**Federal Grantee Procurement Regulations**

**Fact Sheet**

**Education Technology Industry Network of SIIA**

SIIA Ed Policy Forum  
Last Updated: November 2015

**Why is this Important?**

New federal rules took effect on December 26, 2014 impacting administrative, purchasing and auditing policies for federal agencies and programs. The new procurement rules apply to all federal grantees – e.g., school districts, states, institutions of higher education, etc. – and their vendors.

**Overview**

The federal Office of Management and Budget (OMB) has been working on updating its policies for federal agency procurement and grant administration since a 2012 Executive Order in an effort to streamline processes, improve cost effectiveness, and reduce waste/abuse. The new regulations supersede and consolidate into a single set of requirements (2 C.F.R. 200) eight previous separate rules applying to federal agencies and grantees – OMB Circulars A-21, A-87, A-110, A-122, A-89, A-102 and A-133 and the guidance in Circular A-50 on Single Audit Act follow-up. The new rules apply to all purchases made by federal agencies and by any recipient of federal funds through a grant award, including state and local education agencies and postsecondary institutions. This summary does not address the full set of changes, but focuses only on key procurement standards (§200.317 – §200.326) of importance to education agencies/institutions and their vendors.

**Procurement Requirements**

Following initial incomplete reports, SIIA followed up with officials at OMB and the U.S. Department of Education (USED) to gain the following clarifications important to the sector:

**In General:**

- Many of the procurement standards are not fundamentally new, but instead are streamlined through a merger of multiple OMB guidance circulars.
- Most states have far stricter procurement requirements and aren’t likely to notice much of a difference on the new federal rules, such that the new rules generally exempt states.
- While most of these changes aren’t likely to greatly affect schools or the companies serving them, there will be two key shifts in the procurement process:
  1. More pressure will be applied to ensuring fair and open competition
  2. More transparency in pricing and purchasing

**Competition, Transparency and Pricing:**

- All contract awards equal to or greater than $150,000 will be required to be put out for competition through sealed bid or RFP process. This will phase out the use of sole source contracting except in special circumstances.
**Update (July 2015):** SIIA has received guidance from USED that school districts would not be required to make product purchasing decisions solely based on price. Other considerations may be taken into account such as prior investments and effectiveness. Once a product is decided upon though, LEAs should find a supplier willing to provide such products at the lowest cost.

**Update (November 2015):** SIIA received guidance on two specific scenarios regarding procurement by noncompetitive proposals when an item is only available from one source.

1. According to USED guidance, noncompetitive procurement may be appropriate if particular software or hardware is required because an LEA has existing technology infrastructure or instructional framework that is truly only available from one source. In this situation the LEA must maintain records documenting the reason that only one source was used. If the software or hardware is available from more than one source, the competitive process must be used.

2. USED guidance states that LEAs that engage in pilot trials of products and then want to “scale up” or LEAs that want to experiment with a new technology or material must follow the competitive procurement process. They can meet this requirement by holding an open procurement competition, identifying the specifications for the product, and stating the initial contract would be a pilot with an option to scale up if proven successful.

- Grantees will be required to negotiate profit separately from price in instances where contracts are awarded without price competition and in all cases where cost analysis is performed. This would occur when competition is not used for small purchases [below the Simplified Acquisition Threshold], in all instances of open-ended contracts (e.g., negotiated based on overhead rates), and in all instances where contracts are extended without competition.

**Update (November 2015):** Updated USED guidance clarified that price comparison is not a form of price competition that would exempt a non-federal entity from negotiating profit as a separate element of the price. This updated guidance is a reversal from previous guidance SIIA received.

If a non-federal entity seeks to acquire property or services that have an anticipated dollar value exceeding the simplified acquisition threshold, the non-Federal entity must use a competitive process and cannot use small purchase procedures (i.e. price comparison).

- There are certain situations that allow for small purchase procedures to be used for procurements that exceed the simplified acquisition threshold. These are listed in (34 CFR 75.135)

**Update (November 2015):** Additional guidance from USED states that small purchase procedures may not be used just because a product is a commercial product and not custom built.

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Timeline and Effective Date:

- For non-federal entities (i.e. State Education Agencies, Local Education Agencies and institutions of higher education) the new rules are not required to go into effect until the end of the first fiscal year after their enactment date (12/26/14). For example, if a school district's fiscal year begins July 1, then the school district would not be required to comply with the new rules until July 1, 2016.

**Update (July 2015):** After consulting with officials at USED, SIIA has been told the grace period will apply to all non-federal entities, not just postsecondary institutions as previously thought.

**Update (November 2015):** A recent technical amendment (80 FR 54407) has changed the grace period for the implementation of the new procurement standards from one fiscal year to two fiscal years for all non-federal entities, including LEAs. This means that an LEA will have the option of delaying implementation of the standards until the end of its second fiscal year that begins after the effective date (December 26, 2014). For example, an LEA with a fiscal year that ends June 30, 2015 will not fall under the new standards until July 1, 2017. Entities should check with state and local agencies for further guidance at that level.

Conflict of Interest:

- Non-Federal entities are required to maintain written standards of conduct covering conflicts of interest (2 CFR 200.318(c)(1)). No employee, officer, or agent must 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.

**Update (November 2015):** SIIA asked for clarification of the phrase “tangible personal benefit.” USED guidance states that this language stresses the importance of ensuring that employees who select, award, and administer contracts supported by a federal award are free from any real or apparent conflict of interest. This includes financial and non-financial benefits that result in a personal benefit such as improved employment opportunities, business referrals, or political influence.

- Contractors that develop or draft specifications, requirements, statements of work, and invitations for bids or requests for proposals are considered an organizational conflict of interest and must be excluded from competing for such procurements (2 CFR 200.319(a)).

**Update (November 2015):** USED issued guidance that an LEA may contact a number of vendors to collect information necessary for developing the RFP, as long as the LEA poses the information request broadly so any potential vendor has the opportunity to provide input. Asking for input from only one or two vendors would be considered an organizational conflict of interest.

- An entity may not specify only a “brand name” product instead of allowing “an equal” product to be offered (2 CFR 200.319(a)(6)).
Update (November 2015): USED provided guidance that a grantee is not required to abandon a technology or infrastructure that is already in place, and there may be limited situations where specifying a “brand name” may be appropriate and not considered restrictive competition.

However, the USED guidance also reiterated that procurement regulations are designed to ensure competition. The grantee will need to compete to find the lowest cost supplier of the technology or instructional approach desired by the LEA. For example, a grantee may require a specific software or hardware that works with their current technology or infrastructure. Such a grantee would need to solicit bids for the specific tablet from multiple vendors. The USED will consider developing additional guidelines, but has not yet done so.

SIIA will continue to track this evolving situation and provide SIIA member updates as warranted. SIIA encourages education officials and school service providers to review the full set of new rules, and especially §200.317 – §200.326 focused on grantee procurement.

Resources

2 C.F.R. 200 – Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards
Electronic Code of Federal Regulations
http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title02/2cfr200_main_02.tpl

Proposed Procurement Standards
Electronic Code of Federal Regulations
http://www.ecfr.gov/cgi-bin/text-idx?SID=6f277b775d6d4fea20ce0a7d83c57ae8&node=sg2.1.200_1316.sg3&rgn=div7

Interim Final Rule
Regulations.gov
http://www.regulations.gov/#!documentDetail;D=ED_FRDOC_0001-0659

Uniform Guidance: Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards
United States Federal Government Chief Financial Officers Council
https://cfo.gov/cofar/

“Education Companies' Profits on Federal Contracts to be Negotiated”
Ed Week (December 9, 2014)
http://blogs.edweek.org/edweek/marketplacek12/2014/12/education_companies_profits_on_federal_contracts_to_be_negotiated.html?qs=siiia

Education Business Forum
Software & Information Industry Association
http://siia.net/ebf/2014/

Transforming the Landscape of Federal Financial Assistance
Office of Management and Budget

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Federal Register “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards; Direct Grant Programs”
https://www.federalregister.gov/articles/2015/11/02/2015-27766/uniform-administrative-requirements-cost-principles-and-audit-requirements-for-federal-awards-direct#h-8