

CASH DISBURSEMENT/PROCUREMENT AND ETHICAL CODE OF CONDUCT

Purpose:

To establish policy and procedure governing the initiation, authorization, and review of all expenditures of VACS.

Scope:

These policies, guidelines, and procedures are applicable without exception to all funds owned or administered by VACS. All expenditures of VACS are to be consistent with applicable state and federal laws and regulations; any restrictions, rules, or regulations placed on the use of the funds by donors and granting agencies; and prudent Management practices. In addition, all expenditures must be reasonable and necessary for carrying out the programs and activities of VACS, and are to be documented in a way which clearly substantiates such reasonableness and necessity. This policy applies to all VACS administration, licensed educators, staff, students, organizations, and individuals that initiate, authorize, or process cash disbursements on behalf of VACS. The scope includes all activities at VACS and in all locations where VACS activities and public funds are expended.

It is expected that in all dealings, VACS employees will act in an ethical Manner that is consistent with VACS's code of ethics, the Utah Educators' Standards, the Public Officers' and Employees' Ethics Act, and State procurement law.

Segregation of Duties:

Wherever possible, duties such as custody of purchase cards and blank checks, initiating expenditures, approving expenditures, maintaining documentation, issuing checks and reconciling records should be segregated among different individuals. When segregation of duties is not possible due to small size and limited staffing, compensating controls such as management supervision and review of cash disbursement records by independent parties should be implemented.

Definitions:

1. "Public funds" are defined as money, funds, and accounts, regardless of the source from which the funds are derived, that are owned, held, or administered by the state or any of its political subdivisions, including VACS [Utah Code 51-7-3(26)].
2. "Small purchase" is the procurement of goods or services for which the total cost is less than \$50,000 and the total individual procurement items cost less than \$1,000, professional services (including architectural or engineering)

costing less than \$100,001, and small construction projects costing less than \$80,000 (Utah Code 63G-6a-408, 53A-20-101, Administrative Code R33-3).

General Policies:

1. All checks or check stock, credit/purchase cards, access to bank accounts and statements, etc. shall be secured and controlled by the accounting/front office with limited access.
2. All disbursing of funds at the school should be done through the accounting/front office
3. Expenditure transactions must be approved by an individual having sufficient knowledge and authority to evaluate the transaction for reasonableness and appropriateness. The school shall designate employees by title or job descriptions who are authorized to approve various dollar amount levels of disbursements and instructed never to sign blank checks).
4. All expenditures made using cash, checks, credit/purchase cards, electronic fund transfers, etc. shall be recorded in VACS's accounting records.
5. Passwords should be established on user access to the accounting system and changed periodically.
6. Checks should be made payable to specified payees and never to "cash" or "bearer."
7. All disbursement activity should be substantiated by supporting documents. Documents should be available, and should demonstrate that proper disbursement controls are in place (signatures for approval, purchase orders, receipts, invoices, bids or quotes, reimbursement forms, travel forms, journal entries, reconciliations, etc.).
 - a. Quotes shall contain the following information:
 - i. Date received or dates that the quoted price is valid, delivery date
 - ii. Company name, address, salesperson
 - iii. Each item, description or specifications, unit, total price, and quantity listed
 - iv. Shipping and freight charges
 8. Salesperson and contact information
 - i. Vendor, VACS employee name and position
 - b. Quotes may be obtained and documented by printing pages from a website; however, all of the quote elements must be documented. Better prices are usually obtained by contacting vendors directly. Telephone quotes must be documented and include all quote elements. Written quotes should be requested on vendor's letterhead.
9. Bank and credit card statements should be reviewed and accounts reconciled in a timely Manner. Activity accounts should be reviewed quarterly

- by the custodian of the activity.
10. The school must comply with applicable VACS and state purchasing laws.
 11. Expenditures will follow the guidelines outlined in the State Procurement Code (Utah Code 63G-6a) and federal purchasing laws.
 12. Contracts must follow guidelines outlined in the State Procurement Code, specifically regarding the length of multi-year contracts [Utah Code 63G-6a-1204(7)].
 13. Construction and improvements must comply with the provisions of the State Procurement Code (Utah Code 63G-6a), Utah Code concerning school construction (Utah Code 53-A-20), the Utah State School Board Administrative Rules, and Title IX.
 14. Exclusive contracts must comply with the guidelines outlined in the State Procurement Code (Utah Code 63G-6a), VACS's procurement policy, and the Utah Public Officers' and Employees' Ethics Act (Utah Code 67-16).
 15. Purchases of goods or services with VACS funds for personal use or personal gain are strictly prohibited; see the Utah Public Officers' and Employees' Ethics Act (Utah Code 67-16).
 16. Multi-year contracts must comply with Utah Code 63G-6a-1204.

VACS Procurement Thresholds:

VACS's procurement policy shall be followed for all qualifying purchases of goods or services. The procurement policy includes:

1. Small Purchases

- (1) The "individual procurement threshold" for VACS is \$1,000. This is the maximum amount that VACS can expend to obtain a single item/service from one vendor at one time without requiring competitive purchasing (Utah Code 63G-6a-408, Administrative Code R33-3).
- (2) The "single procurement aggregate threshold" for VACS is \$3,500. This is the maximum amount that VACS can expend to obtain any combination of individual procurement items/services costing less than \$1,001 from one vendor at one time up to \$3,500 (Utah Code 63G-6a-408).
- (3) The "annual cumulative threshold" for VACS is \$50,000. This is the maximum total annual amount that VACS can expend to obtain individual procurement item(s) costing less than \$1,001 purchased from the same vendor during the fiscal year (July 1 – June 30) not to exceed \$50,000. If a purchase exceeds \$50,000, it is

not considered a small purchase and shall be processed through a bidding process or a request for proposal (RFP) process (Utah Code 63G-6a-408 and Administrative Code R33-3).

(4) Professional services, such as architectural, engineering, accounting, legal, or consulting services less than \$100,001 shall be acquired using a competitive bidding or RFP process, or by selecting a provider from an approved potential vendor list created using an invitation for bids or an RFP under provisions in Utah Code 63G-6a-403 and 404.

(5) Small construction projects:

- i. Costing less than \$25,001 may be procured by direct award without seeking competitive bids or quotes after documenting that all applicable building code approvals, licensing requirements, permitting and other construction related requirements are met.
- ii. Costing between \$25,001 and \$80,000 may be procured by obtaining a minimum of two (2) competitive bids or quotes that include minimum specifications and be awarded to the contractor with the lowest bid or quote that meets the specification after documenting that the requirements are met from (a) above.
- iii. Costing more than \$80,000 are not considered small construction projects and must follow the requirements outlined in Utah Code 53A-20.

2. Reoccurring Purchase Over Annual Cumulative Threshold

(1) If purchases from the same vendor are ongoing, continuous, and regularly scheduled, and exceed the annual cumulative threshold of \$50,000 during the fiscal year, a contract shall be utilized if feasible [Utah Code 63G-6a-408(6)].

3. Artificially dividing a purchase:

(1) Utah Code 63G-6a-408 makes it unlawful to intentionally divide a procurement purchase into one or more smaller purchases to divide an invoice or purchase order into two or more invoices or purchase orders, or to make smaller purchases over a period of time.

- i. This means that intentionally splitting a purchase of similar items that would typically be purchased at the same time from

the same vendor to avoid requiring competitive quotes is unlawful (.e.g., uniforms, club or athletic equipment, textbook orders, etc.). This includes dividing the purchases or invoices over a short period of time, or making separate purchases over a period of time. Purchase splitting often occurs when making purchases on a purchase card. Employees should not split invoices to stay under daily purchase limits on purchase cards or the established purchasing thresholds.

- ii. It maybe determined after an order is placed or received that a large enough quantity was not ordered, or the correct sizes were not obtained, and that additional items must be ordered. If this occurs, the employee initiating the purchase must include a written explanation of the purpose of the purchase and justification as to why it is not considered splitting a purchase. This should be retained with the vendor invoice.
- iii. Penalties for violating this statute are outlined in Utah Code 63G-6a-2305 and 2306. Penalties range from a class B misdemeanor to a second degree felony, depending on the total value of the divided procurements.

4. Hospitality Gifts, Gratuities, Kickbacks, or Position and Influence:

(1) “Contract administrator” means a person who administers a current contract, on behalf of VACS, including making payments relating to the contract, ensuring compliance with the contract, auditing a contractor in relation to the contract, or enforcing the contract (Utah Code 63G-6a-2304.5).

(2) “Interested person” is a person interested in any way in the sale of a procurement item or insurance to VACS (Utah Code 63G-6a-2304.5).

- (3) “Procurement participant” means a person involved in:
- i. Administering, conducting, or making decisions regarding a standard procurement process.
 - ii. Making a recommendation regarding award of a contract or regarding a decision to obtain a procurement item for a particular person.
 - iii. Evaluating a quote, bid, or response.
 - iv. Awarding a contract or otherwise making a decision to obtain a procurement item from a particular person (Utah Code 63G-6a-2304.5).

(4) Hospitality Gift: “Hospitality gift” means a promotional

or hospitality item, including, a pen, pencil, stationery, toy, pin, trinket, snack, nonalcoholic beverage, or appetizer. This does not include money, a meal, a ticket, admittance to an event, entertainment for which a charge is normally made, travel, or lodging (Utah Code 63G-6a-2304.5).

- i. Utah Code 63G-6a-2304.5 states that the total value of all hospitality gifts given, offered or promised to, or received or accepted by, the “procurement participant” or “contract administrator” in relation to a particular procurement or contract must be less than \$10; the total value of all hospitality gifts given, offered or promised to, or received or accepted by, the “procurement participant” or “contract administrator” from any one person, vendor, bidder, responder, or contractor in a fiscal year must be than \$50.
- ii. Any hospitality gift exceeding the \$10 and \$50 threshold is considered a gratuity, and the provisions below apply.

(5) Gratuities: “Gratuity” means any thing of value, including money, a loan at an interest rate below the market value or with terms that are more advantageous to the person receiving the loan than terms offered generally on the market, an award, employment, admission to an event, a meal, lodging, travel, or entertainment for which a charge is normally made (Utah Code 63G-6a-2304.5).

- i. Utah Code 63G-6a-2304.5 makes it unlawful:
- ii. For an “interested person” to give, offer, or promise to give a gratuity to a “procurement participant” or an individual the person knows is a family member of the procurement participant.
- iii. For a “procurement participant” to ask, receive, offer to receive, accept, or ask for a promise to receive a gratuity from an “interested person.”
- iv. For a contractor to give a gratuity to a “contract administrator” of the contractor’s contract or an individual the contractor knows is a family member of a “contract administrator” of the contractor’s contract.
- v. For a “contract administrator” of a contract to ask, receive, offer to receive, accept, or ask for a promise to receive, for the “contract administrator” or a family member of a “contract administrator,” a gratuity from a contractor for that contract.
- vi. Penalties for violating this statute are established in Utah Code

63G-6a-2304.5 and 2306. VACS will adhere to these penalties and report violations to the attorney general's office, as required by statute.

1. Interested person and contractors: penalties range from a class B misdemeanor to a second degree felony.

2. Procurement participant and contract administrator: penalties range from a class B misdemeanor to a second degree felony and make employees subject to disciplinary action up to and including dismissal from employment.

(6) Kickback: "Kickback" means a gratuity given in exchange for favorable treatment in a pending procurement or the administration of a contract (Utah Code 63G-6a-2304.5).

Utah Code 63G-6a-2304.5 makes it unlawful:

i. For a person to give, offer, or promise to give a "kickback" to a "procurement participant" or to another person for the benefit of a "procurement participant."

1. For a "procurement participant" to ask, receive, offer to receive, accept or ask for a promise to receive a kickback for the "procurement participant" or for another person.

2. For person to give a kickback to a "contract administrator," or to another person for the benefit of a "contract administrator."

3. For a "contract administrator" to ask, receive, offer to receive, accept or ask for a promise to receive a kickback for the "contract administrator" or for another person.

ii. Penalties for violating this statute are established in Utah Code 63G-6a-2304.5 and 2306. VACS will adhere to these penalties and report violations to the attorney general's office, as required by statute.

1. Person and contractors: penalties range from a class B misdemeanor to a second degree felony.

2. Procurement participant and contract administrator: penalties range from a class B misdemeanor to a second degree felony and individuals are subject to disciplinary action up to and including

dismissal from employment.

5. Position or Influence - Utah Code 63G-6a-2304.5 makes it unlawful for a “procurement participant” to use the “procurement participant’s” position or influence to obtain a personal benefit for the “procurement participant,” or for a family member of the “procurement participant,” from an “interested person.”

- i. Penalties for violating this statute are established in Utah Code 63G-6a-2304.5 and 2306. VACS will adhere to these penalties and report violations to the attorney general’s office, as required by statute.
- ii. Interested person: penalties range from a class B misdemeanor to a second degree felony.
- iii. Procurement participant: penalties range from a class B misdemeanor to a second degree felony and subject to disciplinary action up to and including dismissal from employment.

Cash Disbursements:

1. General Procedures

- a. VACS’s tax exempt status number should only be used in conformity with the Utah State Tax Commission’s guidelines.
- b. VACS has designated State Procurement Code as its purchasing policy.
- c. If an outside entity reimburses employee expenses (meals, travel, etc.), these expenses should not be submitted to VACS for reimbursement.
- d. No disbursing of funds is to be done in other offices or at unapproved off-site activities or functions.
- e. Purchases of goods or services for personal use or personal benefit of any amount are strictly prohibited.
- f. Any purchases should be equitable for both male and female students and comply with Title IX.

2. Procurement Decision Tree

How does an employee initiate a purchase?

- a. Is the purchase available from a state agency or a state cooperative contract? If so, you are encouraged to purchase the item from the agency or state contract. If not, follow the decision chart below.
- b. If the total purchase is
between: i. \$0-\$1,000
The purchaser may select the best source without seeking

competitive quotes. The signature of the requestor and immediate supervisor (or authorized business officer for department or administration) are required on the purchase order or check request form. If the purchase is made using a VACS credit/purchase card, the employee should follow the credit/purchase card policy below.

ii. \$1,001-\$3,500

The purchaser shall obtain at least two (2) competitive quotes and purchase item/service from supplier offering the lowest quote. Quotes must be attached to the purchase documentation and maintained as part of VACS's records. The signature of requestor, immediate supervisor (or authorized business officer for the department), and business administrator are required on the purchase order or check request form.

iii. \$3,501-\$10,000

The purchaser shall obtain at least two (2) competitive quotes and purchase item/service from supplier offering the lowest quote meeting specifications. Quotes must be attached to the purchase documentation and maintained as part of VACS's records. The signature of requestor, immediate supervisor(or authorized business officer for the department), and business administrator are required on the purchase order or check request form.

iv. \$10,001-\$50,000

The purchaser shall obtain at least two (2) competitive quotes and purchase item/service from supplier offering the lowest quote meeting specifications. Quotes must be attached to the purchase documentation and maintained as part of VACS's records. Completed bids and an approved purchase order shall be sent to VACS purchasing for initiation and purchase. The signature of requestor, immediate supervisor (or authorized business officer for the department), and business administrator for VACS are required on the purchase order or check request form.

v. Greater than \$50,001

VACS shall enter into a competitive bid process or RFP in compliance with Utah Code 63G-6a sections 601-612 and 701-711, or use an approved vendor list with an invitation for bids or an RFP in compliance with Utah Code 63G-6a-403 and 404. The bid or RFP process shall be managed by VACS purchasing. If a bid process is utilized, select the lowest responsive and responsible bidder that meets the objective criteria described in the invitation to bid. If an RFP process is utilized, select the responsive and responsible offeror with the highest total score. Supporting documents must be retained and maintained as part of VACS's records. The signature of requestor, immediate supervisor (or authorized business officer for the department), business administrator, and superintendent of VACS are required for final approval. If the purchase is greater than \$99,999, the signature of the board of trustees is also required for final approval.

vi. Less than \$100,001 for professional services

When acquiring professional services such as accounting, legal, consulting, architectural, or engineering goods or services valued less than \$100,001, VACS shall follow the policy in section e. above.

1. Small construction projects

- a. Costing less than \$25,001 may be procured by direct award without seeking competitive bids or quotes after documenting that all applicable building code approvals, licensing requirements, permitting and other construction related requirements are met. The signature of the requestor, immediate supervisor (or authorized business officer for the department), business administrator, and superintendent of VACS are required for final approval.
- b. Costing between \$25,001 and \$80,000 may be procured by obtaining a minimum of two (2) competitive bids or quotes that include minimum specifications and be awarded to the contractor with the lowest bid or quote that meets the

specification after documenting that the requirements are met from (i). The signature of the business administrator and director of VACS are required for final approval.

c. Costing more than \$80,000 are not considered small construction projects and must follow the requirements outlined in Utah Code 53A-20, and the board shall advertise for bids at least 10 days before the bid due date. The signature of the business administrator, director, and the board of trustees are required for final approval.

vii. Greater than \$100,000 for professional services

VACS shall enter into a competitive bid process or RFP in compliance with Utah Code 63G-6a sections 601-612 and 701-711. The bid or RFP process shall be managed by VACS purchasing. If a bid process is utilized, select the lowest responsive and responsible bidder that meets the objective criteria described in the invitation to bid. If an RFP process is utilized, select the responsive and responsible offeror with the highest total score. Supporting documents must be retained and maintained as part of VACS's records. The signature of the business administrator, director, and VACS's board of trustees are required for the invitation to bid or RFP.

3. Sole Source

a. Sole source procurement shall only be used if a product or service is unique and can be easily proven as one of a kind, offered by only one vendor. If there is more than one potential bidder or offeror for a particular item, sole source does not apply. All sole source determinations must be completed through the VACS purchasing department.

b. All sole source requests estimated to be \$50,000 and above must be posted for public comment, in accordance with Utah Code 63G-6a-802 and 406.

c. Sole source justification should be documented according to Utah Code 63G-6a-802 and be approved by administration.

4. Purchase Cards

a. All purchase cards shall be kept secured and controlled by the accounting/front office with limited access. PIN numbers should be kept secured.

- b. Card users shall follow VACS and state purchasing policies and comply with the Utah State Tax Commission's guidelines regarding VACS's tax exempt status number.
- c. Purchases exceeding \$1,000 made using the purchase card should be pre-approved, using an expenditure authorization form, prior to making the purchase.
- d. If cards are assigned to specific employees, the card user shall retain all receipts for purchases made with public funds. The card user shall review and reconcile the card statement activity each month and attach all receipts to the card statement. The card user should sign their card statement certifying that all purchases have been made in accordance with VACS and state policy.
- e. Administration (or designee) must review each card holder's statement, along with all receipts, for approval. Approval should be documented.
- f. An employee with oversight over the card user(s) should be responsible for providing authorization.
- g. Individual expenditures made on purchase cards shall be recorded in VACS's accounting records according to approved NCEC chart of accounts. The issuance of a check or an electronic funds transfer to pay the monthly card statement balance shall be documented and approved by administration prior to issuance.
- h. ATM transactions, cash advances, or personal use are strictly prohibited.
- i. Violation of purchase card policy, including not retaining documentation of purchases or making personal purchases, may result in card cancellation, disciplinary action, or criminal prosecution.
- j. Transaction, daily, or monthly limits will be established based on purchasing authority.
- k. Administration or employees designated by VACS will develop an internal review plan to periodically select purchase card statements to verify that VACS policies and procedures are being followed, and that purchases are appropriate, documented, and coded to the proper funding sources.

l. If the card is lost or stolen, immediately contact the appropriate authority. 5.

Reimbursement Requests

- a. Employees seeking reimbursement for VACS expenditures made with employee funds must complete a reimbursement request form, which is signed by the requestor and approved by the employee's immediate supervisor. An administrator's or board employee's

immediate supervisor may be the director or board chair.

b. Supporting documentation, including detailed receipts and justification for departure from the standard purchase order process, is required. Authorization must be documented by the immediate supervisor.

6. VACS Issuance of Checks

a. All checks, check stock, access to bank accounts, and bank statements shall be kept secured and controlled by the accounting/front office with limited access. Password should be kept secured and changed periodically.

b. An employee who does not have the ability to issue checks shall review the issued check and accompanying supporting documentation to ensure all policies and procedures are followed prior to signing the check

c. Each disbursement shall be substantiated with supporting documentation, such as an invoice, receipts, quotes (according to the procurement policy above), reimbursement forms, contracts, travel forms, etc. All expenditures shall be recorded in VACS's accounting records using the NCEs chart of accounts, or under VACSs roll-up process to convert to the NCEs chart of accounts.

d. Signature stamps should not be utilized, and blank checks or checks made payable to "cash" or "bearer" should never be signed.

e. It maybe necessary to void a check. If this occurs, the word "VOID" should be written on the check, and the actual check shall be retained.

7. Journal Entries/Electronic Fund Transfers

a. All electronic fund transfers and journal entries shall be kept secured and controlled by the accounting/front office with limited access. Password should be kept secured and changed periodically.

b. Each journal entry or electronic fund transfer should be substantiated by supporting documentation.

c. Each journal entry or electronic fund transfer should be recorded in VACS's accounting records.

d. Administration or an individual without cash disbursement duties shall document approval of journal entries or electronic fund transfers.

e. Periodically, VACS's finance committee or designee should review and approve the journal entries and electronic fund transfers.

8. Review process

a. Monthly, bank reconciliation(s) should be performed on all VACS-approved accounts, including credit card transactions. If the

bank reconciliation is completed by someone who has access to the accounting system and the bank accounts, it should be reviewed and approved by another person, such as the school leader or director, or a member of the finance committee or board.

b. Monthly, administration should review bank statements and bank reconciliations, as well as credit card statements, and document the review and approval. VACS's finance committee or VACS Management should ensure that monthly bank reconciliations and credit/purchase card statement reconciliations are occurring.

c. Periodically, administration or designated members of Management shall review cash disbursements to verify that all VACS and State policies and procedures are being followed.

VALLEY ACADEMY FEDERAL PROCUREMENT STANDARDS

§200.317 Procurements by states.

When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with §200.322 Procurement of recovered *materials* and ensure that every purchase order or other contract includes any clauses required by section §200.326 Contract provisions. All other non-Federal entities, including subrecipients of a state, will follow §§200.318 General procurement standards through 200.326 Contract provisions.

§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 §200.213 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.

(j)(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.

[78 FR 78608, Dec. 26, 2013, as amended at 79 FR 75885, Dec. 19, 2014; 80 FR 43309, July 22, 2015]

§200.319 Competition.

(a) 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. Some of the situations considered to be restrictive of competition include but are not limited to:

- (1) Placing unreasonable requirements on firms in order for them to qualify to do business;
- (2) Requiring unnecessary experience and excessive bonding;
- (3) Noncompetitive pricing practices between firms or between affiliated companies;
- (4) Noncompetitive contracts to consultants that are on retainer contracts;
- (5) Organizational conflicts of interest;
- (6) 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
- (7) Any arbitrary action in the procurement process.

(b) 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.

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

(1) 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

(2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(d) 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.

[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 use one of the following methods of procurement.

(a) Procurement by micro-purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (§200.67 Micro-purchase). To the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting

competitive quotations if the non-Federal entity considers the price to be reasonable.

(b) Procurement by small purchase procedures. 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 Threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.

(c) Procurement by sealed bids (formal advertising). 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 bid method is the preferred method for procuring construction, if the conditions in paragraph (c)(1) of this section apply.

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

- (i) A complete, adequate, and realistic specification or purchase description is available;
- (ii) Two or more responsible bidders are willing and able to compete effectively for the business; and
- (iii) 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.

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

(i) Bids must be solicited from an adequate number of known suppliers, 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;

(ii) 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;

(iii) 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;

(iv) 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

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

(d) Procurement by competitive proposals. 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. If this method is used, the following requirements apply:

(1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical;

(2) Proposals must be solicited from an adequate number of qualified sources;

(3) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;

(4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

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

(e) [Reserved]

(f) Procurement by noncompetitive proposals. Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:

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

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

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

(4) 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; 80 FR 54409, Sept. 10, 2015]

§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 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.

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

§200.323 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.

§200.324 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.

(b) 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.

§200.325 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) 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.

§200.326 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.