Introduction to American Rescue Plan Act of 2021:

Procurement

Our Agenda

Preliminary Considerations:

What Is Public Procurement, Anyway?

State Procurement Laws for North Carolina Local Governments:

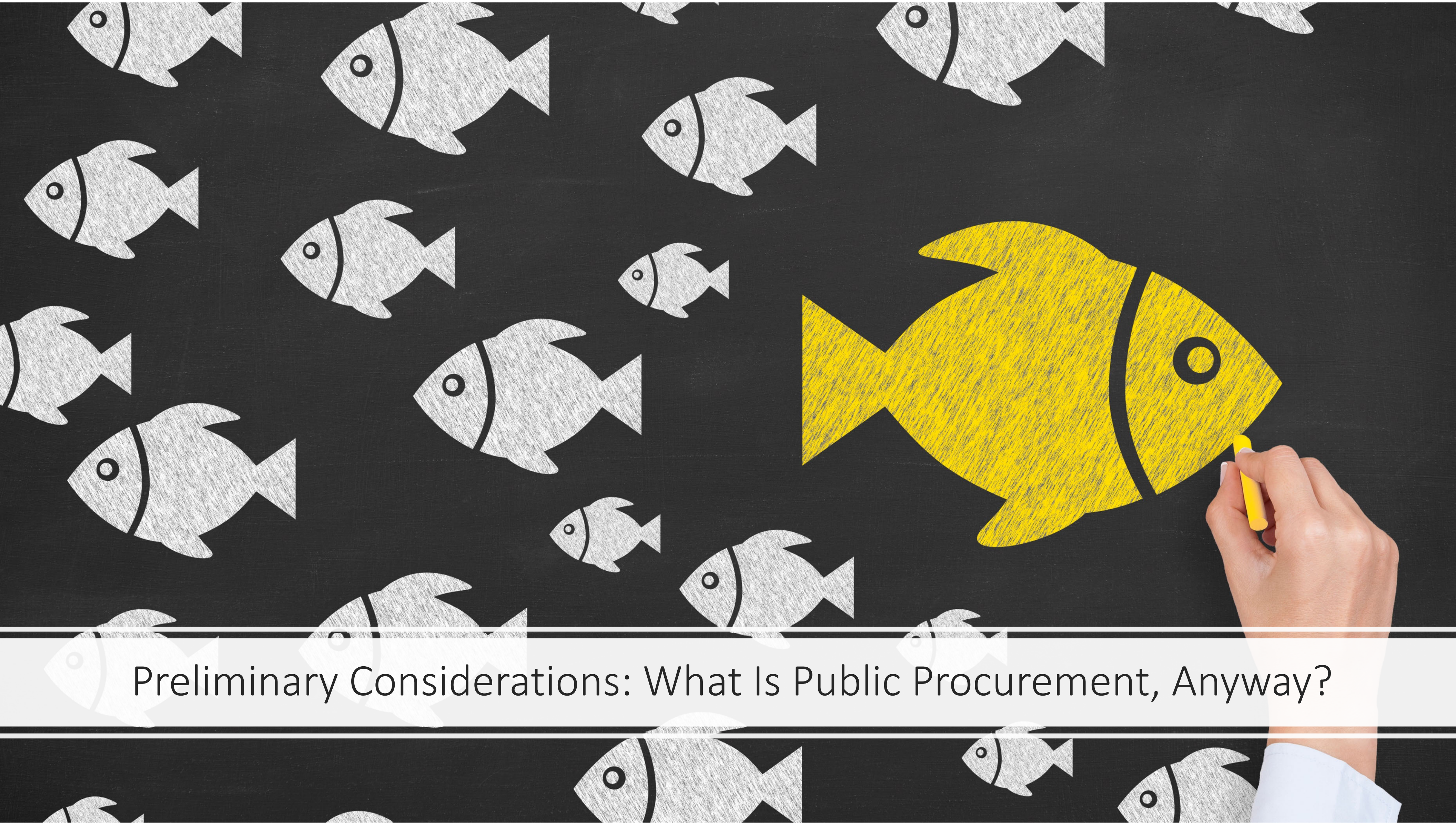
A Refresher

Federal Procurement Standards Applicable to ARPA Local Fiscal Recovery Funds:

Compliance Tips

Conflict of Interest Standards Applicable to ARPA Local Fiscal Recovery Funds:

Avoiding Hot Water



Preliminary Considerations: What Is Public Procurement, Anyway?

What Is Public Procurement?

- The ***process*** by which a public entity purchases goods or services from a third party.
- What factors might influence that process at the local government level in North Carolina when spending federal grant funds?

State Laws

1. 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 (Chapter 153A (counties); (Chapter 160A (municipalities))
2. North Carolina Contract Law (non-statutory)

Federal Laws and Regulations

1. United States Code
2. Federal Grant Regulations, Agency Regulations, and Guidance
   - 2 C.F.R. Part 200 (the "Uniform Guidance") and Grant Procurement Standards
3. Terms and Conditions of a Federal Award

Decision to Purchase a Good or Service

Local Purchasing Policies

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

Economic and Managerial Considerations

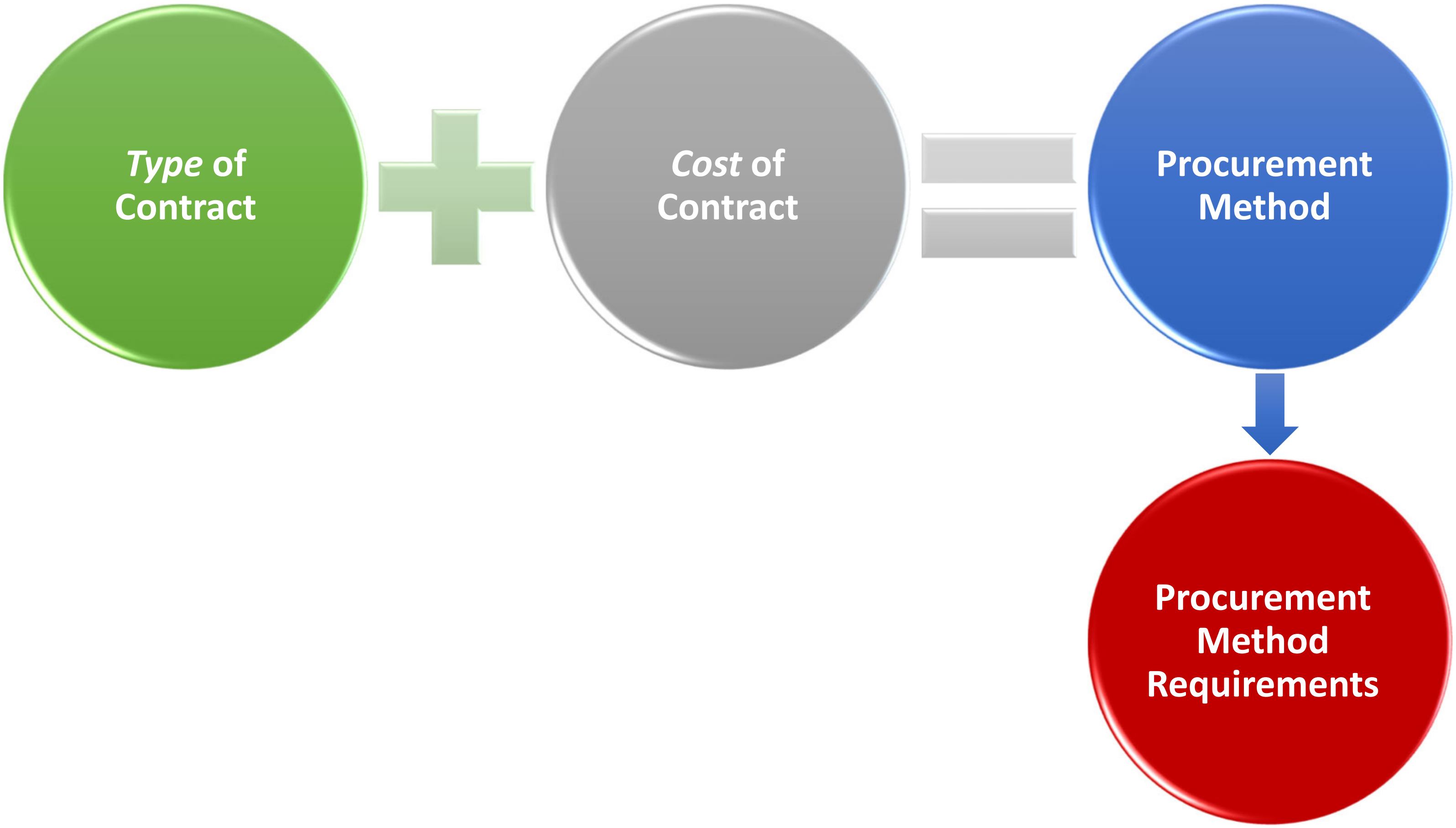
- Competition to Ensure Value
- "Fairness"

State Procurement Laws for North Carolina Local Governments

State Procurement Laws: The Basics

- Subject to exemption by general law (rare) or local act, ***all*** units of local government are subject to the competitive bidding laws in Article 8 of Chapter 143 and Article 3D of Chapter 143 of the General Statutes.
- In general, state law establishes three types of mandatory competitive bidding processes:
  1. Formal bidding (G.S. § 143-129)
  2. Informal bidding (G.S. § 143-131)
  3. Qualifications-based selection (G.S. § 143-64.31 *et seq.*)

Procurement Methods Under North Carolina Law



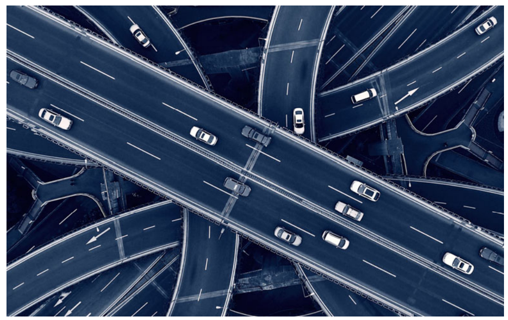
Four *Types* of Contracts Under North Carolina Competitive Bidding Law

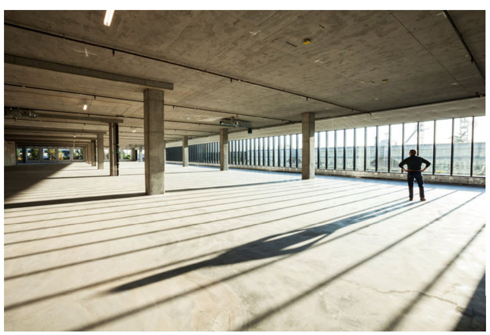
***Type* of Contract**

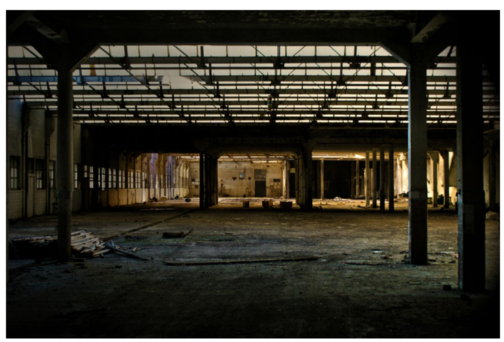
1. **“Purchase” Contract**
   - The purchase of “apparatus, supplies, materials, or equipment”

Four *Types* of Contracts Under North Carolina Competitive Bidding Law

***Type* of Contract**







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

Four *Types* of Contracts Under North Carolina Competitive Bidding Law

***Type* of Contract**

3. "Mini-Brooks Act" Services

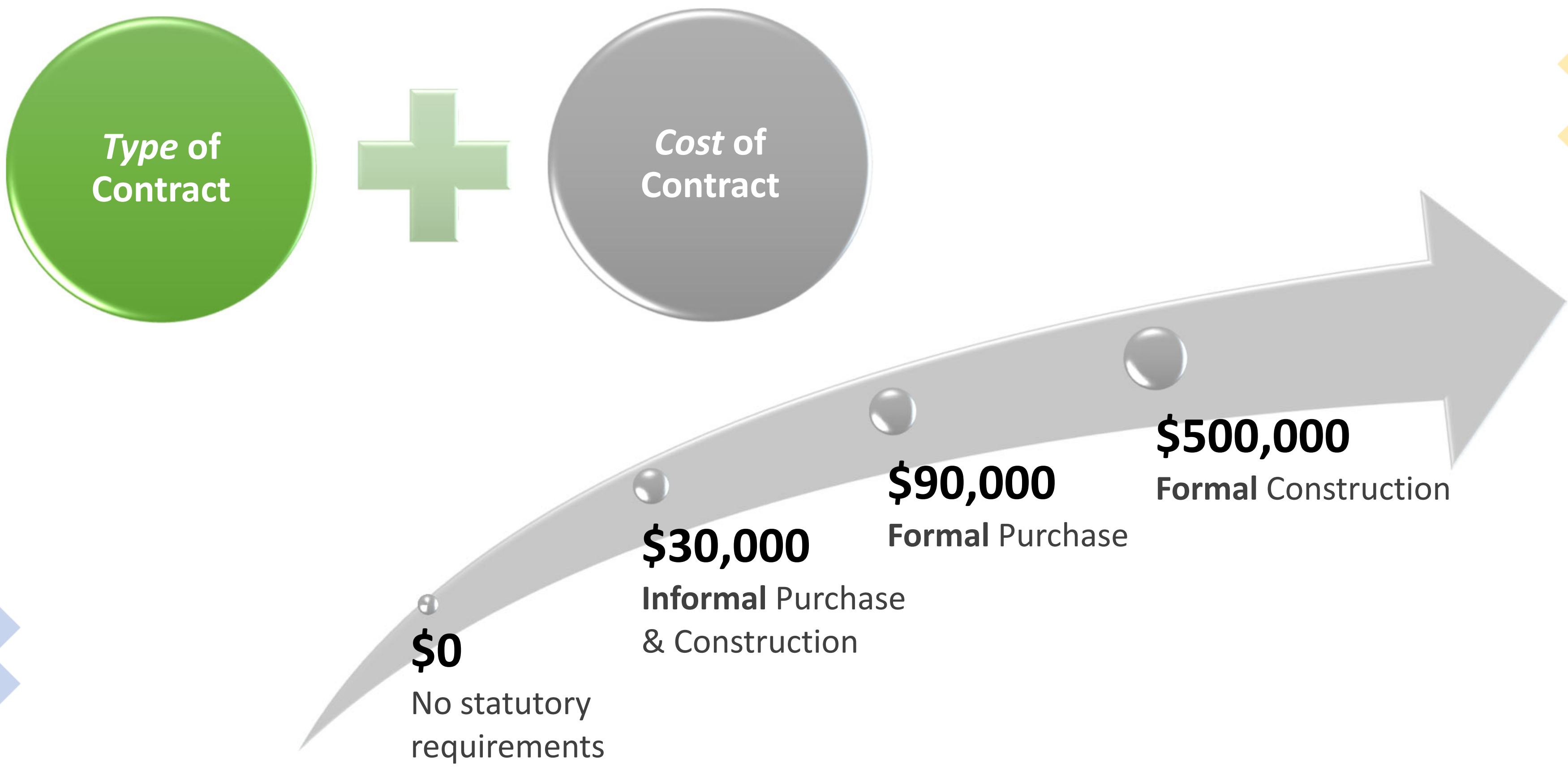
- Architectural
- Engineering
- Surveying
- Alternative Construction Delivery Methods
  - Construction Management at-Risk
  - Design-Build
  - Design-Build Bridging
  - Public-Private Partnership

Four *Types* of Contracts Under North Carolina Competitive Bidding Law

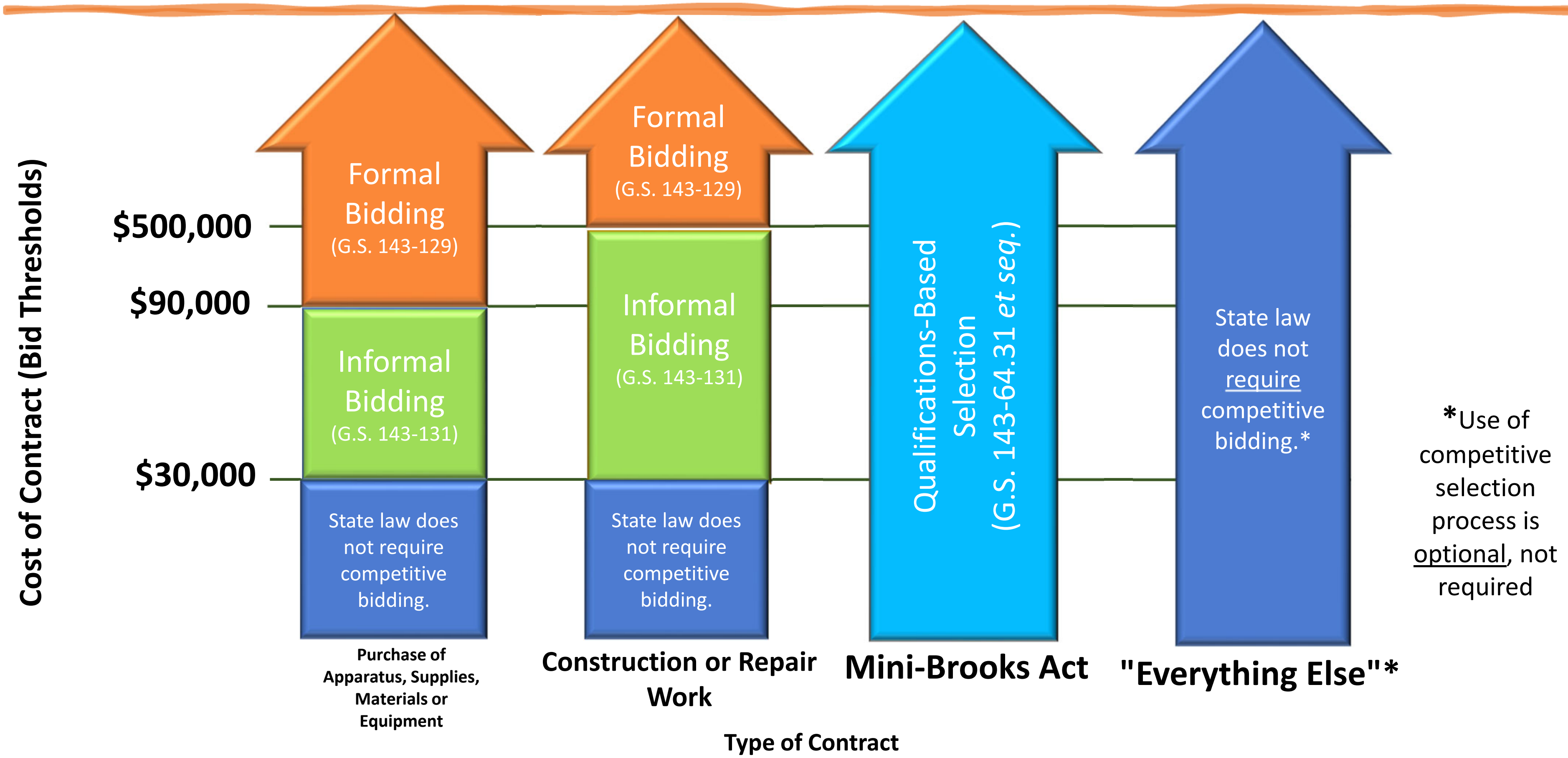
***Type* of Contract**

4. **“Everything Else”**
   - Services
   - “True” Leases
   - Purchase of Real Property

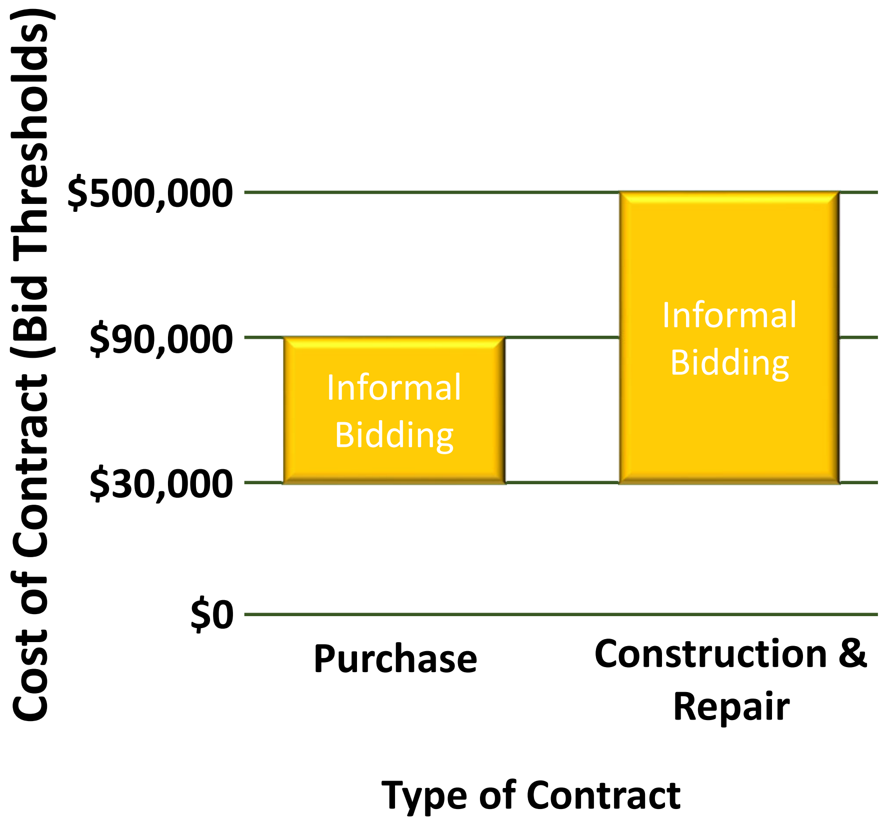
Four *Types* of Contracts Under North Carolina Competitive Bidding Laws – But . . . Consider "Thresholds"



Basic Procurement Rules – N.C. Law

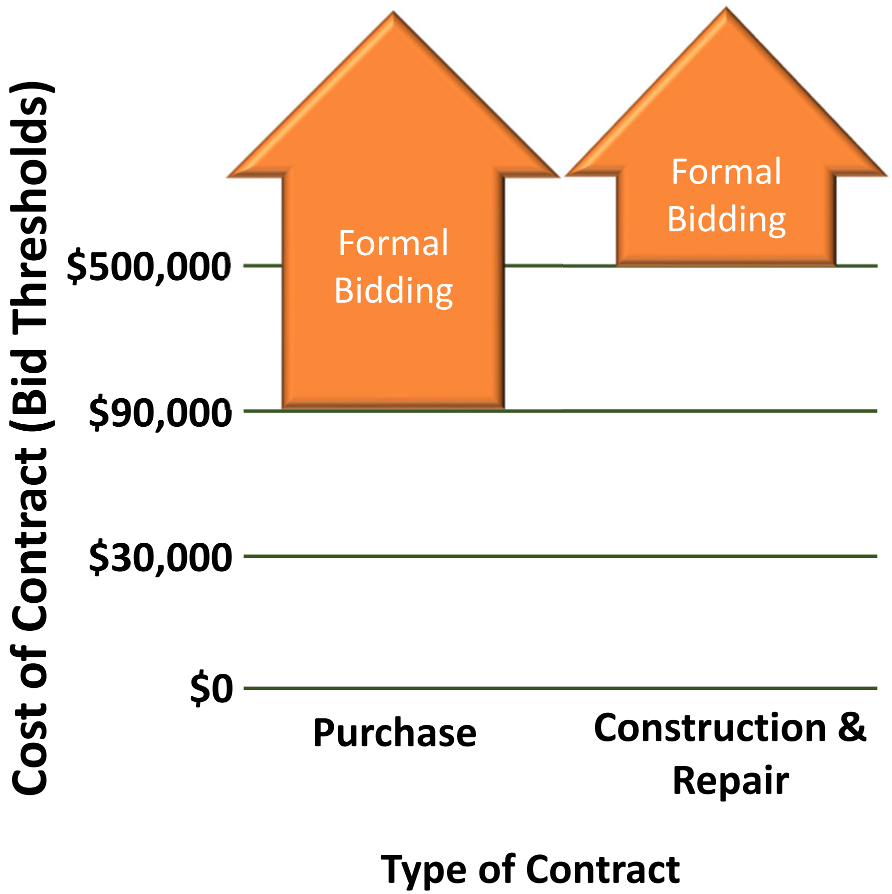


Informal Bidding Requirements Under N.C. Law



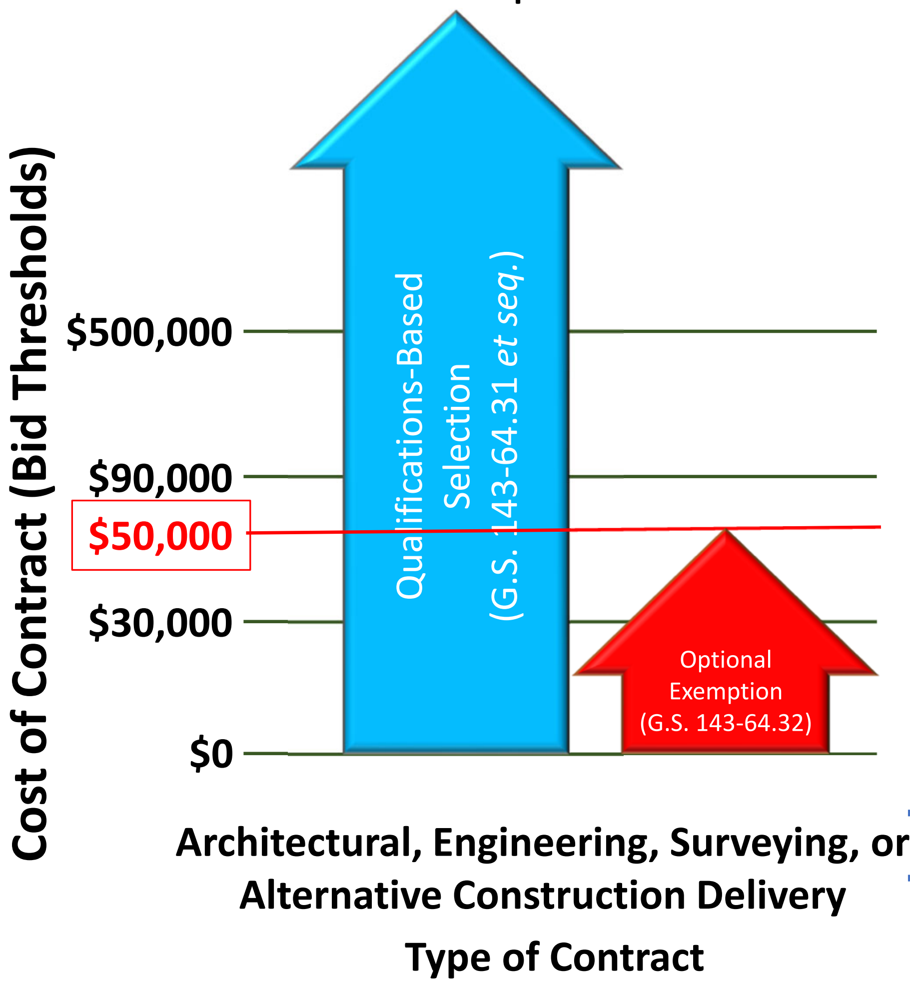
- ✓ Keep record of bids
- ✓ Award to lowest responsive responsible bidder
- No specific method of advertising
- No specific form of bids
- No minimum number of bids
- No public bid opening
- No governing board approval

Formal Bidding Requirements Under N.C. Law



- 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

Mini-Brooks Act Requirements Under N.C. Law



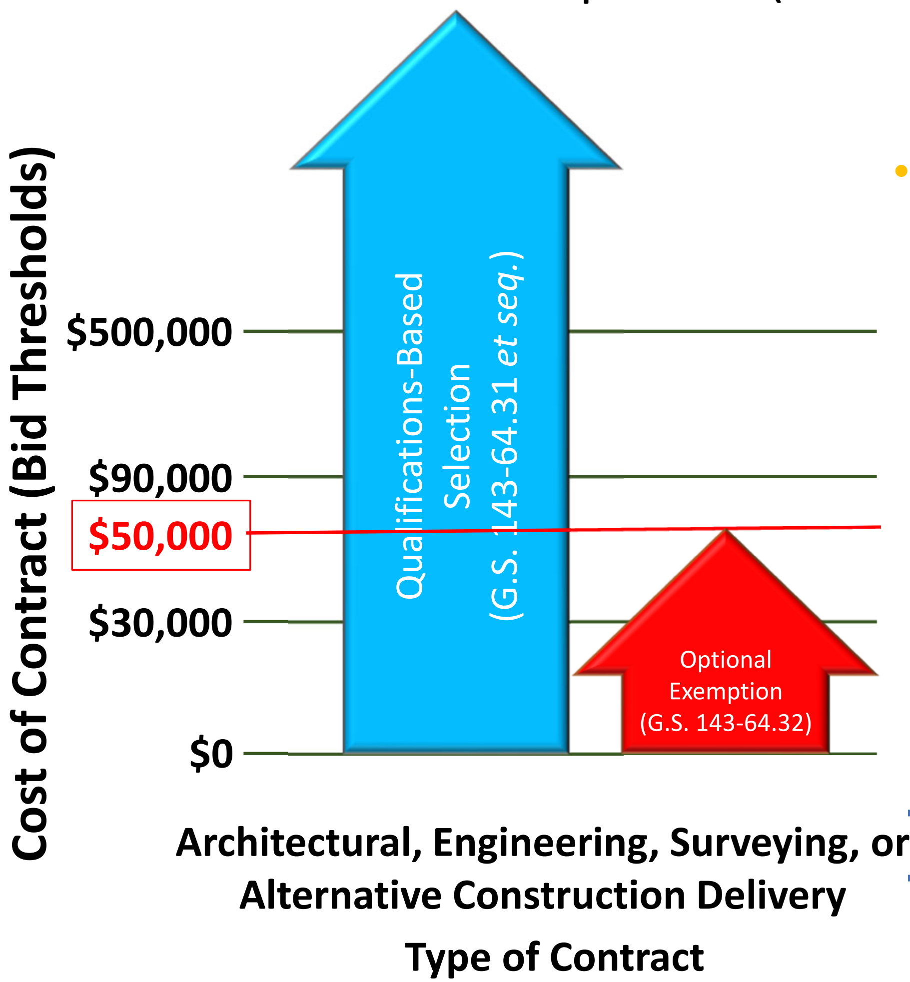
- ✓ "Announce" requirements for the service sought
  - ✓ Make good faith efforts to notify M/WBE firms
- ✓ May <u>not</u> solicit fee quotes or work product in request for qualifications
- ✓ Award to best qualified respondent, based upon demonstrated qualifications and competence
- ✓ Negotiate a "fair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

Ask:

<u>Does the scope of work require licensure?</u>

- 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:

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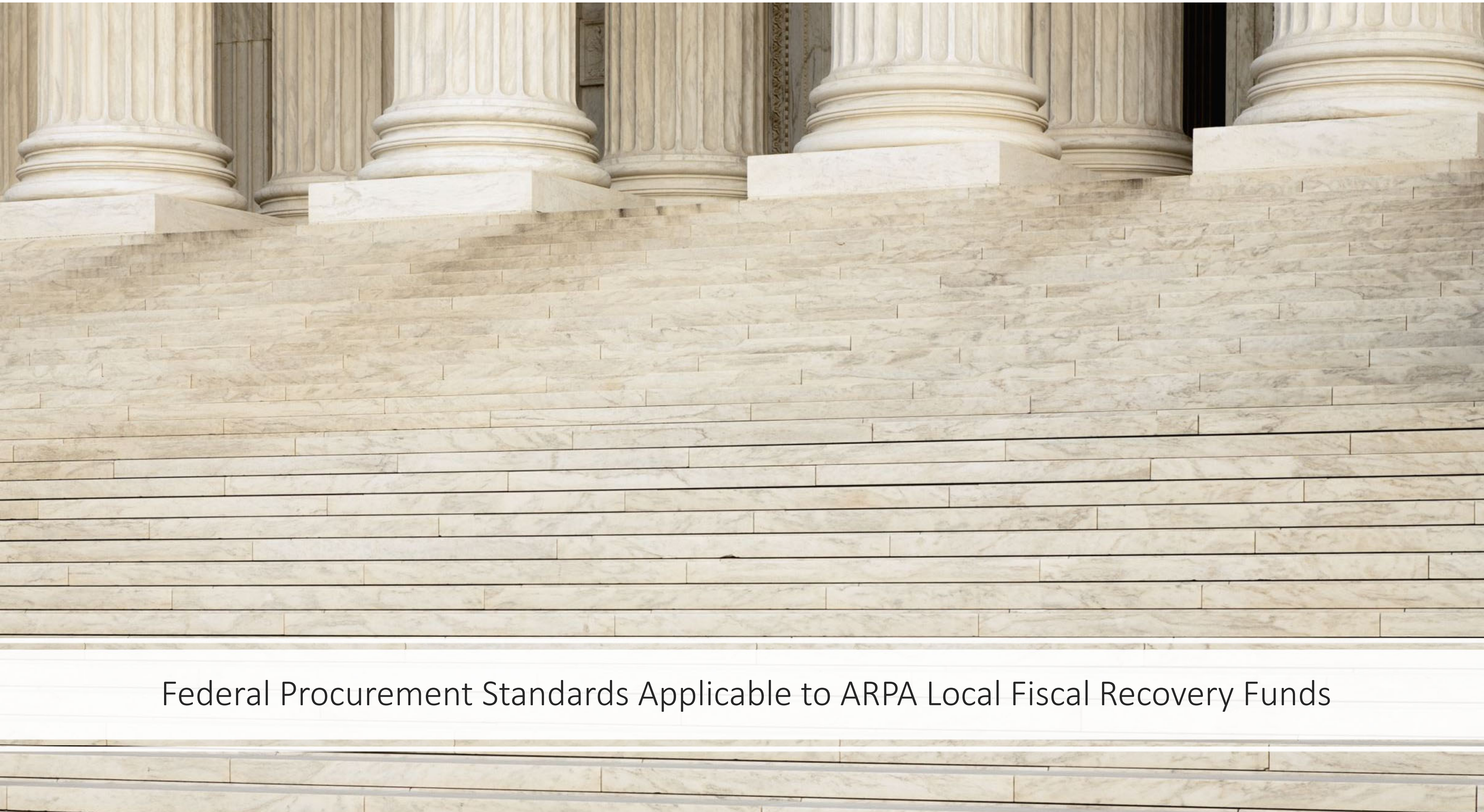


Federal Procurement Standards Applicable to ARPA Local Fiscal Recovery Funds

Sources of ARPA Procurement Standards

ARPA

- American Rescue Plan Act of 2021, Pub. L. 117-2 (Mar. 11, 2021)

Treasury Regulations and Guidance

- Interim Final Rule (86 Fed. Reg. 26786 (May 17, 2021))
  - Compliance and Reporting Guidance
    - Frequently Asked Questions

Fiscal Recovery Fund Award Terms and Conditions

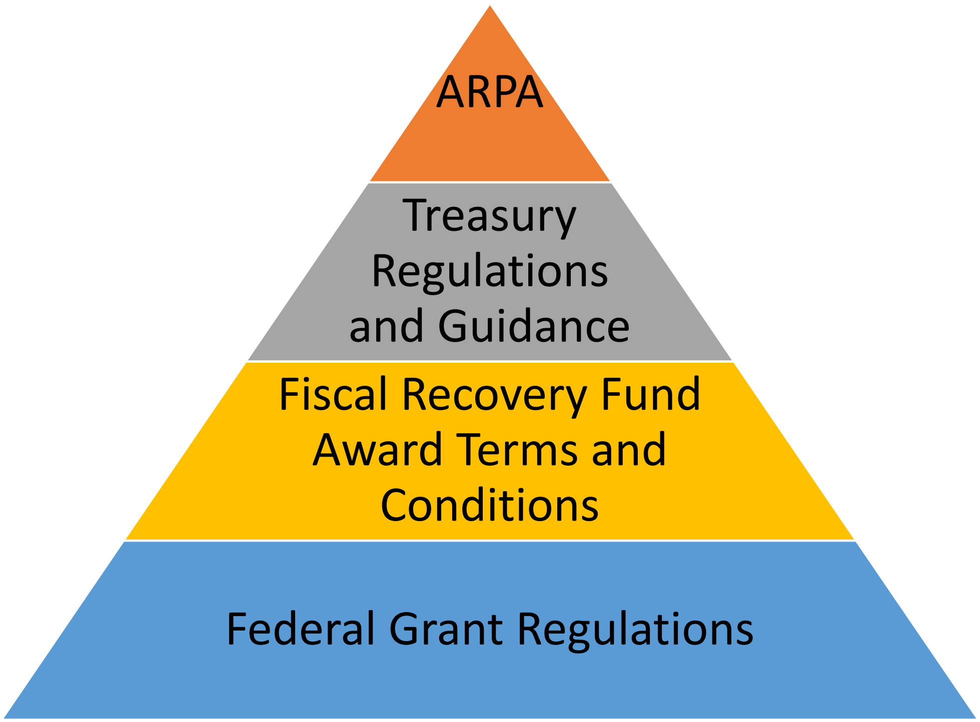
- Federal Assistance Listing (21.027)
  - *See "Policy Requirements"*
- Financial Assistance Agreements

Federal Grant Regulations

- 2 C.F.R. Part 200 (the "Uniform Guidance")
- 2 C.F.R. Part 180 / 31 C.F.R. Part 19
- 31 C.F.R. Part 21

The Uniform Guidance Applies . . . Unless It Doesn't

- American Rescue Plan Act
  - The text of the Act does not address procurement standards for LFRF expenditures by non-federal entities.
- Interim Final Rule
  - "[A]s provided for in the award terms, payments from the Fiscal Recovery Funds *as a general matter* will be subject to the provisions of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR part 200) (the "Uniform Guidance")[.]"
- Award Terms and Conditions
  - "Federal regulations applicable to this award include, without limitation . . . Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. Part 200, *other than such provisions may determine are inapplicable to this Award and subject to such exceptions as may be otherwise provided by Treasury*."
- Assistance Listing (21.027), "Policy Requirements"
  - Treasury has not made any exceptions to the Uniform Guidance procurement standards in the Assistance Listing.



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]

And we should care because . . . ?

Existing Policies May Be Inaccurate

The revised UG is applicable to LFRF.

[1] 2 C.F.R. § 200.109.
[2] 85 Fed. Reg. 3766 (Jan. 22, 2020).
[3] 85 Fed. Reg. 49521 (Aug. 13, 2020).

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:**
    - **2 C.F.R. §§ 200.318 – 200.327**
- Subpart E – Cost Principles
- Subpart F – Audit Requirements

What is Subpart D <u>not</u>?

Federal Acquisition Regulation ("FAR") (48 C.F.R. Part 2).
Applicable to procurement by the *federal government*.

Subpart D Terminology

- A Few Basic Definitions[1]
  - “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.

[1] 2 C.F.R. § 200.1.

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.

Contract vs. Subaward

Contract Relationship

- A procurement relationship
- Provides goods and services within normal business operations
- Provides similar goods and services to many purchasers
- Normally operates in a competitive environment
- Provides goods or services that are ancillary to the federal program
- Not subject to compliance requirements of the federal program

Subrecipient Relationship

- An assistance relationship (LG assisting subrecipient)
- Subrecipient determines eligibility of beneficiaries
- Performance measured against federal program objectives
- Responsible for programmatic decision-making
- Adheres to applicable federal program requirements
- Uses federal funds to carry out a program for public purposes specified in statutes, as opposed to providing goods or services for the benefit of the pass-through entity

Note that a contract with a nonprofit or other local government is not automatically a subaward. It must meet the criteria for a subrecipient relationship.

What Might an Auditor Review In Our FRF 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))

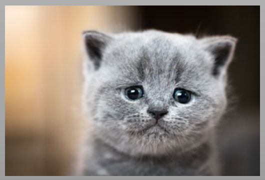
(2 C.F.R. § 200.214)

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))



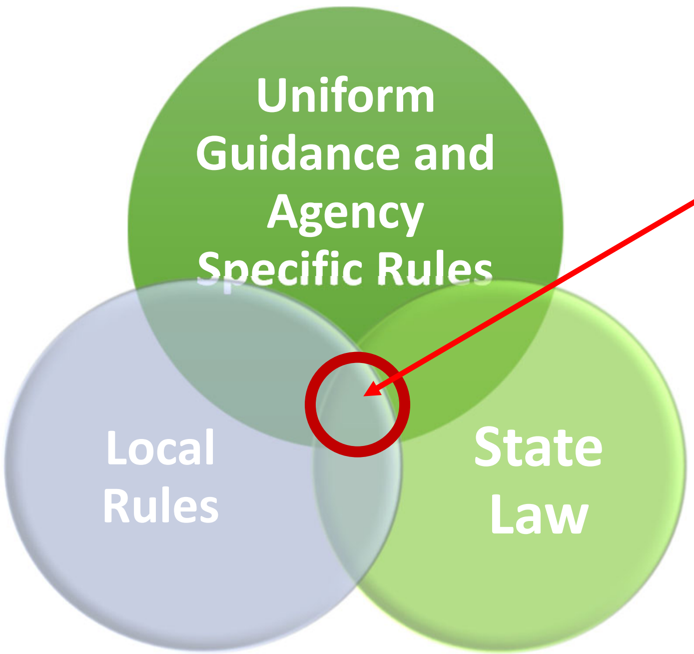
Don't despair! You can do it!

2021 OMB Compliance Supplement, https://www.whitehouse.gov/wp-content/uploads/2021/08/OMB-2021-Compliance-Supplement_Final_V2.pdf

Your Unit's Written Purchasing Policy

(2 C.F.R. § 200.318(a))

Purchasing Policy – A First Principle



- "The non-Federal entity must have and use documented procurement procedures, consistent with State, local, and tribal laws and regulations and the standards of this section, for the acquisition of property or services required under a Federal award or sub-award. The non-Federal entity's documented procedures must conform to the procurement standards identified in 200.317 through 200.327 of this subpart."[1]

- Subpart D (2 C.F.R. §§ 200.317 – 200.327) provides procurement standards that *differ* from North Carolina law.

[1] 2 C.F.R. § 200.318(a).

Your Unit's Written Purchasing Policy

(2 C.F.R. § 200.318(a))

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

Your Unit's Written Purchasing Policy

(2 C.F.R. § 200.318(a))

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

- Most, but not all, categories of federal grant funds are subject to the Uniform Guidance procurement standards.
- ARPA LFRF monies are subject to those standards, meaning recipients and subrecipients must follow those procurement standards when spending ARPA LFRF.

Recommendation #1: 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.

Recommendation #2: Ask potential subrecipients for purchasing policy and compare against Uniform Guidance requirements and/or state law requirements.

Your Unit's Written Purchasing Policy

(2 C.F.R. § 200.318(a))

Purchasing Policy

Applicability of the Policy
Expenditure of Federal Grant Funds

Pre-Solicitation Requirements
Before Bidding or Contracting

Procurement Methods
While Bidding

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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.*

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.*

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).

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

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

Procurement Methods
While Bidding

Post-Solicitation Requirements
While Entering Into Agreements

Final Requirements
During and After Performance

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.

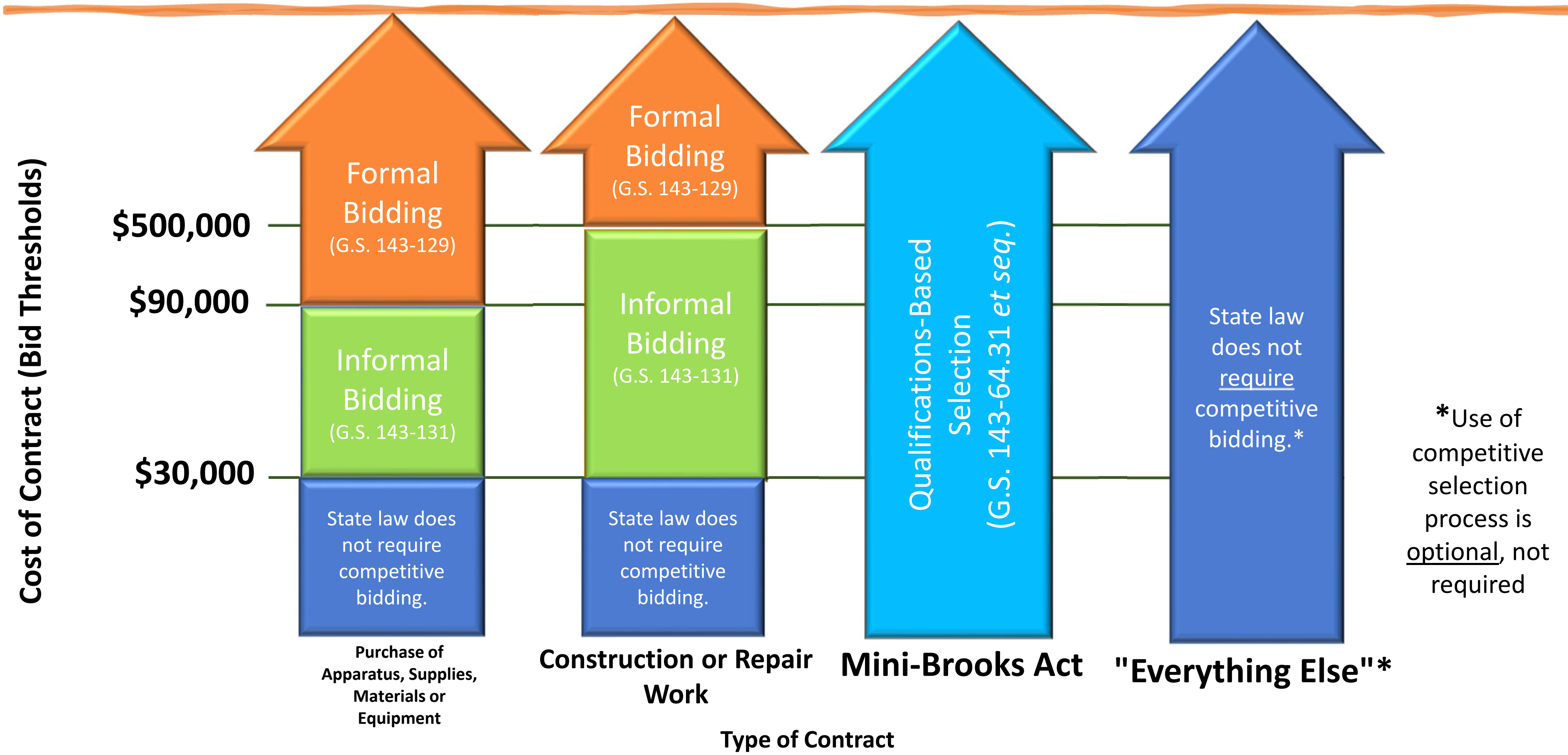
Adopt Specific Purchasing Procedures (2 C.F.R. § 200.319(d))

- Require clear and accurate description of item or service sought.
- Identify all requirements that bidders must fulfill and all evaluation factors.

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).

Procurement Methods – N.C. Law

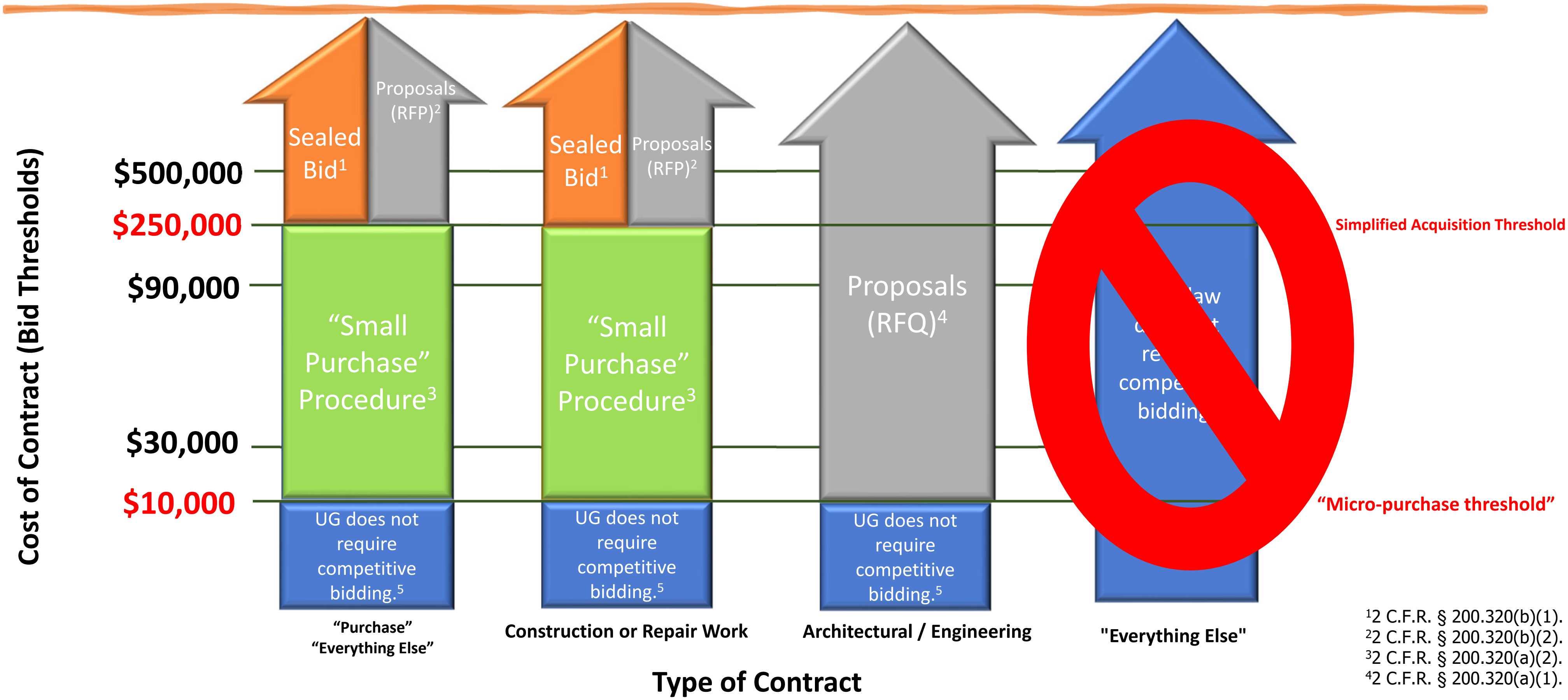


More Subpart D Terminology

- “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.

[1]2 C.F.R. § 200.1.

Procurement Methods – Uniform Guidance



[1] 2 C.F.R. § 200.320(b)(1).
[2] 2 C.F.R. § 200.320(b)(2).
[3] 2 C.F.R. § 200.320(a)(2).
[4] 2 C.F.R. § 200.320(a)(1).

<u>Optional</u> Ability to Increase the Micro-Purchase Threshold (2 C.F.R. § 200.320(a)(1)(iv)(C))

Non-Federal Entity May Self-Certify a Micro-Purchase Threshold Up To $50,000

- Non-Federal entities must self-certify the threshold on annual basis.
- Must maintain documentation to be made available to auditors in accordance with 2 C.F.R. § 200.334 (records retention).

- 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)

Certification Must Include:

1. A **<u>justification</u>** for the threshold.
2. A **<u>clear identification</u>** of the threshold.
3. **<u>Supporting documentation</u>** of any of the following:

A. Qualification as a low-risk auditee for most recent audit in accordance with 2 C.F.R. § 200.520;

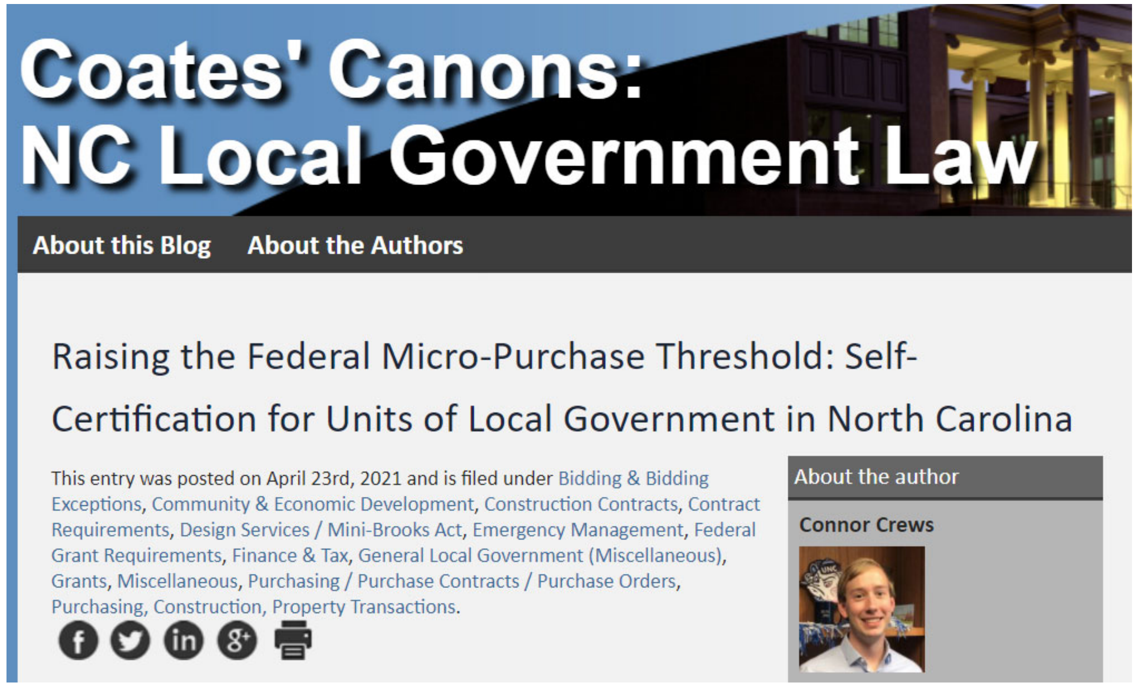
B. An annual internal institutional risk assessment to identify, mitigate, and manage financial risks; ***OR***

C. For public institutions, a **<u>higher threshold consistent with state law</u>**

Optional Ability to Increase the Micro-Purchase Threshold

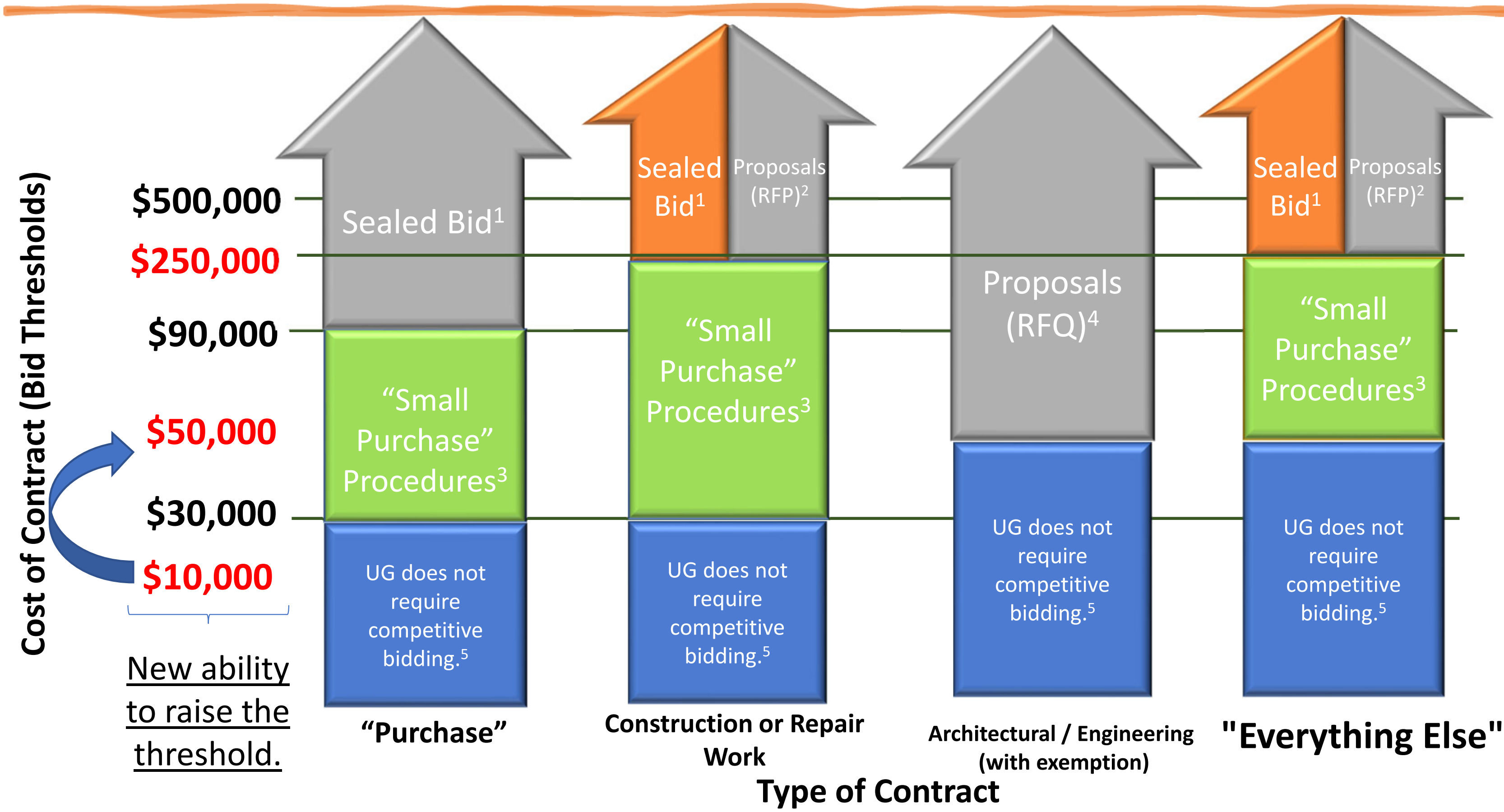
2 C.F.R. § 200.320(a)(1)(iv)(C)

Blog Post includes explanation and template resolution.



https://canons.sog.unc.edu/raising-the-federal-micro-purchase-threshold-self-certification-for-units-of-local-government-in-north-carolina/

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



[1] 2 C.F.R. § 200.320(b)(1).
[2] 2 C.F.R. § 200.320(b)(2).
[3] 2 C.F.R. § 200.320(a)(2).
[4] 2 C.F.R. § 200.320(a)(1).

State and UG Procurement Methods

N.C. Public Procurement Method	Uniform Guidance Counterpart Method
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))

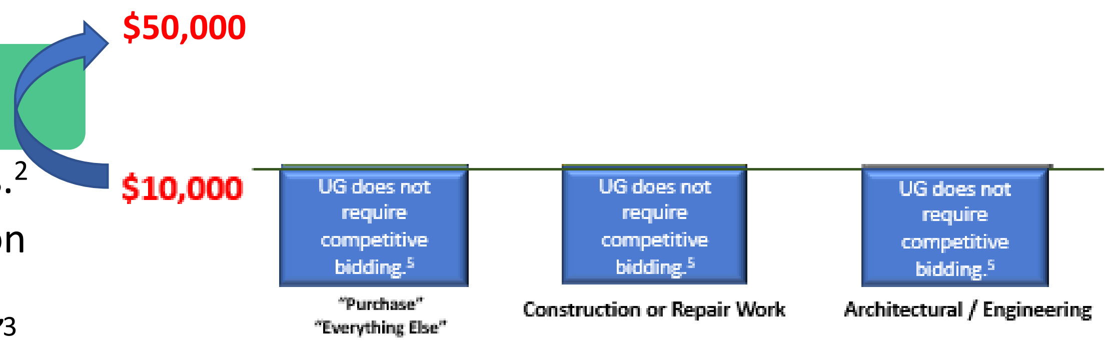
Micro-Purchases (2 C.F.R. 200.320(a)(1))

What is a "micro-purchase"?

- "The acquisition of supplies or services, the ***aggregate dollar amount*** of which does not exceed the ***micro-purchase threshold***."[1]

What does the UG method require?

1. Equitable distribution among qualified suppliers.[2]
2. Determination that price is "reasonable based on research, experience, purchase history or other information and documents it files accordingly."[3]



Combining UG Method With NC Method

- Equitably distribute.
- Determine reasonable price.

[1] 2 C.F.R. § 200.320(a)(1).
[2] *Id.*
[3] 2 C.F.R. § 200.320(a)(1)(ii).

A Question You Might Have

Can a unit use a credit card or P-card to make a micro-purchase?

Yes.

"Charge or purchase cards can be used for micro-purchases as long as the non-Federal entity has documented and approved procedures for such purchases."[1]

BUT

1. Unit still must determine that price is "reasonable based on research, experience, purchase history or other information and documents it files accordingly."

AND

2. Contractor must certify to unit its compliance with Byrd Anti-Lobbying Amendment (31 U.S.C. 1352).

[1] 2 CFR Frequently Asked Questions (May 3, 2021), https://www.cfo.gov/assets/files/2CFR-FrequentlyAskedQuestions_2021050321.pdf.

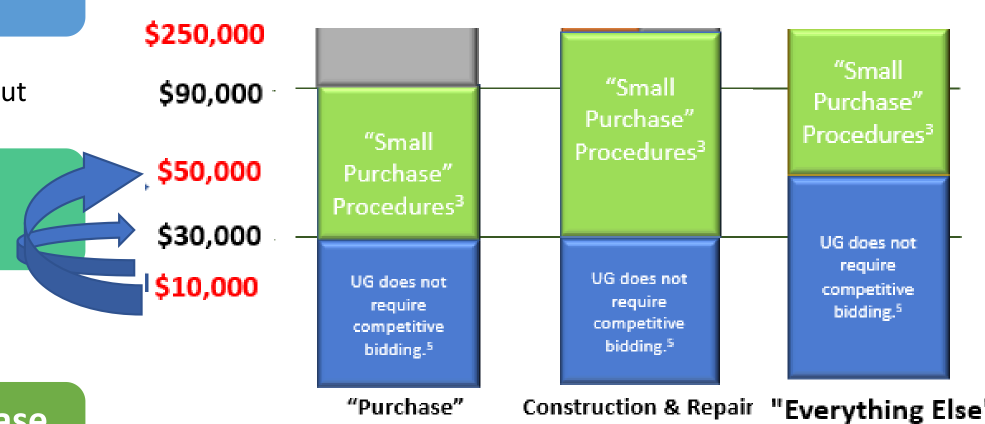
Small Purchase Procedures (2 C.F.R. 200.320(a)(2))

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."[1]

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.***"[2]



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".
- ✓ Construction or repair project involving building? Solicit M/WBE / HUB participation. 2 C.F.R. 200.321 / G.S. 143-131(b).
- ✓ Keep a record of quotes received.
- ✓ Award to lowest, responsive responsible bidder.

[1] 2 C.F.R. § 200.320(a)(2)(i).
[2] 2 C.F.R. § 200.320(a)(2)(ii).

Formal Procurement Method #1: Sealed Bidding (2 C.F.R. 200.320(b)(1))

When does it apply?

- When the value of procurement of property or services <u>exceeds</u> the Simplified Acquisition Threshold ("SAT") or a lower threshold established under state or local law.
  - The SAT is, $250,000 for each type of contract *except those for the purchase of "apparatus, supplies, materials or equipment" ($90,000).*

What does the UG method require?

- Public advertising.
  - UG does not clarify whether newspaper publication is required, but it can assist.
- Solicitation from an adequate number of qualified sources.
- Public bid opening at the time advertised.
- Receipt of two bids prior to award.
- Firm fixed-price contract (lump sum or unit price) awarded to lowest responsive responsible bidder.
- Rejection of bids only for sound documented reasons.
- Bonding (for construction).

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

Combining UG Method with NC Method

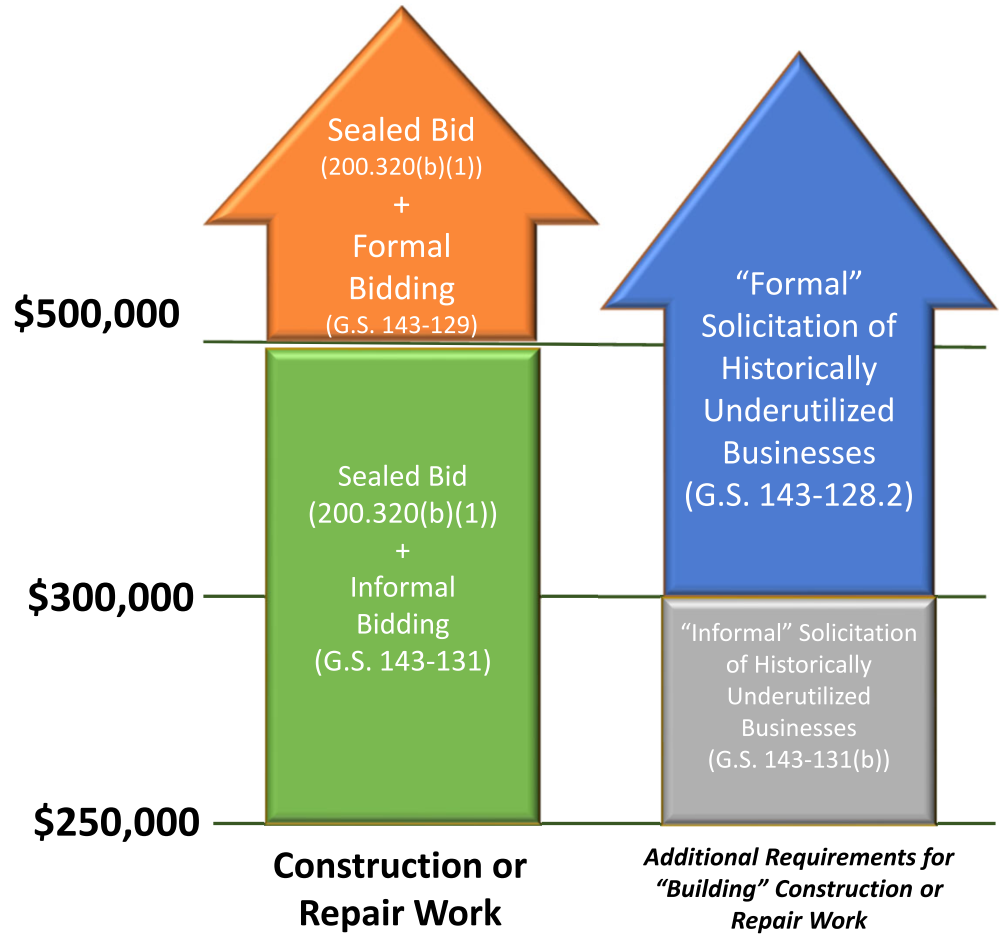
(Construction or Repair Work Exceeding $500,000)

- 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 <u>can prove</u> "public advertising" under UG.
- Receipt of paper, sealed bids.
- Public bid opening at the time advertised.
- Receipt of <u>three</u> 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).

***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).



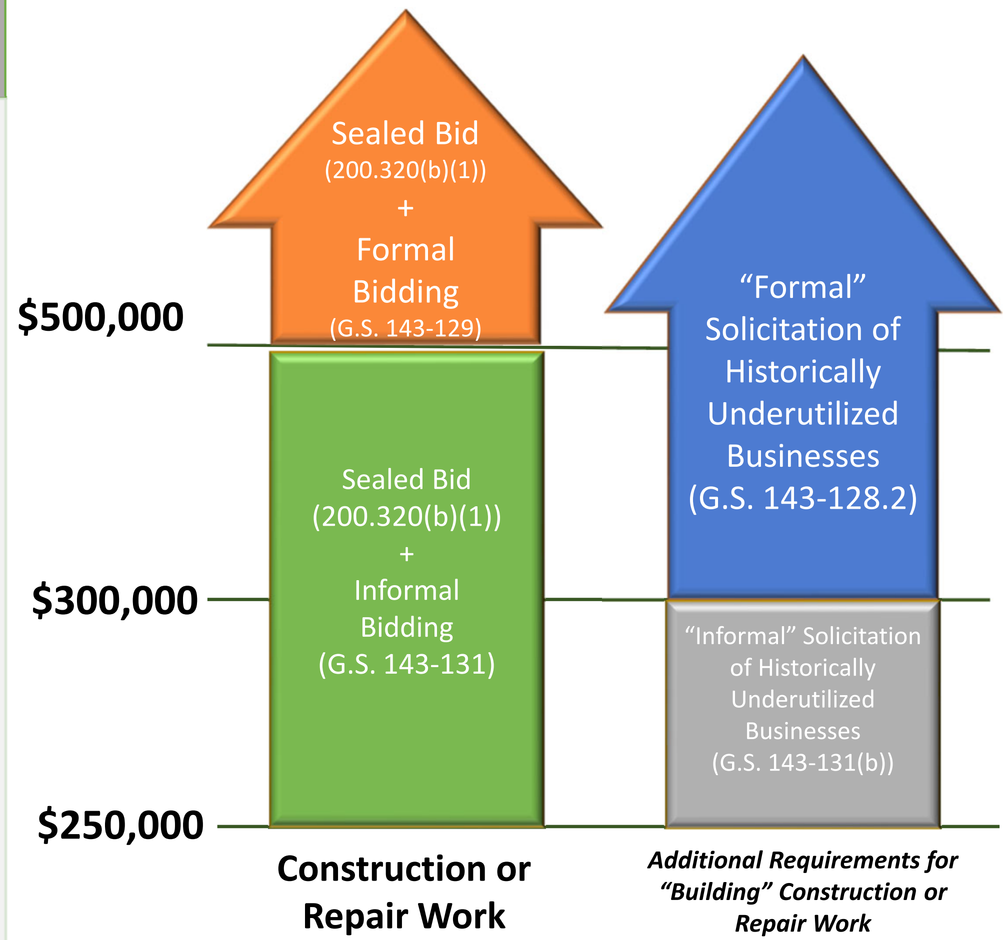
Formal Procurement Method #1:
Sealed Bidding (2 C.F.R. 200.320(b)(1)) – Construction or Repair Work

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 subcontracts are to be let, to take these steps.



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)

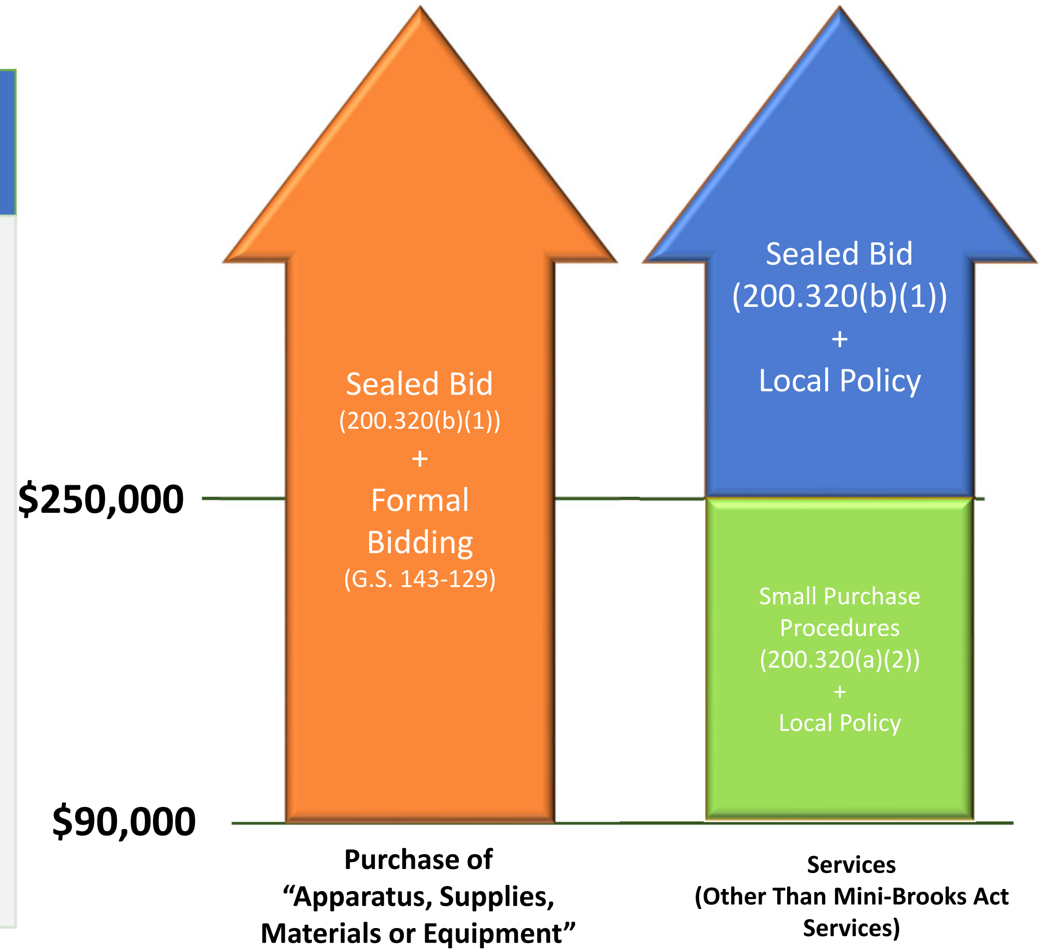
- Advertisement in newspaper of general circulation or electronically (with board approval). (G.S. 143-129(b)).
  - Compliance Tip: Affidavit of publication likely <u>can prove</u> "public advertising" under UG.
- Affirmative steps to seek small and M/WBE participation. (2 C.F.R. 200.321)
- Receipt of paper, sealed bids.
- Public bid opening at the time advertised.
- Receipt of <u>two</u> 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 <u>can prove</u> "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 <u>two</u> 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*."

[1] 2 C.F.R. § 200.320(a)(1).

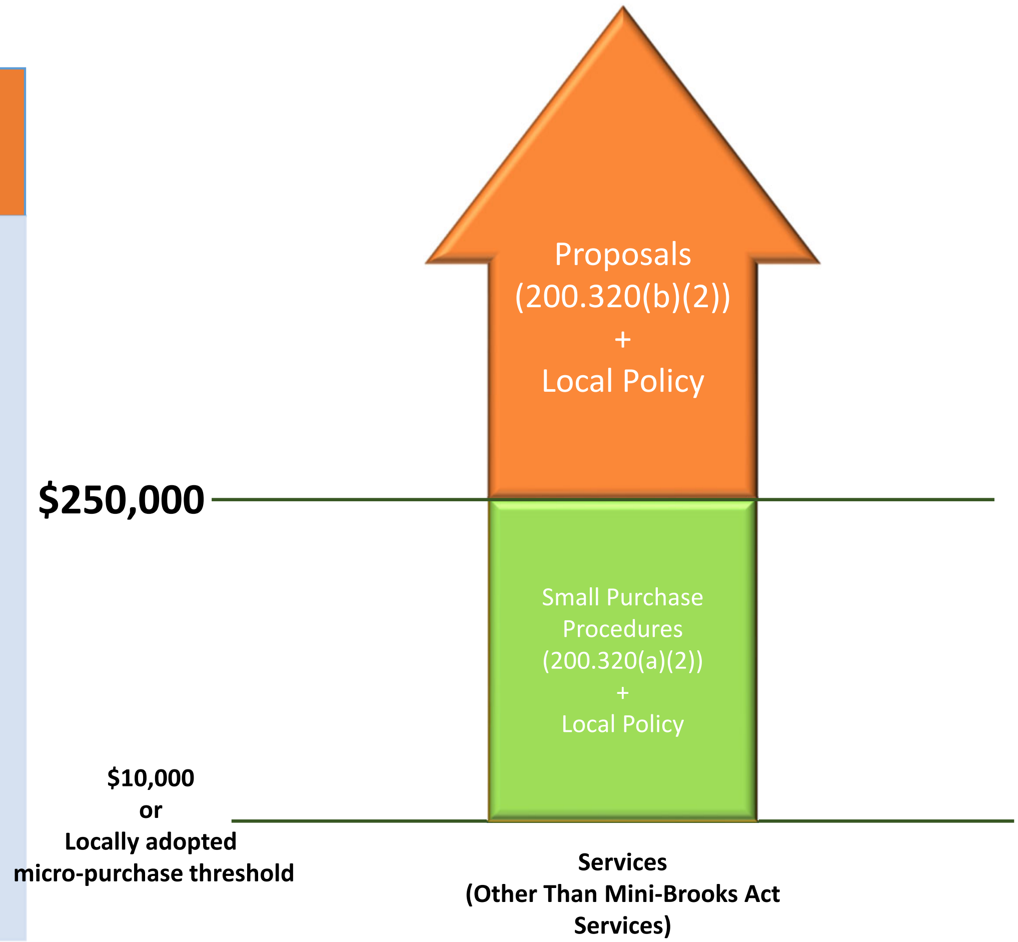
[2] *Id.*

[3] 2 C.F.R. § 200.320(a)(1)(ii).

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.
- Affirmative steps to seek small and M/WBE participation. (2 C.F.R. 200.321).
- 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*."



Contracting for Auditing Services

200.501: Audit Requirements

- Single audit or program-specific audit performed in conformity with 2 CFR Part 200 required for non-federal entities expending $750,000 or more

200.509: Auditee Selection & Evaluation

- Responsiveness to RFP
- Experience
- Availability of staff, professional qualifications, technical abilities
- Results of peer and external quality control reviews
- Price
- Try to utilize minority and women-owned firms
- May not engage an auditor who prepares the indict cost proposal or cost allocation plan if the indirect costs in the prior year exceeded $1 million

Contracting for Auditing Services

N.C.G.S. 159-34: Annual Audit Requirements

- Annual audit shall evaluate performance regarding compliance with all federal and State agency regulations
- Auditor selected by governing board

- Evaluation criteria (follow 2 C.F.R. 200.509)
  - Responsiveness to RFP
  - Availability of staff
  - Results of peer reviews
  - Price

- NC Department of State Treasurer website contains model RFPs for auditing services

- Key Takeaway: Arrange for the audit required by this part in accordance with §200.509 (auditor selection), and ensure it is properly performed and submitted when due in accordance with §200.512 (report submission) and N.C.G.S. § 159-34.

Formal Procurement Method #2:
Proposals (2 C.F.R. 200.320(b)(2)) –
Mini-Brooks Act Services (Architectural, Engineering, or Surveying Services)

Combining UG Method with NC Method

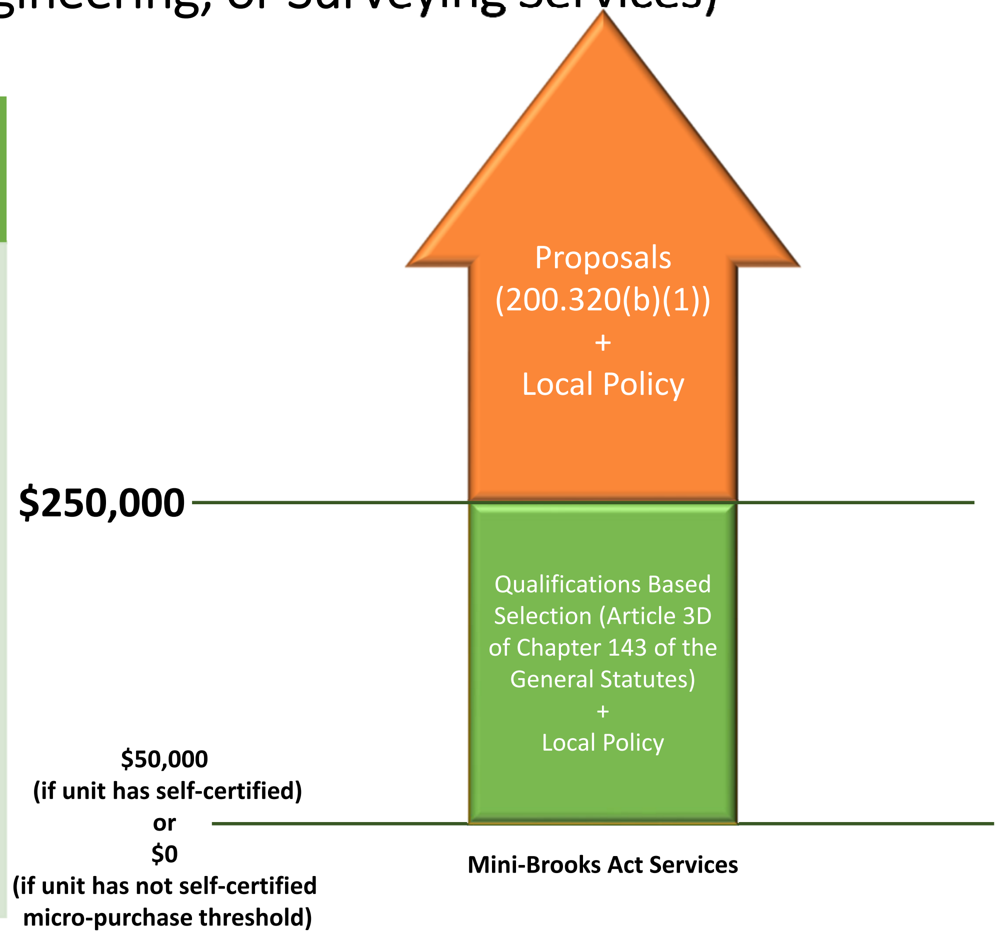
(Qualifications-Based Selection for Architectural, Engineering, or Surveying Services Exceeding $250,000)

- Request for <u>qualifications</u> must be "publicized".
  - Compliance Tip: Affidavit of publication from newspaper of general circulation likely <u>can prove</u> "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.

Small Purchase Procedures +

NC Method (QBS).

- Request for <u>qualifications</u> must be "announced".
  - Publication in newspaper not required, but can be helpful.
- Standard of Award: "Demonstrated competence and qualification without regard to fee other than *unit price* information".
- Responses from "an adequate number of qualified offerors as determined appropriate by the non-Federal entity."
- 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)).
- Negotiate "fair and reasonable" compensation.



Alternative Construction Delivery Methods (CAUTION)

What are the primary methods under N.C. law?	NC Standard of Award – Qualifications Based Selection (Article 3D of Chapter 143)	UG Proposals Standard of Award (2 C.F.R. 200.320(b)(2))	My Recommendation
Construction Management at-Risk (G.S. 143-128.1) Design-Build (G.S. 143-128.1A)	• 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".	• "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."**	• **Assume CMAR and Design-Build are not permissible construction delivery methods.** • **Consult with counsel before entering into alternative construction delivery method using ARPA FRF monies.**

Noncompetitive Procurement (2 C.F.R. 200.320(c))

When is it permissible?

If a unit makes a micro-purchase. (c)(1)	Item is available only from a single source. (c)(2)	The public exigency or emergency for the requirement will not permit a delay resulting from publicizing a competitive solicitation. (c)(3)	Express authorization from a Federal awarding agency or pass-through entity in response to a written request from the non-Federal entity. (c)(4) • Treasury will not be providing express authorization for CLFRF.	After solicitation of a number of sources, competition is determined inadequate. (c)(5)

Your Unit's Written Purchasing Policy

(2 C.F.R. § 200.318(a))

Purchasing Policy

Procedure for Verifying That Contractor Is Not Debarred, Suspended, or Excluded

(2 C.F.R. § 200.318(h))

(2 C.F.R. § 200.214)

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

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."

Verify Contractors' Debarment, Suspension, or Exclusion Status

FRF Award Terms and Conditions

Federal regulations applicable to this award include . . .

OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement), 2 C.F.R. Part 180, *including the requirement to include a term or condition in all lower tier covered transactions (contracts and subcontracts described in 2 C.F.R. Part 180, subpart B) that the award is subject to 2 C.F.R. Part 180 and Treasury's implementing regulation at 31 C.F.R. Part 19.*

How do 2 C.F.R. Part 180 and 31 C.F.R. Part 19 apply to FRF procurement?

- Prohibit 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
  1. *contracts for goods and services purchased by a recipient or subrecipient in the amount of $25,000 or more.*
  2. *subcontracts awarded by contractors in the amount of $25,000 or more.*
  3. *contracts for federally required audit services.*
- *See* 2 C.F.R. 180.210 and 31 C.F.R. 19.210 (each defining "covered transaction").

What do we need to do?

1. Search SAM.gov Exclusions List (https://sam.gov/content/exclusions) for counterparty name. If possible, also search names of counterparty principals or "sounds like" names.
2. Document searches in your procurement files.
3. Add a "clause or condition" to "covered transaction" contracts (require subrecipients to do the same).
4. Require contractors to include "clause or condition" in "covered transaction" subcontracts.

For more information, see 31 C.F.R. Subpart C.

Looking for contract language? FAA and FEMA provide guides, but agency-specific laws and regulations vary. Consult with counsel.

Your Unit's Written Purchasing Policy

(2 C.F.R. § 200.318(a))

Purchasing Policy

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Expenditure of Federal Grant Funds

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During and After Performance

Include Federally Required Clauses in ARP FRF Contracts

- 2 C.F.R. 200.327 *requires* inclusion of all *applicable* contract clauses in Appendix II to 2 C.F.R. Part 200.
    - 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)
        - *Huawei / ZTE Ban* (2 C.F.R. 200.216).

Required Contract Clauses (2 C.F.R. Part 200, Appendix II)

Looking for contract language? FEMA provides a guide, but agency-specific laws and regulations vary. Consult with counsel. **Copying and pasting Appendix II is insufficient!**

Citation	Summary of Requirement	FRF Compliance Tips and Notes
(A) Remedies for Breach	Contracts exceeding the Simplified Acquisition Threshold ($250,000) must address administrative, contractual, or legal remedies where contractors violate or breach contract terms.	Applies to all FRF-supported contracts > $250,000. Counsel should review or draft.
(B) Termination for Cause / Convenience	Contracts in excess of $10,000 must address ability of non-Federal entity to terminate (1) for cause, and (2) for convenience (i.e., for any reason).	Applies to all FRF-supported contracts > $10,000. Counsel should review or draft.
(C) Equal Opportunity Clause	"Federally assisted construction contracts" (41 C.F.R. 60-1.3) must include the Equal Opportunity Clause specified at 41 C.F.R. Part 60-1.4(b).	FRF-supported construction contracts with a cost > $2,000 are likely "federally assisted construction contracts."
(D) Davis-Bacon Act	"*When required by Federal program legislation*", all prime construction contracts in excess of $2,000 must require compliance with the Davis-Bacon Act (40 U.S.C. 3141-3144; 3146-3148) and implementing regulations. Generally, the Act requires payment of "prevailing wages" specified in Department of Labor guidance and payment no less than once per week.	FAQ 6.17: Treasury states that the Davis-Bacon Act does not apply to eligible infrastructure projects funded solely by CLFRF. The FAQ does not address capital expenditures outside of water, sewer, or broadband projects, but ARPA does not explicitly incorporate the requirements of the Davis-Bacon Act. For these projects, it is not clear that compliance with the Davis-Bacon Act is "required by Federal program legislation." Consult with counsel before proceeding.
(D) Copeland Anti-Kickback Act	All prime construction contracts in excess of $2,000 include a provision for compliance with the Copeland "Anti-Kickback" Act (40 U.S.C. 3145), which generally prohibits contractors from inducing any person involved in construction to give up any compensation to which they are entitled.	FRF-supported construction contracts with a cost > $2,000 are within scope.

Required Contract Clauses (2 C.F.R. Part 200, Appendix II) (cont.)

Looking for contract language? FEMA provides a guide, but agency-specific laws and regulations vary. Consult with counsel. **Copying and pasting Appendix II is insufficient!**

Citation	Summary of Requirement	**FRF Compliance Tips and Notes**
(E) Contract Work Hours and Safety Standards Act	Requires computing wages of mechanics and laborers used in construction work on basis of 40-hour work week and 1.5x pay for overtime wages. Prohibits requiring laborers and mechanics from working in unsanitary, hazardous, or dangerous settings.	Applies to FRF-supported contracts > $100,000 involving employment of mechanics or laborers on construction work. Counsel should review or draft.
(F) Rights to Inventions Made Under a Contract or Agreement	Requires non-Federal entity to comply with 37 C.F.R. Part 401 (implementing provisions of the Bayh-Dole Act), which governs rights to certain intellectual property developed with the proceeds of federal funding.	Treasury has not given guidance on this issue, but it is unlikely that FRF Awards meet the definition of "funding agreements" in 37 C.F.R. 401.2(a).
(G) Clean Air Act and Federal Water Pollution Control Act	Contracts and subawards in excess of $150,000 must contain a provision requiring non-Federal award to agree to comply with all standards, orders, or regulations issued pursuant to the Clean Air Act and Federal Water.	Applies to FRF-supported contracts with a cost > $150,000. Counsel should review or draft.
(H) Suspension and Debarment	Contracts cannot be awarded to excluded parties. Contractor should certify that contractor, principals, or affiliates are excluded or disqualified. Contractor should agree to flow down requirements to covered transactions.	See previous slide on Suspension and Debarment.
(I) Byrd Anti-Lobbying Amendment	Contractors that apply or bid on contracts exceeding $100,000 must file with recipient or subrecipient the certification found at 31 C.F.R. Part 21, Appendix A (Certification Regarding Lobbying). Separately, all contractors must certify to tier above that it will not and has not used Federal appropriate funds to lobby (as further defined in the clause).	Certification applies to bids or awards on contracts with cost of $100,000 or more. All contractors must certify, via contract, to tier above that no Federal appropriated funds have or will be used to lobby.

Required Contract Clauses (2 C.F.R. Part 200, Appendix II) (cont.)

Looking for contract language? FEMA provides a guide, but agency-specific laws and regulations vary. Consult with counsel. **Copying and pasting Appendix II is insufficient!**

Citation	Summary of Requirement	**FRF Compliance Tips and Notes**
(J) Procurement of Recovered Materials	Requires contractors to comply with Section 6002 of the Solid Waste Disposal Act, which generally requires procuring only items designated by EPA at 40 CFR Part 247 as containing "highest percentage of recovered materials practicable" where the cost of a purchase exceeds $10,000.	Applies to FRF-supported contracts involving purchases of $10,000 or more. Counsel should review or draft.
(K) Huawei / ZTE Ban ("Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment") (NEW in 2020) (see 2 C.F.R. 200.216)	Prohibits recipients or subrecipients from obligating grant funds to: (1) Procure or obtain; (2) Extend or renew a contract to procure or obtain; or (3) Enter into a contract (or extend a renew a contract) to procure or obtain . . . Equipment, services, or systems that uses covered telecommunications equipment or services as a substantial or essential part of any system, or as critical technology of any system. "Covered telecommunications equipment or services" includes items produced by certain Chinese manufacturers specified in 2 C.F.R. 200.216.	FEMA has provided a sample provision. Counsel should review or draft.
(K) Domestic Preference Clause (NEW in 2020) (see 2 C.F.R. 200.322)	New 2 C.F.R. 200.322 states that "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 the section must be included in all contracts.	Applies to all FRF-supported contracts. Counsel should review or draft.

Your Unit's Written Purchasing Policy

(2 C.F.R. § 200.318(a))

Purchasing Policy

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

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.

2 C.F.R. § 200.318(i).

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 ARPA Local Fiscal Recovery Funds: Avoiding Hot Water

Conflicts of Interest in Procurement: Sources of Rules

8. Conflicts of Interest. Recipient understands and agrees it must maintain a conflict of interest policy consistent with 2 C.F.R. § 200.318(c) and that such conflict of interest policy is applicable to each activity funded under this award. Recipient and subrecipients must disclose in writing to Treasury or the pass-through entity, as appropriate, any potential conflict of interest affecting the awarded funds in accordance with 2 C.F.R. § 200.112.

FRF Award Terms and Conditions, Section 8

\+

Uniform Guidance

2 C.F.R. 200.318(c)(1)

Conflicts of Interest Related to the Selection, Award, and Administration of Contracts

2 C.F.R. 200.318(c)(2)

Organizational Conflicts of Interest Related to Procurement Actions

2 C.F.R. 200.112

Disclosure to Federal Awarding Agency or Pass-Through Entity of Conflict of Interest

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

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))

When does a conflict arise?

- 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.

Possible Examples of a "Financial or Other Interest" in a Firm Considered for a Contract	Possible Examples of a "Tangible Personal Benefit" From a Firm Considered for a Contract
1. Direct or indirect equity interest in a firm considered for a contract, which may include: - Stock in a corporation. - Membership interest in a limited liability company. - Partnership interest in a general or limited partnership. - 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. - Option to purchase any equity interest in a firm.	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.
2. Holder of any debt owed by a firm considered for a contract. - Secured debt (e.g., debt backed by an asset of the firm (like a firm's building or equipment)) - Unsecured debt (e.g., a promissory note evidencing a simple promise to repay a loan). ○ Holder of a judgment against the firm.	2. Referral or promise of referral of business from the firm considered for a contract
3. Supplier or subcontractor to a firm considered for a contract.	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)

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

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

Local Government Officials involved in selection, award, or administration

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

Local Government Agents involved in selection, award, or administration

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

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 the U.S. Treasury 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".

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 the U.S. Treasury and terminating the contract.

AMERICAN RESCUE PLAN

[1]The 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.

Example #1

The Brother

- A County wants to use LFRF to purchase PPE for its frontline health employees providing vaccinations. A county commissioner's brother owns a local medical supply store. The County bids a substantial purchase of PPE from the medical supply store using LFRF monies, and the local medical supply store is the lowest responsive, responsible bidder.
- Any problems here?

Violation of N.C. Law?

- G.S. 14-234(a)(1) prohibits public officials or employees involved in "making or administering" contracts from receiving a "direct benefit" from the contract.
  - A "direct benefit" arises when the public official or employee, or their spouse, (1) owns 10% or more of the counterparty under contract with the unit; (2) receives income or commission directly under the contract; or (3) acquires property under the contract.
- Result? No violation of N.C. law.

Violation of UG?

- Yes. County commissioner is involved in administration of the contract and is a Covered Individual. The brother is an immediate family member of a Covered Individual—a "Related Party". This violates the UG standard because the Related Party has a financial interest in a firm considered for a contract.

Example #2

The Consultant

- A Town has hired a consulting firm to advise on the best ways to allocate LFRF monies. The consultant recommends to the Town that it use LFRF monies on mental health services for those whose substance abuse worsened during the pandemic. After a competitive solicitation process, the Town hires 123 Behavioral Health Services, Inc. The consulting firm is currently completing a strategic planning process for 123 Behavioral Health.
- Any problems here?

Violation of N.C. Law?

- G.S. 14-234(a)(1) prohibits public officials or employees involved in "making or administering" contracts from receiving a "direct benefit" from the contract.
  - A "direct benefit" arises when the public official or employee, or their spouse, (1) owns 10% or more of the counterparty under contract with the unit; (2) receives income or commission directly under the contract; or (3) acquires property under the contract.
- Result? <u>No violation of N.C. law.</u>

Violation of UG?

- <u>Potentially</u>. Assume the consulting firm is an "agent" of the Town. Depending on its involvement, it may have been involved in the "selection, award, or administration" of this contract. Conservatively, the consulting firm has a "financial interest" in 123 Behavioral Services, Inc. This may violate the UG standard.

Organizational Conflicts of Interest
(2 C.F.R. 200.318(c)(2))

If Applicable, Address Organizational COIs in Your Written Conflict of Interest Policy

- If a 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 <u>organizational conflicts of interest</u>.

What is a "parent", "affiliate", or "subsidiary"?

- The Uniform Guidance does not define "parent" or "affiliate". EPA has suggested that its grantees consult the term "affiliate" in 2 C.F.R. 200.180.905. ("Persons are *affiliates* of each other if, directly or indirectly, either one controls or has the power to control the other or a third person controls or has the power to control both. The ways a Federal agency may determine control include, but are not limited to: (a) interlocking management or ownership; (b) identity of interests among family members; © shared facilities and equipment; (d) common use of employees . . . ."
- It does define "subsidiary" as an "entity in which more than 50 percent of the entity is owned or controlled directly by a parent corporation or through another subsidiary of a parent corporation."

What is an organizational COI?

- Because of its relationship with a parent, affiliate, or subsidiary organization, it is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

Conflicts of Interest in Subrecipient Selection?

Do these rules apply to selection of *subrecipients*?

8. Conflicts of Interest. Recipient understands and agrees it must maintain a conflict of interest policy consistent with 2 C.F.R. § 200.318(c) and that such conflict of interest policy is applicable to each activity funded under this award. Recipient and subrecipients must disclose in writing to Treasury or the pass-through entity, as appropriate, any potential conflict of interest affecting the awarded funds in accordance with 2 C.F.R. § 200.112.

For now, assume they do unless Treasury indicates otherwise.

FRF Award Terms and Conditions, Section 8

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Uniform Guidance

2 C.F.R. 200.318(c)(1)

Conflicts of Interest Related to the Selection, Award, and Administration of Contracts

2 C.F.R. 200.318(c)(2)

Organizational Conflicts of Interest Related to Procurement Actions

2 C.F.R. 200.112

Disclosure to Federal Awarding Agency or Pass-Through Entity of Conflict of Interest

Conflicts of Interest in Subrecipient Selection

Do these rules apply to selection of *subrecipients*?

8. Conflicts of Interest. Recipient understands and agrees it must maintain a conflict of interest policy consistent with 2 C.F.R. § 200.318(c) and that such conflict of interest policy is applicable to each activity funded under this award. Recipient and subrecipients must disclose in writing to Treasury or the pass-through entity, as appropriate, any potential conflict of interest affecting the awarded funds in accordance with 2 C.F.R. § 200.112.

For now, assume they do unless Treasury indicates otherwise.

Why?

2 C.F.R. 200.112 requires federal agencies to "establish conflict of interest policies for Federal awards."

Treasury has not done that, but other agencies (e.g., EPA) have. EPA's policy applies the standards in 2 C.F.R. 200.318(c)(1) and 2 C.F.R. 200.318(c)(2) to the "award, administration, or monitoring of subawards"

Application:

Recipient's employees, officers, or agents (or their immediate family members) are involved in award, or administration of subrecipient relationship and have financial interest in or are receiving tangible personal benefit from subrecipient or contractor to that subrecipient. Consider this to violate 200.318(c)(1) and disclose.

Questions?