



Procurement & Subawards Using Federal Funds in the Community Grants Program

June 2024

**PROCUREMENT
UPDATES**



UNIFORM GRANT GUIDANCE (UGG) UPDATES

Procurement

- Giving Tribal Nations the same status as states under [2 CFR 200.317](#) such that Tribal Nations will follow their own policies and procedures for procurement competitions. [*Tribes will be subject to the procurement standards in effect at the time of award].
- Removing existing prohibition on geographic preference contained at [2 CFR 200.319\(c\)](#).
- Removing the requirement in [2 CFR 200.324\(b\)](#) to negotiate profit as a separate element of the contract when only one bid is received in response to a competitive solicitation.

Indirect Cost Rate

- Raising the *de minimis* indirect cost rate from 10 percent to 15 percent.

Threshold increases

- Equipment and unused supplies from \$5,000 to \$10,000.

EFFECTIVE DATE: October 1, 2024 (Unless recipients are informed otherwise, any awards made before the OMB changes take effect must comply with the current requirements.)

More information about the 2 CFR Part 200 updates is available [here](#).

STATUTORY FLEXIBILITY

State/Local Compliance

Projects are not subject to Federal procurement requirements for competition and methods of procurement if the recipient has:

- ✓ Procured services or products through contracts entered into prior to March 9, 2024; and
- ✓ Complied with state and/or local laws governing competition (including laws/policies relating to participation by disadvantaged business enterprises or equivalent, as applicable, and method of procurement).

Covered Projects

Recipients request coverage by providing written statement to EPA PO affirming:

- Any contracts entered into prior to March 9, 2024 (include date of executed contract(s)); and
- Compliance with state and/or local laws governing competition.
 - Including: laws/policies relating to participation by disadvantaged business enterprises or equivalent, as applicable, and method of procurement.

Contracts and contract amendments will be considered covered by the provision upon receipt of written confirmation from EPA.

Federal Compliance: Non-Covered Projects

Recipients who do not qualify for this procurement flexibility must procure all services (professional, construction, etc.), supplies, and equipment awarded under this grant in accordance with all applicable federal requirements.

- Including: 40 U.S.C. 1101 et seq. (the Brooks Act) or an equivalent State qualifications-based procurement requirement, as applicable; 2 CFR Part 200; 2 CFR Part 1500; and/or 40 CFR Part 33.

All recipients, including those that qualify for the procurement flexibilities discussed above must comply with the requirements in the Davis-Bacon Act, American Iron and Steel (AIS), and Build America, Buy America (BABA) in any procurements and resulting contracts as applicable; these requirements are not waived by this provision and include incorporation of prevailing wage determinations and AIS/BABA in solicitation documents.

SUBAWARD V. PROCUREMENT CONTRACT



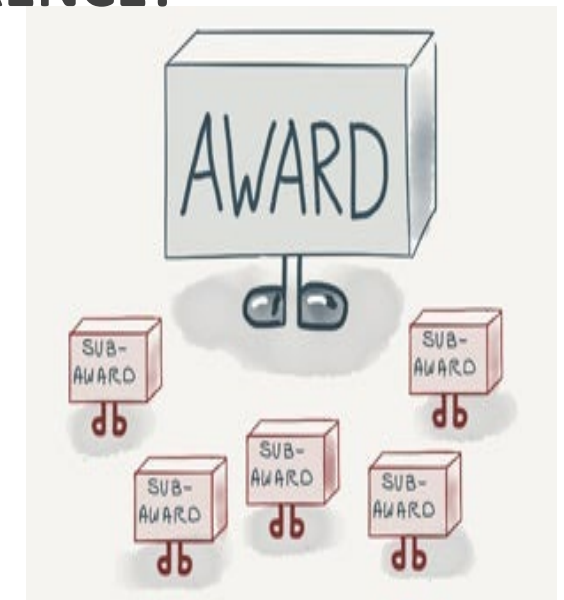
SUBAWARD V. PROCUREMENT CONTRACT: WHAT'S THE DIFFERENCE?

Subawards

- A financial assistance transaction between an EPA grant recipient and an eligible subrecipient (or by a subrecipient to a lower subrecipient).
- Do not include payments to a contractor or a program beneficiary or participant in a Federal program.
- Regulations and EPA Policy do not require competition for subawards.
- **PROFIT IS NOT ALLOWABLE!**

Contracts

- As provided in [2 CFR 200.331](#), contractors (including individual consultants) typically:
 - Provide goods and services on commercial terms;
 - Provide similar goods and services to many different purchasers;
 - Operate in a competitive environment; and
 - A reasonable profit is allowable.



Transactions with for-profit companies and individual consultants are (with very, very few exceptions) procurement contracts.

Just a friendly reminder...

EPA'S SUBAWARD POLICY

- The [EPA Subaward Policy](#) implements new [UGG](#) regulatory requirements.
 - UGG codifies standards for distinguishing between subawards and contracts at [2 CFR 200.331](#).
- The National Term and Condition for Subawards can be found in Appendix B of the EPA Subaward Policy.
- **EPA grantees must include a number of provisions in subaward agreements and implement systems to monitor and guide subrecipient performance. (Appendix D of the Subaward Policy provides a model agreement).**

EPA SUBAWARD POLICY AND ATTACHMENTS

- ✓ The [EPA Subaward Policy](#) has several appendices, including:
 - Appendix A: [Distinctions Between Subrecipients and Contractors](#)
 - Appendix B: [National Term and Condition for Subawards](#)
 - Appendix C: [Model Programmatic Subaward Reporting Requirement](#)
 - Appendix D: [Subaward Agreement Template](#)

- ✓ Additionally, EPA posted an [EPA Subaward Policy Frequently Asked Questions](#).

PROCUREMENT STANDARDS



WHY DO PROCUREMENT STANDARDS MATTER?

- ✓ **Compliance:** Recipients must follow all applicable federal laws and regulations.
- ✓ **Transparency and Accountability:** Allows for oversight and auditing to ensure that grant funds are used for their intended purposes and that there is no fraud, waste, or abuse.
- ✓ **Full and Open Competition:** Promotes competition among potential vendors, resulting in better value for the government and the public.
- ✓ **Cost-Effectiveness:** Ensure recipients obtain goods and services at reasonable prices, thus maximizing the value of the grant funds.
- ✓ **Generally, Community Grant recipients' procurements must comply with several statutes/regulations, including*:**
 - ✓ [40 USC 1101 etc.](#) (the “Brooks Act”)
 - ✓ [2 CFR Part 200](#)
 - ✓ [2 CFR Part 1500](#); and/or
 - ✓ [40 CFR Part 33](#)

Procurement Standards	200.317 – 200.327
§ 200.317	Procurements by states.
§ 200.318	General procurement standards.
§ 200.319	Competition.
§ 200.320	Methods of procurement to be followed.
§ 200.321	Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.
§ 200.322	Domestic preferences for procurements.
§ 200.323	Procurement of recovered materials.
§ 200.324	Contract cost and price.
§ 200.325	Federal awarding agency or pass-through entity review.
§ 200.326	Bonding requirements.
§ 200.327	Contract provisions.

***Note, the following requirements are not applicable to every Community Grants project.**

FAILURE TO FOLLOW THE RULES COULD MEAN...

If a recipient fails to follow applicable statutes/regulations, EPA can impose specific conditions (i.e., more requirements) [[2 CFR 200.208](#)]:

- (1) Requiring payments as reimbursements rather than advance payments;
- (2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given performance period;
- (3) Requiring additional, more detailed financial reports;
- (4) Requiring additional project monitoring;
- (5) Requiring the non-Federal entity to obtain technical or management assistance; or
- (6) Establishing additional prior approvals, including approval of a corrective action plan.



FAILURE TO FOLLOW THE RULES COULD MEAN (CONT'D)...

If a recipient fails to follow the additional requirements or EPA does not think the additional requirements will solve the issue, EPA *may* take action for noncompliance.

Additional remedies for noncompliance are discussed in 2 CFR 200.339 – 200.343. For example:

▼ Remedies for Noncompliance

§ 200.339 Remedies for noncompliance.

§ 200.340 Termination.

§ 200.341 Notification of termination requirement.

§ 200.342 Opportunities to object, hearings, and appeals.

§ 200.343 Effects of suspension and termination.

- Temporarily withhold cash payments pending correction of the deficiency.
- Disallow all or part of the cost of the activity or action not in compliance.
- Wholly or partly suspend or terminate the Federal award.
- Initiate suspension or debarment proceedings.
- Withhold further Federal awards for the project or program.
- Take other remedies that may be legally available.

A FEW GENERAL STANDARDS

[2 CFR 200.318](#) details general procurement standards that apply to non-Federal entities, including:

- a) 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 subaward. The non-Federal entity's documented procurement procedures must conform to the procurement standards identified in 2 CFR [200.317](#) through [200.327](#).
- b) Non-Federal entities must **maintain oversight** to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
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- e) To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal Government, **the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services**. Competition requirements will be met with documented procurement actions using strategic sourcing, shared services, and other similar procurement arrangements.

COMPETITION BASICS UNDER THE UGG

- Community grant recipients (including Tribal Nations for now), other than State entities, that procure services, supplies, and/or equipment where the amount of the contract will be more than the micro-purchase threshold in [2 CFR 200.320\(a\)\(1\)](#) (\$10,000 for most applicants) must comply with the fair and open competition requirements in 2 CFR Part 200 and 2 CFR Part 1500.
 - States follow the same procurement procedures as they do for non-Federal funds apart from the requirements in [200.321](#) (small and disadvantaged businesses), [200.322](#) (domestic preferences), [200.323](#) (recycled materials), and [200.327](#) (contract clauses contained in [Appendix II](#)).
 - EPA's [40 CFR Part 33 Disadvantaged Business Participation](#) rule also applies to states.
 - Note, there are separate rules for Tribal Nations as it pertains to the six good faith efforts to solicit DBEs requirement [[40 CFR 33.304](#)]

Refer to EPA's [Best Practice Guide for Procuring Services, Supplies, and Equipment Under EPA Assistance Agreements](#) as guidance.

EPA'S DBE RULE – SIX GOOD FAITH EFFORTS

Local governments, States, Non-profits

§ 33.301 What does this subpart require?

A recipient, including one exempted from applying the fair share objective requirements by [§ 33.411](#), is required to make the following good faith efforts whenever procuring construction, equipment, services and supplies under an EPA financial assistance agreement, even if it has achieved its fair share objectives under [subpart D of this part](#):

- (a) Ensure DBEs are made aware of contracting opportunities to the fullest extent practicable through outreach and recruitment activities. For Indian Tribal, State and Local and Government recipients, this will include placing DBEs on solicitation lists and soliciting them whenever they are potential sources.
- (b) Make information on forthcoming opportunities available to DBEs and arrange time frames for contracts and establish delivery schedules, where the requirements permit, in a way that encourages and facilitates participation by DBEs in the competitive process. This includes, whenever possible, posting solicitations for bids or proposals for a minimum of 30 calendar days before the bid or proposal closing date.
- (c) Consider in the contracting process whether firms competing for large contracts could subcontract with DBEs. For Indian Tribal, State and local Government recipients, this will include dividing total requirements when economically feasible into smaller tasks or quantities to permit maximum participation by DBEs in the competitive process.
- (d) Encourage contracting with a consortium of DBEs when a contract is too large for one of these firms to handle individually.
- (e) Use the services and assistance of the SBA and the Minority Business Development Agency of the Department of Commerce.
- (f) If the prime contractor awards subcontracts, require the prime contractor to take the steps in [paragraphs \(a\) through \(e\)](#) of this section.

Tribal Nations

§ 33.304 Must a Native American (either as an individual, organization, Tribe or Tribal Government) recipient or prime contractor follow the six good faith efforts?

- (a) A Native American (either as an individual, organization, corporation, Tribe or Tribal Government) recipient or prime contractor must follow the six good faith efforts only if doing so would not conflict with existing Tribal or Federal law, including but not limited to the Indian Self-Determination and Education Assistance Act ([25 U.S.C. 450e](#)), which establishes, among other things, that any federal contract, subcontract, grant, or subgrant awarded to Indian organizations or for the benefit of Indians, shall require preference in the award of subcontracts and subgrants to Indian organizations and to Indian-owned economic enterprises.
- (b) Tribal organizations awarded an EPA financial assistance agreement have the ability to solicit and recruit Indian organizations and Indian-owned economic enterprises and give them preference in the award process prior to undertaking the six good faith efforts. Tribal governments with promulgated tribal laws and regulations concerning the solicitation and recruitment of Native-owned and other minority business enterprises, including women-owned business enterprises, have the discretion to utilize these tribal laws and regulations in lieu of the six good faith efforts. If the effort to recruit Indian organizations and Indian-owned economic enterprises is not successful, then the recipient must follow the six good faith efforts. All tribal recipients still must retain records documenting compliance in accordance with [§ 33.501](#) and must report to EPA on their accomplishments in accordance with [§ 33.502](#).
- (c) Any recipient, whether or not Native American, of an EPA financial assistance agreement for the benefit of Native Americans, is required to solicit and recruit Indian organizations and Indian-owned economic enterprises and give them preference in the award process prior to undertaking the six good faith efforts. If the efforts to solicit and recruit Indian organizations and Indian-owned economic enterprises is not successful, then the recipient must follow the six good faith efforts.
- (d) Native Americans are defined in [§ 33.103](#) to include American Indians, Eskimos, Aleuts and Native Hawaiians.

COMPETITION THRESHOLDS UNDER THE UGG

- 1. Purchases up to the micro purchase level (generally **\$10,000**) may be made without competition provided the recipient distributes purchases equitably among qualified suppliers to the extent “practicable” and the prices are reasonable. [2 CFR 200.320\(a\)\(1\)](#).**
 - Generally, for purchases of supplies (including computing devices) but recipients may obtain consulting or instructional services PROVIDED the equitable distribution requirement is met.
 - A series of micro purchases with the same consultant without using other sources as well will raise compliance issues.
 - Some universities or nonprofit research institutions may have higher micro-purchase threshold if approved by cognizant Federal agency for indirect costs.



COMPETITION THRESHOLDS UNDER THE UGG (CONT'D)

2. Recipients may use small purchase procedures for contracts up to the simplified acquisition threshold (**\$250,000**) by obtaining price or rate quotations from an adequate number of qualified sources. [2 CFR 200.320\(a\)\(2\)](#).
- EPA expects recipients to obtain prices/quotes from at least 3 sources.
 - Can be by email
 - Recipients must document their efforts:
 - For professional services, the email soliciting prices/quotes may be used for documentation.
 - For equipment, internet searches of price catalogues documented by “screen shots” are acceptable.

COMPETITION THRESHOLDS UNDER THE UGG (CONT'D)

3. For procurements **in excess of \$250,000**, recipients must either advertise for sealed bids or publicly solicit competitive proposals. [2 CFR 200.320\(a\)\(2\)](#).
- Sealed bidding is appropriate when detailed specifications are available and selection is based principally on price.
 - A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder.
 - Competitive proposal procedures are typically used for professional services.
 - Generally, cost/price **MUST** be a selection factor in evaluating proposals.

Qualifications-based procurement, where price is not a selection factor, must be used if the grant statute specifically requires qualifications-based procurement (e.g., 33 U.S.C. 1382(b)(14), which applies to *some* Community Grants). Additionally, it *may* be used when acquiring services that can **ONLY** be provided by a licensed Architectural and Engineering (A/E) firm (such as when **REQUIRED** by federal, state, or local law). It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

THE BROOKS ACT

While following the UGG procurement standards is the general rule, Community Grants projects that are inclusive of Clean Water State Revolving Fund eligible activities ONLY, irrespective of whether such projects are co-funded with CWSRF funding, must comply with the procurement processes for architectural and engineering (A/E) services as identified in 40 U.S.C. 1101 et seq. (the Brooks Act), or an equivalent State qualifications-based requirement.



THE BROOKS ACT (CONT'D)

NOTE: FOR projects with workplans inclusive of CWSRF eligible activities only!!

33 U.S.C. 1382(b)(14): A contract to be carried out using funds directly made available by a capitalization grant under this subchapter for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services shall be negotiated in the same manner as a contract for architectural and engineering services is negotiated under chapter 11 of title 40 or an equivalent State qualifications-based requirement (as determined by the Governor of the State).

Why does this apply?

Because the language contained in the explanatory statements accompanying the FY 2022, FY 2023, and FY 2024 Consolidated Appropriations Acts that states: “Applicable Federal Requirements that would apply to a Clean Water State Revolving Fund or Drinking Water State Revolving Fund project grant recipient shall apply to a grantee receiving a CPF grant under this section.”

THE BROOKS ACT (CONT'D)

What does this requirement mean?

- ✓ For A/E professional services as described in the previous slide (not for other things an architect and/or engineer may do), the recipient must use competitive proposal procedures for **qualifications-based procurement where price is not a selection factor.**
 - Geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract. 2 CFR 200.319(c).
- ✓ The recipient should have discussions with at least 3 firms to consider anticipated concepts and compare alternative methods for furnishing services and select at least 3 firms considered to be the most highly qualified to provide the services required.
- ✓ Where equivalent State requirements are complied with, the source of the requirement (e.g., existing State legislation or regulation, etc.) must be stated, and a certification from the Governor of the State that the State's A/E procurement requirements are equivalent to [40 U.S.C. 1101 et seq.](#) must accompany the grant application. In lieu of a certification from the Governor, the Attorney General's certification submitted with each grant application may include this certification.
- ✓ The recipient shall negotiate a contract with the most highly qualified firm to determine compensation that is fair and reasonable based on a clear understanding of the project scope, complexity, professional nature, and the estimated value of the services to be rendered.
 - In the event that a contract cannot be negotiated with the most highly qualified firm, negotiation continues in order of qualification.

DOES THE TYPE OF CONTRACT MATTER?

Time and Materials Contracts. [[2 CFR 200.318\(j\)](#)]

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.

- May be used only when 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.



Contract Cost and Price. [[2 CFR 200.324\(d\)](#)]

The cost plus a percentage of cost and percentage of construction cost methods of contracting **must not be used**.

- This method does not encourage efficiency. → The more work the contractor does, the more profit is earned.

CONSULTANT FEE CAP

- Limits the amount of compensation for individual consultants that recipients may charge to EPA agreements to Level IV of the Federal Executive Level. [*Does not include consultant's overhead or travel costs.]
- **STATUTORY!!!!** Implementing regulations at [2 CFR 1500.10](#).
 - EPA cannot waive requirement.
- When the Cap applies is based on whether the recipient selects, directs, or controls the consultant along the same lines as an employee.
- Contracts with multi-employee consulting firms rarely trigger consultant fee cap but terms of contract are important.
- Consultants are contractors even if they receive an IRS 1099 from recipient—competitive procurement rules apply!



SOLE SOURCE CONTRACTS

As provided at [2 CFR 200.320\(c\)](#), procurement through solicitation of a proposal from only one source may be used only when one or more of the following circumstances apply:

- Item/service only available from a single source.
- Public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.
- Awarding agency or pass-through entity expressly authorizes non-competitive proposals.
- After solicitation of a number of sources, competition is determined inadequate.

“Single source” procurements are justified by copyrights, patents, and equipment maintenance agreements with manufacturers.

The fact that a contractor prepared a proposal **does not** justify a sole source contract for that entity to perform work.

EPA will **not** approve sole source contracts for goods and services that are readily available in the commercial marketplace, including contractor or instruction services provided by individuals.



“XYZ contractor is familiar with our program and we have partnered with the firm for years” **Does not work!**

SOLE SOURCE CONTRACTS & TRIBAL NATIONS



Under the Indian Self-Determination and Education and Assistance Act (ISDEAA), tribal recipients may give preference to Indian organizations and to Indian-owned economic enterprises when awarding procurement contracts under EPA assistance agreements, which is consistent with 40 CFR 33.304.

EPA does not interpret the ISDEAA or 40 CFR Part 33 to 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.

CONFLICTS OF INTEREST

Conflicts of interest are prohibited by [2 CFR 200.318\(c\)](#).

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

Organizational Conflicts of Interest

“If the [recipient] has a parent, affiliate, or subsidiary organization that is not a State, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.”



CONSIDERATIONS FOR PREPARING SOLICITATION DOCUMENTS/SELECTING CONTRACTORS

PRACTICES THAT ARE RESTRICTIVE OF COMPETITION

As provided in [2 CFR 200.319\(b\)](#), “In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements.”

Practices that are **restrictive of competition** include:

- ⊗ Using sample language or templates from contractors planning to bid on the services
- ⊗ Accepting **any assistance** from a contractor ***if*** that contractor plans to compete for the resultant contract
- ⊗ Imposing unreasonable competition requirements, such as:
 - ⊗ Overly narrow specifications that only one firm can meet
 - ⊗ Requiring firms to have experience with EPA Grants
- ⊗ Making noncompetitive awards to consultants that are on retainer contracts
- ⊗ Discouraging other contractors from submitting an offer by naming firms



EPA'S DBE RULE

Make good faith efforts to solicit quotes from Disadvantaged Business Enterprises required by [40 CFR Part 33](#).

- EPA does not currently have a directory or list of certified MBEs/WBEs, however, EPA recommends checking with the Small Business Administration, Department of Transportation, or the state in which your organization intends to do business.

EPA recommends publicly advertising RFPs/RFQs and keeping the bidding period open for **at least 30 days for full and open competition.**

*Note, consistent with 40 CFR 33.304, Tribal Nations are allowed to “solicit and recruit Indian organizations and Indian-owned economic enterprises and give them preference in the award process prior to undertaking the six good faith efforts.”



COMPETE SMART!

Consider the use of multi-year contracts with broad scopes and options when investing in a competitive proposal process.

- ✓ Cost/price analysis must be done in advance
- ✓ Profit must be negotiated as separate element for each contract in which there is no price competition

- Include **“options”** in the Request For Proposal/Request For Qualifications that will allow the same contractor to conduct work under current and future grants.
- Must request updated cost information from the contractor to determine if there is a change in rates and to ensure the new price for services is reasonable as required by [2 CFR 200.324\(a\)](#) & [404](#).
- Verify any price increase is reasonable by using information available online (or other sources) to conduct a market survey.


For example...

“The resulting contract will be for 4 years. [Organization name] may amend or extend this contract beyond the initial 4 years to accommodate the terms and conditions of the FYXX Grant or future EPA grants awarded to [Organization name] within this 4-year period provided a market survey conducted by [Organization name] indicates that the prices the contractor proposes are reasonable.”

MUST I CONSIDER COST REASONABLENESS IN EVALUATING PROPOSALS?

- Generally, yes, unless the task falls under the scope of the Brooks Act qualifications-based procurement procedures or equivalent State qualifications-based procurement requirement (i.e., Community Grants projects with workplans inclusive of CWSRF-eligible activities that are procuring for A/E services as identified at 33 U.S.C. 1382(b)(14)) or the task **CAN ONLY** be performed by a licensed A/E firm (such as when **REQUIRED** by federal, state, or local law)
 - For instance, price reasonableness must be considered when procuring *construction* services.
- Then, and only then, can the recipient conduct a qualifications-based procurement, where price is not considered, but just for **that particular task(s)**.
- Otherwise, price reasonableness **must** be considered, which will be discussed in more detail on the following slides.

COST REASONABLENESS MUST BE CONSIDERED

 **Cost-Effectiveness:** Ensure recipients obtain goods and services at reasonable prices, thus maximizing the value of the grant funds.

Community Grants recipients may compare pricing for grant writing/application preparation and grant implementation services.

*Recipients may directly charge reasonable proposal preparation costs to the EPA grant.

Options for evaluating price reasonableness:

- ❖ Alongside all other evaluation criteria
- ❖ Only for the top two or three scoring proposals



REMINDER: FOR COMMUNITY GRANTS PROJECTS WHERE THE *BROOKS ACT* APPLIES (i.e., those inclusive of CWSRF-eligible activities), PRICE MUST NOT BE CONSIDERED IN EVALUATING PROPOSALS.

WEIGHTED EVALUATION CRITERIA

➤ **Must have weighted evaluation factors**

- Document rationale for selecting the contractor (required by [2 CFR 200.318\(i\)](#))
- EPA recommends that the **reasonableness of cost/price proposal is at least 25% of the total percentage** (when applicable)
- **Reasonableness of cost/price can** be evaluated at the same time as the other factors for all bids (which is EPA's preference) **OR** only evaluated for two or more top-scoring bids (when multiple bids are received) (when applicable)

➤ Evaluation criteria

- Use weighted percentages;
- Assign points to each selection factor; or
- Include a range of points with associated descriptors

WEIGHTED EVALUATION CRITERIA (CONT'D)

For example, responses will be evaluated against the following factors

- X% - Demonstrated experience in [*infrastructure project activities*]
- X% - successfully completing tasks/projects
- X% - engaging with community member, federal & state agencies
- X% - Experience and capacity of project team/personnel
- X% - Reasonableness of cost/price proposal (e.g., rates, other available info) – as applicable
- X% - References



90 - 100	Most Effective	5
80 - 89	Above Average	4
70 - 79	Average	3

Or, for example

- Highly Advantageous (4 Points)
- Advantageous (3 Points)
- Not Advantageous (2 Points)
- Unacceptable (0 Points)

OTHER CONSIDERATIONS FOR PREPARING SOLICITATION DOCS

■ Davis-Bacon:

- Davis-Bacon labor standards and prevailing wage requirements only apply to a federal financial assistance program if the statute (i.e., typically the statute authorizing the grant program) mandates compliance with Davis-Bacon prevailing wage requirements [**Davis-Bacon does apply to Community Grants – but not all projects**]
- If Davis-Bacon applies to your grant **and** you are procuring for services that trigger Davis Bacon compliance, the prevailing wage determination **must** be included in the solicitation documents.

■ Build America, Buy America (BABA):

- Established a domestic content procurement preference for all Federal financial assistance obligated for **infrastructure** projects after May 14, 2022.
- The domestic content procurement preference requires that all iron, steel, manufactured products, and construction materials used in covered infrastructure projects are produced in the United States.

■ American Iron and Steel (AIS)

***If you are unsure if any of the above requirements apply to your project, please consultant your EPA regional point of contact and/or the terms and conditions of your EPA grant.**

CONSIDERATIONS FOR SELECTING A CONTRACTOR

- Document the decision.**
 - E.g., a scoring rubric

- The lowest price does not have to be selected, but you must document the rationale and basis for the contract price. [[2 CFR 200.318\(h\) and \(i\)](#)]**
 - You may be required to provide this documentation to EPA's Grants Management Officer (GMO)/Award Official for review as required by 2 CFR 200.337(a).
 - Prior approval of the contract terms by the GMO may be required as provided for in 2 CFR 200.208(c)(6) if the GMO/Award Official is concerned about the recipient's compliance with competitive procurement rules.

- Currently, if only one bid is received, and the contract is over \$250K, you must negotiate profit as a separate element of the contract. [[2 CFR 200.324\(b\)](#)]**
 - Applies to "Qualifications-based" procurement for Architectural and Engineering services where price is not a selection factor as required by [2 CFR 200.320\(b\)\(2\)\(iv\)](#).

- Ensure the contractor is not suspended or debarred. [[General T&C #21](#)]**

AFTER THE PROCUREMENT: CONTRACT PROVISIONS



- After you have selected the contractor, determine what contract clauses need to be included in the contract, such as:
 - Contract provisions in [Appendix II to 2 CFR Part 200](#) (as applicable)
 - [AIS](#) (as applicable)
 - [BABA](#) (as applicable)
 - [Davis-Bacon](#) (as applicable)
 - [Appendix A to 40 CFR Part 33](#)
 - [Recipient and Subrecipient cross-cutter requirements](#) (some of these provisions may be pertinent to your contract)

The next several slides contain contract language that should be included in your contracts as appropriate.

APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL AWARDS

In addition to other provisions required by the Federal agency or non-Federal entity, all contracts made by the non-Federal entity under the Federal award must contain provisions covering the following, as applicable.

(A) **Contracts for more than the simplified acquisition threshold**, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by [41 U.S.C. 1908](#), must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL AWARDS (CONT'D)



(B) **All contracts in excess of \$10,000** must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement

APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL AWARDS (CONT'D)

(C) **Equal Employment Opportunity.** Except as otherwise provided under [41 CFR Part 60](#), **all contracts that meet the definition of “federally assisted construction contract”** in [41 CFR Part 60-1.3](#) must include the equal opportunity clause provided under [41 CFR 60-1.4\(b\)](#), in accordance with [Executive Order 11246](#), “Equal Employment Opportunity” ([30 FR 12319](#), [12935](#), [3 CFR Part, 1964-1965 Comp.](#), p. 339), as amended by [Executive Order 11375](#), “Amending [Executive Order 11246](#) Relating to Equal Employment Opportunity,” and implementing regulations at [41 CFR part 60](#), “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.”

APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL AWARDS (CONT'D)

(D) **Davis-Bacon Act**, as amended ([40 U.S.C. 3141-3148](#)). When required by Federal program legislation, **all prime construction contracts in excess of \$2,000** awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act ([40 U.S.C. 3141-3144](#), and [3146-3148](#)) as supplemented by Department of Labor regulations ([29 CFR Part 5](#), “Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction”). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The non-Federal entity must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland “Anti-Kickback” Act ([40 U.S.C. 3145](#)), as supplemented by Department of Labor regulations ([29 CFR Part 3](#), “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States”). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency.

- EPA’s Davis-Bacon and Related Acts website is available [here](#).
- EPA grant recipients, subrecipients, prime contractors and subcontractors must include the link to the [Contract Provisions for Davis-Bacon and Related Acts](#) in all contracts that are subject to DBRA requirements. In addition, EPA recipients and subrecipients must include the link to [DBRA Requirements for EPA Subrecipients](#) in all EPA subawards that are subject to DBRA requirements.

APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL AWARDS (CONT'D)

(E) Contract Work Hours and Safety Standards Act ([40 U.S.C. 3701-3708](#)). **Where applicable, all contracts awarded by the non-Federal entity in excess of \$100,000 that involve the employment of mechanics or laborers** must include a provision for compliance with [40 U.S.C. 3702](#) and [3704](#), as supplemented by Department of Labor regulations ([29 CFR Part 5](#)). Under [40 U.S.C. 3702](#) of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of [40 U.S.C. 3704](#) are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL AWARDS (CONT'D)

(F) **Rights to Inventions Made Under a Contract or Agreement.** If the Federal award meets the definition of “funding agreement” under 37 CFR § 401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency.



APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL AWARDS (CONT'D)

(G) Clean Air Act ([42 U.S.C. 7401-7671q.](#)) and the Federal Water Pollution Control Act ([33 U.S.C. 1251-1387](#)), as amended—**Contracts and subgrants of amounts in excess of \$150,000** must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act ([42 U.S.C. 7401-7671q](#)) and the Federal Water Pollution Control Act as amended ([33 U.S.C. 1251-1387](#)). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL AWARDS (CONT'D)

(H) **Debarment and Suspension** (Executive Orders 12549 and 12689)—**A contract award** (see [2 CFR 180.220](#)) **must not be made to parties listed on the governmentwide exclusions in the System for Award Management (SAM)**, in accordance with the OMB guidelines at [2 CFR 180](#) that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), “Debarment and Suspension.” SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than [Executive Order 12549](#).



APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL AWARDS (CONT'D)

(I) Byrd Anti-Lobbying Amendment ([31 U.S.C. 1352](#))—**Contractors that apply or bid for an award exceeding \$100,000 must file the required certification.** Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by [31 U.S.C. 1352](#). Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.

APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL AWARDS (CONT'D)

(J) **Procurement of Recovered Materials.** A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at [40 CFR part 247](#) that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, 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; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.



APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL AWARDS (CONT'D)

(K) Prohibition on certain telecommunications and video surveillance services or equipment.

(a) Recipients and subrecipients are prohibited from obligating or expending loan or 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 or renew a contract) to procure or obtain equipment, services, or systems that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. As described in [Public Law 115-232](#), section 889, covered telecommunications equipment is telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).

(i) For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities).

(ii) Telecommunications or video surveillance services provided by such entities or using such equipment.

(iii) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

(b) In implementing the prohibition under [Public Law 115-232](#), section 889, subsection (f), paragraph (1), heads of executive agencies administering loan, grant, or subsidy programs shall prioritize available funding and technical support to assist affected businesses, institutions and organizations as is reasonably necessary for those affected entities to transition from covered communications equipment and services, to procure replacement equipment and services, and to ensure that communications service to users and customers is sustained.

(c) See [Public Law 115-232](#), section 889 for additional information.

(d) See also [§ 200.471](#).

APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL AWARDS (CONT'D)

(L) Domestic Preferences for Procurements

(a) As appropriate and to the extent consistent with law, the non-Federal entity should, to the greatest extent practicable under a Federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). The requirements of this section must be included in all subawards including all contracts and purchase orders for work or products under this award.

(b) For purposes of this section:

(1) “Produced in the United States” means, for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

(2) “Manufactured products” means items and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.

(c) Federal agencies providing Federal financial assistance for infrastructure projects must implement the Buy America preferences set forth in [2 CFR part 184](#).

AMERICAN IRON AND STEEL SAMPLE CONTRACT LANGUAGE

ALL CONTRACTS MUST HAVE A CLAUSE REQUIRING COMPLIANCE WITH THE AIS REQUIREMENT. THIS IS AN EXAMPLE OF WHAT COULD BE INCLUDED IN ALL CONTRACTS IN PROJECTS THAT USE COMMUNITY GRANT FUNDS. EPA MAKES NO CLAIMS REGARDING THE LEGALITY OF THIS CLAUSE WITH RESPECT TO STATE OR LOCAL LAW:

The Contractor acknowledges to and for the benefit of the _____ (“Owner”) and the _____ (the “Funding Authority”) that it understands the goods and services under this Agreement are being funded with federal monies and have statutory requirements commonly known as “American Iron and Steel;” that requires all of the iron and steel products used in the project to be produced in the United States (“American Iron and Steel Requirement”) including iron and steel products provided by the Contactor pursuant to this Agreement. The Contractor hereby represents and warrants to and for the benefit of the Owner and the Funding Authority that (a) the Contractor has reviewed and understands the American Iron and Steel Requirement, (b) all of the iron and steel products used in the project will be and/or have been produced in the United States in a manner that complies with the American Iron and Steel Requirement, unless a waiver of the requirement is approved, and (c) the Contractor will provide any further verified information, certification or assurance of compliance with this paragraph, or information necessary to support a waiver of the American Iron and Steel Requirement, as may be requested by the Owner or the Funding Authority. Notwithstanding any other provision of this Agreement, any failure to comply with this paragraph by the Contractor shall permit the Owner or Funding Authority to recover as damages against the Contractor any loss, expense, or cost (including without limitation attorney’s fees) incurred by the Owner or Funding Authority resulting from any such failure (including without limitation any impairment or loss of funding, whether in whole or in part, from the Funding Authority or any damages owed to the Funding Authority by the Owner). If the Contractor has no direct contractual privity with the Funding Authority, as a lender or awardee to the Owner for the funding of its project, the Owner and the Contractor agree that the Funding Authority is a third-party beneficiary and neither this paragraph (nor any other provision of this Agreement necessary to give this paragraph force or effect) shall be amended or waived without the prior written consent of the Funding Authority.

BUILD AMERICA, BUY AMERICA SAMPLE CONTRACT LANGUAGE

ALL CONSTRUCTION CONTRACTS MUST HAVE A CLAUSE REQUIRING COMPLIANCE WITH THE BABA REQUIREMENTS. THIS IS AN EXAMPLE OF WHAT COULD BE INCLUDED IN A PROJECT'S CONSTRUCTION CONTRACT. EPA MAKES NO CLAIMS REGARDING THE LEGALITY OF THIS CLAUSE WITH RESPECT TO STATE OR LOCAL LAW:

The Contractor acknowledges to and for the benefit of the _____ (“Owner”) and the _____ (the “Funding Authority”) that it understands the goods and services under this Agreement are being funded with federal monies and have statutory requirements commonly known as “Build America, Buy America;” that requires all of the iron and steel, manufactured products, and construction materials used in the project to be produced in the United States (“Build America, Buy America Requirements”) including iron and steel, manufactured products, and construction materials provided by the Contractor pursuant to this Agreement. The Contractor hereby represents and warrants to and for the benefit of the Owner and Funding Authority that (a) the Contractor has reviewed and understands the Build America, Buy America Requirements, (b) all of the iron and steel, manufactured products, and construction materials used in the project will be and/or have been produced in the United States in a manner that complies with the Build America, Buy America Requirements, unless a waiver of the requirements is approved, and (c) the Contractor will provide any further verified information, certification or assurance of compliance with this paragraph, or information necessary to support a waiver of the Build America, Buy America Requirements, as may be requested by the Owner or the Funding Authority. Notwithstanding any other provision of this Agreement, any failure to comply with this paragraph by the Contractor shall permit the Owner or Funding Authority to recover as damages against the Contractor any loss, expense, or cost (including without limitation attorney’s fees) incurred by the Owner or Funding Authority resulting from any such failure (including without limitation any impairment or loss of funding, whether in whole or in part, from the Funding Authority or any damages owed to the Funding Authority by the Owner). If the Contractor has no direct contractual privity with the Funding Authority, as a lender or awardee to the Owner for the funding of its project, the Owner and the Contractor agree that the Funding Authority is a third-party beneficiary and neither this paragraph (nor any other provision of this Agreement necessary to give this paragraph force or effect) shall be amended or waived without the prior written consent of the Funding Authority.

EPA'S DBE RULE – APPENDIX A TO 40 CFR PART 33

Each procurement contract signed by an EPA financial assistance agreement recipient, including those for an identified loan under an EPA financial assistance agreement capitalizing a revolving loan fund, must 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.

RESOURCES

EPA Resources (non-exhaustive)

- [Your Regional POC!!](#)
- [EPA's Frequent Questions for Community Grants](#)
- [Community Grants: Reminders for Preparing Solicitation Documents](#)
- [EPA's Best Practice Guide for Procuring Services, Supplies, and Equipment Under EPA Assistance Agreements](#)
- [EPA Subaward Policy](#)
- [EPA Subaward Policy Frequent Questions](#)
- [EPA BABA webpage](#)
- [EPA AIS webpage](#)

Statutes/Regulations (non-exhaustive)

- [40 USC 1101 etc.](#) (the Brooks Act **[ONLY APPLIES TO PROJECTS WITH WORKPLANS INCLUSIVE OF CWSRF ELIGIBLE ACTIVITIES]**)
 - [33 USC 1382\(b\)\(14\)](#) (discusses activities where Brooks Act procurement procedures or an equivalent State qualifications-based requirement applies)
- [2 CFR Part 200](#) (the UGG)
- [2 CFR Part 184](#) (BABA)
- [2 CFR Part 1500](#) (EPA's supplement to the UGG)
- [29 CFR Subtitle A](#) (Davis-Bacon regs, including required labor standards/contract provisions)
- [40 CFR Part 33](#) (EPA's DBE regs)

Reminder: **Do not seek assistance** from contractors (including individual consultants) in preparing your solicitation documents (RFP/RFQ) *if* that contractor plans to submit a bid!