

ESG and CARES Act Procurement Federal Requirements & Best Practices



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Overview

- Procurement Authority & Expectations & CARES Act Waivers
- Procurement Methods
- Procurement Timing
- Cost Reasonableness & Independent Cost Estimates
- Pre-Agreement Costs
- Resources



Procurement Authority

- State Procurement Authority for Federal Programs
 - State adopted 2 CFR 200.317 procurement requirements
 - The requirements flow to jurisdictions, agencies, and subrecipients participating in state administered Federal programs
- Local Procurement Authority
 - Non-state agencies and subrecipients should have a written (documented) procurement policy that includes the use of federal funds, like ESG
 - Those policies can also adopt 2 CFR 200 procurement requirements for federal programs



Procurement Expectations

- Follow your policies
 - The “Do what you said you would do” rule
- Document each procurement
 - Especially if it deviates from the standard (best) process or if it uses a waiver or exception
- Plan as far ahead as you can
 - Try to incorporate all potential activity phases, full scopes of potential work, and long-term expectations
- Keep cost-reasonableness in mind
 - Even emergency procurements must meet reasonableness standards



Intent of Procurement Regulations

- Encourage fair and open competition
- Prevent price gouging
- Protect the public's interest in public funds
- Support market participation for minority and women owned businesses
- Support employment opportunities for low- and moderate-income persons



CARES Act Procurement Language

Provided further, That recipients may deviate from applicable procurement standards when procuring goods and services to prevent, prepare for, and respond to coronavirus:

- What does this mean?
- Where can we find guidance?

Procurement Methods





Procurement Method Types

- Micro Purchases
- Small Purchases
- Sealed Bid
- Competitive Proposals
- Non-competitive Proposals (Sole-Source)
- Emergency Procurements
 - Subrecipient Selections



Micro Purchase – 2 CFR 200.67

- Purchase of supplies or services under \$10,000 (periodically updated for inflation)
<https://www.hud.gov/sites/dfiles/SPM/documents/Memo%20M-18-18%20Micro-purchase.pdf>
- Does **not** require solicitation of competitive bids/proposals
- Requires need and rationale documentation
- Requires cost reasonableness documentation
- Requires documentation of best efforts to use minority and women owned firms when possible



Shelter Beds Example

- **Memo:** Mission Shelter COVID-19 Response Bed Purchase: Procurement Documentation
- **Need:** Mission Shelter is opening a satellite emergency shelter at a surplus school site to help promote social distancing and to reduce the number of people housed at the main Mission Shelter site. The satellite shelter will require 35 additional beds and bedding to support the persons experiencing homelessness in the community. The existing Mission shelter will move 15 beds from the shelter to the satellite facility to help support social distancing at the primary site. The satellite shelter will need an additional 20 beds and associated bedding.
- **Cost Reasonableness:** Researched vendor pricing of 2 vendors with available per-unit costs available online on 7/13/2020 (see screenshots). Called two other regional vendors for pricing. Compared pricing on a per-unit basis (see spreadsheet). Selected online vendor based on total purchase cost.
- **MBE/WBE:** Equipment purchase from vendor, no MBE/WBE.



Micro Purchase Costing Sample

Per Unit Cost	ACME (online)	ACME Total	ABC (online)	ABC Total	SAFE (local)	SAFE Total	RESTWEL (local)	RESTWEL Total
Single metal bed w mattress (20)	\$87	\$1,740	\$115	\$2,300	\$103	\$2,060	\$84	\$1,680
Under-Bed metal chest (20)	\$54	\$1,080	\$48	\$960	\$52	\$1,040	\$63	\$1,260
Mattress covers (40)	\$18	\$720	\$12	\$480	\$15	\$600	\$20	\$800
sheets and blankets (80 sets)	\$9	\$720	\$8	\$640	\$6	\$480	\$10	\$800
Pillows (60)	\$15	\$900	\$16	\$960	\$14	\$840	\$13	\$780
Total Cost	\$183	\$5,160	\$199	\$5,340	\$190	\$5,020	\$190	\$5,320



Small Purchase – 2 CFR 200.320 (b)

- Purchase of services, supplies, or property below the Simplified Acquisition Threshold of \$250,000 (periodically updated for inflation)
- Requires everything required by micro-purchase; and
- Requires documented **informal** solicitation of bids/prices - solicitation information should be consistent for all vendors
- Requires cost reasonableness documentation
- Requires applicable federal contracting language in the contract
- Threshold includes contract modifications that increase total cost – beware of the margin



BCC Email to Regional/Statewide Vendors Example

Good Afternoon,

The Emerald City is looking to contract with a consultant to prepare National Environmental Protection Act (NEPA) reviews for an Emergency Shelter Acquisition and rehabilitation project to be funded in part with through a State administered federal passthrough grants. The new facility will provide capacity for about 54 beds and will be designed to maximize social distancing to protect shelter residents and staff.

*The consultant will be expected to prepare a regional environmental review record, document the appropriate level of environmental review, manage all publishing, and coordinate consultations. Current structures under consideration are located in the oldest residential areas in the City, so State Historic Preservation Office (SHPO) consultation is likely. Please see the **attached scope of work** for additional details. Please complete the **attached bid form** if you are interested in responding to this solicitation.*

Contact: Dorothy Gale at dgale@emeraldcity.org for questions.

Due Date: Responses are due before 5:00 pm on August 31, 2020.

Thank you for your response!

Sincerely, The Emerald City Continuum of Care



Sealed Bid – 2 CFR 200.320 (c)

- Formally advertised procurement for a fixed price contract (lump sum or unit price) to the lowest responsible bidder
- Should be used for **all construction procurement** regardless of cost
- Does not require documentation of cost reasonableness if procurement is below Simplified Acquisition Threshold, however cost analysis is always recommended
- Should follow a well-documented transparent and formal process
- Requires applicable federal contracting language in the contract



Competitive Bids – 2 CFR 200.320 (d)

- Requests for proposals for goods or services where both price and other factors (qualifications, experience, and other factors advantageous to the program) are considered in the evaluation process
- Requires cost reasonableness and independent cost estimate (ICE)
- RFP should not unduly restrict competition
- RFP should be publicly distributed in a way to ensure an adequate number of qualified sources are informed of the procurement
- RFP should include evaluation factors (e.g. scoring criteria)



Non-Competitive – 2 CFR 200.320 (f) (aka Sole Source)

- There is only one vendor/consultant; or
- Written approval from HCD; or
 - Prior procurement efforts
 - Risk of conflict of interest
 - Opportunity for partnership leveraging
- Competition is inadequate; or
 - Not enough qualified vendors
 - Qualified vendors are not available during the project
 - Project requires specialized certification that are not available locally
- There is an emergency or exigency



Emergency Procurement

- CARES Act allows for procurement deviations
- FEMA Emergency Procurement Model
 - <https://www.fema.gov/news-release/2020/03/20/procurement-under-grants-under-exigent-or-emergency-circumstances>
- Exigency: there is a need to avoid, prevent, or alleviate serious harm or injury, financial or otherwise, to the non-state entity
- Emergency: a threat to life, public health or safety, or improved property requires immediate action to alleviate the threat



Emergency Procurement Justification Documentation

- Justification for emergency procurement
 - See Non-Competitive requirements
- Product/Service description
 - Including estimated cost
- Clear explanation of exigency or emergency conditions
- Timing for emergency contract
 - Transition to competitively procured
 - May be based on timing of emergency
- Explain why competition was not feasible
- Identify any known or potential conflicts of interest in the non-competitive contract
- Any other pertinent information



Single Respondent vs. Sole Source

- A single respondent is when an agency completes a competitive process – whether sealed bid or RFP, and receives only one response. If the process has been documented and has followed all of the required steps, then the single response may be deemed adequate
- Sole source is when a grantee only asks for a bid or response from one contractor/vendor/consultant



Subrecipient Selection

- Subrecipients are selected, not procured
 - Formal application process with application evaluations and established criteria
 - Request for Qualifications from qualified organizations
 - Unsolicited applications or proposals
 - Grantee guided application or proposal
 - Combination of approaches
- Establish and document the selection procedure to support subrecipient status



Contracts Vs. Subrecipient Agreements

- **Contracts**
 - Competitively procured (2 CFR 200.320)
 - May be with a non-profit if competitively procured
 - Does not need to comply with 2 CFR 200 uniform guidance administrative requirements (however the contract must include contract provisions in Appendix II)
 - Provides the goods and services within normal business operations;
 - Provides similar goods or services to many different purchasers;
 - Normally operates in a competitive environment;
 - Provides goods or services that are ancillary to the operation of the Federal program; and
 - Is not subject to compliance requirements of the Federal program as a result of the agreement, though similar requirements may apply for other reasons.



Contracts Vs. Subrecipient Agreements Continued

- Subrecipient Agreements
 - Selected, not competitively procured.
 - Must be Non-Profit or authorized Community-Based Development Organization (CBDO) under 24 CFR 570.204 (c)
 - Must comply with 2 CFR 200 uniform guidance for administrative requirements (much like a grantee)
 - Determines who is eligible to receive what Federal assistance;
 - Has its performance measured in relation to whether objectives of a Federal program were met;
 - Has responsibility for programmatic decision making;
 - Is responsible for adherence to applicable Federal program requirements specified in the Federal award; and
 - In accordance with its agreement, uses the Federal funds to carry out a program for a public purpose specified in authorizing statute, as opposed to providing goods or services for the benefit of the pass-through entity.
- 2 CFR 200.330



Procurement Documentation

- Memo for each phase of the procurement
 - Pre Award
 - Rational for procurement method
 - Need for service/item
 - Pre-bid independent cost estimates (if applicable)
 - Solicitation process
 - Efforts to solicit from minority and women owned businesses
 - Communication with potential bidders
 - Evaluation criteria (if applicable)
 - Contract type (if applicable)



Procurement Documentation Cont.

- Award
 - Receipt of all proposals (time-stamped if necessary)
 - For sealed bids, bid opening date and process
 - Evaluation process (such as scoring) for each proposal
 - Cost reasonableness analysis (if applicable)
 - Price negotiations with contractors/vendors/consultants
- For detailed documentation requirements for each procurement method, see the Buying Right guide
- Documentation does not stop at award, should also include contract administration
 - Amendments, negotiations, administration communication, payments, percent complete, deliverables, milestones, program/project progress



Procurement Planning

- If federal funds are a consideration for a project, activity, or purchase, then follow federal procurement requirements
 - Even if you do not have the funds in hand
 - Consider if there may be federal funding available in response to emergency/exigency
- Plan at activity concept
 - If you want to use the same contractor/consultant throughout the project or on multiple phases, then you must procure for the full scope of work
 - Use budget options or additives to get costing for the full scope of work
 - Use conditions in the contract to restrict or phase the scope of work to available funds



Methods and Timing Summary

- Start planning for procurement at project concept
- Make sure to select the most appropriate procurement method – if the potential procurement cost is at the threshold, be conservative
- If possible, procure for the full project, even if it isn't fully funded – use contract conditions and contract amendments to phase tasks
- Document your process – use emails to demonstrate easy time-stamps for time sensitive documentation
- When in doubt, do some research, don't assume



Cost Reasonableness

- Stewardship of public funds to make sure costs are reasonable for goods or services provided
- Price analysis – price comparison of total sum
- Cost analysis – evaluation of the separate elements that make up the total cost
- Cost reasonableness may be performed by grantee staff or by an independent consultant
- Cost reasonableness **cannot** be based on received bids



Independent Cost Estimates (ICE)

- Step 1 – if an ICE is required, identify whether or not staff have the expertise and/or capacity to complete the estimate
 - Subrecipient Agreements do not require an ICE
 - For construction projects the ICE is often prepared by an engineer or architect
 - For items or goods with unit prices, the ICE may just be a simple pre-purchase price comparison of similar goods or various brands
 - price comparison results should be time stamped (such as emails or screen shots)
 - Cost analysis requires evaluating the components of the activity and is typically more time consuming
 - If staff do not have expertise/capacity consider procuring a cost estimator



ICE Continued

- Step 2 – Identify cost estimating resources
 - Have you recently contracted for or purchased a similar good or service that can be used as cost data?
 - Have your neighbors? It is ok to share info!
 - Is cost information available online or through a cost estimating tool?
 - Is there market research available? If not, can you do market research? This may mean calling vendors and/or looking out-of-state



ICE Continued (2)

- Step 3 – Document your process
 - Who, when, what, and where you get your cost data
 - Similarities and differences between cost analysis resources and the needed good or service
 - Rationale for weighting or inflating costs in the estimate
 - How the component costs are structured – what tasks and deliverables are in each component



ICE Continued (3)

- Step 4 – Complete your estimate
 - If you plan to use a specific budget template in your procurement, use that template (or similar) for your ICE
 - Time-stamp your ICE – it should be complete before you receive bids to prove it is independent
 - Make sure the documentation gets into your procurement package, including any memos and time stamps



Price Analysis Variances

- If your ICE and your bid prices come in fairly close (or you can easily explain the variances), you are good to go!
- If there are large unexplainable variances;
 - It may indicate that bid respondents do not understand the RFP or plans and specs the way you intended
 - It also may indicate the plans/specs or scope of work is incomplete and contractors are trying to fill in the gaps
 - There may be a volatile market or a market shortage or cost data might be too old
- Grantees with large cost analysis variances should carefully evaluate the procurement method and documents to make sure they are correct
 - Evaluate if the received bids/costs are comparable
 - Make sure the bids are truly responsive/responsible and all of the federal contracting requirements were included
- If you run into trouble, contact your representative and we will do our best to help find a solution.



Pre-Agreement Costs

- CARES Act allows for the reimbursement of eligible pre-agreement costs post-contract execution
 - COVID-19 related costs incurred prior to CARES Act ratification (March 27, 2020)
- Pre-Agreement costs are eligible costs incurred for an eligible activity before the Standard Agreement is executed
 - If it would be eligible after SA, then it is potentially eligible pre- SA
- All pre-agreement costs are incurred at the applicant's risk
 - HCD is not responsible for reimbursing pre-agreement costs if no award is made

Questions!