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Healthcare fraud enforcement in federal programs

an interview with
Amy Berne



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Now arrived: Procurement changes to OMB uniform guidance

- » The new Uniform Guidance procurement standards are now in effect, and certain recipients of federal awards now have a new set of procurement regulations with which to comply.
- » The Uniform Guidance is applicable to state and local governments, American Indian tribes, higher education institutions, and not-for-profit organizations for all federal awards or funding increments to existing awards made on or after December 26, 2014.
- » The five approved procurement methodologies are procurement by micro-purchases, small purchase procedures, sealed bids, competitive proposals, and noncompetitive proposals.
- » As always, documentation is key to ensuring evidence of good faith compliance with the Uniform Guidance.
- » Many organizations, especially non-profits, have limited resources and should consider seeking outside assistance to identify compliance gaps and conform their internal processes and procedures to comply with the new standards.

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The Office of Management and Budget (OMB) originally issued its Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance or UG) in December 2013.¹ The Uniform Guidance applies to state and local governments, American Indian tribes, higher education institutions, and not-for-profit organizations (nonfederal entities) for all federal awards or funding increments to existing federal awards made on or after December 26, 2014. Uniform Guidance Section 200.38 defines a *federal award* as a “grant from a Federal agency or pass-through entity (a nonfederal entity that provides a subaward to a [nonfederal

entity] to carry out part of a Federal program)” or a “cost-reimbursement contract under the Federal Acquisition Regulations (FAR) that a nonfederal entity receives directly from a Federal awarding agency or indirectly from a pass-through entity.”

Significant changes in the Uniform Guidance procurement requirements have been coming for some time, with the OMB delaying the requirement for three years from the original effective date. That is, if a nonfederal entity operates on a June 30 tax year-end, the first year the procurement standards would be applied is Fiscal Year 2019 (July 1, 2018, through June 30, 2019).² The UG procurement standards represent a major shift in the way nonfederal entities must approach procurement. Many are struggling with these changes, and finding themselves unprepared to handle the strict new compliance requirements, policy overhauls, training needed, and the cultural shift



Santo

the standards introduce.³ The standards place emphasis on procurement methodology to achieve the goals of increased responsibility and competition.

Although the UG includes various provisions that a nonfederal entity must abide by, this article focuses on the procurement standards enumerated in Subpart D of the regulation.

New procurement standards

As noted, the new procurement standards apply to nonfederal entities that receive a federal award (as defined in the UG) and intend to pass through that funding by procuring goods or services. Some key concepts and/or provisions that must be followed are:

- ▶ **Competition**—A nonfederal entity must provide for full and open competition in procuring goods and services. Situations must be avoided that may prevent competition, such as placing unreasonable requirements on bidders to preclude some from qualifying.
- ▶ **Documented policies**—Documented procedures must ensure all solicitations clearly and accurately describe the requirements of the goods or services to be procured and identify all requirements that bidders must fulfill and the factors used in evaluating bids. In addition, if policies include a prequalified list of persons, firms, or products used in procuring goods and services, the list should be current and include enough qualified sources to ensure open competition.⁴
- ▶ **Oversight**—A nonfederal entity must provide monitoring and oversight of contractors to ensure they perform in accordance with the terms, conditions, and specifications of their contracts.
- ▶ **Conflicts of interest**—A nonfederal entity must maintain written policies about the conduct of its employees involved in the

selection, award, and administration of contracts. These policies must cover organizational and personal conflict of interest to prevent the provision of unfair awards.

- ▶ **Using geographical preferences**—Unless federal statutes mandate or encourage geographical preference, a nonfederal entity must prohibit using statutorily or administratively imposed state, local, or tribal geographical preferences when conducting procurements.⁵
- ▶ **Contract provisions**—All contracts made by nonfederal entities using federal awards must contain all applicable provisions defined in Appendix II to Part 200. The appendix contains 10 subsections that cover a variety of contractual clauses, such as termination for cause and convenience, lobbying, and rights to inventions.⁶
- ▶ **Records**—A nonfederal entity must maintain documentation to support the history of the procurement.

Types of Procurements

After considering the general procurement requirements, the Uniform Guidance outlines five allowable methods (§200.320).

Micropurchases

This applies to purchases in which the aggregate dollar amount doesn't exceed the micropurchase threshold (currently \$3,500). Purchases may be made without cost or price analysis or soliciting any quotes or bids if the nonfederal entity considers the price to be reasonable. Entities are encouraged to distribute these purchases among qualified suppliers.

Small purchase

If a purchases is above the micropurchase threshold but below the Simplified Acquisition Threshold (SAT) as defined by the Federal Acquisition Regulation (FAR, currently \$150,000), informal price or rate

quotations must be obtained from more than one qualified source. Quotes may be obtained from a variety of sources (e.g., internet search, vendor price listing, verbal quotes), and no cost or price analysis is required.⁷

Sealed bids

If the purchase is above the SAT, bids are publicly solicited, and a firm fixed-price contract is awarded to a responsible bidder who has the lowest price and conforms to all the material terms and conditions of the invitation for bid. Price is a significant factor in this method, and it generally is the preferred method for procuring construction. This method is used if bids may be solicited from an adequate number of suppliers (two or more), a complete and realistic specification or purchase description is available, the purchase results in a firm fixed-price contract, and the selection may be made based on price. A cost and price analysis must be performed for these purchases, and the entity must make independent estimates before receiving bids or proposals.⁸

Competitive proposals

This applies to purchases greater than the SAT in situations where sealed bids are not deemed appropriate. Typically, a Request for Proposal (RFP) is made. This may be the case when price isn't the only factor in awarding a contract. This usually results in a fixed-price or cost-reimbursement type contract.

Noncompetitive proposals

This method results in a solicitation from a sole source and may be used if one or more of the following conditions apply:

- ▶ Item is available from only one source;
- ▶ Public emergency won't permit a delay resulting from competitive solicitation;
- ▶ Awarding agency authorizes noncompetitive proposals in response to a written request from the nonfederal entity; and/or
- ▶ After soliciting several sources, competition is determined to be inadequate.

With any of the above methods, the procurement standards also underline contracting with small and minority businesses, women's business enterprises and labor surplus area firms. A nonfederal entity should strive to use these firms when possible.

Documentation of the inability to procure such firms for each procurement would help ensure a record of compliance.

One excellent resource is OMB's update to its frequently asked questions document, dated July 2017.


Best practices

Nonfederal entities should consider these best practices while making changes to conform to the new Uniform Guidance requirements:

- ▶ **Conduct a gap assessment** between current and necessary policies and procedures and revise your procurement policy accordingly, including written standards on conduct, such as those addressing conflicts of interest.
- ▶ **Don't employ a one-size-fits-all approach.** Policies should be tailored and specific to the nonfederal entity. For example, the sealed bids and competitive proposal procurement methods require an "adequate" number of bids/proposals. Each nonfederal entity may define what "adequate" is for its organization and document that in its procurement policies.
- ▶ Assemble a procurement document library consisting of templates and forms designed

to support documentation requirements under the Uniform Guidance. The library may include templates like procurement planning forms, source justification forms, and monitoring plans.⁹

- ▶ Train everyone involved in the procurement process to ensure they understand the new requirements and policy at appropriate organizational levels.
- ▶ Use your internal audit function to ensure your new procedures and controls are operating effectively, once your policy changes have been effective for a reasonable amount of time.¹⁰
- ▶ Seek outside help to provide an efficient way to ensure your compliance. Many nonfederal organizations have limited infrastructure to identify compliance issues and create policy updates and process improvements.

Now that they are in effect, nonfederal entities must review the Uniform Guidance procurement standards, align current practices with those standards, and provide training to those involved in procurement to help ensure compliance. A variety of resources are available online. One excellent resource is OMB's update to its frequently asked questions document, dated July 2017. The update includes answers to new questions as well as revisions to certain questions and answers included in previous versions of the document. 

1. Title 2 U.S. Code of Federal Regulations, Part 200 (Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards). Available at <http://bit.ly/2qLC5Yz>
2. Lindsey Oakley: "The Time Is Now to Implement Uniform Guidance Procurement Requirements", BKD, LLP. December 2017. Available at <http://bit.ly/2HypNxb>
3. Andrea Wilson: "Good News for Stragglers: OMB Issues a Uniform Guidance Procurement Grace Period Extension", BDO Industry Blogs; August 14, 2017. Available at <http://bit.ly/2HcuUUd>
4. Ibid, Ref #3
5. Id.
6. Tom Rogers: "Breaking Down the New Uniform Guidance Procurement Standards", Vendor Centric Blog; February 9, 2017. Available at <http://bit.ly/2HcUkwV>
7. Ibid, Ref #3
8. Id.
9. Ibid, Ref #7
10. Ibid, Ref #4

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