

Procurement Policy

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I. Introduction

A. Applicability & Scope of Federal Compliance

This policy is intended for adoption by State of Vermont American Rescue Plan Act (ARPA) State subrecipients. Federal regulations require that subrecipients have written procurement policies and procedures that meet federal grant management requirements. Your organization may adopt this policy in its entirety or may use it to supplement or modify your existing procurement policies and procedures to ensure federal compliance.

This policy is designed specifically with ARPA compliance in mind, and following the procedures outlined herein will help to ensure that any procurement is carried out in compliance with ARPA terms and conditions and any federal regulatory requirements *as they pertain to ARPA*.

This policy is not necessarily a one-size-fits-all guarantee of federal compliance for all federal grants. If your organization is conducting procurements under any other federal programs, you should confer with your agency point of contact regarding whether this policy is complete and consistent with regard to the requirements of that program.

This policy also does not include any requirements that may have been imposed by the pass-through entity making the subaward to your organization. You should consult the controlling documents for your subaward and coordinate with your pass-through entity point of contact to ensure you are meeting all non-federal requirements.

B. Policy Management

This policy reflects the federal regulatory requirements for ARPA as of the day it was promulgated. It is your responsibility as a federal subrecipient to remain aware of any regulatory changes and to incorporate them into this policy.

If you make changes to this policy, you should:

- (1) Ensure those changes are consistent with federal requirements.
- (2) Maintain a record of all changes, as well as backup copies of all versions of the policy.

C. Recordkeeping – General Requirements

ARPA terms and conditions require that all records be preserved for a minimum of 5 years past the point when all grant funds are expended or returned to the U.S. Department of Treasury. In general, your organization should follow this rule *unless the terms and conditions of your subaward specify a longer record retention period*.

If the terms and conditions of your subaward specify a shorter record retention period, you still must adhere to the longer retention period required by Treasury.

There are specific record-keeping requirements for property acquired with federal grant funds, which should be addressed in your organization's recordkeeping policy. Your state agency point of contact can provide additional information on recordkeeping requirements.

Records pertaining to real property and equipment must be kept for a minimum of 3 years after the final disposition of the property.¹

D. Agency Oversight

Your organization is required to cooperate with the subrecipient monitoring process implemented and carried out by you administering agency.

Your administering agency, the State of Vermont, and the U.S. Department of Treasury are entitled to examine any documents, papers, or other records pertaining to the federal award. Those entities are also entitled to have reasonable access to your organization's personnel for interviews and discussions related to those documents.² This right of access lasts as long as the records are maintained. The only exception to this rule is when review of the records would involve disclosing the true name of a victim of a crime. Under those circumstances, you should inform your administering agency that permitting access to records would result in such a disclosure and discuss with them how to proceed.

Your organization must make available, upon request of the U.S. Department of Treasury or the State of Vermont, technical specification on proposed procurements. This review will usually take place prior to solicitation but may take place after the technical specifications have been incorporated into a solicitation.³

If your awarding agency has confirmed that the current version of your procurement policy is 2 CFR 200 compliant, you do not need to submit your procurement documents for pre-procurement review. However, you may request pre-procurement review of procurement documents from your administering agency at any point.

E. Responsibility

Your organization is solely responsible, in accordance with good administrative practice and sound business judgement, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. The standards expressed in this policy do not relieve your organization or any contractual responsibilities under your contracts.

II. Initiating a Contract

A. Contractor v. Subrecipient Determination⁴

As a first step, the responsible employee must determine that a contract is the appropriate method for accomplishing a particular goal. In most cases, a contract will be the correct method. *If you think a subaward, rather than a contract might be required to accomplish a particular goal, you should contact your state agency POC for support.*

Based on the below criteria, the responsible employee must make an individualized determination as to whether the desired action should be accomplished by a subaward or a contract. The responsible

¹ 2 CFR 200.334

² 2 CFR 200. 227

³ 2 CFR 200.325

⁴ 2 CFR 200.331

employee must *make a record* of the rationale for their decision. Records must be detailed enough to fully explain to a reader why the determination was made.

Subrecipients:

- Carry out a portion of the federal award.
- Determine which beneficiaries are eligible to receive assistance.
- Subrecipient performance is measured by whether the objectives of the federal award are met.
- Have responsibility for making decisions about how the award is carried out.
- Are responsible for adherence to federal program requirements.
- Use federal funds to carry out a program for a public purpose, as opposed to providing goods or services as part of their regular course of business.
- May not make a profit from the federal award.

Contractors:

- Provide goods and services for your organization's own use in carrying out the federal award.
- Have a procurement relationship with your organization and are subject to procurement rules.
- Provide similar goods and services to many different purchasers in the normal course of business.
- Normally operate in a competitive environment.
- Provide goods and services to aid in the carrying out of the federal award but are not themselves responsible for carrying out the award.
- May, and usually will, make a profit from the contract.

Note: Neither the character of the legal instrument nor the terminology used is determinative of what sort of relationship exists. I.e., merely creating a contract and referring to the other party as a "contractor" cannot turn what would otherwise be a subrecipient relationship into a contractor relationship.

B. Pre-Contract Considerations

There are various priorities which must be kept in mind when initiating any procurement process:

1. Efficiency and Prevention of Waste⁵:

Procurements must be conducted in such a way as to use federal funds as efficiently as possible. This means:

- Avoiding the acquisition of unnecessary or redundant items.
- Using federal surplus whenever reasonably possible.
- Entering into cooperation agreements with other entities for the shared use of goods and services.

⁵ 2 CFR 200.318

2. *Using value engineering clauses in contracts.* Value engineering is the formal technique by which contractors may (1) voluntarily suggest methods for performing more economically and share in any resulting savings, or (2) be required to establish a program to identify and submit for consideration methods for performing more economically. Value engineering attempts to eliminate, without impairing essential functions or characteristics, anything that increases acquisition, operation, or support costs.⁶[Contracting with Small Businesses, Black, Indigenous, Person of Color \(BIPOC\), and Woman-Owned Businesses, and Labor Surplus Area Firms](#)⁷

Affirmative steps must be taken to ensure that BIPOC and women-owned businesses, small businesses, and labor surplus area firms are used whenever possible. These steps must include, but are not limited to:

- Placing qualified small, BIPOC, and woman-owned businesses on solicitation lists.
- Ensuring that these businesses are solicited whenever they are potential sources.
- When economically feasible, dividing total requirements into smaller tasks or quantities to permit maximum participation by these businesses.
- When requirements permit, establishing delivery schedules that encourage participation by these businesses.
- When appropriate, using the services and assistances of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce.
- **If subcontracts are permitted, requiring prime contractors to take the above steps.**

3. [Domestic Preferences for Procurements](#)⁸

You should purchase or acquire goods, products, and materials produced in the United States whenever doing so is practicable under the federal award and consistent with law. **This requirement must also be included in all contracts and purchase orders.**

4. [Full and Open Competition](#)⁹

Regardless of the procurement method employed, all transactions must be accomplished in a way that provides full and open competition. Conditions that are considered restrictive of competition include, but are not limited to:

- Placing unreasonable requirements on firms in order for them to qualify to do business.
- Requiring unnecessary and excessive bonding.
- Noncompetitive pricing practices between firms or between affiliated companies.
- Noncompetitive contracts to consultants that are on retainer contracts.
- Organizational conflicts of interest (see Conflicts of Interest policy for more).
- Specifying only a “brand name” product instead of allowing an equivalent product to be offered and describing the performance or other requirements of the procurements.
- An arbitrary action in the procurement process.

⁶ Federal Acquisition Regulation (FAR) 48 CFR 2.101

⁷ 2 CFR 200.321

⁸ 2 CFR 200.322

⁹ 2 CFR 200.319

5. Simplified Acquisition Threshold (SAT)¹⁰

The Simplified Acquisition Threshold (SAT) is the dollar amount below which your organization may use small purchase methods. Unless your administering state agency has set a lower maximum threshold, the maximum threshold is \$250,000 as determined by the federal Fair Acquisition Regulation.

Your organization should determine its own SAT based on your particular internal controls, risk profile, and other policies. You may set your organizations SAT below, but never above, the federal \$250,000 threshold or the threshold dictated by your state administering agency.

6. Cost or Price Analysis¹¹

You 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 specific procurement situation, but as a starting point, you must make independent estimates before receiving bids or proposals.

C. Recordkeeping – Procurement Process

Your organization must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to, the following: Rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

III. Procurement Methods

For every contract, you must select the appropriate procurement method of procurement based on the value of the contract and the nature of the goods or services being procured.

Informal Procurement		Formal Procurement	
Micro Purchases	Small Purchases	Sealed Bids	Proposals
<ul style="list-style-type: none"> ● Purchases <\$10K ● Price is reasonable based on research, experience, or other factors. ● Should be distributed equitably among qualified suppliers 	<ul style="list-style-type: none"> ● Purchases <\$250K ● Simplified process ● Must obtain multiple quotations 	<ul style="list-style-type: none"> ● Purchases >\$250K ● Preferred method ● Fixed price contract to lowest qualified bidder ● 2+ bidders necessary for effective competition 	<ul style="list-style-type: none"> ● Purchases > \$250K ● Publicly solicited ● Used when sealed bids are not appropriate ● Evaluation criteria ● Firm fixed price or cost reimbursement*

A. Informal Procurement: Micro Purchases¹²

Price Threshold

Micro-purchase means a purchase of supplies or services, the aggregate amount of which does not exceed the micro-purchase threshold. Unless otherwise indicated, the micro-purchase threshold is \$10,000.

¹⁰ 2 CFR 200.1, 2CFR 200.320(a)(2)

¹¹ 2 CFR 200.324(a)

¹² 2 CFR 200.320(a)(1)

Your organization should make an independent assessment of whether a threshold *lower than \$10,000* should be adopted and document the reasons for adopting whatever threshold is employed.

Increasing the micro-purchase threshold up to \$50,000:

Your organization may self-certify a micro-purchase threshold up to \$50,000 on an annual basis and must maintain records if that certification in accordance with 2 CFR 200.334. The self-certification must include a justification, clear identification of the threshold, and supporting documentation of any of the following:

- A qualification as a low-risk auditee, in accordance with the criteria in 2 CFR 200.520 for the most recent audit;
- An annual internal institutional risk assessment to identify, mitigate, and manage financial risks; or
- For public institutions, a higher threshold consistent with state law.¹³

Procedure

Micro-purchases may be awarded without soliciting price or rate quotations if you determine that the price is fair based on experience, research, or other factors. If you have access to multiple qualified suppliers offering supplies or services at the same rate, you must distribute your micro-purchases equally among those suppliers.

Recordkeeping

In maintaining records of micro-purchase transactions, you should make a record of what factors led you to believe the price was fair, what suppliers are available, and why you chose to use a particular supplier over others available.

B. Informal Procurement: Small Purchases (below Simplified Acquisition Threshold)¹⁴

Price Threshold

As discussed in section II.B.5 above, your organization should determine its Simplified Acquisition Threshold (SAT) before conducting any informal procurements. In no case may the SAT be below the \$250,000 federal threshold or any threshold set by your state administering agency.

Your organization should make an independent assessment of whether a threshold *lower than \$250,000* should be employed and document the reasons for adopted whatever threshold is

Procedure

To ensure full and fair competition, you should solicit price or rate quotations from several qualified sources before selecting a vendor. Vendors should be selected based on price quotations, as well as other factors such as research and experience.

You may request price quotations from only one source **if and only if the item or service being procured is only available from that single source**. Single source solicitations are disfavored because they are inherently non-competitive.

Recordkeeping

Maintain a record of all quotations received and your rationale for all decisions made during the procurement process, including the number of quotations solicited and the reasons why you chose a

¹³ 2 CFR 200.320(a)(1)(iv)

¹⁴ 2 CFR 200.320(a)(2)

particular vendor. If you solicit only two quotations, make a record of why you solicited the minimum number of required quotations. If you solicit only one quotation, make a record of why a non-competitive procurement method was used including the unsuccessful steps you took to locate additional qualified vendors.

C. Formal Procurement: Sealed Bids¹⁵

Price Threshold

All acquisitions with an aggregate price above the SAT.

Procedure

Bids are publicly solicited, and a firm fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bids method is the preferred method for procuring construction if the conditions are appropriate.

The opportunity to bid must be publicly advertised. When advertising, follow the recommendations of section II.B. above "Federal Preferences in Advertising."

In order for sealed bidding to be feasible, the following conditions should be present:

- A complete, adequate, and realistic specification or purchase description is available;
- Two or more responsible bidders are willing and able to compete effectively for the business; and
- The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

If sealed bids are used, the following requirements apply:

- Bids must be solicited from an adequate number of qualified sources, providing them sufficient response time prior to the date set for opening the bids.
- The invitation for bids must be publicly advertised.
- The invitation for bids, which must include any specifications and pertinent attachments, must define the items or services in specific enough detail to allow the bidder to properly respond.
- All bids must be opened at the time and place prescribed in the invitation for bids.
- A firm fixed price contract award must be made in writing to the lowest responsive and *responsible bidder*.
- Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest.
- Payment discounts, such as discounts for early payment of an invoice, may only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of by your organization.

¹⁵ 2 CFR 200.302(b)(1)

- Any or all bids may be rejected if there is a sound documented reason.

Responsible Bidder (or Responsible Offeror): A bidder (or offeror) who has the experience, personnel, equipment, and finances to perform the requirement of the contract. The lowest overall bidder on the contract may not be the lowest *responsible bidder*.

Recordkeeping

Keep a record of how and where bids were advertised and otherwise solicited, the project details included in the solicitation, what bids were received, and the rationale for your organization's ultimate choice of vendor.

D. Formal Procurement: Proposals¹⁶

Price Threshold

All acquisitions with an aggregate price above the SAT which are not suitable for procurement through sealed bids.

Procedure

Proposals are solicited for a fixed price or cost-reimbursement type contract. Proposals are generally used when conditions are not appropriate for the use of sealed bids. They are awarded in accordance with the following requirements:

- Requests for proposals must be publicized and identify all evaluation factors and their relative importance.
- Proposals must be solicited from an adequate number of qualified offerors.
- Any response to publicized requests for proposals must be considered to the maximum extent practical.
- You must have a written method for conducting technical evaluations of the proposals received and making selections.
- Contract must be awarded to the responsible offeror whose proposal is most advantageous, with price and other factors considered.

Proposals for Architectural & Engineering Contracts:

You may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby offeror's qualifications are evaluated, and the most qualified offeror is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional

Recordkeeping¹⁷

Keep a record of how and where proposals were publicized and otherwise solicited, the project details included in the solicitation, what proposals were received, and the rationale for your organization's ultimate choice of vendor.

¹⁶ 2 CFR 200.320(b)(2)

¹⁷ 2 CFR 200.318(i)

E. Noncompetitive Procurement¹⁸

Non-competitive procurement is strongly discouraged and only allowed if one or more of the following conditions are present:

1. The aggregate dollar amount of the contract does not exceed the micro-purchase threshold. (see section III.A. above)
2. The item is available only from a single source.
3. The public exigency or emergency for the requirement will not permit a delay resulting from publicizing a competitive solicitation. *Please note: The overall COVID-19 pandemic state of emergency does not constitute an emergency for procurement purposes.*
4. After solicitation of several sources, competition is determined inadequate.

If you chose to use a non-competitive method of procurement for one of the above reasons, you should thoroughly document the reasons why you believe non-competitive procurement is permitted in that specific case, as well as any steps you took to rule out the feasibility of a competitive procurement process.

F. Time and Material Contracts¹⁹

Time-and-materials contracts may be used **only after a determination that no other contract is suitable** and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time-and-materials type contract means a contract whose cost to your organization is the sum of:

- (1) The actual cost of materials; and
- (2) Direct labor hours charged at a fixed hourly rate that reflects wages, general and administrative expenses, and profit.

Since the formula generates an open-ended contract price, a time-and-materials contract provides no incentive to the contractor for cost control or labor efficiency. The contractor must set a ceiling price that the contractor exceeds at its own risk. Your organization must assert a high degree of oversight in order to be assured that the contractor is using efficient methods and effective cost controls.

G. Bonding – Construction or Facility Improvement Contracts & Subcontracts²⁰

For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold the minimum bonding requirements must be met:

- (1) A bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.
- (2) A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's requirements under such contract.

¹⁸ 2 CFR 200.320(c)

¹⁹ 2 CFR 200. 218(j)

²⁰ 2 CFR 200.326

- (3) A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

If your organization wants to impose bonding requirements that do not meet these minimums, you must seek permission from your awarding agency who will then make a determination as to whether your proposed requirements adequately protect the federal interest.

IV. Contract Requirements

A. Creating a Compliant Contract

1. Contractor Profits²¹

You must negotiate profit as a separate element of the price for each contract in which there is no price competition (i.e., micro purchases, non-competitive procurement) and in all cases where cost analysis (see section II.B.6 above) 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.

Prohibited Forms of Construction Contract:

Both the “cost plus percentage of cost” and “percentage of construction cost” methods of contracting are prohibited.

2. Conformity with Cost Principles

Costs, or prices based on estimated costs for contracts, under the federal award are only allowable to the extent that costs incurred or cost estimates included in negotiated prices would be allowable under Subpart E of the Uniform Guidance and your organizations own cost principles. In general, the cost must²²:

- Be necessary and reasonable for the performance of the federal award and be allocable thereto.
- Conform with any limitations or exclusions as to the types or amounts of cost items.
- Be consistent with policies and procedures that apply uniformly to both federally financed and other activities carried out by your organization.
- Be accorded consistent treatment. A cost may not be assigned to a federal award as a direct cost if any other cost incurred for the same purpose in like circumstances has been allocated to the federal award as an indirect cost.
- Be determined in accordance with generally accepted accounting principles (GAAP).
- Not be included as a cost or used to meet cost sharing or matching requirements of any other federally financed program unless explicitly authorized.
- Be adequately documented.
- Be incurred during the approved budget period.

²¹ 2 CFR 200.324(b)

²² 2 CFR 200.401

A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a reasonable person under the circumstances at the time the decision was made to incur the cost. The question of reasonableness is particularly important if your organization is predominantly federally funded. In determining the reasonableness of a given cost, you should consider²³:

- Whether the cost is of a type generally recognized as ordinary and necessary for the operation of your organization or the proper and efficient performance of the federal award.
- The restraints or requirements imposed by other factors such as: sound business practices, arm's-length bargaining, federal, state, local, tribal, and other laws and regulations, terms and conditions of the federal award, and terms and conditions imposed by your administering agency or the state of Vermont.
- Market prices for comparable goods or services for the geographic area.
- Whether the individual responsible for incurring the cost acted prudently in the circumstances considering their responsibility to your organization, its employees, other stakeholders, the public at large, the state of Vermont, and the federal government.
- Whether your organization significantly deviates from its established practices and policies regarding the incurrence of costs which may unjustifiably increase the federal award's costs.

A cost is allocable to a particular federal award or other cost objective if the goods or services involved are chargeable or assignable to the federal award or cost objective in accordance with relative benefits received. This standard is met if the cost²⁴:

- Is incurred specifically for the federal award.
- Benefits both the federal award and your organization's other work and can be distributed in proportion that may be approximated using reasonable methods.
- Is necessary to the overall operation of your organization and is assignable in part to the federal award in accordance with the cost principles contained in Subpart E of the Uniform Guidance.

For more details on federal cost principles, refer to Subpart E of 2 CFR 200.

B. Required Contract Terms under Uniform Guidance:²⁵

In addition to any other provisions, all contracts under the federal award must include the following terms as applicable. You must also require contractors to extend all relevant provisions to any subcontractors:

All contracts:

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

²³ 2 CFR 200.404

²⁴ 2 CFR 200.405

²⁵ 2 CFR 200.328

excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.

All contracts over \$10,000:

1. All contracts in excess of \$10,000 must address termination for cause and for convenience by your organization including the manner by which it will be effected and the basis for settlement.

All contracts over \$100,000:

1. 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.

All contracts over \$150,000:

1. 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).

All contracts over the \$250,000:

1. 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.

Construction Contracts:

1. 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."

The required clauses themselves are contained in Appendix _____ of this document.

2. 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.

ARPA and Davis-Bacon Act:

ARPA awards are *exempt* from Davis-Bacon Act requirements. However:

If ARPA funds are used in conjunction with funds that *do* have David-Bacon Act requirements attached, the project must comply with the Davis-Bacon Act. ARPA projects over \$10,000,000 will need to either certify David-Bacon Act compliance or report additional information as detailed in the ARPA Compliance and Reporting Guide.

3. 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.

Contracts Involving the Employment of Mechanics or Laborers:

1. 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.

Contracts for Experimental, Developmental, or Research Work:

1. 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.

C. Additional Required Terms

Additional required contract terms may be found in both the award agreement between the federal government and the pass-through entity and your organization’s subaward agreement. Both those documents should be consulted when drafting contracts in order to ensure all required terms are included.

D. Contractor Oversight

Your organization is responsible for maintaining oversight of all contractors and subcontractors to ensure they are performing in compliance with the terms and conditions of your agreement, the federal award, and applicable uniform guidance provisions.²⁶

Each contract should contain provisions detailing how the performance of the contract will be supervised and how compliance will be monitored. If you have concerns about how contractor oversight should be carried out, you should discuss the specifics of the procurement contract with your administering state agency.

E. Contract Modification

Contracts may be modified, so long as the modification does not bring the contract out of compliance with this policy or the terms and conditions of your award.

If the value of the contract being modified exceeds the simplified acquisition threshold, a new cost or price analysis must be performed.

V. Closeout

All contracts should contain provisions specifying the conditions under which a contract will be deemed complete. Closeout documentation should include, at a minimum:

- A final assessment of the contractor’s performance, including whether they satisfied all contract requirements.
- A final accounting of all funds expended by your organization under the contract.
- A formal acknowledgement that all financial obligations incurred by your organization chargeable to the federal award have been satisfied.

²⁶ 2 CFR 200.318

Your subaward agreement will contain specifics for closing out your award with your administering state agency. You should work with your agency point of contact to complete closeout.

Appendix

I. Equal Opportunity Clauses:

The following language must be included as a condition of any grant, contract, loan, insurance, or guarantee involving federally assisted construction which is not exempt from the requirements of the equal opportunity clause:

The applicant hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the regulations of the Secretary of Labor at 41 CFR Chapter 60, which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the following equal opportunity clause:

During the performance of this contract, the contractor agrees as follows:

- (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following:
Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.
- (2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.
- (3) The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.
- (4) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments

under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

- (5) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.
- (6) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
- (7) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.
- (8) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (8) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance:

Provided, however, that in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: Provided, That if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and sub-contractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive Order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and sub-contractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive Order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.