

## **9. PROCUREMENT**

### **PURPOSE OF THIS REVIEW AREA**

The non-Federal entity must use its own documented procurement procedures which reflect applicable State, local, and tribal laws and regulations, and conform to applicable Federal law and the standards identified in 2 CFR Part 200. With regard to the procurement standards in 2 CFR Part 200, state recipients can use the state's overall policies and procedures, except that the state must comply with 2 CFR 200.321 (contracting with small and minority businesses (superseded by DOT's DBE regulation)), 200.322 (domestic preferences), 200.323 (procurement of recovered materials), and 200.327 (contract provisions). States also must comply with any requirement applicable to FTA recipients by reason other than a 2 CFR Part 200 procurement standard; for example, 49 U.S.C. 5325(a) requires recipients to conduct all procurement transactions in a manner that provides full and open competition, regardless of Part 200's allowance for states to use state procedures.

**Circular 4220.1G is guidance, and therefore non-binding. If there is a conflict between guidance contained in Circular 4220.1G and the Uniform Administrative Requirements, the Uniform Administrative Requirements supersede FTA C. 4220.1G.**

### **NOTE TO REVIEWER REGARDING BABA**

A procurement funded by a Federal award obligated on or after November 10, 2022, must comply with the Build America, Buy America Act (BABA) requirements in the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, div. G §§ 70901-27, as implemented at 2 CFR Part 184.

For many years, FTA's Buy America statute at 49 U.S.C. 5323(j) has, with some exceptions, required all steel, iron, and manufactured products used in a federally funded project to be produced in the United States. A principal effect of BABA is to add construction materials to this list of items. BABA does not change FTA's Buy America standards for steel, iron, or manufactured products including rolling stock (e.g., FTA *does not apply* the 55% cost-of-components standard to procurements).

#### *When BABA Applies:*

BABA's domestic preference for construction materials applies only to procurements funded by Federal awards obligated on or after November 10, 2022. If a procurement occurs under a Federal award that was obligated before November 10, 2022, BABA does not apply, even if the procurement occurs on or after that date. Additionally, to ease the transition to complying with BABA, on January 30, 2023, DOT announced a limited Waiver of Buy America Requirement for Construction Materials for Certain Contracts and Solicitations, available on DOT's website. Contracts and solicitations meeting the terms of the waiver are also exempt from the BABA construction materials requirement.

#### *What BABA Standard Applies:*

On April 18, 2022, OMB issued memorandum M-22-11, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure," to guide federal agencies' initial implementation of BABA. OMB subsequently codified final guidance, with an effective date of October 23, 2023, at 2 CFR Part 184. Awards may be subject to either the Initial or Final BABA guidance based on the date of award execution:

- Federal awards obligated on or after October 23, 2023, will apply 2 CFR Part 184.

- Federal awards obligated on or after May 14, 2022 (the date BABA became effective by statute), and before October 23, 2023, will continue to apply OMB's Initial Implementation Guidance.
- If a project that previously received a Federal award obligated on or after May 14, 2022, and before October 23, 2023, receives an additional Federal award obligated before October 23, 2024, the additional Federal award also will apply OMB's Initial Implementation Guidance.
- Any Federal award obligated on or after October 23, 2024, will apply 2 CFR Part 184, regardless of whether 2 CFR Part 184 applied to previous awards for the project.

For procurements reviewed that contain deficiencies related to statutory or regulatory requirements that may deem the procurements ineligible for Federal funding, discuss the appropriate corrective action with the FTA regional office.

## **QUESTIONS TO BE EXAMINED**

1. Does the recipient have written procurement policies and procedures that include required state, local, and Federal provisions?
2. Does the recipient maintain written standards of conduct for its representatives engaged in the selection, award, and administration of FTA-funded contracts?
3. Question removed from the FY25 Contractor Manual.
4. Does the recipient make awards only to responsible contractors as described in its policies and procedures and in compliance with the requirements of 49 U.S.C. 5325(j) and 2 CFR 200.318(h)?
5. Does the recipient maintain records sufficient to detail the history of each procurement as described in its policies and procedures and in compliance with 2 CFR Part 200?
6. Does the recipient ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders in its policies and procedures and in compliance with 2 CFR Part 200?
7. Does the recipient ensure that it conducts all procurement transactions in a manner that provides full and open competition and does not unduly restrict competition in its procurement process and as described in its policies and procedures and in compliance with 49 U.S.C. 5325(a) and 2 CFR Part 200?
8. Did the recipient appropriately use each method of procurement as described in its policies and procedures and in compliance with 2 CFR Part 200?
9. Does the recipient procure Architectural Engineering (A&E) Services in accordance with 49 U.S.C. 5325(b)?
10. Does the recipient develop independent cost estimates and conduct cost and/or price analysis as described in its policies and procedures for each procurement action including contract modifications above the Federal Simplified Acquisition Threshold?
11. Did the recipient include applicable federal clauses in FTA-funded procurements exceeding the micro-purchase limit and in construction contracts?
12. Did the recipient include required certifications in solicitations and receive signed certifications from bidders as part of their bid or proposal, as applicable?

13. If the recipient included liquidated damages in its procurements, did it do so appropriately?
14. Did the recipient approve, evaluate, and document change orders to procurements as described in its policies and procedures?
15. If the recipient included options in an FTA-funded procurement, did it base the number of options on its reasonably foreseeable need and evaluate the option price prior to awarding the contract?
16. If the recipient procured bus or rail rolling stock or replacement parts with FTA funds, did it adhere to the time limitations on placing orders against the contracts?
17. If the recipient purchased FTA-funded assets through an assignment of options (a/k/a “piggyback”), did the underlying contract comply with applicable Federal requirements regarding excessive options, inclusion of Federal requirements, assignability, price, and no cardinal changes?
18. Question removed from the FY22 Contractor Manual.
19. If the recipient procured buses with FTA funds, did it comply with requirements for bus testing reports?
20. If the recipient procured rolling stock with FTA funds, did it comply with the requirements of 49 CFR part 663, including pre-award and post-delivery Buy America audit requirements, resident inspector requirements, and purchaser's certifications?
21. Does the recipient perform oversight of its subrecipients' FTA-funded procurement activities as described in its policies and procedures?

## **INFORMATION NEEDED FROM RECIPIENT**

### **Recipient Information Request**

- Current procurement policies and procedures
- State statute regarding A&E (qualifications-based) procurements (States only)
- Procurement standards of conduct
- Procurement protest procedures
- List of FTA-funded procurements awarded since the last review. Identify the following items for each award:
  - Date
  - Dollar value
  - Type (professional service, architectural & engineering, operations management services, rolling stock, construction, materials and supplies)
  - Method: (invitation for bid, request for proposal, pre-qualified bidders, sole source, single bid, brand name, award-to-other-than-low-bidder, piggyback, joint procurements, options)
  - New Start or Small Start-related procurement
  - Awarded by contractors or subrecipients
  - Change order(s), if applicable
  - Disadvantaged Business Enterprise (DBE) goal, if applicable
  - Liquidated damages claimed or recovered
  - Status of contract (open (percent complete) or completed)
- List of change orders executed over \$250,000 since last review
- List of protests received or decided since last review
- List of capital leases awarded since the last review
- List of claims

## ***Recipient Follow-Up***

- Procurement files selected for review
  - FAIN for procurement files selected
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### **P1. Does the recipient have written procurement policies and procedures that include required state, local, and Federal provisions?**

#### **BASIC REQUIREMENT**

All recipients must have written procurement policies and procedures.

#### **APPLICABILITY**

Non-state recipients

#### **DETAILED EXPLANATION FOR REVIEWER**

All recipients must have written procurement policies and procedures.

Policies and procedures must explain how the recipient will ensure compliance with the standards and requirements identified in 2 CFR 200.318 (General Procurement Standards) through 200.327 (Contract Provisions) including:

##### *General procurement standards*

- **Contract oversight:** Recipients must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
- **Standards of conduct:** Recipients must maintain written standards of conduct covering conflicts of interest and governing the performance of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent must 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. An employee, officer, agent, and board member of the recipient may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors. 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. If the recipient has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the recipient 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 recipient is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.
- **Unnecessary or duplicative items:** The recipient's procedures must avoid the acquisition of unnecessary or duplicative items.
- **Award to responsible contractors:** The recipient must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement.
- **Procurement history:** The recipient must maintain records sufficient to detail the history of the 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.

- **Time and Material contracts:** The recipient may use time and material type contracts 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. Since this contract type 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 recipient 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.
- **Contract dispute resolution:** The recipient 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.

#### *Competition*

- **Full and open competition:** All procurement transactions must be conducted in a manner that provides full and open competition, unless there are specific circumstances in which noncompetitive procurement can be used. 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:
  - Placing unreasonable requirements on firms in order for them to qualify to do business;
  - Requiring unnecessary experience and excessive bonding;
  - Noncompetitive pricing practices between firms or between affiliated companies;
  - Noncompetitive contracts to consultants that are on retainer contracts;
  - Organizational conflicts of interest;
  - 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
  - Any arbitrary action in the procurement process.
- **Geographic Preference:** The recipient 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. A recipient or subrecipient may implement a local or other geographical or economic hiring preference relating to the use of labor for construction of a project funded by the grant, including prehire agreements, subject to any applicable State and local laws, policies, and procedures. Nothing in 2 CFR Part 200 preempts state licensing laws. When contracting for 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.
- **Procedures for procurement transactions:** The recipient must have written procedures for procurement transactions. These procedures must ensure that all solicitations:
  - 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 offerors must be clearly stated; and

- Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.
- Prequalification: The recipient 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 full and open competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

#### *Methods of procurement*

- Allowed methods of procurement: Recipients must use one of the following methods of procurement: (1) micro-purchases; (2) simplified acquisition procedures; (3) sealed bid; (4) competitive proposals; or (5) non-competitive.

#### *Contract cost and price*

- Cost or price analysis: Recipients 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.
- Profit: Recipients 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 a 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.
- Estimated costs: 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 recipient under 2 CFR Part 200 Subpart E—Cost Principles. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.
- Cost plus percentage of cost: The cost plus a percentage of cost and percentage of construction cost methods of contracting may not be used.

#### *Bonding requirements*

- Bonding requirements: For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, FTA may accept the bonding policy and requirements of the non-Federal entity provided that FTA has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be applied as follows:
  - 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.

- 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.
- 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.

#### *Contract provisions*

- Contract provisions: Recipient’s contracts must contain the applicable provisions described in Appendix II to 2 CFR Part 200—Contract Provisions for non-Federal Entity Contracts Under Federal Awards, and any other provisions required under Federal law.

#### **NOTE TO REVIEWER ON APPLICATION OF BABA:**

A procurement funded by a Federal award obligated on or after November 10, 2022, must comply with the Build America, Buy America Act (BABA) requirements in the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, div. G §§ 70901-17.

Note on BABA implementation. A procurement funded by a Federal award obligated on or after November 10, 2022, must comply with the Build America, Buy America Act (BABA) requirements in the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, div. G §§ 70901-17.

For many years, FTA’s Buy America statute at 49 U.S.C. 5323(j) has, with some exceptions, required all steel, iron, and manufactured products used in a federally funded project to be produced in the United States. A principal effect of BABA is to add construction materials to this list of items. BABA does not change FTA’s Buy America standards for steel, iron, or manufactured products including rolling stock (e.g., FTA *does not apply* the 55% cost-of-components standard to procurements).

#### *When BABA Applies:*

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#### *What BABA Standard Applies:*

In the course of implementing BABA’s new requirements, the U.S. Office of Management and Budget has published more than one set of interpretations for applying BABA.

On April 18, 2022, OMB issued memorandum M-22-11, “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure,” to guide federal agencies’ initial implementation of BABA.—OMB subsequently codified final guidance, with an effective date of October 23, 2023, at 2 CFR Part 184. Awards may be subject to either the Initial or Final BABA guidance based on the date of award execution:

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For procurements reviewed that contain deficiencies related to statutory or regulatory requirements that may deem the procurements ineligible for Federal funding, discuss the appropriate corrective action with the FTA regional office and regional counsel.

#### *Other requirements*

- Exclusionary or discriminatory specification: Federal funds may not be used to support a procurement that uses an exclusionary or discriminatory specification.
- Buy America: Recipient's procurements must comply with Buy America requirements in 49 U.S.C. 5323(j) and 49 CFR Parts 661 and 663.

### **INDICATORS OF COMPLIANCE**

- a. *Does the recipient have written procurement policies and procedures?*
- b. *Do the recipient's written procurement policies and procedures include the two elements required by 2 CFR 200.319(d)?*

Required Written Procurement Policies and Procedures			
Policy/Procedure	CFR Reference	Recipient Written Policy/Procedure and Page or Section Number	Comment
<i>Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured.</i>	2 CFR Part 200.319(d)(1)	-	-

Required Written Procurement Policies and Procedures			
Policy/Procedure	CFR Reference	Recipient Written Policy/Procedure and Page or Section Number	Comment
<i>Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.</i>	2 CFR Part 200.319(d)(2)	-	-

c. Does the recipient have procurement procedures that include the elements in the chart below? If written, cite location; otherwise discuss and document the recipient's process for each.

Requirements	Recipient Policy and Procedure (Page or Section Number)	Description of Process
Maintenance of contract oversight (Contract Administration System) 200.318 (b)	-	-
Maintenance of written standards of conduct 200.318 (c)	-	-
Avoidance of unnecessary or duplicative items 200.318 (d)	-	-
Contracting with responsible contractors 200.318 (h)	-	-
Maintenance of written procurement history 200.318 (i)	-	-
Use of time and material contracts 200.318 (j)(1)	-	-
Procedures for contract dispute resolution 200.318 (k)	-	-
Promotion of full and open competition 200.319 (a)	-	-
Prohibition on geographic preference 200.319 (c)	-	-

Requirements	Recipient Policy and Procedure (Page or Section Number)	Description of Process
Use and maintenance of prequalification lists, if permitted 200.319 (e)	-	-
(1) micro-purchases; ( <i>if this method is used, include in this table the threshold used</i> ) 200.320 (a)(1)	-	-
((2) Simplified acquisitions; ( <i>if this method is used, include in this table the threshold used</i> ) 200.320 (a)(2)	-	-
(3) sealed bid; 200.320 (b)(1)	-	-
(4) competitive proposals; or 200.320 (b)(2)	-	-
(5) non-competitive proposals 200.320 (c)	-	-
(6) Authorization of rolling stock acquisition and related equipment FAST Act §3019	-	-
Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms 200.321	-	-
Procurement of recovered materials 200.323	-	-
Cost or price analysis 200.324	-	-
Negotiation of contractor profit 200.324 (b)	-	-
Use of independent cost estimates 200.324	-	-
Use of estimated costs 200.324	-	-
Prohibition of cost plus percentage of cost contracts	-	-

Requirements	Recipient Policy and Procedure (Page or Section Number)	Description of Process
200.324		
Bonding requirements for construction or facility improvement contracts 200.326	-	-
Inclusion of required Contract provisions 200.327	-	-
Prohibition of exclusionary or discriminatory specifications 49 USC 5325(h)	--	-
Compliance with Buy America and Build America, Buy America Act requirements	-	-

- d. *Does the recipient have procurement policies and procedures that are contrary to 2 CFR 200.318 (General Procurement Standards) through 200.327 (Contract Provisions)?*
- e. *If, in the recipient's policies and procedures, micro- and simplified acquisition thresholds are more restrictive because of a state or local law/regulation, does a review of these types of procurements demonstrate that the recipient is following its policies and procedures?*

#### INSTRUCTIONS FOR REVIEWER

Request and review the recipient's procurement policies and procedures. Through review of the policies and procedures, interviews with recipient personnel, and examination of procurements selected, determine if:

- The recipient has written policies and procedures that include the two written elements required by 2 CFR 200.319.
- The recipient has policies and procedures in place and/or it can demonstrate how it ensures compliance with the standards and requirements identified in 2 CFR 200.318 through 200.327. If written, cite the location of the policy in the chart above; otherwise discuss and document the recipient's process for each.
- Based on a review of elements in the chart above, the recipient has policies and/or procedures that are contrary to the requirements identified in 2 CFR 200.318 through 200.327. For example, if the recipient is using micro-purchase procedures for procurements over \$10,000 without having obtained a higher threshold level per 2 CFR 200.320(a)(1)(iv) or (v), this is contrary to 2 CFR 200.320(a). Recipients can be more, but not less, restrictive than the Federal requirements.

Note: In accordance with 2 CFR 200.320(a)(1)(iv) or (v)

(iv) ***Non-Federal entity increase to the micro-purchase threshold up to \$50,000.*** Non-Federal entities may establish a threshold higher than the micro-purchase threshold identified in the FAR in accordance with the requirements of this section. The non-Federal entity may self-certify a threshold up to \$50,000 on an annual basis and must maintain documentation to be made available to the Federal awarding agency and auditors in accordance with § 200.334.

(v) ***Non-Federal entity increase to the micro-purchase threshold over \$50,000.*** Micro-purchase thresholds higher than \$50,000 must be approved by the cognizant agency for indirect costs. The non-federal entity must submit a request with the requirements included in paragraph (a)(1)(iv) of this section. The increased threshold is valid until there is a change in status in which the justification was approved. The recipient follows its procurement policies and procedures. Note that the determination for this element is made after a review of procurement files. If the recipient has a state or local law or regulation regarding procurement methods to be followed in its procurement policies and procedures for certain monetary thresholds that are more restrictive than Federal requirements, those procedures are to be followed.

## POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it does not have written procurement policies and procedures.

DEFICIENCY CODE P1-1: Procurement policies and procedures not evident

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit procurement policies that include all required provisions.

The recipient is deficient if it does not have written procedures for procurement transactions to ensure that all procurements 1) incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured, and 2) identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

DEFICIENCY CODE P1-2: Procurement transaction procedures missing or incomplete

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit procurement transaction procedures that include all required provisions.

The recipient is deficient if procurement policies and procedures contain provisions that are contrary to the provisions outlined above.

DEFICIENCY CODE P1-3: Procurement policies and procedures contrary to [reviewer to specify section]

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit revised procurement policies that are not contrary to 2 CFR 200.318 through 200.327.

The recipient is deficient if it does not follow its procurement policies and procedures regarding procurement methods for distinct monetary purchase thresholds if their policies are more stringent than Federal thresholds.

DEFICIENCY CODE P1-4: Procurement policies and procedures not followed

SUGGESTED CORRECTIVE ACTION: The recipient must provide evidence that it is implementing its procurement policies and procedures.

**NOTE TO REVIEWER:** The reviewer is to coordinate with the FTA regional office to determine the appropriate corrective action for this deficiency.

## **GOVERNING DIRECTIVE**

### *2 CFR 184.2 Applicability, effective date, and severability.*

(a) **Non-applicability of this part to existing Buy America Preferences.** This part does not apply to a Buy America Preference meeting or exceeding the requirements of section 70914 of the Build America, Buy America Act applied by a Federal agency to Federal awards for infrastructure projects before November 15, 2021.

(b) **Effective date of this part.** The effective date of this part is October 23, 2023. Except as provided in paragraph (c) of this section, this part applies to Federal awards obligated on or after its effective date. Awards obligated on or after May 14, 2022, the effective date of the Build America, Buy America Act, and before the effective date of this part, are instead subject to OMB Memorandum M-22-11.

(c) **Modified effective date of this part for certain infrastructure projects.** If an infrastructure project that has previously received a Federal award obligated on or after May 14, 2022, but before the effective date of this part receives an additional Federal award obligated within one year of the effective date of this part, the additional Federal award is subject to OMB Memorandum M-22-11. However, if significant design or planning changes are made to the infrastructure project, the Federal awarding agency may apply this part to the additional Federal award. Federal awards for an infrastructure project obligated after one year from the effective date of this part are subject to this part, regardless of whether this part applied to previous awards for the project.

(d) **Severability.** The provisions of this part are separate and severable from one another. OMB intends that if a provision of this part is held to be invalid or unenforceable as applied to a particular person or circumstance, the provision should be construed so as to continue to give the maximum effect permitted by law as applied to other persons not similarly situated or to dissimilar circumstances. If any provision is determined to be wholly invalid and unenforceable, it should be severed from the remaining provisions of this part, which should remain in effect.

### *2 CFR 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 §§ 200.321, 200.322, and 200.323 and ensure that every purchase order or other contract includes any clauses required by § 200.327. All other non-Federal entities, including subrecipients of a State, must follow the procurement standards in §§ 200.318 through 200.327.

### *2 CFR 200.318 General procurement standards*

(a) The non-Federal entity must have and use documented procurement procedures, consistent with State, local, and tribal laws and regulations and the standards of this section, for the acquisition of property or services required under a Federal award or subaward. The non-Federal entity's documented procurement procedures must conform to the procurement standards identified in §§ 200.317 through 200.327.

(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. Competition requirements will be met with documented procurement actions using strategic sourcing, shared services, and other similar procurement arrangements.

(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 § 200.214.

(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.

#### 2 CFR 200.319 Competition

(a) All procurement transactions for the acquisition of property or services required under a Federal award must be conducted in a manner providing full and open competition consistent with the standards of this section and § 200.320.

(b) 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.

(c) 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.

(d) 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.

(e) 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.

(f) Noncompetitive procurements can only be awarded in accordance with § 200.320(c).

2 CFR 200.320 Methods of procurement to be followed.

The non-Federal entity must have and use documented procurement procedures, consistent with the standards of this section and §§ 200.317, 200.318, and 200.319 for any of the following methods of procurement used for the acquisition of property or services required under a Federal award or subaward.

(a) Informal procurement methods. When the value of the procurement for property or services under a Federal award does not exceed the simplified acquisition threshold (SAT), as defined in § 200.1, or a lower threshold established by a non-Federal entity, formal procurement methods are not required. The non-Federal entity may use informal procurement methods to expedite the completion of its transactions and minimize the associated administrative burden and cost. The informal methods used for procurement of property or services at or below the SAT include:

(1) Micro-purchases -

(i) Distribution. The acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (See the definition of micro-purchase in § 200.1). To the maximum extent practicable, the non-Federal entity should distribute micro-purchases equitably among qualified suppliers.

(ii) Micro-purchase awards. Micro-purchases may be awarded without soliciting competitive price or rate quotations if the non-Federal entity considers the price to be reasonable based on research, experience,