

American Rescue Plan Act State and Local Fiscal Recovery Fund Procurement Considerations

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Risks of Improper ARPA Spending

- Audit
- Recoupment 31 CFR 35.10
- Negative Press

Sources of Compliance Obligations



State Law

Terms and Conditions
of your SLFRF award

2 CFR Part 200, Uniform Administrative
Requirements, Cost Principles, and Audit
Requirements for Federal Awards (“UGG”)

State Law

- **Purchases in excess of \$30,000 (other than professional services) must be competitively bid**
- **KRS 424.260(1)**
 - “Except where a statute specifically fixes a larger sum as the minimum for a requirement of advertisement for bids, no city, county, or district, or board or commission of a city or county, or sheriff or county clerk, may make a contract, lease, or other agreement for materials, supplies except perishable meat, fish, and vegetables, equipment, or for contractual services other than professional, involving an expenditure of more than thirty thousand dollars (\$30,000) without first making newspaper advertisement for bids. This subsection shall not apply to the transfer of property between governmental agencies as authorized in KRS 82.083(4)(a).”

State Law – Model Procurement Code (KRS 45A.345-460)

- Same dollar threshold (\$30,000) for competitive procurement requirements, but additional recordkeeping obligations
- Procurement options/obligations more similar to UGG procurement requirements applicable to ARPA

Uniform Grant Guidance

- Procurement/Purchasing (Subpart D)
- Contract Terms (Subpart D/Appendix II)
- Accounting Principles (Subpart E)
- Audit Requirements (Subpart F)

Uniform Grant Guidance

- Documenting policies, procedures and decision making provides two benefits:
 1. Internally, it provides clarity and instruction to those involved in administering ARPA funds.
 2. Externally, they reflect your compliance, and steps taken to ensure compliance, to Treasury.



UGG Policy Requirements

- A nonfederal entity (such as a county) must have a **written** procurement policy that reflects procurement and cost accounting procedures consistent with applicable state and federal requirements
- Must include a conflicts of interest policy stating:
 - No employee, officer, or agent may participate in selection, awards, or administration of contracts supported by a federal award if he/she has a real or apparent conflict of interest
 - Conflict of interest defined in 2 CFR 200.318(c)

UGG Procurement Procedures

- Pre-solicitation
 - All procurements must provide for full and open competition
 - Contractors who assist in developing specifications for a solicitation cannot compete for the award of that contract
 - Cannot impose statutorily imposed state or local geographic preferences
 - Avoid unnecessary/duplicative procurements
 - Consider breaking out procurements for economy
 - Consider alternatives to promote economy
 - Only award contracts to “responsible” contractors
 - Contracts over \$25,000 must include a suspension/debarment certification

UGG Procurement Procedures

- Recordkeeping
 - Keep a detailed history of all steps in the procurement:
 - Document rationale for method of procurement selected
 - Document selection of contract type (lump sum, time and materials, etc.)
 - Document contractor selection/rejection reasoning
 - Basis for contract price

Bid/Proposal Solicitation Contents

- Clear and accurate description of the goods or services to be procured
 - Include minimums/maximums, qualities desired, necessary standards
 - “Brand name or equivalent” – do not unnecessarily require a brand name product, but you may reference a brand name to convey characteristics required or desired
- Identify and provide requirements and/or desired qualities offerors must fulfill and other factors you will consider in evaluating bids or proposals

UGG Methods of Procurement

Method	Dollar Threshold
Micro-Purchase	\$10,000 or higher threshold set by recipient
Small Purchase Procedure	\$10,000-\$30,000
Formal Procurement	\$30,000 or more (or \$250,000 for professional services)
• Sealed Bid	\$30,000 or more (or \$250,000 for professional services)
• Competitive Proposal	\$30,000 or more (or \$250,000 for professional services)
Noncompetitive Proposal/Sole Source	Greater than Micro-Purchase Threshold

Micro-Purchase/Small Purchase Procedures

- Micro-Purchase (\$10k or less)
 - No cost or price analysis required
 - No quotations necessary, price just must be reasonable and micro-purchases spread amongst qualified bidders
- Small Purchase (\$10k-\$30k)
 - Quotations obtained from at least two qualified sources, informally documented (Notes on phone call or web search print)

Formal Procurement Methods (<\$30k)

- Sealed Bids – appropriate where:
 - A complete, thorough specification is available,
 - Two or more responsible bidders are willing and able to compete,
 - The procurement lends itself to a fix price contract, and
 - Selection of the bidder can be made principally on the basis of price
- Competitive Proposals – appropriate where:
 - Fixed price bids inadequate
 - Recipient considering a variety of factors in selecting a competitor
 - NOTE: price must still be the primary selection factor, except when selecting architectural or engineering services.

Formal Procurement – Cost or Price Analysis

- For procurement actions in excess of \$250,000, including contract modifications, recipient must perform a cost or price analysis prior to soliciting bids or proposals. 2 CFR 200.323
- Cost analysis applicable to cost-reimbursement type contracts, A/E contracts, or professional services contracts
- Method and degree of analysis required depends on the facts of the procurement, but generally an independent estimate of the cost will suffice
 - Estimate a breakdown of profit vs. cost, as applicable
- **Cost plus contracts prohibited.**

Sealed Bids

If sealed bids are used, the following requirements apply:

Bids solicited from an adequate number of known suppliers, providing sufficient response time prior to opening date

Invitation for bids publicly advertised

Any or all bids may be rejected for sound, documented reasons

Invitation must define the items or services in a manner that allows bidders to respond

Invitation must state date, time and place of bid opening and public opening must take place as advertised

Firm, fixed price contract awarded to lowest responsible and responsive bidder

Competitive Proposals

- Must be publicized and identify all evaluation factors and their relative importance.
- All responses must be considered to the maximum extent practical
- Proposals must be solicited from an adequate number of qualified sources
- Must have a written method for evaluating proposals and selecting a proposer
- Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered

Sole Source Procurement

- Permitted in LIMITED circumstances:
 - Competition inadequate after soliciting proposals
 - Unique circumstances (e.g., compatibility with existing software)
 - Public emergency
 - Written approval from Treasury
- Must document justification for sole source procurement

Extras

- Must take all necessary affirmative steps to ensure MBE/WBEs are used when possible. “Affirmative steps” include:
 - Placing small business and MBE/WBEs on solicitation lists
 - Assuring MBE/WBEs solicited when they are potential sources
 - Dividing total requirements where possible to permit MBE/WBE participation
 - Using small business, MBE/WBE organizations for assistance
 - Requiring contractor to take these steps in subcontracting

Subawards vs. Contracts

- **Contract** – for the purpose of obtaining goods and services for the recipient’s own use, and creates a procurement relationship
- **Subaward** – for the purpose of carrying out a portion of the federal award and creates a federal assistance relationship
 - Look for: performance measured in relation to program/project objectives, responsibility for programmatic decision making, discretion in fund allocation to program ends.
 - Note: The Final Rule clarifies that “households, communities, small businesses, nonprofits, and impacted industries” are *beneficiaries*, not subrecipients, so awards to those entities do not need to be subawards.
- Why does it matter?
 - Different oversight, compliance, and audit obligations

Contract Clauses: 2 CFR 200 Appendix II

	Required Provision	Contract Criteria	Sample Language Y/N
1.	Remedies for breach of contract	> \$250k	No.
2.	Termination for cause or convenience	> \$10k	No.
3.	Equal Employment Opportunity	Construction work	Yes. 41 CFR Part 60-1.4(b)
4.	Davis Bacon Act	Not applicable to ARPA	
5.	Copeland Anti-Kickback Act	Not applicable to ARPA	
6.	Contract Work Hours and Safety Standards Act	> \$100k + mechanics or laborers	Yes. 29 CFR 5.5(b)

Contract Clauses: 2 CFR 200 Appendix II cont'd

	Required Provision	Contract Criteria	Sample Language Y/N
7.	Rights to inventions	Unlikely to apply to ARPA contracts	
8.	Clean Air Act and Federal Water Pollution Control Act	> \$150k	Yes.
9.	Debarment and Suspension	All	Yes.
10.	Byrd Anti-Lobbying Amendment	All (>\$100k: Certification)	Yes. Clause and certification.
11.	Procurement of Recovered Materials	When work involves the use of the materials	Yes.

Cost Accounting (Subpart E)

- Costs must be “allowable”
 - Necessary and reasonable for the award’s purpose
 - Allocable to the award
 - Incurred consistent with policies and procedures during the approved period
 - Determined in accordance with GAAP
- Difference between direct/indirect costs
 - Direct costs – identified specifically with a particular cost objective
 - Indirect costs – overhead, general administration, etc.
- Examples of costs that may never be charged to a federal award:
 - Alcohol
 - Entertainment costs
 - Defense and prosecution of legal proceedings
 - Lobbying costs

Contact Information

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