Missouri Division of Workforce Development **Issued: October 19, 2016**
DWD Issuance 04-2016 **Effective: October 19, 2016**

Subject: **Selection or Designation of Service Providers, including Selection of One-Stop Operators, by the Local Workforce Development Board**

1. Purpose: This Issuance provides guidance to Local Workforce Development Boards (Local WDB) on federal and state laws, regulations, and policies governing procurement of service providers, including One-Stop Operators (OSO). The Local WDB may directly designate some providers. It must competitively select others, including the OSO. A single entity may serve the Local WDB in more than one service provider role.

2. Background: The rules[1] implementing the Workforce Innovation and Opportunity Act (WIOA)[2] allow for a Local WDB to contract with a single entity to fulfill more than one service-provider role in its One-Stop Delivery System.[3] Multiple roles notwithstanding, WIOA requires the Local WDB to have the OSO disclose any potential conflicts of interest it has with training service or other service providers.[4]

WIOA sec. 121(d)(2)(A) requires Local WDBs to select[5] OSOs "through a competitive process." WIOA Final Rule 20 CFR 678.635 specifies **July 1, 2017**, as the deadline for Local WDBs to have competitively selected OSOs and placed them in active service operating One-Stop Centers. (The exceptions being any contracts still in force signed prior to July 1, 2015.)

The Rules set a deadline of November 17, 2016 [that is, 90 days after the publication of the Final Rules in the *Federal Register*], for each Local WBD to demonstrate its **intention** to conduct a competitive process.[6]

WIOA sec. 107(d)(10) assigns the Local WDB the role of selecting operators and providers. Section 107(f) gives the Local WDB authority to hire a director and other staff to assist the Local WDB in carrying out its functions. Therefore, there are at least five potential "hats" for one or more entities to wear:

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[1] 20 CFR 678.620(b) and 678.625 in *Workforce Innovation and Opportunity Act, Joint Rule for Unified and Combined State Plans, Performance Accountability, and the One-Stop System Joint Provisions; Final Rule*, ETA Docket 2015-0002, August 19, 2016, and 20 CFR 679.430 in *Workforce Innovation and Opportunity Act, Final Rule*, ETA Docket 2015-0001, August 19, 2016.

[2] Pub. Law 113-128 [29 U.S.C. 3101 et seq.].

[3] It is also possible for such an entity to function simultaneously as the LFA for the LWDA *if* independently appointed to that role by the Chief Elected Official (CEO). In most Missouri LWDAs, however, the CEO has appointed the Local WDB to serve as the LFA. For additional guidance on the designation and powers of a LFA, see DWD Issuance 22-2015, "Designation of a LFA by the CEO," June 22, 2016.

[4] WIOA sec. 121(d)(4)(A) [29 U.S.C. 3151(d)(4)(A)].

[5] The DOL and ED, in promulgating the Part 678, Subpart D, rules to implement WIOA section 121, note that they intentionally use the term "selection" of a OSO through a competitive process, rather than "designation" or "certification" as used in WIOA, to avoid confusion. The State herein follows suit.

[6] "This demonstration may include, but is not limited to, market research, requests for information, and conducting a cost and price analysis." [20 CFR 678.635(b), WIOA Final Rules]. The Final Rule at 20 CFR 678.605(d) also requires the Local WDB to prepare written documentation explaining how and why it decided upon the competitive process chosen to select an OSO. In its rulemaking preamble guidance, DOL characterized this written documentation as "maintenance records." The State would only require a copy of this documentation if compliance with Part 678, Subpart D, were to be questioned.

- OSO [competitive procurement required];
- Local WDB support staff [noncompetitive award][7];
- Career Services provider [noncompetitive award];
- Youth Services (Youth Workforce Investment Activities) provider [competitive procurement required, unless services are provided by the Local WDB per 20 CFR 681.400]; and
- Training Services provider [noncompetitive, but provider must be eligible if training is provided through the Individual Training Account (ITA) process].

Under the WIOA Final Rule,[8] a Local WDB may function as an OSO itself only with the prior approval of the local Chief Elected Official (CEO) and that of the Governor. Likewise, WIOA[9] generally prohibits a Local WDB from directly providing Training Services unless it receives a waiver from the Governor. Obtaining such a waiver requires substantiating that there is an absence of qualified providers in the Local Workforce Development Area (LWDA), that the board meets eligibility requirements, that the training is in demand locally, and that a public notice and comment sunshine process preceded the waiver request.

Using the Same Provider for Multiple Roles

The Local WDB may decide whether it wishes to procure the services of an entity that fulfills two or more of the functions of OSO, the Local WDB support staff, Career Services provider, Youth Services provider, and Training Services Provider. Likewise, it is up to the CEO whether to designate as his or her Local Fiscal Agent (LFA) (if one is used) the Local WDB itself or an entity that is already serving the Local WDB in other capacities.[10]

. This Policy Issuance, favoring local discretion and flexibility, describes the circumstances whereby an entity may contract with a Local WDB to provide two or more of the services mentioned above. It includes guidance from WIOA, the Final Rules, and previously published DWD policy on "full and open competition"[11] and on conflicts of interest that could result from multitasking.[12]

3. Substance: **Local WDB Responsible for Internal Controls**

The Local WDB must avoid conflicts of interest and ensure performance accountability when one entity performs two or more One-Stop Delivery System roles. "Firewalls" should be sufficiently rigorous, to the satisfaction of the Local WDB and the CEO, to assure this. The Final Rulemaking from the U.S. Departmjent of Labor (DOL) requires that:

> *"Any organization that has been selected or otherwise designated to perform more than one of these functions must develop a* ***written agreement*** [emphasis added] *with the Local WDB and CEO to clarify how the organization will carry out its responsibilities while demonstrating compliance with WIOA and corresponding regulations, relevant Office of Management and Budget circulars, and the State's conflict-of-interest policy."* [13]

[7] Recruiting costs for Local WDB staff are allowable per the Uniform Guidelines at 2 CFR 200.463 "Recruiting," but must be consistent with the non-federal entity's existing cost-accounting practices and policies.

[8] 20 CFR 678.600(c)(6).

[9] WIOA sec. 107(g)(1) [29 U.S.C. 3122(g)(1)].

[10] 20 CFR 679.420, WIOA Final Rules.

[11] Per the Uniform Guidelines at 2 CFR 200.319 "Competition."

[12] DWD Issuance 15-2011, "Transparency and Integrity in Local Workforce Investment Board Decisions," May 30, 2012, and any subsequent superseding policy.

[13] 20 CFR 679.430, WIOA Final Rules. (After the drafting of these Rules, formal Uniform Guidance in Title 2 of the *Code of Federal Regulations* replaced the OMB circulars referenced in this paragraph.)

Nothing in WIOA or the Rules prohibits a Local WDB from issuing a competitive Request for Proposal (RFP) requiring the awardee to perform multiple functions (any combination of Local WDB staff, OSO, Career Services provider, Youth Services, or Training Services provider). If a single entity *does* perform two or more of these roles (and possibly LFA as well—if appointed by the CEO), WIOA and the DOL's Final Rules require statutory and regulatory assurances to avoid conflicts of interest.

Designating Local WDB Staff

- The Local WDB chooses its staffing entity at its own discretion without a competitive process.
- Neither the Local WDB staff, OSO, nor any other services provider, may *manage* a services competition (drafting proposal specifications, evaluating bids, selecting the awardee, etc.) in which it will be a competitor. The Local WDB must establish "robust" policies and firewalls to avoid any inherent conflict of interest.[14] The Uniform Guidelines[15] also require disclosure of all potential conflicts of interest *in writing* to the federal awarding agency or to the pass-through entity (DWD). The LWDAs also should require such disclosures (to the Local WDB) from their own providers.

Selecting the OSO

- WIOA charges the Local WDB with **selecting**[16] OSOs,[17] empowers them to terminate an OSO "for cause,"[18] and requires the consent of the CEO for hiring and firing an OSO.
- *Transition*—Any Local WDB whose contract or agreement with a current OSO expires on or before July 1, 2017, must comply with the WIOA competitive process requirement.[19] A Local WDB might have a current (entered into prior to the beginning of PY 2016) multiple-year OSO contract whose multiple or option years extend through or past PY 2017. In such a case, DOL guidance[20] and the Final Rules[21] allow the option of completing that contract, **if** the parties incorporate WIOA requirements (including adherence to the Uniform Guidelines) by amendment or modification of the option years of the contract. At the conclusion of that current, amended contract, the Local WDB must competitively select the next OSO, per WIOA and the Rules, for the ensuing PY.

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[14] DOL preamble narrative for 29 CFR 678.615 and 2 CFR 200.319 "Competition."

[15] 2 CFR 200.112 "Conflict of Interest."

[16] "Section 121(d)(2)(A) of WIOA *only* allows for selection of a OSO through a competitive process. This proposed regulation uses the term **'selection'** of OSO through a competitive process, rather than **'designation'** or **'certification,'** to avoid confusion." (DOL preamble narrative for 20 CFR Part 678 Subpart D—OSOs, 80 FR 20602.)

[17] WIOA sec. 121(a)(2) [29 U.S.C. 3151(a)(2)].

[18] WIOA sec. 121(d)(1) [29 U.S.C. 3151(d)(1)].

[19] WIOA sec. 121(d)(2)(A) [29 U.S.C.3151(d)(2)(A)].

[20] DOL, ETA, Training & Employment Guidance Letter (TEGL) 38-14, "Operational Guidance to Support the Orderly Transition of Workforce Investment Act Participants, Funds, and Subrecipient Contracts to the WIOA," June 8, 2015.

[21] 20 CFR 678.635, WIOA Final Rules, and the accompanying DOL preamble commentary. This exception is specifically referenced in a posting by DOL on its website at (https://www.doleta.gov/wioa/FAQs.cfm#q!244) on April 4, 2016.

- Aside from the above exception, an OSO, whether a single entity (public, private, or nonprofit) or a consortium of at least three of the Required One-Stop Partners,[22] **must be selected through a competitive process.**[23,24] The competitive process must be in accord with the Local WDB By-Laws (procurement policy). It also must concur with the Local Plan, any policies of the CEO consortium or local government that may apply, and any relevant stipulations in the Memorandum of Understanding for the local One-Stop Delivery System. Beyond this locally required diligence, and adherence to the Uniform Guidelines for federal awards,[25] **the State imposes no additional requirements** on how the Local WDB, with CEO consent, will manage the "competitive process." **Attachment 1** to this Issuance provides the Title 2 Part 200 sections of Uniform Guidance relating to procurement. These regulations must be followed except in situations where they conflict with specific provisions in WIOA or in the WIOA Final Rules.
- WIOA requires[26] the Local WDBs to ensure that OSOs:
  - Disclose potential conflicts of interest with training or service providers;
  - Avoid practices that create disincentives for services to individuals with barriers to employment; and
  - Comply with federal regulations and procurement policies relating to calculation and use of profits.
- State merit staff can continue to perform functions and activities in a One-Stop Center regardless of whether the OSO is a government, private, or non-profit entity.[27] Likewise, local government staff may also work in the One-Stop Center regardless of who the operator is, if they are responsible for delivering a One-Stop Partner program's services.[28] The Local WDB and the OSO establish a system for management of merit staff in accordance with State policies and procedures.[29] The Functional Leader system currently in place in Missouri One-Stop Centers fulfills this role of managing day-to-day supervision of service delivery.[30]
- The OSO may operate one or more One-Stop Centers. There can be more than one OSO in a LWDA.[31]
- The Local WDB must hold a competitive process to select the OSO **at least once every four years.** A state may require (DWD does not), or a Local WDB may choose to set, a shorter interval for the competitive-selection process.[32] Nevertheless, DWD strongly encourages Local WDBs to award contracts for one-year terms, with renewal options.

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[22] WIOA sec. 121(b)(1) [29 U.S.C. 3151(b)(1)].

[23] WIOA sec. 121 (d)(2)(A) [29 U.S.C. 3151(d)(2)(A)]; 20 CFR 678.605(c), WIOA Final Rules, further specifies that the competitive procurement process be based on local procurement policies and the Uniform Guidance in 2 CFR 200-318-200.326 *(see Attachment 1)*. This subsection also specifies the term "noncompetitive proposals" in the Uniform Guidance is equivalent to the term "sole source procurement" in WIOA. Subsection (d), which follows, requires the Local WDB to maintain a written record of how it chose the form of the competition.

[24] "Procurement by sole source is permitted only under limited conditions. Because of the potential for abuse of the sole-source selection method, DOL intends to set a high bar for justifying that there is only one possible operator. The Local WDBs cannot use their past experience with an entity being the OSO or one response to Requests for Information (RFI) alone as justification." DOL preamble narrative for 29 CFR 678.605, "How is the OSO selected?" (80 FR 20603–20604).

[25] 2 CFR Parts 200 and 2900.

[26] WIOA sec. 121(d)(4) [29 U.S.C. 3151(d)(4)].

[27] 20 CFR 678.630, WIOA Final Rules.

[28] DOL preamble narrative for 29 CFR 678.600–678.635, Subpart D—OSOs, 80FR20603.

[29] 20 CFR 678.630, WIOA Final Rules.

[30] DWD Issuance 01-2016, "Functional Leadership for Missouri Job Centers Guidance and Policy," September 28, 2016.

[31] 29 CFR 678.600(b), WIOA Final Rules.

[32] 29 CFR 678.605(a), WIOA Final Rules.

- An OSO *may not*[33]:
  - Convene system stakeholders to assist in the development of the Local Plan;
  - Prepare and submit Local Plans;
  - Be responsible for oversight of itself;
  - Manage or participate in the competitive selection process for OSOs;
  - Select or terminate other OSOs, Career Services, or Youth Services providers;
  - Negotiate local performance-accountability measures; or
  - Develop or submit budgets for activities of the Local WDB.

  Nevertheless, **separate** parts of an entity that provides OSO services *may* perform some or all of these functions ***if* the organization also serves the Local WDB or the CEO in another role.**[34] However, in that other capacity, there must be a written agreement with the Local WDB and the CEO documenting how internal controls and conflict-of-interest policies will dissociate those activities from the operation of the One-Stop.[35]
- The Local WDB must make information publicly available, by electronic means and open meetings, regarding the selection of OSOs.[36] (Minutes of contract negotiations are not public records and do not have to be posted.[37])

Designating or Selecting the Career Services Provider

- A presupposition in WIOA and in the Final Rules is that most OSOs will wear at least two hats, and be the providers of Career Services.[38] ["If the OSO does not provide Career Services described in Section 3174(c)(2) of this title in a LWDA, the Local WDB shall identify eligible providers of those Career Services in the LWDA by awarding contracts."[39]]
- Whether the Local WDB chooses to make the provision of Career Services part of the OSO competition, or chooses to designate the OSO (or some third party) as the Career Services awardee (before or after the OSO competitively selected), is left to the Local WDB's discretion, with the advice and consent of the CEO. Standing alone, the Career Services contract does not have to be a competitive process.

Selecting the Youth Services Provider

- If the Local WDB decides to hold a **competitive procurement** for Youth Services, and the Local WDB has a Youth Standing Committee, the Local WDB must base the procurement on the recommendations of that committee.[40] However, if the Local WDB elects not to procure services, the grant recipient/local fiscal agent has the option to provide some or all Youth Services directly, as provided for in the rules.[41] DWD will be issuing additional future guidance on the provisioning of Youth Services.

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[33] 29 CFR 678.620(b), WIOA Final Rules.
[34] 20 CFR 678.620(b)(2), WIOA Final Rules.
[35] 29 CFR 679.430, WIOA Final Rules.
[36] WIOA sec. 107(e) [29 U.S.C. 3122(e)] and 20 CFR 679.390, WIOA Final Rules.
[37] RSMo 610.010–610.035; Mo. AG Opinion 83-2009, April 16, 2009.
[38] WIOA sec. 134(c)(2) [29 U.S.C. 3174(c)(2)] and 20 CFR 678.430, WIOA Final Rules.
[39] WIOA sec. 107(d)(10)(D) [29 U.S.C. 3122(d)(10)(D)].
[40] WIOA sec. 107(d)(10)(B) [29 U.S.C. 3122(d)(10)(B)] and 20 CFR 679.370(*l*)(1), WIOA Final Rules.
[41] 20 CFR 681.400(b), WIOA Final Rules, and accompanying DOL Final Rule preamble discussion.

Selecting the Training Services Provider

- The State does not anticipate that a Local WDB would also want the OSO to wear the hat of Training Services Provider (or vice versa). Nevertheless, in such an event, the eligibility requirements in WIOA sec. 107(d)(10)(C) and sec. 122, as well as the aforementioned conflict of interest considerations, would influence the procurement process.

LFA—Contracting for Other Duties with the Local WDB

- The employment of an LFA to assist with the fiduciary duties related to the CEO's role as the grant subrecipient for the LWDA is not within the purview of the Local WDB.[42] Therefore, the Local WDB *cannot bundle the LFA duties into an RFP*. Once the Local WDB fills the roles of the Local WDB staff, OSO, Career Services, Youth Services, and Training Services, the CEO (or the CEO consortium) *may* choose to contract with one of those entities to be the LFA, or may select an entirely different entity, including the Local WDB itself. The *administrative duties* (including those affecting policy and **service delivery**) of a CEO are not delegable to the LFA.[43] Because of this, DOL has explicitly said appointment as an LFA does not automatically permit that LFA to provide Youth Services directly (without a competitive process) under 20 CFR 681.400.[44]

4. Action: No later than 90 days following the publication in the Federal Register of the WIOA Final Rules, 2016, each Local WDB must demonstrate that is taking steps to prepare for the competition to select an OSO. This includes creating a maintenance record documenting the proposed selection process.

The **timetable,** or schedule, to manage the competitive process between the above starting date (including creating job specifications, publicly announcing the competition, and vetting or evaluating the competitors' proposals) and the signing of service agreements is at the **discretion of the Local WDB,** provided it is concluded no later than **July 1, 2017.**

No later than July 1, 2017, all the Local WDBs should have:

- OSOs selected, in place, and operating One-Stop Centers in active service;
- Documentation publicly available that details the competition-and-selection process that was used by the Local WDB to select the OSO;
- Written maintenance records available outlining the firewall and internal control provisions that eliminate conflicts of interest in situations where a contracted entity is performing two or more of the following functions:
  - Support staff for the Local WDB;
  - OSO;
  - Career Services Provider;
  - Youth Services Provider;
  - Training Services Provider; and/or
  - LFA for the CEO

5. Contact: Direct questions or comments regarding this Issuance to: Clinton Flowers, Performance and Research Manager, at (573) 526-8261, or clint.flowers@ded.mo.gov.

[42] WIOA sec. 107(d)(12)(B)(i)(II) [29 U.S.C. 107(d)(12)(B)(i)(II)]; 20 CFR 679.420, WIOA Final Rules; and DWD Issuance 22-2015, "Policy on Designation of a LFA by the CEO," June 22, 2016.
[43] 20 CFR 679.420, WIOA Final Rules.
[44] DOL preamble discussion for WIOA Final Rules 20 CFR 679.420.

6. References:

- Uniform Guidance for Federal Awards, 2 CFR Part 200.
- Workforce Innovation and Opportunity Act, 29 U.S.C. 3101 et seq.
- *Workforce Innovation and Opportunity Act; Final Rule,* Docket ETA 2015-0001, August 19, 2016, and *Workforce Innovation and Opportunity Act, Joint Rule for Unified and Combined State Plans, Performance Accountability, and the One-Stop System Joint Provisions; Final Rule,* ETA Docket 2015-0002, August 19, 2016.
- DWD Issuance 01-2016, "Functional Leadership for Missouri Job Centers Guidance and Policy," September 28, 2016.
- DWD Issuance 22-2015, "Policy on Designation of a Local Fiscal Agent by the Chief Elected Official," June22, 2016.
- DWD Issuance 15-2011, "Transparency and Integrity in Local Workforce Investment Board Decisions," May 30, 2012, and subsequent revisions.

7. Rescissions: None.

8. Attachments: Uniform Guidance for Federal Awards, Procurement Standards, 2 CFR Parts 200.317–200.326.

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ATTACHMENT 1 - DWD Issuance 04-2016

U.S. CODE TITLE 2, GRANTS AND AGREEMENTS

CHAPTER II—OFFICE OF MANAGEMENT AND BUDGET GUIDANCE

PART 200—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS

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.