



Dale R. Folwell, CPA

STATE AND LOCAL GOVERNMENT FINANCE DIVISION
AND THE LOCAL GOVERNMENT COMMISSION

GREGORY C. GASKINS
DEPUTY TREASURER

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TO: Independent Auditors, North Carolina Local Governments and Public Authorities, interested parties

FROM: Sharon Edmundson, Director, Fiscal Management Section

SUBJECT: Uniform Guidance Procurement Standards

DATE: March 20, 2018

As most of you are aware, the Office of Budget and Management (OMB) officially implemented its Uniform Administrative Requirements, Cost Principles, and Audit Requirements, commonly referred to as Uniform Guidance (UG), in December of 2014¹. However, due to significant changes to the procurement requirements that were part of that new guidance, OMB delayed the implementation of those procurement requirements twice, to a full three years from the original UG effective date². With the extensions of time coming to a close, implementation of the procurement requirements is imminent. Local governments and public authorities that expend federal financial assistance (including USDA loans and grants, CDBG funds, FEMA Public Assistance disaster relief grants, and other programs, either directly funded or reimbursement driven) must comply with these new requirements for all fiscal years beginning on or after December 26, 2017; **for most of you this means the fiscal year that begins on July 1, 2018, but it also applies to entities with a fiscal year that began on January 1, and those beginning on April 1 or October 1, 2018.**

Critical Points

The UG procurement requirements are complex but there are some critical points that units need to be aware of immediately. These points are reviewed in more detail throughout this document.

1. ***Applicability*** – The requirements are applicable to the purchase of both goods and services, as well as construction and repair projects, which differs significantly from our State laws that apply primarily to the purchase of goods or construction contracts.
2. ***Includes Loans and Grants*** - The requirements apply to federal financial assistance. We are not aware of any exclusions in place on funds received from USDA loans and grants, FEMA Public

¹ Uniform Administrative Requirement, Cost Principles, and Audit Requirements, Title 2 U.S. Code of Federal Regulations, Part 200

² Federal Register Vol. 80, No. 175 - Effective date: September 10, 2015, two year grace period for implementation of procurement standards in 2CFR 200.317 through 200.326. Federal Register Val. 82, No. 94 - Effective date: May 17, 2017, additional one year grace period. Effective date will start for fiscal years beginning on or after December 26, 2017.

Assistance disaster relief grants, CDBG programs, and the Highway Planning, Research and Construction Program. We believe that SRF programs funded by the EPA are exempt. However, we strongly encourage you to contact the applicable grantor agency for specific questions about applicability to specific sources of funds.

3. **Lower Dollar Thresholds** – The UG procurement requirements start at purchases of \$3,500, \$2,000 if Wage Rate requirements apply. This is a significantly lower threshold than is set by current State law.
4. **Written Policies and Procedures Required** – As you read through all of the rules of the procurement requirements you will note a recurring theme – the unit of government must have written policies and procedures that address the purchase of goods and services in accordance with the UG regulations as well as some peripheral requirements on topics such as a code of ethics and gift bans from vendors. These written policies and procedures must be in place by July 1, 2018 if you are already a participant in a federal assistance program or by your first draw if you are not yet actively participating in a covered program.
5. **Standards of Conduct, Conflicts of Interest, and Gift Ban** – Each participating unit must have written standards of conduct that cover conflicts of interest and the gift ban, which is in place for not only its elected board but all employees and agents of the unit. The rules cover all current or future vendors and service providers. The requirements under the UG procurement rules are more restrictive than what is currently required by the State in this area.
6. **Entities Subject to the Rules** – These rules apply not only to direct recipients of federal financial assistance but also to all sub-recipients including the organization(s) in final receipt of the funds. For example, if a unit of government passes through CDBG funds to a Community Development Corporation (CDC), the rules apply not only to the unit but to the CDC as well.

The UG procurement requirements are part of the administrative requirements found in Subpart D of the Uniform Guidance, §200.318 to §200.326, and apply to the procurement of **goods and services (as well as construction and repair contracts)** directly charged to federal awards. They do not apply to indirect costs or payroll. The UG describes most of these requirements as a “must” or as unconditional, in lieu of a “should” or recommended or best practice. Please note these requirements apply to the procurement of both **goods (purchase contracts) and services** – currently our State statutes do not place many restrictions or documentation requirements on the procurement of services.

The UG procurement requirements apply to purchases that are paid or reimbursed from federal financial assistance. This includes (but is not limited to) purchases that are reimbursed from USDA grants **and loans**, Community Development Block Grant (CDBG) programs, public disaster grants and reimbursement from FEMA, and the Highway Planning, Research, and Construction program. Many units of government participate in one or more of these programs; **it is important to note that it applies to Federal loan funds in addition to grants.**

Some units of government may not receive or expend federal financial assistance on a routine basis; however, the requirements still apply any time they do expend federal financial assistance. Units must have written procedures in place to ensure compliance with the UG procurement standards.

UG procurement standards require that each unit of government maintain its own documented procedures that reflect the requirements of the standards as well as the requirements of all applicable State and local laws and regulations.

The UNC-School of Government has prepared a document, “Comparison of Federal and State Procurement Requirements for North Carolina Local Governments,”³ that breaks down key parts of the UG procurement requirements and compares them to State purchasing law; this document also can be found on our website [here](#). This document is an excellent resource for units to use in educating staff about the new requirements and to assist in determining if the federal or State law is more restrictive.

Please note that if the requirements conflict, the unit is to comply with the more restrictive requirement.

Key Elements of Uniform Guidance Procurement Standards

The various procurement requirements have been put in place to help ensure that all eligible procurements are made in such a way that certain goals are achieved. As a result, there are key elements of the UG procurement standards that must be followed regardless of the method of procurement.

- The unit of government must use ***its own documented procedures*** which reflect applicable state and local laws and regulations, provided that the procurement conforms to applicable federal law and the UG procurement standards.
- The unit of government ***must maintain oversight*** to ensure that the ***contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders***.
- The unit of government ***must maintain written policies and procedures of conduct covering conflicts of interest*** and governing the action of its employees, officers, or agents engaged in the selection, award, and administration of contracts. The policy must cover organizational and personal conflict of interest. ***Please note that the federal requirements are more expansive in coverage than the State’s requirements in this area.*** Units need to pay attention to this area and ensure that documented policies adhere to the federal requirements.
- The unit of government must ***avoid acquisition of unnecessary or duplicative items***. The unit should take advantage of the best procurement practices to ensure the most efficient and effective approach to purchases. The unit of government is encouraged to enter into state and local

³ Comparison of the UG with the NC General Statutes. Also included is a comparison of the UG procurement standards to the FEMA Supplement to Public Assistance Procurement Disaster Team field manual.

government intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services. The unit of government is encouraged to use value engineering clauses in contracts for construction projects of sufficient sizes to offer reasonable opportunities for cost reduction. The unit of government also is encouraged to use federal excess and surplus property in lieu of purchasing new equipment and property.

- The unit of government must conduct procurements in a manner that **prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences**, unless the federal statutes specifically mandate or encourage geographical preferences.
- The unit of government **must maintain records sufficient to detail the history of a procurement**. These records will include, but are not necessarily limited to, why or why not a particular method of procurement, contract type, contractor, or price was used.
- All **procurement transactions must be conducted in a manner that provides full and open competition consistent with the UG procurement standards** and avoids measures that include, but are not limited to:
 - imposing unreasonable requirements on contractors in order for them to qualify to do business;
 - requiring unnecessary experience and excessive bonding; or
 - 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.
- The unit's **contracts must include a number of provisions** required under the UG including remedies, termination for cause and convenience, EEO requirements, worker safety and wage and hour requirements, Clean Air Act and Federal Water Pollution Control Act requirements, debarment and suspension, procurement of recovered materials, contract modifications, access to records, Byrd Anti-lobbying provisions, and other provisions that may be required by the federal granting agency. Examples of these UG-required contract provisions are available at: <https://www.fema.gov/media-library-data/1483976790556-96bfcf3bf2c64e94d6f63dd4169a7d2c/RequiredContractClauses2C.F.R.200.326and2C.F.R.Part200AppendixII10917.pdf>

Five Allowable Methods of Procurement

OMB has defined five allowable methods of procurement that non-federal entities must follow for all eligible purchases of **both goods and services** made with federal financial assistance.

1. **Micro-purchases** – This method refers to the acquisition of goods or services, including construction, when the aggregate dollar amount does not exceed the **micro-purchase threshold**. The micro-purchase threshold as of the date of this memo is \$3,500 (\$2,000 for construction subject to

the Wage Rate requirements).⁴ Soliciting competitive prices is not required if the unit of government believes the price is fair. Units are encouraged to distribute micro-purchases equitably among suppliers, if practical. This method applies to purchases in the aggregate and not to the cost of an individual item. For example, the total purchase price of office supplies that includes a variety of items (pens, pencils, tape, computer paper, notebooks, etc.), could not exceed the threshold for the unit to be allowed to use the micro-purchase method, even though the cost of the individual items in the purchase are well below the maximum. Both the micro-purchase threshold and the Simplified Acquisition Threshold (SAT), which is \$150,000² and discussed in the next paragraph, are periodically adjusted for inflation.

2. **Small purchases** – This method is for procurement of goods (purchase contracts), services, and construction or repair projects between the micro-purchase threshold and the SAT (purchases between \$3,500 and \$150,000). Relatively simple and informal methods of securing services, supplies, or other property are allowed. There must be price or rate quotes from an adequate number of qualified sources. Pricing from the internet, vendor price sheets, or logging of verbal quotes are all allowed. While the UG does not define “adequate number of qualified sources,” some federal agencies have issued guidance assigning specific numbers to this requirement. For example, FEMA has interpreted “adequate number” to mean receiving at least 3 quotes. Units should consult with their federal granting agency to determine if that agency has issued guidance defining “adequate number.”
3. **Sealed bids (formal advertising)** – These apply to procurement of goods (purchase contracts), services, and construction or repair projects that exceed the SAT. Bids are publicly solicited and a firm-fixed-price contract, whether a lump sum or a unit price, is awarded to the responsible bidder whose bid conforms to all the material items and is the lowest price. This method is the preferred method for procuring construction if sealed bids are feasible, if a complete and realistic specification or purchase description is available, if an adequate number of bidders (two or more) participate, and if 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. The unit of government must make independent estimates before receiving bids and proposals.
4. **Competitive proposals** – This method is generally used for procurement of goods (purchase contracts), services, and construction or repair projects greater than the SAT when it is not appropriate to use sealed bids. The technique is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. Request for proposals must be publicized and must identify all evaluation factors and their relative importance. An adequate number of proposals must be solicited. There needs to be a written method for evaluating proposals and selecting recipients. The responsible firm is awarded the contract that is most advantageous to the program considering price and other factors.

⁴ The thresholds for micro-purchases and the SAT are set by the General Service Administration as part of the Federal Acquisition Regulation at Title 48 of the Code of Federal Regulations, Subpart 2.1 (definitions). Other agencies and organizations set thresholds for other types of acquisitions. The notice of proposed changes and amounts are announced in the *Federal Register*.

5. **Noncompetitive proposals** – These proposals are for soliciting from one source and may be used if an item is only available from one source, if a public emergency will not permit a delay, if a federal or pass-through agency authorizes the sole source in response to a written request, or if after solicitation from a number of sources, competition is determined inadequate.

The unit of government must perform a cost or price analysis for all procurement actions that utilize sealed bids, competitive, or noncompetitive proposals, if the contract price is in excess of the SAT. The method and degree of the cost or price analysis is dependent on the facts of the procurement. Micro-purchases and small purchases do not require cost or price analysis.

The UG procurement standards require that units of government and public authorities place emphasis on contracting with small and minority businesses, women business enterprises, and surplus area firms. This includes placing qualifying businesses on vendor lists, soliciting them whenever they are a potential source for goods and services, and dividing the projects into smaller tasks or quantities to permit participation. Contractors also are required to follow these procedures when hiring subcontractors.

Awarding Contracts

Units must make several determinations when awarding contracts, including making a determination if the contractor is responsible and if the contractor has the ability to perform successfully under the contract considering such factors as integrity, compliance with public policy, past performance, and availability of financial and technical resources (this standard of award mirrors the lowest responsive, responsible bidder standard of award under North Carolina state law). The unit also must document and maintain records of procurement that include the rationale for selecting the methodology used to make the purchase, selection of the type of contract, selection or rejection of the contractor, and basis for the contract price. Units cannot award contracts or sub-contracts to companies that have been debarred or suspended (see <https://www.sam.gov> for current list).

Federal versus State Laws over Procurement?

The UG procurement standards apply only to federal financial assistance, but North Carolina state law also applies to purchases of goods and construction or repair contracts made with federal financial assistance.⁵ This memo has focused primarily on procurement requirements under the federal uniform rules. Local governments and public authorities should read the grant agreements or contact your granting agencies for agency-specific guidelines. When comparing federal and state procurement requirements, local governments and public authorities should apply the requirements that are more restrictive, including requirements imposed by local policies. If there is overlap among local, state, and federal rules, and none of the rules are more restrictive than the other, the federal rules will apply.

⁵ Most State of North Carolina procurement requirements applicable to local governments are found in Article 8 of G.S. Chapter 143. Federal law is identified in Title 45 Code of Federal Regulations §92.36.

North Carolina purchasing law has formal and informal bidding requirements. Informal bidding procedures apply to the purchase of **goods only** between \$30,000 and \$90,000 and construction/repair contracts costing \$30,000 and \$500,000. Formal bidding procedures apply to the purchase of **goods only** costing \$90,000 or more and construction/repair contracts costing \$500,000 or more. Compared to the small purchase, sealed bid, or competitive proposal requirements under the UG procurement rules, you can see that State requirements generally are much less restrictive, and therefore the Federal requirements must be followed except to the extent that a particular requirement under state law is more restrictive. For example, the UG sealed bid method requires a minimum of 2 bids in order to open bids and award the contract while state formal bidding requirements for construction and repair contracts require a minimum of 3 bids. Units must carefully compare local, state, and federal procurements requirements to ensure that the most restrictive requirement is always followed.

Steps to Implementing the Uniform Guidance Procurement Standards

In updating its purchasing policies, OMB has stated that “nonfederal entities have the flexibility to incorporate the UG’s procurement requirement verbatim or simply reference it in their procedures and policies. A general statement about how the ‘procurements must conform to applicable Federal law and standards’ should suffice.”⁶ An example of this compliance statement is: “Contracts funded with federal grant funds shall be procured in a manner that is in compliance with all applicable Federal laws, policies, and standards as well as state law and local policies.”

Units of governments must be able to provide documentation to support why a bidder was accepted or rejected for a sealed bid or competitive proposal. Also, as mentioned earlier, sufficient records detailing the history of procurement must be maintained, regardless of what purchase method is used or what decision is reached. Documentation can include printouts of internet searches for price quotes or a written memo detailing the reasons for accepting or rejecting the bidders in a sealed bid or competitive proposal purchase.

Local government auditors will review procurement policies and procedures based on the documented standards when testing major programs such as USDA grants and loans, CDBG programs, and other federal financial assistance for compliance as part of the annual compliance audit.

If your government has not yet adopted the UG procurement requirements, then you are strongly encouraged to do so as soon as possible. Consider these steps:

- ***If the unit’s procurement procedures are not currently documented, the government should make this a top priority.*** Some units have not made documentation and/or updating of written policies and procedures a part of normal operations and will have significant amounts of work to do to comply with these new requirements. The unit’s procurement policy should include a compliance statement confirming that the unit will follow all applicable local, state, and federal procurement requirements when expending federal funds.

⁶ E-mail dated May 25, 2017, from Maribel L. Miller, Executive Office of the President, Office of Budget and Management

- ***If the unit does not have a local policy governing conflicts of interests and prohibitions on gifts and favors from vendors and contractors that is compliant with the UG, it should take steps to develop and implement this policy.***
- Read the requirements found in the UG §200.318 to §200.326 and review the SOG document referenced previously.
- Determine how these requirements will impact the procedures for procuring goods, services and construction or repair contracts that your government currently has in effect.
- Incorporate the UG procurement requirements that are specific to your unit of government into your current policies and procedures. For example, each government should determine an adequate number of bids or proposals (UG §200.318) to obtain.
- In your policies or procedures, be sure to remove guidance from other regulations, circulars, or agency information that is outdated. For example, references to Circulars A-102 or A-133 should be removed.
- Have your legal counsel review the revised procedures. An accounting firm also may provide guidance; however, using a firm that may perform the annual audit of your government may affect the firm's independence.
- Incorporate these revised procedures on any contracts or grant agreements with sub-recipients of federal financial assistance.
- Have your legal counsel develop template (boilerplate) contract language that incorporates all the provisions mandated under the UG. Examples of UG required contract provisions are available at <https://www.fema.gov/media-library-data/1483976790556-96bfcf3bf2c64e94d6f63dd4169a7d2c/RequiredContractClauses2C.F.R.200.326and2C.F.R.Part200AppendixII10917.pdf>
- Discuss the UG procurement requirements with any potential contractor prior to entering into any agreement.

If you have questions about the UG procurement requirements, please contact Jim Burke at (919) 814-4301 or via email at james.burke@nctreasurer.com.