

Local Government Guide to Procurement with Federal Grant Funding

I. INTRODUCTION

A. The Grants Management Common Rule (GMCR): What is it?

The GMCR is a set of regulations (including procurement regulations) that applies to all entities that receive federal grant money. The GMCR is found in the Code of Federal Regulations (C.F.R.), which is a compilation of rules adopted by federal agencies. Each federal agency has its own section of the Code, and the GMCR is codified, in exactly the same form, in each agency's section of the Code. For example, for the Department of Transportation, the GMCR is found in 49 C.F.R. 18, and for the Department of Housing and Urban Development, it's found in 24 C.F.R. 85. You can find a table that shows where each agency has adopted the GMCR here: http://www.whitehouse.gov/omb/grants_chart/.

B. A Note About Citations (References) To the GMCR

Because the GMCR is codified in several places in the Code of Federal Regulations (C.F.R.), the references to the GMCR used in this document use XX's in place of the C.F.R. Title and Chapter so you can substitute the XX's with the relevant title and chapter that applies to your specific grant. For example, citations to the procurement section of the GMCR are in the form XX C.F.R. XX.36. In the Department of Transportation's codification of the GMCR, which is found in Title 49, Part 18, of the C.F.R., you would find the procurement section in 49 C.F.R. 18.36. In the Department of Housing and Urban Development's codification of the GMCR, which is found in Title 24, Part 85 of the C.F.R., you would find the procurement section in 24 C.F.R. 85.36.

C. Applicability Of the GMCR

Although the Grants Management Common Rule applies to most federal grants, it doesn't apply to all federal grants. You can find a list of grants that the Rule does not apply to in XX C.F.R. XX.4, the section titled "Applicability."

D. Definitions

Awarding agency – the federal agency providing the grant funding.

Cost-type contract - Cost-type contract means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

Equipment - Equipment means tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

Real property - Real property means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

Supplies - Supplies means all tangible personal property other than equipment. [In other words, supplies have a useful life of less than one year or an acquisition cost of less than \$5,000 per unit.]

Suspension – Suspension means, depending on the context, either temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or an action taken by a suspending official in accordance with 2 C.F.R. part 2424, to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

Termination – Termination means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. Termination does not include: (1) withdrawal of funds awarded on the basis of the grantee’s underestimate of the unobligated balance in a prior period; (2) withdrawal of the unobligated balance as of the expiration of a grant; (3) refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or (4) voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

E. The Scope Of This Guide

The GMCR rules regarding finances, budgeting, and asset management (except those rules relating to the disposal of surplus property) are beyond the scope of this Guide. These rules can be found in XX C.F.R. XX.20 through XX C.F.R. XX.33. The GMCR rules relating to financial reporting are also beyond the scope of this Guide. They can be found in XX C.F.R. XX.41. Finally, the rules related to settling accounts once the grant is closed out are not covered in this Guide. They can be found in XX C.F.R. XX.50 through XX C.F.R. XX.52.

II. PRE-SOLICITATION REQUIREMENTS

Before starting a procurement process:

- Review all proposed procurements to avoid unnecessary/duplicative purchases of equipment, supplies, and services. XX C.F.R. XX.36(b)(4).
- Consider whether it will it save money/time to consolidate procurements; if so, consolidate (and document how you came to your decision). XX C.F.R. XX.36(b)(4).
- Consider whether it will it save money/time to split up procurements; if so, split them up (and document how you came to your decision). XX C.F.R. XX.36(b)(4).
- If relevant, consider whether a lease or a purchase is the most economical approach (and document how you came to your decision). XX C.F.R. XX.36(b)(4).
- Consider other approaches to look for cost/time savings. XX C.F.R. XX.36(b)(4).
- Perform a cost or price estimate on the contract. XX C.F.R. XX.36(f).
- Look for state or local intergovernmental agreements (such as competitive bidding group purchasing programs, state term contracts, GSA contracts, or formal intergovernmental agreements made with other North Carolina local governments) that you can use to procure equipment, supplies, and services—but get awarding agency approval before using one of those agreements. XX C.F.R. XX.36(b)(5).

- If procuring equipment or supplies, check the federal surplus property website (<http://www.doa.nc.gov/fsp>) to look for equipment or supplies that will meet your needs. XX C.F.R. XX.36(b)(6).

III. PROCUREMENT

If you are a State agency,

- follow the same procurement policies and procedures that apply to your non-federally funded procurements;
- include in each purchase order or other contract any clauses required by Federal statutes and regulations (look to your grant documents to determine which clauses must be included; ask the awarding agency if you have questions). XX C.F.R. XX.36(a).

If you are any other type of government entity (county, municipality, city, town, township, local education agency, local public authority, special district, intrastate district, council of government, any other regional or interstate government entity, or any agency or instrumentality of a local government), then follow the rules outlined below.

Compliance with state statutes/local policies

When using federal grant funds, follow the standard state statutes and local policies only to the extent that those statutes and rules do not conflict with the rules outlined below. XX C.F.R. XX.36(b)(1).

A. Documentation

Keep records showing:

- Why you chose a specific procurement method;
- The basis for your award (why did you select the contractor or vendor you selected? Why did you reject the others?);
- The basis for the contract price; and
- Any other significant decisions that were a part of the procurement process. XX C.F.R. XX.36(b)(9).

B. Procurement Principles

Do not restrict competition. Specifically, **do not**

- Place unreasonable requirements on firms for them to qualify to do business (if you're not sure if a requirement is unreasonable, ask the awarding agency);
- Require unnecessary experience or bonding (the safest course is to stick with the bonding limits required by the GMCR—see part E. Bonding Requirements);
- Permit noncompetitive pricing practices between companies;
- Award contracts to consultants on “retainer” contracts;
- Permit conflicts of interest in contract awards or administration;

- Specify brand names without permitting equal products (and describing the performance requirements that must be met for a product to qualify as an “equal”);
- Act arbitrarily in awarding contracts (in other words, be consistent, fair, and transparent). XX C.F.R. XX.36(c)(1).
- Award based on local geographic preferences. (However, geographic location *may* be a selection criteria when awarding contracts for architectural or engineering services, provided that using such criteria “leaves an appropriate number of qualified firms” to compete for the work, “given the nature and size of the project.”) XX C.F.R. XX.36(c)(2).

Do ask the awarding agency if you want to use any of the exceptions to the bidding requirements permitted under State law, such as piggybacking, using force account work, buying off of state contract, buying used equipment, etc.

Do allow bidders who have not prequalified or are not on your bidders’ lists (or products that are not on your approved products list) to participate in the procurement. XX C.F.R. XX.37(c)(4). (But do not award to bidders who are in the Excluded Parties List System (see below).)

C. Procurement Methods

Four procurement methods are permitted: (1) the small purchase procedure, for procuring services (other than construction), supplies, or equipment costing less than \$100,000; (2) sealed bidding, for procuring services, supplies, or equipment costing \$100,000 or more, and for most construction contracts; (3) competitive proposals, for procuring architectural or engineering services, and for when sealed bids are not appropriate ; and (4) noncompetitive proposals, for certain special circumstances.

The small purchase procedure consists of obtaining price and rate quotations “from an adequate number of qualified sources.” XX C.F.R. XX.36(d)(1). Note that this is similar to the informal bidding process outlined in G.S. 143-131. However, if you’re purchasing “apparatus, supplies, materials, or equipment” costing \$90,000 or more, the North Carolina General Statutes require the use of formal bidding. So you must use formal bidding for those purchases, even if the cost is under \$100,000 (the threshold in the GMCR).

Sealed bidding must be used for all construction contracts (regardless of cost) and for all other contracts costing \$100,000 or more when (1) a complete, adequate, and realistic specification is available, (2) there are two or more responsible bidders available, and (3) the procurement lends itself to a contract award based on price. XX C.F.R. XX.36(d)(2). Sealed bidding consists of

- public advertisement for bids, providing sufficient time for bidders to respond before the date set for the bid opening;
- bids must be solicited from “an adequate number of known suppliers”;
- an invitation for bids, including the specifications and attachments, which defines the items or services required in enough detail to allow the bidders to properly respond;

- awarding a firm fixed-price contract made in writing to the lowest responsive and responsible bidder. (If specified in the bidding documents, factors such as discounts, transportation costs, and life cycle costs may be considered in determining which bid is lowest.)

Any and all bids may be rejected if there is a “sound documented reason.” XX C.F.R. XX36(d)(2)(E).

Note that you must comply with any applicable state laws as well. For example, if you’re bidding out a building construction contract costing \$1 million, you must comply with the formal bidding statute (G.S. 143-129), the contracting method requirements in G.S. 143-128, and the HUB participation requirements in G.S. 143-128.2, along with any other applicable state laws.

Competitive proposals are used when “conditions are not appropriate for the use of sealed bids,” and for the procurement of architectural or engineering services. The requirements for a competitive proposal process are:

- requests for proposals (RFPs) are used;
- the RFP must identify all evaluation factors and each factor’s relevant importance;
- the RFP must be “publicized” (this term is not defined);
- proposals must be solicited from “an adequate number of qualified sources” (these terms are not defined);
- evaluate the proposals based on the criteria in your RFP;
- award the contract to the responsible firm whose proposal is “most advantageous to the program, with price and other factors considered” (XX C.F.R. XX.36(d)(3));
- you must perform a cost analysis (to assess the reasonableness of the proposers’ costs) (XX C.F.R. XX.36(f)(1)); and
- you must negotiate profit as a separate element of the contract, considering 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 the contractor’s past performance, and industry profit rates in the surrounding area for similar work (XX C.F.R. XX.36(f)(2)).

For architectural and engineering services, you may use a similar process except that price is not used as a selection factor. Instead the most qualified firm is selected subject to negotiation of a fair and reasonable fee. XX C.F.R. XX.36(d)(3)(v).

Noncompetitive proposals—that is, awarding a contract directly to one company without using a competitive process—may only be used when the award of a contract is not possible using one of the three other methods, and one of the following criteria applies:

- the item is available from only one source;
- there is a public emergency that will not allow time for a competitive process;
- the awarding agency authorizes a noncompetitive proposal process; or
- after solicitation of competition is attempted (through one of the three other methods), it is determined that there is not enough competition available for a competitive procurement. XX C.F.R. XX.36(d)(4).

To use a noncompetitive proposal you must:

- perform a cost analysis (that is, verify the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits) (XX C.F.R. XX.36(f)(1));
- negotiate profit as a separate element of the contract, considering 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 the contractor's past performance, and industry profit rates in the surrounding area for similar work (XX C.F.R. XX.36(f)(2));and
- submit the procurement documentation to the awarding agency for pre-award review and approval. XX C.F.R. XX.36(d)(4).

D. Minority- and women-owned businesses

You must take certain steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.¹ These steps are:

- Place qualified small and minority businesses and women's business enterprises on solicitation lists;
- Assure that small and minority businesses and women's business enterprises are solicited whenever they are potential sources;
- Divide total requirements into smaller tasks or quantities to permit maximum participation by small and minority businesses and women's business enterprises;
- Establish delivery schedules which encourage participation by small and minority businesses and women's business enterprises;
- Use the services and assistance of the Small Business Administration (<http://www.sba.gov>) and the Minority Business Development Agency of the Department of Commerce (<http://www.nbda.gov>); and
- Require prime contractors to take the same steps listed above. XX C.F.R. XX.36(e).

E. Bonding requirements

Bonds are only required for certain construction contracts. XX C.F.R. XX.36(h). For more details, see the chart here: www.sog.unc.edu/programs/purchase/documents/Bondflowchart.pdf.

IV. AWARDING CONTRACTS

A. Debarred/Suspended Contractors and Vendors

Always check the Excluded Parties List System website (<https://www.epls.gov/>) before awarding a contract. You will lose your grant funding if you award a grant-funded contract to a person or company on that list. XX C.F.R. XX.35.

¹ For a list of labor surplus area firms, see <http://www.doleta.gov/programs/lisa.cfm>.

B. Standard of Award

Award to “responsible contractors possessing the ability to perform successfully under the terms and conditions or a proposed procurement.” (Bottom line: The award standard is compatible with the award standards in the North Carolina General Statutes.) XX C.F.R. XX.36(b)(8).

Do not award time-and-material type contracts (where you agree to pay based on the time spent and materials used instead of based on a lump sum bid) unless no other contract is suitable, and then only if the contractor agrees to a maximum price. XX C.F.R. XX.36(b)(10).

Do not award “cost plus percentage” contracts, where the bidder is paid a percentage of the contract price on top of the cost of the contract itself. XX C.F.R. XX.36(f)(4).

Be prepared to respond to requests by the awarding agency for copies of your solicitation documents, bids, and any other supporting documentation related to your procurement. XX C.F.R. XX.36(g).

V. CONTRACT TERMS

Contracts must contain the following provisions (along with any additional provisions required by the awarding agency):

- Administrative, contractual, or legal remedies in instances where contractors breach the contract (required for contracts costing more than \$100,000);
- Termination for cause and for convenience, along with details regarding how and when the termination can occur (required for contracts costing more than \$10,000);
- Compliance with the following federal statutes and regulations: (1) Executive Order 11246 of September 24, 1965 (“Equal Employment Opportunity”), as amended by Executive Order 11375 of October 12, 1967, and as supplemented by Chapter 60, Title 41 of the Code of Federal Regulations (required for construction contracts costing more than \$10,000); (2) the Copeland “Anti-Kickback” Act (18 U.S.C. 874) as supplemented by Part 3, Title 29 of the Code of Federal Regulations (required for all construction or repair contracts); (3) the Davis-Bacon Act (40 U.S.C. 276a to 276a-7), as supplemented by Part 5, Title 29 of the Code of Federal Regulations (required for construction contracts costing more than \$2,000 when required by a specific grant program [note that ARRA does required compliance with Davis-Bacon]); (4) Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330), as supplemented by Part 5, Title 29 of the Code of Federal Regulations (required for construction contracts costing more than \$2000, and required for non-construction contracts involving mechanics or laborers costing more than \$2500); and (5) standards, orders, or other requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Part 15, Title 40 of the Code of Federal Regulations (required for contracts costing more than \$100,000);
- Notice of awarding agency requirements and regulations pertaining to reporting;
- Notice of awarding agency requirements and regulations pertaining to patent rights;

- Notice of awarding agency requirements and regulations pertaining to copyrights and rights in data;
- Required access to any books, documents, papers, and records of the contractor directly pertinent to the specific contract by you or the awarding agency for the purpose of making audit, examination, excerpts, and transcriptions;
- Retention of all required records for three years after you make final payments and all other pending matters are closed;
- Standards and policies relating to energy efficiency contained in the state energy conservation plan. XX C.F.R. XX36(i)

VI. BID PROTESTS

You must establish a bid protest procedure. If you receive a protest, you must notify the awarding agency. XX C.F.R. XX.36(b)(12).

VII. CONTRACT ADMINISTRATION AND CONTRACT MODIFICATIONS

A. Contract administration

You must establish, maintain, and use a contract administration system. This means you must regularly monitor your contracts and purchases to ensure that each contractor/vendor is complying with their contract terms, conditions, and specifications, including all Federal requirements, and to ensure that performance goals are achieved. XX C.F.R. XX.36(b)(2), XX C.F.R. XX.40(a).

You—not the awarding agency—are responsible for settling all contractual and administrative issues arising out of procurements (including source evaluation, protests, disputes, and claims). XX C.F.R. XX.36(b)(11).

B. Reporting requirements

You will be required to submit performance reports for non-construction contracts. The awarding agency should tell you how often such reports are required. (Ask if you don't know.) The report should contain the following information:

- A comparison of actual accomplishments to the objectives established for the time period covered in the report;
- If the accomplishments do not match the objectives, an explanation of why there is a mismatch;
- Any additional pertinent information, such as analysis and explanation of cost overruns. XX C.F.R. XX.40(b).

You will not usually be required to submit performance reports for construction projects, but the awarding agency may require performance reports under certain situations. (Federal agencies typically

rely on on-site technical inspections and certified percentage-of-completion data to monitor construction projects.) XX C.F.R. XX.40(c).

Along with required performance reports, you must also inform the awarding agency of significant and unexpected problems or delays and of significant favorable developments that occur. XX C.F.R. XX40(d).

C. Contract Changes

Prior written approval of the awarding agency is required for:

- Budget revisions in construction projects which would result in a need for additional funds (XX C.F.R. XX.30(c)(2));
- Fund or budget transfers from a construction project to a non-construction project or vice versa (XX C.F.R. XX.30(c)(3));
- Revisions of the scope or objective of a project (XX C.F.R. XX.30(d)(1));
- Extension of the period of fund availability (XX C.F.R. XX.30(d)(2));
- Changes in key personnel if those persons are specified in an application or grant award (XX C.F.R. XX.30(d)(3));
- Contracting out, subgranting, or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award (does not apply to construction projects or to the procurement or equipment, supplies, or general support services) (XX C.F.R. XX.30(d)(4)).

D. Use of Equipment Purchased with Grant Funds

Equipment [see definition above] purchased with federal grant funds:

- may be used in the program or project for which it was acquired for as long as needed, even if the project or program is no longer supported by grant funds (XX C.F.R. XX.32(c)(1));
- may be used in other activities previously or currently supported by federal funds once it is no longer needed for that original project or program (XX C.F.R. XX.32(c)(1));
- must also be made available for other federally funded programs, if its use in those other programs doesn't interfere with the equipment's primary intended use (XX C.F.R. XX.32(c)(2));
- may not be used to compete with private companies that provide equivalent services, unless specifically permitted by Federal statute (XX C.F.R. XX.32(c)(3)).

Rules regarding management of equipment can be found in XX C.F.R. XX.32(d).

VIII. DISPOSAL OF PROPERTY

For disposal of real property [see definition above] purchased with grant funds, request (and follow) instructions from the awarding agency. XX C.F.R. XX.31(c)

Disposal of equipment [see definition above] purchased with grant funds:

- Used equipment purchased with grant funds can be used as a trade-in for replacement equipment for that same project, *with approval of the awarding agency*. XX C.F.R. XX 32(c)(4).
- Equipment with a current per unit fair market value of less than \$5,000 may be kept, sold, or otherwise disposed of at the discretion of the local unit (no approval needed from the awarding agency). XX C.F.R. XX.32(e)(1).
- Equipment with a current per unit fair market value of more than \$5,000 may be kept or sold and the awarding agency has a right to be paid the agency's share (either the current market value multiplied by the agency's share in the equipment or the proceeds of the sale multiplied by the agency's share in the equipment). For example, if the equipment was purchased with 50% grant funds and 50% local funds, and the proceeds from the sale of the equipment total \$6,000, the unit must pay \$3,000 to the agency. XX C.F.R. XX.32(e)(2).

For disposal of federally-owned equipment provided as part of a grant, request instructions from the awarding agency. XX C.F.R. XX.32(f).

Disposal of supplies [see definition above] purchased with grant funds:

- If there are unused supplies exceeding \$5,000 in total aggregate fair market value when the grant is complete or terminated, use the supplies for other federally sponsored programs or projects. If the supplies are not needed for other federally sponsored programs or projects, the grantee shall compensate the agency for its share in the supplies. For example, if the supplies were purchased with 50% grant funds and 50% local funds, and the proceeds from the sale of the supplies total \$6,000, the unit must pay \$3,000 back to the agency. XX C.F.R. XX.33(b).
- If the fair market value of any supplies purchased with grant funds is less than \$5,000, presumably the supplies may be kept, sold, or otherwise disposed of at the discretion of the local unit (no approval needed from the awarding agency).

IX. RECORD RETENTION

These rules apply to all documents related to procurements funded by federal grants.

Records must be retained for **three years** from the date specified below (if any litigation, claim, negotiation, audit, or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until that action is complete or until the end of the 3-year period, whichever is later). XX C.F.R. XX.42(b).

Starting date of retention period:

- In general,
 - when grant support is continued or renewed at yearly intervals, the retention period starts on the day you submit your last expenditure report for that period.

- when grant support is continued or renewed quarterly, the retention period for each year's records starts on the day you submit your expenditure report for the last quarter of the Federal fiscal year.
- when grant support is not continued or renewed at regularly intervals, the retention period starts on the day you submit your final expenditure report, or (if no report is required) on the day the report would have been due. XX C.F.R. XX.42(c)(1).
- Real property and equipment records: the retention period starts from the date of the disposition, replacement, or transfer of the property. XX C.F.R. XX.42(c)(2).
- For other retention periods (relating to records for income transactions after grant support concludes and records for indirect cost rate proposals), see XX C.F.R. XX.42(c)(3) and (4).

Copies may be substituted for original records. XX C.F.R. XX.42(d).

X. TERMINATION OF AWARD (Consequences for non-compliance)

If you materially fail to comply with any term of a federal grant, the awarding agency may take one or more of the following actions:

- Temporarily withhold cash payments until the error is fixed (or, if the error is not fixed, until more severe actions are taken by the awarding agency);
- Disallow all or part of the cost of the activity or action;
- Wholly or partly suspend or terminate the award (in which case you may still be able to recover costs that were properly incurred before the effective date of the suspension or termination);
- Withhold further awards; or
- Take other legally available remedies. XX C.F.R. XX.43(a) and (c).

You will have an opportunity to appeal the enforcement action if a statute or regulation permits an appeal. XX C.F.R. XX.43(b).