

# Interim Best Practice Guide for Procuring Services, Supplies, and Equipment Under EPA Assistance Agreements.

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## Introduction.

As a recipient of EPA financial assistance agreement (grants and cooperative agreements), you will likely find it necessary to purchase or “procure” professional services, supplies or equipment, in order to complete the work under your EPA awards. EPA developed this Best Practice Guide (Guide) to help recipients other than states meet federal requirements contained in the Procurement Standards of the Uniform Grant Guidance (UGG) published at [2 CFR Part 200](#) when making such purchases.<sup>1</sup> **If you have questions regarding any of the matters addressed in this guidance EPA encourages you to contact your Grants Specialist.**

As provided in [2 CFR 200.317](#), with limited exceptions, states follow the same policies and procedures they follow for procurements financed with non-Federal funds.<sup>2</sup> This Guide should, however, be useful to state pass-through entities when monitoring subrecipient compliance with the UGG because the Procurement Standards “flow down” to subrecipients.<sup>3</sup>

## Overview:

This Guide describes the financial transactions covered by the competitive procurement requirements and other rules you must follow when awarding and administering EPA funded contracts. **With very few exceptions, recipients must follow a competitive process when using EPA funds to purchase supplies, equipment and professional services in amounts that exceed the “micro-purchase” threshold of \$3500.**<sup>4</sup> Other rules cover purchasing systems, conflicts of interest, cost and price analyses, required contract clauses, and bonding requirements for construction. This Guide also provides guidance on unique EPA limitations regarding expenditures for consulting services.

## Differences between procurement contracts and other financial transactions.

It is very important to accurately characterize financial transactions you enter into with EPA funds. There are five basic ways to transfer funds to individuals, organizations, companies and

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<sup>1</sup> As provided at 2 CFR 200.110 “. . . non-Federal entities may continue to comply with the procurement standards in previous OMB guidance [e.g. 2 CFR Part 215] for a total of three fiscal years after this part goes into effect. As such, the effective date for implementation of the procurement standards for non-Federal entities will start for fiscal years beginning on or after December 26, 2017.” Please refer to question .110-6 of OMB’s July 2017 [Frequently Asked Questions](#) for details.

<sup>2</sup> States are subject to the requirement at [2 CFR 200.322](#) for procurement of recovered materials “where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000” per unit and any contract clauses required by [2 CFR 200.326](#). All recipients, including states, must comply with EPA’s rules for disadvantaged business enterprises at [40 CFR Part 33](#).

<sup>3</sup> Pass-through entities, as defined at 2 CFR 200.74, are recipients who provide subawards to eligible subrecipients.

<sup>4</sup> The micro-purchase threshold is periodically adjusted for inflation. Recipients may obtain the current amount of the micro-purchase threshold by using the electronic Code of Federal Regulations tool to access 48 C.F.R. Subpart 2.1 which is the definitions section of the Federal Acquisition Regulation.

government agencies to perform your EPA assistance agreements. The rules differ depending on the type of transaction. Information to help you accurately characterize financial transactions is provided below. EPA has also published detailed Frequent Questions (FQ) to further assist you in characterizing financial transactions at <https://www.epa.gov/grants/grants-policy-issuance-gpi-16-01-epa-subaward-policy-epa-assistance-agreement-recipients>. Note that referring to a financial transaction as a “partnership” does not determine the proper characterization of the transaction or the rules that apply.

1. You may hire personnel or pay current employees to perform work under the assistance agreement.
  - a. An individual must be on your organization’s payroll (i.e., receive a W-2) for tax purposes to be considered an employee. Requirements for documenting the proper use of EPA funds to compensate employees are found at [2 CFR 200.430](#) (wages) and [2 CFR 200.431](#) (fringe benefits).
  - b. Consultants or “contract employees” such as outside experts or training instructors who typically receive IRS Form 1099s for tax records are not considered employees for the purposes of your EPA assistance agreement. They are contractors.
2. You may procure supplies, equipment or professional services from individuals or for-profit companies through procurement contracts. You must have a system in place for administering contracts, ensuring that there are no conflicts of interest, conducting cost or price analyses when required and including contract clauses required by the UGG. EPA also has unique requirements which limit the amount you may pay individual consultants in certain cases. These requirements are discussed in more detail below.
3. You may fund a program or project that carries out a public purpose through a subaward of financial assistance to an eligible organization. Subawards usually may be entered into without competition so differentiating between procurement contracts and subawards is particularly important.
  - a. A subaward may take any form. Even if you refer to it as a contract—it is the substance of the transaction that matters. The UGG provides guidance at [2 CFR 200.330](#) for determining whether a transaction is a subaward or procurement contract and at [2 CFR 200.331](#) for overseeing and managing subrecipients. EPA has supplemented the UGG guidance through EPA’s Subaward Policy and FQs which are available at <https://www.epa.gov/grants/grants-policy-issuance-gpi-16-01-epa-subaward-policy-epa-assistance-agreement-recipients>. Transactions between recipients and for-profit firms or individual consultants are procurement contracts with very few exceptions. There also may be situations in which you enter into a procurement contract with a non-profit organization for commercially available services such as accounting.
  - b. EPA generally considers transactions between recipients and non-Federal units of government, institutions of higher education, and non-profit organizations to be

subawards regardless of whether the instrument is referred to as a contract.<sup>5</sup> Subrecipients must comply with the [UGG Procurement Standards](#) when procuring services, supplies or equipment. Pass-through entities are responsible for ensuring that their subrecipients procure services, equipment and supplies in compliance with the UGG standards.

4. You may transfer funds between agencies of the same unit of government under interagency service agreements or intergovernmental orders provided for at [2 CFR 200.417](#) or between departments of an Institution of Higher Education (IHE).
  - a. Transfers of funds between agencies of the same unit of government (e.g. state, tribal and local governments) are typically not procurement contracts for the purposes of the UGG. EPA also does not consider intragovernmental transfers to be subawards subject to the UGG's management and monitoring requirements of [2 CFR 200.331](#) unless state, tribal or local law provides otherwise.
  - b. Transfers of funds between departments of IHEs are typically not procurement contracts or subawards but are governed by the IHE's internal accounting practices for federal funds.
  - c. Additional guidance on internal transfers is available in the FAQs for EPA's Subaward Policy which is available at <https://www.epa.gov/grants/grants-policy-issuance-gpi-16-01-epa-subaward-policy-epa-assistance-agreement-recipients>
5. You may support the participation of an individual in your EPA -funded program through the payment of stipends, travel allowances, and similar participant support costs under [2 CFR 200.75](#) and [200.456](#). These transactions are neither procurement contracts nor subawards.
  - a. Examples of participant support costs include stipends paid to interns who are not employees of your organization, registration fees for community members attending conferences, and travel support for individuals who are not employees of your organization to enable them to participate in training, work groups, and research projects. EPA also considers rebates, subsidies or similar payments to companies or individuals to encourage their participation in environmental stewardship programs to be participant support costs to the extent consistent with the terms of an EPA assistance agreement.
  - b. You must have prior EPA approval to pay participant support costs or to re-budget funds EPA has provided for participant support costs to other direct cost categories. EPA guidance on participant support costs is available at <https://www.epa.gov/grants/grants-policy-issuance-gpi-16-01-epa-subaward-policy-epa-assistance-agreement-recipients>

## Regulations Governing Procurement Contracts.

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<sup>5</sup> Transfers of funds between recipients and Federal agencies are governed by the terms of the statute that authorizes the Federal agency to provide services to the recipient on a reimbursable basis.

The [UGG Procurement Standards](#) are at [2 CFR Part 200.317 through 200.326](#). The standards for the allowability of professional service costs are found at [2 CFR 200.459](#). Requirements for supplies are set forth at [2 CFR 200.314](#), and equipment is covered by [2 CFR 200.313](#). Additional information regarding the difference between equipment and supplies is provided below. What is important for the purposes of this guidance is that services, supplies and equipment must be purchased or leased in compliance with the [UGG Procurement Standards](#). Additionally, EPA has regulations at [40 CFR Part 33](#) (discussed below) requiring that recipients make good faith efforts use Disadvantaged Business Enterprises (DBE).

Some other EPA regulations may establish purchasing requirements that apply to certain programs. These regulations include those for [Superfund Technical Assistance Grants \(TAG\) \(40 CFR Part 35, Subpart M\)](#) and [Superfund Cooperative \(40 CFR Part 35, Subpart O\)](#). If you are a recipient of a TAG or Superfund Cooperative Agreement, review the applicable rule to ensure you comply with the specific requirements for your assistance agreement.

## **Basic requirements for procurement system.**

The UGG's Procurement Standards are designed to ensure that purchases are made at a reasonable price in a fair and openly competitive way. You must also document your procurement decisions in a manner that will ensure that the transaction has met Federal requirements. Many organizations that receive EPA financial assistance have their own procurement systems. If you have your own system which that meets the minimum standards of the UGG, you may use that system. If your system and procurement requirements do not meet the UGG's minimum requirements you may amend the system or your procurement requirements to meet UGG requirements. In any event, **you must conduct your procurements in accordance with the minimum UGG requirements even if your own procurement system has less stringent standards (e.g. for sole-source contracts).**

The following sections of this guidance are based on and provide cross-references to the applicable regulations and can help ensure you have an adequate procurement system. These are minimum standards and your organization may establish more comprehensive procedures.

1. Your procurement procedures must be documented and comply with State, local or tribal laws and regulation as well as Federal laws and the UGG. [2 CFR 200.318\(a\)](#). (Note: This regulation and the procurement standards cited below can be found here: [2 CFR 200.318 General procurement standards](#).)
2. You must oversee EPA-funded contracts to ensure contractors perform in accordance with the terms and conditions of the contract. [2 CFR 200.318\(b\)](#)
3. You must avoid procuring unnecessary or duplicative items and procure economically by consolidating or breaking out items to obtain discounts. Leasing equipment rather than purchasing may be more economical as indicated in the discussion below on equipment. [2 CFR 200.318\(d\)](#).

4. EPA encourages recipients to enter into intergovernmental or inter-entity agreements to competitively procure common goods and services. [2 CFR 200.318\(e\)](#). For example, some states have contracts with environmental consultants that local governments may also use to acquire consulting services without further competition. Two or more recipients or subrecipients could also solicit offers for common services such as developing web sites or laboratory analysis and share the cost of the contract. Recipients should document how the costs are allocated, the competitive procedures used to select the contractor, and the basis for selecting the individual or firm awarded the contract.

5. Recipients should consider obtaining excess or surplus Federal personal property from the General Services Administration in lieu of purchasing new equipment. [2 CFR 200.318\(f\)](#). Additional information on obtaining surplus property from GSA is available at <https://www.gsa.gov/portal/content/104591>

6. If you are carrying out a construction project, consider using “value engineering” clauses to reduce costs. [2 CFR 200.318\(g\)](#) : “Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost” PART 48—VALUE ENGINEERING <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=774c132cd89f432a4396b976f68a0661&mc=true&n=pt48.1.48&r=PART&ty=HTML>

7. Evaluate potential contractors’ performance histories, integrity records, and compliance with public policies and laws. [2 CFR 200.318\(f\)](#). Additional information regarding how to find out if a contractor is eligible to participate in an EPA funded project is provided below under “Suspension and Debarment”.

8. Document the history of the procurement. Minimum record -keeping requirements include the “. . . rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.” [2 CFR 200.318\(i\)](#). EPA recommends that recipients develop detailed paper or electronic files for each procurement action above the micro-purchase threshold. These files should include documentation of:

- a. Selection of contract type (e.g. fixed -price or cost reimbursement);
- b. Independent estimate of the cost for the contract;
- c. Solicitation of bids or offers and responses from potential contractors or sole-source justification;
- d. Determination that the price is reasonable;
- e. Final contract including any clauses required by [Appendix II of the UGG](#);
- f. Amendments to the contract and contract administration actions; and,
- g. Good faith efforts to use DBEs.

More information on these basic procurement requirements is provided below. Additionally, as required by [2 CFR 200.302\(b\)\(7\)](#) and [200.403](#) recipients must have written procedures for determining that costs are necessary, reasonable and allocable to the EPA assistance agreement. Recipients should, for example, be able to document why an EPA -funded contract is necessary to carry out a particular provision of the scope of work for the agreement. Recipients must also have internal controls as required by [2 CFR 200.302\(b\)\(4\)](#), including procedures to document that contracts were successfully performed (i.e., goods and services delivered and accepted) and charges to the agreement for contractual services are accurate and documented.

9. EPA is not a party to recipients' contracts. The recipient alone is responsible for exercising sound business judgment in administering contracts and settling protests, disputes and contractor claims. Recipients must, however, refer violations of law to the appropriate local, state or Federal authority. [2 CFR 200.318\(k\)](#).

## **Conflicts of Interest in Procurement.**

1. Financial Conflicts of Interest. As provided at [2 CFR 200.318\(c\)\(1\)](#):

No employee, officer, or agent [of a recipient] may participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts.

You must have written standards of conduct to implement these requirements. These standards may include exceptions when financial interests are not substantial / or unsolicited gifts are of nominal value (e.g. coffee mugs, baseball caps, pens and refrigerator magnets). However, recipients' codes of conduct must include disciplinary actions for violations.

Note: EPA takes financial conflict of interest violations seriously as reflected [in EPA's Recipient Conflict of Interest Policy](#). The Agency may disallow costs for contracts tainted by conflicts of interest whether the recipient has adopted a code of conduct or not.

2. Organizational Conflicts of Interest. Recipients other than state, tribal or local governments must also maintain written standards of conduct addressing organizational conflicts of interest. "Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization." [2 CFR 200.318\(c\)\(2\)](#). An example of an organizational conflict of interest is a situation in which a nonprofit recipient procures services from a for -profit affiliate with EPA funds. Guidance on relationships that make two organizations affiliated is available at [2 CFR 180.905](#).

## **Disadvantaged Business Enterprise (DBE) opportunity.**

Under [40 CFR 33.301](#), a recipient must make good faith efforts to contract with DBEs whenever procuring construction, equipment, services and supplies under an EPA financial assistance agreement. The good faith efforts are required methods to be used by all EPA recipients to ensure DBEs have the opportunity to compete for procurements funded by EPA financial assistance. The regulations at [40 CFR 33.501\(a\)](#) require a recipient to document its methods used to adhere to the good faith efforts and retain the documentation in the recipient's records. Recipient's failure to retain proper documentation may constitute noncompliance and result in remedial action as described in [40 CFR 33.105](#). Examples of proper documentation include, but are not limited to, email logs, phone logs, electronic searches and communication, handouts at conferences, flyers sent to DBEs or similar records. In addition, if one or more of the good faith efforts cannot be performed, EPA recommends that the circumstances that have precluded the efforts be documented and retained in the recipient's records.

In addition, [Appendix A to 40 CFR Part 33](#) requires that each procurement contract signed by an EPA financial assistance agreement recipient include the following term and condition:

The contractor shall not discriminate on the basis of race, color, national origin or sex in the performance of this contract. The contractor shall carry out applicable requirements of 40 CFR part 33 in the award and administration of contracts awarded under EPA financial assistance agreements. Failure by the contractor to carry out these requirements is a material breach of this contract which may result in the termination of this contract or other legally available remedies.

**EPA's Office of Small and Disadvantaged Business Utilization (OSDBU) provides DBE resources and Training at <https://www.epa.gov/resources-small-businesses>.** The competition requirements discussed below must take into consideration the recipient's obligations under 40 CFR Part 33.

## Competition.

**1. You must, to the maximum extent practicable, ensure open and free competition** in your purchasing. [2 CFR 200.319](#). Some situations that are indicators of unnecessarily restricted competition specified in the regulation include:

- Imposing unreasonable requirements on firms in order for them to compete for your business.
- Requiring unnecessary experience and excessive bonding.
- Allowing noncompetitive pricing practices between firms or between affiliated companies.
- Making noncompetitive awards to consultants that are on retainer contracts.
- Permitting organizational conflicts of interest.
- Specifying only a **brand name** product instead of allowing an **equal product** to be offered and describing the performance of other relevant requirements of the procurement.
- Taking arbitrary actions that favor one firm over others.

a. Recipients may not use geographic preferences in conducting procurements even if those preferences are authorized by state, tribal or local law. A Federal statute must authorize the use of geographic preferences. However, for architectural and engineering (A/E) services, location may be a selection factor provided there are an adequate number of firms to compete for the contract. [2 CFR 200.319\(b\)](#).

b. Under the Indian Self-Determination and Education and Assistance Act (ISDEAA), as amended, 25 U.S.C 450-458ddd-2 tribal recipients may give preference to Indian organizations and to Indian-owned economic enterprises when awarding procurement contracts under EPA assistance agreements.<sup>6</sup> EPA does not interpret the ISDEAA to, in and of itself, authorize sole source procurements with Indian organizations and Indian-owned economic enterprises. However, tribal recipients may give preference to these entities when developing lists for soliciting bids and proposals.

c. Your written procedures for competitive procurements must ensure that solicitations clearly and accurately describe technical requirements, qualitative factors, and minimum standards while avoiding detailed product specifications that restrict competition. You may use “brand name or equivalent” for supplies and equipment only if it is impractical or too costly to develop clear and accurate technical specifications. Recipients must disclose evaluation factors to offerors. [2 CFR 200.319\(c\)](#).

d. Recipients may use pre-qualified bidders lists only if the lists are periodically updated, take DBE considerations into account, and include enough sources (at least 3) to ensure maximum open and free competition and sources may qualify during the solicitation period. [2 CFR 200.319\(d\)](#).

## 2. Competition Thresholds.

a. As authorized by [2 CFR 200.320\(a\)](#), recipients may purchase goods and services that do not cost more than the [2 CFR 200.67](#) Micro-purchase threshold (currently set at \$3,500) without competition provided purchases are equitably distributed among suppliers to the extent practicable, taking DBE considerations into account, and the price is reasonable.

(1) The most current micro-purchase threshold can be found in the [Federal Acquisition Regulation \(FAR\)](#) at [48 CFR 2.101](#), and is periodically adjusted for inflation.

(2) Micro-purchases are appropriate where market forces ensure that prices are competitive (e.g. supplies).

(3) Recipients may not make a series of purchases in a relatively short time frame from the same source (particularly for professional services) in amounts at or less than the micro-purchase threshold or less to avoid competition as that practice would not lead to equitable distribution of purchases from qualified sources. Auditors may properly question compliance with the UGG Procurement

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<sup>6</sup> Indian Organizations and Indian-owned economic organizations are defined at 25 U.S.C. 1452.

Standards in these circumstances. Recipients should make a good faith estimate of the amount of contractual services or products necessary to perform a particular activity over the life of the assistance agreement and estimate the amount of the contract accordingly.

b. For purchases that cost more than the micro-purchase threshold but less than the [2 CFR 200.88](#) Simplified Acquisition Threshold (currently set at \$150,000), recipients may use [2 CFR 200.320\(b\)](#) small purchase procedures and solicit offers from an adequate number of sources, taking DBE considerations into account, without formally advertising or otherwise publicizing the contracting opportunity.

(1) The amount of the [2 CFR 200.88](#) Simplified Acquisition Threshold is the same as that found in the [FAR](#) at [48 CFR 2.101](#), and is periodically adjusted for inflation.

(2) EPA's position is that recipients must obtain documented prices or quotes (e.g. by email or price list searches) from at least 3 three qualified sources to meet this requirement although recipients may establish procurement procedures that require solicitations from more sources.

(3) You need not select the lowest priced item or service if it does not meet your requirements or you can otherwise demonstrate that the goods or services available at a higher price offer the best value. You must, however, justify a decision to purchase at the higher price and ensure that the vendor charges similarly situated customers the same price as it is offering to you and document that decision in the procurement file.

(4) You do not need to obtain bid or performance bonds for purchases in amounts less than the Simplified Acquisition Threshold.

c. Procurements in excess of the Simplified Acquisition Threshold are subject to the formal competitive requirements of [2 CFR 200.319](#) and [2 CFR 200.320\(c\) or \(d\)](#). There are two types of formal procurements—sealed bids and competitive proposals.

(1) Sealed bidding is appropriate when precise specifications can be developed and a firm fixed -priced contract will be awarded to the responsive bidder based principally on price. The sealed bid approach to competitive procurements is typically only used for construction projects, purchases of equipment widely available in the commercial market-place, and procurement of supplies in bulk.

(a) Recipients must solicit bids from an adequate number of potential contractors, taking DBE considerations into account.

(b) Tribal and local government recipients must publicly advertise the contracting opportunity. Other recipients may use web site announcements, pre-qualified or general bidders lists that comply with [2 CFR 200.319\(d\)](#), or similar means to solicit bids.

(c) The solicitation would need to remain open at least 30 days as provided in [40 CFR 33.301\(b\)](#) and the recipient should make the U.S. Small Business administration and the U.S. Minority Business Development Agency aware of the solicitation per [40 CFR 33.301\(d\)](#).

(d) Detailed requirements for sealed bidding are set forth at [2 CFR 200.320\(c\)](#). If you do not intend to award the contract to the lowest bidder, contact EPA's Grant Specialist to determine if EPA approval is required under [2 CFR 200.324\(b\)](#).

(2) Procurement by competitive proposals is appropriate when conditions for sealed bidding are not met and the recipient will award either a firm fixed -price or cost -reimbursement contract. This technique is typically used for acquisition of services where the offerors' qualifications or technical approaches may be more important than price considerations.

(a) Requests for proposals (RFP) must be publicized and identify evaluation factors. Publication techniques include website announcements, pre-qualified or general offeror lists that comply with [2 CFR 200.319\(d\)](#), or similar transparent means to solicit proposals.

(b) The RFP would need to remain open at least 30 days as provided in [40 CFR 33.301\(b\)](#) and the recipient should make the U.S. Small Business administration and the U.S. Minority Business Development Agency aware of the solicitation per [40 CFR 33.301\(d\)](#).

(c) Recipients must have a written method for conducting technical evaluations.

(d) Detailed requirements for procurement by competitive proposals are set forth at [2 CFR 200.320\(d\)](#).

(e) Note that as authorized by [2 CFR 200.320\(d\)\(5\)](#) recipients may use qualification based competitive selection techniques for Architecture and Engineering services where price is not a selection factor provided the recipient negotiates fair and reasonable compensation with the A/E firm.

d. Recipients may request that the EPA review their procurement systems for compliance with the UGG Procurement Standards and thus obtain an exemption from pre-procurement reviews by EPA. [2 CFR 200.324\(c\)](#). Otherwise, EPA may require that you submit procurement documents for purchases in excess of the Simplified Acquisition Threshold to EPA for clearance prior to or after conducting a competition. [2 CFR 200.324\(b\)](#).

3. Long -term contracts.

a. Recipients may enter into competitively-awarded long-term (generally not to exceed five years) contracts for professional services or equipment leases that include options for periodic renewals. If the long term contract precedes the EPA assistance agreement, recipients may use that contract if it was procured competitively consistent with Federal financial assistance regulations (including DBE considerations) in effect at the time. The use of such contracts in EPA assistance agreements does not constitute sole source procurement since the original contract was competed.

b. Long-term contracts that were awarded without competition may not meet EPA's minimum requirements for compliance with the UGG Procurement Standards. Additionally, out of scope modifications to contracts in amounts that exceed the Simplified Acquisition Threshold are subject to EPA approval as provided at [2 CFR 200.324\(b\)\(5\)](#).

#### 4. Sole -Source Contracts.

a. Sole-source contracts in excess of the micro-purchase threshold should be rare. Potential justifications include [200.320\(f\)\(1\)](#), only one source has the goods or is able to perform the service, [200.320\(f\)\(2\)](#), an emergency, [200.320\(f\)\(3\)](#) EPA approval, or [200.320\(f\)\(4\)](#) after soliciting a number of sources the recipient reasonably decided competition was inadequate.

b. EPA's general policy is to require competition in accordance with the [Procurement Standards in the UGG](#) for commercially available items (including consulting services). EPA recommends that recipients consult with EPA prior to making sole source procurements. Situations in which EPA may approve sole source contracts are generally limited to those in which a patent, copyright, or equipment maintenance agreement with the manufacturer are in place; the service or product demonstrates that an item is available from only one firm; or there is an emergency (e.g. a natural disaster) that precludes competitive contracting. Recipients who procure sole source contracts without EPA approval do so at their own risk.

c. EPA staff may not suggest, recommend or direct recipients to hire particular firms or individuals.

d. EPA does not require recipients to identify contractors in proposals. The fact that a recipient has named a contractor in its proposal as a "partner" or otherwise does not in and of itself justify a sole-source award. If, at any time, EPA finds that a sole-source contract does not comply with EPA's interpretation of the UGG, EPA may disallow all or part of the cost of the contract as provided at [2 CFR 200.338](#).

## Contract types.

**You must decide which type of contract is appropriate** given the circumstances of each purchase. You may use your standard contract types for contracts under your EPA assistance. Contract types include:

**1. Fixed-price contracts.** Fixed-price contracts are used when there will likely be effective competition based on a complete product description and clear plans and specifications. As provided at [2 CFR 200.320\(c\)](#), recipients must use fixed price contracts in sealed bid situations. Recipients may use fixed priced contracts in other situations as well.

- a. There should not be any significant technical or engineering unknowns.
- b. The contractor furnishes the goods or services for the fixed -price, and so assumes significant risk. Profit is not typically stated or negotiated separately.

**2. Cost -reimbursable contracts.** You should use a cost -reimbursement contract when it is not feasible to award a fixed price contract.

- a. The contractor's cost and profit are typically negotiated separately. The contractor satisfactorily completes only the amount of work equivalent to the estimated cost to qualify for the negotiated profit; the contractor may not complete the entire project.
- b. The contractor assumes less risk than under a fixed price contract. Alternatively, you may negotiate a cost -reimbursable contract that includes a ceiling that may not be exceeded but requires completion of the work. In this situation, the risk to the contractor is increased.

**4. Time and Materials Contracts.** Recipients may use “time and materials” contracts only in circumstances in which no other contracting instrument is available, and there is a cap on the amount of the contract that the contractor exceeds at its own risk. [2 CFR 200.318\(j\)](#). A time -and -materials contract is one in which the contract price is the sum of the cost of materials plus fixed labor hours that are “loaded” with wages, overhead, and profit such that the contractor has no incentive to control costs. Additional information on time and materials contract rules is available at [2 CFR 200.318\(j\)\(2\)](#).

**5. “Cost Plus” Contracts Prohibited.** Percentage of construction cost and cost plus a percentage cost contracts provide an incentive for the contractor to increase costs in order to increase profit. The UGG Procurement Standards prohibit this type of contract. [2 CFR 200.323\(d\)](#).

## **6. Additional resources.**

EPA has posted answers to Frequent Questions on competitive procurement requirements at <https://www.epa.gov/grants/grants-policy-issuance-gpi-16-01-epa-subaward-policy-epa-assistance-agreement-recipients>. Recipients may also consult with their Project Officers and Grant Specialists for advice.

## **Cost or price analysis.**

1. Under [2 CFR 200.323\(a\)](#), recipients must perform a cost or price analysis in connection with every procurement action other than micro-purchases and simplified acquisitions, including

contract modifications.<sup>7</sup> Price analysis includes the comparison of price quotations submitted, market prices, bid prices for firm fixed-price contracts or similar information. Cost analysis is the review and evaluation of each element of cost to determine reasonableness.

2. Recipients must make and document independent estimates before receiving bids or proposals. Additional guidance is available at <https://www.usaid.gov/sites/default/files/documents/1868/300maa.pdf>

3. Under [2 CFR 200.323\(b\)](#), recipients must negotiate profit as a separate element of cost for procurements other than micro-purchases, including sole -source contracts under the Simplified Acquisition Threshold.

4. You must determine the method and depth of review based on the facts surrounding your particular situation. Factors to consider include the amount of the contract, the extent of competition, the types of goods or services, and your experience in acquiring comparable items. When competition yields pricing within a reasonable range no further review may be necessary.

a. Even though the UGG does not require formal cost or price analyses for purchases in amounts lower than the Simplified Acquisition Threshold recipients must ensure that the costs for these transactions are reasonable. [2 CFR 200.403](#). Factors for determining reasonableness include arms-length bargaining and market prices for comparable goods and services. [2 CFR 200.404](#). EPA encourages recipients to document efforts taken to compare prices and other means of ensuring that reasonableness of contracts in amounts under the Simplified Acquisition Threshold. Your procurement records must document the basis for the contract price. [2 CFR 200.318\(i\)](#).

b. When competition yields pricing within a reasonable range, no further review may be necessary. In other situations, recipients may conduct internet searches to find catalogue prices or service rates.

5. Additional information on cost or price analysis is available at Appendix A to this Guide.

## **Limitations on consultant compensation.**

1. By statute, EPA may not reimburse recipients for compensation they pay to individual consultants on an hourly, daily or other basis that has the effect of exceeding the amount paid to Federal employees at Level IV of the Executive Schedule. The amount of allowable consultant compensation is revised at the beginning of each calendar year when Office of Personnel Management (OPM) changes the compensation for Level IV of the Executive Schedule. The 2017 Rate can be found here: [Salary Table No. 2017-EX](#).

a. EPA has implemented the consultant fee limit at [2 CFR 1500.9](#) and in the most current Consultant Fee Term and Condition in EPA assistance agreements. The term “individual

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<sup>7</sup> For procurements subject to 40 CFR Part 35, Subpart O, recipients must conduct a cost or price analysis in connection with every procurement as required by [40 CFR 35.6585](#).

consultant” is defined in section 3 of Grants Policy Issuance 04-04 which was published in the [Federal Register at 69 Fed. Reg. 18380 \(April 7, 2004\)](#).

b. All contracts with individual consultants are subject to the Procurement Standards in Subpart D of 2 CFR Part 200. Contracts or subcontracts with multi-employee firms for services are not affected by the consultant compensation limitation provided the contractor or subcontractor rather than the recipient selects, directs and controls individual employees providing consulting services. Recipients may refer to Grants Policy Issuance 04-04 at [Federal Register at 69 Fed. Reg. 18380 \(April 7, 2004\)](#) for additional information.

c. When the consultant fee applies often involves complex issues. EPA encourages recipients to contact their Grant Specialist if there are any questions.

## **Software and other intellectual property**

You may copyright any software or written material that is subject to copyright and was developed, or for which ownership was purchased, under an award. EPA reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so as provided at [2 CFR 200.315](#).

## **Debarment and Suspension**

1. You must ensure you do not award a contract to any person (organization or individual) debarred or suspended or otherwise excluded (excluded) from or ineligible for participation in Federal assistance programs, unless you have obtained an exception from EPA under 2 CFR [180.135](#). Excluded individuals are also precluded from acting as principals on contracts that EPA funds. EPA’s definition of **principal** is found at [2 CFR 1532.995](#).

2. To verify that the person with whom you intend to do business is not excluded you can:

- a. Check the [System for Award Management \(SAM\)](#);
- b. Collect a certification from that person documenting that the person is not excluded; or
- c. Add a clause or condition to the covered transaction with that person indicating that not being excluded is a condition of the agreement.

### **EPA strongly recommends that recipients check SAM.**

3. When searching SAM, search by the name of the contractor, not by agency, to ensure all debarred, suspended or otherwise excluded contractors are found. EPA recommends that you search using the multiple names search function.

- a. Some debarred contractors are ineligible under only certain programs. You must check the cause and treatment code to determine the circumstances related to each contractor.

b. If your search query provides possible matches, EPA recommends that you contact the agency that imposed the suspension, debarment or exclusion to determine the effect of the action and to ensure a match.

4. You must also ensure your subrecipient or contractor complies with 2 CFR Parts 180 and 1532, when using EPA funds and informs each person with whom they do business with at the next lower tier ([2 CFR Section 180.330](#)) of these requirements. To pass down these requirements, you must include a term or condition in lower-tier transactions requiring lower-tier participants to comply with subpart C of 2 CFR Parts 180 and 1532 ([2 CFR Section 1532.332](#)). Additional information regarding recipient and subrecipient responsibilities to ensure that excluded entities do not participate in EPA financial assistance programs may be found in the General Terms and Conditions (T&C) “Suspension and Debarment” in the pass-through entity’s agreement with EPA.

Required Contract Clauses.

[Appendix II of the UGG](#) and [Appendix A to 40 CFR Part 33](#) specify the clauses that must be included in your EPA-funded contracts. The requirements vary based on the amount of the contract and the type of activities you will carry out under the EPA -funded agreements.

## Supplies.

Supplies are tangible personal property other than equipment with a per -item acquisition cost of \$5000 or less as provided at [2 CFR 200.94](#).

1. Electronic devices including laptops, personal computers, tablets, and cell phones with a per -item acquisition cost of less than \$5,000 may be classified as supplies unless the recipient’s property management systems classify these items differently. Recipients may define such items as equipment to ensure they are tracked in their inventory systems.
2. You must follow the UGG Procurement Standards when purchasing supplies. Micro-purchases in amounts of \$3500 or less without competition are permissible since competition in the commercial market-place is likely to yield reasonable prices, and recipients must equitably distribute purchases among sources by rotating vendors. Recipients, however, should consider using small purchase procedures to obtain bulk purchase discounts for supplies that will be used in large quantities.

## Equipment.

1. Equipment is defined at [2 CFR 200.33](#) as tangible, non-expendable, personal property having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit, although the recipient may establish a lower dollar amount threshold, through its written policies and procedures. This category includes only equipment the recipient proposes to purchase as a direct cost.

(a) Equipment also includes accessories and services included with the purchase price necessary for the equipment to be operational.

(b) Pursuant to [2 CFR 200.439\(b\)\(2\)](#), recipients must have prior EPA approval for equipment purchases.

2. You must follow the UGG Procurement Standards when purchasing equipment. Equipment service or maintenance contracts (not included in the purchase price) that are procured separately may be subject to competition unless the terms of the equipment warranty require that the original equipment manufacturer service or maintain the equipment for the warranty to be effective.

3. Short- or long-term leases of equipment may be more cost-effective than purchases of equipment. UGG requirements for equipment rentals are found at [2 CFR 200.465](#).

**Even though EPA practice is to budget equipment leasing costs in the “Other” category, equipment rental contracts are also subject to the UGG Procurement Standards.**

## **Unique Requirements for Construction Contracts.**

1. Some EPA programs that fund construction, alteration and repair of facilities such as Brownfields, Superfund, and State Clean Water and Drinking Water Revolving Funds are subject to prevailing wage requirements relating to the Davis Bacon Act. Recipients should carefully review the terms and conditions of their assistance agreements for information regarding compliance with this important requirement.

2. Construction and facility improvement contracts in amounts exceeding the Simplified Acquisition Threshold must ensure that EPA’s interest is protected through bonding. [2 CFR 200.325](#).

3. You may request that EPA accept your bonding policies by submitting the bonding policies to your Grant Specialist to obtain approval by an authorized EPA official. If EPA has not approved your policies, bonding must meet the following standards as provided at 2 CFR [200.325\(a\),\(b\) and \(c\)](#).

(a) Bidders must provide a bid guarantee equivalent to five percent of the bid price. The bid guarantee may be a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid to ensure the bidder will accept award of a contract if you accept the bidder's bid.

(b) Successful bidders must provide a performance bond for 100 percent of the contract price to ensure fulfillment of the contractors' obligations under the contract.

(c) Successful bidders to provide a payment bond for 100 percent of the contract price. A payment bond ensures payment as required by statute to all persons supplying labor and material under the contract.

## Single and EPA audit.

If you spend \$750,000 or more in a year in Federal funds, you must obtain a single or program-specific audit in accordance with the requirements of [2 CFR Part 200, Subpart F Audit Requirements](#).

1. If you receive only one federal grant and elect to do a program specific audit, it is likely your auditor will review your purchasing practices under EPA's grant. If you elect to have your auditor conduct a single audit, the auditor may review your EPA grant purchases.
2. EPA's Office of Inspector General or the Government Accountability Office (GAO) may conduct an audit of your EPA grants. EPA and GAO auditors are likely to review your purchasing system as well as your purchases. These audits will be planned and performed in such a way as to build upon work performed by your auditors.

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## Appendix A: Conducting a price and or cost analysis

### Price Analysis

A **price analysis** is an evaluation of a proposed price, without regard to the contractor's separate cost elements and proposed profit, to determine the price is reasonable. Although the UGG does not require price analyses for contracts less than the simplified acquisition threshold, a price analyses may be useful in documenting the reasonableness of contract costs. The following guide will assist you in completing price analyses.

**Cost Estimate** – An independent cost estimate for the supplies, equipment, or service you will be purchasing. This estimate may be based on such things as you and your staff's experience with similar purchases, a review of catalog or off-the-shelf prices available on the internet, prices or costs for similar services, or other relevant information. If detailed plans and specifications for a fixed price contract are developed for bidders, the person or firm developing those plans should develop a detailed independent price estimate. Additional guidance is available at <https://www.usaid.gov/sites/default/files/documents/1868/300maa.pdf>

**Comparison of Prices** – Compare prices obtained from catalogues, suppliers, or bidders to your independent estimate.

### Price Reasonableness –

A. If the offeror or bidder's price appears reasonable based on your independent estimate, and other appropriate information, purchase the supply, equipment, or service.

B. If the offeror or bidder's price is significantly higher than your independent estimate, review

your requirements to determine whether unnecessary, overly restrictive, or complex requirements caused the higher than expected price. (Even if the price is significantly lower than expected, you should review the stated requirement or plans and specifications to ensure they are complete and will result in the supply, equipment, or service you need.) It may help, in making your determination, to talk to those providing quotes or bids.

1. If, after this evaluation, you determine the price is reasonable, considering the circumstances, purchase the supply, equipment, or service.
2. If you determine inappropriate requirements for the supply, equipment, or service resulted in an unreasonable price or the price is unreasonable, make adjustments and obtain new offers or bids.

C. You should ensure that the contractor is charging you the same prices as other similarly situated customers particularly in sole -source situations. Agreeing to pay an excessive price for a good or service that you purchase with EPA funds may lead to disallowance of the cost for the item even if you are able to justify sole source procurement.

## Cost Analysis

A **cost analysis** is the evaluation of each major contract cost category to determine reasonableness of each category and of the total cost of a contract or change order. A cost review may be done under negotiated cost type contracts, not fixed-priced contracts. Cost categories include personnel, fringe benefits, travel, subcontracting, indirect costs, profit and the like.

To obtain the information you need to conduct a cost analysis, you must require your offerors to provide cost data with their offers. EPA does not provide a form for this price data, so unless you prescribe a form, offerors may submit their cost data in any appropriate format. The offeror should certify that the information reflects complete, current, and accurate data.

The following is a general list of cost categories under which contractors may submit cost information and guidance on how you should evaluate each category:

**Personnel Costs** – Costs for labor directly related to the contract.

**For Example** the offeror will likely provide information that looks like this:

| Category                           | Estimated Hours | Hourly Rate | = Personnel Cost |
|------------------------------------|-----------------|-------------|------------------|
| Professional                       | 300x            | \$30.00=    | \$ 9,000         |
| Nonprofessional                    | 2000x           | 25.00=      | 50,000           |
| Clerical                           | 800x            | 15.00=      | 12,000           |
| <b>Total Direct Personnel Cost</b> |                 |             | <b>\$71,000</b>  |

**Consider:**

A. Whether the level of effort or the total amount of time proposed is consistent with the effort required to complete the contract.

B. The labor mix or the labor categories proposed to ensure they are consistent with the difficulty and technical nature of the work - professional versus nonprofessional versus clerical.

C. The proposed salaries, including reasonable escalation factors to ensure they are consistent with the offerors' actual pay scales. Generally, the conversion of annual salaries into hourly rates is accomplished by dividing the annual salary by 2,087 hours (assuming an 8-hour work day).

**Fringe Benefits** – Personnel costs other than employees' direct salary or pay (i.e., employer's portion of FICA insurance, retirement, sick leave, holiday pay, and vacation cost. While these costs are normally accumulated in a pool and allocated using percentages as shown below, offerors may calculate actual fringe benefit costs for each employee who will work on your job. Either method is acceptable if applied consistently.

**Example:**

| Category                         | Estimated Fringe Benefit Rate | x | Total Hourly Pay | = | Fringe Benefit Amount |
|----------------------------------|-------------------------------|---|------------------|---|-----------------------|
| Professional                     | 10%                           | x | \$9,000          | = | \$ 900                |
| Nonprofessional                  | 10%                           | x | 50,000           | = | 5,000                 |
| Clerical                         | 10%                           | x | 12,000           | = | 1,200                 |
| <b>Total Fringe Benefit Cost</b> |                               |   |                  |   | <b>\$7,100</b>        |

**Consider:**

A. Whether the fringe benefit rate applied to the direct labor base corresponds to fringe benefits available to each of the proposed labor categories and are consistent with the offeror's established benefits package.

B. Whether the offeror's FICA and unemployment insurance are applied only up to the maximum salary limits established by statute, if any.

**Indirect Costs** – Indirect costs are costs which cannot be charged to a project specific activity. Some contractors may have federally approved indirect cost rates from a cognizant federal audit agency. You may allow the contractor to charge the approved rate if it covers cost-reimbursement contracts.

Indirect costs often include office space, equipment depreciation, and personnel costs for clerical pools, executive salaries, and administrative support. Each organization determines the costs it will include in its indirect cost pool, and the organization must treat the costs the same if the circumstances are alike. Indirect costs are allocated to the particular contracts based on a fair method of approximation, generally a percentage of a specific set of direct costs under the contract. Indirect costs are also referred to as overhead or burden costs.

Indirect costs should be logically grouped and compared to some part or all of the organization's direct costs (the base). The most popular base is direct labor; however, there are instances where an equitable allocation cannot be made using this base.

**Example:**

| Category                   | Rate  | Direct Labor Base | = Cost          |
|----------------------------|-------|-------------------|-----------------|
| Indirect Cost              | 50% x | \$71,000          | = \$35,000      |
| <b>Total Indirect Cost</b> |       |                   | <b>\$35,000</b> |

**Consider if the vendor does not have a federally approved rate:**

- A. Whether the allocation base is an equitable basis for distribution.
- B. Whether the proposed overhead rate is the same as that used for the contractor's other contracts.

**Travel and per Diem Costs** – Travel costs include transportation, per diem or subsistence, and other reasonable travel related items directly related to the contract.

**Example:**

| Transportation                            | Number of Miles | Rate per Mile | = Amount        |
|---|-----------------|---------------|-----------------|
| POV Office to job site and return         | 50x             | \$ .30        | = \$15.00       |
| POV Office to EPA and return              | 20x             | .30           | = \$6.00        |
| Transportation                            | Origin          | Dest          |                 |
| Flight to attend contract related meeting | Dallas          | Waco          | \$210.00        |
| Per Diem                                  | Number of Days  | Rate per Day  |                 |
|   | 10x             | \$75.00       | = \$750.00      |
| <b>Total Travel and Per Diem Cost</b>     |                 |               | <b>\$991.00</b> |

**Consider:**

- A. Whether the proposed travel is necessary to complete the contact.
- B. Whether all people traveling on a trip are necessary.
- C. The cost per trip.
- D. Whether the per diem or subsistence allowance is the same for other travel by the offeror's personnel.

You may use federal per diem rates for comparison purposes.

**Supply, Material and Equipment Costs** – Offerors will often have costs for supplies, material, and equipment (items with an acquisition cost of \$5,000 or more), material, and supplies directly related to the contract.

**Example:**

| <b>Item</b>                                    | <b>Quantity</b> | <b>Cost per Item</b> | <b>= Cost</b>   |
|--|-----------------|----------------------|-----------------|
| Recording Barometers                           | 5x              | \$ 455               | = \$ 2,275      |
| Wind Turbine Generator                         | 1x              | 6,370                | = 6,370         |
| Incremental Water Quality Samplers             | 5x              | 1,600                | = 8,000         |
| Aluminum Tubing                                | 1500 ft.        | .70 ft.              | = 1,050         |
| Miscellaneous Supplies                         |                 |                      | 2105            |
| <b>Total Equipment, Materials, Supply Cost</b> |                 |                      | <b>\$19,800</b> |

Consider:

- A. Whether the proposed equipment (items with a unit acquisition cost of \$5,000 or more) is needed to complete the contract.
- B. Whether it would be better to lease or rent the equipment as opposed to purchasing it.
- C. Whether proposed materials and supplies are needed and the cost appears reasonable.

**Subcontract Costs** – Subcontracts are contracts awarded by your contractor.

**Example:**

| <b>Cost Type</b>            | <b>Price</b> |
|-----------------------------|--------------|
| <b>Total Contract Costs</b> | \$150,000    |
| <b>Profit</b>               | \$15,000     |
| <b>Total Cost</b>           | \$165,000    |

**Consider:**

- A. The procedures for cost review of contracts in excess of the simplified acquisition threshold are the same as for a prime contract, so you will need detailed cost information.
- B. For subcontracts less than the simplified acquisition threshold, you are not required to conduct a cost analysis but such an analysis may be useful in documenting the reasonableness of the cost for the subcontract. (Profit for offerors and subcontractors should be evaluated based on the profit section below).

**Profit** – Profit is the amount paid to a contractor above the total cost of the contract.

You should ensure that contractors of negotiated contracts are paid only fair and reasonable profits, as required by [2 CFR 200.323\(b\)](#) profit must be a separate element of price when there is no price competition. EPA does not interpret this requirement to apply to micro-purchases made on a fixed priced basis. As provided in 2 CFR 200.323(b):

To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

**Example:**

| <b>Cost Type</b>                         | <b>Price</b> |
|--|--------------|
| <b>Total Direct &amp; Indirect Costs</b> | \$150,000    |
| <b>Profit</b>                            | \$10,000     |
| <b>Total Cost</b>                        | \$165,000    |

**Consider:**

A. The offeror's risk. Generally, the greater the risk the contractor assumes, the higher the rate of profit. Contractors assume greater risks on fixed-price contracts involving complex or difficult tasks as opposed to cost reimbursement contracts.

B. Profits may also be higher if the contractor incurs significant capital costs, exercises considerable ingenuity, or does independent developmental work.

C. Percentage of construction cost and cost plus a percentage cost contracts provide an incentive for the contractor to increase costs in order to increase profit. These contract types must not be used.

**Cost Review Findings**

After you complete a required cost review, you must determine whether the proposed contract cost is reasonable. If the individual items are reasonable, the total cost is reasonable.

A. If you find an individual cost is not reasonable, you should discuss the cost with the contractor. If, based on the contractor's justification, you and the contractor reach agreement that the cost is reasonable, accept the cost. If you and the contractor agree the cost is excessive, negotiate a reduction to a reasonable amount and accept the cost.

B. If you cannot agree with the contractor concerning the reasonableness of proposed costs, reject that contractor's offer. If the next best offer meets your requirements, you should review

proposed cost information for that contractor. Follow the same review and negotiation process as above for the new contractor's proposed costs.

## **Documentation**

Document all actions in conducting each price or cost analysis. Ensure all price and cost reviews are described and retained in your records in accordance with your record retention requirements or EPA's.