

SUBJECT: Procurement Policy – CDBG-DR

NUMBER: 2.10.2

EFFECTIVE: March 2013

REVISED: July 2015

REVISED: June 2016

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APPROVAL:



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OVERVIEW:

The State of New Jersey (hereinafter referred to as “N.J.”, “State” or “Grantee”) is a recipient of CDBG-DR funds made available pursuant to the Disaster Relief Appropriations Act of 2013, Public Law 113-2 (“Appropriations Act”) and distributed by the U.S. Department of Housing and Urban Development (“HUD”). HUD published Federal Register Notice 78 FR 14329-14349 on March 5, 2013 detailing certain requirements the State was required to meet before HUD would fully obligate the CDBG-DR funds. The Notice requires State Grantee procurement processes to be equivalent to the procurement standards at 24 C.F.R. §85.36, hereinafter amended and superseded by the procurement standards of 2 CFR Part 200, *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (Uniform Requirements).

Pursuant to Federal Register Notice 78 FR 14329-14349 (Mar. 5, 2013), the State submitted a written procurement policy to HUD, noting that all procurements using CDBG-DR funds would be processed through the Division of Purchase and Property (“DPP”), and certified that those procedures were equivalent to the federal procurement requirements set forth in 24 C.F.R. § 85.36. By Memorandum dated April 29, 2013, HUD indicated that it had “reviewed the financial control materials submitted by the State” and “the State of New Jersey has demonstrated adequate financial controls, procedures and processes,” and certified that “the State of New Jersey has in place proficient financial controls and procurement processes.” On February 17, 2015, the State inquired, and HUD confirmed that the State can procure goods and services through other State agencies with procurement authority (e.g., Division of Property Management & Construction (“DPMC”) so long as applicable procurement processes are substantially similar to those certified by HUD. DPMC’s procurement processes are substantially similar to those utilized by DPP.

Effective December 26, 2014, HUD amended 24 C.F.R. Parts 84 & 85 and adopted 2 C.F.R. Part 200, which applies to Federal awards made on or after December 26, 2014. See 2 C.F.R. § 2400.101. Because the State was awarded Superstorm Sandy CDBG-DR funds prior to December 26, 2014, and “Federal awards made prior to December 26, 2014 will continue to be governed by the regulations in effect and codified in 24 C.F.R. part 85 (2013 edition) or as provided by the terms of the Federal award. . . .” 24 C.F.R. §85.1, the State was afforded an additional two (2) fiscal years to transition to the implementation of the Part 200 procurement standards.

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HUD’s procurement standards for state entities are codified at 2 C.F.R. §§200.317-200.326, attached hereto as Appendix A. 2 C.F.R. §200.317 provides that “a state must follow the same policies and procedures it uses for procurements from its non-Federal funds.” *See also* 24 C.F.R. § 570.489(g) (when procuring goods and services using CDBG funds, “the State shall follow its procurement policies and procedures”).

For consistency and simplicity, all other non-Federal entities, including subrecipients/subgrantees of the State who are not State entities, shall follow 2 C.F.R. §§ 200.318 “General Procurement Standards” through 200.326 “Contract provisions”. At least once every twelve (12) months, the Sandy Recovery Division (“SRD”) Monitoring Unit monitors each program in receipt of Sandy CDBG-DR funding (the DCA Internal Audit team monitors the programs pertaining to homeownership). This review includes documents related to subrecipient/ subgrantee procurements.

All procurement activities shall adhere to the principles and standards governing federal grant distribution or their equivalent in State law, and all applicable State procurement laws, including but not limited to Executive Order 125 (Christie 2013) (“EO 125”).

N.J. Department of the Treasury Circular 18-10-DPP, *Purchases from Federal Supply Schedules or Schedules of Other Federal Procurement Programs* (supersedes 13-15-DPP effective immediately), sets forth the procedure for establishing a State contract based on the pricing offered through a federal procurement program, including but not limited to the U.S. General Services Administration (“GSA”), the Department of Veterans Affairs (“VA”), and the Defense Logistics Agency (“DLA”). DPP, within the N.J. Department of the Treasury, is the State’s central procurement agency and is the entity responsible for Circular 18-10-DPP, as well as other procurement-related circulars and guidance at N.J.A.C. 17:12. Although DCA and other State agencies may possess their own statutory procurement authority, all procurements using CDBG-DR funds will be processed through DPP to ensure compliance with 2 C.F.R. § 200.317 and fair and open competition.

To be clear, New Jersey does *not* purchase *through* GSA eBay or other federal procurement schedules; rather, State law authorizes the Director of DPP to “promulgate the Federal Supply Schedules of the Federal GSA or schedules from other federal procurement programs . . . as an alternate price guide for the purchase of goods and services,” which in turn permits DPP to create a State contract based upon the federal pricing. (N.J.S.A. 52:34-6.1) The overarching purpose of this process is to obtain goods and services that are most advantageous to the State, price and other factors considered, while maintaining a level playing field for all vendors through competition and transparency.

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For reference, DPP statutes are found at N.J.S.A. 52:34-6 et seq, and administrative regulations pertaining to DPP operations are found at N.J.A.C. 17:12 et seq.

The following outlines how the State’s procurement processes are equivalent to the procurement standards set forth in 2 C.F.R. §§200.318—200.326.

2 C.F.R. §200.213 Suspension and Debarment

“Non-Federal entities are subject to the non-procurement debarment and suspension regulations implementing Executive Orders 12549 and 12689, 2 CFR part 180. These regulations restrict awards, subawards, and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.” Before awarding a contract using CDBG funds, DCA consults the Federal System for Award Management (“SAM”) for listings of contractors suspended, proposals for debarment and debarment. DPP maintains a central debarment list and its causes for debarment are set forth at N.J.A.C. 17:12-6.3, Causes for debarment of a person(s). In addition, Section 2.10 of the State’s Standard Terms and Conditions, which are applicable to all contracts entered into by the State, requires that “[t]he contractor must comply with all local, State and Federal laws, rules and regulations applicable to this contract and to the goods delivered and/or services performed hereunder.” SAM notwithstanding, the State’s administrative regulations, coupled with the State’s Standard Terms and Conditions, will effectively eliminate any debarred or suspended entity from consideration for a disaster recovery contract award.

2 C.F.R. §200.317 States.

“When procuring property and services under a grant, a State must follow the same policies and procedures it uses for procurements from its non-Federal funds.” With respect to GSA procurements, Circular 18-10-DPP is the source of guidance for navigating this process, regardless of funding source.

2 C.F.R. §200.318 General Procurement standards.

(a): *“The non-Federal entity must use its own documented procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.”* Circular 18-10-DPP was crafted in accordance with State law and DPP regulations. The procurements conducted pursuant to this procedure also comply with applicable Federal

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law. DPP is copying the DOD GSA procurement process to ensure full and open competition. DPP procurement specialists review procurements on a case-by-case basis to ensure compliance with subject-specific Federal laws (e.g. Davis-Bacon Act for public works procurements). Procurement specialists also monitor State and federal debarment lists as well as political contribution databases for “Pay to Play” conflicts prior to awarding contracts. Note that states and municipalities must have their own written procurement procedures, and cannot simply rely on the Federal regulations (i.e., simply refer to the Federal regulations). Also, if the non-Federal entity is subject to any requirements in its non-Federal procurements that are more restrictive than the Federal law, then those requirements must be incorporated into the procurement process.

(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.”* DPP maintains a Contract Compliance and Audit Unit (“CCAUC”), that is authorized by N.J.A.C. 17:12-4 to request and audit records related to State procurements, either as discovery related to a complaint or for any other reason to ensure that contractors are performing in compliance with contract terms and conditions. In addition, vendors and agencies are required to submit reports to DPP on a regular basis to ensure that the contracts are performed in accordance with the specified terms.

Additionally, the independent Office of the State Comptroller is responsible for auditing and monitoring the solicitation of proposals and the awarding of State contracts that involve “a significant consideration or expenditure of funds or are comprised of complex or unique components. . . .” See N.J.S.A. §§ 52:15C-7 and 52:15C-10. Pursuant to EO 125, the State Comptroller reviews all Sandy-related procurements and contract amendments.

(c)(1): *“The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the performance of their employees engaged in the selection, award and administration of contracts...”* All State employees are bound by the Uniform Ethics Code that outlines the code of conduct for all employees and is borne from New Jersey’s Conflict of Interests Law. The State Ethics Commission administers and enforces the Conflicts of Interest Law, N.J.S.A. 52:13D-12, et seq. The Commission consists of seven (7) members: four (4) public members appointed by the Governor to staggered terms and three (3) Executive Branch employees who are appointed by and serve at the pleasure of the Governor. Additionally, the New Jersey Code of Local Government Ethics Law (N.J.S.A. 40A:9-22.1) provides a written code of standards of conduct that governs the performance of employees engaged in the award and administration of contracts.

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The State also maintains a *Plain Language Guide to Ethical Business Conduct for Companies Transacting Business with the State of New Jersey* (“Guide”). The Guide covers a wide range of business practices and procedures, setting forth basic principles to guide all employees, officers, and directors of companies transacting business with the State of New Jersey. The Guide is publicly available on the Department’s website at http://www.state.nj.us/treasury/purchase/ethics_guide.shtml.

In addition, the Department of the Treasury requires that all employees involved in the “drafting, reviewing, evaluating or making contract awards, or substantively assisting in any of those tasks, or authorizing payments under those contracts” must complete a *Personal and Business Relationships Disclosure Form*, that is reviewed and approved by the Department’s Ethics Liaison Officer. These forms must be completed annually, and employees are subject to discipline and/or prosecution for submitting false information. In addition, DPP requires all employees that serve on Evaluation Committees to complete a form that requires committee participants to maintain confidentiality and screen participants for potential conflicts of interest. This process is documented in a Divisional Standard Operating Procedure.

(c)(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.”

The Department of Community Affairs and DPP are State entities and do not have any parent, affiliate, or subsidiary organizations that are not State entities.

(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...” With respect to GSA procurements, DPP regulations at N.J.A.C. 17:12-1A.5 mandate that Federal supply schedule-based contracts will only be promulgated when the following conditions have been met:

1. The price of the good and/or service being procured is no greater than the price offered to Federal agencies;
2. The State receives the benefit of any contract price reductions, whether statutory, regulatory or contractual in nature, during the term of the contract; and
3. The price of the good and/or service under consideration for purchase via a Federal supply schedule contract is not equal to or greater than the State contract price for the same or equivalent goods or services, unless the Director determines that

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the best interests of the State are served by use of the proposed Federal supply schedule-based contract.

Goods and services obtained through these contracts must be procured in a way that is most advantageous to the State, price and other factors considered.

(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 goods and services.”* To further leverage the economy of scale provided by the Federal supply schedules, DPP regulations permit local use of State contracts based on Federal supply schedules pursuant to N.J.A.C. 17:12-2.3.

(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.”* The State makes every effort to utilize Federal excess and surplus property when doing so is consistent with State law and Department policy.

(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.”* The State makes every effort to utilize value engineering clauses for applicable construction projects when doing so is consistent with State law and Department policy.

(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.”* Procurement specialists and evaluation committee members carefully and thoroughly review proposals and mandatory forms to ensure that procurements are awarded to responsible bidders. State law requires that bidders provide evidence of ownership disclosure, political contributions and disclosure of investments in Iran. In addition, Department policy mandates that bidders provide disclosure of investigations or other adverse actions prior to award. Proposals are evaluated based on a number of factors, including the bidder’s ability to successfully perform the contract. Procurement specialists are also responsible for monitoring State and federal debarment lists as well as political contribution databases for “Pay to Play” conflicts prior to awarding contracts.

DPP maintains a central debarment list and its causes for debarment are set forth at N.J.A.C.17:12-6.3, Causes for debarment of a person(s). In addition, Section 2.10 of the State’s Standard Terms and Conditions, which are applicable to all contracts entered into by

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the State, requires that “[t]he contractor must comply with all local, State and Federal laws, rules and regulations applicable to this contract and to the goods delivered and/or services performed hereunder.” These administrative regulations, coupled with the Standard Terms and Conditions, will effectively eliminate any debarred or suspended entity from consideration for a disaster recovery contract award. The State must ensure compliance with 2 C.F.R. §200.213, “Suspension and debarment.”

Additionally, the independent Office of the State Comptroller is responsible for auditing and monitoring the solicitation of proposals and the awarding of State contracts that involve “a significant consideration or expenditure of funds or are comprised of complex or unique components. . . .” See N.J.S.A. §§ 52:15C-7 and 52:15C-10. Pursuant to EO 125, the State Comptroller reviews all Sandy-related procurements and contract amendments.

(i): *“The non-Federal entity must maintain records sufficient to detail the history of procurement...”* As part of DPP’s pre-approval process, agencies are required to research the various federal program schedules to identify vendors that sell the desired goods or services and must obtain price quotes from at least three viable vendors by giving all solicited vendors the same opportunity to provide a price quote and the same information regarding work to be performed as well as the conditions of the proposed Federally- based contract to ensure that all vendors are on a level playing field. If agency due diligence reveals that fewer than three vendors offer the required good or service, the agency must document this fact. All research, vendor selection determination and supporting documentation are provided to DPP which is made part of the permanent file and retained by DPP for a minimum of 7 years.

(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.”* Every effort is made to avoid the use of time and material contracts. In the limited instances where these contracts are used, the contract complies with the conditions set forth in this subsection. All contracts awarded for recovery efforts will require a task-order process on firm fixed price or a not-to-exceed basis before any expenditure of funds under that contract.

(k): *“The non-Federal entity alone must be responsible... for the settlement of all contractual and administrative issues arising out of procurements...”* All issues arising out of and pertaining to procurements are handled either by the State Contract Manager or DPP. Protests are handled by DPP Hearing Officers, pursuant to procedures set forth at N.J.A.C. 17:12-3. Complaints are handled by DPP’s CCAU unit pursuant to procedures set

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forth at N.J.A.C. 17:12-4. With regard to protest procedures, the State Contract Manager is also empowered to deal with various administrative procurement issues. Awards through a GSA RFQ are made by the Procurement Bureau within DPP. All protests of Procurement Bureau awards to the Director are handled by DPP Hearing Officers, pursuant to procedures set forth in N.J.A.C. 17:12-3. Protests handled by DPP Hearing Officers are then appealable to the Appellate Division of the New Jersey Superior Court.

2 C.F.R. §200.319 Competition.

(a): *“All procurement transactions must be conducted in a manner providing full and open competition...”* The overarching purpose of the State’s procurement process is to obtain goods and services that are most advantageous to the State, price and other factors considered, while maintaining a level playing field for all vendors through competition and transparency. DPP, through its previous interactions with FEMA in the development of the debris removal contracts, is fully aware of the need to maintain full and open competition and a level playing field for all participants in the procurement process. Specifications, requirements, scopes of work, and requests for proposal are developed by the using agencies in concert with DPP and are developed in such a way as to ensure fair and open competition. In the event that a procurement is so complex or technical that development of a specification requires the assistance or engagement of a contractor by the State, that contractor would be excluded from competing for that procurement or participating as a subcontractor in any resultant contracts.

(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...”* To combat the perception of local favoritism that can be inferred from such local preference laws, many states have promulgated statutes and regulations to enforce reciprocal action against states and localities. New Jersey is no exception. N.J.A.C. 17:12-2.13, Preference laws; out-of-State vendors, states in part that “. . . the Director shall apply on a reciprocal basis against an out-of-State bidder any in-State preference which is applied in favor of that bidder by the state or locality in which the bidder maintains its principal place of business.”

(c): *“The non-Federal entity must have written procedures for procurement transactions . . .”* DPP advises bidders of the criteria to be used in the evaluation of proposals and these criteria are clearly described and outlined in the procurement documents. The criteria are weighted by the procurement specialist prior to the proposal submission date and these weights are not disclosed to the bidders until an award has been made. The procurement document sets

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forth a written description of the technical requirements necessary for bidders to submit a responsive proposal, including but not limited to, delivery and submission requirements, forms and certifications to be included with the proposal, and submittals comprising the technical and price proposals. The procurement documents further set forth the general evaluation criteria to be used in the technical evaluation of the proposal. In addition, a pricing evaluation model is generally set forth in the procurement documents which serve as the basis for the ranking of bidder submitted price 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...”* Currently, DPP does not maintain any prequalification lists for vendors or otherwise related to the procurement of goods or services administered through DPP. In the event that DPP adopts a prequalification procedure in the future, this process will be developed with an eye toward maximizing full and open competition. At times, DPP may procure a multiple award contract to a pool of contractors that have succeeded our advertised competitive process. In those instances, both a task-order based process and a “mini-bid” process will occur before any work is performed under that type of contract. For construction contracts, DPMC maintains updated lists of prequalified vendors with multiple vendors for each discipline.

2 C.F.R. §200.320 Methods of procurement to be followed.

It is difficult to align each specific standard in this subsection with specific State policies; however, the process set forth in Circular 18-10-DPP is equivalent to the intent of Federal standards set forth in this subsection by ensuring full and open competition and a level playing field for all bidders by requiring quotes from at least three viable sources, publication of evaluation criteria, clearly written scope of services, a thorough technical evaluation of proposals, and awards to responsible vendors whose proposals are most advantageous to the State, price and other factors considered. When the Procurement Bureau within DPP conducts an RFQ posted through GSA, the regular procurement lifecycle is completed, albeit in a condensed timeframe. After the RFQ is posted, a question and answer period is conducted. The RFQ contains standard terms and conditions and Best and Final Offers (similar to Final Proposal Revisions) are requested from bidders determined to be in the competitive range. After the intent to award is issued, unsuccessful bidders may request a debriefing and if necessary, may submit a protest to the Director. Protests are heard in accordance with N.J.A.C. 17:12-3. It is the State’s intention to use the Procurement Bureau to the maximum extent practicable for all HUD grant funded procurements.

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Pursuant to Circular Number 19-10-DPP, Delegated Purchasing Authority, DPP established thresholds for simplified procurement methods for purchases that do not exceed \$40,000. Micro-purchases, or those valued at less than \$1,000, can be issued without price competition. Purchases between \$1,000 and \$17,500 may be accomplished by soliciting three (3) telephone quotations, internet quotations, or signed facsimile quotations. To assure fair competition, the agency provides all vendors with the same information about the good or service to be acquired, along with the same terms and conditions. The date and time that each quote is received is noted and the quote is retained. For purchases valued at more than \$17,500 but less than \$40,000, an agency must solicit a minimum of three (3) sealed quotes. The Agency Request for Proposal, which includes the deadline for submissions, is distributed to all vendors at the same time. The agency establishes internal control procedures for acceptance, security, review and evaluation of the sealed quotes. Generally, the vendor with the lowest price is entitled to award, provided that the vendor's proposal fully conforms to the terms and conditions of the agency's specifications and the State's Terms and Conditions.

2 C.F.R. §200.321 Contracting with small and minority firms, women's business enterprises and labor surplus area firms.

State law prohibits the establishment of set-aside goals based on race or gender. The State has adopted a goal that 25% of contracts (by dollar value) should be awarded to small businesses, however, and when appropriate, DPP will designate certain contracts or subcontracting opportunities as "Small Business Set Asides." DPP strongly encourages the use of small, minority, women and veteran-owned New Jersey businesses and invites the successful bidders to utilize these resources.

2 C.F.R. §200.323 Contract cost and price.

It is difficult to align each specific standard in this subsection with specific State policies; however, the State's policy overall is equivalent to the intent of the standards set forth in this subsection with respect to GSA procurements as DPP regulations at N.J.A.C. 17:12-1A.5 mandate that Federal supply schedule-based contracts shall only be promulgated when the following conditions have been met:

1. The price of the good and/or service being procured is no greater than the price offered to Federal agencies;
2. The State receives the benefit of any contract price reductions, whether statutory, regulatory or contractual in nature, during the term of the contract; and

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3. The price of the good and/or service under consideration for purchase via a Federal supply schedule contract is not equal to or greater than the State contract price for the same or equivalent goods or services, unless the Director determines that the best interests of the State are served by use of the proposed Federal supply schedule-based contract.

Therefore, this cost analysis must be undertaken by the agency prior to submission to DPP as part of the pre-approval process outlined in the Circular. Goods and services obtained through these contracts must be procured in a way that is most advantageous to the State, price and other factors considered. When the Procurement Bureau itself conducts an RFQ posted through GSA, the regular procurement lifecycle is completed, albeit in a condensed timeframe. After the RFQ is posted, a question and answer period is conducted. The RFQ contains standard terms and conditions and Best-and-Final Offers (“BAFOs”) are requested from bidders determined to be in the competitive range. Depending on the dollar value of the procurement, a DPP pricing analyst will also review the reasonableness of the pricing prior to award. After the intent to award is issued, unsuccessful bidders may request a debriefing and if necessary, may submit a protest to the Director. Protests are heard in accordance with N.J.A.C. 17:12-3.

2 C.F.R. §200.324 Federal awarding agency or pass-through entity review.

It is difficult to compare each specific standard in this subsection with specific State policies; however, the State’s practice is equivalent to the intent of the standards set forth in this subsection as agencies must submit to DPP a pre-approval package, including among other items, the specification, Federal supply schedule, proposed vendor(s), and cost analysis. Prior to contract creation, DPP will thoroughly review the package and conduct a pre-award review with the agencies to ensure that a level playing field and full and open competition were maintained. When the Procurement Bureau itself conducts an RFQ posted through GSA, the regular procurement lifecycle is completed, albeit in a condensed timeframe. After the RFQ is posted, a question and answer period is conducted. The RFQ contains standard terms and conditions and BAFOs are requested from bidders determined to be in the competitive range. Depending on the dollar value of the procurement, a DPP pricing analyst will also review the reasonableness of the pricing prior to award. After the intent to award is issued, unsuccessful bidders may request a debriefing and if necessary, may submit a protest to the Director. Protests are heard in accordance with N.J.A.C. 17:12-3.

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2 C.F.R. §200.325 Bonding requirements.

This section is largely inapplicable to procurements based on Federal supply schedule pricing. If the service being procured requires bonding to protect the State’s interests, the Procurement Bureau will include applicable bonding in accordance with the provisions of this subsection.

2 C.F.R. §200.326 Contract provisions.

The general provisions enumerated in this subsection are included in the State’s Standard Terms and Conditions. Section 2.10 of the State’s Standard Terms and Conditions, which are applicable to all contracts entered into by the State, requires that “[t]he contractor must comply with all local, State and Federal laws, rules and regulations applicable to this contract and to the goods delivered and/or services performed hereunder.” The Federal provisions are incorporated into contracts where they are applicable, (e.g. Davis-Bacon Act is only applicable to public works projects).

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Appendix A

2 C.F.R. §200.213 Suspension and Debarment.

Non-Federal entities are subject to the non-procurement debarment and suspension regulations implementing Executive Orders 12549 and 12689, 2 CFR part 180. These regulations restrict awards, subawards, and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs or activities.

[80 FR 43309, July 22, 2015]

2 C.F.R. §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.

2 C.F.R. §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

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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.

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(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:

(j)(1)(i) The actual cost of materials; and

(j)(1)(ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

(j)(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]

2 C.F.R. §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

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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

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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]

2 C.F.R. §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:

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- (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;

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(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]

2 C.F.R. §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.

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(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.

2 C.F.R. §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.

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(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.

2 C.F.R. §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.

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(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 following these requirements and have its system available for review.

2 C.F.R. §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.

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2 C.F.R. §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.