



Department of
Job and Family Services

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August 9, 2022

Fiscal Administrative Procedure Transmittal (FAPMTL) No. **469**

TO: Fiscal Administrative Procedure Manual Holders

FROM: Matt Damschroder, Director

SUBJECT: Procurement and Contract Requirements

As part of a five-year review process, the Ohio Department of Job and Family Services has rescinded rule 5101:9-4-06 "Small and Minority Businesses and Women's Business Enterprise and Labor Surplus Area Firms" of the Administrative Code because its content is being inserted into rule 5101:9-4-07 "Procurement and Contract Requirements" of the Administrative Code.

Please direct inquiries to your ODJFS Fiscal Supervisor or the CFIS Helpdesk CFIS_HELP_DESK@jfs.ohio.gov.

Instructions:

Location	Remove	Insert
Chapter 4	5101:9-4-06 (effective 2/2/2015)	N/A
Chapter 4	5101:9-4-07 (effective 5/27/2021)	5101:9-4-07 (effective 8/18/2022)

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TO BE RESCINDED

5101:9-4-06 **Small and minority businesses and women's business enterprise and labor surplus area firms.**

The county family services agency (CFSA) and workforce development agency (WDA) shall make efforts to utilize small and minority-owned businesses, women's business enterprises, and labor surplus area firms when they are potential resources for supplies, equipment, construction, and services as established in 2 C.F.R. Part 200.321. These efforts include:

- (A) Placing qualified small and minority businesses, and women's business enterprises on solicitation lists, and assuring that those businesses are solicited whenever they are potential resources.
- (B) Dividing total requirements into small tasks or quantities to permit maximum small and minority businesses and women's business enterprises participation when economically feasible. When tasks are divided to allow small businesses and women's business enterprises to compete, the separation cannot be done to avoid competitive bidding requirements.
- (C) Establishing delivery schedules to encourage participation by small and minority businesses, and women's business enterprises where the requirement permits.
- (D) Using the services and assistance of the small business administration, the office of minority business development agency of the U.S. department of commerce, the community services administration, and other entities, as appropriate.
- (E) Requiring the prime contractor to take affirmative steps as listed in paragraphs (A) to (D) of this rule if any subcontracts are to be let.
- (F) Encouraging small and minority-owned businesses and women's business enterprises to contract with consortiums of small business and minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually.

Effective: 8/18/2022

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Certification

08/08/2022

Date

Promulgated Under: 111.15
Statutory Authority: 5101.02
Rule Amplifies: 307.86, 329.04
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01/22/2010, 02/02/2015

5101:9-4-07

Procurement and contract requirements.**(A) General purpose and applicability**

- (1) County family services agencies (CFSAs) and Workforce Innovation and Opportunity Act (WIOA) local areas may enter into procurement contracts to acquire goods and services for the administration of a federal program. Where applicable, WIOA local areas shall include workforce development boards (WDB). CFSAs and WIOA local areas follow procurement standards established in 2 C.F.R. 200.317 to 200.327. Specific methods of procurement are outlined in rule 5101:9-4-07.1 of the Administrative Code.
- (2) Subgrant agreements as outlined in rule 5101:9-4-88 of the Administrative Code funded in whole or in part with federal funds do not represent acquisitions and are not subject to the requirements contained in this rule provided that such relationships are documented between the entities. CFSAs and WIOA local areas shall inform sub-grantees of applicable procurement requirements in any contract or other applicable types of agreements used in awarding the contract or grant.
- (3) Unless applicable local requirements are more restrictive, acquisitions that are made in whole or in part with federal funds, including instances where state or county funds are used as a match for state/federal funds, CFSAs and WIOA local areas shall procure pursuant to rule 5101:9-4-02 of the Administrative Code and the federal requirements set forth in this rule.
 - (a) Pursuant to division (D) of section 307.86 of the Revised Code, acquisitions made under section 329.04 of the Revised Code are exempt from state competitive bidding requirements. However, acquisitions made under section 307.86 of the Revised Code are not exempt from applicable federal requirements, including those referenced in this rule.
 - (b) Acquisitions listed that are procured with federal block grants authorized by the Omnibus Budget Reconciliation Act of 1981 and the "Child Care and Development Block Grant of 1990," as amended, are excluded from the requirements of this rule. However, CFSAs and WIOA local areas shall adhere to requirements contained in rule 5101:9-4-02 of the Administrative Code and local standards of acquisition.

(B) General procurement requirements

The following are general procedural requirements applicable to all procurements unless deemed exempt:

(1) Contract cost and price analysis

- (a) CFSA's and WIOA local areas shall perform a cost or price analysis in connection with every procurement action in excess of either the local small purchase threshold or, the simplified acquisition threshold (as set by 48 C.F.R. subpart 2.1) including contract modification. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point the CFSA and WIOA local area must make independent estimates before receiving bids or proposals. The CFSA and WIOA local area must maintain written documentation to support any procurement action based on cost or price analysis.
- (i) A cost analysis shall be performed when the bidder is required to submit elements of the estimated cost, (e.g., under professional consulting and architectural engineering services contracts.) A cost analysis is the verification of proposed cost data and projections of the data, and the evaluation of the specific elements of costs and profits. A cost analysis will be necessary when adequate price competition is lacking. A cost analysis will also be necessary for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of catalog or market price of commercial product sold in substantial quantities to the general public; or based on prices set by law or regulation.
- (ii) A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.
- (b) CFSA's and WIOA local areas shall 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 will 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 grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with federal cost principles. CFSA's and WIOA local areas may reference their own cost principles that comply with the applicable federal cost principles.

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

(2) Competition

All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of 45 C.F.R. 75.328 (U.S. department of health and human services (HHS)), and 2 C.F.R. 200.319 (U.S. department of labor (DOL) and U.S. department of agriculture (USDA) food and nutrition service (FNS)). In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:

- (a) Placing unreasonable requirements on firms in order for them to qualify to do business;
- (b) Requiring unnecessary experience and excessive bonding;
- (c) Non-competitive pricing practices between firms or between affiliated companies;
- (d) Non-competitive awards to consultants that are on retainer contracts;
- (e) Organizational conflicts of interest;
- (f) Specifying only a "brand name" product instead of allowing an "equivalent" product to be offered and describing the performance of other relevant requirements of procurement; and
- (g) Any arbitrary action in the procurement process.

(3) Selection procedures

All CFSA's and WIOA local areas shall have written selection procedures for all procurement transactions.

- (a) Written procedures must ensure that all solicitations:
 - (i) Incorporate a clear and accurate description of the technical requirements for the materials, products or services to be procured. Such description shall not, in competitive procurements, contain

features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of technical requirements, a "brand name or equivalent" description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the brand name which must be met by bidders must be clearly stated.

(ii) Identify all requirements that the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(b) CFSAs and WIOA local areas shall ensure that all pre-qualified lists of persons, firms or products, which are used in acquiring goods and services, are current and include enough qualified sources to ensure maximum open and free competition. CFSAs and WIOA local areas must not preclude potential bidders from qualifying during the solicitation period.

(c) CFSA and WIOA local area procedures shall include a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, the CFSA and WIOA local area shall conduct an analysis of lease versus purchase alternatives and any other appropriate analysis to determine the most economical approach. Breaking out procurements should only be done to obtain a more economical price and shall not be done to avoid procedural requirements.

(4) Non-profit agencies for persons with severe disabilities

(a) If permissible under federal law for procurements involving federal funds, then before determining which method of procurement to use, CFSAs and WIOA local areas shall determine whether a product or service is on the procurement list for products and services provided by persons with severe disabilities as described in section 4115.33 of the Revised Code. If the product or service is on the procurement list and is available within the period required by that agency, the agency must procure the

product or service at the price established by the state use committee from a qualified nonprofit agency.

- (b) If the provision of the product or service cannot be made in either the time period required or in the amount specified by the agency, the CFSAs and WIOA local areas may pursue a method of procurement outlined in rule 5101:9-4-07.1 of the Administrative Code.

(5) Small and minority businesses, women's business enterprise and labor surplus area firms

The CFSA and WIOA local area shall make efforts to utilize small and minority-owned businesses, women's business enterprises, and labor surplus area firms, when they are potential resources for supplies, equipment, construction and services as established in 2 C.F.R. Part 200.321. These efforts include:

- (a) Placing qualified small and minority businesses and women's business enterprises on solicitation lists and assuring that those businesses are solicited whenever they are potential resources.
- (b) Dividing total requirements into small tasks or quantities to permit maximum small and minority businesses and women's business enterprises participation when economically feasible. When tasks are divided to allow small businesses and women's business enterprises to compete, the separation cannot be done to avoid competitive bidding requirements.
- (c) Establishing delivery schedules to encourage participation by small and minority businesses and women's business enterprises, where the requirement permits.
- (d) Using the services and assistance of the small business administration, the office of minority business development agency of the U.S. department of commerce, the community services administration and other entities, as appropriate.
- (e) Requiring the prime contractor to take affirmative steps as listed in paragraphs 5(a) to 5(d) of this rule if any subcontracts are to be let.

~~(5)~~(6) Geographic preference

- (a) For purchases made in whole or in part with federal funds, or with state or local funds required for match, CFSAs and WIOA local areas shall

conduct procurement in a manner that prohibits the use of statutorily or administratively imposed in-state or local geographical preferences in evaluation of bids or proposals, except in those cases where applicable federal statutes expressly mandate or encourage geographic preference. Nothing in paragraph (B) of this rule preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

- (b) When only state and/or local funds are used for a purchase, the board of county commissioners, by resolution, may adopt the model system of preferences for products mined or produced in Ohio and for Ohio-based contractors (formerly "Buy-Ohio"). The resolution shall specify the class or classes of contracts to which the system of preferences apply. While the system of preferences is in effect, no county officer or employee shall award a contract in violation of the preference system.

~~(6)~~(7) As appropriate and to the extent consistent with law, the non-federal entity should, to the greatest extent practicable under a federal award, provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States (including but not limited to iron, aluminum, steel, cement, and other manufactured products). The requirements of this paragraph shall be included in all subawards including all contracts and purchase orders for work or products.

~~(7)~~(8) CFSA and WIOA local areas are prohibited from obligating or expending loan or grant funds to procure, obtain, or enter into a contract (or extend or renew a contract) to procure or obtain equipment, services, or systems that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. As described in Public Law 115-232, section 889, covered telecommunications equipment is telecommunications equipment produced by "Huawei Technologies Company" or "ZTE Corporation" (or any subsidiary or affiliate of such entities).

~~(8)~~(9) Debarment and suspension

- (a) CFSA and WIOA local area procedures shall include requirements to ensure that no contracts are entered into with or purchases made from a person or entity which is debarred or suspended or is otherwise ineligible for participation in federal assistance programs under executive orders 12549 and 12689, debarment and suspension, and other applicable regulations

and statutes, including 2 C.F.R. parts 180, 200, and 417, 29 C.F.R. part 98, and 45 C.F.R. part 75.

- (b) CFSA and WIOA local area procedures shall also include provisions that purchases will be made in conformance with section 9.24 of the Revised Code which prohibits the awarding of contracts, paid for in whole or in part with state funds, to a person against whom a finding for recovery has been issued by the auditor of state on or after January 1, 2001, if the finding for recovery is unresolved.

~~(9)~~(10) Monitoring

CFSAs and WIOA local areas shall maintain a contract administration system that ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(C) 2 C.F.R. general contract requirements

CFSA and WIOA local area contracts shall contain the following provisions which are fully detailed and outlined in appendix II to part 200.

- (1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. This applies to all contracts in excess of the either local small purchase threshold or the simplified acquisition threshold (as set by 48 C.F.R. subpart 2.1).
- (2) Termination for cause and for convenience by the CFSA and local WIOA area including the manner by which it will be affected and the basis for settlement. This applies to all contracts in excess of ten thousand dollars.
- (3) Compliance with executive order 11246 of September 24, 1965, entitled "Equal Employment Opportunity," as amended by executive order 11375 of October 13, 1967, and as supplemented in DOL regulations (41 C.F.R. chapter 60). This applies to all federally assisted construction contracts awarded in excess of ten thousand dollars by CFSA and local WIOA areas and their contractors or sub-grantees.
- (4) Compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874 and 40 U.S.C. 3145) as supplemented by DOL regulations (29 C.F.R. part 3).
- (5) Compliance with the Davis-Bacon Act as amended (40 U.S.C. 3141-3148) as supplemented by DOL regulations (29 C.F.R. part 5). This applies to all construction contracts in excess of two thousand dollars.

- (6) Compliance with sections 3702 and 3704 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708) as supplemented by DOL regulations (29 C.F.R. part 5).
- (7) Compliance with "Rights to Inventions" clause 37 C.F.R. part 401 pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.
- (8) Compliance with all applicable standards, orders, or requirements issued pursuant to the Clean Air Act as amended (42 U.S.C. 7401-7671) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). This is applicable with any contract in excess of one hundred fifty thousand dollars).
- (9) Certification that a contractor has not and will not use federal funds to pay for any lobbying activities as defined in the "Byrd Anti-lobbying Amendment" (31 U.S.C. 1352). Certification is required for contractors that apply or bid for an award of one hundred thousand dollars or more.

(D) ODJFS general contract requirements

- (1) The Ohio department of job and family services (ODJFS), the CFSA and the WIOA local area, the federal grantor agency, the comptroller general of the United States, or any of their duly authorized representatives shall have access to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.
- (2) Financial, programmatic, statistical, and recipient records and supporting documents shall be retained for a minimum of three years after the submittal of the final expenditure report for the grant or as otherwise provided by any minimum retention requirements specified by applicable state or federal law. If any litigation, claim, negotiation, audit or other action involving the records has started before the expiration of the three-year period, the records shall be retained until the completion of the action and resolution of all issues that arise from it, or until the end of the regular three-year period, whichever is later.

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