

Federal Procurement Q&A – June 2022

Questions were provided by the AASBO procurement committee in response to the April 2022 ADE-Brustein & Manasevit Federal Procurement Webinar. The following answers are provided through consultation with Bonnie Graham, Brustein & Manasevit, PLLC.

1. Conferences – exempt since considered ‘travel’?

In general, whether a conference registration is considered a travel cost or a contract for goods and services defers largely to your travel procedures and accounting practices. Depending on the registration / agreement, though, it could be considered a contract – but would almost certainly be a micropurchase (under \$10,000) that does not require multiple quotes.

Bonnie received a comment after the training from someone worried that if travel costs do not go through procurement procedures, then what would prevent an employee from booking a first-class ticket, etc. To clarify – just because federal procurement rules are not implicated does not change the requirements that all costs must be reasonable and necessary. Following procurement rules is a way to demonstrate reasonableness, but travel policies likewise can (and often do) include requirements to ensure reasonable costs such as taking public transportation when available, getting gov’t rates, per diem caps, etc. And certainly, travel policies (including federal travel rules) do not allow federal funding to cover private planes or first-class tickets, etc.

With respect to conference registration costs – even if treated as travel, to charge the registration to a federal award there must be documentation that: “(1) Participation of the individual is necessary to the Federal award; and (2) The costs are reasonable and consistent with non-Federal entity's established travel policy.” 2 CFR 200.475(b). If district and/or local travel policies suggest getting quotes from similar conferences and/or training events to document the reasonableness of the training, then the grantee should do so, regardless of whether the registration is a “contract for services” subject to procurement or not.

2. She (Bonnie Graham) talked about travel reimbursements not needing to follow procurement, but what about travel (hotel & airfare) direct payments?

A contract is defined as “a legal instrument by which a recipient or subrecipient purchases property or services needed to carry out the project or program under a federal award.” 2 CFR 200.1. Travel costs are defined as the expenses for transportation, lodging, subsistence and related costs incurred by employees who are in travel status on official business of the nonfederal entity. 2 CFR 200.475. Often, travel costs are accounted for separately from contracted services. Further, travel policies generally set limits on the amount of travel costs that an employee could be reimbursed for – such as per diems, etc. In all circumstances, travel costs must be documented as reasonable and consistent with the non-federal entity’s established travel policy. 2 CFR 200.475(b)(2).

Even if travel costs to commercial vendors (hotels/ airfare) are accounted for as contracted services by the district, it is unlikely that these costs would exceed the micropurchase threshold. However, the grantee still must document that the flight/hotel purchased is reasonable – such as a printout of a flight comparison service (i.e., Google flights, Expedia, etc.). And often, travel policies require a gov’t rate or place a limit on the amount the employee will be reimbursed for hotel costs.

3. Memberships – she (Bonnie Graham) said most would not be over \$10,000. Is she (Bonnie Graham) looking at each individual membership as a separate purchase, and we don’t need to consider commodity totals?

Procurement thresholds are generally determined based on the aggregated total from a vendor, so if multiple memberships are purchased – the price threshold would be aggregated. From the OMB FAQs:

Do the competition requirements apply to each individual purchase, or can they be leveraged for strategic sourcing agreements, shared services arrangements, or other efficient uses of funds?

The competition requirements apply to broader procurement decisions. Section 200.318 paragraphs (d) and (e) encourage non-Federal entities to build into their procurement policies practices that consolidate procurements where appropriate to make most efficient use of Federal funds.

If the costs for a few employees to be members in a technical / professional organization will exceed \$10,000, then the district will need to consider procurement requirements, such as: (1) whether there is a competing organization that the district can get a comparison quote from; or (2) whether the organization can be considered a sole source, such that competition requirements do not apply. Regarding memberships and subscriptions, keep in mind the requirements in 2 CFR 200.454.

4. In Handout (from the BruMan webinar) – service agreements with other government agencies. Recommended following noncompetitive procurement process. Sole Source with governing board or waiver from ADE?

Most likely, a service agreement with other gov’t agencies is not a sole source. (Arguably, there are competitors who provide similar services in the market?). Based on the authority in 2 CFR 200.320(c)(4), it is at the discretion of the State Education Agency (SEA) to determine whether to review noncompetitive procurements. After careful consideration and analysis, ADE has determined to continue recommending LEAs follow both federal and state procurement guidelines per UGG and EDGAR for a more expeditious and judicious pathway in evaluating applicable federal policy against local contexts and specific circumstances. However, 2 CFR 200.320(c) outlines five potential pathways that LEAs may use to leverage a noncompetitive procurement. Of these, LEAs may also choose to submit a written request to the federal awarding agency (U.S. Department of Education), per 2 CFR 200.320(c)(4).

5. Process for noncompetitive purchase approval from ADE? One per vendor? Renew annually? In Handout (from the BruMan webinar) – stated ADE could set up a standardized request/approval process for particular vendors or services.

Based on the authority in 2 CFR 200.320(c)(4), it is at the discretion of the State Education Agency (SEA) to determine whether to review noncompetitive procurements. After careful consideration and analysis, ADE has determined to continue recommending LEAs follow both federal and state procurement guidelines per UGG and EDGAR for a more expeditious and judicious pathway in evaluating applicable federal policy against local contexts and specific circumstances. However, 2 CFR 200.320(c) outlines five potential pathways that LEAs may use to leverage a noncompetitive procurement. Of these, LEAs may also choose to submit a written request to the federal awarding agency (U.S. Department of Education), per 2 CFR 200.320(c)(4).

6. If my board declares it a sole source, do I have to have ADE approval?

No, the district does not need ADE approval to use a noncompetitive process where the item / service is available from a single source. 2 CFR 200.320(c)(2). **In general, sole source contracts receive additional scrutiny from auditors and monitors.** There have been audit findings where a district believed a purchase to be sole source, but an auditor disagreed. However, in general, liability is limited to whatever the competitive /reasonable price would have been. Accordingly, even when using a sole source process, the district may want to include documentation in the file that supports the reasonableness of the price.



7. If I have ADE approval, does my board have to declare it a sole source?

Is the district referencing the state’s approval to use a noncompetitive process to select a vendor, under 2 CFR 200.320(c)(4)? Based on the authority in 2 CFR 200.320(c)(4), it is at the discretion of the State Education Agency (SEA) to determine whether to review noncompetitive procurements. After careful consideration and analysis, ADE has determined to continue recommending LEAs follow both federal and state procurement guidelines per UGG and EDGAR for a more expeditious and judicious pathway in evaluating applicable federal policy against local contexts and specific circumstances. However, 2 CFR 200.320(c) outlines five potential pathways that LEAs may use to leverage a noncompetitive procurement. Of these, LEAs may also choose to submit a written request to the federal awarding agency (U.S. Department of Education), per 2 CFR 200.320(c)(4).

8. How to handle ADE private day schools? She (Bonnie Graham) recommended sole source justifications would be appropriate or ADE waiver.

Assuming this involves using IDEA funds to send a student with a disability to a private school as required by the student’s IEP and that this an exemption from AZ state procurement requirements? If so, then the federal threshold for competition is \$250,000. Most thresholds are viewed on an annual basis. So long as tuition is under \$250,000, then the district could meet federal procurement by identifying a second quote from another private placement to demonstrate the reasonableness of the price. If that’s not an option, then the district likely could use a sole source justification based on the IEP team’s decision that the student should be placed in the private school to receive FAPE.

9. If I have a textbook purchase under \$250,000 using federal funds, I can just do 3 written quotes to satisfy procurement? Or possibly I could get 2 based on “adequate number of qualified sources”? Would adoption process where pricing is compared through the adoption committee satisfy the requirement?

Yes, if AZ procurement does not apply to textbooks – then the federal thresholds apply. As long as the district has documentation of price comparisons (2 or more quotes), which could include the comparisons reviewed by the adoption committee, then the informal procurement process is likely satisfied.

10. Is 2 step JOC process compliant since RFP step considers price as a factor?

In general, publicizing the requests for proposals, setting out evaluation criteria that includes price as a factor, and selecting the most advantageous bidder based on the established evaluation process arguably meets federal procurement in 2 CFR 200.320(b)(2). However, keep in mind, sealed bids are the preferred method for procuring construction contracts. Under the sealed bid process, 2 CFR 200.320(b)(1), price must be the primary factor for selection. An LEA could possibly utilize a JOC, 2 step process, but they must be able to demonstrate that cost was the primary factor, and the cost was necessary and reasonable. The LEA would be assuming the risk and would need to compliance with the federal requirements.

11. Cost Price Analysis – they referred to it as one thing, but we follow 2 separate processes depending on if we get one response or multiple responses

The federal requirements on cost and price analysis are found in 2 CFR 200.324:

- (a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.
- (b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. 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.

(c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under [subpart E of this part](#). The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.

(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

In general, the analysis involves an estimate of the overall cost, as well as individual price elements, before soliciting bids or proposals. Profit is negotiated separately in circumstances where there is no price competition, and for all contracts that exceed \$250,000.

12. USDA Market Basket – include 75% of anticipated purchases. Follow up before award for pricing on remaining items to ensure reasonableness. Remaining 25% of anticipated purchases – or remaining items of vendor’s entire price list?

“When using a market basket analysis, the program operator must obtain pricing for the remaining listed goods that were not included in the market basket analysis prior to the final award.” [USDA Guidance](#). This is interpreted to be the remaining items in the vendor’s price list that is included in / covered by the contract.

13. What method are others using to document price is reasonable based on research, experience, purchase history or other information for Micro Purchases?”

Generally, requisition forms or purchase orders for micropurchases will include a simple check-the-box assertion that the purchaser considers the vendor’s price reasonable based on: __ research; __ experience; __ purchase history; __ other _____. This likely satisfies the requirement to document reasonableness for micropurchases.

14. Does cost need to be the #1 factor in an RFP? I continue to advise Districts to do so until we get something definitive.

Yes, for sealed bids, which must be selected “principally on the basis of price.” 2 CFR 200.320(b)(1)(i)(C). For open proposals, contracts are awarded to the “responsible offeror whose proposal is most advantageous to the non-federal entity, with price and other factors considered.” 2 CFR 200.320(b)(2)(iii) (emphasis added). The proposal itself must determine the evaluation factors and their relative importance, so that responders know how price fits in with respect to other factors. But a district could evaluate a bid with greater emphasis on qualifications or capacity, rather than price.

15. The FAR states that the Federal awarding agency or pass-through entity expressly authorizes a noncompetitive procurement in response to a written request from the non-Federal entity. How do we request this authorization, and can we obtain this authorization for the exemptions in the Arizona School District Procurement Code?

Under most circumstances, the Federal Acquisition Regulations (FAR) are not applicable to school districts. Only if the school district is a contractor or subcontractor of the federal government would the FAR apply. Grants and subgrants are subject to the procurement requirements in the Uniform Grant Guidance (UGG), 2 CFR Part 200.

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