Projects:
Before During, and After

A Consideration of Procurement
Laws and Regulations

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Our Agenda

- Preliminary Considerations in Procurement
- You Already Know This, Right?: State Procurement Laws for North Carolina Local Governments
- Federal Grant Procurement Standards
- Conflict of Interest Standards
Preliminary Considerations in Procurement
What Is Public Procurement?

- The process by which a public entity purchases goods or services from a third party.
- What particular factors influence a unit of local government in North Carolina when it decides how to spend federal grant funds?

State Laws
- The North Carolina General Statutes and Local Acts
- Competitive Bidding Laws (Article 8 of Chapter 143; Article 3D of Chapter 143)
- Authority to Enter Into a Contract (e.g., Chapter 153A; 160A)
- North Carolina Contract Law (non-statutory)

Federal Laws and Regulations
- United States Code (e.g., CARES Act, CRRSA Act, ARP Act)
- Federal Grant Regulations, Agency Regulations, and Guidance
- 2 C.F.R. Part 200 (the “Uniform Guidance”) and Grant Procurement Standards
- Terms and Conditions of a Federal Award

Local Purchasing Policies
- Where a unit has authority to enter into a contract, how will it exercise that authority?

Decision to Purchase a Good or Service

Economic and Managerial Considerations
- Competition to Ensure Value
- “Fairness” or “Equality” or “Equity”
You Already Know This . . . State Procurement Laws for North Carolina Local Governments
Procurement Methods Under North Carolina Law

- **Type of Contract**
- **Cost of Contract**

Equals

- **Procurement Method**

Procurement Method Requirements
Four *Types* of Contracts Under North Carolina Competitive Bidding Law

1. **“Purchase” Contract**
   - The purchase of “apparatus, supplies, materials, or equipment”
Four *Types* of Contracts Under North Carolina Competitive Bidding Law

2. “Construction or Repair” Contract
   - Vertical
     - Construction of a new building
     - Renovation of an old building
   - Horizontal
     - Water or sewer lines
     - Broadband installation
     - Road construction
Distinguishing Construction Contracts from Service Contracts

- G.S. 87-1(a) requires GC licensure if cost of the undertaking is $30,000 or more and involves “construction of any building, highway, public utilities, grading or any improvement or structure.”

Under state law, is general contractor licensure required to complete the scope of work? (G.S. 87-1; 21 N.C. Admin. Code 12A.0100 et seq.)

If yes, treat the contract as a contract for “construction or repair work” for competitive bidding purposes.

If no, treat the contract as a service contract for competitive bidding purposes.
Four *Types* of Contracts Under North Carolina Competitive Bidding Law

3. **“Mini-Brooks Act” Services**
   - Architectural
   - Engineering
   - Surveying
   - Alternative Construction Delivery Methods
     - Construction Management at-Risk
     - Design-Build
     - Design-Build Bridging
     - Public-Private Partnership
Four *Types* of Contracts Under North Carolina Competitive Bidding Law

4. “Everything Else”
   - Services
   - “True” Leases
   - Purchase of Real Property
Four *Types* of Contracts Under North Carolina Competitive Bidding Laws – But . . . Consider “Thresholds”

- **Type of Contract**
- **Cost of Contract**

- $0
  - No statutory requirements
- $30,000
  - Informal Purchase & Construction
- $90,000
  - Formal Purchase
- $500,000
  - Formal Construction
Basic Procurement Rules – N.C. Law

- **Formal Bidding** (G.S. 143-129)
  - Cost of Contract (Bid Thresholds:
    - $500,000
    - $90,000
    - $30,000
    - Purchase of Apparatus, Supplies, Materials or Equipment
    - Construction or Repair Work

- **Informal Bidding** (G.S. 143-131)
  - State law does not require competitive bidding.

- **Qualifications-Based Selection** (G.S. 143-64.31 et seq.)
  - State law does not require competitive bidding.*

- **Mini-Brooks Act**
  - "Everything Else"*

*Use of competitive selection process is optional, not required.
Informal Bidding Requirements Under N.C. Law

- Keep record of bids
- Award to lowest responsive responsible bidder
  - No specific method of advertising
  - No specific form of bids
  - No minimum number of bids
  - No public bid opening
  - No governing board approval
Lowest Responsive, Responsible Bidder Standard of Award

- Lowest Cost
- Responsive Bid
  - Legal Requirements
  - Bid specifications
- Responsible Bidder
  - Skills
  - Abilities
  - Resources

*Only minor deviations can be waived!*
Formal Bidding Requirements Under N.C. Law

- **Purchase**
  - $0
  - Advertise in newspaper for at least 7 full days (electronic advertisement only requires board approval)
  - Sealed bids
  - Public bid opening
  - Award to lowest responsive responsible bidder
  - Governing board approval (may delegate for purchases)
  - For construction only:
    - 3-bid minimum
    - 5% bid bond or security

- **Construction & Repair**
  - $30,000
  - Formal Bidding
  - $90,000
  - Formal Bidding
  - $500,000
  - Formal Bidding
Mini-Brooks Act Requirements Under N.C. Law

- “Announce” requirements for the service sought
  - Make good faith efforts to notify M/WBE firms
- May not solicit fee quotes or work product in request for qualifications
- Award to best qualified respondent, based upon demonstrated qualifications and competence
- Negotiate a “fair and reasonable fee”

Ask: Does the scope of work require licensure?
  - G.S. 83A-1(7): “practice of architecture”
  - G.S. 89C-3(6): “practice of engineering”
  - G.S. 89C-3(7): “practice of land surveying”
Mini-Brooks Act Exemption (G.S. 143-64.32)

- May “in writing” exempt “particular projects” where “an estimated professional fee” is less than $50,000.
  - “In Writing”
    - Staff memorandum or board resolution.
  - “Particular Projects”
    - Case-by-case basis.

Ask:
Does the scope of work require licensure?
- G.S. 83A-1(7): “practice of architecture”
- G.S. 89C-3(6): “practice of engineering”
- G.S. 89C-3(7): “practice of land surveying”
Sources of ARPA Procurement Standards

Federal Statutes

Agreements with Federal Government
- Award Terms and Conditions (e.g., ARPA Local Fiscal Recovery Funds)
- Federal Assistance Listing (21.027)

Federal Grant Regulations
- 2 C.F.R. Part 200 (the “Uniform Guidance”)
- ARPA Final Rule
- ARPA Interim Final Rule
OMB Revised the Uniform Guidance in 2020

- OMB must review the Uniform Guidance every five years.\(^1\)

- OMB published proposed changes in January 2020.\(^2\)

- With two exceptions that became effective on August 13, 2020, the revisions became effective as of November 12, 2020.\(^3\)

\(^1\) 12 C.F.R. § 200.109.
Where Are the Procurement Standards?

- Subpart A – Acronyms and Definitions
- Subpart B – General Provisions
- Subpart C – Pre-Award Requirements and Contents of Federal Awards
- **Subpart D – Post Federal Award Requirements**
  - Applicable Procurement Standards:
- Subpart E – Cost Principles
- Subpart F – Audit Requirements

**What is Subpart D not?**
Federal Acquisition Regulation ("FAR") (48 C.F.R. Part 2). Applicable to procurement by the *federal government*. 
Subpart D Terminology

• A Few Basic Definitions

  • “Contract”
    • A legal instrument by which a recipient or subrecipient purchases property or services needed to carry out the project or program under a Federal award.”
  
  • “Contractor”
    • An entity that receives a contract.”
  
  • “Subaward”
    • An award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a Federal award received by the pass-through entity. It does not include payments to a contractor or payments to an individual that is a beneficiary of a Federal program. A subaward may be provided through any form of legal agreement, including an agreement that the pass-through entity considers a contract.
  
  • “Subrecipient”
    • An entity, usually but not limited to non-Federal entities, that receives a subaward from a pass-through entity to carry out part of a Federal award, but does not include an individual that is a beneficiary of such award.
  
  • “Pass-Through Entity”
    • “A non-Federal entity that provides a subaward to carry out part of a Federal program.

Why Does This Terminology Matter?

Subpart D applies to:
- The “acquisition of property or services required under a Federal award or subaward.” (2 C.F.R. 200.318(a)).

Which entities receive Federal awards?
- Recipients.

Which entities receive Federal subawards?
- Subrecipients.

Subpart D applies to:
- A recipient or subrecipient’s purchase of property or services. In other words, contracts.

Subpart D does not apply to:
- A recipient’s selection of a subrecipient.
What Might an Auditor Review In Our Federal Grant Procurement Files?

Your Unit’s Written Purchasing Policy
(2 C.F.R. § 200.318(a))

Proper Use of Procurement Method Specified in the Uniform Guidance
(2 C.F.R. § 200.320)

Use of “Full and Open Competition” or Lack Thereof
(2 C.F.R. § 200.319)
(2 C.F.R. § 200.320(c))

Confirmation That Your Unit Did Not Impose State or Local Preferences in Awarding Federally Funded Contracts
(2 C.F.R. § 200.319(c))

Cost or Price Analysis for Procurements Exceeding the Simplified Acquisition Threshold ($250,000)
(2 C.F.R. § 200.319)

Procedure for Verifying That Contractor Is Not Debarred, Suspended, or Excluded
(2 C.F.R. § 200.318(h))
(2 C.F.R. § 200.214)

Records Showing Procurement History, Rationale for Procurement Method, Basis for Selection of Contract Type, Contractor, and Price
(2 C.F.R. 200.318(i))

Your Written Standards of Conduct Covering Conflicts of Interest
(2 C.F.R. § 200.318(c)(1))

Don’t despair! You can do it!

Purchasing Policy - Structure

**Applicability of the Policy**
“Contracts” Supported by Federal Grant Funds

**Pre-Solicitation Requirements**
*Before Bidding or Contracting*

**Solicitation Requirements: Procurement Methods**
*While Bidding*

**Post-Solicitation Requirements**
*While Entering Into Agreements*

**Final Requirements**
*During and After Performance*
• Most, but not all, categories of federal grant funds are subject to the Uniform Guidance procurement standards.

• **ARPA FUNDS ARE SUBJECT TO THESE STANDARDS.**

*General Recommendation:* Assume that the UG procurement standards apply to “contracts” supported by federal grant dollars unless specific agency regulations or federal award terms and conditions state otherwise.
Applicability of the Policy

Expenditure of Federal Grant Funds

Pre-Solicitation Requirements
Before Bidding or Contracting

Procurement Methods
While Bidding

Post-Solicitation Requirements
While Entering Into Agreements

Final Requirements
During and After Performance

Structuring Considerations
• Avoid unnecessary or duplicative purchases. 2 C.F.R. § 200.318(d).
• Consider consolidating or breaking out purchases to obtain more economical purchases. Id.
• Analyze the benefits of leasing versus purchasing. Id.
• Use “time-and-materials” contracts only after determination that no other contract is suitable. Include ceiling price. 2 C.F.R. 200.318(j).

Cost or Price Analysis
• Must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold, including contract modifications. 2 C.F.R. § 200.324(a).

Independent Estimates of Cost
• Must make independent estimates of cost prior to receiving bids or proposals for every procurement action in excess of the Simplified Acquisition Threshold. 2 C.F.R. § 200.324(a).
### Your Unit’s Written Purchasing Policy

(2 C.F.R. § 200.318(a))

### Applicability of the Policy

**Expenditure of Federal Grant Funds**

- **Pre-Solicitation Requirements**
  - Before Bidding or Contracting

- **Procurement Methods**
  - While Bidding

- **Post-Solicitation Requirements**
  - While Entering Into Agreements

- **Final Requirements**
  - During and After Performance

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### Units Are “Encouraged” To . . .

- Enter into interlocal or cooperative agreements for common or shared goods or services. 2 C.F.R. § 200.318(e).
- Purchase federal excess and surplus property when feasible. 2 C.F.R. 200.318(f).
- Use value engineering in construction contracts. *Id.*

### Dispute Resolution

- Each unit is responsible for resolving “all contractual and administrative issues” arising out of procurement actions. A unit need not adopt bid protest procedures, but awarding agency will not intervene. 2 C.F.R. § 200.318(k).
Purchasing Policy

Applicability of the Policy
Expenditure of Federal Grant Funds

Pre-Solicitation Requirements
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Bidding Methods (2 C.F.R. § 200.320)
- Formal Methods
  - Sealed Bid
  - Proposals
- Informal Methods
  - Small Purchase Procedures
  - Micro-Purchases
  - Non-Competitive Procurement

Ensuring “Full and Open” Competition (2 C.F.R. § 200.319(b))
- Avoiding situations “restrictive” of competition:
  - Unreasonable requirements.
  - Unnecessary experience or bonding.
  - Specifying brand name without equals.
  - Arbitrary actions.

Adopt Specific Purchasing Procedures
(2 C.F.R. § 200.319(d))
- Require clear and accurate description of item or service sought.
- Identify all requirements that bidders must fulfill and all evaluation factors.

Use of “Full and Open Competition” or Lack Thereof
(2 C.F.R. § 200.319)
(2 C.F.R. § 200.320(c))

Confirmation That Your Unit Did Not Impose State or Local Preferences in Awarding Federally Funded Contracts
(2 C.F.R. § 200.319(c))

Ensuring “Full and Open” Competition
- Prohibit contractors that develop or draft specifications, requirements, statements of work, invitations to bid, or requests for proposals from competing from procurement. 2 C.F.R. § 200.319(b).
- Prohibit imposition of state or local geographic preference in bid evaluation. 2 C.F.R. § 200.319(c).
Proper Use of Procurement Method Specified in the Uniform Guidance (2 C.F.R. § 200.320)

Use of “Full and Open Competition” or Lack Thereof (2 C.F.R. § 200.319)
(2 C.F.R. § 200.320(c))

Confirmation That Your Unit Did Not Impose State or Local Preferences in Awarding Federally Funded Contracts (2 C.F.R. § 200.319(c))

Applicability of the Policy
Expenditure of Federal Grant Funds

Pre-Solicitation Requirements
Before Bidding or Contracting

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While Entering Into Agreements

Final Requirements
During and After Performance

**Units Must . . .**

- Take affirmative steps specified in 2 C.F.R. 200.321 to ensure that small businesses and MWBE firms are used “when possible”:
  1. Place qualified small and M/WBE firms on solicitation lists.
  2. Solicit small and M/WBE firms when such firms are potential sources.
  3. Divide procurement into multiple segments to permit maximum participation by small and M/WBE firms.
  4. Establish delivery schedules which might permit small and M/WBE participation.
  5. Use services of federal or state agencies (e.g., NC Office for Historically Underutilized Businesses in Department of Administration) to publicize opportunities.
  6. Require prime contractors to take steps #1 through #5.
### Purchasing Policy

**Applicability of the Policy**
- *Expenditure of Federal Grant Funds*

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**Pre-Solicitation Requirements**
- *Before Bidding or Contracting*

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**Procurement Methods**
- *While Bidding*

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**Post-Solicitation Requirements**
- *While Entering Into Agreements*

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**Final Requirements**
- *During and After Performance*

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#### Proper Use of Procurement Method Specified in the Uniform Guidance
- *(2 C.F.R. § 200.320)*

#### Use of “Full and Open Competition” or Lack Thereof

#### Confirmation That Your Unit Did Not Impose State or Local Preferences in Awarding Federally Funded Contracts
- *(2 C.F.R. § 200.319(c))*

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**Units Must . . .**

- “As appropriate and to the extent consistent with law . . .

- “the non-Federal entity *should*, to the greatest extent practicable under a Federal award . . .

- “provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products.”

**The requirements of this section (2 C.F.R. 200.322) must be included in all contracts and purchase orders for work or products.**
Procurement Methods – N.C. Law

- **Formal Bidding** (G.S. 143-129)
- **Informal Bidding** (G.S. 143-131)
- **Qualifications-Based Selection** (G.S. 143-64.31 et seq.)
- **Mini-Brooks Act**

*State law does not require competitive bidding.*

*Use of competitive selection process is optional, not required.*

- **Purchase of Apparatus, Supplies, Materials or Equipment**
- **Construction or Repair Work**
- **Type of Contract**

<table>
<thead>
<tr>
<th>Cost of Contract (Bid Thresholds)</th>
<th>Type of Contract</th>
</tr>
</thead>
<tbody>
<tr>
<td>$500,000</td>
<td>Formal Bidding</td>
</tr>
<tr>
<td>$90,000</td>
<td>Informal Bidding</td>
</tr>
<tr>
<td>$30,000</td>
<td>Qualifications-Based Selection</td>
</tr>
<tr>
<td>$500,000</td>
<td>Mini-Brooks Act</td>
</tr>
<tr>
<td>$90,000</td>
<td>&quot;Everything Else&quot;</td>
</tr>
</tbody>
</table>

*Use of competitive selection process is optional, not required.*
More Subpart D Terminology

• “Micro-purchase”
  • A purchase of supplies or services, the aggregate amount of which does not exceed the micro-purchase threshold.

• “Micro-purchase threshold”
  • The dollar amount at or below which a non-Federal entity may purchase property or services using micro-purchase procedures under 2 C.F.R. 200.320.

• “Simplified Acquisition Threshold”
  • The dollar amount below which a non-Federal entity may purchase property or services using small purchase methods.

Procurement Methods – Uniform Guidance

- **Sealed Bid**
  - $500,000
  - Construction or Repair Work
  - "Small Purchase" Procedure
  - UG does not require competitive bidding.

- **Sealed Proposals (RFP)**
  - $250,000
  - "Small Purchase" Procedure
  - UG does not require competitive bidding.

- **Proposals (RFQ)**
  - $90,000
  - Architectural / Engineering

- **Sealed Bid**
  - $30,000
  - "Everything Else"

- **Proposals (RFP)**
  - $10,000
  - "Purchase" "Everything Else"

- **Proposal**
  - $50,000

- **Sealed Bid**
  - $90,000

- **Proposal**
  - $250,000

- **Proposal**
  - $500,000

- **Proposal**
  - $10,000

**Simplified Acquisition Threshold**

**"Micro-purchase threshold"**

1. $500,000
2. $250,000
3. $90,000
4. $30,000
5. $10,000
**Optional Ability to Increase the Micro-Purchase Threshold (2 C.F.R. § 200.320(a)(1)(iv)(C))**

<table>
<thead>
<tr>
<th>Non-Federal Entity May Self-Certify a Micro-Purchase Threshold Up To $50,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>• - Non-Federal entities must self-certify the threshold on annual basis.</td>
</tr>
<tr>
<td>• - Must maintain documentation to be made available to auditors in accordance with 2 C.F.R. § 200.334 (records retention).</td>
</tr>
</tbody>
</table>

- Suggests that units of local government in NC may self-certify micro-purchase thresholds of:
  - $30,000 for purchase of apparatus, supplies, materials, and equipment;
  - $30,000 for construction or repair work;
  - $50,000 for services other than A/E/S services subject to Mini-Brooks Act; and
  - $50,000 for Mini-Brooks Act services if unit exercises exemption ($0 if unit *fails* to exercise exemption)

<table>
<thead>
<tr>
<th>Certification Must Include:</th>
</tr>
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<tbody>
<tr>
<td>• A <strong>justification</strong> for the threshold.</td>
</tr>
<tr>
<td>• A <strong>clear identification</strong> of the threshold.</td>
</tr>
<tr>
<td>• 3. <strong>Supporting documentation</strong> of any of the following:</td>
</tr>
</tbody>
</table>

- Qualification as a low-risk auditee for most recent audit in accordance with 2 C.F.R. § 200.520;
- B. An annual internal institutional risk assessment to identify, mitigate, and manage financial risks; **OR**
- C. For public institutions, a **higher threshold consistent with state law**
Optional Ability to Increase the Micro-Purchase Threshold

2 C.F.R. § 200.320(a)(1)(iv)(C)

Blog Post includes explanation and template resolution.

Available only for Federal awards received after 11/12/2020.

UG Procurement Rules with State Law Overlay – Only If Unit Adopts Highest Bidding Thresholds “Consistent With State Law”

Compliance Note: Applicable only to awards made after 11/12/2020.

12 C.F.R. § 200.320(b)(2).

<table>
<thead>
<tr>
<th>Type of Contract</th>
<th>Cost of Contract (Bid Thresholds)</th>
<th>UG Procurement Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction or Repair Work</td>
<td>$10,000 - $30,000</td>
<td>Sealed Bid1</td>
</tr>
<tr>
<td></td>
<td>$30,000 - $50,000</td>
<td>UG does not require competitive bidding.5</td>
</tr>
<tr>
<td></td>
<td>$50,000 - $90,000</td>
<td>“Small Purchase” Procedures3</td>
</tr>
<tr>
<td></td>
<td>$90,000 - $250,000</td>
<td>UG does not require competitive bidding.5</td>
</tr>
<tr>
<td></td>
<td>$250,000 - $500,000</td>
<td>“Small Purchase” Procedures3</td>
</tr>
<tr>
<td></td>
<td>$500,000+</td>
<td>Sealed Bid1</td>
</tr>
<tr>
<td>Architectural / Engineering (with exemption)</td>
<td>$10,000 - $30,000</td>
<td>Proposals (RFP)2</td>
</tr>
<tr>
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<td>Sealed Bid1</td>
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</table>

“Everything Else” | $10,000 - $30,000 | Sealed Bid1 |
| | $30,000 - $50,000 | UG does not require competitive bidding.5 |
| | $50,000 - $90,000 | “Small Purchase” Procedures3 |
| | $90,000 - $250,000 | UG does not require competitive bidding.5 |
| | $250,000 - $500,000 | “Small Purchase” Procedures3 |
| | $500,000+ | Sealed Bid1 |
State and UG Procurement Methods

<table>
<thead>
<tr>
<th>N.C. Public Procurement Method</th>
<th>Uniform Guidance Counterpart Method</th>
</tr>
</thead>
</table>
| 1. Formal Bidding (G.S. § 143-129) | 1. Formal Methods (2 C.F.R. § 200.320(b))  
  • Sealed Bids (2 C.F.R. § 200.320(b)(1))  
  • Proposals (2 C.F.R. § 200.320(b)(2)) |
| 2. Informal Bidding (G.S. § 143-131) | 2. Informal Methods  
  • Small Purchase Procedures (2 C.F.R. § 200.320(a)(2))  
  • Micro-Purchase (2 C.F.R. § 200.320(a)(1)) |
| 3. Qualifications-Based Selection (G.S. 143-64.31 et seq.) | 3. Proposals (2 C.F.R. § 200.320(b)(2)) |
| 4. No particular method required. | 4. Noncompetitive Procurement  
  • Micro-Purchase (2 C.F.R. § 200.320(c)(1))  
  • Single Source (2 C.F.R. § 200.320(c)(2))  
  • Exigency or Emergency (2 C.F.R. § 200.320(c)(3))  
  • Express Authorization from Federal Grantor Agency or Pass-Through Entity (2 C.F.R. § 200.320(c)(4))  
  • Inadequate Competition (2 C.F.R. § 200.320(c)(5)) |
Micro-Purchases (2 C.F.R. 200.320(a)(1))

What is a “micro-purchase”?

- “The acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold.”

What does the UG method require?

- Equitable distribution among qualified suppliers.
- Determination that price is “reasonable based on research, experience, purchase history or other information and documents it files accordingly.”

Combining UG Method With NC Method

- Equitably distribute.
- Determine reasonable price.
Small Purchase Procedures (2 C.F.R. 200.320(a)(2))

What are they?

• “The acquisition of property or services, the aggregate dollar amount of which is higher than the micro-purchase threshold but does not exceed the simplified acquisition threshold.”

What does the UG method require?

• Price or rate quotations must be obtained from an adequate number of qualified sources as determined by the non-Federal entity.”

Combining UG Method With NC Method for Purchase / Construction and Repair Work (Informal Bidding)

- Seek price or rate quotations in any form.
- Determine an “adequate number of qualified sources”.
- Keep a record of quotes received.
- Award to lowest, responsive responsible bidder.
Formal Procurement Method #1: Sealed Bidding (2 C.F.R. 200.320(b)(1))

<table>
<thead>
<tr>
<th>When does it apply?</th>
</tr>
</thead>
<tbody>
<tr>
<td>• When the value of procurement of property or services exceeds the Simplified Acquisition Threshold (“SAT”) or a lower threshold established under state or local law.</td>
</tr>
<tr>
<td>• The SAT is, $250,000 for each type of contract <em>except those for the purchase of “apparatus, supplies, materials or equipment”</em> ($90,000).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>What does the UG method require?</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Public advertising.</td>
</tr>
<tr>
<td>• UG does not clarify whether newspaper publication is required, but it can assist.</td>
</tr>
<tr>
<td>• Solicitation from an adequate number of qualified sources.</td>
</tr>
<tr>
<td>• Public bid opening at the time advertised.</td>
</tr>
<tr>
<td>• Receipt of two bids prior to award.</td>
</tr>
<tr>
<td>• Firm fixed-price contract (lump sum or unit price) awarded to lowest responsive responsible bidder.</td>
</tr>
<tr>
<td>• Rejection of bids only for sound documented reasons.</td>
</tr>
<tr>
<td>• Bonding (for construction).</td>
</tr>
</tbody>
</table>
### Formal Procurement Method #1:
**Sealed Bidding (2 C.F.R. 200.320(b)(1)) – Construction or Repair Work**

**Building Construction or Repair Work**

- “Formal” Solicitation of Historically Underutilized Businesses (“HUB”)
  - Unit must establish goal for HUB participation in total contract amount. G.S. 143-128.2(a).
  - Unit must make good faith efforts to solicit HUB participation. G.S. 143-128.2(e).
  - Unit must require bidders to undertake good faith efforts to solicit minority participation. G.S. 143-128.2(f).
  - 10 statutory good faith efforts.
  - Bidders must (1) submit affidavit of good faith efforts or self-performance affidavit (reflecting no subcontracting to occur), and (2) identify minority businesses on bid. G.S. 143-128.2(c).
  - Apparent LRRB must submit either (1) affidavit showing unit’s participation goal is met; or (2) documentation showing good faith efforts to meet participation goal. G.S. 143-128.2(c)(1).

**Sealed Bid** (200.320(b)(1)) + **Formal Bidding** (G.S. 143-129)

- Receipt of paper, sealed bids.
- Public bid opening at the time advertised.
- Receipt of three bids prior to award, or re-advertisement. (G.S. 143-132).
- Receipt of 5% bid bond or other security. (G.S. 143-129; 2 C.F.R. 200.326(a)).
- Award to lowest responsive responsible bidder. Governing board approval required.
- Rejection of bids only for sound documented reasons.
- Receipt of performance bond and payment bond for each prime contractor with a contract in excess of $50,000. (G.S. 44A-26(a)(1); G.S. 44A-26(a)(2); 2 C.F.R. 200.326).

**Informal” Solicitation of Historically Underutilized Businesses (G.S. 143-128.2)**

- “Informal” Solicitation of Historically Underutilized Businesses (G.S. 143-131(b))

### Additional Requirements for “Building” Construction or Repair Work

- Preparation of separate specifications for buildings (HVAC, plumbing, electrical, and general). (G.S. 143-128(a)).
- Use of separate prime or single prime contracting for buildings. (G.S. 143-128(a1)(1); G.S. 143-128(a1)(2)).
- Advertisement in newspaper of general circulation or electronically (with board approval). (G.S. 143-129(b)).
- Compliance Tip: Affidavit of publication likely can prove “public advertising” under UG.

<table>
<thead>
<tr>
<th>Amount</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>$500,000</td>
<td>Sealed Bid (200.320(b)(1)) + Formal Bidding (G.S. 143-129)</td>
</tr>
<tr>
<td>$300,000</td>
<td>Sealed Bid (200.320(b)(1)) + Informal Bidding (G.S. 143-131)</td>
</tr>
<tr>
<td>$250,000</td>
<td>Construction or Repair Work</td>
</tr>
</tbody>
</table>

---
Formal Procurement Method #1:
Sealed Bidding (2 C.F.R. 200.320(b)(1)) – Construction or Repair Work

**Combining UG Method with NC Method**
(Construction or Repair Work Exceeding $250,000 But Less Than $500,000)

- Preparation of separate specifications for buildings (HVAC, plumbing, electrical, and general). (G.S. 143-128(a)). $300k and above.
- Use of separate prime or single prime contracting. (G.S. 143-128(a1)(1); G.S. 143-128(a1)(2)). $300k and above.
- Seven day lapse in between advertising and opening is not required. But UG still requires “public advertising”, which can be newspaper or electronic (if providing sufficient notice).
- Compliance Tip: Affidavit of publication likely can prove “public advertising” under UG.
- Receipt of paper, sealed bids.
- Public bid opening at the time advertised.
- Receipt of two bids prior to award, or re-advertisement. (G.S. 143-132 does not apply).
- Receipt of 5% bid bond or other security. (2 C.F.R. 200.326(a)).
- Award to lowest responsive responsible bidder.
- Rejection of bids only for sound documented reasons. Governing board approval not required unless dictated by local policy.
- Receipt of performance bond and payment bond for each prime contractor with a contract in excess of $50,000 if cost of project exceeds $300,000. (G.S. 44A-26(a)(1); G.S. 44A-26(a)(2); 2 C.F.R. 200.326).

**Building Construction or Repair Work**
“Informal” Solicitation of Historically Underutilized Businesses (“HUB”) (less than $300,000)

- If building construction or repair project cost is greater than $300,000, see previous slide for requirements.
- If building construction or repair project cost is less than $300,000, solicit small and minority business participation. (G.S. 143-131(b) / 2 C.F.R. 200.321).
- Place small and MWBE / HUB firms on solicitation lists.
- Solicit small and MWBE / HUB firms that are potential sources.
- Divide total requirements of project into smaller tasks, where feasible, to permit maximum small and MWBE / HUB participation.
- Use services of N.C. Office of Historically Underutilized Businesses to publicize opportunities.
- Require prime contractor, if subcontractors are to be let, to take these steps.

**Sealed Bid** (200.320(b)(1)) + Formal Bidding (G.S. 143-129)

- $500,000
- $300,000
- $250,000

**Sealed Bid** (200.320(b)(1)) + Informal Bidding (G.S. 143-131)

- “Formal” Solicitation of Historically Underutilized Businesses (G.S. 143-128.2)
- “Informal” Solicitation of Historically Underutilized Businesses (G.S. 143-131(b))

**Additional Requirements for “Building” Construction or Repair Work**
Formal Procurement Method #1: Sealed Bidding (2 C.F.R. 200.320(b)(1)) – “Purchases” or Services

**Combining UG Method with NC Method**
(Purchases of “Apparatus, Supplies, Materials or Equipment” Exceeding $90,000)

- Advertisement in newspaper of general circulation or electronically (with board approval). (G.S. 143-129(b)).
- Compliance Tip: Affidavit of publication likely can prove “public advertising” under UG.
- Affirmative steps to seek small and M/WBE participation. (2 C.F.R. 200.321)
- Receipt of paper, sealed bids.
- Public bid opening at the time advertised.
- Receipt of two bids prior to award, or re-advertisement. (2 C.F.R. 200.320(b)(1)).
- Award to lowest responsive responsible bidder. Governing board approval not required unless dictated by local policy.
- Rejection of bids only for sound documented reasons.

**Combining UG Method with NC Method**
(Purchases of Services Other than Mini-Brooks Act Services Exceeding $250,000)

- Public advertisement.
- Compliance Tip: Affidavit of publication likely can prove “public advertising” under UG.
- Affirmative steps to seek small and M/WBE participation. (2 C.F.R. 200.321)
- Receipt of paper, sealed bids.
- Public bid opening at the time advertised.
- Receipt of two bids prior to award, or re-advertisement. (2 C.F.R. 200.320(b)(1)).
- Award to lowest responsive responsible bidder. Governing board approval not required unless dictated by local policy.
- Rejection of bids only for sound documented reasons.

**NOTE DISCRETION TO USE THE “PROPOSALS” METHOD WHEN SEALED BIDDING IS “NOT APPROPRIATE”**.
Formal Procurement Method #2: Proposals (2 C.F.R. 200.320(b)(2))

When does it apply?

- When the value of procurement of services exceeds the Simplified Acquisition Threshold (“SAT”).
- The SAT is, $250,000 for each type of contract except those for the purchase of “apparatus, supplies, materials or equipment” ($90,000).
- AND . . .
- When the conditions for sealed bidding are inappropriate.

What does the UG method require?

- “Publicization”.
- UG does not clarify whether newspaper publication is required, but it can assist.
- Identifying all evaluation factors and their relative importance.
- A written method of conducting evaluations and making selections.
- Award to a responsible offeror whose proposals is “most advantageous to the non-Federal entity, with price and other factors considered.”
Formal Procurement Method #2: Proposals (2 C.F.R. 200.320(b)(2)) – Services (Other Than Mini-Brooks Act Services)

Combining UG Method with NC Method (none)  
(Purchases of Services Exceeding $250,000)

- Request for proposals must be “publicized”.
- Compliance Tip: Affidavit of publication from newspaper of general circulation likely can prove “publicization” under UG.
- RFP must identify all evaluation factors and their relative importance.
- Solicitation from “an adequate number of qualified offerors.”
- Award to a responsible offeror whose proposals is “most advantageous to the non-Federal entity, with price and other factors considered.”

Combining UG Method with NC Method (Proposals + QBS + Local Policy)
Above Micro-Purchase Threshold

- Request for qualifications must be “publicized”.
- Compliance Tip: Affidavit of publication from newspaper of general circulation likely can prove “publicization” under UG.
- RFQ must identify permissible evaluation factors set forth in G.S. 143-64.31.
- Standard of Award: “Demonstrated competence and qualification without regard to fee other than unit price information”.
- Affirmative steps to seek small and M/WBE participation, but total fee solicitation is not allowed. (2 C.F.R. 200.321 / G.S. 143-64.31(a)).
- Solicitation from “an adequate number of qualified offerors.”
- Negotiate “fair and reasonable” compensation.

Combining UG Method with NC Method (Micro-Purchase + Local Policy)
Below Micro-Purchase Threshold with Exemption

- If unit exercises exemption, micro-purchase procedure governs.
- If unit fails to exercise exemption, proposals procedure governs because N.C. law sets a lower threshold for qualifications-based selection (i.e. beginning at $50,000 without QBS exemption).

$250,000
Micro-Purchase Threshold
(Variable)

$50,000
(if unit has self-certified)

$10,000
(if unit has not self-certified)

$0
(if unit has not self-certified)
Alternative Construction Delivery Methods
(CAUTION)

What are the primary methods under N.C. law?

- Construction Management at-Risk (G.S. 143-128.1)
- Design-Build (G.S. 143-128.1A)

NC Standard of Award – Qualifications Based Selection (Article 3D of Chapter 143)

- **CMAR**
  - “The [CMAR] shall be selected in accordance with Article 3D of [Chapter 143].”
  - Standard of Award: “Demonstrated competence and qualification without regard to fee other than unit price information”.

- **Design-Build**
  - “The design-builder shall be selected in accordance with Article 3D of [Chapter 143].”
  - Standard of Award: “Demonstrated competence and qualification without regard to fee other than unit price information”.

UG Proposals Standard of Award (2 C.F.R. 200.320(b)(2))

- “Contracts must be awarded to the responsible offeror whose proposal is most advantageous to the non-Federal entity, with price and other factors considered.”

- UG defines qualifications-based procurement as process “whereby offeror’s qualifications are evaluated and the most qualified offeror is selected, subject to negotiation of fair and reasonable compensation.”

- It states that this “method, where price is not a selection factor, can only be used in the procurement of professional A/E services. It cannot be used to purchase other types of services through A/E firms that are a potential source to perform the proposed effort.”

My Recommendation

- **Assume CMAR and Design-Build are not permissible construction delivery methods absent specific authorization from grantor agency or in applicable regulations.**
- **Consult with counsel.**
Noncompetitive Procurement (2 C.F.R. 200.320(c))

<table>
<thead>
<tr>
<th>When is it permissible?</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>If a unit makes a micro-purchase.</td>
<td>Item is available only from a single source.</td>
</tr>
<tr>
<td>(c)(1)</td>
<td>(c)(2)</td>
</tr>
<tr>
<td>The public exigency or emergency for the requirement will not permit a delay resulting from publicizing a competitive solicitation.</td>
<td>Express authorization from a Federal awarding agency or pass-through entity in response to a written request from the non-Federal entity.</td>
</tr>
<tr>
<td>(c)(3)</td>
<td>(c)(4)</td>
</tr>
<tr>
<td>After solicitation of a number of sources, competition is determined inadequate.</td>
<td></td>
</tr>
<tr>
<td>(c)(5)</td>
<td></td>
</tr>
</tbody>
</table>

But what about all of our competitive bidding exceptions under NC law?
Purchasing Policy

Applicability of the Policy
Expenditure of Federal Grant Funds

Pre-Solicitation Requirements
Before Bidding or Contracting

Procurement Methods
While Bidding

Post-Solicitation Requirements
While Entering Into Agreements

Final Requirements
During and After Performance

Your Unit’s Written Purchasing Policy
(2 C.F.R. § 200.318(a))

Procedure for Verifying That Contractor Is Not Debarred, Suspended, or Excluded
(2 C.F.R. § 200.318(h))
(2 C.F.R. § 200.214)

Award Only to Responsible, Eligible Contractors
(2 C.F.R. 200.318(h))

• Principle #1: Award contracts only to responsible contractors possessing the ability to perform successfully. Consider integrity, compliance with public policy, record of past performance, and financial and technical resources.

• Principle #2: Do not award contracts to parties that are “debarred, suspended, or otherwise excluded from or ineligible from participation in Federal assistance program or activities.”
### How does 2 C.F.R. Part 180 apply?

- Prohibits recipients and subrecipients, and the contractors of each, from entering into certain federally grant funded contracts with contractors or subcontractors that have been “excluded” from receiving benefits from the federal government.

### What is a “lower tier covered transaction”?

- Among other things, a “lower-tier” covered transactions include
  - contracts for goods and services purchased by a recipient or subrecipient in the amount of $25,000 or more.
  - subcontracts awarded by contractors in the amount of $25,000 or more.
  - contracts for federally required audit services.


### What do we need to do?

- Search SAM.gov Exclusions List ([https://sam.gov/content/exclusions](https://sam.gov/content/exclusions)) for counterparty name. If possible, also search names of counterparty principals or “sounds like” names.

- Document searches in your procurement files.

- Add a “clause or condition” to “covered transaction” contracts (require subrecipients to do the same).

- Require contractors to include “clause or condition” in “covered transaction” subcontracts.

Looking for contract language? [FAA](https://www.faa.gov) and [FEMA](https://www.fema.gov) provide guides, but agency-specific laws and regulations vary. Consult with counsel.
Purchasing Policy

Include Federally Required Clauses in Contracts Subject to the Uniform Guidance

  - Compliance Tip #1: Copying and pasting Appendix II into your contracts is insufficient.
  - Compliance Tip #2: Simply referencing the federal statutes cited in Appendix II is insufficient.
  - Compliance Tip #3: Read the text of Appendix II and, with counsel, develop appropriate terms.
  - Compliance Tip #4: Appendix II changed in 2020. Two new contract clauses should be added.
    - Domestic Preference Clause (2 C.F.R. 200.322)
Purchasing Policy

Applicability of the Policy
Expenditure of Federal Grant Funds

Pre-Solicitation Requirements
Before Bidding or Contracting

Procurement Methods
While Bidding

Post-Solicitation Requirements
While Entering into Agreements

Record Generation and Retention: Document, Document, Document

- Must maintain records sufficient to detail the history of procurement.
  - Rationale for procurement.
  - Selection of contract type.
  - Contractor selection or rejection.
  - Basis of contract price.

Final Requirements
During and After Performance

Pay Attention to your Contractors

- Must maintain oversight to ensure that contractors perform in accordance with terms, conditions, and specifications of their contracts.

2 C.F.R. § 200.318(b).
Conflict of Interest Standards Applicable to Funds Governed by the Uniform Guidance: Avoiding Hot Water
Conflicts of Interest in Procurement

Sources of Rules

- 2 C.F.R. 200.318(c)(1)
  Conflicts of Interest Related to the Selection, Award, and Administration of Contracts

- 2 C.F.R. 200.112
  Disclosure to Federal Awarding Agency or Pass-Through Entity of Conflict of Interest
Adopt a Written Conflict of Interest Policy

- 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.
- The standards of conduct must provide for disciplinary actions to be applied for violations by officers, employees, and agents.

What must it prohibit?

- 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.
- Officers, employees, and agents of a non-Federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts.

When does a conflict arise?

- A real or apparent 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.
Conflicts of Interest Related to Selection, Award, and Administration of Contracts (2 C.F.R. 200.318(c)(1))

- 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.

<table>
<thead>
<tr>
<th>Possible Examples of a “Financial or Other Interest” in a Firm Considered for a Contract</th>
<th>Possible Examples of a “Tangible Personal Benefit” From a Firm Considered for a Contract</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Direct or indirect equity interest in a firm considered for a contract, which may include:</td>
<td>1. Opportunity to be employed by the firm considered for a contract, an affiliate of that firm, or any other firm with a relationship with the firm considered for a contract.</td>
</tr>
<tr>
<td>- Stock in a corporation.</td>
<td></td>
</tr>
<tr>
<td>- Membership interest in a limited liability company.</td>
<td></td>
</tr>
<tr>
<td>- Partnership interest in a general or limited partnership.</td>
<td></td>
</tr>
<tr>
<td>- Any right to control the firm’s affairs, directly or indirectly. For example, a controlling equity interest in a firm that controls a firm considered for a contract.</td>
<td></td>
</tr>
<tr>
<td>- Option to purchase any equity interest in a firm.</td>
<td></td>
</tr>
<tr>
<td>2. Holder of any debt owed by a firm considered for a contract.</td>
<td>2. Referral or promise of referral of business from the firm considered for a contract</td>
</tr>
<tr>
<td>- Secured debt (e.g., debt backed by an asset of the firm (like a firm’s building or equipment))</td>
<td></td>
</tr>
<tr>
<td>- Unsecured debt (e.g., a promissory note evidencing a simple promise to repay a loan).</td>
<td></td>
</tr>
<tr>
<td>o Holder of a judgment against the firm.</td>
<td></td>
</tr>
<tr>
<td>3. Supplier or subcontractor to a firm considered for a contract.</td>
<td>3. Political influence (e.g., appointment to a local office or position) or personal influence (e.g., admission to a social club, nonprofit board, or other organization)</td>
</tr>
</tbody>
</table>
Conflicts of Interest Related to Selection, Award, and Administration of Contracts (2 C.F.R. 200.318(c)(1))

Step 1

Covered Individuals
Identify all employees, officials, and agents of the unit of local government that will be involved in the selection, award, or administration of a contract. These are “Covered Individuals”.

- Local Government Employees
  involved in selection, award, or administration

- Local Government Officials
  involved in selection, award, or administration

- Local Government Agents
  involved in selection, award, or administration

Answer the following questions for each Covered Individual.
(1.) Does the Covered Individual have a financial or other interest in a firm considered for a contract?
(2.) Will the Covered Individual receive a tangible personal benefit from a firm considered for a contract?

If the answer to either question is yes, identify and mitigate the conflict.
Mitigation may require (1) removing the Covered Individual from any role in selection, award, or administration of a contract, (2) disqualifying the identified firm from consideration, or (3) if the unit has already entered into the contract, disclosing the conflict of interest to federal agency and terminating the contract.

Step 2

Related Parties
Identify all “Immediate Family Members” of Covered Individuals, business partners of Covered Individuals, outside organizations that employ or are about to employ any Covered Individual. These are “Related Parties”.

- Immediate Family Member
- Partner
- Employer (or potential employer of individual)

Answer the following questions for each Related Party.
(1.) Does the Related Party have a financial or other interest in a firm considered for a contract?
(2.) Will the Related Party receive a tangible personal benefit from a firm considered for a contract?

If the answer to either question is yes, identify and mitigate the conflict.
Mitigation may require (1) removing the Covered Individual from any role in selection, award, or administration of a contract, (2) disqualifying the identified firm from consideration, or (3) if the unit has already entered into the contract, disclosing the conflict of interest to federal agency and terminating the contract.

1The Uniform Guidance does not define “immediate family member”. 2 C.F.R. 200.465(c)(4) provides an illustrative, but not binding, example of who might be an “Immediate Family Member”: (i) spouse, and parents thereof; (ii) children, and parents thereof; (iii) parents, and spouses thereof; (iv) siblings, and spouses thereof; (v) grandparents and grandchildren, and spouses thereof; (vi) domestic partner and parents thereof, including domestic partners in (i) through (v); and (vii) any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.
Thank You!

Questions?

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ccrews@sog.unc.edu