts were made, explain why.
- Define and justify the period of emergency or exigency for the specific situation:
- Transition to a competitively bid contract as soon as the emergency or exigent period ends: Failure to plan for transition to a competitively bid contract cannot be the basis for continued use of the emergency or exigency exception.

Uniform Guidance Procurement

Non-Procurement – Additional Rules when Sole-Sourcing:

- Contracts must include the required contract clauses.
- Contract must include the federal bonding requirements if the contract is for construction or facility improvement.
- Contract must be awarded to a responsible contractor.
- Must complete a cost or price analysis to determine that the cost or price of the contract is fair and reasonable.
- Contract must not be a cost-plus-percentage-of-cost contract type.
- When using a time-and-materials contract, must comply with the applicable rules.
- Document any known conflicts of interest and any efforts that were made to identify possible conflicts of interest before the sole-sourced contract was awarded.

Uniform Guidance Procurement

Subpart D, Procurement:

- **What about Ohio Competitive Bidding Laws?**– Most restrictive laws and regulations apply. For example, if State law is more restrictive than Federal Procurement law, State law applies.
- Certain costs may be exempt from State Competitive Bidding laws but are not exempt under Federal Procurement Rules (e.g., professional services, text books, motor vehicles, fuel, cost-sharing contracts).
 - Must meet one of the exemptions under **2 CFR §200.320(c)**; these are the only exceptions to Procurement Rules.

Uniform Guidance Procurement

Subpart D, Procurement:

What about State Term Purchasing / Joint Contracting / Intergovernmental Agreements?

- School districts are encouraged to collaborate on procurement actions for goods and services where the result will lead to cost savings.
- **However, proceed with caution** - Procurement Rules applicable to states differ from those applicable to school districts - *more on this soon!*
- Full and open competition must be maintained.
- School districts wishing to utilize intergovernmental agreements, etc. must be able to demonstrate that the procurements complied with **all** applicable federal procurement under grant rules before undertaking.

Uniform Guidance Procurement

Differing State vs. Local Procurement Rules ...What?

- State entities will always follow the procurement standards found at 2 C.F.R §200.317, which directs them to utilize their own procurement standards, comply with applicable guidelines regarding procurement of recovered materials as set forth in 2 C.F.R. § 200.322, and include all necessary contract provisions required by 2 C.F.R. § 200.326.
- Conversely, school districts must adhere to their own procurement policies and procedures, applicable state and/or local laws, and the federal procurement under grant requirements found at 2 C.F.R. §§ 200.318-326.

Uniform Guidance Procurement

Differing State vs. Local Procurement Rules ...What?

- Further, as it relates to schools, the federal procurement under grant standards at 2 CFR § 200.319(b) prohibit the use of statutorily or administratively imposed local, state, and/or local geographic preferences in the evaluation of bids or proposals, except in those cases where applicable federal statutes expressly mandate or encourage geographic preferences.
- However, because the state is not subject to regulation at 2 CFR §200.319, the regulation bears no applicability to the question presented in this scenario. If Ohio law requires the State to comply with geographic preferences in Procurement, the State can allowably do so under 2 CFR §200.317.

Procurement – Additional Uniform Rules

Ensure contractor is not suspended, debarred, or excluded on SAM.gov (2 CFR §200.214; 2 CFR §200 Part 180)

When possible, must use minority businesses, women's business enterprises, and labor surplus area firms (2 CFR §200.321)

Buy American (2 CFR §200.322)

Procurement – Additional Uniform Rules

Prohibition on certain telecommunications and video surveillance services or equipment (2 CFR §200.216) (e.g., Huawei Technologies Company)

Never contract with the enemy (2 CFR §200.215 & 2 CFR Part 183).

Various other contract provisions as outlined in Appendix II to 2 CFR Part 200 – these are items your statutory legal counsel should assist with.

Uniform Guidance Procurement

What about Prepositioned Contracts?

School districts must ensure –

- The contract was procured in compliance with the applicable procurement under grant rules for its entity type (state or non-state entity rules);
- The work to be performed falls within the scope of work of the prepositioned contract and the new work does not create a **cardinal change** to the prepositioned contract.
- The contract's scope of work must adequately encompass the type and extent of future work.

Uniform Guidance Procurement

DOCUMENT!!! DOCUMENT!!! DOCUMENT!!!

- Must maintain detailed records to support the history of the Procurement, including, but not limited to, the rationale for the method of procurement, the selection of the contract type, the contractor selection or rejection, and the basis for the contract price;
- Acquisition planning information and other pre-solicitation documents;
- The statement of work/scope of services;
- A list of sources solicited;
- Copies of published notices of proposed contract action;

Uniform Guidance Procurement

DOCUMENT!!! DOCUMENT!!! DOCUMENT!!!

- Copies of the solicitation documents, as well as any addenda or amendments;
- The notice to unsuccessful bidders or offers and a record of any debriefing;
- A record of protests, disputes and claims;
- Copies of bid, performance, payment, and other bond documents;
- The notice to proceed; and
- Steps taken to comply with the affirmative socioeconomic steps required by 2 CFR § 200.321.

Uniform Guidance Procurement

What happens if the Federal Procurement Rules are not followed?

Treasury has authority to take any of the remedies outlined in 2 CFR §200.339, including:

- Temporarily withhold cash payments until the deficiency is corrected;
- Disallow, or deny the use of, the grant funds or any matching credit for all or part of the activity that is deficient;
- Suspend or terminate the federal grant award;
- Initiate suspension or debarment proceedings;
- Withhold any further federal awards for the project or program; or
- Take other remedies that may be legally available.

Questions?

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Contact

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