Texas Workforce Commission

Financial Manual for Grants and Contracts Supplement on Procurement

Procurement Standards, Requirements and Technical Information for Entities that Receive TWC Grant Awards

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\* This Publication includes a mix of compliance requirements and informational content. Heading titles immediately followed by an asterisk (\*) indicate content that contains compliance requirements. All other headings contain informational content. Refer to [A.3 Organization, Use & Flexibility](#cA3_organization_use_flexibility), in this Publication, for more information.

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# A. Introduction

## A.1 Purpose

The Texas Workforce Commission (TWC) Financial Manual for Grants and Contracts (FMGC) Supplement on Procurement is a guide for TWC [grantees](#definition_grantee). It compiles selected procurement standards and requirements imposed by [TWC grant awards](#definition_twc_grant_award) for [contracts](#definition_contract) and [subgrants](#definition_subgrant) that [grantees](#definition_grantee) make under those awards. To aid in a grantee’s understanding of and compliance with those requirements, this Publication also includes a significant amount of supplemental technical information and guidance.

The decision to include a significant amount of supplemental technical information and guidance in this Publication was born from necessity. Procurement has an inherently high risk for noncompliance. That risk can be exacerbated by staff turnover, weaknesses in written procurement procedures, having limited or no experience with public procurement practices or publicly funded grant awards, and limited “how to” training opportunities. Grantee procurement questions rank highest in frequency among those addressed by TWC’s fiscal technical assistance staff, and TWC’s grant compliance monitors frequently identify procurement compliance deficiencies. Some of those procurement findings result in unallowable costs that must be repaid to TWC from a grantee’s own funds.

Procurement standards and requirements don’t exist for the mere sake of existing. Each has a specific purpose toward preserving the public’s trust that public funds are being used in a fair and efficient manner for their intended purpose. While no one-size-fits-all model procurement system exists, the technical information and guidance in this Publication aims to provide TWC grantees who need it with a resource for understanding the procurement standards and requirements imposed by TWC grant awards, for developing or enhancing procurement procedures where needed, and ultimately to increase procurement compliance, thereby maximizing grant funds and preserving the integrity of the process and retaining public trust.

## A.2 Scope

This Publication covers federal, state, and TWC requirements that govern procedures that TWC [grantees](#definition_grantee) follow when procuring property and services, and making [subgrants](#definition_subgrant) under [TWC grant awards](#definition_twc_grant_award). Additional requirements may exist in individual TWC grant awards.

Prior approval requirements for [equipment](#definition_equipment) purchases are provided in [Chapter 13: Property](https://twc.texas.gov/financial-manual-grants-contracts-chapter-13-property) in TWC’s Financial Manual for Grants and Contracts.

Note: This Publication does not govern TWC’s conduct of its own procurements, nor does it govern how TWC makes grant awards. As a Texas state agency, TWC is required to follow state law and its own policies and procedures for procurements and competitive grant solicitations that it conducts.

## A.3 Organization, Use & Flexibility

### A.3.1 Organization & Use

This Publication—the TWC Financial Manual for Grants and Contracts (FMGC) Supplement on Procurement—is incorporated into TWC’s FMGC by reference. As such, reference to TWC’s FMGC includes this Publication.

This Publication includes a [Table of Contents](#toc), followed by an [Introduction](#cA0_introduction), and then compliance and informational content. The end of this Publication includes a compilation of the [Policy Statements](#z_policy_statements) from this Publication, as well as a list of [Acronyms & Abbreviations](#z_acronyms_abbreviations) and a [Glossary](#z_glossary).

This Publication includes numbered headings. For example, B.3.5.1 refers to Part B, Section 3, Subsection 5, item 1.

This Publication makes abundant use of hyperlinks. It is navigable by hyperlinks from the Table of Contents. It can also be navigated from the Navigation Pane in Microsoft Word if the user selects to show that pane in the software’s “View” preferences. Hyperlinks are used throughout the Publication to link to source documents, other parts of the FMGC, and to make cross-references within the Publication. Hyperlinks also connect defined terms to the Glossary. Under each heading and subheading, the first use of a defined term includes a hyperlink to the Glossary. Except where specified otherwise, all other occurrences of that term under that heading or subheading are presumed to have the same meaning as the hyperlinked term.

Relating to source citations, this Publication cites to a variety of source references and resources for which the content, citation, and URL may change over time. In many cases, this Publication cites to a source’s version, date or codification year. While TWC will make every effort to keep citations and content current, lag times will occur in TWC’s updates to this Publication. Users of this Publication are reminded that it supplements but does not replace or substitute for the terms and conditions of TWC grant awards, or applicable standards and requirements. A lag time in an update to this Publication has no effect on the applicability or effective date of changes that occur in subsequent versions of underlying source citations. Similarly, for resources that this Publication cites for informational purposes, the reference to that material in no way alters the applicability of that source, nor does it supersede changes that occur in the content cited from that source or the authoring entity’s interpretation of its product.

On completeness, this Publication incorporates a range of procurement standards, requirements, and information for making [contracts](#definition_contract), and requirements affecting the award of [subgrants](#definition_subgrant). As noted in the preceding paragraph, this Publication does not replace or substitute the terms and conditions of TWC grant awards, or applicable standards and requirements. The omission of an applicable standard or requirement from this Publication has no effect on the applicability or effective date of that standard or requirement. Similarly, TWC and its oversight entities have it within their authority to make additional issuances, and the omission of such issuances from this Publication has no effect on the applicability or effective date of those issuances.

### A.3.2 Flexibility

This Publication includes both mandatory compliance requirements, and technical information or guidance. The technical information or guidance is informational, and as such, compliance with the specific information or guidance provided in that content is not mandatory. [Grantees](#definition_grantee) may use a different approach from what is described in the informational content, provided that it results in procurements and [subgrant](#definition_subgrant) award procedures that conform to the UG, UGMS, the requirements in this Publication, and other applicable requirements.

Within this Publication, the content under headings and subheadings containing mandatory procurement standards and requirements is introduced by a Policy Statement or a statement that identifies the content as additional compliance detail. As an additional indicator, heading and subheading titles that are immediately followed by an asterisk indicate a heading or subheading that contains compliance requirements. The asterisks carry into the Table of Contents for quick identification of sections and subsections that contain compliance requirements. For additional clarity, the first sentences under each heading or subheading that contains informational content state: “This Section, [Section Name], provides supplemental technical information or guidance. It is included for informational purposes.”

## A.4 Effective Date, Distribution & Updates

Effective September 1, 2020, this Publication replaces the content previously published in FMGC [Chapter 14: Procurement](https://twc.texas.gov/financial-manual-grants-contracts-chapter-14-procurement). That chapter contained some outdated content that had already been superseded by way of inclusion of the superseding and all other applicable requirements within the terms and conditions of [TWC grant awards](#definition_twc_grant_award). Consequently, the standards and requirements in this Publication were already in effect prior to issuance of this Publication, and as such do not necessitate a delay in the effective date to allow for an implementation period.

This Publication—FMGC Supplement on Procurement—is published on TWC’s website. TWC does not distribute hard copies of this Publication.

Updates to this Publication will be made as needed. When possible, changes will be made annually to coincide with the beginning of the state’s fiscal year, September 1. However, updates may be made more or less frequently.

## A.5 Sources

As covered in [A.3.1 Organization & Use](#cA3_1_organization_and_use), in this Publication, this Publication includes a variety of source references and resources for which the content, citation, and URL may change over time. A lag time in an update to this Publication has no effect on the applicability or effective date of changes that occur in subsequent versions of underlying source citations. Refer to A.3.1 Organization & Use, in this Publication, for additional information.

Unless specified otherwise, all citations to the U.S. Code of Federal Regulations (C.F.R.) are based on those in the 2020 codification of the C.F.R., and all cited state statutes are inclusive of any changes made up through and including the 86th Texas Legislature, 2019. Unless specified otherwise, references to TWC rules refer to TWC rules adopted or re-adopted on or before June 30, 2020.

This Publication compiles information from the following sources:

* Office of Management and Budget (OMB) “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards” (Uniform Guidance) (UG) ([2 C.F.R. Part 200](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part200.pdf)) (see Note)
* [OMB Memorandum M-18-18](https://www.whitehouse.gov/wp-content/uploads/2018/06/M-18-18.pdf), issued June 20, 2018, and entitled “Implementing Statutory Changes to the Micro-Purchase and the Simplified Acquisition Thresholds for Financial Assistance” (see Note)
* U.S. Department of Health and Human Services (HHS) implementing regulations for UG: [2 C.F.R. Part 300](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part300.pdf), as amended by [45 C.F.R. Part 75](https://www.govinfo.gov/content/pkg/CFR-2019-title45-vol1/pdf/CFR-2019-title45-vol1-part75.pdf) (2019) (see Note)
* U.S. Department of Agriculture (USDA) implementing regulations for UG: [2 C.F.R. Part 400](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part400.pdf) (see Note)
* U.S. Department of Labor (DOL) implementing regulations for UG: [2 C.F.R. Part 2900](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part2900.pdf) (see Note)
* U.S. Department of Education (ED) implementing regulations for UG: [2 C.F.R. Part 3474](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part3474.pdf) (see Note)
* [Council on Financial Assistance Reform (COFAR), Frequently Asked Questions (FAQ) for UG, July 2017](https://www.cfo.gov/wp-content/uploads/2017/08/July2017-UniformGuidanceFrequentlyAskedQuestions.pdf) (see Note)
* OMB Nonprocurement Debarment and Suspension guidance ([2 C.F.R. Part 180](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part180.pdf)) and HHS, USDA, DOL, and ED implementing regulations
* Texas Comptroller of Public Accounts “[Uniform Grant Management Standards](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)” (UGMS), as adopted June 2004 and amended March 7, 2016 (the 2016 amendment was made to revise the single audit threshold to $750,000 pursuant to UG)
* Selected TWC rules, as codified in the [Texas Administrative Code (TAC), Title 40, Part 20](https://texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=3&ti=40&pt=20)
* [Texas General Appropriations Act](http://lbb.state.tx.us/budget.aspx), 86th Texas Legislature, Regular Session, 2019
* [Texas Government Code, Chapter 771, Interagency Cooperation Act](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.771.htm)
* [Texas Government Code, Chapter 791, Interlocal Cooperation Act](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.791.htm)
* [Texas Government Code, Chapter 2254, Professional and Consulting Services, Subchapters A and B](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2254.htm)
* Selected Federal program statutes and regulations
* Selected TWC policy and guidance

Additionally, this Publication includes or adapts, as additional reference material, selected information, guidance or examples from the following sources:

* Federal Acquisition Regulation (FAR) ([48 C.F.R. Parts 1-51](https://www.govinfo.gov/app/collection/cfr/2019/title48/chapter1) (2019)), which codifies federal regulations that apply to procurements performed by certain federal agencies
* [State of Texas Procurement and Contract Management Guide](https://comptroller.texas.gov/purchasing/publications/procurement-contract.php), Version 1.3, published by the Texas Comptroller of Public Accounts for use by Texas state agencies
* Texas Education Agency (TEA) [Financial Accountability System Resource Guide](https://tea.texas.gov/finance-and-grants/financial-accountability/financial-accountability-system-resource-guide) (FASRG), Version 16.0, for Texas school districts, charter schools, and education service centers
* [Government Finance Officers Association](https://www.gfoa.org/) (GFOA) Best Practices/Advisories

All references that this Publication makes to the FAR, State of Texas Procurement and Contract Management Guide, TEA FASRG, and GFOA Best Practices/Advisories refer to the versions listed above. Except where specified otherwise, inclusion of information from these sources in no way incorporates the sources into this Publication in their entirety, nor does it impose their content on a [grantee](#definition_grantee) beyond what that grantee’s organization might otherwise be required to do pursuant to other requirements governing the organization. Additionally, the referenced content may change over time. In cases where a grantee is otherwise subject to these sources, it should refer to these sources over this Publication with respect to the referenced information.

Note: On August 13, 2020, the OMB published final guidance to make changes to the UG and certain other parts of Title 2 of the C.F.R. ([85 FR 49506](https://www.govinfo.gov/content/pkg/FR-2020-08-13/pdf/2020-17468.pdf)). The UG changes in 2 C.F.R. §§ 200.216 “Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment” and 200.340 “Termination,” in the updated guidance, took immediate effect. The other UG changes made by that update is November 12, 2020. The change in 2 C.F.R. § 200.216 is included in [P.2a Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment](#cP2a_0_prohibition_telecom_surveillance), in this Publication. The change in 2 C.F.R. § 200.340, and all other UG changes made by the August 13, 2020 announcement will be added to the text of the FMGC and this Publication, as appropriate, on or shortly after November 12, 2020. Among those changes will be the rescission of OMB Memorandum M-18-18, which is listed in this Publication’s source list. (OMB M-18-18 functioned as interim authority to increase the micro-purchase threshold and simplified acquisition threshold until those increases officially took effect under the UG, a change that occurred under the UG updates that take effect November 12, 2020.) The OMB update to the UG may also result in changes to federal agencies implementing regulations for the UG, which have not yet occurred.

## A.6 Applicability

### A.6.1 Applicability Overview\*

This Section provides additional compliance detail concerning the applicability of this Publication.

Except as specified otherwise in this Publication, in a TWC grant award, or by other TWC issuances, this Publication applies to procurements and [subgrant](#definition_subgrant) solicitations conducted by TWC [grantees](#definition_grantee) (including grantees that are for-profit entities) under [TWC grant awards](#definition_twc_grant_award). It does not apply to Vocational Rehabilitation [contractors](#definition_contractor) or other TWC contractors under [contracts](#definition_contract) that TWC makes unless specified otherwise by that contract. It does not govern TWC’s conduct of its own procurements, nor does it govern how TWC makes grant awards. As a Texas state agency, TWC follows state law and its own policies and procedures for procurements and competitive grant solicitations that it conducts.

### A.6.2 Applicability to For-Profit Grantees\*

This Section provides additional compliance detail concerning the applicability of this Publication.

TWC applies this Publication to for-profit [grantees](#definition_grantee) to promote TWC’s uniform treatment of grant funds, to the extent possible, considering the following:

* UG authorizes each [federal awarding agency](#definition_federalawardingagency) to apply Subparts A-E of UG to grant awards and subawards ([subgrants](#definition_subgrant)) made to for-profit entities
* DOL implementing regulations for UG include for-profit entities that receive a [federal award](#definition_federal_award) (including a subaward (subgrant)) in its definition of non-federal entity, making such entities subject to UG, as supplemented by the DOL regulations at [2 C.F.R. Part 2900](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part2900.pdf), when such entities receive a federal award (including a subaward (subgrant)) that is funded with DOL funds
* Provisions of the Workforce Innovation and Opportunity Act (WIOA) Final Rule at [20 C.F.R. §683.200(a)](https://www.govinfo.gov/content/pkg/CFR-2019-title20-vol4/pdf/CFR-2019-title20-vol4-sec683-200.pdf) (2019) require commercial organizations, for-profit entities, and foreign entities that are [recipients](#definition_grantee) or [subrecipients](#definition_subgrantee) of a federal award of WIOA Title I or Wagner-Peyser Act funds to adhere to the administrative requirements and cost principles in UG, including any exceptions identified by DOL implementing regulations under 2 C.F.R. Part 2900
* [UGMS, Part IV, §\_\_.210(e)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf) requires TWC to establish requirements, as necessary, to ensure compliance by for-profit grantees and subgrantees

### A.6.3 Applicability to Selection of Subgrantees (Subrecipients)\*

This Section provides additional compliance detail concerning the applicability of this Publication.

TWC requires that [grantee](#definition_grantee) procedures for making [subgrants](#definition_subgrant) to [subgrantees (subrecipients)](#definition_subgrantee) conform to the same standards of this Publication as those that govern [procurement transactions](#definition_procurement_transaction), except where this Publication specifically identifies a requirement as not applicable for subgrants. Similarly, provisions that this Publication identified as being unique to subgrants do not apply to grantees’ procurement transactions.

### A.6.4 Exception: Selection of Adult Education & Literacy Consortium Members\*

This Section provides additional compliance detail concerning the applicability of this Publication.

Relating to an Adult Education and Literacy (AEL) grant award that TWC makes to a consortium of eligible AEL training providers to carry out the local provider activities identified in Adult Education and Family Literacy Act (AEFLA) (see Note) § 231—Grants and Contracts for Eligible Providers—the ED Office of Career, Technical, and Adult Education (OCTAE) interprets AEFLA § 231 to prohibit the consortium from using a competitive application or procurement process to select consortium members, regardless of whether the work to be performed by an eligible training provider as part of that consortium constitutes a [subgrantee (subrecipient)](#definition_subgrantee) or [contractor (vendor)](#definition_contractor) relationship between the [grantee](#grantee) and that consortium member. This is because AEFLA § 231 establishes the competitive selection of local providers for AEL local provider grant awards as being a responsibility of the “eligible agency” (TWC), rather than locally.

Note: Refers to AEFLA, as reauthorized under Title II of the Workforce Innovation and Opportunity Act (Public Law 113-128).

### A.6.5 Exception: Pass-Through to Other State Agencies and States\*

This Section provides additional compliance detail concerning the applicability of this Publication.

TWC may pass through grant funds to other Texas state agencies and States. Except for the inclusion of applicable contract provisions, such entities are not subject to the standards described in this Publication. Pursuant to the UG and UGMS, such entities will adhere to the same policies and procedures that apply to procurements and [subgrant](#definition_subgrant) selection for their other activities, except that purchase orders, [contracts](#definition_contract), and subgrants made under [federal awards](#definition_federal_award) must include certain contract provisions which are required by the UG.

More specifically, when procuring property and services under a [federal award](#definition_federal_award), the UG and UGMS require that a [State](#definition_state) must follow the same policies and procedures that it uses for procurements from its non-Federal funds, but must ensure that every purchase order or other contract includes any clauses required by federal statutes and executive orders and their implementing regulations, including those set forth in [2 C.F.R. § 200.326](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-326.pdf) Contract Provisions. Also refer to [E.4 Procurement of Recovered Materials](#cE4_recovered_materials) in this Publication.

Reference:

[2 C.F.R. § 200.317](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-317.pdf); [UGMS, Part III, §\_\_.36(a)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## A.7 Request for Fiscal Technical Assistance

[Grantees](#definition_grantee) may request clarification on this Publication’s content by e-mailing TWC’s Fiscal-TA mailbox at [fiscal.ta@twc.state.tx.us](mailto:Fiscal.TA@twc.state.tx.us). [Subgrantees (subrecipients)](#definition_subgrantee) should request clarifications from grantees. A grantee may forward a subgrantee’s question to TWC at the grantee’s discretion.

# B. Procurement Cycle & Internal Controls

## B.1 Procurement Cycle

This Section, B.1 Procurement Cycle, provides supplemental technical information or guidance. It is included for informational purposes.

Procurement generally refers to the acquisition of property and services from commercial sources. It is sometimes described as a process, series of phases, or procurement cycle. Various descriptions depict the steps and decisions involved. Regardless of the description, procurement generally involves a chain of actions that occur with respect to the acquisition of property and services; the receipt of and payment for the procured items or services; related oversight and administration; and closeout, including ultimate disposition of acquired property (if any).

The following list is a sample illustration of the significant phases and activities involved in the procurement cycle.

* Planning
* Need determination (refer to [F.2 Avoid Unnecessary & Duplicative Purchases](#cF2_duplicative_purchases) in this Publication)
* Lease versus purchase and other analysis (refer to [F.3 Lease Versus Purchase & Other Analysis](#cF3_lease_purchase_analysis) in this Publication)
* Independent estimate (refer to [F.6 Independent Estimate](#cF6_independent_estimate) in this Publication)
* Consolidating or breaking out procurements (refer to [G.2 Consolidating & Breaking Out Procurements](#cG2_consolidating_breakingout_purchases) in this Publication)
* Selecting an acquisition approach (refer to [H. Acquisition Approaches](#cH0_acquisition_approaches) and [J. Special Considerations for Certain Purchases](#cJ0_special_purchases) in this Publication)
* Solicitation and evaluation
* Define specifications and requirements (refer to [L.4 Statement of Work & Specifications](#new_14_52_specifications) in this Publication)
* Define selection/evaluation criteria (refer to [N.5 Evaluation Factors](#new_14_53_evalfactors) in this Publication)
* Select evaluators (refer to [N.6 Evaluation Team Selection](#new_14_54_eval_team) in this Publication)
* Prepare solicitation
* Publicize solicitation (if applicable) (refer to [M. Advertisement & Bidders List](#cM0_advertiesment_bidders_list) in this Publication)
* Bidders conference (if applicable) (refer to [K.6 Bidders Conference](#new_14_57_biddersconference) in this Publication)
* Receive quotations or offers (refer to [N.1 Receiving Quotations & Offers](#new_14_61_receive_quotes_offers) in this Publication)
* Evaluate quotations or offers (refer to [N.4 Administrative Review](#new_14_64_admin_review), [N.7 Evaluation: Sealed Bids (Bid Tabulation)](#new_14_65_evaluation_bids), [N.8 Evaluation: Competitive Proposals (Evaluation Team)](#new_14_66_evaluation_proposals), and [O. Cost/Price Analysis](#new_14_67_cost_price_analysis) in this Publication)
* Selection and negotiation (refer to [N.3 Selection Process](#new_14_63_selection_process), [P.5 Negotiation](#new_14_69_negotiation) and [P.1 Awards to Responsible Parties](#new_14_70_responsible_parties) in this Publication)
* Negotiate performance levels
* Negotiate fair and reasonable profit, if applicable
* Negotiate payment details and frequency
* Negotiate duration of the contract or agreement, and the modification process
* Obtain applicable authorized approval
* Make offer and obtain acceptance
* Execute contract or agreement
* Implementation and oversight (refer to [Q.2 Oversight of Contracts & Subgrants](#new_14_74_oversight))
* Conduct oversight and monitoring
* Ensure timely invoices and payments
* Monitor for compliance with contract requirements
* Evaluate and approve [contract modifications](#definition_contractmod)
* Closeout
* Reconcile costs and payments
* Reconcile performance goals with actual performance
* Ensure participant and financial records are secured and retained
* Prepare closeout documents

A similar approach would apply for procurement of [subgrants](#definition_subgrant).

## B.2 Quotations Versus Offers

This Section, B.2 Quotations Versus Offers, provides supplemental technical information or guidance. It is included for informational purposes.

This Section provides information about a [grantee’s](#definition_grantee) and supplier’s legal obligations in connection with quotations versus offers that a supplier provides to a grantee, and why the distinction matters. It is adapted from the definition of “offer” in [48 C.F.R. § 2.101](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-sec2-101.pdf) (2019) and [48 C.F.R. § 13.004](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-sec13-004.pdf) (2019) “Legal Effect of Quotations,” in the FAR. The information in this Section is not legal advice. A grantee should consult its own legal counsel if it requires advice about the nature or legal enforceability of a specific arrangement. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the FAR.)

[Chapter 15: Contracts](https://twc.texas.gov/financial-manual-grants-contracts-chapter-15-contracts), in the FMGC, observes that Supreme Court decisions have upheld the validity of four essential components of a [contract](#definition_contract), one of which is [manifestation of mutual assent](#definition_mutualassent). A common approach for achieving mutual assent is by an offer and acceptance of an offer. Grantee employees who purchase [supplies](#definition_supplies), services or other property for grantees directly engage in offer and acceptance. As reflected in [I.2 Procurement by Small Purchase Procedures](#new_14_32_small_purchase_procedures), in this Publication, small purchase procedures frequently involve quotations rather than offers, while responses received when conducting procurement by sealed bids (formal advertising) or competitive proposals are offers.

In general, an offer refers to a response to a solicitation that, if accepted by the grantee, would bind the offeror to perform under the resulting contract. A response to an Invitation for Bids (IFB) is an offer that is called a bid. A response to a Request for Proposals (RFP) is an offer that is called a proposal. A response to a Request for Quotations is a quotation. A quotation is not an offer. Refer to [L.1 Solicitation Document Selection](#new_14_48_select_sol_doc), in this Publication, for more information about RFPs, IFBs and Requests for Quotations.

Because a quotation is not an offer, issuance of an order in response to a quotation does not on its own form a binding contract. In such case, the order is an offer by the organization placing the order to buy certain supplies, services or other property under specified terms and conditions. The supplier’s acceptance of the order—which might be indicated in writing by the supplier, by the supplier’s furnishing of the ordered supplies or services, or by the supplier proceeding with the work to the point where substantial performance has occurred—establishes a contract.

In addition to determining a grantee’s and supplier’s legal obligations, the distinction between an offer and quote can have implications for what a grantee reports as obligations on the expenditure reports that it submits to TWC. An amount should not be reported to TWC as an obligation if no legally binding debt exists under the grant award. As such, merely placing an order in response to a quotation does not establish an obligation. It is when the supplier accepts the order that an obligation exists.

## B.3 Internal Controls

### B.3.1 Basic Standard\*

Policy:

[Grantees](#definition_grantee) must have internal controls for purchasing and procurement that provide reasonable assurance that transactions are properly recorded and accounted for, transactions are executed in accordance with applicable requirements, and grant assets are safeguarded.

UG and UGMS require grantees to have internal controls that provide reasonable assurance that the grantee manages grant funds in compliance with applicable laws, regulations, and grant requirements.

Additionally, UG specifies the following:

* Internal controls for compliance should be designed to provide reasonable assurance that transactions are properly recorded and accounted for, that accountability is maintained for assets, that transactions are executed in accordance with applicable requirements, and that funds, property, and other assets are properly safeguarded against loss from unauthorized use or disposition.
* Internal controls should be in compliance with guidance in ‘‘Standards for Internal Control in the Federal Government’’ issued by the Comptroller General of the United States (also known as the Green Book) or the ‘‘Internal Control Integrated Framework,’’ issued by the Committee of Sponsoring Organizations (COSO) of the Treadway Commission.
* Grantees must evaluate and monitor their compliance with statutes, regulations and the terms and conditions of grant awards, take prompt action when instances of noncompliance are identified, and take reasonable measures to safeguard protected personally identifiable information and other information the awarding agency or [pass- through entity](#definition_passthruentity) designates as sensitive or the grantee considers sensitive consistent with applicable laws regarding privacy and obligations of confidentiality.

Reference:

[2 C.F.R. § 200.61](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-61.pdf); [2 C.F.R. § 200.62](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-62.pdf); [2 C.F.R. § 200.303](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-303.pdf); [UGMS, Part IV, §\_\_.300(b)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

Internal controls for purchasing and procurement exist in all five components of the COSO framework for internal control that are discussed in [Chapter 2: Internal Controls](https://twc.texas.gov/financial-manual-grants-contracts-chapter-2-internal-controls) in the FMGC—control environment, risk assessment, control activities, information and communication, and monitoring. Refer to Chapter 2: Internal Controls in the FMGC, and the resources cited within that chapter for more information about the five components of internal control and how those components relate to the internal controls for purchasing and procurement, and other compliance areas. Inadequate internal controls in the area of purchasing and procurement increase the risk for unauthorized, unnecessary, unallowable, and fraudulent purchases.

### B.3.2 Examples of Internal Controls

This Section, B.3.2 Examples of Internal Controls, provides supplemental technical information or guidance. It is included for informational purposes.

Examples of internal controls for purchasing and procurement include but are not limited to the following:

* Top-down commitment to integrity and ethical values
* Commitment to staff training and competencies
* Clear lines of responsibility and authority
* Processes to identify and address purchases and procurement weaknesses
* Written policies and procedures
* Separation of duties
* Pre- or auto-numbered purchase requisitions and purchase orders
* Access to purchase order stock is restricted to authorized personnel
* Procurement cards have credit limits, access to and use of procurement cards is restricted to authorized personnel, written policies and procedures define permissible uses and require supporting documentation, [grantee](#definition_grantee) performs routine reconciliation and monitoring of transactions
* Petty cash is kept in a secure location, access is restricted to the petty cash custodian, transactions require supporting documentation, petty cash is periodically audited by someone other than the petty cash custodian
* Requests are reviewed for need, non-duplication, and allowability of costs
* Scrutiny of requests to conduct [noncompetitive procurements](#definition_noncompetitiveproc)
* Formal mechanisms exist for communications regarding procurements
* Establishment and use of boilerplate templates when applicable
* Verify goods and services received against the purchase order/[contract](#definition_contract) and the related invoice information before authorizing payment
* Secure goods received in a restricted area until they can be verified, tagged (if appropriate), and delivered to the appropriate location or user
* Purchasing and payment documents require evidence to show that approvals and checks required by the grantee’s procedures have been performed
* Review ledgers for accuracy of recorded transactions
* Invoices are paid timely

The preceding list provides examples of internal controls specific to purchasing and procurement. It is not intended to serve as a checklist or exhaustive list of controls, nor is the absence of a specific control intended to imply a compliance violation in every case. Grantees’ management personnel are responsible for identifying risks and implementing controls to carry out their objectives, including providing reasonable assurance of compliance with grant requirements.

### B.3.3 Written Procedures

Written procedures are part of an entity’s internal control structure. Refer to [C Written Procurement Procedures](#cC0_written_procedures), in this Publication, for discussion about written policies and procedures.

### B.3.4 Separation of Duties

This Section, B.3.4 Separation of Duties, provides supplemental technical information or guidance. It is included for informational purposes.

Inadequate separation of duties involving purchasing and procurement processes increases the risk for excessive costs, unauthorized and unnecessary purchases, unallowable costs and other improper charges to grant awards.

A best practice is to have a separation of duties among responsibilities for the following:

* Approving purchases
* Receiving ordered property and services
* Approving invoices for payment
* Review and reconciliation of financial records
* Performing physical inventory of property

[Grantees](#definition_grantee) that have a small number of employees to perform its organization’s purchasing, accounting and property management functions might find it necessary to implement compensating controls to mitigate the risks of having inadequate separation of duties. Management staff at these organizations should identify where risks exist and implement solutions appropriate to the organization’s circumstances and financial resources. Examples include but are not necessarily limited to cross-training of other grantee personnel to perform duties needed to achieve adequate separation, more frequent financial record reviews and/or more frequent internal monitoring by personnel not involved in the processes, and outsourcing all or part of a function to a third party having the expertise to perform the function on the grantee’s behalf.

### B.3.5 Sample Process for Purchase Requisitions & Purchase Orders

This Section, B.3.5 Sample Process for Purchase Requisitions & Purchase Orders, provides supplemental technical information or guidance. It is included for informational purposes.

The content in this subsection illustrates a sample process for purchase requisitions and purchase orders. It is adapted from the TEA FASRG for Texas school districts, charter schools, and education services, but as adapted, is anticipated to have universal appeal to TWC [grantees](#definition_grantee). (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the TEA FASRG.)

Purchase orders are a common method for acquiring goods and services. A purchase order functions as a formal order for goods, materials or services from a [contractor (vendor)](#definition_contractor). Once approved by both parties, a purchase order is a binding commitment to remit payment to the contractor after the [grantee](#definition_grantee) receives the item(s) and an invoice from the contractor.

Purchase orders also have the following accounting functions:

* A purchase order typically contains information about the expenditure that will be made and the account code(s) to charge. When a grantee issues a purchase order to a contractor (vendor), the grantee might then record the purchase order as an encumbrance in the grantee’s accounting system. Encumbrances function as expenditure control mechanisms. The tracking of encumbrances is common to governmental entities. Not all grantees track encumbrances.
* Purchase orders are also used in the accounts payable function. Items received and invoiced are verified against the order that was placed, as documented by the purchase order—steps which are necessary before payment can be made to the contractor (vendor).

Purchase orders typically begin with a purchase requisition, and culminate in the receipt of property or services. The following describes a sample process.

#### B.3.5.1 Purchase Requisition

This Section, B.3.5.1 Purchase Requisition, provides supplemental technical information or guidance. It is included for informational purposes.

A purchase requisition is an internal document that might be used by [grantee](#definition_grantee) personnel to initiate a purchase order. It might be used for purchases of [supplies](#definition_supplies), services, or [equipment](#definition_equipment). Depending on the grantee’s accounting and purchasing systems, it might be generated manually or electronically.

#### B.3.5.2 Approval of Requisitions

This Section, B.3.5.2 Approval of Requisitions, provides supplemental technical information or guidance. It is included for informational purposes.

The [grantee’s](#definition_grantee) purchasing and procurement procedures should indicate the individuals or positions in the grantee’s organization that the grantee has authorized to initiate purchase requisitions. Requisitions should be approved by appropriate personnel. Monitoring of the available budget is an important element of the approval process.

#### B.3.5.3 Requisition Format

This Section, B.3.5.3 Requisition Format, provides supplemental technical information or guidance. It is included for informational purposes.

No uniform requisition format applies for [TWC grant awards](#definition_twc_grant_award). Information commonly included on purchase requisitions includes the following:

* A description of items or services to be purchased
* The quantity needed
* A suggested supplier from the [grantee’s](#definition_grantee) [vendor list](#definition_vendorslist) (if applicable)
* The account code to be charged

It is a good management practice for grantees to establish and use a standard format for purchase requisitions. Doing so enables information to be readily identified and transferred to a purchase order. [Grantees](#definition_grantee) are not prohibited from combining the requisition and purchase order on one form if proper control procedures are used. For example, an unnumbered requisition, once properly approved by authorized personnel, may become a numbered purchase order.

#### B.3.5.4 Requisition Approval

This Section, B.3.5.4 Requisition Approval, provides supplemental technical information or guidance. It is included for informational purposes.

Personnel responsible for approving purchase requisitions should review the requisition for the following:

* Accuracy
* Availability of funds
* Proper signatures
* Adequate description
* Proper account coding
* Overall completeness

An appropriate acquisition approach should be used to conduct any necessary procurement. (If the requestor conducted the procurement, such as by [micro-purchase](#definition_micropurchase) procedures or small purchase procedures, that documentation would also be reviewed.) After procurement, the request might be assigned a purchase order number, contract number (if applicable), purchase order date, and a cancellation date. The purchase order (or [contract](#definition_contract)) would then be issued to the procured [contractor (vendor)](#definition_contractor). Refer to [I.1 Procurement by Micro-purchase Procedures](#cI1_procurement_micropurchase_procedures) and [I.2 Procurement by Small Purchase Procedures](#cI2_procurement_small_purchase_procedure), in this Publication, for information about those procurement methods.

Although not required, a good management practice is to require that the purchase order be approved through a central office by responsible, designated personnel who is knowledgeable about applicable purchasing and procurement requirements. For control purposes, purchasing personnel might maintain a log of all purchase orders issued, which includes the date of submission, purchase order number, [contractor (vendor)](#definition_contractor) name and the requesting personnel, department, or office location.

#### B.3.5.5 Purchase Orders

This Section, B.3.5.5 Purchase Orders, provides supplemental technical information or guidance. It is included for informational purposes.

A purchase order is documentary evidence of orders placed in response to a properly initiated and approved purchase requisition. Use of a standard format facilitates processing. Information commonly included on a purchase order includes the following:

* Supplier name and address
* Quantity of goods
* Description of goods
* Account codes
* Price (per unit and total)
* Payment terms
* Discounts, if any
* Transportation arrangements
* Other pertinent information, for example, delivery destination

It is common for purchase orders to have multiple copies which may include the following:

* [Contractor](#definition_contractor) Copy, which is sent to the supplier
* Accounting Copy, which is sent to the [grantee’s](#definition_grantee) business or accounting office and may be used for encumbering funds
* Receiving Copy, which is sent to the accounting department when the ordered items or services have been received, confirming that payment should be made to the contractor (vendor) according the grantee’s accounts payable process
* User or File Copy, which is kept by the user department

A grantee should have purchase order cancellation procedures. Grantees should inform contractors of these procedures and should include the cancellation terms in writing on the purchase order. For example, a grantee’s procedures might specify that purchase orders are cancelable if the grantee does not receive the ordered items within 60 days. (In this example, 60 days is used for illustration purposes only.) In some instances, flexible cancellation dates might be more appropriate, depending on factors relating to the purchase, such as the grantee’s proximity to the contractor, availability of merchandise, quantity ordered, etc.

#### B.3.5.6 Receiving and Distributing Purchases

This Section, B.3.5.6 Receiving and Distributing Purchases, provides supplemental technical information or guidance. It is included for informational purposes.

The purchase process includes checking deliveries and ensuring that the end users that needed the delivered goods and services received them as ordered. Procedures should be in place for verifying the receipt of services. Procedures should also be in place for receiving and distributing goods. For example, receiving personnel might contact the end user or location to inform them that goods have been received. Personnel should distribute goods to the proper location and/or personnel. For control purposes, the requesting user should compare goods received to their copy of the purchase order to ensure that they agree that the ordered items were received in the quality and quantity requested.

Individuals trained in receiving procedures should first receive the goods. The quantity and quality of items should be checked. Items to be included on the inventory should be identified, and if tagging procedures are used, the items should be tagged before being placed into service. Receiving activities should be monitored to ensure that policies and procedures are adhered to by individuals receiving goods and services.

A receiving report should be prepared for purchases.

For some [grantees](#definition_grantee), the receiving report might be part of the purchase order (such as a receiving copy), while in others it might be a separate report. Upon receipt of purchases, the receiving personnel should compare the purchases received to the purchase order. Exceptions and damaged merchandise, if any, should be noted on the receiving report. The receiving report is then dated, signed and provided to the accounting department to be reconciled to the invoice.

If personnel receive an order in partial shipments, each shipment should be recorded on the receiving report and submitted to the accounting department. The accounting department should maintain a record of receiving reports received to date until all items have been received or until the purchase order has been cancelled.

The personnel responsible for purchasing may also be responsible for resolving any deficiencies with the [contractor (vendor)](#definition_contractor). The grantee’s policies and procedures should identify the personnel with this responsibility.

### B.3.6 Petty Cash Transactions

This Section, B.3.6 Petty Cash Transactions, provides supplemental technical information or guidance. It is included for informational purposes.

A [grantee](#definition_grantee) might use a petty cash fund to make very small purchases. Petty cash funds can save time and paperwork. A petty cash fund can also save on associated administrative costs. However, it is important that the grantee has adequate controls over petty cash to account for all petty cash transactions.

Authorizations to purchase from a petty cash fund should be clearly defined in a grantee’s procedures.

Additionally, the dollar amount of individual petty cash purchases should be limited. The dollar amount limit for purchases will be defined by the entity’s own procedures and other procurement requirements governing it. For example, the TEA FASRG for Texas school districts, charter schools, and education service centers suggests that each purchase should not exceed $50 to $100 in value. (This example is included for illustration purposes.) (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the TEA FASRG.)

Petty cash purchases should be minimized. It is important that petty cash custodians maintain accurate accounting records for all petty cash purchases.

All of the following are examples of controls for the safeguarding of petty cash:

* Cash in the fund plus receipts for payments equals the petty cash amount
* The petty cash fund is periodically reconciled, and the reconciliation documented
* Petty cash storage is secured by use of a locked and restricted storage arrangement
* A petty cash custodian is designated
* Disbursements are for small amounts and only for allowable costs
* Petty cash fund receipts are not commingled with receipts of other activities
* Each disbursement is adequately documented, and upon payment, supporting documents are defaced to prevent reuse (for example, stamped “paid”)
* Someone other than the petty cash custodian periodically conducts unscheduled audits of the petty cash account

### B.3.7 Procurement Card Transactions

This Section, B.3.7 Procurement Card Transactions, provides supplemental technical information or guidance. It is included for informational purposes.

[Grantees](#definition_grantee) that use procurement cards (also referred to as purchasing cards or P-cards) should have written procedures for the handling of procurement card transactions.

The following information is adapted from TEA’s FASRG for Texas school districts, charter schools, and education service centers, but as adapted, is anticipated to have universal appeal to all TWC grantees. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the TEA FASRG.)

P-cards can provide efficiency, transparency and security when correctly used. Use of P-cards enables the volume of transactions to increase without need for additional labor to handle purchases that would otherwise be made through more labor-intensive purchase order processes. This makes it possible for employees to focus less time on paperwork associated with requesting, approving, logging, and ordering purchase orders. P-cards enable purchasing staff to focus attention on larger dollar, infrequent purchases and their compliance requirements. Software tools available with P-card programs may enable supervisors to review purchasing details on [contractors (vendors)](#definition_contractor), timing of purchases, and the amount spent.

While P-cards have clear benefits, they can also increase risk for fraud, waste and abuse, if not properly controlled.

Examples of controls for P-card transactions include the following:

* Making it clear to employees that misuse and abuse will not be tolerated, such as by having written policies and procedures, and for example, using appropriate P-card usage as a factor in performance appraisals, and implementing a “three-strikes-you’re-out” policy, in which the grantee would revoke or terminate an employee’s P-card privileges if the employee had three instances of misuse or inability to provide receipts for purchases made with the card
* Holding all employees to the same rules (although spending limits may vary by employee)
* Being selective when issuing cards, focusing on repetitive, small-dollar purchases
* Restricting usage by spending limits, designating unauthorized merchant category codes, and limiting time of use to business hours
* Setting P-card limits as low as possible to accommodate business needs (if a need exists to allow certain employees to make emergency purchases using a P-card, a higher limit may be authorized for those employees)
* Requiring a cardholder’s supervisor or other appropriate personnel to review cardholder transactions (TEA’s FASRG recommends keeping within a ratio of four to ten cardholders per reviewer)
* Applying high standards to both the selection of cardholders and card reviewers
* Requiring cardholders and reviewers to complete P-card training prior to receiving a P-card and reviewing transactions, respectively
* Requiring cardholders and reviewers to acknowledge in writing that they received a copy of the grantee’s policies and procedures for P-card use before receiving a P-card and reviewing transactions, respectively
* Employees other than P-card holders and reviewers should set up cardholders and reviewers in the grantee’s P-card system and banking system
* Do not permit the same employee to buy, receive, approve, and reconcile card purchases
* Requiring cardholders to turn in detailed receipts and document the business reason for each purchase
* Requiring that restaurant receipts, if any, provide line-by-line detail of the order
* Requiring a reviewer to immediately call an employee if the reviewer notices a questionable transaction (rather than waiting for the due date of receipts)
* Revoking a department’s card privileges if the department staff assigned to review purchases does not review and approve transactions according to the grantee’s policy
* Requiring separate staff to monitor the work of the reviewers
* Review the list of P-card users annually
* Review average spending by cardholder, purchases from unauthorized suppliers, purchases shipped to a cardholder’s home, and purchase amounts slightly below purchase limits (these can help reveal employees in need of additional training or attempting to misuse the card)
* Review reports provided by P-card programs, such as declined authorizations reports, disputes reports, and lost/stolen card reports (these can reveal employees in need of additional training or attempting to misuse the card)
* If periodic review of grantee-wide activity identifies frequently used vendors or products, consider negotiating volume discounts
* Encourage staff to use available fraud hotlines and reporting avenues to report any fraud

The preceding list is provided to illustrate examples of control decisions that grantees need to consider with respect to their purchasing and procurement decisions. It is not intended for use as a compliance checklist. A grantee may use different procedures than those listed above, provided that they result in transactions that are properly recorded and accounted for, transactions being executed in accordance with applicable requirements, and safeguarding of grant assets.

# C. Written Procurement Procedures

As referenced in [B.3 Internal Controls](#cB3_internal_controls), in this Publication, written procedures are part of an entity’s internal control structure. As covered in this Section, C. Written Procurement Procedures, the UG and UGMS specifically require written procurement procedures. This Section also includes a sample content outline for a purchasing manual, to assist [grantees](#definition_grantee) who might be developing or revising their procurement procedures.

## C.1 Written Procurement Procedures

### C.1.1 Basic Standard\*

Policy:

[Grantees](#definition_grantee) (other than [States](#definition_state)) must have written procurement procedures that result in procurements that conform to applicable federal law, the procurement standards set forth in the UG and UGMS, and other applicable requirements. A grantee that is a [State](#definition_state) must follow the same procurement policies and procedures that it uses for procurements from its non-federal funds, with the exception that for [federal awards](#definition_federal_award), the State must also adhere to UG requirements for the procurement of recovered materials and ensure that every purchase order or contract includes the clauses required by the contract provisions identified in the UG.

The UG and UGMS establish standards for procurement procedures according to whether the entity is a [State](#definition_state) or another entity. Refer to [C.1.1.1 Procurement Procedures: States](#cC1_1_1_1_procedures_states) and [C.1.1.2 Procurement Procedures: Grantees](#cC1_1_1_2_procedures_grantees), in this Publication, for more information about these standards.

Reference:

[2 C.F.R. § 200.317](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-317.pdf) (States); [2 C.F.R. § 200.318(a)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf) (other grantees); [UGMS, Part III, §\_\_.36(a)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf) (States); [UGMS, Part III, §\_\_.36(b)(1)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf) (other grantees)

#### C.1.1.1 Procurement Procedures: States\*

This Section, C.1.1.1 Procurement Procedures: States, provides additional compliance detail for [C.1.1 Basic Standard](#cC1_1_basic_standard_procedures).

The UG and UGMS require that when procuring property and services under a grant award, a [State](#definition_state) must follow the same procurement policies and procedures that it uses for procurements from its non-federal funds. Additionally, for [federal awards](#definition_federal_award), the State must comply with UG requirements for the procurement of recovered materials and ensure that every purchase order or other [contract](#definition_contract) includes clauses required by the contract provisions identified in UG. Refer to [E.4 Procurement of Recovered Materials](#cE4_recovered_materials) and [K.2.3 Contract Clauses & Provisions](#cK2_3_contract_clauses_provisions), in this Publication, for related information.

TWC may pass-through grant funds to other state agencies or States. The UG requires that States take the above-referenced actions when procuring property and services under a federal award. For applicable procurement laws and procedures, UGMS requires that Texas state agencies consult Title 10 of the Texas Government Code and the Texas Building and Procurement Commission (TBPC) Procurement Manual. (The TBPC Procurement Manual has since been replaced by the State of Texas Procurement and Contract Management Guide that is published by the Texas Comptroller of Public Accounts.)

For procurements and grant solicitations that TWC conducts, TWC also follows its own procurement manual published on the TWC intranet which is not available to the general public. Similarly, TWC follows its own procedures for making grant awards.

Reference:

[2 C.F.R. § 200.317](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-317.pdf); [UGMS, Part III, §\_\_.36(a)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

#### C.1.1.2 Procurement Procedures: Grantees\*

This Section, C.1.1.2 Procurement Procedures: Grantees, provides additional compliance detail for [C.1.1 Basic Standard](#cC1_1_basic_standard_procedures).

The UG and UGMS require each [grantee](#definition_grantee) to use its own documented procurement procedures which reflect applicable state, local, and tribal laws and regulations, provided that the procurements conform to applicable federal law and the standards identified in UG and UGMS. TWC grant awards also require grantees to comply with the FMGC. This Publication—FMGC Supplement on Procurement—is incorporated into the FMGC by reference.

Consistent with the requirement for grantees to adhere to the UG and UGMS procurement standards for the selection of [subgrantees (subrecipients)](#definition_subgrantee) (see [A.6.3 Applicability to Selection of Subgrantees](#cA6_3_applicability_subgrantee_selection), in this Publication), the procedures need to address procurement of both [contractors (vendors)](#definition_contractor) and subgrantees (subrecipients).

Reference:

[2 C.F.R. § 200.318(a)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf); [UGMS, Part III, §\_\_.36(b)(1)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## C.2 Purchasing Manual – Sample Content Outline

This Section, C.2 Purchasing Manual – Sample Content Outline, provides supplemental technical information or guidance. It is included for informational purposes.

Each [grantee](#definition_grantee) will have its own policies and procedures for purchasing and procurement, which reflect the grantee’s own operations, and the procurement requirements governing its organization, including the UG and UGMS. The policies and procedures should be detailed enough to reasonably assure consistency and compliance in procurement and purchasing. Written policies and procedures lessen the risk for noncompliance and bid protests by supporting consistency and conformance with governing procurement standards and requirements. Written policies and procedures also promote efficient operations by taking the guesswork out of the procedures that employees should follow to complete specific tasks.

Policies and procedures comprise part of a grantee’s internal controls. As discussed in [B.3 Internal Controls](#cB3_internal_controls), in this Publication, the UG and UGMS require grantees to have internal controls that provide reasonable assurance that the grantee manages grant funds in compliance with applicable laws, regulations, and grant requirements. UG specifies that these internal controls should be in compliance with guidance in ‘‘Standards for Internal Control in the Federal Government’’ issued by the Comptroller General of the United States (also known as the Green Book) or the ‘‘Internal Control Integrated Framework,’’ issued by the Committee of Sponsoring Organizations (COSO) of the Treadway Commission.

The Green Book is available for free download on the U.S. Government Accountability Office (GAO) website ([www.gao.gov](http://www.gao.gov)). The COSO report can be purchased on the COSO website ([www.coso.org](http://www.coso.org)).

Like the COSO report, the Green Book treats internal control as an integrated framework consisting of the control environment, risk assessment, communication and information, control activities, and monitoring. These components are described briefly in [Chapter 2: Internal Controls](https://twc.texas.gov/financial-manual-grants-contracts-chapter-2-internal-controls), in the FMGC.

In the COSO framework, written policies and procedures constitute a control activity. Under the COSO framework, the process of developing policies and procedures would entail the following actions:

* Identify noncompliance and other risks
* Identify controls to mitigate or lessen the identified risks
* Develop written policies and procedures that reflect the identified controls
* Ensure that written policies and procedures conform to requirements imposed by UG, UGMS, the FMGC (including the FMGC Procurement Supplement), other governing sources, and the entity’s management directives
* Inform personnel where to find the entity’s policies and procedures
* Institute processes to monitor when policies and procedures require change
* Promptly update written policies and procedures when changes occur
* Inform personnel when changes occur to the entity’s policies and procedures
* Provide personnel with training, as necessary

In addition to written policies and procedures governing the actions of a grantee’s own organization, a grantee might have specific written policies and procedures with which the grantee requires its [contractors (vendors)](#definition_contractor) or [subgrantees (subrecipients)](#definition_subgrantee) to comply. In such instances, it is important that the grantee identify those requirements in the [contracts](#definition_contract) and [subgrants](#definition_subgrant) that it makes. In such cases, TWC generally does not prescribe how a grantee incorporates such requirements into contracts (for example, by attachment, reference, or other enforceable means).

No uniform model purchasing manual exists for all grantees. Some procurement and industry organizations offer models for use by their constituents. The following model content outline is adapted from the TEA FASRG for Texas school districts, charter schools, and education service centers. Refer to the TEA FASRG for the complete text.

* Purchasing organization
* Chief procurement officer roles and responsibilities
* Roles and responsibilities of other personnel
* Training and continuing education
* Purchasing ethics
* Competitive procurement options – describe relevant details for each option, for example:
* Identify procurement method
* Conditions for use
* Authorizations and other requirements
* Solicitation document
* Advertising/public notice (if applicable)
* Receiving submissions
* Correction/withdrawal of submissions
* Tabulation/evaluation of submissions
* Selection procedures
* Negotiation procedures (if applicable)
* Award procedures
* Supply management
* Legal considerations

The preceding list is provided for illustration purposes. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the TEA FASRG.)

# D. Standards of Conduct & Conflicts of Interest

## D.1 Ethics in Public Purchasing

This Section, D.1 Ethics in Public Purchasing, provides supplemental technical information or guidance. It is included for informational purposes. Refer to [D.2 Standards of Conduct](#cD2_standards_of_conduct), [D.3 Conflicts of Interest](#cD3_conflicts_of_interest), [D.4 Organizational Conflicts of Interest](#cD4_org_conflicts_of_interest), and [D.5 Acceptance of Gifts](#cD5_gifts), in this Publication, for related UG, UGMS, and TWC requirements.

[Grantees](#definition_grantee) should uphold the highest ethical standards when conducting procurements under [TWC grant awards](#definition_twc_grant_award).

TWC uses public funds from state and federal sources to finance the grant awards that it makes. In addition to requirements to comply with the procurement standards in UG and UGMS, the fact that TWC grant funds are public funds makes grantees subject to public scrutiny regarding fund use. The public nature of the funds makes high ethical standards imperative.

Additionally, as covered in [B.3 Internal Controls](#cB3_internal_controls), in this Publication, UG requires grantees to “establish and maintain effective internal control” which “should be in compliance with guidance in ‘Standards for Internal Control in the Federal Government’ issued by the Comptroller General of the United States or the ‘Internal Control Integrated Framework’ issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).”

Under both the “Standards for Internal Control in the Federal Government” (which is also known the Green Book), and COSO’s “Internal Control Integrated Framework,” part of a grantee’s internal control system is the environment established and maintained by the organization’s oversight body and management (control environment). The control environment provides structure and discipline. It also forms the foundation for all other components of internal control. In both the Green Book and COSO, one of the underlying principles for the control environment is that “the oversight body and management should demonstrate a commitment to integrity and ethical values.”

The Green Book specifically identifies the establishment of standards of conduct and adherence to standards of conduct as attributes of the principle for demonstrating an oversight body’s and management’s commitment to integrity and ethical values. Standards of conduct communicate expectations about integrity and ethical values. The standards, in turn, guide the directives, attitudes, and behaviors of an organization toward achieving its objectives. An organization’s management may use policies, operating principles, guidelines, or other means to communicate standards of conduct to its organization. Ethical guidelines assist personnel, [contractors (vendors)](#definition_contractor), and [subgrantees (subrecipients)](#definition_subgrantee) in understanding acceptable and unacceptable behaviors regarding procurement.

Expectations for high ethical standards are common among entities that conduct procurements with public funds. Following are examples from the FAR, which governs procurements conducted by federal agencies, and from the Texas Procurement and Contract Management Guide for Texas state agencies.

Provisions in [48 C.F.R. § 3.101-1](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-sec3-101-1.pdf) (2019) of the FAR read as follows:

Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the [appearance of a conflict of interest](#definition_apparentconflictofinterest) in Government-contractor relationships. While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.

The Texas Procurement and Contract Management Guide includes an overview of ethics laws and professional standards that governs employees of Texas state agencies. The introduction reads:

Public procurement professionals are the gatekeepers for the proper expenditure of the government’s limited financial resources. They are entrusted to uphold the highest ethical standards and be good stewards of public funds with every purchasing decision they make. Ethical behavior and integrity are fundamental tenets of the public procurement profession that derive from values like “fairness,” “honesty,” and “accountability.” When an individual’s official duties clash with the individual’s personal interests, a “conflict of interest” may occur; this conflict may impair one’s judgement when trying to determine the proper course of action. Any erosion of public trust or perception of impropriety is detrimental to the integrity of the procurement process; therefore, all state employees involved in procurement activities must act in an ethical, impartial, transparent, and professional manner.

The following also comes from the State of Texas Procurement and Contract Management Guide:

Appearance of Impropriety. The root of ethical behavior in public procurement is the commitment of public procurement professionals to ensure they neither gain personally from, nor unduly favor anyone, in the execution of their official duties. They are guided by a duty to serve the public for whom they are employed. Accordingly, public procurement professionals must not only comply with the minimum legal standards of ethical conduct established by statutes, agency rules and policies, and professional certifications, but they should also conduct themselves in a manner that avoids even the appearance of impropriety.

These excerpts from the FAR and State of Texas Procurement and Contract Management Guide are included for informational purposes to emphasize the importance of high ethical standards when using grant funds. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide and the FAR.)

## D.2 Standards of Conduct

### D.2.1 Overview

This Section, D.2.1 Overview, provides supplemental technical information or guidance. It is included for informational purposes.

As noted in [D.1 Ethics in Public Purchasing](#cD1_ethics_public_purchasing), in this Publication, the Green Book specifically identifies the establishment of standards of conduct and adherence to standards of conduct as attributes of the principle for demonstrating an oversight body’s and management’s commitment to integrity and ethical values. Refer to [D.2.2 Basic Standard](#cD2_2_basic_standards_of_conduct), in this Publication, for information about the UG and UGMS procurement standards for standards of conduct. Refer to [D.2.3 Special: Workforce Boards & Workforce Service Providers](#cD2_3_boards_standards_of_conduct), in this Publication, for information about additional standards of conduct requirements that TWC rule establishes for [local workforce development boards](#definition_board).

Standards of conduct are especially important when providing services with public funds. Standards of conduct contribute to the control environment described in [Chapter 2: Internal Controls](https://twc.texas.gov/financial-manual-grants-contracts-chapter-2-internal-controls) in the FMGC by communicating an oversight body’s and management’s expectations about integrity and ethical values to their organization, helping to set the tone for the organization’s internal control system, and assisting employees, [contractors (vendors)](#definition_contractor), and [subgrantees (subrecipients)](#definition_subgrantee) in understanding acceptable and unacceptable behaviors. Grantees’ standards of conduct may also address other topics such as handling of confidential information, misuse of official information, hiring decisions, nepotism, gambling, outside employment, involvement in outside activities, gifts between employees, misuse of position, misuse of property, bribery, and fraud, waste and abuse.

It is not enough to have standards of conduct if those standards are not available to and communicated to grantee personnel, and if applicable, other affected parties. Communication is another component of internal control described in Chapter 2: Internal Controls in the FMGC. It is important that the standards of conduct are communicated and accessible to grantee personnel.

The “Standards for Internal Control in the Federal Government,” issued by the Comptroller General of the United States, comments that an organization’s management may use policies, operating principles, or guidelines to communicate standards of conduct to its organization. The UG and UGMS do not prescribe where a grantee must document its standards of conduct. For example, a grantee might document its standards of conduct in its personnel manual, in a separate code of conduct, or within the respective documented procedures to which specific standards of conduct apply. What is important is that written standards of conduct exist and are communicated to grantee employees, and if applicable, to other individuals covered by those standards.

While grantees have a great deal of flexibility relating to standards of conducts, the UG, UGMS, and TWC do establish some specific minimum requirements as addressed in D.2.2 Basic Standard and D.2.3 Special Workforce Boards & Workforce Service Providers, in this Publication.

### D.2.2 Basic Standard\*

Policy:

Each [grantee](#definition_grantee) must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award, and administration of [contracts](#definition_contract) and [subgrants](#definition_subgrant). Such standards must also include disciplinary actions addressing violations. In addition to standards established by the UG and UGMS, [local workforce development boards](#definition_board) must comply with standards set forth in TWC rule.

The UG and UGMS require each grantee to maintain written standards of conduct governing the actions of its employees engaged in the selection, award and administration of contracts. For [federal awards](#definition_federal_award), the UG specifically requires grantees to cover conflicts of interest in their standards of conduct. TWC requires grantees that receive [state awards](#definition_stateaward) from TWC to do the same. The UG and UGMS also require that the standards of conduct provide for disciplinary actions for violations of such standards by the grantee’s officers, employees or agents, or by [contractors (vendors)](#definition_contractor) or their agents. TWC extends these requirements to require that these standards of conduct standards are also met for employees engaged in the selection, award and administration of subgrants.

Local workforce development boards and their [workforce service providers](#definition_workforceserviceprovider) are subject to standards of conduct TWC rule requirements that apply in addition to the UG and UGMS standards discussed in this Section. Refer to [D.2.3 Special: Workforce Boards & Workforce Service Providers](#cD2_3_boards_standards_of_conduct), in this Publication, for information about TWC rules that apply to those entities.

Refer to [D.3 Conflicts of Interest](#cD3_conflicts_of_interest) and [D.4 Organizational Conflicts of Interest](#cD4_org_conflicts_of_interest), in this Publication, for standards relating to conflicts of interest. Refer to [D.1 Ethics in Public Purchasing](#cD1_ethics_public_purchasing), in this Publication, for information on a related topic. Refer to [D.5 Acceptance of Gifts](#cD5_gifts), in this Publication, for a related topic.

Reference:

[2 C.F.R. § 200.318(c)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf); [UGMS, Part III, §\_\_.36(b)(3)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

### D.2.3 Special: Workforce Boards & Workforce Service Providers\*

This Section, D.2.3 Special: Workforce Boards & Workforce Service Providers, provides additional compliance detail for [D.2.2 Basic Standard](#cD2_2_basic_standards_of_conduct).

As stated in D.2.2 Basic Standard, [local workforce development boards](#definition_board) and their [workforce service providers](#definition_workforceserviceprovider) are subject to standards of conduct requirements that apply in addition to the UG and UGMS standards. TWC rules include the following standards of conduct requirements for members of local workforce development boards and for oversight of workforce service providers.

Note: The content in this Section reflects TWC Chapter 802 rules as last adopted November 26, 2019. In the event of conflict between the representation of these rules in this Publication or subsequent rule change, the TWC rule, as codified in Title 40 of the Texas Administrative Code (TAC) prevails.

#### D.2.3.1 Standards of Conduct for Board Members\*

This Section, D.2.3.1 Standards of Conduct for Board Members, provides additional compliance detail for [D.2.2 Basic Standard](#cD2_2_basic_standards_of_conduct).

Chapter 802 of TWC rules set forth TWC requirements for [conflicts of interests](#definition_conflict_of_interest) of board members of [local workforce development boards](#definition_board). The rules require each local workforce development board to include in its organizational plan or bylaws, or in a separate code of conduct, provisions for penalties, sanctions, or other disciplinary actions for any direct violations of the local workforce development board’s conflict of interest policy. The rules also require that such information include definitions of [immediate family](#definition_immediatefamily) and [substantial interest](#definition_substantialinterest), as those terms are defined by TWC rule.

Refer to [D.3.4 Special: Workforce Boards & Workforce Service Providers](#cD3_4_boards_conflicts_of_interest), in this Publication, for related conflicts of interest information.

Reference:

[40 TAC § 802.41](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf)

#### D.2.3.2 Workforce Service Providers’ Standards of Conduct\*

This Section, D.2.3.2 Workforce Service Providers’ Standards of Conduct, provides additional compliance detail for [D.2.2 Basic Standard](#cD2_2_basic_standards_of_conduct).

Chapter 802 of TWC rules requires [local workforce development boards](#definition_board) to ensure that [workforce service providers](#definition_workforceserviceprovider) comply with federal and state statutes and regulations regarding standards of conduct and conflicts of interest, including those in UG and UGMS, and professional licensing requirements. Refer to [D.3 Conflicts of Interest](#cD3_conflicts_of_interest), in this Publication, for more information about conflicts of interests.

Reference:

[40 TAC § 802.21](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf)

## D.3 Conflicts of Interest

### D.3.1 Overview

This Section, D.3.1 Overview, provides supplemental technical information or guidance. It is included for informational purposes.

TWC finances the grant awards that it makes with public funds from state and federal sources. The use of public funds makes it imperative that [grantees](#definition_grantee) have high ethical standards that include avoidance of conflicts of interest. (Refer to [D.1 Ethics in Public Purchasing](#cD1_ethics_public_purchasing), in this Publication, for more information about ethics.) Real conflicts of interest and [apparent conflicts of interest](#definition_apparentconflictofinterest) create a public trust issue by creating concern about the propriety of a decision. The avoidance of conflicts of interest helps preserve the integrity of the procurement process and promotes public trust that public funds are being used in the public’s best interest, rather than for personal benefit.

The Merriam-Webster dictionary generally describes a conflict of interest as a conflict between the private interests and official responsibilities of a person in a position of trust. The UG and UGMS procurement standards further define conflicts of interest, as described in this Section, D.3 Conflicts of Interest. This Section also includes certain TWC rules that establish additional requirements for [local workforce development boards](#definition_board) and their [workforce service providers](#definition_workforceserviceprovider).

### D.3.2 Basic Standard\*

Policy:

No employee, officer, or agent of a [grantee](#definition_grantee) may participate in the selection, award, or administration of a [contract](#definition_contract) or [subgrant](#definition_subgrant) if such person has a real conflict of interest or [apparent conflict of interest](#definition_apparentconflictofinterest). In addition to standards established by the UG and UGMS, [local workforce development boards](#definition_board) must comply with standards set forth in TWC rule.

Pursuant to UG and UGMS, no employee, officer or agent may participate in the selection, award or administration of a contract supported by a [federal award](#definition_federal_award) or [state award](#definition_stateaward) if he or she has a real conflict of interest or apparent conflict of interest. TWC extends these requirements to such individuals’ participation in the selection, award, or administration of a subgrant.

Reference:

[2 C.F.R. § 200.318(c)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf); [UGMS, Part III, §\_\_.36(b)(3)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

Pursuant to UGMS, a conflict of interest would arise under a state award when any of the following has a financial or other interest in a firm that is selected to receive an award:

* An employee, officer or agent
* Any member of the [immediate family](#definition_immediatefamily) of the employee, officer or agent
* A partner of the employee, officer or agent
* Any organization that employs or is about to employ any of these parties

For [federal awards](#definition_federal_award), the UG more broadly considers a conflict of interest to have occurred when any of the entities listed above has a “financial or other interest in or a tangible personal benefit from a firm considered for a contract.” As noted above, TWC extends the same definition with respect to an entity that is selected to receive a subgrant under a federal award.

Reference:

[2 C.F.R. § 200.318(c)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf); [UGMS, Part III, §\_\_.36(b)(3)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

Local workforce development boards and [workforce service providers](#definition_workforceserviceprovider) are subject to conflict of interest TWC rule requirements that apply in addition to the UG and UGMS standards discussed in this Section. Refer to [D.3.4 Special: Workforce Boards & Workforce Service Providers](#cD3_4_boards_conflicts_of_interest), in this Publication, for information about TWC rules that apply to those entities.

Refer to [D.2 Standards of Conduct](#cD2_standards_of_conduct) and [D.4 Organizational Conflicts of Interest](#cD4_org_conflicts_of_interest), in this Publication, for related information.

### D.3.3 Conflict of Interest Disclosure Form

This Section, D.3.3 Conflict of Interest Disclosure Form, provides supplemental technical information or guidance. It is included for informational purposes.

In implementing the conflict of interest standards in UG, UGMS, TWC rule, and this Publication, a [grantee](#definition_grantee) will likely use a conflict of interest disclosure form. An example of a conflict of interest disclosure form can be found in Appendix 4 of the Texas Procurement and Contract Management Guide for Texas state agencies, published by the Texas Comptroller of Public Accounts. It is referenced here for illustration purposes.

### D.3.4 Special: Workforce Boards & Workforce Service Providers\*

This Section, D.3.4 Special: Workforce Boards & Workforce Service Providers, provides additional compliance detail for [D.3.2 Basic Standard](#cD3_2_basic_conflicts_of_interest).

As stated in D.3.2 Basic Standard, [local workforce development boards](#definition_board) and their [workforce service providers](#definition_workforceserviceprovider) are subject to standards of conduct requirements that apply in addition to the UG and UGMS standards. TWC rules include the following special conflict of interest requirements for local workforce development boards.

Note: The content in this Section reflects the Chapter 802 rules as re-adopted November 26, 2019. In the event of conflict between the representation of these rules in this Publication or subsequent rule change, the TWC rule, as codified in Title 40 of the Texas Administrative Code (TAC) prevails.

#### D.3.4.1 Oversight of Workforce Service Providers\*

This Section, D.3.4.1 Oversight of Workforce Service Providers, provides additional compliance detail for [D.3.2 Basic Standard](#cD3_2_basic_conflicts_of_interest).

The Board Contracting Guidelines in Chapter 802 of TWC rules require [local workforce development boards](#definition_board) to ensure that their [workforce service providers](#definition_workforceserviceprovider) avoid any real [conflict of interest](#definition_conflict_of_interest) or [apparent conflict of interest](#definition_apparentconflictofinterest). Additionally, the rules require local workforce development boards to ensure that workforce service providers refrain from using nonpublic information gained through a relationship with TWC, a TWC employee, a local workforce development board, or local workforce development board employee to seek or obtain financial gains that would be a real or apparent conflict of interest.

Reference:

[40 TAC § 802.21(c)](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf)

Additionally, Chapter 802 of TWC rules specify certain matters that local workforce development boards must require their workforce service providers to disclose, the contents of the disclosure, and the frequency of disclosure. Refer to TWC rules at [40 TAC § 802.21(d)](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf) for those requirements.

Reference:

[40 TAC § 802.21(d)](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf)

#### D.3.4.2 Board Member Conflicts of Interest\*

This Section, D.3.4.2 Board Member Conflicts of Interest, provides additional compliance detail for [D.3.2 Basic Standard](#cD3_2_basic_conflicts_of_interest).

TWC rules set forth TWC requirements for [conflicts of interest](#definition_conflict_of_interest) of board members of [local workforce development boards](#definition_board). The rules identify matters on which board members must not vote and decisions in which board members must not participate, requires board members to declare certain relationships before taking office, and disclose conflicts of interest that arise. Refer to TWC rules at [40 TAC Chapter 802](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf) for the complete requirements.

Reference:

[40 TAC § 802.41](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf)

#### D.3.4.3 Employment of Former Board Employees by Workforce Service Providers\*

This Section, D.3.4.3 Employment of Former Board Employees by Workforce Service Providers, provides additional compliance detail for [D.3.2 Basic Standard](#cD3_2_basic_conflicts_of_interest).

[Local workforce development boards](#definition_board) must comply with the restrictions in [40 TAC § 802.42](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf) of TWC rules.

The TWC rules at 40 TAC § 802.42 provide that, in order to avoid a conflict of interest, a local workforce development board shall ensure that the local workforce development board's [workforce service providers](#definition_workforceserviceprovider) shall not employ or otherwise compensate a former local workforce development board employee who:

* was in a [Board decision-making position](#definition_boarddecisionmakingposition); and
* was employed or compensated by the local workforce development board anytime during the previous twelve (12) months.

The rule applies the following exceptions. Where there is no actual conflict of interest, but there is an [appearance of such a conflict](#definition_apparentconflictofinterest), a local workforce development board in an open meeting may provide for an exception to the period described in the preceding paragraph by a vote of two-thirds of the membership present. In making such a determination, the local workforce development board shall assess all relevant factors, including, but not limited to, whether there is a critical need for the skills involved, the relative cost and availability of alternatives, and the need to protect the integrity and stability of the Texas workforce system. In such an instance, the local workforce development board shall impose whatever terms and conditions it deems necessary to mitigate the appearance of a conflict of interest.

In terms of corrective actions, the rule provides that a local workforce development board shall ensure that its contracts (see Note) with workforce service providers require compliance with 40 TAC § 802.42 and provide effective enforcement mechanisms allowing it to impose corrective actions, up to and including contract termination, for violation of 40 TAC § 802.42.

Lastly, concerning work on a “particular matter,” the TWC rule at 40 TAC § 802.42 requires that a local workforce development board shall ensure that its workforce service providers shall not employ or otherwise compensate a former local workforce development board employee to work on a particular matter that the employee worked on for the local workforce development board. “Particular matter” has the meaning defined in 40 TAC § 802.2. Nothing in 40 TAC § 802.42 shall prohibit a local workforce development board's workforce service provider from employing or otherwise compensating a former employee of the local workforce development board who worked on a particular matter for the local workforce development board as long as the former local workforce development board employee never works on that same particular matter once employed or otherwise compensated by the local workforce development board's workforce service provider.

Note: As used within the context of the preceding text from the TWC rule at 40 TAC § 802.42, the term “contract” is inclusive of both a vendor [contract](#definition_contract) and a [subgrant (subaward)](#definition_subgrant).

Reference:

[40 TAC § 802.42](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf)

## D.4 Organizational Conflicts of Interest\*

Policy:

[Grantees](#definition_grantee) must conform to the UG standards regarding [organizational conflicts of interest](#definition_org_conflict_of_interest).

For grantees that receive [federal awards](#definition_federal_award), the UG requires that if the grantee has a parent, affiliate, or subsidiary organization that is not a [state](#definition_state), [local government](#definition_localgovernment) or [Indian tribe](#definition_indiantribe), the grantee must also maintain written standards of conduct covering organizational conflicts of interest. TWC extends this requirement to [state awards](#definition_stateaward) that TWC makes.

Refer to [D.2 Standards of Conduct](#cD2_standards_of_conduct), in this Publication, for more information about standards of conduct. Refer to [D.1 Ethics in Public Purchasing](#cD1_ethics_public_purchasing) and [D.3 Conflicts of Interest](#cD3_conflicts_of_interest), in this Publication, for related topics.

Reference:

[2 C.F.R. § 200.318(c)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf)

## D.5 Acceptance of Gifts

### D.5.1 Basic Standard\*

Policy:

Employees, officers and agents of the [grantee](#definition_grantee) must neither solicit nor accept gratuities, favors or anything of monetary value from [contractors (vendors)](#definition_contractor) or [subgrantees (subrecipients)](#definition_subgrantee), potential contractors or subgrantees (subrecipients), or parties to [subcontracts](#definition_subcontract) or [subgrants](#definition_subgrant). Grantees may set standards for situations in which the financial interest is not substantial, or the gift is an unsolicited item of nominal intrinsic value. [Local workforce development boards](#definition_board) and their [workforce service providers](#definition_workforceserviceprovider) must also comply with additional requirements in TWC rules.

Pursuant to UG and UGMS, the officers, employees, and agents of a grantee may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. TWC’s policy reflects that UGMS also prohibits solicitation and acceptance of such items from potential contractors. TWC extends the requirement to the acceptance of such items from subgrantees (subrecipients) and potential subgrantees. Both UG and UGMS permit grantees to set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value (“nominal intrinsic value” in UGMS).

Local workforce development boards and their workforce service providers must also comply with related provisions of TWC rules. Refer to [D.5.2 Special: Workforce Boards & Workforce Service Providers](#cD5_2_gifts_boards), in this Publication, for information about the additional TWC rules that apply to those entities.

Refer to [D.1 Ethics in Public Purchasing](#cD1_ethics_public_purchasing), [D.2 Standards of Conduct](#cD2_standards_of_conduct), and [D.3 Conflicts of Interest](#cD3_conflicts_of_interest), in this Publication, for related topics.

Reference:

[2 C.F.R. § 200.318(c)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf); [UGMS, Part III, §\_\_.36(b)(3)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

### D.5.2 Special: Workforce Boards & Workforce Service Providers\*

This Section, D.5.2 Special: Workforce Boards & Workforce Service Providers, provides additional compliance detail for [D.5.1 Basic Standard](#cD5_1_gifts_basic_standard).

[Local workforce development boards](#definition_board) must comply with requirements for acceptance of gifts that are established by Chapter 802 of TWC rules. The requirements established by TWC rules apply in addition to those that apply under UG and UGMS.

TWC rules at 40 TAC Chapter 802 require local workforce development boards to ensure that their [workforce service providers](#definition_workforceserviceprovider) promptly disclose in writing a gift greater than $50 in value given to a board member or employee of a local workforce development board by a workforce service provider or its employees. The workforce service provider’s disclosure must occur within 10 days of giving such gift.

Note: The content in this Section reflects the Chapter 802 rules as re-adopted November 26, 2019. In the event of conflict between the representation of these rules in this Publication or subsequent rule change, the TWC rule, as codified in Title 40 of the Texas Administrative Code (TAC) prevails.

Reference:

[40 TAC § 802.21](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf)

# E. Competition & Preferences

This Section, E. Competition & Preferences, covers the topics of full and open competition (including use of prequalified lists), geographic preferences, Buy American Act applicability, certain entities’ responsibilities relating to the procurement of recovered materials, and responsibilities relating to the use of historically underutilized businesses, in general, and to the specific use of small and minority businesses, women’s business enterprises, and labor surplus area firms.

## E.1 Full & Open Competition

### E.1.1 Overview

This Section, E.1.1 Overview, provides supplemental technical information or guidance. It is included for informational purposes.

Full and open competition is a basic tenet of public purchasing. It promotes public opportunity to compete for publicly funded awards without concern for partiality and preferential treatment. It also promotes the accomplishment of fair and reasonable prices through market competition. Actions that restrict or limit competition can erode public trust, result in award protests, reduce suppliers’ willingness to respond to solicitations, and lessen or eliminate achievement of cost-effective pricing through market influence.

Full and open competition affects many areas of procurement, including, but not limited to:

* Taking care not to define the business need in a manner that restricts competition
* Impartiality of persons involved in the procurement
* Scrutinizing requests to conduct [noncompetitive procurements](#definition_noncompetitiveproc)
* Development and use of a [bidders list](#definition_bidderslist) to notify interested entities about opportunities
* Development of solicitation specifications and technical requirements
* Clarity of the purpose and statement of work
* Time permitted for suppliers and potential offerors to respond
* Advertising and other solicitation procedures
* Identification and weighting of evaluation criteria
* Secure handling of quotations and offers
* Evaluation of quotations and offers using the established evaluation criteria
* Selection decisions using established selection criteria
* Negotiation

Refer to [E.1.2 Basic Standard](#cE1_2_competition_basic_standard), in this Publication, for the UG and UGMS standard for full and open competition. The UG and UGMS standard for full and open competition exists because of the important role that competition has in public purchasing.

### E.1.2 Basic Standard\*

Policy:

All [procurement transactions](#definition_procurement_transaction) must be conducted in a manner providing full and open competition consistent with the standards in UG, UGMS and this Publication. Except where specified otherwise, selection of [subgrantees (subrecipients)](#definition_subgrantee) must also be conducted in a manner providing full and open competition.

The UG and UGMS require that all procurement transactions be conducted in a manner providing full and open competition consistent with standards in UG and UGMS. Additionally, TWC requires that procurement transactions be conducted in accordance with the FMGC. This Publication is incorporated into the FMGC by reference.

Except where specified otherwise, TWC also applies this standard to the selection of subgrantees. For an example of an exception, refer to [A.6.4 Exception: Selection of Adult Education & Literacy Consortium Members](#cA6_4_applicability_ael_consortium), in this Publication, in which the [grantee](#definition_grantee) for an AEL local provider award is not required to select subgrantee consortium members on a competitive basis in situations when the grantee represents a consortium of providers.

Refer to [E.1.3 Participation by Entities Involved in Solicitation](#cE1_3_competition_solicitationinvolvemet), [E.1.4 Situations that Restrict Competition](#cE1_4_competition_restrictive_actions), and [E.1.5 Prequalified Lists](#cE1_5_prequalified_lists), in this Publication, for additional compliance detail for this standard.

Reference:

[2 C.F.R. § 200.319(a)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-319.pdf); [UGMS, Part III, §\_\_.36(c)(1)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

### E.1.3 Participation by Entities Involved in Solicitation\*

This Section, E.1.3 Participation by Entities Involved in Solicitation, provides additional compliance detail for [E.1.2 Basic Standard](#cE1_2_competition_basic_standard).

As covered in E.1.2 Basic Standard, in this Publication, all [procurement transactions](#definition_procurement_transaction) must be conducted in a manner providing full and open competition consistent with the standards in the UG, UGMS, and FMGC, and, except where specified otherwise, the same standard applies to the selection of [subgrantees (subrecipients)](#definition_subgrantee).

Relating to that standard, UG and UGMS require that to ensure objective [contractor (vendor)](#definition_contractor) performance and eliminate unfair competitive advantage, contractors (vendors) that develop or draft specifications, requirements, statements of work, Invitations for Bids (IFBs), or Requests for Proposals (RFPs) must be excluded from competing for such procurements. TWC applies the same requirement with respect to any subgrantee (subrecipient) that might develop or draft such materials, or contribute to the development or drafting of such materials, for a [subgrant](#definition_subgrant) opportunity issued by a [pass-through entity](#definition_passthruentity).

Reference:

[2 C.F.R. § 200.319(a)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-319.pdf); [UGMS, Part III, §\_\_.36(c)(1)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

### E.1.4 Situations that Restrict Competition\*

This Section, E.1.4 Situations that Restrict Competition, provides additional compliance detail for [E.1.2 Basic Standard](#cE1_2_competition_basic_standard).

In keeping with the procurement standard for full and open competition, [grantees](#definition_grantee) must avoid situations that limit or restrict competition.

As covered in E.1.2 Basic Standard, in this Publication, all [procurement transactions](#definition_procurement_transaction) must be conducted in a manner providing full and open competition consistent with the standards in the UG, UGMS, and FMGC, and, except where specified otherwise, the same standard applies to the selection of [subgrantees (subrecipients)](#definition_subgrantee).

As identified in UG and UGMS, some situations considered to be restrictive of competition include, but are not limited, to the following:

* Placing unreasonable requirements on firms in order for them to qualify to do business
* Requiring unnecessary experience and excessive bonding
* Noncompetitive pricing practices between firms or between affiliated companies
* Noncompetitive [contracts](#definition_contract) to consultants that are on retainer contracts
* [Organizational conflicts of interest](#definition_org_conflict_of_interest)
* Specifying a ‘‘brand name’’ product instead of allowing an equal product to be offered and describing the performance or other relevant requirements of the procurement
* Any arbitrary action in the procurement process

In the rare situation that a grantee determines that a business need makes it necessary to restrict competition, TWC advises that a written explanation describing the rationale for the decision should be retained in the grantee’s procurement records, consistent with the UG and UGMS standard in [Q.3 Procurement Records](#cQ3_procurement_records), in this Publication, which requires that the procurement records detail the history of the procurement. TWC observes, consistent with the standard for full and open competition, that it is important that grantees scrutinize any such decision. TWC cautions that written explanation only documents the grantee’s rationale; it provides no relief from enforcement actions if an audit or compliance review determines that the decision unnecessarily limited or restricted competition.

Refer to the following, in this Publication, for more information about the topics in some of the above-listed restrictions. Refer to [K.1 Bonding Requirements](#cK1_bonding_requirements) for more information about bonding. Refer to [J.1 Special: Consulting, Professional & Legal Services](#cJ1_consulting_professional_legal_svcs) and [J.2 DOL Consultant Fee Limit](#cJ2_DOL_consultant_fee_limit) for a definition of consultant and more information relating to consultants and [consulting services](#definition_consulting_services). Refer to [D.4 Organizational Conflicts of Interest](#cD4_org_conflicts_of_interest) for information about organizational conflicts of interest. Refer to [L.4 Statement of Work & Specifications](#cL4_SOW_and_specifications) for additional information about the use of “brand name” specifications and placing unreasonable requirements on firms in order for them to qualify to do business.

Reference:

[2 C.F.R. § 200.319(a)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-319.pdf); [UGMS, Part III, §\_\_.36(c)(1)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

### E.1.5 Prequalified Lists

#### E.1.5.1 Basic Standard\*

This Section, E.1.5.1 Basic Standard, provides additional compliance detail for [E.1.2 Basic Standard](#cE1_2_competition_basic_standard), concerning full and open competition.

The UG and UGMS require that [grantees](#definition_grantee) must ensure that all prequalified lists of persons, firms or products used in acquiring goods and services are current and include enough [qualified sources](#definition_qualified_sources) to ensure maximum open and free competition. Additionally, the UG and UGMS require that grantees must not preclude potential bidders from qualifying during the solicitation period.

Reference:

[2 C.F.R. § 200.319(d)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-319.pdf); [UGMS, Part III, §\_\_.36(c)(4)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

Note: A prequalified list is not the same as a [bidders list](#definition_bidderslist). The following paragraphs provide additional information about prequalified lists. Refer to [M.2 Bidders List](#cM2_bidders_list), in this Publication, for information about bidders lists.

#### E.1.5.2 Explanation

This Section, E.1.5.2 Explanation, provides supplemental technical information or guidance. It is included for informational purposes.

The UG and UGMS do not elaborate on what constitutes a prequalified list or how to develop or use one.

Establishment and use of prequalified lists is not required, but where used must satisfy the UG and UGMS requirements described in [E.1.5.1 Basic Standard](#cE1_5_1_prequalified_lists_basicstandard), in this Publication.

In general, a prequalified list is a list of entities that a [grantee](#definition_grantee) has assessed ahead of time as being reputable and trustworthy and suitable to work with, so that whenever quotations are needed, the listed companies can be contacted to provide the needed quotations without further review of those particular entities’ qualifications.

The existence of a prequalified list does not substitute for competition. A prequalified list merely aids in expediting procurement and lessening burden on the listed suppliers by removing the need to review the listed suppliers’ qualifications each time the grantee conducts a procurement for which those entities are potential sources.

The number of quotations to obtain from the list will vary according to the purchase and the grantee’s procurement procedures. Hence, the UG and UGMS standard that the list must be current and include enough [qualified sources](#definition_qualified_sources) to ensure maximum open and free competition.

Note: Neither UG or UGMS, or TWC prescribe the frequency of updates needed for a list to be considered “current.” If an entity uses prequalified lists, its procurement procedures should include steps that address the maintenance of the lists. The sample steps in the subsection that follows suggest that updates generally occur annually, for example; however, an entity’s procedures may call for a different frequency.

#### E.1.5.3 Sample Steps

This Section, E.1.5.3 Sample Steps, provides supplemental technical information or guidance. It is included for informational purposes.

Sample steps for creating prequalified lists follow:

1. Categorize regularly purchased materials for which a prequalification list will be created into like groups.
2. Identify suppliers for each category.
3. Advertise in newspapers and/or elsewhere as appropriate to maximize exposure. Interested parties are asked to provide details of their relevant experience, and may also provide documentation such as certificates of incorporation, licenses, etc. This step generally does not include the provision of price lists.
4. Invite each of the suppliers identified in Step 2 to formally apply for the prequalification.
5. Establish one or more committees to assess each applicant according to pre-established criteria. The assessment may include physically visiting the applicant’s facilities, if appropriate.
6. Entities deemed suitable to supply needed goods and services are listed under the respective category.
7. All entities are contacted to inform them whether they will be included on the list. Unsuccessful entities are thanked for their participation by written letter or e-mail.
8. The process is performed frequently enough to ensure that the list is current and reflective of the marketplace (generally, annually).
9. When requiring quotations, the [grantee](#definition_grantee) contacts the entities on the list (for the respective category). As reflected in [E.1.5.1 Basic Standard](#cE1_5_1_prequalified_lists_basicstandard), in this Publication, UG and UGMS require that the number on the list comprises an adequate number of suppliers to ensure maximum open and free competition, and that additional entities be permitted to qualify during the solicitation period.
10. Provided that the prequalified list meets the requirements in UG and UGMS—i.e., the list includes enough [qualified sources](#definition_qualified_sources) to ensure maximum open and free competition, and the grantee does not preclude potential bidders from qualifying during the solicitation period—the grantee procedures may include a step that promotes use of the listed suppliers over others in the marketplace. For example, the list is provided to the Finance department who check it before processing a payment request. If a payment request is submitted for an entity not on the list, the Finance department inquires why prequalified suppliers were not used. The underlying rationale is that while other companies might offer a more competitive rate than those on the prequalified list, they also might represent an elevated level of risk to the grantee, because they were not subjected to the same detailed prequalification evaluation as those on the list.

## E.2 Geographic Preference

### E.2.1 Basic Standard\*

Policy:

[Grantees](#definition_grantee) must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in cases where applicable federal statutes mandate or encourage geographic preference.

As covered under E.1.2 Basic Standard, in this Publication, all [procurement transactions](#definition_procurement_transaction) must be conducted in a manner providing full and open competition consistent with the standards in the UG, UGMS, and FMGC, and, except where specified otherwise, the same standard applies to the selection of [subgrantees (subrecipients)](#definition_subgrantee).

Relating to that standard, the UG and UGMS require that grantees must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except in cases where applicable federal statutes mandate or encourage geographic preference. For [federal awards](#definition_federal_award), UG also explicitly prohibits use of statutorily or administratively imposed tribal preferences in the evaluation of bids or proposals. TWC applies the same requirement with respect to the selection of subgrantees (subrecipients).

Refer to [E.2.1.1 Preference Versus Specification](#cE2_1_1_geopref_vs_specification), in this Publication, for supplemental technical information. Refer to [E.2.2 Geographic Preference & State Licensing Laws](#cE2_2_geopref_state_licensing_laws) and [E.2.3 Geographic Location for Architectural & Engineering Services](#cE2_3_geopref_architectural_engineering), in this Publication, for additional compliance detail for this standard.

Reference:

[2 C.F.R. § 200.319(b)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-319.pdf); [UGMS, Part III, §\_\_.36(c)(2)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

#### E.2.1.1 Preference Versus Specification

This Section, E.2.1.1 Preference Versus Specification, provides supplemental technical information or guidance. It is included for informational purposes.

As covered in [E.2.1 Basic Standard](#cE2_1_geopref_basic_standard), in this Publication, [grantees](#definition_grantee) must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except in cases where applicable federal statutes mandate or encourage geographic preference.

To be clear, a preference differs from a specification. A preference reflects partiality. A specification reflects a business need. A solicitation requirement that requires offerors to have an office in Texas or in the local area because the grantee issuing the solicitation desires to promote or only work with entities within the specified area is a geographical preference, and is prohibited under the above standard, unless the preference is mandated or encouraged by applicable federal statute. A solicitation requirement based on a business need that offers be located within a specific geographic area—such as a need to procure a [real property](#definition_realproperty) lease in a specified area to serve participant needs in that area—is a specification. The prohibition described above prohibits geographical preference. It does not prohibit use of geographical location as a specification when a business need exists to do so.

Note: Some programs require compliance with certain provisions of the federal Buy American Act. The federal Buy American Act is an example of a federal statute that mandates geographic preference, although at the national, rather than state or local, level. Refer to [E.3 Buy American Act](#cE3_buy_american_act), in this Publication, for related information.

### E.2.2 Geographic Preference & State Licensing Laws\*

This Section, E.2.2 Geographic Preference & State Licensing Laws, provides additional compliance detail for [E.2.1 Basic Standard](#cE2_1_geopref_basic_standard).

As covered in E.2.1 Basic Standard, in this Publication, the UG and UGMS prohibit the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except where mandated or encouraged by applicable federal statute.

Related to that, the UG and UGMS are explicit that the prohibition on state, local, or tribal geographical preference does not preempt state licensing laws. Refer to [E.2.2.1 State Licensing Laws Example](#cE2_2_1_geopref_state_license_law_eg), in this Publication, for an example.

Reference:

[2 C.F.R. § 200.319(b)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-319.pdf); [UGMS, Part III, §\_\_.36(c)(2)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

#### E.2.2.1 State Licensing Laws Example

This Section, E.2.2.1 State Licensing Laws Example, provides supplemental technical information or guidance. It is included for informational purposes.

As covered in [E.2.2 Geographic Preference & State Licensing Laws](#cE2_2_geopref_state_licensing_laws), the UG and UGMS prohibition on the use of geographical preference does not preempt state licensing laws. For example, state law requires individuals or firms that provide certain services to be licensed by the state before the individual or firm can legally perform certain work within the state. If procuring an individual or firm to provide a service for which a state licensing requirement exists, the geographical preference prohibition does not prohibit a grantee from considering an entity’s license status when procuring for that service.

### E.2.3 Geographic Location for Architectural & Engineering Services\*

This Section, E.2.3 Geographic Location for Architectural & Engineering Services, provides additional compliance detail for [E.2.1 Basic Standard](#cE2_1_geopref_basic_standard).

As covered in E.2.1 Basic Standard, in this Publication, the UG and UGMS prohibit the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except where mandated or encouraged by applicable federal statute.

Related to that, the UG and UGMS establish that the prohibition on geographical preference does not prevent a [grantee](#definition_grantee) from using geographic location as a selection criterion when procuring Architectural and Engineering (A/E) services. The UG and UGMS specifically provide that when contracting for A/E services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms to compete for the [contract](#definition_contract), given the nature and size of the project.

Refer to [J.3 Architectural, Engineering & Land Surveying Services](#cJ3_architectural_engineering_surveying), in this Publication, for more information about the procurement of A/E services.

Reference:

[2 C.F.R. § 200.319(b)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-319.pdf); [UGMS, Part III, §\_\_.36(c)(2)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## E.3 Buy American Act & Similar Laws

### E.3.1 Basic Standard\*

Policy:

When required by program statute or regulation, or the grant award, a [grantee](#definition_grantee) must comply with applicable provisions of the federal Buy American Act or similar laws, and ensure that the requirement is included in [contracts](#definition_contract) and [subgrants](#definition_subgrant), as appropriate.

Many [federal awards](#definition_federal_award) that TWC receives require a degree of compliance with the Buy American Act or similar laws. Such requirements might be imposed by a program statute or regulation, federal appropriations act, Executive Order, or the terms and conditions of the federal award itself. It is also possible that state law could require a degree of compliance with the law.

Where applicable to a [TWC grant award](#definition_twc_grant_award), TWC includes the requirement in the grant award consistent with the UG and UGMS standards that require inclusion of all requirements imposed so that the award is used in accordance with applicable statutes, regulations and the terms and conditions of the federal award or [state award](#definition_stateaward). Depending on the source of the requirement, the provision might appear as a specific reference to the Buy American Act or similar laws, or it might be incorporated by reference to the requirement that mandates the grantee’s compliance with that law. Grantees must refer to their TWC grant award and program requirements to determine whether the award requires funds to be expended in accordance with the Buy American Act or similar laws. Additionally, grantees must ensure that the requirement is included in contracts and subgrants according to the applicability of the particular provision.

Examples of federal programs that require some degree of compliance with the Buy American Act include, but are not limited to the following:

* Adult, dislocated worker, and youth activities (including statewide activities) under Title I, Subtitle B of the Workforce Innovation and Opportunity Act (WIOA)
* National Dislocated Worker (NDW) grants funded under WIOA § 170
* Wagner-Peyser Act
* Trade Adjustment Act (TAA)
* Senior Community Service Employment Program (SCSEP)
* Child Care and Development Fund (CCDF)
* Temporary Assistance for Needy Families (TANF) (including the Texas Choices program)
* Unemployment Insurance Reemployment Services and Eligibility Assessment (RESEA)
* Adult Education and Family Literacy Act (Title II of WIOA)

The following paragraphs identify some of the provisions of the Buy American Act. Again, grantees must refer to the terms of their grant awards for the specific requirements that apply.

Reference:

[2 C.F.R. § 200.331(a)(2)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-331.pdf); [UGMS, Part IV, §\_\_.400(c)(2)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

### E.3.2 Buy American Act Provisions at 41 U.S.C. §§ 8301 – 8303\*

This Section, E.3.2 Buy American Act Provisions at 41 U.S.C. §§ 8301 - 8303, provides additional compliance detail for [E.3.1 Basic Standard](#cE3_1_buy_american_basic_standard), in this Publication.

The WIOA program statute ([WIOA § 502(a)](https://www.congress.gov/113/plaws/publ128/PLAW-113publ128.pdf)) requires [grantees](#definition_grantee) to expend funds made available under Title I or II of WIOA or under the Wagner-Peyser Act (29 U.S.C. §§ 49 et seq.) in compliance with 41 U.S.C. §§ 8301-8303 (commonly known as the “Buy American Act”).

The provisions of 41 U.S.C. §§ 8301-8303 read as follows (see Note):

§ 8301. Definitions. In this chapter:

1. Public building, public use, and public work.—The terms “public building”, “public use”, and “public work” mean a public building of, use by, and a public work of, the Federal Government, the District of Columbia, Puerto Rico, American Samoa, and the Virgin Islands.
2. United States.—The term “United States” includes any place subject to the jurisdiction of the United States.

§ 8302. American Materials Required for Public Use

(a) In General.—

(1) Allowable materials.—Only unmanufactured articles, materials, and supplies that have been mined or produced in the United States, and only manufactured articles, materials, and supplies that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States, shall be acquired for public use unless the head of the department or independent establishment concerned determines their acquisition to be inconsistent with the public interest or their cost to be unreasonable.

(2) Exceptions.—This section does not apply—

(A) to articles, materials, or supplies for use outside the United States;

(B) if articles, materials, or supplies of the class or kind to be used, or the articles, materials, or supplies from which they are manufactured, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and are not of a satisfactory quality; and

(C) to manufactured articles, materials, or supplies procured under any contract with an award value that is not more than the micro-purchase threshold under section 1902 of this title.

(b) Reports.—

(1) In general.—Not later than 180 days after the end of each of fiscal years 2009 through 2011, the head of each Federal agency shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives a report on the amount of the acquisitions made by the agency in that fiscal year of articles, materials, or supplies purchased from entities that manufacture the articles, materials, or supplies outside of the United States.

(2) Contents of report.—The report required by paragraph (1) shall separately include, for the fiscal year covered by the report—

(A) the dollar value of any articles, materials, or supplies that were manufactured outside the United States;

(B) an itemized list of all waivers granted with respect to the articles, materials, or supplies under this chapter, and a citation to the treaty, international agreement, or other law under which each waiver was granted;

(C) if any articles, materials, or supplies were acquired from entities that manufacture articles, materials, or supplies outside the United States, the specific exception under this section that was used to purchase the articles, materials, or supplies; and

(D) a summary of—

(i) the total procurement funds expended on articles, materials, and supplies manufactured inside the United States; and

(ii) the total procurement funds expended on articles, materials, and supplies manufactured outside the United States.

(3) Public availability.—The head of each Federal agency submitting a report under paragraph (1) shall make the report publicly available to the maximum extent practicable.

(4) Exception for intelligence community.—This subsection shall not apply to acquisitions made by an agency, or component of an agency, that is an element of the intelligence community as specified in, or designated under, section 3 of the National Security Act of 1947 (50 U.S.C. 401a).

§ 8303. Contracts for Public Works

(a) In General.—Every contract for the construction, alteration, or repair of any public building or public work in the United States shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers shall use only—

(1) unmanufactured articles, materials, and supplies that have been mined or produced in the United States; and

(2) manufactured articles, materials, and supplies that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States.

(b) Exceptions.—

(1) In general.—This section does not apply—

(A) to articles, materials, or supplies for use outside the United States;

(B) if articles, materials, or supplies of the class or kind to be used, or the articles, materials, or supplies from which they are manufactured, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and are not of a satisfactory quality; and

(C) to manufactured articles, materials, or supplies procured under any contract with an award value that is not more than the micro-purchase threshold under section 1902 of this title.

(2) Particular article, material, or supply.—If the head of the department or independent establishment making the contract finds that it is impracticable to comply with subsection (a) for a particular article, material, or supply or that it would unreasonably increase the cost, an exception shall be noted in the specifications for that article, material, or supply and a public record of the findings that justified the exception shall be made.

(3) Inconsistent with public interest.—Subsection (a) shall be regarded as requiring the purchase, for public use within the United States, of articles, materials, or supplies manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, unless the head of the department or independent establishment concerned determines their purchase to be inconsistent with the public interest or their cost to be unreasonable.

(c) Results of Failure To Comply.—If the head of a department, bureau, agency, or independent establishment that has made a contract containing the provision required by subsection (a) finds that there has been a failure to comply with the provision in the performance of the contract, the head of the department, bureau, agency, or independent establishment shall make the findings public. The findings shall include the name of the contractor obligated under the contract. The contractor, and any subcontractor, material man, or supplier associated or affiliated with the contractor, shall not be awarded another contract for the construction, alteration, or repair of any public building or public work for 3 years after the findings are made public.

The provisions at 41 U.S.C § 8302(a)(2)(C) specify that the term “micro-purchase threshold,” as used in the exception at that provision, has the meaning at 41 U.S.C. § 1902, which is $10,000.

Note: The excerpt above reflects the text available on the U.S. House of Representatives, Office of the Law Revision Counsel web site for the United States Code (<https://uscode.house.gov/>), as it existed July 5, 2020. The law is subject to change over time. The above text and information are included for informational purposes. In the event of conflict between the above text and information, and the actual law, the text in the law prevails.

### E.3.3 Buy American Act & Certain Equipment and Product Purchases\*

This Section, E.3.3 Buy American Act & Certain Equipment and Product Purchases, provides additional compliance detail for [E.3.1 Basic Standard](#cE3_1_buy_american_basic_standard), in this Publication.

The WIOA program statute reads:

In the case of any [equipment](#definition_equipment) or product that may be authorized to be purchased with financial assistance provided using funds made available under title I or II or under the Wagner-Peyser Act (29 U.S.C. § 49 et seq.), it is the sense of Congress that entities receiving the assistance should, in expending the assistance, purchase only American-made equipment and products.

This provision exists in [WIOA § 502(b)](https://www.congress.gov/113/plaws/publ128/PLAW-113publ128.pdf), and applies in connection with the provision at WIOA § 502(a), which is covered in E.3.2 Buy American Act Provisions at 41 U.S.C. §§ 8301 - 8303, in this Publication.

### E.3.4 Products Falsely Labeled as Made in America\*

This Section, E.3.4 Products Falsely Labeled as Made in America, provides additional compliance detail for [E.3.1 Basic Standard](#cE3_1_buy_american_basic_standard), in this Publication.

The WIOA program statute ([WIOA § 502(c)](https://www.congress.gov/113/plaws/publ128/PLAW-113publ128.pdf)) prohibits funds under Titles I and II of WIOA and under the Wagner-Peyser Act from being expended with certain firms that have been debarred, suspended, or made ineligible for [federal awards](#definition_federal_award) because the entity intentionally affixed a “Made in America” inscription or similar inscription to a product that was not made in the United States.

Specifically, WIOA reads:

(c) PROHIBITION OF [CONTRACTS](#definition_contract) WITH PERSONS FALSELY LABELING PRODUCTS AS MADE IN AMERICA.—If it has been finally determined by a court or Federal agency that any person intentionally affixed a label bearing a ‘‘Made in America’’ inscription, or any inscription with the same meaning, to any product sold in or shipped to the United States that is not made in the United States, the person shall be ineligible to receive any contract or [subcontract](#definition_subcontractor) made with funds made available under title I or II or under the Wagner-Peyser Act (29 U.S.C. 49 et seq.), pursuant to the debarment, suspension, and ineligibility procedures described in sections 9.400 through 9.409 of title 48, Code of Federal Regulations, as such sections were in effect on August 7, 1998, or pursuant to any successor regulations.

Refer to [P.2 Suspension & Debarment](#cP2_suspension_debarment), in this Publication, for information about the suspension and debarment provisions that apply to all grant awards.

## E.4 Procurement of Recovered Materials\*

Policy:

State agencies and political subdivisions of the [State](#definition_state) that receive [federal awards](#definition_federal_award), and their [contractors (vendors)](#definition_contractor), must comply with Section 6002 of the Solid Waste Disposal Act, as amended.

The UG requires that state agencies and political subdivisions of the State that receive federal awards, and their contractors, must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act.

The UG specifies that Section 6002 of the Solid Waste Disposal Act, as amended, requires the following:

* Procuring only items designated in guidelines of the U.S. Environmental Protection Agency (EPA) at [40 C.F.R. Part 247](https://www.gpo.gov/fdsys/pkg/CFR-2016-title40-vol27/pdf/CFR-2016-title40-vol27-part247.pdf) that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired by the preceding fiscal year exceeded $10,000
* Procuring solid waste management services in a manner that maximizes energy and resource recovery
* Establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines

The UG does not define “political subdivisions” for this purpose. In general, examples of political subdivisions include, but are not necessarily limited to, a county, municipality, special district, school district, junior college district, and housing authority. TWC does not consider a [local workforce development board](#definition_board) to be a political subdivision of the state for this purpose.

Reference:

[2 C.F.R. § 200.322](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-322.pdf)

## E.5 Small & Minority Business, Women’s Business Enterprises & Labor Surplus Areas; Historically Underutilized Businesses

### E.5.1 Basic Standard\*

Policy:

[Grantees](#definition_grantee) must take all necessary affirmative steps to assure that minority businesses, women’s business enterprises and [labor surplus area firms](#definition_labor_surplus_area_firm) are used when possible. Additional requirements may apply to some grantees.

The UG and UGMS require that grantees take “all necessary affirmative steps” to assure that minority businesses, women’s business enterprises, and labor surplus area firms are used when possible. The UG and UGMS apply this standard to [procurement transactions](#definition_procurement_transaction). TWC also extends it to the selection of [subgrantees](#definition_subgrantee).

The UG and UGMS require that affirmative steps must include all the following:

* Placing qualified small and minority businesses and women’s business enterprises on solicitation lists
* Assuring that small and minority businesses, and women’s business enterprises are solicited whenever they are potential sources
* Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women’s business enterprises
* Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women’s business enterprises
* Using the services and assistance, as appropriate, of such organizations as the U.S. Small Business Administration (SBA), Minority Business Development Agency (MBDA) of the U.S. Department of Commerce, and Texas State Comptroller of Public Accounts
* Requiring the prime [contractor (vendor)](#definition_contractor), if [subcontracts](#definition_subcontract) are to be let, to take the affirmative steps listed above

These are the minimum steps required by the UG and UGMS. Additional affirmative steps may be taken consistent with the requirement that grantees take “all necessary affirmative steps.”

Relating to the step pertaining to use of the services and assistance of the SBA, MBDA, and Texas State Comptroller of Public Accounts, refer to [E.5.2 Services of the Small Business Administration](#cE5_2_sba_services), [E.5.3 Services of the Minority Business Development Agency](#cE5_3_mbda_services), and [E.5.4 Services of the State Comptroller of Public Accounts](#cE5_4_cpa_services), in this Publication, for information about the services and assistance of those organizations.

Refer to [J.4 Audit Services](#cJ4_audit_services), in this Publication, for a requirement that “positive efforts must be made to use small businesses, minority-owned firms, and women’s business enterprises” when procuring an auditor.

The grant terms or governing requirements for some entities may make some grantees subject to requirements in addition to those that apply under the UG and UGMS. For example, TWC enters into a separate Agency-Board Agreement (ABA) with each [local workforce development board](#definition_board). The ABA requires local workforce development boards to “make a reasonable effort to meet the state goal on subcontracts and supplier [contracts](#definition_contract) to Historically Underutilized Businesses certified by the State of Texas, as defined in [Texas Government Code § 2161.001](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2161.htm#2161.001), including any certified women or minority owned businesses or enterprises.”

Reference:

[2 C.F.R. § 200.321](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-321.pdf); [UGMS, Part III, §\_\_.36(e)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf); Agency-Board Agreement, Section 16

### E.5.2 Services of the Small Business Administration

This Section, E.5.2 Services of the Small Business Administration, provides supplemental technical information or guidance. It is included for informational purposes.

The primary charge of the Small Business Administration’s (SBA’s) Office of Government Contracting and Business Development is to work with federal agencies to promote use of certain types of historically underutilized businesses. The SBA’s Subcontracting Network ([SubNet](https://www.sba.gov/contracting/finding-government-customers/subcontracting/sub-net)) is a database listing of subcontracting solicitations and opportunities posted by large federal prime [contractors (vendors)](#definition_contractor) and other non-federal agencies.

### E.5.3 Services of the Minority Business Development Agency

This Section, E.5.3 Services of the Minority Business Development Agency, provides supplemental technical information or guidance. It is included for informational purposes.

The Minority Business Development Agency (MBDA) of the U.S. Department of Commerce helps create and maintain U.S. jobs by promoting the growth and global competitiveness of large, medium, and small businesses owned and operated by members of minority communities. The MBDA business development specialists in MBDA Business Centers provide procurement assistance to help minority-owned firms do business with federal, state, and local government as well as private corporations, including identification of procurement opportunities, solicitation analysis, bid and proposal preparation, research [contract](#definition_contract) award histories, post-award contract administration and certification assistance. In Texas, the MBDA has business centers in Dallas, El Paso, Houston, and San Antonio.

As used in this paragraph, the terms “federal, state, and local government” has the meaning attributed by the MBDA or its governing authorities.

### E.5.4 Services of the State Comptroller of Public Accounts

This Section, E.5.4 Services of the State Comptroller of Public Accounts, provides supplemental technical information or guidance. It is included for informational purposes.

The Texas State Comptroller of Public Accounts administers a statewide Historically Underutilized Business (HUB) program that facilitates the use of HUBs in state procurement and provides HUBs with information on the state’s procurement process. A web-based [HUB Directory](https://mycpa.cpa.state.tx.us/tpasscmblsearch/index.jsp) can be used to identify HUBs to whom notifications of procurement opportunities can be sent.

# F. Planning & Analysis

This Section, F. Planning & Analysis includes UG and UGMS standards relating to the avoidance of unnecessary and duplicative purchases, the performance of lease-versus purchase and other appropriate analysis, and independent estimates. It also includes supplemental technical information pertaining to acquisition planning, in general, pre-solicitation market research, and considerations relating to the selection of the type of award to be made.

## F.1 Acquisition Planning

This Section, F.1 Acquisition Planning, provides supplemental technical information or guidance. It is included for informational purposes.

TWC encourages [grantees](#definition_grantee) to incorporate acquisition planning into written procurement procedures.

Although not explicitly addressed by the UG and UGMS, acquisition planning is an important part of procurement. Planning promotes efficient operations, which is a theme promoted by UG and UGMS. For example, in [2 C.F.R. § 200.400(a)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-400.pdf), UG observes that its cost principles are based in part on the “fundamental” premise that “the non-Federal entity is responsible for the efficient and effective administration of the [federal award](#definition_federal_award) through the application of sound management practices.” Additionally, the administrative requirements in both UG and UGMS require grantees to have internal controls for the proper and efficient performance of the grant award. Lastly, UG defines internal controls as “a process…designed to provide reasonable assurance regarding the achievement of objectives in” several categories that include “effectiveness and efficiency of operations.”

Some acquisitions are planned purchases that are known well in advance, and others cannot be planned for (unplanned transactions). Accordingly, acquisition planning might occur at several points.

The absence of planning for reasonably foreseeable purchasing needs does not justify use of inefficient or [noncompetitive procurement](#definition_noncompetitiveproc) procedures.

In some instances, a grantee’s procurement personnel may be able to anticipate the general nature of planned acquisitions through involvement in or review of their organization’s operating budget, or by considering recurring transactions. Early identification of grantee needs provides opportunity to identify instances where the [aggregate cost](#definition_aggregatecost) of similar items may exceed the [micro-purchase threshold](#definition_micropurchase_threshold) or [simplified acquisition threshold](#definition_simplified_acq_threshold), where administrative efficiencies might be gained by identifying an appropriate acquisition approach that aggregates purchasing needs, and if appropriate, procuring a [contractor (vendor)](#definition_contractor) in advance of receiving individual purchase requests. For example, if an entity’s combined annual office supply purchases for a year ordinarily exceed the micro-purchase threshold, examining the types of purchases made and securing one or more contractors prior to the beginning of the year may provide some administrative efficiencies, result in more economical pricing (such as, as the result of bulk purchasing discounts), and also avoid appearances of breaking up procurement to circumvent procurement thresholds.

Additionally, some level of planning is involved at the time that each procurement is conducted (whether the purchase is planned or unplanned), such as to determine and then conduct the most appropriate acquisition approach considering the property or service needed, availability under [existing contracts](#definition_existing_contract), urgency, time needed to provide for competition, nature of the market, individual circumstances, etc. These planning efforts may be initiated at the time the need is determined to exist.

Refer to [F.2 Avoid Unnecessary & Duplicative Purchases](#cF2_duplicative_purchases), in this Publication, for related information. Refer also to [F.3 Lease Versus Purchase & Other Analysis](#cF3_lease_purchase_analysis) and [F.6 Independent Estimate](#cF6_independent_estimate), in this Publication. For related supplemental technical information, refer to [F.4 Pre-Solicitation Market Research](#cF4_presolicitation_market_research) and [F.5 Contract/Award Considerations](#cF5_contract_award_considerations).

## F.2 Avoid Unnecessary & Duplicative Purchases

### F.2.1 Basic Standard\*

Policy:

[Grantees](#definition_grantee) must avoid acquisitions of unnecessary or duplicative items.

The UG and UGMS specifically require that grantees’ procedures avoid acquisition of unnecessary or duplicative items.

Reference:

[2 CFR § 200.318(d)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf); [UGMS, Part III, §\_\_.36(b)(4)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

Additionally, as reflected in [Chapter 8: Cost Principles](https://twc.texas.gov/financial-manual-grants-contracts-chapter-8-cost-principles), in the FMGC, the UG and UGMS require each cost that is charged or assigned to a [TWC grant award](#definition_twc_grant_award) to be allowable under, necessary and reasonable for performance of, and allocable to that grant award; and be adequately documented. Amounts paid for unnecessary or duplicative items are improper payments and may result in questioned costs.

Reference:

[2 C.F.R. § 200.53](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-53.pdf) and [2 C.F.R. § 200.428](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-428.pdf) (improper payments); [2 C.F.R. § 200.84](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-84.pdf) (questioned costs); [UGMS, Part IV, §\_\_.105](https://comptroller.texas.gov/purchasing/docs/ugms.pdf) (questioned cost)

Refer to [F.2.2 Need Determination/Justification](#cF2_2_need_determination), in this Publication, for supplemental technical information on a related topic.

### F.2.2 Need Determination/Justification

This Section, F.2.2 Need Determination/Justification, provides supplemental technical information or guidance. It is included for informational purposes.

This Section is identified as being included for informational purposes because the UG and UGMS do not specifically address performance and documentation of need determinations. However, grantees are reminded that, as covered in [F.2.1 Basic Standard](#cF2_1_duplicative_purchases_basic), the UG and UGMS do require that [grantees](#definition_grantee) avoid acquisition of unnecessary or duplicative items. Additionally, [Q.3 Procurement Records](#cQ3_procurement_records), covers the UG and UGMS standard that requires grantee’s procurement records to document the history of a procurement. Finally, [Chapter 8: Cost Principles](https://twc.texas.gov/financial-manual-grants-contracts-chapter-8-cost-principles), in the FMGC, requires that costs be necessary and reasonable for performance of, and allocable to the grant award to which it is charged or assigned, and also require that costs be adequately documented. Need determination has a relationship with all these standards.

Need determination challenges wasteful and avoidable costs. The determination should include analysis of lease versus purchase alternatives, as appropriate, and any other appropriate analysis, as described in [F.3 Lease Versus Purchase & Other Analysis](#cF3_lease_purchase_analysis), in this Publication, to determine the most economical approach.

Practically speaking, need determination is the first step in procurement. It begins with a request or identification of need for property or services. It ends with a decision to acquire or not acquire the requested property or service. Its documentation helps justify the purchase.

A need determination might include the following actions:

* Written description of the property or service needed
* Written explanation for the need
* Identification of the end user
* Identification of the grant award(s) or program(s) for which the property or service will be used, and determination of availability of funding
* Description of how the property or service will benefit grantee operations, program activities, participants, employers, etc.
* If the request includes a “brand name” specification, identification of the specific characteristic(s) that make acquisition of the specific brand necessary, and justifying why a similar product or service won’t meet the business need
* Consideration of whether the specified property or service is like other property or services already acquired under or available to the grant award(s) that would fund the purchase, and if so, explain why an additional or duplicate purchase is needed
* Consideration of whether a one-time or recurring purchase will be needed (refer also to [G.1.4 Split & Sequential Purchases](#cG1_4_split_sequential_purchases))
* Determination of whether the property or service is allowable under, necessary and reasonable for the performance of, and allocable to the grant award(s) or program(s) that would be used to fund the purchase
* If approved, documented approval by authorized personnel and the date approved

The preceding list is provided for illustrative purposes.

Need determination will vary in complexity and be documented in a variety of ways. The extent of the analysis depends on the nature of the request. Simple, small purchases might simply require concurrence from a person having purchase approval or procurement authority, while more complex and costly procurement might require greater analysis and support.

Example:

A purchase request to make a routine purchase of office [supplies](#definition_supplies) might include a statement to that effect or be obvious from the request that the purchase is a routine purchase, with the approver’s sign-off being adequate evidence of the grantee’s determination that the purchase is necessary. Compare that with an unusually large purchase of copier paper made to gear up for a large print job or to take advantage of a time-limited discount that would result in a significant cost savings. The statement for the latter might include a statement that describes the reason for the unusually large purchase and why it is necessary. Again, the approver’s sign-off could provide evidence that the grantee considers the purchase to be necessary.

Example:

The need determination for a [real property](#definition_realproperty) lease would be more extensive than for supplies, describing, for example, the need for the amount of space specified, the type of space, location, etc. This may include information about the use of the space, the number of customers and staff to use the space, associated parking need assumptions, specifications about public transportation options for customers, etc.

The analysis or justification need not be specifically identified as a “need determination” (though doing so may help facilitate review and audit by external oversight entities). For example, it might take the form of a purchase requisition that contains, references, or has attached to it information that provides for a complete audit trail. In other cases, it might take the form of a separately prepared need determination statement or justification with required approval shown on the face of that document or attached.

The grantee’s procurement procedures will govern how the grantee processes and documents need requests and determinations. However, to provide an audit trail, the need determination for an approved request should evidence the request, reference or attach any additional information that was considered in the decision to approve or not approve the request, and provide evidence of who approved the request and when.

## F.3 Lease Versus Purchase & Other Analysis

### F.3.1 Basic Standard\*

Policy:

[Grantees](#definition_grantee) must perform appropriate analysis to determine the most economical approach to meet the needs of a specific purchase.

The UG and UGMS require that where appropriate, grantees must make an analysis of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

Refer to [F.3.1.1 Explanation: Lease Versus Purchase & Other Analysis](#cF3_1_1_lease_purchase_explanation), in this Publication, for additional information.

Reference:

[2 CFR § 200.318(d)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf); [UGMS, Part III, §\_\_.36(b)(4)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

#### F.3.1.1 Explanation: Lease Versus Purchase & Other Analysis

This Section, F.3.1.1 Explanation: Lease Versus Purchase & Other Analysis, provides supplemental technical information or guidance. It is included for informational purposes.

Lease versus purchase analysis refers to an analysis that compares the cost of leasing property to the cost of purchasing the same property to determine the most cost-effective approach. It occurs only if a purchase request is for property for which lease alternatives exist. Depending on the property, other analysis might also be appropriate. For example, if the acquisition relates to the purchase of a vehicle, it might be appropriate to include the effects of mileage reimbursements as an alternative approach. An analysis might also consider the availability of federal or state surplus property, if available.

Lease versus purchase analysis is not the only type of analysis that might occur. In some instances, it might be appropriate to perform a make-versus-buy analysis, such as if considering development of a new system, software or application with internal resources versus purchasing one or having one developed by a third party. In other instances, a cost-benefit analysis of a proposed approach might be appropriate.

When analyzing costs associated with any alternative, it is important to attempt a realistic estimate of all costs of each option being considered, for example, operating and maintenance costs, repairs, life cycle costs, etc.

Lease versus purchase, and other analysis may occur as part of the need determination/justification described in [F.2.2 Need Determination/Justification](#cF2_2_need_determination), in this Publication, or as a separate step in the procurement.

## F.4 Pre-Solicitation Market Research

This Section, F.4 Pre-Solicitation Market Research, provides supplemental technical information or guidance about market research, and the use of a Request for Information (RFI) in the performance of market research. It is included for informational purposes.

### F.4.1 Market Research

This Section, F.4.1 Market Research, provides supplemental technical information or guidance. It is included for informational purposes.

[Grantees](#definition_grantee) are encouraged to conduct pre-solicitation market research, as appropriate, to aid in determining need, defining specifications, anticipating the existence of potential suppliers, and other planning efforts.

The UG and UGMS do not address market research specifically. However, as a good management practice, grantees may benefit from performing market research before conducting a procurement, especially when conducting non-routine procurements. Market research can be part of the need determination described in [F.2.2 Need Determination/Justification](#cF2_2_need_determination).

The State of Texas Procurement and Contract Management Guide for Texas state agencies identifies market research as one of the actions that a state agency may take to help identify key business requirements for a proposed acquisition. Issuance of a Request for Information (RFI) is another tool that state agencies can use to learn more about a specific market. Refer to [F.4.2 Request for Information](#cF4_2_RFI), in this Publication, for more information about RFIs.

The State of Texas Procurement and Contract Management Guide includes the following observation about market research:

Market research is routinely used by public procurement professionals to obtain information relating to the size of the potential vendor pool, pricing, applicable industry standards, market trends, and determine if the item or service to be purchased is readily available in the commercial marketplace. Market research may include online research, review of industry periodicals and information obtained from professional organizations, attendance at trade shows, discussions with other customers, and consultations with industry representatives.

(Refer to [A.5 Sources](#cA5_sources), in this Publications, for more information about references to the State of Texas Procurement and Contract Management Guide.)

The use of market research is not unique to Texas state agencies.

The following information is adapted from [48 C.F.R. Part 10 “Market Research,”](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-part10.pdf) (2019) in the FAR.

In general, market research refers to actions taken before solicitation to determine the most suitable approach to acquire the specific items or services for which the grantee has identified a need. It can aid in determining whether sources capable of satisfying the grantee’s requirements exist; determining whether items are available commercially or require development; understanding the contracting, warranty, maintenance, packaging, and other practices of sources; determining whether consolidation or bundling is necessary and justified; developing specifications; and in making similar decisions.

Techniques for conducting market research include:

* Contacting knowledgeable individuals in government and industry regarding market capabilities to meet the grantee’s requirements
* Reviewing the results of recent market research undertaken to meet similar or identical requirements, if any
* Publishing a formal RFI in appropriate technical or scientific journals or business publications
* Participating in interactive, online communication among industry, acquisition personnel, and customers
* Obtaining source lists of similar items from other contracting activities or agencies, trade associations or other sources
* Reviewing catalogs and other generally available product literature published by manufacturers, distributors, and dealers or available on-line
* Conducting interchange meetings or holding pre-solicitation conferences to involve potential offerors early in the acquisition process

If contacting potential sources for information, grantees should not request those entities to submit more than the minimum information necessary and should take care not to release information that would give such sources an unfair competitive advantage in the procurement.

The extent of research will necessarily vary, depending on such factors as urgency, estimated dollar value, complexity, and past experience. The cost of conducting the research should by no means exceed the cost of the item to be procured. Similarly, when performed, grantees should document market research in a manner appropriate to the size and complexity of the acquisition.

(Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the FAR.)

### F.4.2 Request for Information

This Section, F.4.2 Request for Information, provides supplemental technical information or guidance. It is included for informational purposes.

An RFI is not required for and is not appropriate for use with every acquisition. Public purchasers sometimes use an RFI as a formal research method to gather information directly from an industry about a type of product or service, such as available products or solutions, trends, industry practices or standards, cost structures or pricing methodologies, and feedback on the purchasing entity’s approach. The results might then enable the purchasing entity to develop a more up-to-date and accurate description of the scope of work or technical requirements for its need.

No uniform definition of RFI exists. For purposes of this Publication, RFI has the meaning defined in Appendix I of the State of Texas Procurement and Contract Management Guide for Texas state agencies. The State of Texas Procurement and Contract Management Guide defines RFI as “a general invitation to the vendor community requesting information that may be used in a potential future solicitation.”

The UG and UGMS do not address RFIs specifically. However, consistent with the UG and UGMS standard of full and open competition, if an RFI is used, a [grantee](#definition_grantee) cannot use the RFI to circumvent, limit, or restrict competition. Additionally, a grantee cannot use an RFI in connection with a procurement performed under a [TWC grant award](#definition_twc_grant_award) if the grantee’s written procurement procedures or other requirements governing the grantee’s procurements do not permit the grantee to use RFIs in the grantee’s other procurements. Grantees that use RFIs should have written procurement procedures for RFIs.

If reviewing a grantee’s use of an RFI in connection with a procurement performed under a TWC grant award, TWC will consider whether the process that the grantee used circumvented, limited, or restricted competition. In making that determination, TWC will consider the UG and UGMS standards for full and open competition, the grantee’s written and actual procurement procedures, any other procurement requirements (such as state laws) that govern the grantee’s procurements, and procurement practices used by similar entities or other entities that make procurements with public funds. Refer to [E.1 Full & Open Competition](#cE1_full_and_open_competition), in this Publication, for the UG and UGMS standard for full and open competition.

For example, in considering procurement practices used by other entities that make procurements with public funds, TWC may consider guidance that applies to procurements that state agencies conduct. State agencies’ procurements must conform to applicable state law and the State of Texas Procurement and Contract Management Guide. Key points from the State of Texas Procurement and Contract Management Guide include the following:

* An RFI does not substitute for procurement
* A [contract](#definition_contract) cannot be developed from a response to an RFI
* Vendor communications should occur through designated grantee contacts only
* RFIs are commonly advertised publicly or submitted to an appropriate professional or trade organization
* Suppliers must not be provided with information that would give an entity an advantage in a later procurement, or which might be construed as preliminary negotiations
* Supplier participation in an RFI process must be voluntary; a supplier must not be penalized for the supplier’s response to or absence of response to an RFI (consequently, an RFI cannot be used to develop a pre-qualified vendors list)
* RFI activities should conclude prior to starting specifications drafting
* Specifications must not be tailored to benefit a specific supplier; doing so limits competition
* No appearance of favoritism should occur toward certain suppliers in the RFI and fact-gathering process, or thereafter
* Consulting exclusively with the incumbents or a small number of suppliers could give the appearance of favoritism and should be avoided when possible

Refer to the State of Texas Procurement and Contract Management Guide for more information about state agencies’ use of RFIs.

## F.5 Contract/Award Considerations

### F.5.1 Overview

This Section, F.5 Contract/Award Considerations, addresses procurement planning considerations specific to [contract](#definition_contract)/award types, and dollar value and length of the contract/award. It includes a mix of mandatory requirements and supplemental technical information. Also refer to [K. Bonding, Clauses & Provisions](#cK0_bonding_clauses_provisions), in this Publication.

### F.5.2 [Reserved]

This Section is reserved for future use.

### F.5.3 Considerations: Contract/Award Types

This introductory text of Section, F.5.3 Considerations: Contract/Award Types, and subheading [F.5.3.1 Contract Types for Sealed Bids & Competitive Proposals](#cF5_3_1_contracts_for_IFBs_RFPs), provide supplemental technical information or guidance. It is included in this Publication for informational purposes. Subsections [F.5.3.2 Time & Materials Contracts](#cF5_3_2_time_and_materials_contracts), [F.5.3.3 Prohibited Contract Types](#cF5_3_3_prohibited_contracts), and [F.5.3.4 Fixed Amount Subawards](#cF5_3_4_fixed_amount_subawards), in this Publication, provide related compliance detail.

[Grantees](#definition_grantee) should consider contract type when selecting a procurement method. The procurement method used will need to be appropriate to the contract type. Where a Time and Materials (T&M) contract or fixed amount subaward ([subgrant](#definition_subgrant)) will be used, the grantee must adhere to the respective procurement standards in UG and UGMS. [Cost plus percentage of cost contracts](#definition_costpluspercentageofcost) and [cost plus percentage of construction cost contracts](#definition_costplusconstruction) must never be used under [TWC grant awards](#definition_twc_grant_award).

[Contracts](#definition_contract) generally fall into two categories—[fixed-price contract](#definition_fixedpricecontract) and [cost reimbursement contracts](#definition_costreimbursementcontract)—each with variations. Time & Materials (T&M) contracts are a third category. Refer to [Chapter 15: Contracts](#chapter15_contracts), in the FMGC, for descriptions of fixed-price contracts (including [firm-fixed-price contracts](#definition_firmfixedpricecontract)) and cost reimbursement contracts.

Some contract types—such as cost reimbursement contracts—are not appropriate for every procurement method. Additionally, use of some contract types are prohibited. Therefore, selection of contract/award type requires some forethought.

#### F.5.3.1 Contract Types for Sealed Bids & Competitive Proposals

This Section, F.5.3.1 Contract Types for Sealed Bids & Competitive Proposals, provides supplemental technical information or guidance. It is included for informational purposes.

This Section is identified as being informational because it highlights and cross-references to relevant standards that are covered in other parts of this Publication.

As covered in [I. Procurement Methods](#cI0_procurement_methods), in this Publication, the UG and UGMS specify conditions for procurement by [micro-purchase](#definition_micropurchase) procedures, simplified acquisition procedures, sealed bids (formal advertising), competitive proposals, and noncompetitive proposals. As covered in [I.3 Procurement by Sealed Bids (Formal Advertising)](#cI3_procurement_sealed_bids) and [I.4 Procurement by Competitive Proposals](#cI4_procurement_competitive_proposals), the UG and UGMS conditions for procurement by sealed bids (formal advertising) and competitive proposals include consideration of contract type. As reflected in those standards, UG and UGMS require that when using sealed bids (formal advertising) the procurement must lend to a [firm-fixed-price contract](#definition_firmfixedpricecontract). Whereas, UG and UGMS provide that the method of using competitive proposals is normally conducted when either a [fixed price contract](#definition_fixedpricecontract) or [cost reimbursement contract](#definition_costreimbursementcontract) will be awarded.

#### F.5.3.2 Time & Materials Contracts\*

Policy:

A [grantee](#definition_grantee) may use a Time & Materials (T&M) contract only after a determination that no other [contract](#definition_contract) is suitable, provided, in addition, that the contract includes a ceiling price that the [contractor (vendor)](#definition_contractor) exceeds at its own risk.

When a grantee anticipates use of a T&M contract, it should use a procurement method that provides for negotiation—procurement by small purchase procedures, competitive proposals, or, if appropriate for the circumstances, noncompetitive proposals. Use of T&M contracts must conform to the UG and UGMS standards for the use of those contracts.

The UG and UGMS permit a grantee to use a T&M contract only after a determination that no other contract is suitable, provided, in addition, that the contract includes a ceiling price that the contractor (vendor) exceeds at its own risk.

As described in the UG and UGMS, T&M type contract means a contract whose cost to a grantee is the sum of the following:

* The actual cost of materials
* Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses and profit

The UG and UGMS observe that because this formula generates an open-ended contract price, a T&M contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, UG and UGMS require that each T&M contract must set a ceiling price that the contractor exceeds at its own risk. Furthermore, UG and UGMS require that a grantee awarding a T&M contract to a contractor must assert a high degree of oversight in order to obtain a reasonable assurance that the contractor is using efficient methods and effective cost controls.

Reference:

[2 C.F.R. § 200.318(j)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf); [UGMS, Part III, §\_\_.36(b)(10)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

Grantees may refer to the information relating to T&M contracts in [48 C.F.R. Part 16.6](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-part16-subpart16-6.pdf) (2019) of the FAR for information about federal agencies’ uses of T&M contracts.

Note: UG and UGMS are silent on the appropriate procurement methods to use with T&M contracts. Similarly, the FAR does not specify a method for use by federal agencies. The TWC policy requirement that the method must allow for negotiation reflects the UG and UGMS standards that require setting of a ceiling price that the contractor exceeds at its own risk, and the need to examine the proposed material costs for reasonableness.

#### F.5.3.3 Prohibited Contract Types\*

Policy:

[Grantees](#definition_grantee) must not use [cost plus percentage of cost contracts](#definition_costpluspercentageofcost) or [percentage of construction cost contracts](#definition_costplusconstruction) for [contracts](#definition_contract) or [subgrants](#definition_subgrant) made under [TWC grant awards](#definition_twc_grant_award).

The UG and UGMS prohibit use of cost plus percentage of cost and percentage of construction cost contracts.

Reference:

[2 C.F.R. § 200.323(d)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-323.pdf); [UGMS, Part III, §\_\_.36(f)(4)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

Use the hyperlinks above to access the descriptions of cost plus percentage of cost contract and percentage of construction cost contract that are included in the Glossary of this Publication.

#### F.5.3.4 Fixed Amount Subawards\*

Policy:

Under a [federal award](#definition_federal_award), a [grantee](#definition_grantee) must not make a [fixed amount award](#definition_fixed_amount_award) that exceeds the [simplified acquisition threshold](#definition_simplified_acq_threshold) unless prior approval was obtained from the [federal awarding agency](#definition_federalawardingagency), through TWC. Fixed amount subawards must meet corresponding standards of the UG.

The UG provisions at [2 C.F.R. § 200.332](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-332.pdf) provide that, “With prior written approval from the federal awarding agency, a [pass-through entity](#definition_passthruentity) may provide subawards [[subgrants](#definition_subgrant)] based on fixed amounts up to the simplified acquisition threshold, provided that the subawards meet the requirements for fixed amount awards in § 200.201 Use of Grant Agreements (Including Fixed Amount Awards), Cooperative Agreements, and Contracts.” The UGMS is silent on and places no restrictions on the use of fixed amount subgrants.

Therefore, for federal awards, a grantee must not make a fixed amount subgrant that exceeds the simplified acquisition threshold unless prior approval was obtained from the federal awarding agency, through TWC. Fixed amount subgrants under federal awards must meet corresponding standards of the UG in [2 C.F.R. § 200.201](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-201.pdf).

This provision applies to grant awards that TWC makes, as well as subgrants. Grantees or [subgrantees (subrecipients)](#definition_subgrantee) seeking to make a fixed amount subgrant that exceeds the simplified acquisition threshold must submit such requests to the grantee’s TWC grant manager. (Subgrantees must submit such requests through the TWC grantee.) If TWC concurs with the request, TWC must then obtain approval from the respective federal awarding agency or agencies associated with the federal award funds involved.

In addition to prior approval requirements, the following conditions apply for fixed amount subgrants under UG:

* The award amount must be negotiated using the cost principles (or other pricing information) as a guide. The project scope must be specific. Adequate cost, historical, or unit pricing data must be available to establish a fixed amount award based on a reasonable estimate of actual cost. Payments must be based on meeting specific requirements of the award. Accountability is to be based on performance and results. Except in the case of termination before completion of the award, there is no review of the actual costs incurred by the grantee (or subgrantee) in performance of the award. Some of the ways in which the award may be paid include, but are not limited to the following:
* In several partial payments, with the amount of each payment agreed upon in advance and the milestone or event triggering the payment also agreed upon in advance and set forth in the award
* On a unit price basis, for a defined unit or units, at a defined price or prices, agreed to in advance of performance of the award and set forth in the award
* In one payment at completion of the award
* A fixed amount award cannot be used in programs that require mandatory cost sharing or match
* At the end of the award, the entity receiving the fixed amount award must certify in writing to the entity that made the award that the project or activity was completed or the level of effort was expended. If the required level of activity or effort was not carried out, the amount of the award must be adjusted
* Periodic reports may be established for each award
* Changes in principal investigator, project leader, project partner or scope of effort must receive prior written approval of the entity that made the fixed amount award

Reference:

[2 C.F.R. § 200.201(b)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-201.pdf) and [2 C.F.R. § 200.332](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-332.pdf)

### F.5.4 Dollar Value & Length of Contract/Award

#### F.5.4.1 Considerations: Contract/Award Value & Length

This Section, F.5.4.1 Considerations: Contract/Award Value & Length, provides supplemental technical information or guidance. It is included for informational purposes.

When determining the procurement method to use, [grantees](#definition_grantee) should consider the anticipated total dollar value involved, inclusive of the initial [contract](#definition_contract)/award period and any renewals/option years or extensions. Where the total value is anticipated to exceed the [micro-purchase threshold](#definition_micropurchase_threshold) and circumstances do not qualify for procurement by noncompetitive proposals, the grantee would need to conduct procurement by simplified acquisition procedures, sealed bids (formal advertising), or competitive proposals. Where the total value is anticipated to exceed the [simplified acquisition threshold](#definition_simplified_acq_threshold) and circumstances do not qualify for procurement by noncompetitive proposals, the grantee would need to conduct procurement by sealed bids (formal advertising) or competitive proposals.

The UG and UGMS establish a micro-purchase threshold and a simplified acquisition threshold. Use of [micro-purchase](#definition_micropurchase) procedures or small purchase procedures to make a contract/award that exceeds the respective procurement threshold violates UG and UGMS procurement standards. Refer to [G.1 Procurement Thresholds](#cG1_procurement_thresholds), in this Publication, for more information about the micro-purchase and simplified acquisition thresholds.

Total contract/award value is comprised of the dollar value of the initial contract/award period, plus the value of subsequent renewals/option years or extensions. A grantee’s independent estimate will assist in anticipating the total contract/award value. Refer to [F.6 Independent Estimate](#cF6_independent_estimate), in this Publication, for information about independent estimates.

Considering whether a specific purchase is a one-time need or will have an on-going need also factors into decisions about contract/award length. Another factor that could affect a decision about contract/award length is price stability or the degree to which future competition would be anticipated to result in cost savings. A third factor to consider is any requirement that sets a limit on contract/award length, such as those in the grantee’s own policies and procedures, and those described in [F.5.4.2 Special: Workforce Boards & Workforce Service Providers](#cF5_4_2_board_contract_limits), in this Publication. Other factors could also impact the decision.

Considering the anticipated total dollar value, inclusive of renewals or extensions, helps avoid need to conduct a new procurement at an inopportune time, or alternatively, make noncompliant use of noncompetitive renewal options where conduct of a new procurement presents a non-viable business alternative.

#### F.5.4.2 Special: Workforce Boards & Workforce Service Providers\*

This Section, F.5.4.2 Special: Workforce Boards & Workforce Service Providers, provides additional compliance detail relating to the duration of a [contract](#definition_contract) or [subgrant](#definition_subgrant) that a [local workforce development board](#definition_board) makes to a [workforce service provider](#definition_workforceserviceprovider).

Local workforce development boards must comply with the Board Contracting Limits established by Chapter 802 of TWC rules, which limit the length of subgrants and contracts that local workforce development boards make to workforce service providers.

In procuring a new workforce service provider, TWC rule requires that a local workforce development board must take the following actions:

* Procure the workforce service provider for an initial period of at least one (1) year, not to exceed two (2) years, allowing for subsequent renewals during an option period following the conclusion of the initial procurement period
* Ensure that the “initial procurement” (initial contract) and subsequent renewals do not exceed a maximum of five (5) years total
* In determining whether to renew an agreement during the “option period” (optional renewal period) following the completion of the “initial procurement period” (initial contract period), consider the workforce service provider’s performance, oversight of services, reasonableness of cost, and any other locally developed criteria

Reference:

[40 TAC § 802.22](http://texreg.sos.state.tx.us/public/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=40&pt=20&ch=802&rl=22)

Note 1: As used within the context of the preceding text from the TWC rule at 40 TAC § 802.42, the term “contract” is inclusive of both a vendor [contract](#definition_contract) and a [subgrant (subaward)](#definition_subgrant) to a workforce service provider.

Note 2: The TWC rule at 40 TAC § 802.22 does not preclude a local workforce development board from enacting termination provisions, when appropriate, such as enactment of termination as an enforcement remedy. The rule itself also does not preclude a workforce service provider from terminating the award before the end of the initial period or during any renewal. (The award provisions would govern a provider’s rights to terminate the award.) If it becomes necessary to secure an interim provider on an emergency basis, such as if termination occurs before procurement of a new workforce service provider can be completed, the one-year minimum duration established by TWC rule does not apply to that award. The initial length of the interim award should be the minimum duration needed to complete the procurement. Procurement of the new provider should be completed as soon as possible. Where termination is anticipated, a local workforce development board should begin working on the procurement for the new workforce service provider as soon as possible. Refer also to [I.5 Procurement by Noncompetitive Proposals](#cI5_proc_by_noncompetitive_proposals), especially [I.5.5 Prior Approval (Including Potential Breaks in Program Service Delivery)](#cI5_5_noncomp_prior_approval).

Note 3: The content in this Section reflects the Chapter 802 rules as last adopted November 26, 2019. In the event of conflict between the representation of these rules in this Publication or subsequent rule change, the TWC rule, as codified in Title 40 of the Texas Administrative Code (TAC) prevails.

### F.5.5 Prohibition Against Direct Delivery of Services

This Section, F.5.4.5 Prohibition Against Direct Delivery of Services, provides additional compliance detail for [local workforce development boards](#definition_board).

Local workforce development boards must comply with the prohibition against direct delivery of services reflected in Chapter 802 of TWC rules.

Under the TWC rules at [40 TAC § 802.43](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf), a local workforce development board shall ensure, through the oversight and management of local workforce development board policies, that it does not directly deliver or determine eligibility for workforce services in its local workforce development area (workforce area) or contract (see Note) with the following persons or entities to deliver or determine eligibility for workforce services:

* A board member on the local workforce development board;
* A business, organization, or institution that a board member represents on the local workforce development board;
* A board member's business, organization, or institution in which a board member has a substantial financial interest; or
* A local workforce development board employee.

The prohibitions in 40 TAC § 802.43 do not apply to public education agencies, such as community colleges and independent school districts, that have board members who fulfill the requirements set forth in [Texas Government Code § 2308.256(a)(3)(A)](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2308.htm#2308.256).

The rule adds that a local workforce development board may grant a one-year exception to the prohibitions described in 40 TAC § 802.43(a) for a community-based organization that fulfills the requirements set forth in [Texas Government Code § 2308.256(a)(2)](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2308.htm#2308.256). The exception can be granted only by a two-thirds vote of the members present in an open meeting and cannot be granted for contracts (see Note) for the operation of Workforce Solutions Offices.

The rule at 40 TAC § 802.43 also requires that a local workforce development board shall ensure that the board, its members, or its employees do not directly control the daily activities of its [workforce service providers](#definition_workforceserviceprovider). The rule provides that TWC shall review a local workforce development board's compliance through an examination of the local workforce development board's exercise of direction and control over its workforce service providers. It provides that TWC may use the factors for testing the employment status as set out in [40 TAC § 821.5](https://twc.texas.gov/files/agency/rules-chapter-821-payday-twc.pdf).

Lastly, the rule establishes that nothing in 40 TAC § 802.43 restricts a board member or a board member's organization from receiving Texas workforce system services and thereby being a customer of a local workforce development board's workforce service providers' services.

Note: As used within the context of the preceding text from the TWC rule at 40 TAC § 802.43, the term “contract” is inclusive of both a vendor [contract](#definition_contract) and a [subgrant (subaward)](#definition_subgrant).

Reference:

[40 TAC § 802.43](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf)

## F.6 Independent Estimate

### F.6.1 Basic Standard\*

Policy:

[Grantees](#definition_grantee) must make independent estimates before receiving bids or proposals under the sealed bids (formal advertising), competitive proposals, and noncompetitive proposals methods of procurement.

UG and UGMS require independent estimates as part of the procurement standards that relate to [cost analysis](#definition_costanalysis) and [price analysis](#definition_priceanalysis). This Publication covers independent estimates as a separate standard, because while used in connection with cost and price analysis, the UG and UGMS require that independent estimates must be made before bids or proposals are received. Refer to [O. Cost/ Price Analysis](#cO0_cost_price_analysis), in this Publication, for information about the UG and UGMS standards for cost and price analysis.

Reference:

[2 C.F.R. § 200.323(a)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-323.pdf); [UGMS, Part III, §\_\_.36(f)(1)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

#### F.6.1.1 Explanation: Independent Estimate

This Section, F.6.1.1 Explanation: Independent Estimate, provides supplemental technical information or guidance. It is included for informational purposes.

An independent estimate is the [grantee’s](#definition_grantee) own estimate of what a needed item of property or service should cost.

As reflected in [F.6.1 Basic Standard](#cF6_1_independent_est_basic_standard), in this Publication, the UG and UGMS require that independent estimates be made before bids or proposals are received. Bid and proposals are the responses received in response to an Invitation for Bids (IFB) and Request for Proposals (RFP), respectively. Procurement by noncompetitive proposals also requires proposals. The UG and UGMS specifically associate IFBs and RFPs with procurement by sealed bids (formal advertising) and competitive proposals, respectively. As such, an independent estimate is required when using the sealed bids (formal advertising), competitive proposals, or noncompetitive proposals methods of procurement.

Note, that some degree of estimate should also occur when needed to decide whether to procure by [micro-purchase](#definition_micropurchase) procedures, small purchase procedures, or formal procedures, or any other time when needed to perform an initial budget check to verify whether adequate funds will be available for the acquisition, and to consider whether a procurement will fall within applicable procurement thresholds. However, such estimate differs from the independent estimate described in this Section, F.6 Independent Estimate.

An independent estimate is a tool to help analyze offerors proposed costs and/or prices, with the end goal to result in a reasonable contract price. In the planning stages, an independent estimate can also aid in the initial budget check to determine whether funds will be available for the acquisition. It can also assist in selection of an appropriate procurement method, such as for determining whether the [aggregate cost](#definition_aggregatecost) will exceed the [micro-purchase threshold](#definition_micropurchase_threshold) or [simplified acquisition threshold](#definition_simplified_acq_threshold). After receiving bids or proposals, the independent estimate serves as a benchmark for cost and/or price analysis; this is its primary purpose.

An independent estimate should not be more complex or detailed than what is necessary to accomplish its use in connection with the cost and/or price analysis, considering the grantee’s familiarity with the cost or price involved. The method and degree of analysis for preparing an independent estimate may vary. For example, for repeat purchases for which the cost or price is relatively stable, the independent estimate might be based on prior purchases. On the other hand, for purchases of property or services not previously acquired, the estimate may draw from initial market research or information from industry or peer organizations. Refer to [F.4 Pre-Solicitation Market Research](#cF4_presolicitation_market_research), in this Publication, for information about market research.

It is helpful for documentary purposes if the independent estimate is labeled accordingly; however, such identification is not required.

# G. Thresholds, Consolidation & Breaking Out Procurements

This Section includes information about procurement thresholds, as well as UG and UGMS standards relating to consolidating and breaking out procurements. It includes both compliance requirements and supplemental information.

## G.1 Procurement Thresholds

### G.1.1 Micro-Purchase & Simplified Acquisition Thresholds\*

Policy:

[Grantees](#definition_grantee) must not divide (break out or split) procurements to circumvent the [micro-purchase threshold](#definition_micropurchase_threshold) or [simplified acquisition threshold](#definition_simplified_acq_threshold).

The UG and UGMS permit procurement by small purchase procedures for acquisitions of property and services, the [aggregate cost](#definition_aggregatecost) of which does not exceed the simplified acquisition threshold. The UG also addresses [micro-purchase](#definition_micropurchase) procedures. The UG permits procurement by micro-purchase procedures for acquisitions of [supplies](#definition_supplies) and services, the aggregate cost of which, does not exceed the micro-purchase threshold. Inherent to grantees’ efforts to comply with these thresholds is the avoidance of actions that divide (break out or split) procurements in order to circumvent the micro-purchase or simplified acquisition threshold.

With respect to the micro-purchase and simplified acquisition thresholds, the phrase, “does not exceed,” means that the procurement must be at or below the respective threshold.

Use the above links to refer to the definitions of micro-purchase threshold and simplified acquisition thresholds, in the Glossary to this Publication, for the dollar amounts established for those thresholds under TWC grant awards.

TWC also applies this requirement to grantee’s selection of [subgrantees (subrecipients)](#definition_subgrantee).

Reference:

[2 C.F.R. § 200.67](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-67.pdf) (micro-purchase); [2 C.F.R. § 200.88](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-88.pdf) (simplified acquisition threshold); [2 C.F.R. § 200.320(a) and (b)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-320.pdf) (procurement methods); [UGMS, Part III, §\_\_.36(d)(1)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf) (procurement methods)

Refer to [G.1.2 Other Procurement Thresholds](#cG1_2_other_thresholds), [G.1.3 Aggregate Dollar Limit](#cG1_3_aggregate_dollar_limit), [G.1.4 Split & Sequential Purchases](#cG1_4_split_sequential_purchases), and [G.1.5 Sample Threshold Scenarios](#cG1_5_sample_threshold_scenarios), in this Publication, for additional compliance detail and supplemental technical information related to this topic. Also refer to [G.2 Consolidating & Breaking Out Procurements](#cG2_consolidating_breakingout_purchases), in this Publication.

### G.1.2 Other Procurement Thresholds\*

This Section, G.1.2 Other Procurement Thresholds, provides additional compliance detail for [G.1.1 Micro-Purchase & Simplified Acquisition Thresholds](#cG1_1_micro_and_smallpurchase_thresholds).

In addition to the [micro-purchase threshold](#definition_micropurchase_threshold) and [simplified acquisition threshold](#definition_simplified_acq_threshold), procurements that a [grantee](#definition_grantee) conducts under TWC grant awards must also conform to other thresholds, if any, that the grantee’s procurement procedures ordinarily apply to the grantee’s non-TWC procurements, provided that the dollar limit imposed by any such additional threshold does not result in violation of the micro-purchase threshold and simplified acquisition threshold discussed in this Publication.

As covered in [C. Written Procurement Procedures](#cC0_written_procedures), in this Publication, the UG and UGMS require grantees to use their own procurement procedures, provided that such procurements conform to the standards in the UG and UGMS. Some entities—such as, local governments, school districts, charter schools, education service centers, and public universities and colleges, as those entities are defined by applicable state law or other governing requirements—may be subject to additional procurement thresholds under other requirements that govern their organizations, such as state law. Additionally, those and other grantees might prescribe their own additional thresholds in their procurement procedures.

In that TWC grant awards require compliance with the UG and UGMS, as applicable, and the UG and UGMS require grantees to follow their own procurement procedures when conducting procurements under [federal awards](#definition_federal_award) or [state awards](#definition_stateaward)—a grantee whose procurement procedures ordinarily apply procurement thresholds that are in addition to or more restrictive than the micro-purchase and simplified acquisition thresholds discussed in this Publication must also conform to those thresholds when conducting procurements under TWC grant awards, provided that the dollar limit imposed by any such additional thresholds conforms to the limits imposed by the micro-purchase or simplified threshold discussed in this Publication.

### G.1.3 Aggregate Dollar Limit\*

This Section, G.1.3 Aggregate Dollar Limit, provides additional compliance detail for [G.1.1 Micro-Purchase & Simplified Acquisition Thresholds](#cG1_1_micro_and_smallpurchase_thresholds).

For procurements that a [grantee](#definition_grantee) conducts under a TWC grant award, compliance with the aggregate dollar limits (aggregate cost) used with the [micro-purchase threshold](#definition_micropurchase_threshold) and [simplified acquisition threshold](#definition_simplified_acq_threshold) discussed in this Publication will be determined based on the guidance in this Section, unless the grantee’s procurement procedures or other requirements governing the grantee’s procurements impose a more restrictive definition that is applicable to the [TWC grant award](#definition_twc_grant_award).

The micro-purchase and small purchase thresholds apply on an aggregate cost basis. The UG and UGMS do not define “aggregate” for this purpose.

For purposes of determining whether a cost exceeds the micro-purchase or simplified acquisition thresholds described in this Publication, TWC describes aggregate cost as follows:

* For a one-time purchase, aggregate cost is the total dollar value of that purchase
* For repeat purchases of “like” items or services, the need for which could not have been anticipated, aggregate cost determinations are applied on a purchase-by-purchase basis
* For repeat purchases of “like” items or services that were anticipated or could reasonably have been anticipated, aggregate cost is the total combined dollar value those purchases
* For [contracts](#definition_contract), aggregate cost means the total contract value, including any modifications that change the total contract value, renewals/option years, extensions and amendments.

The length of time during which recurring costs are accumulated to determine “aggregate cost” is defined by the grantee’s procedures or other requirements governing its entity’s procurements. The UG and UGMS do not specify a time over which aggregate cost must be measured for purposes of determining compliance with the micro-purchase and simplified acquisition thresholds; however, other procurement requirements might, such as federal requirements governing an entity’s non-TWC grants, state statutes, other state oversight entities, or an entity’s own written procedures. As an example, the TEA FASRG for Texas school districts, charter schools, and education service centers generally considers aggregate cost on the basis of a 12-month period, such as the calendar year or the entity’s fiscal year, according to whichever best meets the entity’s tracking needs. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the TEA FASRG.)

In considering this information, TWC applies the following to determine whether a grantee exceeded the micro-purchase or simplified acquisition threshold:

* If a grantee’s procedures define a time which the grantee ordinarily applies to its non-TWC procurements, TWC will ordinarily use that time to determine the grantee’s compliance with the micro-purchase and simplified acquisition thresholds described in this Publication.
* If not defined in a grantee’s procedures, aggregate cost will be presumed to be determined in perpetuity for that TWC grant award, meaning that aggregate will be considered based on the sum of all procurements of “like” items or services, regardless of the time over which the purchases were made.

For purchases made under a contract, the contract length should be appropriate given such factors as need, price stability over time, entry of new suppliers, product stability, etc.

Lastly, the UG and UGMS do not prescribe how to classify “like” property and services. The meaning may vary among grantees. For example, state agencies might use National Institute of Governmental Purchasing (NIGP) codes for procurements that they conduct. For some entities, other (non-TWC) oversight entities might prescribe how to cluster purchases for purposes of determining compliance with thresholds. For example, TEA might prescribe categories for use by school districts, charter schools and education service centers in Texas. If not defined by a grantee’s procedures, TWC will consider factors such as the similarity of the purchases made, the planned or unplanned nature of the purchases, and the information in [G.1.5 Sample Threshold Scenarios](#cG1_5_sample_threshold_scenarios), in this Publication, to determine whether the grantee adhered to procurement thresholds.

Also refer to [G.1.4 Split & Sequential Purchases](#cG1_4_split_sequential_purchases), in this Publication.

### G.1.4 Split & Sequential Purchases\*

This Section, G.1.4 Split & Sequential Purchases, provides additional compliance detail for [G.1.1 Micro-Purchase & Simplified Acquisition Thresholds](#cG1_1_micro_and_smallpurchase_thresholds).

As covered in G.1.1 Micro-Purchase & Simplified Acquisition Thresholds, in this Publication, a [grantee](#definition_grantee) must not split or divide purchases to circumvent applicable procurement thresholds.

The UG and UGMS procurement standard covered in [G.2 Consolidating & Breaking Out Procurements](#cG2_consolidating_breakingout_purchases), in this Publication, encourages grantees to break out procurements when doing so would enable the grantee to obtain a more economical purchase. The standard does not permit a grantee to split purchases to circumvent procurement thresholds. Splitting purchases that would be considered a single purchase under normal practices is not permitted, for example, purchasing computer monitors separate from central processing units when the purchasing need identified was for a complete computer.

Additionally, sequential purchases—separate recurring purchases of the same or similar items—are not permitted if the intent is to circumvent procurement thresholds. If the combined [aggregate cost](#definition_aggregatecost) of the individual purchases exceeds a procurement threshold, use of a procurement method suitable for the higher volume and value should be used. Not all recurring purchases can be anticipated. If a grantee can demonstrate that purchases could not be reasonably anticipated and no evidence exists to indicate a willful intent to circumvent procurement thresholds, these types of purchases may be acquired using the procurement method that is most appropriate for the individual purchase.

If a purchase is anticipated to fall within the simplified acquisition threshold, but quotations come back in excess of that amount, the grantee would need to reperform its procurement using a procurement method that is appropriate for the purchase—sealed bids (formal advertising) or competitive proposals.

### G.1.5 Sample Threshold Scenarios

This Section, G.1.5 Sample Threshold Scenarios, provides supplemental technical information or guidance. It is included for informational purposes.

#### G.1.5.1 Scenario 1: Textbook Purchases for Participant Training Program

This Section, G.1.5.1 Scenario 1: Textbook Purchases for Participant Training Program, provides supplemental technical information or guidance. It is included for informational purposes.

The WIOA Title I formula adult program permits grant funds to be used to pay for training services and textbooks for qualifying program participants. Under WIOA, qualifying program participants enroll in their choice of training programs at their certified training provider of choice. Textbook needs vary by participant according to the training provider, instructor, number of classes that the participant enrolls in, and other factors. Consequently, [local workforce development boards](#definition_board) and their [workforce service providers](#definition_workforceserviceprovider) are frequently unable to anticipate specific textbook needs in advance.

Also relevant is that local purchasing and payment policies vary. For example:

* In many cases, participants that receive training services under WIOA Title I will order or purchase textbooks from their training provider’s bookstore. In those cases, it is common for a local workforce development board or its service provider to have an account with the provider whereby the program participant receiving training services through that training provider acquires qualifying textbooks on account and the training provider periodically invoices the local workforce development board or its service provider.
* Alternatively, some program participants purchase qualifying textbooks out-of-pocket from a training provider’s bookstore or other book retailer and then request reimbursement from the local workforce development board’s service provider.
* It is also possible that in some cases, a local workforce development board’s service provider might directly order and pay for qualifying textbooks for some program participants.

Under the first two examples of this scenario, TWC would not expect a local workforce development board or its service provider to procure one or more bookstores to service qualifying textbook purchases made by program participants. Similarly, TWC does not expect local policy to require program participants to shop for the lowest book prices. In these cases, a local workforce development board or its service provider would, however, be expected to have procedures for reviewing invoices and requests to assure that book prices are not excessive. This is based on the following assumptions:

* Each participant’s textbook needs are treated as a separate unanticipated purchase because the specific textbook needs for each participant cannot be anticipated.
* The total dollar value of each participant’s individual textbook needs will fall within the [micro-purchase threshold](#definition_micropurchase_threshold).
* Prices are not expected to vary significantly among book vendors and participate choice will naturally result in distribution of purchases among multiple vendors.
* Requiring participants to demonstrate price reasonableness would add an unnecessary administrative burden on participants and create a potential barrier to participation.

Under the third of the three example scenarios listed in this Section—in which a workforce service provider might make a direct order of qualifying textbooks for a program participant—the service provider may make each purchase using micro-purchase procedures if the specific textbook needs can’t be anticipated with sufficient accuracy to procure a textbook vendor for the service provider’s aggregate textbook needs, and the purchase falls within the micro-purchase threshold. The standards for micro-purchase procedures are covered in [I.1 Procurement by Micro-purchase Procedures](#cI1_procurement_micropurchase_procedures), in this Publication. If, under the same circumstances, the purchase will exceed the micro-purchase threshold, each may be treated as a separate small purchase procurement. The standards for small purchase procedures are covered in [I.2 Procurement by Small Purchase Procedures](#cI2_procurement_small_purchase_procedure), in this Publication.

#### G.1.5.2 Scenario 2: Supportive Services

This Section, G.1.5.2 Scenario 2: Supportive Services, provides supplemental technical information or guidance. It is included for informational purposes.

Several TWC grant programs permit grant funds to be used to provide program participants with a variety of supportive services. The specific allowable services vary by program but include a range of support that includes work tools, scrubs, uniforms, work shoes, vehicle repairs, and eyeglasses. The specific details of each need vary by customer and program.

Additionally, purchase and payment policies vary according to circumstances. For example:

* To create a uniform learning or work environment, a training provider or employer might specify the exact item that a participant needs and/or where to purchase it; or
* Ease of access might cause a [grantee](#definition_grantee) to permit a participant to use a training provider’s bookstore for items provided by that bookstore that the participant needs in connection with training services received at that provider; or
* A grantee might procure one or more suppliers for specific needs.

When, a training provider or employer specifies the exact item and where to purchase it—such as to create a uniform learning or work environment—no procurement is required, but a brief note such as “item and supplier required by training provider” or “item and supplier required by employer” should be included as explanation for why no procurement occurred for that purchase. This might affect certain purchases of scrubs, work tools, and other items.

In other cases, there are no outside restrictions on which supplier to use, but use of a training provider’s bookstore provides the greatest ease of access for program participant’s receiving training services from that provider, and participants may have barriers that make it difficult to access other suppliers. As with the textbooks described in Scenario 1, a grantee might establish an account with the provider and receive periodic invoices for qualifying support that was authorized for a program participant. No procurement is required.

When neither of these two examples apply, it may be appropriate for the grantee to procure one or more suppliers for use by program participants. For example, it may be appropriate to procure one or more suppliers of a particular supportive service item for which need by multiple participants can be anticipated. In that case, the aggregate cost, for purposes of determining the applicable procurement threshold, would be the combined cost of those purchases. Alternatively, unanticipated purchases would be procured on a purchase-by-purchase basis, and the applicable procurement threshold would be determined accordingly. Refer to [G.1.3 Aggregate Dollar Limit](#cG1_3_aggregate_dollar_limit) and [G.1.4 Split & Sequential Purchases](#cG1_4_split_sequential_purchases), in this Publication, for related information.

#### G.1.5.3 Scenario 3: Office Supplies

This Section, G.1.5.3 Scenario 3: Office Supplies, provides supplemental technical information or guidance. It is included for informational purposes.

Almost every [grantee](#definition_grantee) will purchase office [supplies](#definition_supplies) with grant funds. (Some TWC grants awards are for specific limited purposes, such as [equipment](#definition_equipment) only, and do not include purchases of office supplies.)

Specific supply needs likely vary from purchase to purchase, with purchases of some items or types of items recurring and others being one-time occurrences. Grantees should consider the types of items purchased and the frequency. Grantees will determine the most practical way to group items for procurement purposes. For example, one entity might monitor the [aggregate cost](#definition_aggregatecost) of its combined office supply purchases, while others might purchase adequate quantities of different types of items to separately monitor groups of purchases, such as purchases of copier paper, for example. Refer to the discussion about definition “like” items and services in [G.1.3 Aggregate Dollar Limit](#cG1_3_aggregate_dollar_limit).

Consistent with the discussion of “aggregate cost” in G.1.3 Aggregate Dollar Limit, threshold compliance for supply purchases would be determined as follows:

* For a one-time purchase, aggregate cost is the total dollar value of that purchase
* For repeat purchases of “like” items, the need for which could not have been anticipated, aggregate cost determinations are applied on a purchase-by-purchase basis
* For repeat purchases of “like” items that were anticipated or could reasonably have been anticipated, aggregate cost is the total combined dollar value those purchases
* For [contracts](#definition_contract), aggregate cost means the total contract value, including any modifications that change the total contract value, renewals/option years, extensions and amendments.

A grantee is not required to procure a single supplier for all of its supply needs. Multiple suppliers may be used. For example, a grantee might procure a supplier for copier paper, and a different or the same supplier for general office supplies like writing utensils, notepads, staples, tape, etc. Grantee staff would then purchase the procured items through the specified supplier. Where a specific purchase need arises that was not procured, the grantee would separately consider the procurement needs for that item. For example, if the need arises for a new paper shredder or if the grantee decides it needs to acquire multiple paper shredders, the grantee would consider the appropriate procurement method for that need. It may be appropriate to perform a separate small purchase procurement for that purchase, or depending on the dollar value involved, a separate micro-purchase, or a formal procurement.

Refer also to [G.1.4 Split & Sequential Purchases](#cG1_4_split_sequential_purchases) and [G.2 Consolidating & Breaking Out Procurements](#cG2_consolidating_breakingout_purchases), in this Publication.

## G.2 Consolidating & Breaking Out Procurements

### G.2.1 Basic Standard\*

Policy:

[Grantees](#definition_grantee) should consider consolidating or breaking out procurements when doing so would enable the grantee to obtain a more economical purchase.

The UG and UGMS specify that consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase.

TWC also applies this requirement to grantee’s selection of [subgrantees (subrecipients)](#definition_subgrantee).

Reference:

[2 CFR § 200.318(d)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf); [UGMS, Part III, §\_\_.36(b)(4)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

Note: “Breaking out procurements” is not synonymous with approaches to split purchases to circumvent procurement thresholds. Refer to [G.1 Procurement Thresholds](#cG1_procurement_thresholds), in this Publication, especially [G.1.4 Split & Sequential Purchases](#cG1_4_split_sequential_purchases), for information about procurement thresholds and unacceptable procurement splits.

Refer to [G.2.2 Sample Consolidation & Break Out Scenarios](#cG2_2_sample_consolidation_scenarios) for examples of consolidating and breaking out procurements.

### G.2.2 Sample Consolidation & Break Out Scenarios

This Section, G.2.2 Sample Consolidation & Break Out Scenarios, provides supplemental technical information or guidance. It is included for informational purposes.

#### G.2.2.1 Consolidation Scenario 1

This Section, G.2.2.1 Consolidation Scenario 1, provides supplemental technical information or guidance. It is included for informational purposes.

A decision to consolidate procurements would involve [grantee](#definition_grantee) personnel considering the frequency and dollar amount of repeat purchases or purchases of similar items to determine whether the property or services could be acquired more efficiently or economically by consolidating the needs under a single procurement. For example, grantees routinely acquire office [supplies](#definition_supplies) for grant operations, making multiple purchases throughout the year. If the grantee conducts each purchase as a separate procurement, grantee personnel must obtain price or rate quotations for each purchase. If the decision were made to consolidate purchases, the grantee would procure one or more supply [contractors (vendors)](#definition_contractor) for the year using a procurement method appropriate to the dollar amount involved. Depending on the number of individual orders normally placed by the grantee, doing so has the potential to improve the efficiency of grantee operations by eliminating the need to obtain price or rate quotations for each order. In some instances, depending on the dollar amount involved, bulk purchasing might incentivize suppliers to offer purchase discounts. In this scenario, an opportunity to consolidate procurements might be identified by reviewing the grantee’s operating budget, self-monitoring of expenditure levels for purchases of like items, or an indication on or in connection with a purchase request which indicates that recurring purchases are anticipated.

#### G.2.2.2 Consolidation Scenario 2

This Section, G.2.2.2 Consolidation Scenario 2, provides supplemental technical information or guidance. It is included for informational purposes.

Another example of procurement consolidation could involve a scenario in which a [grantee](#definition_grantee) has multiple offices or locations and requires each office or location to conduct its own procurements. Consolidation, in this case, could refer to a process change in which the entity establishes a centralized procurement function (or transfers some or all the procurement responsibility from the various offices or locations to an existing centralized procurement office). The centralized procurement office would then conduct procurements on behalf of the specified offices and locations. In this scenario an opportunity to consolidate might be identified by a decision to conduct a cost-benefit analysis to weigh the options of each approach.

#### G.2.3.3 Break Out Scenarios

This Section, G.2.2.3 Break Out Scenarios, provides supplemental technical information or guidance. It is included for informational purposes.

A decision to break out procurements might be driven by an opportunity to promote participation among historically underutilized businesses. Another scenario in which breaking out procurements might be appropriate is if a specific component of a purchase is anticipated to be available at a more economical price if separately procured.

The UG and UGMS require a [grantee](#definition_grantee) to maintain records that are adequate to detail the history of procurement, which include, but are not necessarily limited to the rationale for the procurement method. Whatever the scenario, if breaking out a procurement, the grantee should include the written rationale for the decision in the procurement records. Refer to [Q.3 Procurement Records](#cQ3_procurement_records), in this Publication, for information about the UG and UGMS standard for procurement records.

# H. Acquisition Approaches

## H.1 Acquisition Approaches

### H.1.1 Overview

This Section, H.1.1 Overview, provides supplemental technical information or guidance. It is included for informational purposes.

[Grantees](#definition_grantee) should perform appropriate analysis to determine the acquisition approach that meets the needs for each acquisition and conforms to the procurement standards in the UG and UGMS.

As covered in [Q.3 Procurement Records](#cQ3_procurement_records), in this Publication, the UG and UGMS require grantees to maintain records sufficient to detail the history of a procurement—including rationale for the procurement method. Accordingly, unless it is apparent from the grantee’s written procedures, the dollar amount involved, or other evidence, grantees should include a written statement in the records for each procurement, which describes the rationale for the procurement approach used. This is especially important if the grantee deviated from its written procurement procedures, or if the decision considered unique circumstances specific to the procurement involved.

This Publication discusses the following acquisition approaches:

* [H.2 Existing Contract](#cH2_existing_contract)
* [H.3 Excess & Surplus Property and Other Used Property](#cH3_excess_surplus_property)
* [H.4 Purchasing Cooperatives & State Contracts](#cH4_purchasing_cooperatives)
* [H.5 Intergovernmental & Inter-Entity Agreements](#cH5_intergovernmental_contracts)
* [H.6 Procurement](#cH6_acquisition_procurement)

Additionally, [J. Special Considerations for Certain Purchases](#cJ0_special_purchases), in this Publication, covers special considerations involving [consulting services](#definition_consulting_services), [professional services](#definition_professionalservices), and legal services; insurance and related broker selection; [real property](#definition_realproperty) leases and related broker selection; and selected program activities and services.

### H.1.2 Sample Acquisition Approach Determination Steps

This Section, H.1.2 Sample Acquisition Approach Determination Steps, provides supplemental technical information or guidance. It is included for informational purposes.

Consistent with the State of Texas Procurement and Contract Management Guide for Texas state agencies, TWC emphasizes the importance of selecting an appropriate acquisition approach. The State of Texas Procurement and Contract Management Guide includes the following:

The importance of selecting the proper procurement method cannot be overstated. Particular care must be taken to ensure that the correct procurement method is identified early in the procurement process. If the incorrect procurement method is selected, the purchase will not result in best value to the State and will most likely be more expensive and less efficient than if the correct method was used, and, in the worst case, may result in a void [contract](#definition_contract) that must be re-solicited.

Similarly, a [grantee’s](#definition_grantee) selection of acquisition approach can impact the efficiency with which the acquisition is conducted and the ultimate contract price. As emphasized throughout this Publication, however, whatever approach is used must result in a procurement that conforms to the standards in the UG and UGMS. Refer to [C. Written Procurement Procedures](#cC0_written_procedures), in this Publication, for standards affecting grantees’ procurement procedures.

The following illustrates a sequence of steps that a grantee might use in the acquisition approach determination process. The approach of using a sequence of steps is modeled after a process in the State of Texas Procurement and Contract Management Guide for Texas state agencies, however, the steps were modified to more generally fit with the acquisition approaches described in this Publication. Grantees may further adapt the following sequence of steps or use a different approach for acquisition approach selection.

Step 1: Is the purchase need an emergency or matter of public exigency? If yes, refer to [I.5 Procurement by Noncompetitive Proposals](#cI5_proc_by_noncompetitive_proposals), in this Publication. If no, proceed to Step 2.

Step 2: Can the purchase be completed using state or federal surplus property? If yes, refer to [H.3 Acquisition: Excess & Surplus Property](#cH3_excess_surplus_property), in this Publication. If no, proceed to Step 3.

Step 3: Can the purchase be completed through an [existing contract](#definition_existing_contract), purchasing cooperative, or state contract? If yes, refer to [H.2 Acquisition: Existing Contract/Award](#cH2_existing_contract) or [H.4 Acquisition: Purchasing Cooperatives & State Contracts](#cH4_purchasing_cooperatives), in this Publication. If no, proceed to Step 4.

Step 4: Can the purchase be completed by contracting with another state agency or local government under the Texas Interagency Cooperation Act or Texas Interlocal Cooperation Act? If yes, refer to [H.5 Acquisition: Intergovernmental & Inter-Entity Agreements](#cH5_intergovernmental_contracts), in this Publication. If no, proceed to Step 5. (Note: For this purpose, “state agency” and “local government” have the meanings assigned by the referenced state statutes.)

Step 5: Is the purchase for [professional services](#definition_professionalservices), [consulting services](#definition_consulting_services), or legal services; insurance; or a lease for [real property](#definition_realproperty)? If yes, refer to [J. Special Considerations for Certain Purchases](#cJ0_special_purchases), in this Publication. If no, proceed to Step 6.

Step 6: Will the purchase be completed through procurement by micro-purchase procedures, small purchase procedures, sealed bids (formal advertising), competitive proposals, or noncompetitive proposals? Refer to [I. Procurement Methods](#cI0_procurement_methods), in this Publication.

As noted above, some of the information in this Section, H.1.2 Sample Acquisition Approach Determination Steps, is based on information in the State of Texas Procurement and Contract Management Guide. Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.

## H.2 Acquisition: Existing Contract/Award\*

This Section, H.2 Acquisition: Existing Contract/Award, provides additional compliance detail for [C. Written Procurement Procedures](#cC0_written_procedures), [E.1 Full & Open Competition](#cE1_full_and_open_competition), [H.5 Acquisition: Intergovernmental & Inter-Entity Agreements](#cH5_intergovernmental_contracts), and [Q.3 Procurement Records](#cQ3_procurement_records).

As used in this Section, “[existing contract/subgrant](#definition_existing_contract)” has the meaning defined in the Glossary to this Publication.

[Grantees](#definition_grantee) occasionally ask TWC about the permissibility of using an existing contract or subgrant in lieu of conducting a new procurement. Conformance to the UG and UGMS procurement standards dictates that grantees adhere to the following if using an existing contract or subgrant as an alternative to conducting a new procurement:

* The use must conform to the grantee’s documented procurement procedures, which reflect applicable state, local, and tribal laws and regulations, and result in a procurement that conforms to applicable federal law and the standards in the UG and UGMS.
* Accordingly, the original procurement of the existing contract or subgrant must have been conducted in a manner that conforms to the procurement standards in the UG and UGMS.
* The existing contract or subgrant must have an equivalency of subject matter to the proposed use and allow for the additional use in a manner that is consistent with the standard for full and open competition.
* The procurement records for the new purchase must reflect the grantee’s rationale for using the existing contract or subgrant.
* The UG and UGMS are silent on, and so do not explicitly prohibit use of, existing contracts or subgrants as an alternative to conducting a new procurement.
* The UG and UGMS encourage use of intergovernmental and inter-entity agreements, subject to the limits described in H.5 Acquisition: Intergovernmental & Inter-Entity Agreements. Use of an existing contract or subgrant offers the administrative efficiency associated with not conducting a new procurement.
* The UG and UGMS require each grantee to have written procurement procedures which reflect applicable state, local, and tribal laws and regulations. Accordingly, a grantee’s procedures would need to provide for the use of existing contracts or subgrants. If a law or regulation that governs a grantee’s organization, or a grantee’s own procurement procedures prevent a grantee from using existing contracts or subgrants for its other acquisitions, such use is also not permissible under TWC grant awards.
* The UG and UGMS require that the grantee’s procedures result in procurements that conform to the UG and UGMS. Accordingly, the grantee’s procedures are not permitted to circumvent the UG and UGMS standards, meaning that the existing contract or subgrant would need to have been procured in a manner that conforms to the UG and UGMS procurement standards.
* The UG and UGMS require procurements to be conducted in a manner providing for full and open competition. Awarding additional work to an existing contractor (vendor) or subgrantee (subrecipient) would circumvent the competition standard if the existing contract or subgrant does not have equivalency of subject matter. The standard would also be circumvented if the existing contract or subgrant does not provide for the additional work, and information about the opportunity would have been likely to impact a potential offerors decision to compete for the contract or subgrant had they been aware of it when the procurement for the existing contract or subgrant occurred.
* Note: A grantee’s determination as to whether the existing contract or subgrant meets these conditions requires interpretation of the original procurement document and the existing contract or subgrant. Grantees are encouraged to seek the advice of their legal counsel, as appropriate, in making such determination.
* The UG and UGMS specifically require that procurement records include the rationale for the method of procurement.

If a grantee does use an existing contract or subgrant to acquire property or services, or deliver program services under a [TWC grant award](#definition_twc_grant_award), TWC may consider information such as the following to determine whether the acquisition conforms to UG and UGMS standards:

* Whether the grantee’s procurement procedures ordinarily permit or prohibit use of existing contracts or subgrants
* Documentation demonstrating the grantee’s determination that the existing contract or subgrant was originally procured in a manner that conforms to the UG and UGMS
* If the existing contract or subgrant was made by an entity other than the grantee, written evidence that the contracting entity, and if appropriate, the [contractor (vendor)](#definition_contractor) authorized the grantee to use the contract
* Documented communications with the grantee’s legal counsel, if any
* Whether the grantee’s purchase falls between the start and end dates of the existing contract or subgrant
* If the duration of the contract or subgrant was extended to be active for a sufficient length of time to complete the purchase, whether the original contract or subgrant provided for extension, whether the existing contract or award was active when the extension was made, and whether the extension was executed before the new acquisition occurred
* A determination by the grantee that the new purchase falls within the form, function, and utility requirements of the existing contract or subgrant (equivalency of subject matter), and if not, the written rationale for a determination that the change in scope would not have impacted an entity’s decision to compete for the original contract or subgrant (this does not include minor variations, such as color, if the variation would have had no significant effect on the original award decision, an entity’s decision to compete or not compete for the contract or subgrant, or scope of work)
* A determination that the price available under the existing contract or subgrant is reasonable for the new work
* Evidence that pricing concessions were pursued if the acquisition materially increases the quantity of property or services that will be acquired under the existing contract
* If the existing contract or subgrant was procured using [micro-purchase](#definition_micropurchase) procedures or small purchase procedures, and the new acquisition will cause total acquisitions under the contract or subgrant to exceed the respective procurement threshold, use of the existing contract or subgrant is not permitted
* Evidence that the grantee considered the contractor (vendor) or /[subgrantee (subrecipient)](#definition_subgrantee) performance under the existing contract or subgrant—such as history of non-performance, late delivery, poor quality, etc.—before adding the new work to that contract or subgrant

In making its oversight determination as to the grantee’s compliance with the procurement standards in the UG and UGMS, TWC may also consider additional relevant circumstances, as appropriate.

## H.3 Acquisition: Excess & Surplus Property\*

Policy:

[Grantees](#definition_grantee) are encouraged to use federal and state surplus property in lieu of purchasing new property whenever such use is feasible and reduces project costs.

UG and UGMS encourage grantees to use federal and state excess and surplus property in lieu of purchasing new [equipment](#definition_equipment) and property whenever such use is feasible and reduces project costs. The [Texas Facilities Commission](http://www.tfc.state.tx.us/divisions/supportserv/) (TFC) is the state agency that administers the federal and state excess and surplus property program in Texas. Refer to [H.3.1 Texas Federal and State Excess and Surplus Property Program](#cH3_1_TFC_surplus_program), in this Publication, for additional information.

Reference:

[2 C.F.R. § 200.318(f)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf); [UGMS, Part III, §\_\_.36(b)(6)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

### H.3.1 Texas Federal and State Excess and Surplus Property Program

This Section, H.3.1 Texas Federal and State Excess and Surplus Property Program, provides supplemental technical information or guidance. It is included for informational purposes.

The Texas Facilities Commission (TFC) manages the disposition of both salvage and surplus [personal property](#definition_personalproperty) from state agencies, and property that has been donated to the state by federal programs. Visit [TFC’s website](http://www.tfc.state.tx.us/divisions/supportserv/) for details and inventory. The program is governed by [Texas Government Code, Chapter 2175—Surplus and Salvage Property](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2175.htm).

Eligibility to participate in TFC’s surplus property program is governed by state law. As of this printing, entities eligible for the TFC programs are as follows:

* Federal excess and surplus property inventories are available to state agencies, political subdivisions, some nonprofit organizations and Small Business Administration (8a) program participants
* State excess and surplus property inventories are available to state agencies, political subdivisions, some [assistance organizations](#definition_assistanceorganization) (including [local workforce development boards](#definition_board)) and the general public (limited) (for this purpose, "assistance organization has the meaning defined at [Texas Government Code § 2175.001(1)](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2175.htm#2175.001))

Eligibility requirements can change over time. The preceding list is included in this Publication for informational purposes. Refer to TFC or its website for current eligibility requirements. TWC has no authority or role in determining an entities authority to participate in TFC’s surplus property program.

Generally, grantees that acquire excess or surplus property from TFC are solely responsible for maintaining, transporting and disposing of such property. The grantee must remove state property tags, if any, when it takes possession of the property.

TWC reminds grantees that, to the extent that a grantee uses grant funds to acquire excess or surplus property, such property is subject to the requirements in [Chapter 13: Property](https://twc.texas.gov/business/fmgc/financial-manual-grants-contracts-chapter-13-property.html), including disposition requirements that apply when the grantee no longer needs the property.

## H.4 Acquisition: Purchasing Cooperatives & State Contracts

### H.4.1 Purchasing Cooperatives & State Contracts\*

This Section, H.4.1 Purchasing Cooperatives & State Contracts, provides additional compliance detail for [H.5 Acquisition: Intergovernmental & Inter-Entity Agreements](#cH5_intergovernmental_contracts).

[Grantees](#definition_grantee) are encouraged to join purchasing cooperatives.

The UG and UGMS do not explicitly address cooperative purchasing programs but, as covered in H.5 Acquisition: Intergovernmental & Inter-Entity Agreements, do address intergovernmental and inter-entity agreements. To foster greater economy and efficiency, the UG and UGMS encourages grantees to enter intergovernmental agreements for the procurement (or use) of common goods or services. UG also encourages grantees to enter inter-entity agreements for the same purpose. This includes participation in purchasing cooperatives.

TWC considers purchases that are made through a purchasing cooperative or purchasing network to satisfy the procurement requirements in UG, UGMS, and this Publication if the following two conditions are met:

* The grantee is eligible to participate in the cooperative or network under the rules that govern that specific cooperative or network
* The procurement procedures used by the cooperative or network satisfy the procurement requirements in UG, UGMS, and this Publication

Where a grantee determines that it has met these requirements, TWC requires that the grantee retain documentation that demonstrates the grantee’s assessment of the purchasing procedures used by the cooperative or network.

In making its assessment, TWC recommends that the grantee contact the cooperative or network directly to discuss and gain an understanding of the procurement procedures used, rather than rely solely on a description provided on the Internet or other literature. The assessment should be documented in writing in the grantee’s procurement records.

The requirement to demonstrate the grantee’s assessment of the purchasing procedures used by the cooperative or network does not apply for the grantee’s participation in any of the following:

* Texas SmartBuy Membership Program (formerly State of Texas Cooperative (CO-OP) Purchasing Program)
* Texas Multiple Award Schedule (TXMAS) Program
* Texas Department of Information Resources (DIR) State Term Contracts

This Publication specifically addresses grantee use of these three State purchasing options because TWC is familiar with the State’s procurement procedures. Some grantees will not be eligible to use these [contracts](#definition_contract). Eligibility requirements for these programs vary and can change over time. Each of these programs is discussed further in the following paragraphs.

### H.4.2 Texas SmartBuy Membership Program

This Section, H.4.2 Texas SmartBuy Membership Program, provides supplemental technical information or guidance. It is included for informational purposes.

Members of the Texas SmartBuy Membership Program (formerly the State of Texas Cooperative (CO-OP) Purchasing Program) gain access to state term contracts, TXMAS contracts and piggyback contracts. Using these services through the Texas SmartBuy Membership Program meets competitive bidding requirements. For TWC monitoring purposes, documentation of procurements must include identification of the contract number under which a good or service is purchased, the internal requisition or purchase request and the purchase order.

Membership is available to eligible entities that apply and pay an annual subscription fee. Eligible entities include, but are not limited to [local workforce development boards](#definition_board) and certified Texas Rising Star child care providers.

Information about the Texas SmartBuy Membership Program can be found on the [Texas State Comptroller of Public Accounts website](https://comptroller.texas.gov/) and in [Texas Local Government Code, § 271.081](http://www.statutes.legis.state.tx.us/Docs/LG/htm/LG.271.htm#271.081).

### H.4.3 Texas Multiple Award Schedule Program

This Section, H.4.3 Texas Multiple Award Schedule Program, provides supplemental technical information or guidance. It is included for informational purposes.

TXMAS contracts have been developed from [contracts](#definition_contract) awarded by the federal government or other governmental entities. This program adapts already competitively awarded contracts to the procurement needs of the State of Texas. Entities eligible for the TXMAS program include state agencies and members of the Texas SmartBuy Membership Program. Refer to [H.4.2 Texas SmartBuy Membership Program](#cH4_2_smartbuy_membership_pgm), in this Publication, for related information.

For more information about the program and eligible entities, refer to the [Texas Multiple Award Schedule Program](https://comptroller.texas.gov/purchasing/contracts/txmas/) information on the Texas State Comptroller of Public Accounts website, and to [Texas Government Code § 2155.502](http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.2155.htm#2155.502), [Texas Government Code § 2155.504](http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.2155.htm#2155.504), and [Local Government Code § 271.101](http://www.statutes.legis.state.tx.us/Docs/LG/htm/LG.271.htm#271.101).

### H.4.4 Department of Information Resources Contracts & Services

This Section, H.4.4 Department of Information Resources Contracts & Services, provides supplemental technical information or guidance. It is included for informational purposes.

Texas Department of Information Resources (DIR) [contracts](#definition_contract) and services provide a wide variety of information technology products and services through cooperative state term contracts and other programs. Eligibility varies by program or service.

Refer to the [DIR website](https://dir.texas.gov/) for more information about these contracts and services.

## H.5 Acquisition: Intergovernmental & Inter-Entity Agreements\*

Policy:

To foster greater economy and efficiency, and in accordance with efforts to promote cost effective use of shared services across the Federal Government, [grantees](#definition_grantee) are encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services. Such actions must adhere to the UG and UGMS procurement standards, including standards for full and open competition.

To foster greater economy and efficiency, UG and UGMS encourage grantees to enter into state and local intergovernmental agreements where appropriate for procurement or use of common or shared goods and services. The UG also encourages inter-entity agreements for the same purpose. This provision permits entities to enter agreements for the joint procurement of property and services, and for the use of [contracts](#definition_contract) for property and services procured by other entities, provided that in either case, the procurement conforms to the procurement standards in the UG and UGMS. This includes, for example, purchases resulting from joint procurements, membership in purchasing cooperatives, and use of [existing contracts](#definition_existing_contract) provided that the grantee is eligible to use the contract and the contract was procured in conformance with the procurement standards in the UG and UGMS.

This provision does not permit grantees to forego competition and instead enter inter-entity agreements or intergovernmental agreements to acquire property or services for the grantee’s performance of a grant award in lieu of procurement. For example, this provision does not permit a grantee to forego procurement to contract directly with another entity for a [real property](#definition_realproperty) lease. The guidance in this Section, H.5 Acquisition: Intergovernmental & Inter-Entity Agreements, is based on a [federal awarding agency](#definition_federalawardingagency) response to a TWC-posed question on the topic.

Note: Some entities may receive an interlocal contract or interagency contract from TWC. To be clear, pursuant to the UG and UGMS standards governing the procurement procedures of [States](#definition_state), the limitation above does not preclude the State of Texas from using intergovernmental agreements under the Texas Interlocal Cooperation Act (Texas Government Code, Chapter 791) and Texas Interagency Cooperation Act (Texas Government Code, Chapter 771) to acquire (or lease) property and services in accordance with state law. Accordingly, the provision does not preclude TWC from executing interlocal contracts and interagency contracts in lieu of procurement, provided that it does so in accordance with State law and TWC procedures.

Refer also to [H.4 Acquisition: Purchasing Cooperatives & State Contracts](#cH4_purchasing_cooperatives), in this Publication, relating to the use of inter-entity and intergovernmental agreements for that purpose. Refer also to [H.2 Acquisition: Existing Contract/Award](#cH2_existing_contract), in this Publication. Refer to [C. Written Procurement Procedures](#cC0_written_procedures), in this Publication, which address standards governing procurement procedures of [States](#definition_state) and other grantees. Refer to [E.1 Full & Open Competition](#cE1_full_and_open_competition), in this Publication, addressing procurement standards for competition in all [procurement transactions](#definition_procurement_transaction).

Reference:

[2 C.F.R. § 200.318(e)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf) and [UGMS, Part III, §\_\_.36(b)(5)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf) (inter-entity and intergovernmental entities); [Texas Government Code, Chapter 771](http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.771.htm); [Texas Government Code, Chapter 791](http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.791.htm)

## H.6 Acquisition: Procurement\*

This Section, H.6 Acquisition: Procurement, provides additional compliance detail for [I. Procurement Methods](#cI0_procurement_methods), in this Publication.

Where the acquisition need is not met by one of the acquisition approaches described elsewhere in [H. Acquisition Approaches](#cH0_acquisition_approaches), in this Publication, the UG and UGMS require that grantees use one of the following methods of procurement: procurement by micro-purchases, small purchases, sealed bids (formal advertising), competitive proposals, or noncompetitive proposals. TWC applies this for both [contracts](#definition_contract) and [subgrants](#definition_subgrant).

Refer to I. Procurement Methods, in this Publication, for information about these procurement methods.

# I. Procurement Methods

## I.1 Procurement by Micro-purchase Procedures

### I.1.1 Background

This Section, I.1.1 Background, provides supplemental technical information or guidance. It is included for informational purposes.

Recognizing micro-purchase procedures as a set of small purchase procedures, TWC first incorporated parameters for the use of micro-purchase procedures into the FMGC on March 1, 2013, ahead of the UG’s first publication on December 26, 2013. (Refer to [Appendix L: Changes](https://twc.texas.gov/financial-manual-grants-contracts-appendix-l-changes), in the FMGC.) As then, TWC applies that guidance to both [federal awards](#definition_federal_award) and [state awards](#definition_stateaward) that it makes. The TWC guidance has since been updated to conform more closely with the UG, such as by now restricting use of micro-purchase procedures to [supplies](#definition_supplies) and services only. This Publication also provides formal additional compliance guidance for TWC [grantees](#definition_grantee).

### I.1.2 Basic Standard\*

Policy:

[Grantee](#definition_grantee) procedures may permit procurement by micro-purchase procedures for purchases of [supplies](#supplies) and services, the [aggregate cost](#definition_aggregatecost) of which will not exceed the [micro-purchase threshold](#definition_micropurchase_threshold). Micro-purchases may be awarded without soliciting competitive quotations if the grantee considers the price to be reasonable. However, grantees must distribute micro-purchases equitably among [qualified suppliers](#definition_qualified_sources), to the extent practicable.

The UG formally recognizes procurement by micro-purchase procedures as one of five (5) procurement methods available to grantees of [federal awards](#definition_federal_award) (the other four methods being procurement by small purchase procedures, sealed bids (formal advertising), competitive proposals, and noncompetitive proposals). As described by the UG, micro-purchase procedures comprise a subset of small purchase procedures that expedite the lowest dollar small purchase transactions for supplies and services in a manner that minimizes the associated administrative burden and cost of conducting the procurement.

The UG describes procurement by micro-purchase procedures as the acquisition of supplies or services, the aggregate cost of which does not exceed the [micro-purchase threshold](#definition_micropurchase_threshold). UG provides that micro-purchases may be made without soliciting competitive quotations if the grantee considers the price reasonable, but requires that to the extent practicable, grantees must distribute micro-purchases equitably among [qualified suppliers](#definition_qualified_sources).

If the grantee is unable to determine price reasonableness without obtaining competitive quotations, competitive quotations must be obtained.

While the UGMS is silent on micro-purchase procedures, TWC also permits use of micro-purchase procedures under [state awards](#definition_stateaward) that it makes.

Reference:

[2 C.F.R. § 200.67](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-67.pdf) (micro-purchase (definition); [2 C.F.R. § 200.320(a)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-320.pdf) (procurement method)

### I.1.3 Micro-purchase Threshold\*

This Section, I.1.3 Micro-purchase Threshold, provides additional compliance detail for [I.1.2 Basic Standard](#cI1_2_micropurchase_basic_standard).

The [micro-purchase threshold](#definition_micropurchase_threshold) is defined in the Glossary to this Publication. Refer to [G.1 Procurement Thresholds](#cG1_procurement_thresholds), in this Publication, for information about adherence to the micro-purchase threshold, including discussion about “aggregate cost.”

### I.1.4 Supplies and Services\*

This Section, I.1.4 Supplies and Services, provides additional compliance detail for [I.1.2 Basic Standard](#cI1_2_micropurchase_basic_standard).

The UG specifies use of [micro-purchase](#definition_micropurchase) procedures for purchases of [supplies](#definition_supplies) and services that adhere to the [micro-purchase threshold](#definition_micropurchase_threshold). The restriction to supplies and services precludes use of micro-purchase procedures to acquire [equipment](#definition_equipment), [intangible personal property](#definition_intangibleproperty) (including insurance policies and software licenses), lease or rental of [real property](#definition_real_property), and any other purchase that is not a supply or service.

### I.1.5 Price Reasonableness\*

This Section, I.1.5 Price Reasonableness, provides additional compliance detail for [I.1.2 Basic Standard](#cI1_2_micropurchase_basic_standard).

As referenced in I.1.2 Basic Standard, in this Publication, the UG establishes that purchases made by [micro-purchase](#definition_micropurchase) procedures may be conducted without soliciting competitive quotations if the [grantee](#definition_grantee) considers the price to be reasonable. If price reasonableness cannot be determined without soliciting competitive quotations, then competitive quotations must be solicited. If competitive quotations will be solicited, the standards for conducting procurement by small purchase procedures should be followed.

Soliciting competitive quotations refers to a process of actively requesting quotes from suppliers, whether by phone, fax, solicitation document, or any other method. By contrast, obtaining prices from catalogs, the Internet, sales circulars, or by visiting a brick-and-mortar location, rather than by requesting a supplier to provide a quote does not constitute a process of soliciting competitive quotations (unless the supplier referred the grantee to the suppliers catalog, Internet page, etc., in response to the grantee’s request for a quote from that supplier).

The UG does not prescribe how a grantee is to determine price reasonableness. Ultimately, it will be the grantee’s written procurement procedures that define the steps that its organization takes to assure that a price is reasonable when using micro-purchase procedures. The content in [I.1.5.1 Purchase-by-Purchase Comparison](#cI1_5_1_micropurchase_price_comparison), [I.1.5.2 Annual Price Comparison](#cI1_5_2_micropurchase_annual_comparison), and [I.1.5.3 Research, Experience, Prior Purchases & Other Information](#cI1_5_3_mciropurchase_research_etc), in this Publication, describe several recognized approaches. A grantee may use a combination of approaches depending on the purchase or dollar value involved. A grantee’s use of a different approach from those described in this Publication is permissible provided that the approach can be reasonably expected to result in a reasonable price.

#### I.1.5.1 Purchase-by-Purchase Price Comparison

This Section, I.1.5.1 Purchase-by-Purchase Price Comparison, provides supplemental technical information or guidance. It is included for informational purposes.

One of TWC’s [federal awarding agencies](#definition_federalawardingagency) has indicated price comparison as a preferred approach for considering whether a price is reasonable when using [micro-purchase](#definition_micropurchase) procedures. This approach would involve a [grantee’s](#definition_grantee) conduct of an informal comparison of catalog, Internet, or other readily available pricing sources. Under this approach, comparison from a minimum of three [qualified suppliers](#definition_qualified_sources) is recommended, but comparison of two suppliers would also be acceptable if the grantee is able to determine whether the price is reasonable. When selecting a supplier on the basis of a purchase-by-purchase price comparison, the supporting documentation for the purchase need not identify the suppliers compared or include copies or a matrix of the prices compared, provided that the grantee’s written procedures instruct personnel how to conduct the price comparison and require personnel approving the purchase request to scrutinize whether the price does in fact appear reasonable for the proposed purchase.

While identified as a preferred approach by one of TWC’s federal awarding agencies, the UG does not mandate any particular approach for how a grantee determines whether a price is reasonable. For that reason, this Publication considers the description to be informational.

#### I.1.5.2 Annual Price Comparison

This Section, I.1.5.2 Annual Price Comparison, provides supplemental technical information or guidance. It is included for informational purposes.

Another approach for determining price reasonableness of a [micro-purchase](#definition_micropurchase) is an annual price comparison. A representative of one of TWC’s federal awarding agencies informally described this approach to TWC.

To illustrate, if conducting an annual price comparison for [supplies](#definition_supplies), the process would entail the [grantee](#definition_grantee) identifying supplies that it frequently purchases or anticipates purchasing during a specified period, such as the grantee’s twelve (12) month budget year, provided that the purchases of each item will not individually exceed the [micro-purchase threshold](#definition_micropurchase_threshold). After developing the list, the grantee would conduct an informal price comparison for each of the listed items as they are priced at that point in time. Because each of the items listed must fall within the micro-purchase threshold, the price comparison for each of the items may be based on catalog, Internet, or other readily available price sources.

As with the purchase-by-purchase price comparison described in [I.1.5.1 Purchase-by-Purchase Price Comparison](#cI1_5_1_micropurchase_price_comparison), TWC encourages comparison of prices from a minimum of three suppliers for each item listed, although comparison of only two suppliers would also be acceptable if the grantee is able to determine whether the price is reasonable. It is not necessary that every supplier be able to provide all items on the list, but prices from multiple suppliers should be compared for each item.

In the example described to TWC, the results would be documented on a matrix that lists each of the supplies for which pricing was compared, the names of the suppliers compared, and the price identified for each supplier at that point-in-time. The lowest price supplier for a specific item would be designated as the supplier for that item for the twelve (12) months covered by that comparison. Price reasonableness for purchases of items not on the list would be determined on a purchase-by-purchase basis.

Footnotes to the matrix or the grantee’s written procedures could describe the methodology used to obtain the prices. Provided that the footnotes or methodology describes how the prices were obtained, copies of the source documents for the prices (e.g. copies of catalog pages, Internet printouts, etc.) do not need to be retained in the grantee’s procurement files.

Under this approach, the comparison would be performed and documented at least annually, with items being added to or removed from the list, as appropriate.

TWC suggests also considering the following additional points in connection with this approach. First, only items for which the price can be anticipated to remain stable over the course of the year (with minimal price fluctuation) should be surveyed. Items which are known to fluctuate significantly in price during the year, and items about which the grantee is uncertain about price stability should not be included on the list. The price reasonableness of these items should instead be determined on a purchase-by-purchase basis as the need for the item arises. Additionally, because pricing is compared at a single point in time, the price comparison should be based on the supplier’s regular prices. Price comparisons for the listed items should not be based on time-limited sales pricing that may not be available when the need to make the purchase arises. Third, instances can arise in which the supplier selected for an item is out of stock of that item when the grantee’s actual purchase need arises. The grantee’s procedures need to address whether it will use the next lowest priced supplier from its comparison, or instead require a separate purchase-by-purchase price comparison for that individual purchase. Fourth, when conducting the comparisons, care should be taken to consider shipping costs (if applicable) and price discounts that the grantee will take advantage of during the year, as such amounts influence the actual price paid by the grantee.

#### I.1.5.3 Research, Experience, Prior Purchases & Other Information

This Section, I.1.5.3 Research, Experience, Prior Purchases & Other Information, provides supplemental technical information or guidance. It is included for informational purposes.

While the approaches described in [I.1.5.1 Purchase-by-Purchase Price Comparison](#cI1_5_1_micropurchase_price_comparison) and [I.1.5.2 Annual Price Comparison](#cI1_5_2_micropurchase_annual_comparison), in this Publication, use price comparisons to make price reasonableness determinations, the UG does not mandate that price reasonableness be based on price comparison. A third approach to determining whether a price is reasonable when making [micro-purchases](#definition_micropurchase) is by research, experience, prior purchases or consideration of other information.

When making a price reasonableness determination based on research, experience, prior purchase history, or other information, the goal is not to identify the lowest priced supplier, but rather to determine whether the price of the supplier that was selected is consistent with market prices. No cost comparison documentation is required to be retained under this approach. As when determining price reasonableness by making informal price comparisons, [grantees](#definition_grantee) are not required to retain copies of the research, experience, purchase history, or other information on which the price reasonableness determination is based, if its written procedures describe the approach, and require personnel who approve the purchase to scrutinize price reasonableness. Price determinations based on this approach are to be conducted on a purchase-by-purchase basis.

### I.1.6 Equitable Distribution Among Suppliers\*

This Section, I.1.6 Equitable Distribution Among Suppliers, provides additional compliance detail for [I.1.2 Basic Standard](#cI1_2_micropurchase_basic_standard).

The UG requires that [micro-purchases](#definition_micropurchase) be distributed equitably among [qualified suppliers](#definition_qualified_sources), to the extent practicable.

If basing selection on a price comparison, this distribution requirement is superseded by the more restrictive, lowest-price determination made by that comparison. However, when determining price reasonableness based on price comparison, and comparing prices of only a few suppliers when more suppliers exist, [grantees](#definition_grantee) should have procedures for rotating price comparisons among suppliers, rather than always comparing prices from the same group of suppliers.

Similarly, if two or more suppliers are known to offer a supply or service at the same rate, COFAR FAQ Item .320-1 applies this requirement by explaining that purchases should be rotated among all suppliers. Practically speaking, this would apply to determinations that are made on a purchase-by-purchase basis, or when an annual price comparison showed the prices of the identified suppliers to be equal.

This requirement is also important to remember when the basis for determining price reasonableness is not based on lowest price as determined by a cost comparison, such as when determining price reasonableness based on research, experience, prior purchases, or other information.

### I.1.7 Other Applicable Procurement Standards\*

This Section, I.1.7 Other Applicable Procurement Standards, provides additional compliance detail for [I.1.2 Basic Standard](#cI1_2_micropurchase_basic_standard).

The UG does not exempt [micro-purchase](#definition_micropurchase) procedures from adherence to other UG procurement standards. For example:

* [Grantees](#definition_grantee) are required to have written procurement procedures.
* The purchase must be necessary and not duplicative.
* Purchases cannot be made from a supplier if a real conflict of interest or [apparent conflict of interest](#definition_apparentconflictofinterest) would exist.
* Purchases cannot be made from a supplier that is debarred, suspended, or otherwise ineligible under the federal System for Award Management (SAM) or Texas debarment list.
* Appropriate documentation must be retained in the procurement records.
* Any protests, disputes, or other issues arising from the procurement are the responsibility of the grantee to settle in accordance with good administrative practice and sound business judgement.

For grant awards that require compliance with the federal Buy American Act, compliance with the Buy American Act does not apply to purchases that fall within the micro-purchase threshold, as defined for purpose of that Act, unless otherwise required by the grant award or the requirements referenced therein.

Refer to [C. Written Procurement Procedures](#cC0_written_procedures), [D.3 Conflicts of Interest](#cD3_conflicts_of_interest), [E.3 Buy American Act & Similar Laws](#cE3_buy_american_act), [F.2 Avoid Unnecessary & Duplicative Purchases](#cF2_duplicative_purchases), [P.2 Suspension & Debarment](#cP2_suspension_debarment), [Q.1 Protests & Settlement of Other Issues](#cQ1_protests_disputes_settlements), and [Q.3 Procurement Records](#cQ3_procurement_records), in this Publication, for information related to the above topics.

### I.1.8 Written Procurement Procedures (Micro-Purchases)

This Section, I.1.8 Written Procurement Procedures (Micro-Purchases), provides supplemental technical information or guidance. It is included for informational purposes.

At a minimum, [grantees](#definition_grantee) are encouraged to address the following in their written procurement procedures for making purchases with [micro-purchase](#definition_micropurchase) procedures:

* Restrict micro-purchase procedures to [supplies](#definition_supplies) and services only, and describe other restrictions imposed by the grantee’s organization as to the type of purchases that can be made with micro-purchase procedures, if any
* Describe the method to be used by grantee personnel to determine the price reasonableness of supply and service micro-purchases
* When price comparisons will be conducted, specifying the sources from which prices will be compared, such as catalogs, sales circulars, and the Internet
* Requiring solicitation of competitive quotations if price reasonableness cannot be determined by less formal methods
* Requiring the personnel responsible for approving the purchase request to scrutinize the reasonableness of the price of the selected supplier as part of their review, and by recognizing that the approver’s signature indicates concurrence that the price is reasonable, and that the purchase is necessary
* Describing how purchases will be equitably distributed among suppliers, consistent with the information in [I.1 Acquisition: Procurement by Micro-Purchase Procedures](#cI1_procurement_micropurchase_procedures), in this Publication

## I.2 Procurement by Small Purchase Procedures

### I.2.1 Basic Standard\*

Policy:

[Grantees](#definition_grantee) may permit procurement by small purchase procedures for relatively simple purchases of services, [supplies](#definition_supplies) or other property (tangible and intangible) that do not cost more than the [simplified acquisition threshold](#definition_simplified_acq_threshold) in the aggregate. Small purchases may be made with informal procurement methods that obtain price or rate quotations (without public advertisement) from an adequate number of [qualified sources](#definition_qualified_sources).

The UG and UGMS describe small purchase procedures as those relatively simple and informal procurement methods for securing services, supplies or other property that do not cost more than the simplified acquisition threshold in the aggregate. When small purchase procedures are used, the UG and UGMS require that price or rate quotations must be obtained from an adequate number of qualified sources.

Refer to [I.2.2 Simplified Acquisition Threshold](#cI2_2_spp_threshold), [I.2.3 Informal Procurement Methods](#cI2_3_spp_methods), [I.2.4 Adequate Number of Qualified Sources](#cI2_4_spp_qualified_sources), [I.2.5 Noncompetitive Small Purchases](#cI2_5_spp_noncompetitive), [I.2.6 Evaluation Factors (Small Purchases)](#cI2_6_spp_evaluation_factors), and [I.2.7 Documentation (Small Purchases)](#cI2_7_spp_documentation), in this Publication, for additional compliance detail and other information.

Reference:

[2 C.F.R. § 200.320(b)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-320.pdf); [UGMS, Part III, §\_\_.36(d)(1)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

### I.2.2 Simplified Acquisition Threshold\*

This Section, I.1.3 Micro-purchase Threshold, provides additional compliance detail for [I.2.1 Basic Standard](#cI2_1_spp_basic_standard).

The simplified acquisition threshold is defined in the Glossary to this Publication. Refer to [G.1 Procurement Thresholds](#cG1_procurement_thresholds), in this Publication, for information about adherence to the [simplified acquisition threshold](#definition_simplified_acq_threshold), including discussion about “aggregate cost.”

### I.2.3 Informal Procurement Methods\*

This Section, I.2.3 Informal Procurement Methods, provides additional compliance detail for [I.2.1 Basic Standard](#cI2_1_spp_basic_standard).

Informal procurement methods for conducting procurement by small purchase procedures include oral solicitation (such as phone quotes), informal written requests for quotes, and use of a written solicitation document, such as a Request for Quotations. Quotations may also be obtained more informally, such as from catalogs and the Internet, for example when contacting the supplier directly is not anticipated to result in different pricing.

A [grantee’s](#definition_grantee) procurement procedures will determine which informal method a grantee uses and when. For example, a grantee’s procedures might specify methods to use for additional dollar thresholds established by the grantee or other governing statutes or regulations affecting the grantee’s procurements. Additionally, grantees may conduct competitive procurements that fall between the [micro-purchase threshold](#definition_micropurchase_threshold) and [simplified acquisition threshold](#definition_simplified_acq_threshold) by sealed bids (formal advertising) or competitive proposals.

### I.2.4 Adequate Number of Qualified Sources\*

This Section, I.2.4 Adequate Number of Qualified Sources provides additional compliance detail for [I.2.1 Basic Standard](#cI2_1_spp_basic_standard).

The UG and UGMS require that [grantees](#definition_grantee) obtain quotations from an “adequate number of [qualified sources](#definition_qualified_sources).”

“Adequate number of qualified sources” refers to some number of qualified sources that is greater than one (as defined by a grantee’s procurement procedures). As reflected in COFAR FAQ Item .320-1, the UG “leaves the discretion of the non-Federal entity written policy to determine the ‘adequate’ number of qualified sources (i.e., any number greater than one).” Similarly, for [state awards](#definition_stateaward) that TWC makes, the UGMS does not prescribe a specific number of quotations that a grantee is required to obtain to comply with the requirement to obtain quotations from an adequate number of qualified sources.

Consequently, TWC leaves it to the discretion of a grantee organization’s documented procurement procedures to define the number of quotations that constitute an “adequate number” for this purpose. The number required by a grantee’s procedures may be any number greater than one (1).

Obtaining quotations promotes competition and helps determine and demonstrate that a price is reasonable in comparison to market prices. For grantees seeking guidance on a best practice, TWC recommends (but does not require) that grantees obtain quotations from at least three (3) qualified sources, because the receipt of at least three (3) quotations better positions a grantee to identify “low ball” quotes and quotes that exceed typical market rates than does obtaining only two (2) quotations. Grantees are reminded that regardless of the number of quotations obtained, the cost principles in [Chapter 8: Cost Principles](https://twc.texas.gov/business/fmgc/financial-manual-grants-contracts-chapter-8-cost-principles.html), in the FMGC, require that the price secured must be reasonable in comparison to market prices.

TWC has no expectation that a grantee identifies and obtains quotations from every potential source that operates in the market. Additionally, a grantee is not required to exhaust all potential qualified sources in effort to obtain a quotation from more than one supplier.

If after making reasonable attempts to obtain at least two (2) or more quotations, a grantee is unable to obtain a quotation from more than one (1) qualified source, the grantee should first attempt to understand why only one (1) quote was obtained. For example, is there evidence that more than one (1) qualified source exists, did the procedures or solicitation unduly limit or restrict competition, were efforts sufficient to inform two (2) or more suppliers about the opportunity (if applicable), did the solicitation require information that may have discouraged suppliers from responding, were suppliers simply uninterested in the solicitation or unable to respond for other reasons (too busy, for example), or were there other circumstances that affected competition? After the response deadline expires, it may sometimes be helpful and warranted to contact one (1) or more known sources to ask why they did not respond. This step will inform the grantee’s decision to make additional attempts to obtain price or rate quotations from more than one (1) qualified source, or to evaluate the response received from the one source. The grantee should document its efforts and decision in a note in the procurement records.

If after making reasonable attempts to obtain quotations from two or more qualified sources, the grantee receives a response from only one qualified source, the grantee needs to determine whether the price is reasonable. Ordinarily, price reasonableness of small purchases can be determined by comparison of the quotations received from suppliers. Where only one qualified supplier responded, the grantee will need to use an alternative approach to ensure the price reasonableness of the quotation obtained. Alternatives for determining and demonstrating price reasonableness when a grantee obtains a quote from only one qualified source may include, but is not necessarily limited to, the following:

* Market research
* Comparison of the proposed price with prices found to be reasonable for previous purchases
* Current price lists, catalogs or advertisements (however, inclusion of a price in a price list, catalog or advertisement does not in and of itself establish fairness and reasonableness of price)
* A comparison with similar items
* The contracting officer’s personal knowledge of the item being purchased
* Comparison to an independent estimate prepared by the grantee (if applicable)
* Rates at which the source sold the same property or service to other entities
* Any other reasonable basis

When obtaining price or rate quotations, quotations should not be solicited based on personal preference, and should not be restricted to well-known and widely distributed makes or brands only.

Quotations should be obtained within a reasonable proximity of time to one another to ensure a comparison of current prices.

Prequalified lists may be used in connection with small purchase procurements, subject to the limitations and conditions described under [E.1.5 Prequalified Lists](#cE1_5_prequalified_lists), in this Publication.

### I.2.5 Noncompetitive Small Purchases\*

This Section, I.2.5 Noncompetitive Small Purchases, provides additional compliance detail for [I.2.1 Basic Standard](#cI2_1_spp_basic_standard) and [I.5 Procurement by Noncompetitive Proposals](#cI5_proc_by_noncompetitive_proposals).

A [grantee](#definition_grantee) is not precluded from conducting a small purchase according to the standards for procurement by noncompetitive proposals if circumstances fall within those described in I.5 Procurement by Noncompetitive Proposals, in this Publication, such as emergency or public exigency, sole source, or if after soliciting a number of sources competition is determined inadequate.

### I.2.6 Evaluation Factors (Small Purchases)\*

This Section, I.2.6 Evaluation Factors (Small Purchases), provides additional compliance detail for [I.2.1 Basic Standard](#cI2_1_spp_basic_standard).

Before obtaining quotations, a [grantee](#definition_grantee) will need to determine whether selection will be based on price alone (lowest price) or will involve consideration of price and other factors (best value), such as performance and quality.

If the grantee will base selection on lowest price but the grantee does not select the lowest priced quotation, the procurement will be deemed noncompliant unless the grantee can demonstrate a sound reason for dismissing the lower quote(s). In such cases, written explanation should be included in the procurement record.

If the grantee will base selection on price and other factors, the evaluation factors should be determined and documented before obtaining quotes, and should be included in the solicitation document (if a solicitation is issued) to demonstrate efforts for fair treatment. Weights may be included or not included in the solicitation, according to the grantee’s procurement procedures. Where selection will be based on a mix of price and other factors, TWC encourages grantees to request that the responses be provided in a format that will enable the grantee to evaluate them in an efficient and minimally burdensome manner.

If selection will be made based on price and other factors but the grantee does not select the quotation it scored as providing the “best value” based on those factors, the procurement will be deemed noncompliant unless the grantee can demonstrate a sound reason for dismissing that quote. In such cases, written explanation should be included in the procurement record.

A grantee’s procurement procedures will identify the process and criteria for individuals involved in the evaluation process. If evaluation and selection will be performed by personnel outside of the grantee’s procurement or contracting office, TWC recommends that the grantee’s procedures require subsequent review and approval by procurement, contracting or other personnel who can verify that procedures were followed. This serves as a control to promote compliance with the grantee’s procedures and the procurement standards in the UG and UGMS. Unless prescribed otherwise by a grantee’s written procedures, evaluation of small purchase quotations does not require an [evaluation team](#definition_evaluation_team) (also known as an evaluation committee). However, an evaluation team may be useful if selection cannot be made on the basis of objective factors (i.e., where price is not the only factor).

Regardless of who conducts the evaluation, TWC requires that the evaluation be conducted in an impartial manner and on the basis established prior to obtaining quotations. Grantee personnel should never mark a quotation or evaluation in a way that makes the original information illegible, such as with correction fluid, ink, etc.

### I.2.7 Documentation (Small Purchases)

This Section, I.2.7 Documentation (Small Purchases), provides supplemental technical information or guidance. It is included for informational purposes.

As covered in [Q.3 Procurement Records](#cQ3_procurement_records), in this Publication, [grantees](#definition_grantee) must document the significant details of the procurement in the procurement file. For procurement by small purchase, examples include, but are not necessarily limited to the following:

* Evidence of the solicitation or how the prices were obtained
* The quotations received
* The dates the quotations were received
* The grantee’s evaluation/comparison of quotations received
* The basis for selection
* Any unique circumstances affecting the procurement

The grantee’s procurement procedures will dictate where the documentation is retained. For example, the information may be attached to the resulting purchase order or [contract](#definition_contract), and invoice; or in a separate procurement file.

## I.3 Procurement by Sealed Bids (Formal Advertising)\*

Policy:

Procurement under the sealed bid method must be conducted in accordance with applicable administrative requirements. This includes requirements that bids must be publicly solicited and a [firm-fixed-price contract](#definition_firmfixedpricecontract) (lump sum or unit price) must be awarded to the responsible bidder whose bid, conforming to all the material terms and conditions of the Invitation for Bids (IFB), is the lowest in price (for [federal awards](#definition_federal_award)) or best value to the state (for [state awards](#definition_stateaward)).

Refer to [F.5 Contract/Award Considerations](#cF5_contract_award_considerations), in this Publication, and [Chapter 15: Contracts](https://twc.texas.gov/business/fmgc/financial-manual-grants-contracts-chapter-15-contracts.html), in the FMGC, for information about [contract](#definition_contract)/award types. Refer to [P.1 Awards to Responsible Parties](#cP1_awards_to_responsible_parties), in this Publication, for additional discussion about responsible parties.

The UG and UGMS specify that the sealed bid method is the preferred method for procuring construction when conditions make sealed bidding feasible, as described in the following paragraph. Note: TWC programs do not allow construction of new buildings, but alterations and minor renovations are allowable in some circumstances. Refer to [Chapter 8: Cost Principles](https://twc.texas.gov/business/fmgc/financial-manual-grants-contracts-chapter-8-cost-principles.html), in the FMGC, and also to UG, UGMS, and the grant award for discussion about allowable costs.

The UG and UGMS specify that for sealed biding to be feasible, all the following conditions should be present:

* A complete, adequate and realistic specification or purchase description is available
* Two (2) or more responsible bidders are willing and able to compete effectively for the business
* 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

The UG and UGMS specify that if sealed bids are used, all the following requirements apply:

* Bids must be publicly advertised and solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids
* The IFB, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond
* All bids must be publicly opened at the time and place prescribed in the IFB
* A firm-fixed-price contract award will be made in writing to the lowest responsive and responsible bidder (for federal awards) or to the bidder(s) whose bid(s) represent best value to the state (for state awards). (The difference for federal and state awards reflects a difference between the UG, which applies to federal awards, and UGMS, which is published by the Texas State Comptroller of Public Accounts.) Where specified in bidding documents, factors such as discounts, transportation costs and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of.
* Any or all bids may be rejected if there is a sound documented reason

This procurement method does not allow for negotiation.

Reference:

[2 C.F.R. § 200.320(c)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-320.pdf); [UGMS, Part III, §\_\_.36(d)(2)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## I.4 Procurement by Competitive Proposals\*

Policy:

Procurement by the competitive proposal method must be conducted in accordance with applicable administrative requirements. This includes publicizing the solicitation, identifying all evaluation factors and their relative importance in the solicitation, and selecting the offeror whose proposal is most advantageous (“best value”) after considering price and other factors. It is normally conducted with more than one (1) source submitting an offer, and either a [fixed price type contract](#fixedpricecontract) or [cost reimbursement type contract](#costreimbursementcontract) is awarded. It is generally used when conditions are not appropriate for the use of sealed bids.

Refer to [F.5 Contract/Award Considerations](#cF5_contract_award_considerations), in this Publication, and [Chapter 15: Contracts](https://twc.texas.gov/business/fmgc/financial-manual-grants-contracts-chapter-15-contracts.html), in the FMGC, for information about [contract](#definition_contract)/award types.

The UG and UGMS specify that if the competitive proposals method is used, the following requirements apply:

* RFPs must be publicized and identify all evaluation factors and their relative importance. Any response to publicized RFPs must be considered to the maximum extent practical.
* Proposals must be solicited from an adequate number of [qualified sources](#definition_qualified_sources)
* [Grantees](#definition_grantee) must have a written method for conducting technical evaluations of the proposals received and for selecting awardees
* Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered
* Competitive proposal procedures may be used for [qualifications-based procurement](#definition_qualifications_based_proc) of architectural/engineering (A/E) professional services whereby competitors’ qualifications are evaluated and the most qualified competitor 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 services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort. (Refer also to [J.3 Architectural, Engineering & Land Surveying Services](#cJ3_architectural_engineering_surveying), in this Publication.)

This method allows for negotiation. Refer to [P.5 Negotiation](#cP5_negotiation), in this Publication, for related information.

Reference:

[2 C.F.R. § 200.320(d)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-320.pdf); [UGMS, Part III, §\_\_.36(d)(3)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## I.5 Procurement by Noncompetitive Proposals

### I.5.1 Basic Standard\*

Policy:

Procurement by noncompetitive proposals must not be used except in the limited circumstances permitted by the UG and UGMS; i.e., sole source, public exigency or emergency, authorized in writing, or inadequate competition. Justification must be included in the procurement records. [Grantees](#definition_grantee) should have a bias toward competition and should scrutinize justification before conducting procurement by noncompetitive proposals.

The UG and UGMS describe procurement by noncompetitive proposals as procurement through solicitation of a proposal from only one (1) source.

As required by the UG and UGMS, the noncompetitive proposals method may be used only when one or more of the following circumstances apply:

* The item is available from only one (1) source
* The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation
* For [federal awards](#definition_federal_award), the [federal awarding agency](#definition_federalawardingagency) or TWC expressly authorizes noncompetitive proposals in response to a written request from the grantee. For [state awards](#definition_stateaward), the [state awarding agency](#definition_stateawardingagency) authorizes noncompetitive proposals.
* After solicitation of a number of sources, competition is determined inadequate

Note: TWC does not require grantees to obtain TWC approval prior to conducting procurement by noncompetitive proposals on the basis that an item is available from only one (1) source, public exigency or emergency, or if after soliciting a number of sources the grantee determines competition to be inadequate. Use of procurement by other noncompetitive proposals for other unexpected or unusual matters does require TWC authorization. Grantees must submit such requests to their TWC grant manager.

As covered in [O. Cost/Price Analysis](#cO0_cost_price_analysis), in this Publication, cost analysis is required when adequate price competition is lacking and for noncompetitive procurements, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation.

This method allows for negotiation. Refer to [P.5 Negotiation](#cP5_negotiation) in this Publication, for additional compliance related detail and other information.

Refer to [I.5.2 Bias Toward Competition](#cI5_2_bias_toward_competition), [I.5.3 Sole Source](#cI5_3_noncomp_sole_source), [I.5.4 Public Exigency or Emergency](#cI5_4_noncomp_emergency), [I.5.5 Prior Approval (Including Potential Breaks in Program Service Delivery)](#cI5_5_noncomp_prior_approval), and [I.5.6 Inadequate Competition](#cI5_6_noncomp_inadequat_competition), in this Publication, for related compliance detail and other information.

Reference:

[2 C.F.R. § 200.320(f)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-320.pdf); [UGMS, Part III, §\_\_.36(d)(4)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

### I.5.2 Bias Toward Competition

This Section, I.5.2 Bias Toward Competition, provides supplemental technical information or guidance. It is included for informational purposes.

[Grantees](#definition_grantee) should scrutinize justification before conducting procurement by noncompetitive proposals.

As covered in [E.1 Full & Open Competition](#cE1_full_and_open_competition), in this Publication, the UG and UGMS require grantees to conduct [procurement transactions](#definition_procurement_transaction) in a manner providing for full and open competition. By their nature, noncompetitive proposals do not take advantage of competition to achieve price reasonableness. In some cases, procurement by noncompetitive proposals also limits the opportunity for prospective offerors to compete for publicly funded purchases. For these reasons, use of noncompetitive proposals should be a last resort, and a grantee’s bias should always be toward competition where TWC grant funds are concerned.

### I.5.3 Sole Source\*

This Section, I.5.3 Sole Source, provides additional compliance detail for [I.5.1 Basic Standard](#cI5_1_noncomp_basic_standard).

Sole source refers to circumstances in which a need exists for specific property or services which are available from one (1) source only.

A situation in which a need exists for specific property or services for which more than (1) one supplier exists does not qualify as a [sole source procurement](#definition_solesourceproc) because more than one (1) source exists. Refer also to [L.4 Statement of Work & Specifications](#cL4_SOW_and_specifications), in this Publication, for information about “brand name” specifications and proprietary purchases.

Before making a [noncompetitive procurement](#definition_noncompetitiveproc) based on sole source, it is important that a [grantee](#definition_grantee) be certain that no other prospective sources exist and document that determination in its procurement records. Conducting a competitive procurement—such as procurement by small purchase procedures, procurement by sealed bids (formal advertising) or procurement by competitive proposals, as appropriate—provides audit trail support of efforts to identify multiple sources. While conducting a competitive procurement is not the only possibility for determining whether a sole source circumstance exists, it is generally preferred. Alternatively, a grantee would need to demonstrate that it conducted adequate analysis to rule out the possibility that other sources exist.

TWC encourages (but does not require) grantees to require approval by a top or high-ranking official within their organization who has procurement oversight responsibilities before proceeding with noncompetitive proposals based on sole source.

Potential traps include:

* Inadvertently or deliberately writing specifications that force the selection of a specific entity
* Specifying a brand name based on initial product comparisons or a demonstration
* Equating “wanting” a specific entity with sole source
* Approaching a specific entity for curriculum and/or instruction without considering whether competition may bring a better technical product or more favorable price

Sole source [contracts](#definition_contract) should be limited in length to a time that meets the grantee’s business needs, but not so long as to assume that new suppliers would never occur. Before renewing a sole source procurement, TWC recommends that the grantee “test the waters” to determine whether new suppliers have entered the market. Depending on the grantee’s knowledge about that market, this may be accomplished by market research or by conducting a new procurement.

The UG refers to [noncompetitive procurement](#definition_noncompetitiveproc) as procurement by noncompetitive proposals, suggesting the need to obtain a proposal of some form from the source. Accordingly, when use of sole source is appropriate, a written solicitation and statement of work/specifications should be prepared and issued to the sole source. That entity should respond with a proposal that contains both technical, and cost and price elements. The proposal is subject to technical evaluation and [cost analysis](#definition_costanalysis) and/or [price analysis](#definition_priceanalysis), as appropriate. (See Note.)

Cost and price analysis are particularly important in sole source procurements. Because of the absence of competition, the grantee has no basis for comparing prices to those offered by others for the requirements in question. Sole source procurements are also subject to negotiations in the same manner as competitive ones. Even though the grantee’s hand is weakened by the absence of other offers, the grantee should attempt to negotiate the most satisfactory technical terms and the most favorable price that it can. (See Note.) Refer to [O. Cost/Price Analysis](#cO0_cost_price_analysis), in this Publication, for more information about cost analysis and price analysis.

Whenever procurement will be made based on sole source, the procurement file needs to include a written justification. (See Note.)

Examples of information that a grantee might include in a sole source justification include, but are not necessarily limited to the following:

* The end user that is in need of the property or services
* The name of the initiator of the request and justification
* A statement that sole source procurement approval is being sought
* A description of the property or [supplies](#definition_supplies) required
* A description of the proposed entity’s unique or special capacity to fill the requirements
* A description of the actions that were taken to obtain more than one quote or offer
* Any other facts that support the recommendation and decision
* Approval signatures by authorizing parties within the grantee’s organization
* Cost and/or price analysis, as appropriate
* Evidence of cost negotiation, or explanation why negotiation is not feasible

The preceding list is not intended as a compliance checklist. TWC does not prescribe the specific information that a grantee must include in a sole source justification. The information may vary by grantee and procurement. Therefore, absence of a particular piece of information from the preceding list does not necessarily constitute a compliance finding. What is important is that the grantee’s procurement records include a rationale for the grantee’s decision to use sole source procurement procedures, which is adequate to demonstrate that as the appropriate method under the circumstances.

Note: Where TWC or governing federal or state requirement mandates use of a particular product for which only one supplier exists, and the price for that supplier’s prices are the same regardless of the quantity purchased, the grantee should be prepared to demonstrate those facts to auditors and compliance monitors, but TWC does not expect the grantee to solicit proposals or conduct cost analysis and/or price analysis for those purchases. In such cases, one approach is to maintain a procurement file for that product that contains the appropriate explanation. This enables the grantee to pull that file whenever needed to explain the purchase method to an outside party.

### I.5.4 Public Exigency or Emergency\*

This Section, I.5.4 Public Exigency or Emergency, provides additional compliance detail for [I.5.1 Basic Standard](#cI5_1_noncomp_basic_standard).

Procurement by noncompetitive proposals that is based on public exigency or emergency is appropriate for unexpected situations that require action so immediate that the need does not allow for ordinary procurement actions. Poor planning is not adequate justification for procurement using emergency procedures.

A [grantee’s](#definition_grantee) written procurement procedures should include procedures for emergency procurements and matters of public exigency.

In matters involving public exigency or emergency, TWC encourages grantees to provide for as much competition as is practicable. Where the cost of the purchase is anticipated to exceed the [simplified acquisition threshold](#definition_simplified_acq_threshold), for example, the urgency of a specific matter might not allow for conducting procurement by sealed bids (formal advertising) or competitive proposals but might permit time for telephone quotes or other informal solicitation and proposals, the responses to which helps guard against price gouging and promotes selection of a supplier that offers an economical price. The specific circumstances of the matter and the grantee’s own procurement procedures will dictate the actions that the grantee takes. Even in public exigency or emergency, cost principles require that costs must be reasonable under the circumstances prevailing at the time the decision was made to incur the cost.

The procurement records should include written justification and demonstrate the actions taken by the grantee. The justification should explain the nature of the event, including why procurement other than through noncompetitive proposals would cause unacceptable delay in addressing the public exigency or emergency. It should also indicate how long the exigency or emergency is anticipated to continue. A purchase order or [contract](#definition_contract) (or [subgrant](#definition_subgrant)) entered into in matters of public exigency or emergency should not be any longer than is necessary.

### I.5.5 Prior Approval (Including Potential Breaks in Program Service Delivery)\*

This Section, I.5.5 Prior Approval (Including Potential Breaks in Program Service Delivery), provides additional compliance detail for [I.5.1 Basic Standard](#cI5_1_noncomp_basic_standard).

A [grantee](#definition_grantee) must not conduct procurement by noncompetitive proposals for any reason other than sole source, public exigency or emergency, or if after soliciting a number of sources the grantee determines competition to be inadequate—except with prior approval from TWC. For a [federal award](#definition_federal_award), TWC may be required to obtain approval from the federal awarding agency.

An example of a scenario that may require TWC approval is one in which circumstances make it necessary for a grantee to abruptly terminate a [subgrant](#definition_subgrant) or [contract](#definition_contract) that has a significant impact on service delivery. For example, a [subgrantee (subrecipient)](#definition_subgrantee) or [contractor (vendor)](#definition_contractor) might go out of business or otherwise provide the grantee with notice that it will no longer be providing services to the grantee. Similarly, in extreme cases, a grantee might find it necessary to quickly terminate a subgrant or contract in response to severe nonperformance or noncompliance issues.

When changes such as these require an immediate interim solution to avoid a disruption in program service delivery or entity operations, TWC requires the grantee to take the following actions:

* Promptly notify the TWC grant manager, in writing, of the circumstances and how the grantee plans to ensure that workforce services are not interrupted (if immediate notification is not practicable due to public exigency or emergency, notify the TWC grant manager as soon as is practicable)
* Propose or implement a temporary interim solution, if necessary, that will ensure continuation of services while a permanent solution is developed
* Implement a permanent solution through competitive procurement or other appropriate action

Where the change was not in response to public exigency or emergency that precluded prior TWC notification, TWC will consider the circumstances and, if appropriate, may authorize use of the noncompetitive proposal method for a short duration to alleviate actual or anticipated interruptions in workforce services.

### I.5.6 Inadequate Competition\*

This Section, I.5.6 Inadequate Competition, provides additional compliance detail for [I.5.1 Basic Standard](#cI5_1_noncomp_basic_standard).

The UG and UGMS permit procurement by noncompetitive proposals if after solicitation of a number of sources, competition is determined inadequate.

This scenario might be applicable, for example, if the [grantee](#definition_grantee) solicits quotations or offers, and receives a response from only one (1) [qualified source](#definition_qualified_sources). However, the receipt of a response from only one (1) qualified source does not on its own establish that competition is inadequate. While it is possible that other sources chose not to compete because of their own business reasons, it is also possible that the lack of response was caused by a flaw in the procurement (e.g., insufficient advertisement or solicitation efforts, insufficient response time, restrictive specifications), or other reasons.

Therefore, it is important that a grantee take measures to determine whether competition truly is inadequate. The specific procedures may vary among grantees and procurements.

A common public procurement practice, before proceeding with evaluation of the response received, is to first make an earnest attempt to understand why only one response was received. Examples of considerations include, but are not necessarily limited to examining the following:

* Is there evidence that more than one (1) qualified source exists?
* Did the procurement process or solicitation unduly limit or restrict competition?
* Were efforts sufficient to inform a number of sources about the opportunity?
* Did the solicitation require information that may have discouraged sources from responding?
* Were sources simply uninterested in the solicitation?
* Were there other circumstances that affected competition?

In gaining such understanding, it may sometimes be helpful or warranted, after the response deadline expires, to contact one (1) or more known sources to ask why they did not respond.

The step of determining whether competition was inadequate will inform the grantee’s decision to make additional attempts to obtain quotations or offers from more than one qualified source, or to evaluate the response received from the one source. The grantee should document its efforts and decision in a note in the procurement records. This is especially important where a decision is made to proceed in evaluation of the response that was received. The documentation may take the form of a memorandum describing the basis for the determination. As with any noncompetitive procurement, TWC has responsibility to scrutinize the purchase to determine whether circumstances warranted use noncompetitive procedures. The rationale in the grantee’s procurement records plays an important role in that review.

If after making reasonable attempts to solicit quotations or offers from a number of sources, the grantee receives a response from only one (1) qualified source and determines that its efforts to promote competition were adequate, the grantee needs to determine whether the price is reasonable. Refer to [I.2.4 Adequate Number of Qualified Sources](#cI2_4_spp_qualified_sources) (relating to small purchase procurements) and [O. Cost/Price Analysis](#cO0_cost_price_analysis), in this Publication, for information about determining price reasonableness.

# J. Special Considerations for Certain Purchases

Some acquisitions are subject to unique requirements or have unique considerations that TWC has chosen to address in this Publication to help promote [grantee](#definition_grantee) compliance with the procurement standards in the UG, UGMS, and this Publication. For example:

* [J.1 Consulting, Professional & Legal Services](#cJ1_consulting_professional_legal_svcs)
* [J.3 Architectural, Engineering & Land Surveying Services](#cJ3_architectural_engineering_surveying)
* [J.4 Audit Services](#cJ4_audit_services)
* [J.5 Insurance Coverage & Related Broker Selection](#cJ5_insurance)
* [J.6 Lease of Real Property & Related Broker Selection](#cJ6_leases_brokers)
* [J.7 Selected Program Activities & Services](#cJ7_program_services)

Refer to the referenced Section of this Publication for information about the respective topic.

## J.1 Consulting, Professional & Legal Services

### J.1.1 Background

This Section, J.1.1 Background, provides supplemental technical information or guidance. It is included for informational purposes.

J.1 Consulting, Professional & Legal Services, in this Publication, addresses cost and procurement considerations relating to [consulting services](#consultingservices), [professional services](#definition_professionalservices), and legal services. The UG and UGMS cost principles for selected items of cost include cost principles for determining the allowability of consulting, professional and legal services, which affect [grantees’](#definition_grantee) need determination decisions for the acquisition of these services. The UG and UGMS cost principles collectively identify these cost principles as either “professional service costs” (UG) or “professional and consulting service costs” (UGMS). Texas state procurement law, on the other hand, separately defines “professional services” and “consulting services,” distinguishes them as being separate from “legal services,” and includes unique procurement requirements for each of the three services. J.1 Consulting, Professional & Legal Services, in this Publication, addresses the combined effects of state law and cost principles for consulting, professional, and legal services.

Also note that both state law relating to the acquisition of professional services, and procurement standards in the UG and UGMS carve out special provisions for the procurement of professional services that are architectural, engineering and land surveying services. Additionally, the audit requirements in UG and UGMS establish factors to consider when selecting an auditor. Audit services are also professional services under state law. When acquiring these types of services, grantees will need to adhere to the standards in J.1 Consulting, Professional & Legal Services, and in [J.3 Architectural, Engineering & Land Surveying Services](#cJ3_architectural_engineering_surveying) or [J.4 Audit Services](#cJ4_audit_services), in this Publication, as appropriate.

Lastly, some [federal awards](#definition_federal_award) that TWC receives from the U.S. Department of Labor (DOL) include a consultant fee limit. When acquiring consulting services under a [TWC grant award](#definition_twc_grant_award) that requires compliance with the DOL consultant fee limit, grantees will need to adhere to both the standards in J.1 Consulting, Professional & Legal Services and [J.2 DOL Consultant Fee Limit](#cJ2_DOL_consultant_fee_limit), in this Publication. Similarly, if a grant award includes other limitations on consulting, professional, or legal costs, the limits of that requirements apply in addition to the requirements in this Publication.

### J.1.2 Basic Standard\*

This Section, J.1.2 Basic Standard, provides additional compliance detail relating to the procurement of consulting, professional, and legal services.

[Consulting services](#definition_consulting_services), [professional services](#definition_professionalservices), and legal services must conform to applicable allowability requirements and any applicable limits and be procured in accordance with applicable administrative requirements.

Refer to [J.1.1 Background](#cJ1_1_background), [J.1.3 Definitions: Consultant, Consulting Services & Professional Services](#cJ1_3_definitions_consulting_professiona), [J.1.4 Allowability: Consulting, Professional & Legal Services](#cJ1_4_allowability_consult_professional), and [J.1.5 Procurement: Consulting, Professional & Legal Services](#cJ1_5_procurement_consult_professional), in this Publication, for additional compliance-related detail and other information.

### J.1.3 Definitions: Consultant, Consulting Service & Professional Services

#### J.1.3.1 Definitions: Consultant & Consulting Service\*

This Section, J.1.3.1 Definitions: Consultant & Consulting Service, provides additional compliance detail for [J.1.2 Basic Standard](#cJ1_2_basic_standard_consulting_etc).

As used in this Publication, the terms, consultant and consulting services, have the meanings adapted from definitions in [Texas Government Code, Chapter 2254, Subchapter B—Consulting Services](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2254.htm#2254.021). As adapted from Texas Government Code, Chapter 2254, Subchapter B, the terms, consultant and consulting services have the following meanings:

Consultant means “a person that provides or proposes to provide a consulting service.”

Consulting service means “the service of studying or advising” a [grantee](#definition_grantee) “under a [contract](#definition_contract) that does not involve the traditional relationship of employer and employee.”

Reference:

[Texas Government Code, § 2254.021](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2254.htm#2254.021)

Consulting services cover a range of disciplines that include but are not limited to management, strategy, operations, financial, marketing, social media, operations, human resources, information technology, legal, and compliance. However, not every service that falls within these disciplines is a consulting service. Within this Publication’s use of the term “consulting service,” the services of “studying” and advising” are considered to have the common meanings given to those terms. For example, “studying” commonly refers to a detailed investigation into or analysis of a particular subject or situation, and “advising” commonly refers to offering suggestions or recommendations about the best course of action , or informing about a fact or situation in a formal or official way.

Accordingly, the following will be considered a “consulting service” under this Publication:

* A service in which the primary outcome is a detailed investigation or analysis of a particular subject or situation (studying)
* A service in which the primary outcome is a suggestion or recommendation about the best course of action, or information about a fact or situation in a formal or official way (advising)
* A service performed by an individual that ordinarily identifies themselves as, or whose firm ordinarily identifies that individual as, a “consultant,” with respect to their performance of that service
* A service that the person or firm providing the service ordinarily identifies as a “consulting service”
* A service that the associated solicitation, quote, offer, or contract identifies as a “consulting service”

As used in this Publication, TWC does not consider the following to be “consulting services” unless the [grantee](#definition_grantee), or the person or firm providing the service, describes the service as consulting services in the related solicitation, quote, offer, or contract, or if the person or firm providing the services ordinarily identifies the service as a consulting service or identifies the person performing the service a consultant with respect to that person’s performance of the service:

* Audit services
* Professional development training services for grantee employees
* Grant compliance monitoring services
* Installation or implementation services for an information technology purchase
* Legal advice and litigation services provided by an attorney, which the attorney considers to be legal services

If a grantee requests TWC assistance to determine whether a specific service that is not listed above would be treated as a “consulting service” under this Publication, the grantee should e-mail its TWC grant manager. The TWC grant manager will engage other appropriate TWC staff in making the determination.

The distinction of whether a service is a “consulting service” is relevant for purposes of compliance with the requirements for procurement of consulting services that are described in [J.1.5.1 Procurement: Consulting Services](#cJ1_5_procurement_consult_professional), and with the DOL consultant fee limit described in [J.2 DOL Consultant Fee Limit](#cJ2_DOL_consultant_fee_limit), in this Publication. (The DOL consultant fee applies to grant awards that TWC funds in whole or part from a [federal award](#definition_federal_award) from DOL, but only if the limit is specified in the terms and conditions of the award.)

#### J.1.3.2 Definition: Professional Services\*

This Section, J.1.3.2 Definition: Professional Services, provides additional compliance detail for [J.1.2 Basic Standard](#cJ1_2_basic_standard_consulting_etc).

As used in this Publication, the term “professional services” has meaning defined at [Texas Government Code, Chapter 2254, Subchapter A—Professional Services](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2254.htm#2254.001).

Refer to “[professional services](#definition_professionalservices)” in the Glossary of this Publication for the definition.

Reference:

[Texas Government Code, § 2254.002](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2254.htm#2254.002)

### J.1.4 Allowability: Consulting, Professional & Legal Services\*

This Section, J.1.4 Allowability: Consulting, Professional & Legal Services, provides additional compliance detail for [J.1.2 Basic Standard](#cJ1_2_basic_standard_consulting_etc).

Costs for [consulting services](#consultingservices), [professional services](#professionalservices), and legal services must conform to cost principles in the UG and UGMS.

The UG and UGMS cost principles for selected items of costs require that all of the following be true for costs for consultant, professional, and legal services that are rendered by persons (or “persons and organizations,” in UGMS) who are members of a particular profession or possess a special skill, and who are not officers or employees of the [grantee](#definition_grantee) (or “whether or not officers or employees of the grantee,” in UGMS):

* The costs are [reasonable](#reasonable) in relation to the services rendered
* The costs are not contingent upon recovery of the costs from the federal government
* Consideration is given to the following and other relevant factors (however, in determining the allowability of costs in a specific case, no single factor or any special combination of factors is necessarily determinative):
* The nature and scope of the service rendered in relation to the service required
* The necessity of contracting for the service, considering the grantee’s capability in the specific area
* The past pattern of such costs, particularly in the years prior to [federal awards](#definition_federal_award)
* The impact of federal awards on the grantee’s business (i.e., what new problems have arisen)
* Whether the proportion of federal work to the grantee’s total business is such as to influence the grantee in favor of incurring the cost, particularly where the services rendered are not of a continuing nature and have little relationship to work under federal awards
* Whether the service can be performed more economically by direct employment rather than contracting
* The qualifications of the individual or concern rendering the service and the customary fees charged, especially on non-federally funded activities
* Adequacy of the contractual agreement for the service (e.g., description of the service, estimate of time required, rate of compensation, and termination provisions)
* To be allowable, retainer fees, if any, must be supported by evidence of bona fide services available or rendered

Additional requirements apply, as follows.

If acquiring consulting services, also refer to the following:

* [J.1.5.1 Procurement: Consulting Services](#cJ1_5_1_procurement_consulting), in this Publication
* [J.2 DOL Consultant Fee Limit](#cJ2_DOL_consultant_fee_limit), in this Publication

If acquiring professional services, also refer to the following:

* [J.1.5.2 Procurement: Professional Services](#cJ1_5_2_procurement_professional), in this Publication
* [J.3 Architectural, Engineering & Land Surveying Services](#cJ3_architectural_engineering_surveying), in this Publication, if the services are architectural, engineering or land surveying services
* [J.4 Audit Services](#cJ4_audit_services), in this Publication, if the services are audit services

If acquiring legal and related services, also refer to the following:

* [J.1.5.3 Procurement: Legal Services](#cJ1_5_3_procurement_legal), in this Publication
* “Defense and Prosecution of Criminal and Civil Proceedings and Claims,” in [Chapter 8: Cost Principles](https://twc.texas.gov/business/fmgc/financial-manual-grants-contracts-chapter-8-cost-principles.html), in the FMGC
* UG provisions at [2 C.F.R. § 200.435—Defense and Prosecution of Criminal and Civil Proceedings, Claims, Appeals and Patent Infringements](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-435.pdf)
* [UGMS, Part II, Attachment B, Item 15—Defense and Prosecution of Criminal and Civil Proceedings, and Claims](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

Reference:

[2 C.F.R. § 200.459](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-459.pdf); [UGMS, Part II, Attachment B, Item 34](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

### J.1.5 Procurement: Consulting, Professional & Legal Services

#### J.1.5.1 Procurement: Consulting Services\*

This Section, J.1.5.1 Procurement: Consulting Services, provides additional compliance detail for [J.1.2 Basic Standard](#cJ1_2_basic_standard_consulting_etc).

[Consulting services](#definition_consulting_services) must conform to applicable allowability requirements and limits, and be procured in a manner that conforms to the procurement methods described in this Publication, including consideration of the reasonableness of the consultant’s proposed fee.

When determining the allowability of consulting services:

* TWC requires, consistent with [Texas Government Code, Chapter 2254](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2254.htm) and good management practice, that no [grantee](#definition_grantee) may [contract](#definition_contract) for consulting services unless both of the following are true:
* The grantee has a substantial need for the consulting service, and
* The grantee cannot adequately perform the services with its own personnel or obtain the consulting services through a contract with a state governmental entity (see Note);
* The services must be allowable as described in [J.1.4 Allowability: Consulting Professional & Legal Services](#cJ1_4_allowability_consult_professional), in this Publication;
* If acquiring consulting services under a [TWC grant award](#definition_twc_grant_award) that requires compliance with the DOL consultant fee limit, the consultant costs under that award must comply with the requirements in [J.2 DOL Consultant Fee Limit](#cJ2_DOL_consultant_fee_limit), in this Publication; and
* The services must conform to any other restriction or limits made applicable by the grant award.

Note: Pertaining to the reference to the consulting services provisions in Texas Government Code, Chapter 2254, “state governmental entity” has the meaning defined in that statute.

When procuring consulting services:

* The grantee must conform to its written procurement procedures which conform to the requirements described in [C. Written Procurement Procedures](#cC0_written_procedures), in this Publication; and
* TWC requires, as good management practice, that grantees’ procedures for the procurement of consulting services adhere to the following paragraphs.

Relating to the procurement method used—consistent with the UG and UGMS—the grantee will acquire consulting services using the procurement method that is most appropriate for the nature and cost of the consulting service, meaning procurement by [micro-purchase](#definition_micropurchase) procedures, small purchase procedures, sealed bids (formal advertising), competitive proposals, or, if circumstances warrant, noncompetitive proposals.

For reference, TWC notes that the State of Texas Procurement and Contract Management Guide for Texas state agencies observes that procurement by competitive proposals (RFP) is common for consulting services. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

Pursuant to UG ([2 C.F.R. § 200.320(d)(5)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-320.pdf)) and [UGMS, Part III, §\_\_.36(d)(3)(v)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf), use of a [qualifications-based procurement](#definition_qualifications_based_proc) whereby price is not an evaluation/selection factor is prohibited. Therefore, issuance of a qualifications-based procurement, whereby competitors’ qualifications are evaluated, and the most qualified competitor is selected (contingent on ability to then negotiate a fair and reasonable price with the most qualified competitor) is not permitted.

Relating to evaluation factors—in considering state law at [Texas Government Code, Chapter 2254](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2254.htm)—TWC requires, as a good management practice, that grantees use the following evaluation factors when evaluating responses to a solicitation for consulting services:

* Demonstrated competence
* Knowledge
* Qualifications
* Reasonableness of the proposed fee for the services

In considering state law at Texas Government Code, Chapter 2254, TWC notes that if a contract involves both consulting and other services, the services should be procured in conformance with the procurement requirements for consulting services if the primary objective of the contract is the acquisition of consulting services.

Procurement by noncompetitive proposals, if used, is subject to enhanced scrutiny. TWC anticipates that circumstances will rarely support [sole source procurement](#definition_solesourceproc) of consulting services. Any such justification must be documented in the grantee’s procurement records. The absence of such documentation, or inappropriate use of sole source procurement, could result in questioned costs.

#### J.1.5.2 Procurement: Professional Services\*

This Section, J.1.5.2 Procurement: Professional Services, provides additional compliance detail for [J.1.2 Basic Standard](#cJ1_2_basic_standard_consulting_etc).

[Professional services](#definition_professionalservices) must conform to applicable allowability requirements and be procured in a manner that conforms to the procurement methods described in this Publication.

When determining the allowability of professional services, the services must be allowable as described in [J.1.4 Allowability: Consulting Professional & Legal Services](#cJ1_4_allowability_consult_professional), in this Publication.

When procuring professional services:

* The [grantee](#definition_grantee) must conform to its written procurement procedures which conform to the requirements described in [C. Written Procurement Procedures](#cC0_written_procedures), in this Publication; and
* TWC requires, as good management practice, that grantees’ procedures for the procurement of professional services adhere to the following paragraphs.

Relating to the procurement method used—consistent with the UG and UGMS—the grantee will acquire professional services using the procurement method that is most appropriate for the nature and cost of the service, meaning procurement by [micro-purchase](#definition_micropurchase) procedures, small purchase procedures, sealed bids (formal advertising), competitive proposals, or, if circumstances warrant, noncompetitive proposals.

For reference, TWC notes that the State of Texas Procurement and Contract Management Guide for Texas state agencies, observes that procurement for professional services is commonly accomplished through procurement by competitive proposals (RFP).

The State of Texas Procurement and Contract Management Guide also recognizes advertisement of a Request for Qualifications as a common method for procuring professional services among state agencies; however, note that for grantees, UG ([2 C.F.R. § 200.320(d)(5)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-320.pdf)) and [UGMS, Part III, §\_\_.36(d)(3)(v)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf) prohibit [qualifications-based procurement](#definition_qualifications_based_proc) whereby price is not an evaluation/selection factor, except when procuring architectural and engineering services. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.) Therefore, grantee issuance of a qualifications-based procurement, whereby competitors’ qualifications are evaluated, and the most qualified competitor is selected (contingent on ability to then negotiate a fair and reasonable price with the most qualified competitor) is not permitted as a method for procuring professional services under [TWC grant awards](#definition_twc_grant_award), except in the procurement of architectural and engineering services.

In considering state law at [Texas Government Code, Chapter 2254](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2254.htm), TWC requires, as a good management practice, that award and selection of [professional services](#professionalservices) include the following, except where the procurement is for audit services:

* Demonstrated competence and qualifications to perform the services
* A fair and reasonable price

For audit services, refer to the factors identified in [J.4 Audit Services](#cJ4_audit_services), in this Publication.

In considering the cost principles for reasonable costs, covered in [Chapter 8: Cost Principles](https://twc.texas.gov/business/fmgc/financial-manual-grants-contracts-chapter-8-cost-principles.html), in the FMGC, and state law at [Texas Government Code, Chapter 2254](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2254.htm), TWC requires, as a good management practice, that fees must be consistent with, and may not exceed, the recommended practices and fees published by the applicable professional associations, or any maximum provided by law.

Procurement by noncompetitive proposals, if used, is subject to enhanced scrutiny. TWC anticipates that circumstances will rarely support [sole source procurement](#definition_solesourceproc) of professional services. Any such justification must be documented in the procurement records. The absence of such documentation, or inappropriate use of sole source procurement, could result in questioned costs.

Refer also to [J.3 Architectural, Engineering & Land Surveying Services](#cJ3_architectural_engineering_surveying) and [J.4 Audit Services](#cJ4_audit_services), in this Publication, if purchasing professional services that are architectural, engineering, land surveying, or audit services.

#### J.1.5.3 Procurement: Legal Services\*

This Section, J.1.5.3 Procurement: Legal Services, provides additional compliance detail for [J.1.2 Basic Standard](#cJ1_2_basic_standard_consulting_etc).

Legal services must conform to applicable allowability requirements and be procured in a manner that conforms to the procurement methods described in this Publication.

When determining the allowability of legal services, the services must be allowable as described in the following:

* [J.1.4 Allowability: Consulting, Professional & Legal Services](#cJ1_4_allowability_consult_professional), in this Publication
* “Defense and Prosecution of Criminal and Civil Proceedings and Claims,” in [Chapter 8: Cost Principles](https://twc.texas.gov/business/fmgc/financial-manual-grants-contracts-chapter-8-cost-principles.html), in the FMGC
* UG provisions at [2 C.F.R. § 200.435—Defense and Prosecution of Criminal and Civil Proceedings, Claims, Appeals and Patent Infringements](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-435.pdf)
* [UGMS, Part II, Attachment B, Item 15—Defense and Prosecution of Criminal and Civil Proceedings, and Claims](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

When procuring legal services:

* The [grantee](#definition_grantee) must conform to its written procurement procedures which conform to the requirements described in [C. Written Procurement Procedures](#cC0_written_procedures), in this Publication; and
* TWC requires, as good management practice, that grantees’ procedures for the procurement of legal services adhere to the following paragraphs.

Relating to the procurement method used—consistent with the UG and UGMS—the grantee will acquire legal services using the procurement method that is most appropriate for the nature and cost of the services, meaning procurement by [micro-purchase](#definition_micropurchase) procedures, small purchase procedures, sealed bids (formal advertising), competitive proposals, or, if circumstances warrant, noncompetitive proposals.

Use of a [qualifications-based procurement](#definition_qualifications_based_proc) whereby price is not an evaluation/selection factor is prohibited, pursuant to UG ([2 C.F.R. § 200.320(d)(5)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-320.pdf)) and [UGMS, Part III, §\_\_.36(d)(3)(v)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf). Therefore, issuance of a qualifications-based procurement, whereby competitors’ qualifications are evaluated, and the most qualified competitor is selected (contingent on ability to then negotiate a fair and reasonable price with the most qualified competitor) is not permitted. Evaluation factors must include price, qualifications, and any other relevant factors.

When choosing a procurement method, the frequency of procurement will vary according to the grantee’s specific needs. For example, legal services acquired specifically for an isolated employment-related matter would end upon completion of that engagement, while legal services acquired for general counsel for on-going administrative and contractual matters might be procured for a longer duration with renewals that continue until a need occurs to revisit the services. Examples of circumstances that warrant consideration of whether re-procurement is needed include retirement of the attorney involved, dissatisfaction with the services rendered, occurrence of a conflict of interest that prevents the attorney from continuing representation, a change in the types of services needed, changes in billing rates that were not provided for by the procurement, the contract term identified in the procurement, procurement thresholds, or other factors. Neither the UG or UGMS, nor TWC prescribe a firm limit on the duration of legal services [contracts](#definition_contract). Care should be taken to use a procurement method that corresponds to the total contract value.

Refer to [D.3 Conflicts of Interest](#cD3_conflicts_of_interest), in this Publication, for information about conflicts of interest. As covered in [G.1 Procurement Thresholds](#cG1_procurement_thresholds), in this Publication, total contract value refers to the sum of the original contract term, plus the value of any renewals/option years or extensions (as amended by any modifications that impact price).

Procurement by noncompetitive proposals is anticipated to be rare and will be subject to enhanced scrutiny. TWC anticipates that circumstances will rarely support [sole source procurement](#definition_solesourceproc) of legal services. Any such justification must be documented in the procurement records. The absence of such documentation, or inappropriate use of sole source procurement, could result in questioned costs.

## J.2 DOL Consultant Fee Limit

### J.2.1 Basic Standard\*

Policy:

When specified by a grant award that TWC makes with DOL funds, any consultant fees paid under that award or under any [subgrant](#definition_subgrant) financed by that grant award must not exceed the consultant fee limit imposed by the DOL Employment & Training Administration (ETA)—$710 per day (representing an eight-hour workday)—except with prior written approval from TWC. (TWC must obtain DOL concurrence before granting the approval.)

The DOL grant officer for certain DOL grant awards imposes a consultant fee limit which reads:

For the purposes of this award, the ETA Grant Officer has determined that fees paid to a consultant who provides services under a program shall be limited to $710 per day (representing an eight-hour work day). Any fees paid in excess of this amount cannot be paid without prior approval from the [ETA] Grant Officer.

When TWC receives a [federal award](#definition_federal_award) that includes the DOL consultant fee limit, the terms and conditions of that award, as well as the [pass-through entity](#definition_passthruentity) responsibilities in [2 C.F.R. § 200.331](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-331.pdf) of the UG, require that any grant award or subgrant financed in whole or part under that award must also include and comply with the limit.

Refer to [J.2.2 Covered Grant Awards](#cJ2_2_DOL_consultant_covered), [J.2.3 Definition of Consultant](#cJ2_3_DOL_consultant_defn), [J.2.4 Definition of Consultant Fee](#cJ2_4_DOL_consultant_fee_defn), [J.2.5 Relationship to Cost Allocation](#cJ2_5_DOL_consultant_allocation), and [J.2.6 Prior Approval (Consultant Fee Limit)](#cJ2_6_DOL_consultant_prior_approval) for additional compliance detail.

Reference:

[2 C.F.R. § 200.331](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-331.pdf)

### J.2.2 Covered Grant Awards\*

This Section, J.2.2 Covered Grant Awards, provides additional compliance detail for [J.2.1 Basic Standard](#cJ2_1_DOL_consultant_basic), relating to a DOL consultant fee limit.

The DOL consultant fee limit described in J.2.1 Basic Standard, in this Publication, applies if the [grantee](#definition_grantee) receives a grant award from TWC that includes the limit. If a grantee receives a grant award from TWC, which does not include the limit, the limit does not apply to that TWC grant award.

The specific awards covered by the DOL consultant fee limit vary because DOL applies the limit at the discretion of the respective DOL grant officer. Examples of federally funded [TWC grant awards](#definition_twc_grant_award) that have been covered by the limit include the following:

* Competitive grant awards that TWC finances with WIOA Title I statewide funds
* Grant awards that provide formula allocation funds to local workforce development areas for WIOA Title I adult, dislocated worker, and youth activities
* Reemployment Services and Eligibility Assessment (RESEA) grant awards
* Senior Community Service Employment Program (SCSEP) grant awards

The provision may also exist in other grant awards that TWC makes, such as Disaster Recovery National Dislocated Worker Grants funded under Title I of WIOA, and pilots and demonstration grants funded with DOL monies.

### J.2.3 Definition of Consultant\*

This Section, J.2.3 Definition of Consultant, provides additional compliance detail for [J.2.1 Basic Standard](#cJ2_1_DOL_consultant_basic), relating to a DOL consultant fee limit.

The DOL consultant fee limit described in J.2.1 Basic Standard, in this Publication, applies to “fees paid to a consultant who provides services under a program.” The DOL consultant fee limit does not define “consultant.” Additionally, the UG does not define “consultant” or “consulting service.” In implementing the DOL consultant fee limit, TWC requires [grantees](#definition_grantee) to adhere to the definitions of “consultant” and “consulting service” described in [J.1.3 Definitions: Consultant, Consulting Service & Professional Services](#cJ1_3_definitions_consulting_professiona), in this Publication, which reflects definitions set forth in Texas state law.

### J.2.4 Definition of Consultant Fee\*

This Section, J.2.4 Definition of Consultant Fee, provides additional compliance detail for [J.2.1 Basic Standard](#cJ2_1_DOL_consultant_basic), relating to a DOL consultant fee limit.

As specified in the DOL [federal award](#definition_federal_award) provision, the DOL consultant fee limit described in J.2.1 Basic Standard, in this Publication, requires that “the fees paid to a consultant who provides services under a program shall be limited to $710 per day (representing an eight-hour workday).” The limit equates to a rate of $88.75 per hour [$710 per day / 8-hour workday = $88.75 per hour].

The reference to “an eight-hour workday” implies that the DOL consultant fee limit applies to the consultant’s daily or hourly billing rate for time (labor) only, rather than an average of all costs involved, such as the addition of travel, supply, or other costs, because costs such as travel and [supplies](#definition_supplies) are not generated on an hourly basis. TWC evaluates a [grantee’s](#definition_grantee) compliance with the DOL consultant fee limit in this manner whenever possible.

However, if a grantee or consultant requires that the consultant include all costs in the consultant’s daily or hourly fee, and the grantee is unable to distinguish between the labor and non-labor components, TWC will evaluate the entire fee against the DOL consultant fee limit.

### J.2.5 Relationship to Cost Allocation\*

This Section, J.2.5 Relationship to Cost Allocation, provides additional compliance detail for [J.2.1 Basic Standard](#cJ2_1_DOL_consultant_basic), relating to a DOL consultant fee limit.

In some instances, a [grantee](#definition_grantee) might acquire [consulting services](#definition_consulting_services) for the benefit of multiple grant awards or programs. In that case, the DOL consultant fee limit described in J.2.1 Basic Standard, in this Publication, applies only to the portion of the cost that will be financed by the grant award(s) having the DOL consultant fee limit.

Example:

A grantee acquires consulting services for Program A and Program B. Program A and Program B are both federally funded grant awards. In accordance with relative benefit received under each of those awards, the grantee allocates 30% of the cost to Program A and 70% to Program B.

Program A requires compliance with the DOL consultant fee limit. The consultant charges a fee of $900 per day. Program A’s share of the daily fee is $270 ($900 x 30%); however, the maximum amount that can be charged to Program A per day is $213 ($710 X 30% = $213), unless the grantee obtained prior written approval to exceed the DOL consultant fee limit.

If the grantee does not obtain prior written approval to exceed the DOL consultant fee limit, the difference of $57 per day ($270 - $213 = $57) cannot be charged to Program A. Additionally, that amount cannot be shifted to Program B. If the grantee did not obtain prior written approval to exceed the DOL consultant fee limit, the grantee must use its own local or other unrestricted funds for the portion of Program A’s share of the cost that exceeds the DOL consultant fee limit.

If a [TWC grant award](#definition_twc_grant_award) funds multiple programs or initiatives, and the grant award includes a DOL consultant fee limit that applies to two or more of those programs or initiatives, the limit applies to each of the covered programs or initiatives individually. The portion of a consultant fee cost that is allocable to one of the covered programs or initiatives under that award cannot be shifted to another covered program or initiative under the same grant award. Similarly, amounts exceeding the limit, if any, cannot be shifted to other programs or initiatives that are not covered by the DOL consultant fee limit. Refer to [Chapter 8: Cost Principles](https://twc.texas.gov/financial-manual-grants-contracts-chapter-8-cost-principles), in the FMGC, for discussion about allocable costs.

### J.2.6 Prior Approval (Consultant Fee Limit)\*

This Section, J.2.6 Prior Approval (Consultant Fee Limit), provides additional compliance detail for [J.2.1 Basic Standard](#cJ2_1_DOL_consultant_basic), relating to a DOL consultant fee limit.

[Grantees](#definition_grantee) seeking to exceed the DOL consultant fee limit described in J.2.1 Basic Standard, in this Publication, must submit a prior approval request to the TWC grant manager for the affected [TWC grant award](#definition_twc_grant_award). TWC will then need to request approval from DOL. The TWC grant manager may require the grantee to submit a Contract Action Request (CAR) form.

The request must identify:

* Grantee’s name
* A description of the [consulting service](#definition_consulting_services) to be performed
* The projected start and end dates for the proposed consulting [contract](#definition_contract)
* A description of the procurement actions taken to select the consultant, including the evaluation factors used and their respective weights
* The number of responses received, and if any was determined to be nonresponsive, the rationale for that determination
* For each responsive response received: the evaluation score, the daily or hourly consultant fee, the number of days or hours work projected, the product of the fee and time to be worked, an estimate of any other costs proposed (by type, such as travel, [supplies](#definition_supplies), etc.), and the total estimated cost for each bid or proposal
* If the selected consultant did not submit the lowest price offer, the rationale for the selection
* A description of the need for the consulting service
* If the cost will be funded by a mix of fund sources, an explanation of the distribution methodology, and a table identifying each funding source involved (for TWC funding sources, identify the program name and the unique TWC-assigned award number funding the program), each fund source’s respective percentage share of the cost, and each fund source’s respective dollar share of the cost
* Other information that the grantee considers to be relevant to the request

Additional information may be requested by TWC or DOL (through TWC) as part of the review.

Upon receiving a request, the TWC grant manager will request an initial review from appropriate TWC staff. If the grant manager receives internal concurrence, the request and internal concurrence will be submitted to the TWC point of contact(s) for the respective DOL [federal awards](#definition_federal_award) involved. The TWC point of contact for the affected federal awards or other authorized TWC staff will submit the request(s) to the DOL grant officer.

At a minimum, grantees should plan for a response time of approximately forty-five (45) days, which estimates fifteen (15) days for TWC review, requests for additional information, routing of formal concurrence or non-concurrence, and thirty (30) days for DOL review, requests for additional information, and response to TWC.

Failure to obtain prior written approval ahead of incurring costs that exceed the DOL consultant fee limit may result in unallowable costs.

## J.3 Architectural, Engineering & Land Surveying Services\*

This Section, J.3 Architectural, Engineering & Land Surveying Services, provides additional compliance detail relating to the procurement of architectural, engineering and land surveying services.

A [grantee’s](#definition_grantee) costs for and its procurement of any architectural, engineering, and land survey services must comply with the requirements that apply to [professional services](#definition_professionalservices), as described in [J.1 Consulting, Professional & Legal Services](#cJ1_consulting_professional_legal_svcs), in this Publication, except as specified in this Section, J.3 Architectural, Engineering & Land Surveying Services.

Architectural, engineering, and land surveying services are professional services. Refer to [J.1.5.2 Procurement: Professional Services](#cJ1_5_2_procurement_professional), in this Publication, for requirements that apply to the procurement of professional services. However, unlike other professional services, the UG and UGMS permit use of a [qualifications-based approach](#definition_qualifications_based_proc), whereby price is not an evaluation/selection factor, when procuring for architectural and engineering services. Whatever basis is used, the factors to be used in making the selection should be identified in the solicitation.

Texas state procurement law includes a description of a qualifications-based approach for architectural and engineering services. Under that approach, a grantee would:

* First select the most highly qualified provider of those services based on demonstrated competence and qualifications
* Then attempt to negotiate a fair and reasonable price with that provider

If a fair and reasonable price cannot be negotiated with the most highly qualified provider, the grantee could:

* Formally end negotiations with that provider
* Select the next most highly qualified provider
* Attempt to negotiate a [contract](#definition_contract) with that provider at a fair and reasonable price

The grantee may continue the process described above to select and negotiate with providers until a contract is entered into, but not to the extent that a contract with an unqualified firm or individual would result.

Reference:

[2 C.F.R. § 200.320(d)(5)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-320.pdf); [UGMS, Part III, §\_\_.36(d)(3)(v)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf); [Texas Government Code, § 2254.004](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2254.htm#2254.004)

## J.4 Audit Services\*

This Section, J.4 Audit Services, provides additional compliance detail relating to the procurement of audit services.

A [grantee’s](#definition_grantee) costs for and its procurement of audit services are subject to the same requirements that apply to [professional services](#definition_professionalservices), as described in [J.1 Consulting, Professional & Legal Services](#cJ1_consulting_professional_legal_svcs), in this Publication, except as specified in this Section, J.4 Audit Services.

Financial audit services are professional services. Refer to [J.1.5.2 Procurement: Professional Services](#cJ1_5_2_procurement_professional), in this Publication, for requirements that apply to the procurement of professional services. Where the professional service is for audit services, also refer to the requirements described in this Section, J.4 Audit Services.

The audit requirements in UG and UGMS emphasize that when procuring an auditor, positive efforts must be made to use small businesses, minority-owned firms, and women’s business enterprises.

The UG observes that when procuring audit services, the objective is to obtain high-quality audits, and both the UG and UGMS provide that in requesting proposals for audit services, the objectives and scope of the audit should be made clear.

The UG requires that the grantee must request a copy of the audit organization’s peer review report, which the auditor is required to provide under Generally Accepted Government Audit Standards (GAGAS).

The UG and UGMS require that factors to be considered in evaluating each proposal for audit services include the following:

* The responsiveness to the request for proposal
* Relevant experience
* Availability of staff with professional qualifications and technical abilities
* The results of external quality control reviews
* Price

As provided by the audit requirements in UG and UGMS, an auditor who prepares the indirect cost proposal or cost allocation plan for a grantee must not also be selected to perform the audit required by UG and/or the State of Texas Single Audit Circular (Part IV of UGMS) when the indirect costs recovered by the auditee during the prior year exceeded $1 million. The UG clarifies that this restriction applies to the base year used in the preparation of the indirect cost proposal or cost allocation plan and any subsequent years in which the resulting indirect cost agreement or cost allocation plan is used to recover costs.

Refer to [Chapter 8: Cost Principles](https://twc.texas.gov/business/fmgc/financial-manual-grants-contracts-chapter-8-cost-principles.html), [Chapter 11: Cost Allocation & Resource Sharing](https://twc.texas.gov/business/fmgc/financial-manual-grants-contracts-chapter-11-cost-allocation-resource-sharing.html), and [Chapter 12: Indirect Cost Rates](https://twc.texas.gov/business/fmgc/financial-manual-grants-contracts-chapter-12-indirect-cost-rates.html), in the FMGC, for more information about indirect costs.

Reference:

[2 C.F.R. § 200.509](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-509.pdf); [UGMS, Part IV, §\_\_.305](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## J.5 Insurance Coverage & Related Broker Selection

### J.5.1 Basic Standard\*

This Section, J.5.1 Basic Standard, provides additional compliance detail relating to the procurement of insurance and insurance brokers.

[Grantees’](#definition_grantee) procurements of insurance must conform to the procurement standards in the UG and UGMS.

The procurement standards in the UG and UGMS apply to the acquisition of insurance coverage for TWC grant awards. The UG and UGMS do not exempt insurance purchases from compliance with these standards, nor do UG and UGMS contain unique procurement standards specific to insurance. Therefore, when conducting procurements of insurance, the UG and UGMS require procurement by small purchase procedures, sealed bids (formal advertising), competitive proposals, or if circumstances warrant, noncompetitive proposals. (Insurance is not eligible for procurement by [micro-purchase](#definition_micropurchase) procedures, because the UG restricts use of micro-purchase procedures to [supplies](#definition_supplies) and services only, and insurance coverage is [intangible personal property](#definition_intangibleproperty).)

TWC anticipates that it will be rare that a grantee would be unable to obtain quotes from more than one insurer. Such instances, should they arise, will be subject to enhanced scrutiny to determine whether the grantee (or its broker) took reasonable efforts to promote competition. Such determinations will be based primarily on documentation recorded in the grantee’s procurement records. Grantees should care to scrutinize whether efforts were adequate to provide for competition.

Refer to [J.5.2 Grantee Solicitation Versus Insurance Broker Services](#cJ5_2_insurance_procure_v_broker), [J.5.3 Broker Selection (Insurance)](#cJ5_3_insurance_broker_selection), and their subsections, in this Publication, for additional compliance detail and other related information.

Reference:

[2 C.F.R. § 200.320](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-320.pdf); [UGMS, Part III, §\_\_.36(d)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

### J.5.2 Grantee Solicitation Versus Insurance Broker Services

#### J.5.2.1 Coverage Types & Availability

This Section, J.5.2.1 Coverage Types & Availability, provides supplemental technical information or guidance. It is included for informational purposes.

[Grantees](#definition_grantee) routinely acquire various forms of insurance and indemnification, including but not necessarily limited to the following:

* General liability
* Property
* Automobile
* Workers’ Compensation
* Professional liability
* Health or medical
* Fidelity bond coverage

Insurance markets vary. Individual insurers might offer services nationally, regionally, or only locally. An insurance policy that is available in one area might not be available in another area. Additionally, some insurers might service some types of entities but not others. As a result, procurement results for similar coverage may differ from grantee to grantee.

When procuring for insurance, a grantee might issue a solicitation itself, or acquire the services of an insurance broker. Regardless, a grantee’s approach must provide for full and open competition in a manner that is consistent with the standards in the UG and UGMS. Refer to [E.1 Full & Open Competition](#cE1_full_and_open_competition), in this Publication, for discussion about the UG and UGMS standard for full and open competition.

#### J.5.2.2 Grantee Solicitation for Insurance Quotes\*

This Section, J.5.2.2 Grantee Solicitation for Insurance Quotes, provides additional compliance detail for [J.5.1 Basic Standard](#cJ5_1_insurance_basic_standard), in this Publication.

If a [grantee](#definition_grantee) issues an insurance solicitation itself, the grantee must use a procurement method that is appropriate for the nature and amount of the cost involved—procurement by small purchase procedures, sealed bids (formal advertising), competitive proposals, or if circumstances warrant, noncompetitive proposals. Micro-purchase procedures must not be used, because the UG restricts use of micro-purchase procedures to [supplies](#definition_supplies) and services.

If conducting the insurance procurement by small purchase procedures, the sum of the premiums to be paid as a result of the solicitation must not exceed the [simplified acquisition threshold](#definition_simplified_acq_threshold). An exception to this would be if, with the intent of easing the administrative burden of issuing multiple solicitations, the grantee used a single solicitation to request quotes for multiple unrelated insurance needs. For example, providers of health and medical insurance, may not typically offer general liability coverage. In that case, TWC would examine compliance with the simplified acquisition threshold based on the sum of premiums to be paid for each separate unrelated type of coverage acquired under that solicitation.

If a grantee solicits for insurance itself, and the sum of the premiums to be paid under the solicitation will exceed the simplified acquisition threshold, the grantee will need to formally advertise the solicitation and conduct procurement by sealed bids (formal advertising) or procurement by competitive proposals.

In any case, if the grantee receives only one (1) insurance quote and conducted the procurement appropriately without limiting or restricting competition, the grantee may proceed with evaluation of that quote on the basis that after soliciting a number of sources, competition was determined inadequate. As with other procurements, if award will be made, the firm must be a responsible entity and the price must be reasonable. Refer to [I.2.4 Adequate Number of Qualified Sources](#cI2_4_spp_qualified_sources) (relating to small purchase procurements) and [O. Cost/Price Analysis](#cO0_cost_price_analysis), in this Publication, for information for establishing price reasonableness when only one (1) quote or offer is received. Refer to [I.5.6 Inadequate Competition](#cI5_6_noncomp_inadequat_competition), in this Publication, relating to procurement by noncompetitive proposals when competition is inadequate. Refer also to [P.1 Awards to Responsible Parties](#cP1_awards_to_responsible_parties), in this Publication.

#### J.5.2.3 Broker Application for Insurance Quotes\*

This Section, J.5.2.3 Broker Application for Insurance Quotes, provides additional compliance detail for [J.5.1 Basic Standard](#cJ5_1_insurance_basic_standard), relating to insurance.

If the [grantee](#definition_grantee) selects a broker to obtain insurance quotes on the grantee’s behalf, the grantee should understand how the broker obtained the quotes, especially if only one (1) insurance quote is received. If the broker presents only one (1) quote to the grantee, the grantee will need to consider the broker’s explanation for the absence of other quotes and determine whether additional quotes should be likely. Depending on the determination, the grantee should consider whether to secure the services of a different broker. If the grantee agrees that the efforts were sufficient, the rationale in the procurement records should include a description of the broker’s attempts to obtain more than one (1) quote and the broker’s explanation for the absence of additional quotes. The grantee must also be able to demonstrate the price to be reasonable.

#### J.5.2.4 Documentation\*

This Section, J.5.2.4 Documentation, provides additional compliance detail for [J.5.1 Basic Standard](#cJ5_1_insurance_basic_standard), relating to insurance.

Regardless of whether a [grantee](#definition_grantee) solicits for insurance quotes itself or uses the services of a broker to acquire quotes on the grantee’s behalf, the grantee is responsible for retaining records that document the procurement history. If the grantee used the services of an insurance broker to shop for insurance, the procurement records must also document the process that the grantee used to select and secure the broker.

### J.5.3 Broker Selection (Insurance)

#### J.5.3.1 Broker Selection Considerations\*

This Section, J.5.3.1 Broker Selection Considerations, provides additional compliance detail for [J.5.1 Basic Standard](#cJ5_1_insurance_basic_standard), relating to insurance.

If using the services of an insurance broker, a [grantee](#definition_grantee) must first acquire the broker services.

Depending on the services sought by the grantee, it may or may not pay funds directly to a broker. Brokers often receive payment by way of commission paid or permitted by insurers. In such case, the insured party might ultimately pay insurance premiums to the broker, with the broker then withholding or later receiving a commission from the insurer. In other cases, a grantee might require services that a broker provides on a fee basis. For example, a grantee might pay a broker fee directly to a broker, such as if the grantee is seeking a firm to evaluate or develop a risk management program for its organization, or is seeking a broker’s assistance to help develop the grantee’s own insurance solicitation document (rather than obtaining quotes through the broker).

If the only payments that a grantee will make to a broker are insurance premiums (which may or may not be inclusive of the portion of the premium that an insurer permits the broker to retain as a commission from the insurer), the grantee itself effectively pays no fee for the broker services that it receives. Because grant funds will be charged only for insurance premiums (not broker services), grantees may follow their own procurement procedures for the selection of a broker. If securing a new broker specifically to acquire insurance coverage for TWC grant funds, TWC recommends, at a minimum, that the grantee use an informal qualifications-based approach to select a broker. Such process might consider, for example, the types of insurance that the broker works with, prior experience with organizations that are similar to the grantee, and years of experience. There is no fixed number of brokers that a grantee is required to compare. As a good practice, TWC recommends comparing the qualifications of at least three brokers, if possible.

In contrast, if the grantee seeks services for which a broker charges a fee, the grantee will need to use an appropriate procurement method—[micro-purchase](#definition_micropurchase) procedures, small purchase procedures, sealed bids (formal advertising), competitive proposals—to secure the services.

In either case, the grantee is responsible for the settlement of any protests, disputes, or administrative issues that arise from the broker selection or procurement, as covered in [Q.1 Protests & Settlement of Other Issues](#cQ1_protests_disputes_settlements), in this Publication.

#### J.5.3.2 Insurance Broker versus Insurance Agent

This Section, J.5.3.2 Insurance Broker versus Insurance Agent, provides supplemental technical information or guidance. It is included for informational purposes.

Grantees should be aware that brokers and agents do not offer the same access to insurers.

A [grantee](#definition_grantee) that uses an insurance broker or insurance agent to compare policies on the grantee’s behalf should take care that the grantee’s choice does not unduly limit competition. If working with an agent or broker, a grantee should understand whether the individual is a captive agent, independent agent, or broker; the insurers that the agent represents or that the broker has access to (so as to provide for competition); and how the agent or broker is paid (which also has the potential to impact a grantee’s responsibility to promote competition by having the potential to impact the policy options that an agent or broker presents and recommends to buyers).

An insurance agent might be a captive agent that represents a specific insurance company, or an independent agent that represents multiple companies. A contractual agreement between the agent and each insurer that the agent represents dictates the products that the agent sells and authorizes the agent to initiate an insurance policy on the respective insurer’s behalf.

An insurance broker works with but does not represent multiple insurers. A broker works with insurance buyers (entities or individuals seeking to purchase insurance coverage from an insurer, such as grantees). Insurers do not authorized brokers to initiate insurance policies on the insurer’s behalf. Rather, a broker would work with a grantee (insurance buyer) to complete an application, which the broker then submits to insurers on the buyer’s behalf to obtain quotes that the buyer can compare.

Brokers and agents commonly earn commissions from insurers based on the policies sold. When an insurance buyer purchases an insurance policy, the buyer becomes a policyholder. The policyholder makes periodic payments—insurance premiums—to the insurer for the coverage purchased. A commission is a percentage of the premium that the insurance broker or agent retains or receives from the insurer. Commissions may vary from insurer to insurer and product to product, and may also vary based on other factors, such as whether the insurance buyer is purchasing a new policy or renewing an existing policy with the insurer. In addition to base commissions, an insurer might pay contingent or incentive commissions for achieving profitability, retention, or other benchmarks set by the insurer. As insurance buyers, grantees should be aware that commissions, especially contingent or incentive commissions, have the potential to influence an agent’s or broker’s recommendations to insurance buyers. Grantees should take care to understand the policies presented to them, and how the agent or broker identified those policies.

Some insurers are direct writers, meaning that they sell insurance directly to insurance buyers. However, it is possible that there may not be an adequate quantity of direct writers that offer policies of the type needed by a grantee to enable the grantees to rely on these as the primary source for solicitations.

## J.6 Lease of Real Property & Related Broker Selection

### J.6.1 Basic Standard\*

This Section, J.6.1 Basic Standard, provides additional compliance detail relating to the procurement of real property leases and real estate brokers.

When necessary for a [grantee](#definition_grantee) to lease [real property](#definition_realproperty) to perform the grantee’s work under a grant award, the procurement must conform to the procurement standards in UG and UGMS.

Some grantees, such as [local workforce development boards](#definition_board), receive grant awards that make it necessary for the grantee to lease real property or rent space to establish local workforce centers or other service delivery points to carry out the grant award.

When seeking to lease or rent real property, a grantee might issue a solicitation itself, or secure the services of a commercial real estate broker. In another scenario, a grantee might have a need to collocate certain staff at a specific partner location to best serve workforce solutions customers already frequenting that facility for other reasons, such as collocation of certain staff at a college campus to create a service delivery point if a sufficient number of workforce solutions customers attend class at that institution.

A grantee’s approach must provide for full and open competition in a manner that is consistent with the standards in the UG and UGMS, including, where appropriate, procurement by noncompetitive proposals. Refer to [E.1 Full & Open Competition](#cE1_full_and_open_competition), in this Publication, for discussion about the UG and UGMS standard for full and open competition.

Relating to the [F.2.2 Need Determination/Justification](#cF2_2_need_determination), in this Publication, and in keeping with the UG and UGMS standard for full and open competition in [E.1 Full & Open Competition](#cE1_full_and_open_competition), in this Publication, a grantee must take care, regardless of the acquisition approach used, that its specifications for the property location do not unduly restrict or limit competition. Refer also to [L.4 Statement of Work & Specifications](#cL4_SOW_and_specifications), in this Publication.

Refer to [J.6.2 Grantee Solicitation Versus Real Estate Broker Services](#cJ6_2_leases_procure_v_broker) and its subsections, and [J.6.3 Grantee Selection of a Commercial Real Estate Broker](#cJ6_3_leases_broker_selection), in this Publication, for additional compliance-related detail concerning the lease of real property and related broker selection.

### J.6.2 Grantee Solicitation Versus Real Estate Broker Services

#### J.6.2.1 Grantee Solicitation of Commercial Real Estate Property\*

This Section, J.6.2.1 Grantee Solicitation of Commercial Real Estate Property, provides additional compliance detail for [J.6.1 Basic Standard](#cJ6_1_leases_basic_standard), relating to leases of real property.

If procuring a lease of [real property](#definition_realproperty) without the assistance of a real estate broker/agent, a [grantee](#definition_grantee) must use a procurement method that is appropriate for the nature and dollar amount of the lease involved—such as procurement by small purchase procedures, competitive proposals, sealed bids, or if circumstances warrant, noncompetitive proposals. (Real estate leases cannot be procured by [micro-purchase](#definition_micropurchase) procedures because the UG restricts use of micro-purchase procedures to [supplies](#definition_supplies) and services.)

The UG and UGMS do not exempt lease procurement from compliance with the procurement standards contained therein. Therefore, as covered in [C. Written Procurement Procedures](#cC0_written_procedures), in this Publication, as with other procurements, when procuring a lease for real property, the grantee must follow its documented procurement procedures, provided that the procurement conforms to the UG and UGMS.

When choosing between procurement by small purchase procedures, competitive proposals, or sealed bids, the grantee will need to consider the value of the total lease [contract](#definition_contract), inclusive of any option years/renewals. If the total value of the lease contract will exceed the [simplified acquisition threshold](#definition_simplified_acq_threshold), and more than one property is anticipated to be available, the grantee must conduct procurement by competitive proposals or sealed bids. Refer to [G.1 Procurement Thresholds](#cG1_procurement_thresholds), in this Publication, for more information about the simplified acquisition threshold.

When choosing between procurement by competitive proposals and procurement by sealed bids, grantees should consider that the former permits negotiation and the latter generally does not. Refer to [I.3 Procurement by Sealed Bids (Formal Advertising)](#cI3_procurement_sealed_bids) and [I.4 Procurement by Competitive Proposals](#cI4_procurement_competitive_proposals), in this Publication, for information about procurement by sealed bids and competitive proposals, respectively.

Lastly, procurement by noncompetitive proposals can be used to procure a property lease in the limited circumstances prescribed for that procurement method only. Refer to [I.5 Procurement by Noncompetitive Proposals](#cI5_proc_by_noncompetitive_proposals), in this Publication, for discussion of circumstances that permit procurement by noncompetitive proposals—sole source, emergency or public exigency, authorized by TWC or the [federal awarding agency](#definition_federal_award), or inadequate competition. In that more than one commercial property is generally anticipated to be available to a location, procurement by noncompetitive proposals is subject to enhanced scrutiny. If considering this method, the grantee should scrutinize its defined business need to ensure that it does not unduly restrict or limit competition—for example, in defining the location (general area in which property is needed) could the grantee consider properties in multiple areas, or is the need actually confined to a specific location.

The procurement documentation needs to be retained in the grantee’s procurement records until the expiration of the lease and the associated record retention period.

#### J.6.2.2 Broker Identification of Available Commercial Lease Properties\*

This Section, J.6.2.2 Broker Identification of Available Commercial Lease Properties, provides additional compliance detail for [J.6.1 Basic Standard](#cJ6_1_leases_basic_standard), relating to leases of [real property](#definition_realproperty).

If relying on the expertise of a real estate broker/agent, the [grantee](#definition_grantee) remains responsible for ensuring that the process remains full and open, and for retaining the history of the procurement in the grantee’s procurement records.

The UG and UGMS do not address use of real estate brokers/agents specifically, meaning that such use is neither prohibited by nor exempt from compliance with the procurement standards in the UG and UGMS. As covered in [C. Written Procurement Procedures](#cC0_written_procedures), in this Publication, the grantee will follow its own documented procurement procedures, provided that the procurement conforms to the procurement standards in the UG and UGMS.

The following paragraphs specifically address the UG and UGMS standards for public advertisement and give an example of the general steps that a grantee might take when using a commercial real estate broker/agent to lease real property under a [TWC grant award](#definition_twc_grant_award).

As covered in [G.1 Procurement Thresholds](#cG1_procurement_thresholds), the methods of procurement by competitive proposals and procurement by sealed bids both require public advertisement. Accordingly, if seeking to lease real property for which the total lease will exceed the [simplified acquisition threshold](#definition_simplified_acq_threshold), and public advertisement does not occur, it is important that the grantee and grantee’s use of a commercial real estate broker/agent provides for consideration of all available properties in the area where the property is needed. The following paragraphs elaborate.

The property location services of a real estate broker/agent may substitute for public advertisement if all properties that are anticipated to meet the grantee’s space need are listed with a listing service and the broker/agent has access to listing services and pocket listing information that enable it to identify all available properties; or if it is otherwise practicable to identify all available properties (including available unlisted properties) without public advertisement. If one or more properties that meet the grantee’s space need are not listed (available by landlord/owner only), action must be taken to consider those properties. Note that the landlords/owners for such properties might be less willing to pay a commission to the broker/agent, if selected, a detail that might factor into the payment structure that the grantee and broker/agent agree upon.

The broker/agent or grantee is encouraged to perform initial market research to understand this market characteristic—existence of listed and unlisted properties—before the grantee determines whether to rely solely on a broker’s/agent’s access to listing services to identify available properties. Depending on the size of the area, the number of unlisted properties available, and ability to identify available unlisted properties in the area, it may be appropriate to supplement the broker’s/agent’s use of listing services with public advertisement. If the grantee relies on the broker/agent to perform the market research, the grantee must closely examine the results, guarding against apparent broker/agent biases, such as if unlisted properties are available but have a history or potential of unwillingness to pay the broker/agent commission.

As covered in [Q.3 Procurement Records](#cQ3_procurement_records), in this Publication, the UG and UGMS require grantees to maintain records sufficient to detail the history of the procurement, including rationale for the procurement method. In keeping with this standard, the procurement records should include documentation of the initial market research and the grantee’s rationale to supplement or not supplement the broker’s/agent’s access to listing services with public advertisement of the grantee’s search for commercial property to lease.

An example of the steps a grantee might take when conducting a lease procurement with the full assistance of a real estate broker/agent includes the following:

* Define the business need—such as the general location (based on customer populations or other business needs of the grant award), access to public transportation, parking, size of the space needed, ground floor access (if applicable), ability of the property to meet the build out specifications (such as number of work spaces, common spaces, public bathrooms, etc.)
* Initial market research to determine whether to supplement the broker’s/agent’s use of listing services with public advertisement of the grantee’s property search, using the broker/agent or grantee as the point of contact
* Broker/agent identifies commercial properties that meet the grantee’s specifications
* Broker/agent and grantee identify which of the properties warrant site visits
* Broker/agent schedules site visits and attends the visits with the grantee
* Broker/agent further evaluate the visited properties against the grantee’s specifications
* Broker/agent requests a proposal from landlord/owner of the property or properties that best meet the grantee’s specifications
* Broker/agent reviews and explains the proposals to the grantee
* Grantee reviews the broker/agent recommendation and decides whether to execute a lease
* Broker/agent negotiates with the landlord/owner of the property that the grantee selected
* If agreed to by the broker/agent, the broker/agent assists the grantee with the oversight of any alterations or improvements required to make space ready for grantee occupation
* Grantee retains documentation of its original business need specifications, the broker/agent report on properties that met the specification, consideration of the properties and basis for the choice for site visits, observations made from the site visits, basis for further selection, including proposals received, broker/agent recommendation, grantee selection and basis, negotiation points, and the resulting lease

As noted, these are sample steps. A grantee’s actual process may differ, provided it results in a procurement that it provides for full and open competition and conformance with other UG and UGMS procurement standards.

### J.6.3 Grantee Selection of a Commercial Real Estate Broker/Agent\*

This Section, J.6.3 Grantee Selection of a Commercial Real Estate Broker/Agent, provides additional compliance detail for [J.6.1 Basic Standard](#cJ6_1_leases_basic_standard), relating to leases of [real property](#definition_realproperty).

If acquiring commercial real estate broker or agent services to assist in procuring a property lease needed to carry out a [TWC grant award](#definition_twc_grant_award), the [grantee](#definition_grantee) must use an acquisition approach that is appropriate for the nature and dollar value of the broker/agent agreement.

In selecting or procuring a real estate broker/agent to assist the grantee to lease real property needed to carry out a TWC grant award, a grantee must consider the following:

* If the grantee will compensate the broker/agent directly, using TWC grant funds, the grantee’s procurement of the broker/agent services must conform fully with the procurement standards in the UG and UGMS, including use of a procurement method appropriate to the nature of the services needed and the dollar amount to be paid by the grantee to the broker/agent.
* If the grantee will not compensate the broker/agent directly—relying instead on the broker/agent to be compensated by way of a commission paid by the landlord/owner—the grantee may follow its own documented procurement procedures. There is no fixed number of brokers/agents that a grantee is required to compare. As a good practice, TWC recommends comparing the qualifications of at least three brokers/agents, if possible. Public advertisement and formal procurement will be required if the commission to be earned by the broker/agent is expected to exceed the [simplified acquisition threshold](#definition_simplified_acq_threshold) over the course of the lease.

In Texas, when an entity uses the services of a real estate broker/agent to enter a commercial property lease, the broker/agent routinely seeks payment (commission) from the landlord/owner of the leased property, rather than from the tenant. However, exceptions can occur. For example, where the services are limited, such as to provide technical assistance in the development of a solicitation only, or where the tenant requires work above and beyond what the broker/agent ordinarily providers, the broker/agent might require that the grantee pay a fee directly to the broker/agent for the services that the grantee receives from the broker/agent. Alternatively, a grantee might pay a broker a fee for services that the broker provides to the grantee during the life of the lease. As another example, in some cases, a landlord/owner might refuse to pay the broker/agent commission, and the broker/agent might approach the tenant in effort to obtain payment directly from the tenant.

Before securing broker/agent services, it is important that a grantee define for itself the extent of services that it will require from the broker/agent. If the service is limited to assisting with the development of a solicitation only, the grantee might, for example, consider a fee-based contract, in which the grantee will pay the broker/agent an agreed upon fee for the specific service. If the service will include the full range of broker/agent services available for the selection of leased commercial property, the grantee will need to consider whether the routine practice of landlord/owner payment of the broker/agent commission will be used, or whether circumstances warrant the grantee paying the broker/agent directly (in lieu of the broker/agent collecting a commission from the successful landlord/owner; such as if the grantee anticipates that the amount of the commission that a landlord/owner is willing to pay might influence the broker’s/agent’s property recommendations to the grantee).

In circumstances when the grantee will or might pay the broker/agent directly, using TWC grant funds, the UG and UGMS procurement standards would require that the grantee procure the broker/agent using a procurement method that is appropriate to the nature of the services, and the dollar amount that the grantee will pay.

In circumstances when the grantee will use the full range of broker/agent services and rely on the established practice in which the selected landlord/owner will pay the broker/agent, so that the grantee will make no payment directly to the broker/agent, the UG and UGMS do not specifically require that the grantee’s selection of the broker/agent conform to the procurement standards therein. However, in such circumstances, TWC encourages grantees to use a process that promotes competition and considers broker qualifications and experience, such as, for example:

* Familiarity with the type of property needed and the area needed
* Experience negotiating as a tenant representative (as opposed to landlord/owner representatives)
* Whether the broker/agent currently represents any landlords
* Experience assisting with alterations and Americans with Disabilities Act (ADA) requirements
* Availability to the grantee
* References
* The commission rate assessed to the landlord/owner of the selected property
* Other relevant factors

TWC’s recommendation to consider the qualifications of a minimum of three or more commercial real estate brokers/agents is based on the understanding that the success of the property search and negotiations depend heavily on the expertise of the selected broker/agent. There is no fixed minimum number of brokers/agents that a grantee is required to compare.

Grantees are reminded that conflict of interest requirements apply. Refer to [D.3 Conflicts of Interest](#cD3_conflicts_of_interest), in this Publication, for information about conflicts of interest.

Note: Considering conflict of interest requirements, one grantee asked TWC if the procurement standards would permit the grantee from using the broker or real estate agency services of one (1) of its employees that is also licensed in that area. TWC took the position that a grantee that employs an individual who is a licensed commercial real estate broker or real estate agency is not prohibited from using that employee’s services for its commercial real estate needs, provided that the employee does not collect commission or other compensation for the services provided, which are outside the employee’s normal salary or wages from employment by the grantee.

## J.7 Selected Program Activities & Services

### J.7.1 Basic Standard\*

This Section, J.7.1 Basic Standard, provides additional compliance detail relating to the procurement of selected program activities and services.

[Grantees](#definition_grantee) must comply with applicable program requirements and procurement standards when acquiring program activities and services.

This Section, J.7.1 Selected Program Activities & Services, discusses how the UG and UGMS procurement standards relate to selected program activities and services. This Section covers:

* WIOA Title I adult and dislocated worker training services
* WIOA Title I youth services
* WIOA High Demand Job Training and Texas Industry Partnership property

Refer to the following paragraphs for information about these special topics.

### J.7.2 Workforce Innovation and Opportunity Act

#### J.7.2.1 WIOA Title I Adult and Dislocated Worker Training Services\*

This Section, J.7.2.1 WIOA Title I Adult and Dislocated Worker Training Services, provides additional compliance detail relating to specific program requirements.

With limited exceptions, WIOA Title I Adult and Dislocated Workers training services must be provided by training providers listed in the Texas [Eligible Training Provider System](https://www.twc.texas.gov/partners/eligible-training-providers) (ETPS).

Under the WIOA Title I Adult and Dislocated Worker programs, training services include the following:

* Occupational skills training, including training for nontraditional employment
* On-the-job training
* Incumbent worker training in accordance with WIOA § 134(d)(4)
* Programs that combine workplace training with related instruction, which may include cooperative education programs
* Training programs operated by the private sector
* Skill upgrading and retraining
* Entrepreneurial training
* Transitional jobs in accordance with subsection WIOA § 134(d)(5)
* Job readiness training provided in combination with services described in any of the above training services
* Adult education and literacy activities, including activities of English language acquisition and integrated education and training programs, provided concurrently or in combination with services described in the first seven bullets above
* Customized training conducted with a commitment by an employer or group of employers to employ an individual upon successful completion of the training

WIOA provides an exception to the above ETPS requirement for the following WIOA Title I Adult and Dislocated Worker services:

* On-the-job training
* Customized training
* Incumbent worker training
* Internships
* Paid or unpaid work experience opportunities
* Transitional employment

TWC provides additional information about WIOA Title I Adult and Dislocated Worker training services and ETPS in [TWC rules](http://www.twc.state.tx.us/agency/texas-workforce-commission-rules), TWC’s [WIOA Guidelines](http://www.twc.state.tx.us/files/jobseekers/wioa-guidelines-twc.pdf) and [Workforce Development Letters](https://twc.texas.gov/agency/laws-rules-policy/workforce-policy-and-guidance).

Reference:

[WIOA §§ 122 and 134(c)(3)(C) and (D)](https://www.gpo.gov/fdsys/pkg/PLAW-113publ128/pdf/PLAW-113publ128.pdf)

#### J.7.2.2 WIOA Title I Youth Services\*

This Section, J.7.2.2 WIOA Title I Youth Services, provides additional compliance detail relating to specific program requirements.

[Local workforce development boards](#definition_board) must adhere to the procurement standards in the UG and UGMS when securing eligible providers of youth workforce investment activities under Title I, Subtitle B of WIOA.

The program statute at WIOA § 107 requires local workforce development boards to “identify eligible providers of youth workforce investment activities in the local area by awarding grants or [contracts](#definition_contract) on a competitive basis (except as provided in [WIOA] section 123(b)), based on the recommendations of the youth standing committee, if such a committee is established for the local area…” The provisions of WIOA § 123(b) provides that a local workforce development board “may award grants or contracts [to eligible providers of youth workforce investment activities] on a sole-source basis if such board determines there is an insufficient number of eligible providers of youth workforce investment activities in the local area involved (such as a rural area) for grants and contracts to be awarded on a competitive basis under subsection (a).” The statute at WIOA § 107 also permits local workforce development boards to “terminate for cause the eligibility of such providers.”

Reference:

[WIOA §§ 107(d)(10)(B) and 123(b)](https://www.govinfo.gov/content/pkg/PLAW-113publ128/pdf/PLAW-113publ128.pdf)

#### J.7.2.3 WIOA High Demand Job Training and Texas Industry Partnership Property\*

This Section, J.7.2.3 WIOA High Demand Job Training and Texas Industry Partnership Property, provides additional compliance detail relating to specific program activities.

[Local workforce development boards](#definition_board) that use WIOA-funded High Demand Job Training (HJT) or Texas Industry Partnership (TIP) money to fund or jointly fund [equipment](#definition_equipment) or other activities allowed under those initiatives, must have procedures that result in an economical use of program funds consistent with the requirements of this Section, J.7.2.3 WIOA High Demand Job Training and Texas Industry Partnership Property.

HJT and TIP initiatives promote job training, including capacity building solutions that will enable training providers to support those job training demands. HJT and TIP awards are made by TWC to local workforce development boards in response to an HJT or TIP grant application jointly submitted by the local workforce development board and required partners. Local workforce development boards may separately fund similar projects under other TWC grant awards, to the extent permitted by those awards.

Some of these projects result in the acquisition of equipment which will be located at a training provider to enable that provider to meet the job training needs addressed by the specific project. The participating local workforce development board receives and passes-through WIOA grant funds toward the agreed project costs, with each participating party agreeing to the costs that it will fund. In some cases, local workforce development boards use the WIOA funds to finance all or part of the cost of one or more items of equipment that will be located at and used by a training provider. This might be accomplished by the local workforce development board procuring and paying for the equipment, by the local workforce development board reimbursing the training provider for the provider’s purchase of the equipment, or in some other manner. In such cases, the training provider is receiving federal assistance in the form of WIOA funded equipment. The equipment is not a gift or donation.

Local workforce development boards must take the following minimum actions with respect to this type of assistance. The requirements below consider the procurement standards in the UG and UGMS, cost principles that restrict use of grant funds to costs that are necessary and reasonable for performance of the award, the nature of the assistance, UG and UGMS property standards, record retention requirements for grant awards, and the overall goal of maximizing funds.

* The equipment must be included in the TWC-approved project budget, and be necessary for the proposed project, with a reasonable expectation of being needed for the authorized training until the property’s useful life expires.
* The equipment must be procured by small purchase procedures, sealed bids (formal advertising), competitive proposals, or if appropriate, noncompetitive proposals, in a manner that conforms to the UG and UGMS. Documentation must be available for review upon request.
* When the provider no longer needs the equipment, the property standards described in [Chapter 13: Property](https://twc.texas.gov/business/fmgc/financial-manual-grants-contracts-chapter-13-property.html), in the FMGC, and the UG and UGMS must be adhered to.
* As the entity receiving the assistance and having custody of the property, the provider is responsible for securing the property in a manner that prevents loss, damage, and theft, and for maintaining the property in good working condition.
* The local workforce development board will have no obligation to the provider to provide the provider with replacement property if the property is lost, stolen, or damaged while in the provider’s control.
* The provider is responsible for maintaining appropriate property insurance, unless otherwise agreed to with the local workforce development board.
* In that the property is a form of federal assistance, the provider must not profit from any insurance proceeds relating to the loss, theft, or damage to the property. The provider will use such proceeds, should they occur, to repair the property, replace it with “like” or better property, and/or purchase other property that is approved by TWC in response to a request from the provider through the local workforce development board. Federal interest will remain in the new property.
* The property standards in the FMGC, UG and UGMS require that equipment be included in property records, be included in a physical inventory, be adequately safeguarded, be adequately maintained to be kept in good condition, be used for an authorized purpose for as long as needed, and when no longer needed be disposed of in accordance with UG and UGMS standards (which may, depending on the fair market value of the property at the time of disposition, involve delivery of compensation to the federal or state government, as applicable). The local workforce development board and the training provider may agree which of the two will be responsible for property records, maintenance and inventory the property. It is important that the local workforce development board inform the training provider about applicable property standards. TWC specifies the frequency of the inventory in [Chapter 13: Property](https://twc.texas.gov/business/fmgc/financial-manual-grants-contracts-chapter-13-property.html).

The local workforce development board may add more conditions that it considers to be appropriate to the property involved.

# K. Bonding, Clauses & Provisions

## K.1 Bonding Requirements

### K.1.1 Basic Standard\*

Policy:

[Grantees](#definition_grantee) must include appropriate bonding requirements in [contracts](#definition_contract) and [subgrants](#definition_subgrant) that they make. A grantee’s bonding policy must adequately protect the federal and/or state government’s interest.

This Section, K.1.1 Bonding Requirements covers UG and UGMS bonding requirements that impact construction or facility improvement contracts, and also comments on TWC bonding requirements for subgrants that TWC grantees make.

### K.1.2 Bonding Requirements for Construction or Facility Improvement Contracts\*

This Section, K.1.2 Bonding Requirements for Construction or Facility Improvement Contracts, provides additional compliance detail for [K.1.1 Basic Standard](#cK1_1_bonding_basic_standard), relating to bonding.

When contracting with a [contractor (vendor)](#definition_contractor) for a construction or facility improvement [contract](#definition_contract), [grantees](#definition_grantee) must comply with the bonding requirements in the UG and UGMS.

For construction or facility improvement [contracts](#definition_contract) or [subcontracts](#definition_subcontract) with contractors, which exceed the [simplified acquisition threshold](#definition_simplified_acq_threshold), the UG and UGMS provide that the [federal awarding agency](#definition_federalawardingagency) (for [federal awards](#definition_federal_award)), [state awarding agency](#definition_stateawardingagency) (for [state awards](#definition_stateaward)) or [pass-through entity](#definition_passthruentity) may accept the bonding policy of the grantee (or [subgrantee (subrecipient)](#definition_subgrantee), as applicable), provided that the federal awarding agency, state awarding agency, or pass-through entity has made a determination that the federal or state interest is adequately protected, as applicable.

If such a determination has not been made, the UG and UGMS establish that the minimum requirements are:

* A [bid guarantee](#definition_bidguarantee) from each bidder equivalent to five percent (5%) of the bid price
* A [performance bond](#definition_performancebond) on the part of the contractor for one hundred percent (100%) of the contract price
* A [payment bond](#definition_paymentbond) on the part of the contractor for one hundred percent (100%) of the contract price

The U.S. Department of Health and Human Services (HHS) regulations implementing UG specifically require that where bonds are required in the situations described above, the bonds must be obtained from companies holding certificates of authority as acceptable sureties pursuant to [31 C.F.R. Part 223](https://www.govinfo.gov/content/pkg/CFR-2019-title31-vol2/pdf/CFR-2019-title31-vol2-part223.pdf). While specifically required by HHS only, this requirement is relevant for all awards that TWC makes.

Reference:

[2 C.F.R. § 200.325](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-325.pdf); [45 C.F.R. § 75.334(d)](https://www.govinfo.gov/content/pkg/CFR-2019-title45-vol1/pdf/CFR-2019-title45-vol1-sec75-334.pdf) (2019); [UGMS, Part III, §\_\_.36(h)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

### K.1.3 Bonding Requirements for Subgrants\*

This Section, K.1.3 Bonding Requirements for Subgrants, provides additional compliance detail for [K.1.1. Basic Standard](#cK1_1_bonding_basic_standard), in this Publication.

Refer to [Chapter 3: Insurance](https://twc.texas.gov/business/fmgc/financial-manual-grants-contracts-chapter-3-insurance.html), in the FMGC, for information about bonding requirements that apply to [TWC grant awards](#definition_twc_grant_award) and [subgrants](#definition_subgrant) made under those awards.

## K.2 Other Award Clauses & Provisions

### K.2.1 Basic Standard\*

Policy:

[Grantees](#definition_grantee) must require that applicable clauses, provisions, and requirements be included in all [subgrants](#definition_subgrant) and [contracts](#definition_contract).

This section addresses grant requirements for [pass-through entities](#definition_passthruentity) to include all applicable requirements in subgrants that they make, certain required contract clauses & provisions, and information about value engineering clauses.

### K.2.2 Subgrant Requirements\*

This Section, K.2.2 Subgrant Requirements, provides additional compliance detail for [K.2.1 Basic Standard](#cK2_1_clauses_basic_standard), relating to clauses and provisions.

[Grantees](#definition_grantee) must require that all applicable requirements of the TWC grant award are included in [subgrants](#definition_subgrant) to [subgrantees (subrecipients)](#definition_subgrantee), at any tier.

The terms and conditions of [federal awards](#definition_federal_award) and [state awards](#definition_stateaward) that a grantee receives flow down to subgrants to subgrantees, unless specified otherwise by those terms and conditions or the requirements that they impose. This is explicitly stated in the UG. Additionally, the UG and UGMS require that subgrants identify to subgrantees all requirements imposed on them so that the federal award or state award is used in accordance with federal and state laws, regulations, and the terms and conditions of the federal or state award, as well as any additional requirements imposed on the subgrantee to enable the [pass-through entity](#definition_passthruentity) to meet its own responsibilities under the award that it received.

Reference:

[2 C.F.R. § 200.101(b)(1)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-101.pdf); [2 C.F.R. § 200.331(a)(2) and (a)(3)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-331.pdf); [UGMS, Part IV, §\_\_.400(c)(2)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

### K.2.3 Contract Clauses & Provisions\*

This Section, K.2.3 Contract Clauses & Provisions, provides additional compliance detail for [K.2.1 Basic Standard](#cK2_1_clauses_basic_standard), relating to clauses and provisions. Additionally, it includes a recommendation, described as a “good management practice,” that is included for informational purposes.

[Contracts](#definition_contract) must include applicable contract provisions. In addition to contract provisions required by a [grantee’s](#definition_grantee) own procedures, this includes provisions required by UG, UGMS, the [federal awarding agency](#definition_federalawardingagency) (if applicable), and TWC.

It is a good management practice to attach a copy of applicable contract clauses and provisions to the solicitation document. Doing so informs entities of the terms that they would be required to agree to if they accept a contract award.

The UG requires that in addition to other provisions required by the federal awarding agency or grantee, all contracts made by the grantee under a [federal award](#definition_federal_award) must contain provisions covering the following, as applicable:

* Administrative, contractual, or legal remedies in instances where [contractors (vendors)](#definition_contractor) violate or breach contract terms, and provide for such sanctions and penalties as appropriate
* Termination for cause and for convenience by the grantee including the manner by which it will be affected and the basis for settlement
* Equal employment opportunity
* Davis-Bacon Act, as amended (40 U.S.C. §§ 3141–3148)
* Copeland ‘‘Anti- Kickback’’ Act (40 U.S.C. § 3145), as supplemented by Department of Labor regulations at 29 C.F.R. Part 3 [also see 18 U.S.C. § 874]
* Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 3701–3708)
* The requirements of 37 C.F.R. Part 401, ‘‘Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,’’ and implementing regulations issued by the respective federal awarding agency
* Clean Air Act, as amended (42 U.S.C. §§ 7401–7671q)
* Federal Water Pollution Control Act, as amended (33 U.S.C. §§ 1251–1387)
* Debarment and suspension (Executive Orders 12549 and 12689)
* Byrd Anti-Lobbying Amendment (31 U.S.C. § 1352)
* Procurement of recovered materials
* Value engineering

Reference:

[2 C.F.R. § 200.326](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-326.pdf); [Appendix II to 2 C.F.R. Part 200](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part200-appII.pdf)

Similarly, UGMS requires inclusion of the following contract provisions, as applicable:

* 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
* Termination for cause and for convenience by the grantee including the manner by which it will be affected and the basis for settlement
* Equal employment opportunity
* Copeland “Anti-Kickback” Act (18 U.S.C. § 874) as supplemented in Department of Labor regulations (29 C.F.R. Part 3) [also see 40 U.S.C. § 3145]
* Davis-Bacon Act (40 U.S.C. §§ 3141–3148\* (see Note)) as supplemented by Department of Labor regulations (29 C.F.R. Part 5)
* Contract Work Hours and Safety Standards Act (40 U.S.C. 3701–3708\* (see Note)), as supplemented by Department of Labor Regulations (29 C.F.R. Part 5)
* Notice of awarding agency requirements and regulations pertaining to reporting
* Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract
* Awarding agency requirements and regulations pertaining to copyrights and rights in data
* 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
* Retention of all required records for three years after grantees make final payments and all other pending matters are closed
* Compliance with all applicable standards, orders, or requirements issued under Section 306 of the Clean Air Act (42 U.S.C. § 7606\* (see Note)), Section 508 of the Clean Water Act (33 U.S.C. § 1368), Executive Order 11738, and Environmental Protection Agency regulations
* Mandatory standards and policies relating to efficiency which are contained in the state energy plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163)

Note: The UGMS was adopted in June 2004. The citations for some of the listed clauses and provisions have changed since that date. Within the preceding list of UGMS requirements, codifications marked by an asterisk (\*) indicate updates that this Publication has made from the citations shown in UGMS.

Reference:

[UGMS, Part III, §\_\_.36(i)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

Applicability of the listed UG and UGMS required provisions varies, in some cases being dictated by what is being acquired, the dollar value involved, and entity type.

Refer to [E.4 Procurement of Recovered Materials](#cE4_recovered_materials), [K.2.4 Value Engineering](#ck2_4_clauses_value_engineering), and [P.2 Suspension & Debarment](#cP2_suspension_debarment), in this Publication, for information about those clauses. Refer to [Appendix II to C.F.R. Part 200](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part200-appII.pdf) for information that UG provides about the other contract provisions that it requires. Refer to [UGMS, Part III, §\_\_.36(i)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf) for more information about the contract provisions that it requires. Refer to [Chapter 15: Contracts](#chapter15_contracts), in the FMGC, and [TWC grant awards](#definition_twc_grant_award) for information about other contract provisions.

### K.2.4 Value Engineering\*

This Section, K.2.4 Value Engineering, provides additional compliance detail for [K.2.1 Basic Standard](#cK2_1_clauses_basic_standard), relating to clauses and provisions.

The UG encourages [grantees](#definition_grantee) of [federal awards](#definition_federal_award) to use value engineering clauses in [contracts](#definition_contract) for construction projects of sufficient size to offer reasonable opportunities for cost reductions when appropriate. The UG describes value engineering as a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

Refer to [K.2.4.1 Value Engineering Description](#cK2_4_1_clauses_value_engineer_explanati), in this Publication, for related supplemental information.

Reference:

[2 C.F.R. § 200.318(g)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf)

#### K.2.4.1 Value Engineering Description

This Section, K.2.4.1 Value Engineering Description, provides supplemental technical information or guidance. It is included for informational purposes.

In general, value engineering relates to the acquisition of products that will become practically or stylistically obsolete within a specific length of time. In value engineering, the producer uses the least expensive components that meets the product’s projected lifetime before it becomes obsolete; higher grade components are available and could be used, but at a higher and unnecessary cost given the length of time before it is projected to become obsolete.

As discussed in the Federal Acquisition Regulation (FAR), value engineering clauses permit a [contractor (vendor)](#definition_contractor) to “voluntarily suggest methods for performing more economically and share in any resulting savings” or “be required to establish a program to identify and submit to the Government methods for performing more economically.” Refer to [48 C.F.R. Part 48](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-part48.pdf) (2019) of the FAR for more information about value engineering, as used by federal agencies, and value engineering clauses used by federal agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the FAR.)

### K.2.5 Program-Related Client Services\*

This Section, K.2.5 Program-Related Client Services, provides additional compliance detail for [K.2.1 Basic Standard](#cK2_1_clauses_basic_standard), relating to clauses and provisions.

Pursuant to the Texas General Appropriations Act as passed by the Texas Legislature for the respective state biennium, no funds appropriated to TWC may be utilized for [contracts](#definition_contract) or grant awards (including [subgrants](#definition_subgrant) (see Note)) for the purchase of program-related client services unless all the following are met:

* Such agreements include clearly defined goals, outputs and measurable outcomes which directly relate to program objectives
* Such agreements include clearly defined sanctions or penalties for noncompliance with the contract or award terms and conditions
* Such agreements specify the accounting, reporting and auditing requirements applicable to funds received under the agreement
* The [grantee](#definition_grantee) (or [subgrantee (subrecipient)](#definition_subgrantee)) making the contract or subgrant has implemented a formal program using a risk assessment methodology to monitor compliance with financial and performance requirements under the agreement, including a determination of whether performance objectives have been achieved
* The grantee (or subgrantee) has implemented a formal program to obtain and evaluate program costs information to ensure that all costs, including administrative costs, are reasonable to achieve program objectives

Note: As reflected above, TWC interprets this requirement to be inclusive of contracts to [contractors (vendors)](#definition_contractor), grant awards that TWC makes to grantees, and subgrants to subgrantees (subrecipients).

Reference:

[Rider 15, Texas Workforce Commission, Article VII, General Appropriations Act, 86th Texas Legislature](http://www.lbb.state.tx.us/Documents/GAA/General_Appropriations_Act_2020_2021.pdf), and Acts of subsequent Texas legislative sessions, as applicable

# L. Solicitation Development, Amendment, Cancellation

## L.1 Solicitation Document Selection

### L.1.1 Overview

This Section, L.1.1 Overview, provides supplemental technical information or guidance. It is included for informational purposes.

When conducing a procurement, [grantees](#definition_grantee) should use a solicitation document that is appropriate for the procurement method used.

A variety of solicitation documents exist. Refer to the following Sections in this Publication for descriptions of some types of solicitation documents: [L.1.2 Request for Quotations](#cL1_2_request_for_quotations), [L.1.3 Invitation for Bids (IFB)](#cL1_3_invitation_for_bids), [L.1.4 Request for Proposals (RFP)](#cL1_4_request_for_proposals), and [L.1.5 Request for Qualifications](#cL1_5_request_for_qualifications). A Request for Information (RFI) is not appropriate for the solicitation of quotations or offers. Refer to Request for Information in [F.4 Pre-Solicitation Market Research](#cF4_presolicitation_market_research), in this Publication, for information about RFIs.

### L.1.2 Request for Quotations

This Section, L.1.2 Request for Quotations, provides supplemental technical information or guidance. It is included for informational purposes.

A Request for Quotations is appropriate for procurement by small purchase procedures that use a written solicitation document to obtain price or rate quotations. As discussed in [B.2 Quotations Versus Offers](#cB2_quotations_v_offers), in this Publication, quotations are not offers. Refer to [I.2 Procurement by Small Purchase Procedures](#cI2_procurement_small_purchase_procedure), in this Publication, for information about procurement by small purchase procedures.

### L.1.3 Invitation for Bids

This Section, L.1.3 Invitation for Bids, provides supplemental technical information or guidance. It is included for informational purposes.

The UG and UGMS specify use of an Invitation for Bids (IFB) when conducting procurement by sealed bids (formal advertising). This approach is used when products or services are standardized or uniform. It does not provide for negotiation, except in some cases where negotiation is needed to assure a reasonable price because only one (1) bidder exists. Refer to [I.3 Procurement by Sealed Bids (Formal Advertising)](#cI3_procurement_sealed_bids), in this Publication, for information about procurement by sealed bids.

### L.1.4 Request for Proposals

This Section, L.1.4 Request for Proposals, provides supplemental technical information or guidance. It is included for informational purposes.

The UG and UGMS specify use of a Request for Proposals (RFP) when conducting a procurement by competitive proposals. This approach is used when offerors are expected to offer solutions to a specified need, and when negotiation is desired. Refer to [I.4 Procurement by Competitive Proposals](#cI4_procurement_competitive_proposals), in this Publication, for information about procurement by competitive proposals.

### L.1.5 Request for Qualifications\*

Except for the references to UG and UGMS, this Section, L.1.5 Request for Qualifications, provides supplemental technical information or guidance, and is included for informational purposes. The references to UG and UGMS provide compliance detail relating to the use of Requests for Qualifications.

A Request for Qualifications would typically be used for a [qualifications-based procurement](#definition_qualifications_based_proc), whereby a [grantee](#definition_grantee) would issue a solicitation for which price is not an evaluation factor. The grantee would evaluate competitors’ qualifications and award the [contract](#definition_contract) to the most qualified competitor, subject to negotiation of a fair and reasonable price.

Note, however, that the UG and UGMS restrict use of procurements whereby price is not used as a selection factor by limiting it to the procurement of architectural/engineering services only. Refer to [J.3 Architectural, Engineering & Land Surveying Services](#cJ3_architectural_engineering_surveying), in this Publication, for information about procurement of architectural and engineering services. See also [J.5.3 Broker Selection (Insurance)](#cJ5_3_insurance_broker_selection), in this Publication.

Reference:

[2 C.F.R. § 200.320(d)(5)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-320.pdf); [UGMS, Part III, §\_\_.36(d)(3)(v)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## L.2 Identify Requirements & Evaluation Factors\*

Policy:

[Grantees](#definition_grantee) must have written procedures for [procurement transactions](#definition_procurement_transaction) and awarding of subgrants, which ensure that all solicitations—1) incorporate a clear and accurate description of the technical requirements for the property or services being procured, and 2) identify all requirements that offerors must fulfill and all other factors to be used in evaluating the bids or proposals.

In connection with the standard for full and open competition covered in [E.1 Full & Open Competition](#cE1_full_and_open_competition), in this Publication, the UG and UGMS require that a grantee’s written procurement procedures for procurement transactions must ensure that all solicitations meet the following requirements:

* Incorporate a clear and accurate description of the technical requirements for the material, product or service being procured. Such description must 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, must 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 the 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 named brand which must be met by offers must be clearly stated.
* Identify all requirements that offerors must fulfill and all other factors to be used in evaluating the bids or proposals.

TWC requires the same for solicitations used in connection with the awarding of subgrants.

Refer to [L.3 Responsiveness Criteria](#cL3_responsiveness_criteria) and [L.4 Statement of Work & Specifications](#cL4_SOW_and_specifications), in this Publication, for supplemental technical information on this topic. Also refer to [N.5 Evaluation Factors](#cN5_evaluation_factors), in this Publication.

Reference:

[2 C.F.R. § 200.319(c)(2)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-319.pdf); [UGMS, Part III, §\_\_.36(c)(3)(ii)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## L.3 Responsiveness Criteria

This Section, L.3 Responsiveness Criteria, provides supplemental technical information or guidance relating to [L.2 Identify Requirements & Evaluation Factors](#cL2_id_reqs_and_evaluation_factors). It is included for informational purposes.

As reflected in L.2 Identify Requirements & Evaluation Factors, in this Publication, the UG and UGMS require that solicitations “identify all requirements that offerors must fulfill and all other factors to be used in evaluating the bids or proposals.”

This includes responsiveness requirements, also referenced as responsiveness criteria. Responsiveness criteria—which might also be referred to by other names, such as go-no-go criteria or threshold criteria—refers to criteria that if not met will immediately deem a response nonresponsive and make it ineligible for further consideration.

Refer to [L.3.1 Examples: Responsiveness Criteria](#cL3_1responsiveness_examples), in this Publication, for some examples of these requirements.

### L.3.1 Examples: Responsiveness Criteria

This Section, L.3.1 Examples: Responsiveness Criteria, provides supplemental technical information or guidance. It is included for informational purposes.

The following is adapted from the State of Texas Procurement and Contract Management Guide for Texas state agencies to provide information that a [grantee](#definition_grantee) might consider when developing responsiveness criteria. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

The State of Texas Procurement and Contract Management Guide for Texas state agencies defines “responsive” as meaning the following:

The bid, offer, or proposal complies with all material aspects of the solicitation document, including submission of all required documents.

Responsiveness might be determined during a separate administrative review. The State of Texas Procurement and Contract Management Guide includes the following as examples of some of the criteria that might be checked during such a review:

* Response received by the deadline specified in the solicitation
* Response includes the original and required number of copies specified in the solicitation
* Response includes required signatures
* Response indicates it is valid for the number of days specified in the solicitation (if the specification included such requirement)
* References provided, if required by the solicitation
* Conflict of interest form signed
* Nondisclosure agreement signed
* Response is responsive to the solicitation

TWC advises that grantees should refer to their procurement procedures and the nature of the procurement when determining appropriate responsiveness criteria to identify in the solicitation.

Refer to [D.3 Conflicts of Interest](#cD3_conflicts_of_interest), in this Publication, for information about conflicts of interest. Refer to information about administrative reviews in [N.4 Administrative Review](#cN4_administrative_review), in this Publication, for related information. Also refer to [N.2 Late Submissions](#cN2_late_submissions), in this Publication.

## L.4 Statement of Work & Specifications

### L.4.1 Overview

This Section, L.4.1 Overview, provides supplemental technical information or guidance relating to [L.2 Identify Requirements & Evaluation Factors](#cL2_id_reqs_and_evaluation_factors). It is included for informational purposes.

As reflected in L.2 Identify Requirements & Evaluation Factors, in this Publication, solicitations must contain a clear and accurate description of the work to be performed by the selected [contractor (vendor)](#definition_contractor) or [subgrantee (subrecipient)](#definition_subgrantee). Specifications must incorporate a clear and accurate description of the technical requirements for the material, product or service being procured without unduly limiting or restricting competition. [Grantees](#definition_grantee) must avoid “brand name” specifications and other restrictive specifications.

The description of the work to be performed is typically an element of the statement of work. The description includes specifications. Various types of specifications exist. Consistent with the standard for full and open competition, which is described in [E.1 Full & Open Competition](#cE1_full_and_open_competition), in this Publication, care must be taken to avoid specifications that unnecessarily restrict competition. Brand name specifications are one example of specifications that restrict competition, and for that reason must be avoided. The remaining content under L.4 Statement of Work & Specifications, in this Publication, elaborates on this information.

For information about statement of work and specifications, refer to [L.4.2 Statement of Work](#cL4_2_statement_of_work) and [L.4.3 Specifications](#CL4_3_specifications), respectively. For information about types of specifications and restrictive specifications, refer to [L.4.4 Types of Specifications](#cL4_4_types_of_specifications) and [L.4.5 Brand Name & Other Restrictive Specifications](#cL4_5_brand_name_restrictive_specs), respectively.

### L.4.2 Statement of Work

This Section, L.4.2 Statement of Work, provides supplemental technical information or guidance relating to [L.2 Identify Requirements & Evaluation Factors](#cL2_id_reqs_and_evaluation_factors) and [L.4.1 Overview](#cL4_1_overview), in this Publication. It is included for informational purposes.

As reflected in L.2 Identify Requirements & Evaluation Factors, in this Publication, the UG, UGMS, and TWC require that all solicitations:

Incorporate a clear and accurate description of the technical requirements for the material, product or service being procured. Such description must 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, must 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 the 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 named brand which must be met by offers must be clearly stated.

In general, the statement of work describes the work that the [contractor (vendor)](#definition_contractor) or [subgrantee (subrecipient)](#definition_subgrantee) will perform for the [grantee](#grantee). It includes a description of the technical requirements of the material, product or service being procured (specifications), as referenced in [L.2 Identify Requirements & Evaluation Factors](#cL2_id_reqs_and_evaluation_factors), in this Publication, as well as other information. There is no uniform definition or set of protocol or requirements for what to include in the statement of work. Each may vary according to the grantee’s procedures and the procurement.

For reference, the State of Texas Procurement and Contract Management Guide for Texas state agencies emphasizes that the scope of work must provide “a clear and thorough description of the products and services to be provided while at the same time fostering competition[,]…be logically organized and tailored to the agency’s business need.” It also suggests that the business requirements identified by the need determination serve as a starting point for drafting the statement of work. Refer to [F.2 Avoid Unnecessary & Duplicative Purchases](#cF2_duplicative_purchases), in this Publication, for more information about need determinations.

Ambiguous, unclear, and out-of-date specifications can deter an entity from responding to a solicitation, as can overly complicated requirements. This is something to consider if after soliciting for offers, the grantee receives few or no responses. Market research, including, where appropriate, issuance of a pre-solicitation Request for Information (RFI) can function to inform a [grantee’s](#definition_grantee) solicitation development process to develop a statement of work and specifications that foster competition. Refer to [F.4 Pre-Solicitation Market Research](#cF4_presolicitation_market_research), in this Publication, for information about market research and RFIs.

As noted, the scope of work is not limited to the specifications for the property or service being procured. For example, the State of Texas Procurement and Contract Management Guide for Texas state agencies observes that matters addressed in the scope of work may include the following:

* Specifications of the property or service needed
* Licensing or certification requirements
* Contractor’s (or subgrantee’s) responsibilities
* Procuring entity’s (grantee’s) applicable security policies
* Procuring entity’s (grantee’s) responsibilities
* How the grantee will monitor and evaluate performance
* Communication protocols during the award

Refer to the State of Texas Procurement and Contract Management Guide for the full text of its coverage of statements of work. Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.

Refer to [L.4.3 Specifications](#CL4_3_specifications), in this Publication, for more information about the requirement in L.2 Identify Requirements & Evaluation Factors, that relates to inclusion of a clear and accurate description of the technical requirements for the material, product or service being procured.

### L.4.3 Specifications

This Section, L.4.3 Specifications, provides supplemental technical information or guidance relating to [L.2 Identify Requirements & Evaluation Factors](#cL2_id_reqs_and_evaluation_factors), [L.4.1 Overview](#cL4_1_overview), and [L.4..2 Statement of Work](#cL4_2_statement_of_work), in this Publication. It is included for informational purposes.

As reflected in L.2 Identify Requirements & Evaluation Factors, in this Publication, the UG, UGMS, and TWC require that all solicitations:

Incorporate a clear and accurate description of the technical requirements for the material, product or service being procured. Such description must 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, must 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 the 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 named brand which must be met by offers must be clearly stated.

As covered in 4.2 Statement of Work, in this Publication, the required description is often included in the statement of work, and is often referred to as specifications.

For example, the State of Texas Procurement and Contract Management Guide for Texas state agencies describes a specification as “a description of a product or service the agency seeks to procure and is also what the vendor must offer to be considered for contract award.” It describes the three most common types of specifications used in government procurements as being performance-based specifications, design-based specifications, or a mix of both. Refer to [L.4.4 Types of Specifications](#cL4_4_types_of_specifications), in this Publication, for more information about specification types.

As reflected in L.2 Identify Requirements & Evaluation Factors, it is important that specifications incorporate a clear and accurate description of the technical requirements for the property or service being procured, but without unduly limiting or restricting competition. The degree to which specifications are open or restrictive can directly impact the extent of competition obtained. “Brand name” restrictions are one type of specification that restricts competition. Refer to [L.4.5 Brand Name & Other Restrictive Specifications](#cL4_5_brand_name_restrictive_specs), in this Publication, for more information about “brand name” specifications.

### L.4.4 Types of Specifications

This Section, L.4.4 Types of Specifications, provides supplemental technical information or guidance relating to [L.4.3 Specifications](#CL4_3_specifications), in this Publication. It is included for informational purposes.

As a good management practice, [grantees](#definition_grantee) should choose an appropriate specification type to describe the technical requirements of the property or service needed.

The UG and UGMS do not address specification types specifically. A variety of specification types exist. Following are examples of specification types described in the State of Texas Procurement and Contract Management Guide for Texas state agencies. That guide describes the following specification types as types commonly used in government procurements. These examples are provided in this Publication for reference. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

Grantees should choose a specification type appropriate to its specific procurement. Such type may differ from those described in the following paragraphs when appropriate to the specific procurement. No written explanation is required for specification types that differ from the following, unless required by the grantee’s own written procurement procedures. In contrast, a grantee should retain a written explanation in its procurement records if it deviates from its own written procurement procedures.

This Section includes the following content: [L.4.4.1 Performance-based Specifications](#cL4_4_1_performance_based_specifications), [L.4.4.2 Design-based (Detailed) Specifications](#cL4_4_2_design_based_specifications), [L.4.4.3 Mixed Specifications](#cL4_4_3_mixed_specifications), and [L.4.4.4 Other Specifications](#cL4_4_4_other_specifications).

#### L.4.4.1 Performance-based Specifications

This Section, L.4.4.1 Performance-based Specifications, provides supplemental technical information or guidance. It is included for informational purposes.

There is no uniform definition of “performance-based specifications” for TWC grant awards. The information in this Section, L.4.4.1 Performance-based Specifications, is included to aid grantee’s understanding of this specification type. It is based on the State of Texas Procurement and Contract Management Guide for Texas state agencies, and also includes information from the Federal Acquisition Regulation (FAR). Refer also to [L.4.4.2 Design-based (Detailed) Specifications](#cL4_4_2_design_based_specifications), [L.4.4.3 Mixed Specifications](#cL4_4_3_mixed_specifications), and [L.4.4.4 Other Specifications](#cL4_4_4_other_specifications), in this Publication.

The State of Texas Procurement and Contract Management Guide for Texas state agencies describes performance-based specifications as specifications that “focus on outcomes or results rather than the process by which the products and services are produced.” When the procuring entity uses performance-based specifications, respondents to the solicitation consequently choose the approach that they will use to accomplish the procuring entity’s requirement. The State of Texas Procurement and Contract Management Guide observes that “performance-based specifications allow respondents to bring their own expertise, creativity, and resources to satisfy the agency requirement,” but cautions that the procuring entity has responsibility to set performance specifications that are reasonable and which can be measured.

The State of Texas Procurement and Contract Management Guide provides the following two examples of performance-based specifications.

Example 1:

“Contractor shall provide media services for Texas Tourism which shall increase the tourist dollars by a minimum of 3 percent in the next fiscal year. Visits by out-of-state tourists shall increase by a minimum of 10 percent. These figures will be measured as reported by the Texas Chamber of Commerce.”

Example 2:

“Contractor shall provide a pen that precisely writes with no skipping or smearing. Ink shall not penetrate through paper. Minimum writing distance of ink shall be 500 miles.”

In terms of preference over other specification types, provisions at [48 C.F.R. § 11.104(a)](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-sec11-104.pdf) (2019) of the FAR comment that for procurements performed by federal agencies, “the use of performance specifications is preferred to encourage offerors to propose innovative solutions.”

(Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide and the FAR.)

#### L.4.4.2 Design-based (Detailed) Specifications

This Section, L.4.4.2 Design-based (Detailed) Specifications, provides supplemental technical information or guidance. It is included for informational purposes.

There is no uniform definition of “design-based specifications” for TWC grant awards. The information in this Section, L.4.4.2 Design-based (Detailed) Specifications, is included to aid grantee’s understanding of this specification type. It is based on the State of Texas Procurement and Contract Management Guide for Texas state agencies. Refer also to [L.4.4.1 Performance-based Specifications](#cL4_4_1_performance_based_specifications), [L.4.4.3 Mixed Specifications](#cL4_4_3_mixed_specifications), and [L.4.4.4 Other Specifications](#cL4_4_4_other_specifications), in this Publication.

The State of Texas Procurement and Contract Management Guide describes design-based specifications as specifications that “focus on how the vendor must perform the service or how the product is made rather than what the product or service does.” When the procuring entity uses design-based specifications, respondents to the solicitations consequently have minimal discretion for “the methods or detailed processes” that they will use to meet the procuring entity’s requirement. The State of Texas Procurement and Contract Management Guide cautions that when using designed-based specifications it is important that procuring entities “ensure that processes are in place to properly inspect and test for compliance with the specifications.”

The State of Texas Procurement and Contract Management Guide provides the following two examples of design-based specifications.

Example 1:

“Contractor shall conduct at least seven media campaigns for Texas Tourism during the fiscal year. Three of these campaigns must be directed to out-of-state tourists.”

Example 2:

“Contractor shall provide a pen that has a white round plastic barrel of ¼-inch-diameter. Length of pen, including cap, shall not exceed 5-¾ inches. Ink cartridge shall have a tungsten carbide ball in stainless steel tip. Point shall not exceed 0.3 mm fine point. Ink shall be black.”

These examples are included in this Publication for illustration and informational purposes. Specifications should be only as detailed as is necessary to convey the actual need requirements. As covered in [L.2 Identify Requirements & Evaluation Factors](#cL2_id_reqs_and_evaluation_factors), in this Publication, UG and UGMS specify that detailed product specifications should be avoided if at all possible.

(Refer to [A.5 Sources](#cA5_sources) for more information about references to the State of Texas Procurement and Contract Management Guide.)

#### L.4.4.3 Mixed Specifications

This Section, L.4.4.3 Mixed Specifications, provides supplemental technical information or guidance. It is included for informational purposes.

There is no uniform definition of “mixed specifications” for [TWC grant awards](#definition_twc_grant_award). The information in this Section, L.4.4.3 Mixed Specifications, is included to aid [grantee’s](#definition_grantee) understanding of this specification type. It is based on the State of Texas Procurement and Contract Management Guide for Texas state agencies. Refer also to [L.4.4.1 Performance-based Specifications](#cL4_4_1_performance_based_specifications), [L.4.4.2 Design-based (Detailed) Specifications](#cL4_4_2_design_based_specifications), and [L.4.4.4 Other Specifications](#cL4_4_4_other_specifications), in this Publication.

The State of Texas Procurement and Contract Management Guide describes mixed specifications as specifications that “comingle” performance- and designed-based specifications. It provides the following two examples of mixed specifications.

Example 1:

“Contractor shall provide media services for Texas Tourism which shall include a minimum of seven media campaigns during the fiscal year. Media services shall provide for a minimum increase in tourist dollars of 3 percent in the next fiscal year as measured and reported by the Texas Chamber of Commerce.”

Example 2:

“Contractor shall provide a 0.3 mm fine point, black ink pen. The pen shall precisely write with no skipping or smearing.”

(Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

#### L.4.4.4 Other Specifications

This Section, L.4.4.4 Other Specifications, provides supplemental technical information or guidance. It is included for informational purposes.

There is no uniform definition of specifications for [TWC grant awards](#definition_twc_grant_award). The information in this Section, L.4.4.4 Other Specifications, is included to aid [grantee’s](#definition_grantee) understanding the types of specifications that some entities might use. It is based on information in the State of Texas Procurement and Contract Management Guide for Texas state agencies. Refer also to [L.4.4.1 Performance-based Specifications](#cL4_4_1_performance_based_specifications), [L.4.4.2 Design-based (Detailed) Specifications](#cL4_4_2_design_based_specifications), and [L.4.4.3 Mixed Specifications](#cL4_4_3_mixed_specifications), in this Publication.

Performance-based, design-based, and mixed specifications are the three types of specifications that the State of Texas Procurement and Contract Management Guide identifies as being commonly used in government procurements. Other specification types exist, for example, interface specifications that describe how a software or license interfaces with one or more systems, and quality specifications relating to design, testing, and monitoring for quality control. Grantees are not prohibited from using other specification types, provided that the specifications are appropriate to the specific procurement being conducted and do not unduly limit or restrict competition.

### L.4.5 Brand Name & Other Restrictive Specifications

This Section, L.4.5 Brand Name & Other Restrictive Specifications, provides supplemental technical information or guidance relating to [L.2 Identify Requirements & Evaluation Factors](#cL2_id_reqs_and_evaluation_factors), and [L.4.3 Specifications](#CL4_3_specifications). It is included for informational purposes.

As reflected in [L.2 Identify Requirements & Evaluation Factors](#cL2_id_reqs_and_evaluation_factors), the UG and UGMS require that [grantees](#definition_grantee) must avoid “brand name” specifications and other restrictive specifications. Accordingly, grantees should not specify minimum or maximum dimensions, weights, or other characteristics that are unique to one brand or that would eliminate competition of other products or services, unless an actual business need exists for the specified characteristic and the need is justified in writing in the procurement records.

The UG and UGMS observe that specifying a “brand name” product—instead of allowing an equal product to be offered and describing the performance or other relevant requirements of the procurement—restricts competition. (Refer to [E.1 Full & Open Competition](#cE1_full_and_open_competition), in this Publication.) It does so by limiting the pool of entities eligible to compete for the opportunity. Unnecessarily prescriptive specifications also have the potential to restrict competition.

The UG and UGMS require grantees to avoid detailed product specifications if at all possible, adding that when impractical or uneconomical to make a clear and accurate description of the technical requirements of a need, a ‘‘brand name or equivalent’’ description may be used as a means to define the performance or other salient requirements of the procurement. In doing so, the specific features of the named brand which must be met by offers must be clearly stated. (Refer also to L.2 Identify Requirements & Evaluation Factors, in this Publication.)

For additional information, refer to the following, in this Publication: [L.4.5.1 “Brand Name” Specifications and “Brand Name or Equivalent” Specifications](#cL4_5_1_brandname_and_equiv_specs), [L.4.5.2 Other Restrictive Specifications](#cL4_5_2_other_restrictive_specs), [L.4.5.3 Proprietary Purchases](#cL4_5_3_proprietary_purchases), [L.4.5.4 Restrictive Specifications & Sole Source Procurements](#cL4_5_4_restrictivespecs_solesource), and [L.4.5.5 Justifying Need to Use Brand Name & Other Restrictive Specifications](#cL4_5_5_justifying_restrictive_specs).

#### L.4.5.1 “Brand Name” Specifications and “Brand Name or Equivalent” Specifications

This Section, L.4.5.1 “Brand Name” Specifications and “Brand Name or Equivalent” Specifications, provides supplemental technical information or guidance. It is included for informational purposes.

“Brand name” generally refers to a product name or a trade name that identifies a product of a specific manufacturer.

Specifications that require a specific “brand name,” product, or feature of a product, unique to one entity (thereby precluding consideration of a similar product available from another company) is appropriate only when all the following exist:

* The specific “brand name,” product, or feature is essential to the [grantee’s](#definition_grantee) business needs
* Market research shows that other entities’ similar products (or products lacking the specific feature) don’t meet or can’t be modified to meet the need
* Written justification exists in the procurement records

(The preceding information was adapted from [48 C.F.R. § 11.105(a)](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-sec11-105.pdf) (2019) of the FAR.)

Occurrences of “brand name” specifications should be infrequent and receive enhanced scrutiny by grantee staff approving the procurement.

Distinction exists between a “brand name” specification and a “brand name or equivalent” specification. A “brand name” specification uses a designation, such as a brand name or model number, that identifies a specific product and will only accept offers for that product. A “brand name or equivalent” specification identifies a specific product, but also accepts offers for comparable products from any manufacturer. As referenced at the top of this section, the UG and UGMS regard “brand name or equivalent” specifications, properly used, to be consistent with the standard for full and open competition, while “brand name” specifications restrict competition.

An example of a “brand name or equivalent” clause can be found in [48 C.F.R. § 52.211-6](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol2/pdf/CFR-2019-title48-vol2-sec52-211-6.pdf) (2019) of the FAR. It reads:

(a) If an item in this solicitation is identified as ‘‘brand name or equal,’’ the purchase description reflects the characteristics and level of quality that will satisfy the Government’s needs. The salient physical, functional, or performance characteristics that ‘‘equal’’ products must meet are specified in the solicitation.

(b) To be considered for award, offers of ‘‘equal’’ products, including ‘‘equal’’ products of the brand name manufacturer, must—

(1) Meet the salient physical, functional, or performance characteristic specified in this solicitation;

(2) Clearly identify the item by—

(i) Brand name, if any; and

(ii) Make or model number;

(3) Include descriptive literature such as illustrations, drawings, or a clear reference to previously furnished descriptive data or information available to the Contracting Officer; and

(4) Clearly describe any modifications the offeror plans to make in a product to make it conform to the solicitation requirements. Mark any descriptive material to clearly show the modifications.

(c) The Contracting Officer will evaluate ‘‘equal’’ products on the basis of information furnished by the offeror or identified in the offer and reasonably available to the Contracting Officer. The Contracting Officer is not responsible for locating or obtaining any information not identified in the offer.

(d) Unless the offeror clearly indicates in its offer that the product being offered is an ‘‘equal’’ product, the offeror shall provide the brand name product referenced in the solicitation.

The preceding clause is provided to illustrate how one type of public purchasing entity (federal government agencies) implements “brand name or equal” specifications. Grantees may follow their own documented procedures and clauses to the extent that those procedures and clauses conform to external requirements governing the grantee’s procurements, and to the procurement standards in UG and UGMS.

Additionally, the State of Texas Procurement and Contract Management Guide for Texas state agencies suggests that when using “brand name or equal” specifications it is a best practice that “a minimum of two known acceptable manufacturer/brand names and model numbers that are currently being manufactured should be referenced as ‘or equal.’” TWC encourages, but does not require, grantees to implement this practice in their procurement procedures.

Finally, the State of Texas Procurement and Contract Management Guide also observes that if using “brand name or equivalent” specifications, to receive the benefits of competition, it is necessary that the “or equal” offers be given full consideration during evaluation, taking care not to reject such offers for minor differences in design, construction, or features from the referenced models when such differences do not affect the suitability of the product for its intended use.

(Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide and the FAR.)

#### L.4.5.2 Other Restrictive Specifications

This Section, L.4.5.2 Other Restrictive Specifications, provides supplemental technical information or guidance. It is included for informational purposes.

“Brand name” specifications aren’t the only types of specifications that have the potential to restrict competition. [Grantees](#definition_grantee) should take care not to write specifications that are so detailed as to effectively restrict competition to a specific product. Similarly, grantees are cautioned against inadvertently customizing a product or service when writing specifications. To illustrate, the State of Texas Procurement and Contract Management Guide for Texas state agencies includes a scenario in which an entity specifies a need for four (4) inch resealable bags when the business need could be satisfied by the industry standard of five (5) inch resealable bags. In this scenario, unnecessarily requiring a non-standard bag size reduces the pool of eligible vendors. The customization could also increase costs. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

Questions sometimes arise as to whether limiting a procurement to a specific type of entity is permissible when multiple types of entities provide the type of property or service needed. Similarly, questions sometimes arise as to whether a solicitation can be limited to only entities that have a specified number of years of experience. Such practices would generally be inconsistent with the standard for full and open competition. However, where years of experience is a relevant decision factor, the standard for full and open competition does not preclude a grantee from using prior experience as one of its multiple evaluation criteria for the specific procurement, appropriately weighted, whereby a range of points is assigned to each offer based on each supplier’s or offeror’s respective experience.

#### L.4.5.3 Proprietary Purchases

This Section, L.4.5.3 Proprietary Purchases, provides supplemental technical information or guidance. It is included for informational purposes.

Proprietary purchases inherently restrict competition.

Exact definitions of proprietary purchases vary among entities but share a commonality—restriction to a specific product or purchase on the basis that a business need exists for its distinctive characteristics which are protected by exclusive ownership, such as by patent, copyright, or trade law. For example, the State of Texas Procurement and Contract Management Guide for Texas state agencies includes the following description:

A proprietary purchase is one where the specifications or conditions of the proposed purchase are proprietary to one vendor and do not permit an equivalent product or service to be supplied. The term “proprietary” refers to a product or service that has a distinctive feature or characteristic which is not shared or provided by competing or similar products or services. Proprietary purchases include products or services manufactured or offered under exclusive rights of ownership, including rights under patent, copyright, or trade secret law…In today’s robust marketplace, it is unusual for only one product or one vendor to be capable of addressing an agency’s business need.

The State of Texas Procurement and Contract Management Guide is also clear that a proprietary purchase may or may not constitute a [sole source procurement](#definition_solesourceproc). As reflected in that Guide, if multiple distributors of the identified product or service exist, the purchase does not qualify for sole source procedures. Refer to [L.4.5.4 Restrictive Specifications & Sole Source Procurements](#cL4_5_4_restrictivespecs_solesource), in this Publication, for more information.

TWC advises that because proprietary purchases restrict competition, proprietary purchases should receive enhanced scrutiny by [grantee](#definition_grantee) personnel authorized to approve purchases. TWC also observes that it is important that specifications for a proprietary purchase are based on an actual business need for the distinctive characteristic identified, rather than preference.

(Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

#### L.4.5.4 Restrictive Specifications & Sole Source Procurements

This Section, L.4.5.4 Restrictive Specifications & Sole Source Procurements, provides supplemental technical information or guidance. It is included for informational purposes.

Specifications for a specific brand, product, or feature may or may not warrant use of sole source procedures. Sole source procedures should be used only when an actual sole source circumstance exists.

In a [sole source procurement](#definition_solesourceproc), the specified product or service is available through a single entity only. If the specified product or service is available for purchase through more than one entity, such as multiple dealers, distributors, resellers, or authorized service providers, the procurement (though inherently restrictive) does have opportunity to allow for some competition and because of that does not qualify as a sole source procurement.

For example, a solicitation that requires brand-specific replacement parts that are available through multiple authorized deals for the specified brand does not justify use of sole source procedures. As another example, procurement of a specific software that is available through more than one reseller does not justify use of sole source procedures. (These examples are adapted from the State of Texas Procurement and Contract Management Guide for Texas state agencies.) (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

#### L.4.5.5 Justifying Need to Use Brand Name & Other Restrictive Specifications

This Section, L.4.5.5 Justifying Need to Use Brand Name & Other Restrictive Specifications, provides supplemental technical information or guidance. It is included for informational purposes.

If a business need exists to use “brand name” specifications or other restrictive specifications, the [grantee](#definition_grantee) needs to include written justification for the need in its procurement records. The documentation might be included as part of the need determination, or as a separate record. The justification should receive enhanced scrutiny from grantee personnel approving the procurement. Use of restrictive specifications should be rare.

It is important that the written justification will demonstrate to third parties that a business need existed to use restrict competition by using restrictive specifications. Examples of the types of details to include in the written justification include, but are not necessarily limited to the following:

* A description of the planned use of the procured property or service
* Identification of the unique characteristics needed
* An explanation of the business need for the unique characteristics
* If specifying a brand name, the reason no competing product or service satisfies the need
* A description of any market research performed and the results
* Examples of the technical, practical or operational risks that would occur if competing products or services are selected
* If using sole source procedures, a description of the steps taken to determine that no other dealer, distributor, reseller, or other source exists

Following are examples of statements that, on their own, do not justify use of “brand name” or proprietary specifications:

* An endorsement, statement from a vendor itself, or statement from grantee personnel that claims, “Our professionals have identified [vendor’s product] as the most durable, safe, and efficient system of its kind.”
* A statement from grantee personnel that, “[The vendor] has claimed their technology is proprietary and we agree.” Whether the technology is in fact priority or not, the mere fact that proprietary attributes exist is insufficient on its own to warrant exclusion of competing products or services; a business need must exist for the unique proprietary attributes which preclude use of competitors. Evidence must show that the specified attribute is in fact proprietary.
* A statement from a vendor or from grantee personnel that claims, “[The vendor] is the exclusive patent holder of US Patents [X, Y, and Z]. No other manufacturer can legally produce [the product] with the same properties.” A business need must exist for the proprietary attribute. Evidence must show that the specified attribute is in fact proprietary. Sole source is not warranted if multiple legal distribution outlets exist for the product, such as if the product is available through more than one distributor, retailer, reseller, or authorized dealer.
* “This vendor is our incumbent and only their products will work with the equipment we already have.” A product need not necessarily be the same brand name as existing equipment to be compatible with the existing equipment. This is an example of when a “brand name or equivalent” specification might be appropriate, unless market research on its own can demonstrate that no compatible products exists.
* An explanation from grantee personnel that claims, “The [brand] furniture purchased will be used to provide a comfortable and aesthetically pleasing work environment for employees’ working in the office so they may provide customers frequenting the building excellent customer service in a welcoming atmosphere.” Comfort and aesthetic appeal of a specific brand do not justify use of a “brand name” specification.

(The sample statements in the preceding list are included in a list of examples of noncompliant proprietary purchase justifications in the State of Texas Procurement and Contract Management Guide for Texas state agencies. Explanations were added to describe the deficiencies illustrated by the selected examples.) (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

TWC advises that justifications for “brand name” specifications need to be considered on a case-by-case basis. TWC suggests considering for example, that a grantee’s organization purchased a large quantity of a specialized item of equipment. The equipment has unique characteristics and requires special training. The equipment is used by multiple personnel. One of the items of equipment becomes damaged and is irreparable. Use of a competing product will create incompatibilities and require additional training. This scenario may warrant use of a “brand name” specification for some initial replacements. However, such justification is generally not appropriate in perpetuity, such as an alternative to advance planning for procurement of new equipment, for example, if the age of the equipment or its functionality could have been anticipated to be nearing the end of its life.

TWC also advises that including written justification in the procurement records is an important tool to aid a grantee in its scrutiny of the use of full and open competition in its procurement, and may also become useful in a grantee’s defense of its decision, such as in the event of protest claiming that competition was unnecessarily restricted.

## L.5 Federal Funding Disclosure Statement (Steven’s Amendment)\*

Policy:

If required by the terms and conditions of the [TWC grant award](#definition_twc_grant_award), a [grantee](#definition_grantee) must comply with a federally-imposed federal funding disclosure requirement when issuing requests for proposals, bid solicitations, and other covered communications.

Most [federal awards](#definition_federal_award) that TWC receives require TWC, its grantees, and any [subgrantees (subrecipients)](#definition_subgrantee) under that award to comply with a federally-imposed federal funding disclosure requirement. One such agreement is often referred to as the Steven’s Amendment, which acknowledges the last name of the author of the bill amendment that establishes the requirement.

The funding disclosure requirement required by the Steven’s Amendment is attached to the federal fund appropriations for certain DOL, HHS, and ED funds. It reads:

When issuing statements, press releases, requests for proposals, bid solicitations and other documents describing projects or programs funded in whole or in part with Federal money, all grantees receiving Federal funds, including but not limited to State and local governments, shall clearly state:

* The percentage of the total costs of the program or project which will be financed with Federal money,
* The dollar amount of Federal funds for the project or program, and
* Percentage and dollar amount of the total costs of the project or program that will be financed by nongovernmental sources.

The statute at 7 U.S.C. § 2209d imposes a similar requirement on USDA money. It reads:

On and after October 28, 1991, the Department of Agriculture, when issuing statements, press releases, requests for proposals, bid solicitations, and other documents describing projects or programs funded in whole or part with Federal money, all grantees receiving Federal funds, including but not limited to State and local governments, shall clearly state (1) the percentage of the total cost of the program or project which will be financed with Federal money, and (2) the dollar amount of Federal funds for the project or program.

Refer to the TWC grant award to determine if either requirement applies.

Note: As used in these provisions, the terms “State” and “local governments” have the meanings that apply under the respective federal provision.

## L.6 Bidders Conference

This Section, L.6 Bidders Conference, provides supplemental technical information or guidance. It is included for informational purposes.

In keeping with good management practice and the standard of full and open competition—if a [grantee](#definition_grantee) holds a bidders conference (also referred to as a pre-bid, pre-offer, or pre-proposal conference), it is important that the grantee identify the date, time, and location in the solicitation document, that the date gives potential offerors time to review the solicitation, and that the grantee take care that the conference does not unduly limit or restrict competition.

When conducting a procurement—especially procurement by sealed bids or competitive proposals—a grantee will decide whether to hold a pre-bid or pre-proposal conference. The State of Texas Procurement and Contract Management Guide for Texas state agencies observes that a pre-bid/pre-offer/pre-proposal conference provides potential offerors an opportunity to ask questions about the solicitation, provides an opportunity for entities to develop subcontracting relationships, and helps the procuring entity gauge interest in the opportunity.

The grantee will decide when to hold the conference. Consistent with advice that the State of Texas Procurement and Contract Management Guide provides to Texas state agencies, the date should give potential offerors enough time to receive and review the solicitation. Grantees should be aware that the UG and UGMS do not prescribe a specific amount of time to allow, and TWC observes that the number of days after issuance may vary according to the complexity of the solicitation and other factors. The State of Texas Procurement and Contract Management Guide advises Texas state agencies that they should usually allow at least ten (10) calendar days before holding the conference.

If a grantee holds a conference, the grantee will decide the setting for the conference. The State of Texas Procurement and Contract Management Guide acknowledges options to hold the conference face-to-face, by conference call, or by web conference. The State of Texas Procurement and Contract Management Guide also observes that out-of-town and out-of-state entities might be less willing to participate in a face-to-face pre-bid/pre-offer/pre-proposal conference, because of the time and expense involved. The State of Texas Procurement and Contract Management Guide observes that this may discourage competition by out-of-town entities. Given that standards require promotion of full and open competition, TWC suggests that this should be considered by the grantee in choosing the setting—face-to-face, conference call, or web conference—especially if the grantee requires mandatory attendance at the conference.

TWC generally advises against making a conference mandatory except in very limited instances when specific cause exists to do so. This advice is based on information from the State of Texas Procurement and Contract Management Guide for Texas state agencies. The State of Texas Procurement and Contract Management Guide observes that pre-bid/pre-offer/pre-proposal conferences might be mandatory or non-mandatory. The State of Texas Procurement and Contract Management Guide cautions that the use of “mandatory” conferences could have the effect of limiting competition—such as by administrative elimination of an entity for being late or not attending the conference, and, if held in a face-to-face setting, by potentially discouraging competition by out out-of-town entities. For that reason, the State of Texas Procurement and Contract Management Guide suggests that establishing a conference as “mandatory” should not occur without careful consideration, and if the procuring entity determines appropriate, legal counsel. (Note: TWC does not provide legal counsel to its grantees. If a grantee seeks legal advice, it will need to seek counsel from a qualified professional.)

In considering the question of whether to make a pre-bid/proposal conference “mandatory” or “non-mandatory,” the State of Texas Procurement and Contract Management Guide advises Texas state agencies that a “mandatory” conference should be used “only if an on-site visit is required to have a full understanding of the procurement or if the solicitation is so complex that agency staff believes attendance is critical for potential respondents to fully understand the procurement.” Accordingly, it observes that “mandatory” conferences would be required if the procuring entity determines that “disqualification is appropriate for any response from a vendor that did not receive certain information pertaining to the solicitation at an agency-designated time and location.” Additionally, the State of Texas Procurement and Contract Management Guide requires that when a Texas state agency uses a “mandatory conference,” the solicitation must state, “Failure to attend the pre-bid/offer/proposal conference will result in disqualification of the response.” Also, if a high number of attendees are anticipated for a “mandatory” conference, it suggests offering multiple conference dates.

If using a mandatory conference, TWC advises its grantees that the rationale for the decision, including any related legal counsel, should be retained in the grantee’s procurement records. This is because of the effect that mandatory conference can have on competition. A mandatory pre-bid/pre-offer/pre-proposal conference that unduly limits competition violates the standard for full an open competition that is covered in [E.1 Full & Open Competition](#cE1_full_and_open_competition), in this Publication.

If holding a conference, the State of Texas Procurement and Contract Management Guide requires Texas state agencies to document conference attendees on a sign-in sheet—official record used by the procuring entity to verify who attended the conference. It also requires that when holding a conference that the procuring entity specified as being “mandatory,” the sign-in sheet is to be collected at the beginning of the pre-bid/pre-offer/pre-proposal conference.

TWC advises that it is good management practice to have both contract development or procurement staff, and program staff present at the conference.

During the conference, the grantee will provide oral responses to the questions that conference attendees ask. Grantees should follow-up with written responses. It is a good management practice to inform conference attendees that oral responses provided during the conference are not binding until put in writing. This information is based on instructions that the State of Texas Procurement and Contract Management Guide provides to Texas state agencies.

As noted, much of the information in this section is adapted from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

## L.7 Question & Answer Period

This Section, L.7 Question & Answer Period, provides supplemental technical information or guidance. It is included for informational purposes.

The information in this Section is adapted from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

A question and answer period will provide potential offers with an opportunity to clarify their understanding of a specific solicitation. As a good management practice, [grantees](#definition_grantee) are encouraged to consider permitting a formal question and answer period when conducting procurement by sealed bids (formal advertising) or competitive proposals. Consistent with the standard for full and open competition, it is important that responses to all questions are available to all potential offerors.

When conducting a procurement—especially procurement by sealed bids or procurement by competitive proposals—a grantee will decide whether to offer a formal question and answer period. A question and answer period will provide potential offerors with an opportunity to obtain clarifications about the solicitation. If a grantee uses a formal question and answer period, the grantee should specify the due date for questions, how to submit the questions, and the grantee’s estimated response date in the solicitation.

The grantee does not respond to each individual questioner separately. Rather, the grantee compiles all questions received (without including any identifying entity information) and the response to each question in a document. After the due date for questions ends, the grantee publishes the question and answer document, either as a separate document, or as an addendum to the solicitation. The names of the entities that submitted the questions should be omitted from the published question and answer document.

If the questions received during the question and answer period indicate that significant ambiguities or deficiencies exist in the solicitation, the grantee will need to decide whether to amend, cancel, or reissue the solicitation.

## L.8 Solicitation Amendments

This Section, L.8 Solicitation Amendments, provides supplemental technical information or guidance. It is included for informational purposes.

The information in this section is adapted from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

If amending a solicitation, a [grantee](#definition_grantee) should take care that the addendum does not unduly limit or restrict competition.

An addendum would be issued to add information or make a correction to a solicitation, make a clarification, extend the response due date, or if applicable, alter the date for public opening. If a formal question and answer period was used, the question and answer document might be published as an addendum to the solicitation. Each addendum is numbered. If the change occurs before the response due date, it is expected that the grantee would issue the addendum in the same manner that it issued the solicitation. Doing so promotes competition.

When amending a solicitation, a grantee should take care to give offerors a reasonable time to respond to the addendum. The content of the addendum may warrant an extension to the response due date. The grantee should also consider the extent of the change being made by the addendum. If it is significant enough to potentially affect an entity’s decision to submit or not submit an offer, it is a good management practice and would also be consistent with the standard for full and open competition to re-issue the revised solicitation. In such case, the grantee will decide how long to re-issue the revised solicitation. For example, the State of Texas Procurement and Contract Management Guide recommends that a Texas state agency that issues a revised solicitation, issue the revised solicitation for at least fourteen (14) calendar days after the addendum date.

Making changes that could impact an entity’s decision to submit or not submit an offer, or that could have significant impact on the content of a bid or response could negatively affect competition if no extension is made to the due date when an extension is warranted.

## L.9 Solicitation Cancellation

This Section, L.9 Solicitation Cancellation, provides supplemental technical information or guidance. It is included for informational purposes.

The information in this Section is adapted from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

In keeping with good management practice and to help preserve the integrity of the procurement process, TWC encourages [grantees](#definition_grantee) to have written procedures for cancelling a solicitation.

Grantees may generally cancel a solicitation at any time; however, this is a matter which should be addressed in and would be governed by the grantee’s solicitation. If cancelling a solicitation, notice of the cancellation should be provided in the same manner that the grantee issued the solicitation. The solicitation or grantee’s procedures dictate what the grantee does with responses received before the cancellation. For example, the State of Texas Procurement and Contract Management Guide requires that state agencies that cancel a solicitation return all responses unopened with a notification letter of the cancellation, unless the agency’s solicitation specifies other delivery or disposition arrangements.

## L.10 Pass-Through Entity Review

### L.10.1 Basic Standard\*

Policy:

The UG and UGMS authorize a [pass-through entity](#definition_passthruentity) to require a pre-procurement review of technical specifications or pre-procurement review of procurement documents, if the pass-through entity determines such review is needed. Where TWC or another pass-through entity requires such review, the TWC [grantee](#definition_grantee) (or [subgrantee (subrecipient)](#definition_subgrantee)) involved must adhere to the review requirements, except where it otherwise becomes exempted from such reviews under the UG and UGMS.

The UG and UGMS authorize a pass-through entity to require certain pre-procurement reviews of its subgrantee’s (subrecipient’s) procurements. These standards give TWC authority to require such pre-procurement reviews for its grantees’ procurements. It also requires TWC grantees to require such reviews of their subrecipients if they determine that such review is needed, and so on at lower tiers. TWC also assumes similar review authority with respect to grantee processes for making [subgrants](#definition_subgrant).

Refer to [L.10.2 Pre-Procurement Review of Technical Specifications](#cL10_2_review_technical_specs), [L.10.3 Pre-Procurement Review of Procurement Documents](#cL10_3_reviews_procurement_docs), and [L.10.4 Procurement System Reviews](#cL10_4_procurement_system_reviews), in this Publication, for more information about the reviews and exemption request opportunity.

TWC does not routinely require pre-procurement reviews of its grantees’ procurements or processes for making subgrants.

Reference:

[2 C.F.R. § 200.324](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-324.pdf); [UGMS, Part III §\_\_.36(g)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

### L.10.2 Pre-Procurement Review of Technical Specifications\*

This Section, L.10.2 Pre-Procurement Review of Technical Specifications, provides additional compliance detail for [L.10.1 Basic Standard](#cL10_1_reviews_basic_standard), relating to pass-through entity reviews.

TWC may require a [grantee](#definition_grantee) to make available upon request technical specifications for proposed procurements so that TWC can review the specification before the grantee issues the solicitation. Similarly, a TWC grantee may require such review of its [subgrantees (subrecipients)](#definition_subgrantee), and so on.

The UG and UGMS require that a TWC grantee must make available, upon TWC request, technical specifications for proposed procurements where TWC believes such review is needed to ensure that the item or services specified is the one being proposed for acquisition. This review authority is available to a [pass-through entity](#definition_passthruentity) at any tier. Therefore, the same authority is available to a TWC grantee for review of its subgrantees (subrecipients), and so on.

The UG and UGMS specify that if this review is required it will generally take place prior to the time the specification is incorporated into a solicitation document. However, if the entity being reviewed desires to have the review accomplished after a solicitation document has been developed, the review may occur accordingly, but with such review still usually limited to the technical aspects of the proposed purchase only (rather than the entire solicitation).

Reference:

[2 C.F.R. § 200.324](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-324.pdf); [UGMS, Part III §\_\_.36(g)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

### L.10.3 Pre-Procurement Review of Procurement Documents\*

This Section, L.10.3 Pre-Procurement Review of Procurement Documents, provides additional compliance detail for [L.10.1 Basic Standard](#cL10_1_reviews_basic_standard), relating to pass-through entity reviews.

TWC may require a [grantee](#definition_grantee) to make available upon request procurement documents or independent cost estimates for proposed procurements so that TWC can review those items before the grantee completes its procurement. Similarly, a TWC grantee may require such review of its [subgrantees (subrecipients)](#definition_subgrantee), and so on.

The UG and UGMS provide that the grantee must make available, upon TWC request, procurement documents, such as RFPs or IFBs, or independent cost estimates when any of the following circumstances exists:

* The grantee’s procurement procedures or operation fails to comply with the procurement standards in UG, UGMS or this Publication
* The procurement is expected to exceed the [simplified acquisition threshold](#definition_simplified_acq_threshold) and is to be awarded without competition or only one bid or offer is received in response to a solicitation
* The procurement, which is expected to exceed the simplified acquisition threshold, specifies a “brand name” product
* The proposed [contract](#definition_contract) is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement
* A proposed [contract modification](#definition_contractmod) changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold

This review authority is available to a [pass-through entity](#definition_passthruentity) at any tier. Therefore, the same authority is available to a TWC grantee for review of its subgrantees (subrecipients), and so on.

Reference:

[2 C.F.R. § 200.324](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-324.pdf); [UGMS, Part III §\_\_.36(g)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

### L.10.4 Procurement System Reviews\*

This Section, L.10.4 Procurement System Reviews, provides additional compliance detail for [L.10.1 Basic Standard](#cL10_1_reviews_basic_standard), relating to pass-through entity reviews.

Where a pre-procurement review described in [L.10.2 Pre-Procurement Review of Technical Specifications](#cL10_2_review_technical_specs) or [L.10.3 Pre-Procurement Review of Procurement Documents](#cL10_3_reviews_procurement_docs), in this Publication, is required, the TWC [grantee](#definition_grantee) (or [subgrantee (subrecipient)](#definition_subgrantee)) being reviewed may request that its procurement system be reviewed to determine whether the system meets the procurement standards in UG, UGMS and this Publication, in order for its system to be certified and exempted from such pre-procurement reviews. Generally, such certification/exemption reviews must occur where there is continuous high-dollar funding, and third-party contracts are awarded on a regular basis.

Alternatively, the UG and UGMS permit a grantee (or subgrantee) to self-certify its procurement system. Under UG and UGMS, such self-certification must not limit the awarding entity’s right to survey the system. However, under a self-certification procedure, the awarding entity may rely on written assurances from the grantee (or subgrantee) that the grantee (or subgrantee) is complying with the standards in UG and UGMS, as applicable. A grantee (or subgrantee) making such certification would cite specific policies, procedures, regulations or standards as being in compliance with such requirements and have its system available for review.

Reference:

[2 C.F.R. § 200.324](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-324.pdf); [UGMS, Part III §\_\_.36(g)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

# M. Advertisement & Bidders List

## M.1 Solicitation Advertisement

### M.1.1 Advertisement Requirements

This Section, M.1.1 Advertisement Requirements, provides supplemental technical information or guidance. It is included for informational purposes.

The UG and UGMS require [grantees](#definition_grantee) to use public advertisement when conducting procurement by sealed bids (formal advertising) or procurement by competitive proposals. Refer to [I.3 Procurement by Sealed Bids](#cI3_procurement_sealed_bids) and [I.4 Procurement by Competitive Proposals](#cI4_procurement_competitive_proposals), in this Publication, for more information about procurement by sealed bids and competitive proposals.

Depending on the circumstances, grantees’ procedures might also call for public advertisement when conducting procurement by small purchase procedures or noncompetitive proposals.

Public advertisement helps promote full and open competition. Full and open competition is a basic tenant of public procurement. Refer to [E.1 Full & Open Competition](#cE1_full_and_open_competition), in this Publication, for more information about full and open competition.

A grantee may follow its own written procurement procedures for advertising solicitations, provided that such procedures result in procurements that conform to applicable federal law and the standards in UG, UGMS, and this Publication. Refer to [C. Procurement Procedures](#cC0_written_procedures), in this Publication, for information about written procurement procedures.

Refer to [M.1.2 Method of Advertisement](#cM1_2_advertisement_method), [M.1.3 Duration of Advertisement](#cM1_3_advertisement_duration), [M.1.4 Content of Advertisement](#cM1_4_advertisement_content), and [M.1.5 Documenting Advertisement](#cM1_5_advertisement_documentation), in this Publication, for related information.

### M.1.2 Method of Advertisement

This Section, M.1.2 Method of Advertisement, provides supplemental technical information or guidance. It is included for informational purposes.

When advertisement is required, the method may vary by [grantee](#definition_grantee) and solicitation. For TWC monitoring purposes, TWC looks for the method to be consistent with grantee procedures, and to be adequate to inform potential offerors about the opportunity in a way that promotes full and open competition in a manner that is appropriate for the procurement method used.

Grantees’ procedures may prescribe when to use a specific advertisement method or authorize grantee staff to determine the appropriate method on a case-by-case basis according to the specific procurement.

Examples of advertisement methods include, but are not limited to the following:

* Newspaper
* Trade publications
* Texas Register
* Electronic State Business Daily
* Workforce Solutions Market Place on the TWC website
* National Association of Workforce Boards website
* Grantee’s website
* [Bidders lists](#definition_bidderslist) and other solicitation lists

Each of these advertisement methods are discussed in the following paragraphs.

#### M.1.2.1 Newspaper Advertisement

This Section, M.1.2.1 Newspaper Advertisement, provides supplemental technical information or guidance. It is included for informational purposes.

Announcement in the classified advertisements of a newspaper may be practical for public advertisement of some solicitations, such as when some or all potential offerors are local. Advance planning for cost and content submission deadlines and formats may be necessary.

#### M.1.2.2 Advertising in Trade Publications

This Section, M.1.2.2 Advertising in Trade Publications, provides supplemental technical information or guidance. It is included for informational purposes.

Announcement in a trade publication may be practical for public advertisement when the good or service needed is industry specific. Advance planning for cost and content submission deadlines and formats may be necessary.

#### M.1.2.3 Advertising in the Texas Register

This Section, M.1.2.3 Advertising in the Texas Register, provides supplemental technical information or guidance. It is included for informational purposes.

The [Texas Register](https://www.sos.state.tx.us/texreg/index.shtml) is a state-administered weekly journal published on the Texas Secretary of State website each Friday. It is open to public viewing and is also available on a subscription basis. The Texas Register serves as the journal of state agency rulemaking for Texas, but also includes notices of open meetings, governor’s appointments, attorney general opinions, and other miscellaneous documents including, but not limited to Requests for Proposals (RFPs), and notices of [contracts](#definition_contract) and contract amendments. As such, it is recognized as a source for identifying business opportunities with state agencies and certain other entities within Texas. Also refer to information below about [Electronic State Business Daily](#esbd).

A [grantee](#definition_grantee) eligible to use the Texas Register will need to refer to its written procedures and consider the nature of the goods or services being procured when deciding whether to use the Texas Register to advertise a solicitation. Depending on the property or services being solicited, publishing a solicitation announcement in the Texas Register may or may not be sufficient on its own to satisfy advertisement requirements, or may not be appropriate at all.

#### M.1.2.4 Electronic State Business Daily

This Section, M.1.2.4 Electronic State Business Daily, provides supplemental technical information or guidance. It is included for informational purposes.

[Electronic State Business Daily](http://www.txsmartbuy.com/esbd) (ESBD) is a state-administered daily publication open to public viewing via the Internet. It is widely recognized as a source for identifying business opportunities with Texas state agencies and certain other entities in Texas.

The Texas State Comptroller of Public Accounts administers ESBD to support state agency advertisement responsibilities under [Texas Government Code, § 2155.083](http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.2155.htm#2155.083); however, also makes ESBD available to certain other entities as authorized by state law. The use of ESBD to advertise solicitations is limited to eligible individuals only. Refer to the [Texas Comptroller of Public Accounts website](https://comptroller.texas.gov/) or contact the Comptroller’s Office for information about eligible individuals and instructions for establishing ESBD access.

As of the original publication date of this Publication (September 1, 2020), the Texas State Comptroller of Public Accounts website identifies use of the ESBD as being one of the benefits of membership in the Texas SmartBuy Membership Program (formerly State of Texas Cooperative (CO-OP) Purchasing Program. Refer to [H.4 Acquisition: Purchasing Cooperatives & State Contracts](#cH4_purchasing_cooperatives), in this Publication, for more information about the Texas SmartBuy Membership Program.

TWC has no authority to determine an entity’s eligibility to use ESBD. If conflict exists between the eligibility information above and information provided by the Texas Comptroller of Public Accounts or state law, the information provided by the Texas Comptroller of Public Accounts or state law will prevail as to that entity’s eligibility to use ESBD.

A [Grantee](#definition_grantee) eligible to use ESBD will need to refer to its written procurement procedures and consider the nature of the property or services being procured when deciding whether to use ESBD to advertise a solicitation. Depending on the property or services being solicited, publishing a solicitation announcement in ESBD may or may not be sufficient on its own to satisfy advertisement requirements, or may not be appropriate at all.

#### M.1.2.5 Workforce Solutions Market Place

This Section, M.1.2.5 Workforce Solutions Market Place, provides supplemental technical information or guidance. It is included for informational purposes.

TWC’s [Workforce Solutions Market Place](http://www.twc.state.tx.us/agency/workforce-solutions-market-place) web page provides [local workforce development boards](#definition_board) with an optional supplemental posting opportunity for solicitation announcements. Publication on TWC’s Workforce Solutions Market Place does not on its own satisfy requirements for advertisement.

#### M.1.2.6 National Association of Workforce Boards Website

This Section, M.1.2.6 National Association of Workforce Boards Website, provides supplemental technical information or guidance. It is included for informational purposes.

The National Association of Workforce Boards (NAWB) permits its members to advertise procurements on the association’s website. Refer to the [National Association of Workforce Boards website](https://www.nawb.org/) for membership information. Publication on the website generally does not on its own satisfy requirements for advertisement.

#### M.1.2.7 Publication on Grantee Website

This Section, M.1.2.7 Publication on Grantee Website, provides supplemental technical information or guidance. It is included for informational purposes.

A [grantee](#definition_grantee) may supplement advertisement efforts by publishing solicitation announcements and/or documents on its own website. Publication on a grantee’s website generally does not on its own satisfy requirements for advertisement.

#### M.1.2.8 Bidders Lists & Other Solicitation Lists

This Section, M.1.2.8 Bidders Lists & Other Solicitation Lists, provides supplemental technical information or guidance. It is included for informational purposes.

[Grantees](#definition_grantee) may use bidder’s lists and other solicitation lists to supplement public advertisement. Refer to [M.2 Bidders List](#cM2_bidders_list), in this Publication, for information about bidders lists.

### M.1.3 Duration of Advertisement

This Section, M.1.3 Duration of Advertisement, provides supplemental technical information or guidance. It is included for informational purposes.

The length of time advertised will vary according to the solicitation and [grantee](#definition_grantee) procedures. It should be determined with the intent of allowing potential offerors adequate time to become aware of the opportunity. The number of days may be specified by grantee procedures or other governing requirements. For example, grantee procedures may specify a minimum number of days for advertisement or permit authorized personnel to determine the appropriate number of days on a case-by-case basis. For some entities, state statute governing the grantee’s procurement actions may specify a minimum number of days that applies. For example, state law ([Texas Government Code, § 2155.083](http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.2155.htm#2155.083)) requires Texas state agencies to publish an announcement for fourteen (14) to twenty-one (21) calendar days depending on whether the agency publishes the entire solicitations (such as on ESBD) or the announcement only. The number of days may also be impacted by the method of advertisement. For example, a local newspaper might only be published certain days of the week, or it might only publish certain announcements on specified days.

### M.1.4 Content of Advertisement

This Section, M.1.2.4 Content of Advertisement, provides supplemental technical information or guidance. It is included for informational purposes.

The [grantee](#definition_grantee) will follow its procurement procedures with respect to the information to include in the advertisement. The advertisement provides potential offerors with basic information about the solicitation, which may include such information as:

* The name of the entity issuing the solicitation
* A brief description of the property or services needed
* The geographic area to be served
* Information for obtaining the solicitation package
* The date of a bidder’s conference, if applicable
* The deadline for submitting an offer
* Contact information for questions

The content may vary according to the solicitation and grantee procedures but should enable potential offerors to determine whether the need falls within the scope of their operations, and how to obtain a solicitation package.

The following sample text is provided for illustrative purposes only.

ABC entity is seeking proposals (or sealed bids, if appropriate) to provide XYZ in the counties of D, E and F for the period January 1, XXXX, through December 31, XXXX. An optional (or mandatory) bidder’s conference will be held at ABC’s address at 1:00 PM on March 1, XXXX. Interested parties may download a proposal package (or bid package) beginning February 15, XXXX, through ABC’s website address. The deadline for submitting a response is June 1, XXXX. Please direct all questions to [contact name] at [e-mail address].

Grantees should refer to their procurement procedures for text for advertisements.

### M.1.5 Documenting Advertisement

This Section, M.1.2.5 Documenting Advertisement, provides supplemental technical information or guidance. It is included for informational purposes.

As covered in [Q.3 Procurement Records](#cQ3_procurement_records), in this Publication, a [grantee](#definition_grantee) must maintain records sufficient to detail the history of procurement. When advertisement is required, the grantee needs to include evidence of advertisement in the procurement file, because advertisement is part of the procurement history. The documentation aids the grantee in demonstrating efforts it took to promote full and open competition, and to comply with public advertisement requirements.

For TWC compliance monitoring purposes, documentation of advertisement means evidence that shows the published content, where the content was published, and the dates the content was published. For example, documentation might include a newspaper/publication page or clipping showing the content, publication name and a publication date, and be supplemented by an invoice or receipt detailing the order (i.e., content and dates to run) and the amount due and paid. If running an advertisement in a daily publication for multiple days, it is not necessary to include a newspaper/publication page or clipping for each day’s publication if evidence can show the days ordered and that the grantee staff verified that the advertisement ran on each of the specified days. In such case, include a newspaper/publication page or clipping from at least one of the days, and a checklist signed by staff certifying that they verified the advertisement for each of the days ordered.

## M.2 Bidders List

### M.2.1 Basic Standard

This Section, M.2.1 Bidders Lists, provides supplemental technical information or guidance. It is included for informational purposes.

[Grantees](#definition_grantee) may use a [bidders list](#definition_bidderslist) in the procurement of property and services. Grantees may supplement their own bidders list with the [Centralized Master Bidders List (CMBL)](https://comptroller.texas.gov/purchasing/vendor/cmbl/) maintained by the Texas State Comptroller of Public Accounts.

This Section, M.2 Bidders List, provides grantees with information for developing a bidders list, and for using the CMBL to supplement the grantee’s list.

### M.2.2 Grantee’s Bidders List

This Section, M.2.2 Grantee’s Bidders List, provides supplemental technical information or guidance. It is included for informational purposes.

A bidders list is a list of entities, the entities’ contact information, and product(s) or service(s) offered by those entities, from which mailing lists are compiled and used to promote competition by notifying potential bidders of bid/procurement opportunities.

Where public advertisement is required—such as when conducting procurement by sealed bids (formal advertising) or competitive proposals—such notifications may supplement but generally do not substitute for public advertisement. (Refer to [M.1.1 Advertisement Requirements](#cM1_1_advertisement_requirements), in this Publication, for more information about advertising requirements.) Use of a bidders list must not prevent historically underutilized businesses from having an opportunity to compete, and be selected for award of [subcontracts](#definition_subcontract).

When using a bidders list, evidence of the notices provided, the content of the notice, and the date and time the notice was provided should be included in the procurement records. Notice should not be provided prior to issuing the solicitation.

A bidders list can be developed through a survey of the open market. Efforts to fortify the list occur through market advertising and other means designed to enroll the greatest number of potential bidders. The list requires periodic maintenance to keep it current. The State of Texas Centralized Master Bidders List (CMBL) can be used to supplement a [grantee’s](#definition_grantee) own bidders list. Refer to [M.2.3 State of Texas Centralized Master Bidders List](#cM2_3_bidderslist_cmbl), in this Publication, for related information.

A bidders list should not be confused with prequalified lists of persons, firms or products used in acquiring goods and services. Refer to [E.1.5 Prequalified Lists](#cE1_5_prequalified_lists), in this Publication, for information about prequalified lists.

### M.2.3 State of Texas Centralized Master Bidders List

This Section, M.2.3 State of Texas Centralized Master Bidders List, provides supplemental technical information or guidance. It is included for informational purposes.

[Grantees](#definition_grantee) may supplement their own [bidders list](#definition_bidderslist) with the [Centralized Master Bidders List (CMBL)](https://comptroller.texas.gov/purchasing/vendor/cmbl/) maintained by the Texas State Comptroller of Public Accounts. As with other bidders lists, entities, goods, and services listed on the CMBL have not been procured, and may not be purchased prior to procuring the goods or services in accordance with the requirements of this Publication. There are no membership requirements to search the CMBL.

# N. Evaluation

## N.1 Receiving Quotations & Offers

This Section, N.1 Receiving Quotations & Offers, provides supplemental technical information or guidance. It is included for informational purposes.

The information in this Section is adapted from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

In keeping with good management practice and to help preserve the integrity of the procurement process, TWC encourages [grantees](#definition_grantee) to have written procedures for receiving quotations and offers (bids and proposals).

TWC encourages grantees to time and date stamp quotations and offers when received. Doing so demonstrates whether the submission was received by the due date specified in the solicitation. Quotations and offers should be stored in a secure location with access limited to only those individuals who need access to conduct the procurement. Doing so helps prevent loss, misplacement, and tampering.

When conducting procurement by sealed bids (or sealed proposals) entity’s submit responses in sealed envelopes which must not be opened until the date and time, and at the location specified in the solicitation. Grantees are encouraged to address in their procurement procedures the handling of sealed submissions that grantee personnel open prematurely. For example, for Texas state agencies, the State of Texas Procurement and Contract Management Guide requires the agency to reseal the packet, write “opened in error” or “opened to determine content” on the packet, and have the person who opened the packet sign and date the packet.

Refer to the State of Texas Procurement and Contract Management Guide for additional detail about the actions that Texas state agencies are required to take in connection with the receipt of responses.

## N.2 Late Submissions

This Section, N.2 Late Submissions, provides supplemental technical information or guidance. It is included for informational purposes.

The information in this Section is adapted from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

In keeping with good management practices and to help preserve the integrity of the procurement process, it is important that [grantees](#definition_grantee) not accept late submissions of quotations or offers (bids or proposals).

A solicitation will specify a due date (date and time) for responses. Responses received after the due date specified in the solicitation are late. It is important that a grantee not accept a late response. Accepting a late response constitutes unfair treatment, which is inconsistent with the standard for full and open competition.

When specifying the due date in the solicitation, TWC recommends that a grantee consider and include (or address in its written policies and procedures) provisions to address scenarios that could affect the delivery of an entity’s response, such as technical malfunction, act of nature that could not be anticipated, unanticipated grantee office closures, and postal service delays. A grantee may need to obtain the advice of its legal counsel if its solicitation is unclear on what constitutes a late submission or if it is unclear whether a specific submission meets the due date conditions specified in the grantee’s solicitation.

Late responses should not be opened. The grantee should notify the entity that submitted the late response that the grantee rejected the response because it was late. The grantee’s procedures dictate how it handles late responses. Whatever procedures are used should maintain the integrity of the procurement process. For example, for Texas state agencies, the State of Texas Procurement and Contract Management Guide requires an agency that receives a late response to either return the unopened response to the entity that submitted it (at that entity’s own expense) or to securely dispose of the response as specified in the solicitation.

## N.3 Selection Process

This Section, N.3 Selection Process, provides supplemental technical information or guidance. It is included for informational purposes.

[Grantees](#definition_grantee) should have procurement procedures addressing the selection process.

Depending on the procurement method and evaluation factors used, selection might be based primarily on price or based on best value that considers price and other factors. Evaluation may be preceded by an administrative review to determine whether each offer received was responsive to the solicitation. (Refer to [L.3 Responsiveness Criteria](#cL3_responsiveness_criteria), in this Publication, for related information.) Responsive offers are then evaluated against the evaluation factors specified in the solicitation. The process includes a [cost analysis](#definition_costanalysis) and/or [price analysis](#definition_priceanalysis), as described in [O. Cost/Price Analysis](#cO0_cost_price_analysis), in this Publication, and may also include a pre-award review, as described in [P.3 Pre-Award Reviews](#cP3_preaward_reviews), in this Publication. A grantee’s procedures should specify who must approve the selection. Prior to award, the grantee must verify that the successful respondent is not suspended, debarred, or otherwise ineligible to receive the award, as covered in [P.2 Suspension & Debarment](#cP2_suspension_debarment), in this Publication.

As reflected in [D.3 Conflicts of Interest](#cD3_conflicts_of_interest), in this Publication, the UG and UGMS prohibit real conflicts of interest and [apparent conflicts of interest](#definition_apparentconflictofinterest) by persons involved in the selection and award of a [contract](#definition_contract). Also refer to [D.4 Organizational Conflicts of Interest](#cD4_org_conflicts_of_interest), in this Publication. Refer to [Q.3 Procurement Records](#cQ3_procurement_records), in this Publication, for UG and UGMS standards that require grantees to maintain records sufficient to detail the history of the procurement, which includes [contractor (vendor)](#definition_contractor) selection or rejection.

## N.4 Administrative Review

This Section, N.4 Administrative Review, provides supplemental technical information or guidance. It is included for informational purposes.

The phrase “administrative review” and the related information in this subsection are adapted from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

As a practical matter, responses should be reviewed and determined responsive before evaluation begins. Nonresponsive responses should not be evaluated.

The UG and UGMS require that solicitations identify all requirements that offerors must fulfill. Refer to [L.2 Identify Requirements & Evaluation Factors](#cL2_id_reqs_and_evaluation_factors), in this Publication. Additionally, [L.3 Responsiveness Criteria](#cL3_responsiveness_criteria), in this Publication, includes examples of the types of criteria that a [grantee](#definition_grantee) might include in its solicitation as responsiveness criteria.

The UG and UGMS do not explicitly require an administrative review. Rather, the administrative review is a practical procedural step that a grantee might implement to determine whether responses met the responsiveness criteria that the grantee specified in the solicitation, before proceeding with evaluation (so as not to waste time evaluating nonresponsive submissions).

When conducting procurement by sealed bids (formal advertising), the administrative review may occur during bid tabulation. (Refer to [N.7 Evaluation: Sealed Bids (Bid Tabulation)](#cN7_evaluation_sealedbids_bidtabulation), in this Publication, for information about evaluation of sealed bids.) When conducting procurement by competitive proposals, the review may occur before providing the responses received to the [evaluation team](#definition_evaluation_team) for evaluation. (Refer to [N.8 Evaluation: Competitive Proposals (Evaluation Team)](#cN8_evaluation_competitive_proposals), in this Publication, for information about evaluation of competitive proposals.) For quotations and offers obtained using small purchase procedures, for which selection will be made by a grantee personnel based on price and objective factors alone (rather through an evaluation team), the administrative review, if needed, may occur before evaluating the quotations or offers received.

A checklist is a common way to document the review for internal purposes, and for external review, such as if a protest occurs. A separate check list can be attached to each response, or a single tabular list can be created that documents the results for each respondent in a separate column. It is a good management practice for the person performing the review to sign or initial, and date the review, when complete.

The grantee’s procedures will dictate when and how the review is performed and by whom. Where an evaluation team will be used, the administrative review may be performed by an individual who is not a member of the evaluation team. It is common to conduct the review on a “pass/fail” basis. If unclear to the staff performing the review whether a response meets a specific responsiveness criterion, it may be necessary for the grantee to consult their own legal counsel for assistance. In such instances, the legal advice should be retained in the grantee’s procurement record. Only responses that “pass” the administrative review—that is only responses that are deemed responsive—would be evaluated.

## N.5 Evaluation Factors

### N.5.1 Overview

This Section, N.5.1 Overview, provides supplemental technical information or guidance. It is included for informational purposes.

As cited in [L.2 Identify Requirements & Evaluation Factors](#cL2_id_reqs_and_evaluation_factors), in this Publication, the UG and UGMS require that [grantees’](#definition_grantee) procurement procedures must ensure that solicitations identify all requirements that offerors must fulfill and all other factors to be used in evaluating bids or proposals.

Selection might be based on price alone—such as when conducting procurement by sealed bids (formal advertising) (unless the grantee determines it necessary or is required by its procedures to also consider other factors)—or it might be based on price and other factors that identify the offer that is most advantageous to the program (best value)—such as when conducting procurement by competitive proposals. Refer to [I.3 Procurement by Sealed Bids (Formal Advertising)](#cI3_procurement_sealed_bids) and [I.4 Procurement by Competitive Proposals](#cI4_procurement_competitive_proposals), in this Publication, for more information about procurement by sealed bids and competitive proposals. Refer also to [I.2.6 Evaluation Factors (Small Purchases)](#cI2_6_spp_evaluation_factors).

As a matter of practicality, evaluation factors are generally tailored to each specific acquisition. Consider, for example, requirements that apply to federal agencies covered by the Federal Acquisition Regulation (FAR). As reflected in [48 C.F.R. § 15.304(b)](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-sec15-304.pdf) (2019) of the FAR, evaluation factors “represent the key areas of importance and emphasis to be considered in the source selection decision” and also “support meaningful comparison and discrimination between and among competing proposals.” (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the FAR.)

In determining the evaluation factors to use, it is good practice to verify before issuing the solicitation that the factors and their relative weights are consistent with the priority of importance of the final decisionmaker(s), and the respective effect that the factors have on an offeror’s ability to fulfill the specific procurement need.

Grantees will generally follow their procurement procedures with respect to the evaluation factors they use. In some cases, a grantee’s decision about evaluation factors might be influenced by grant requirements or other procurement requirements governing their operations, such as state laws that govern the conduct of procurements of certain types of entities.

Refer also to [J.4 Audit Services](#cJ4_audit_services), in this Publication, for “factors to be considered in evaluating each proposal for audit services.” Refer also to [J.1.5.1 Procurement: Consulting Services](#cJ1_5_1_procurement_consulting) and [J.1.5.2 Procurement: Professional Services](#cJ1_5_2_procurement_professional), in this Publication.

### N.5.2 Examples of Evaluation Factors

This Section, N.5.2 Examples of Evaluation Factors, provides supplemental technical information or guidance. It is included for informational purposes.

The following examples are provided for illustration purposes only, particularly for consideration by [grantees](#definition_grantee) whose procedures do not prescribe evaluation factors or who are uncertain about the types of factors to use. TWC generally does not prescribe which evaluation factors a grantee must use. (However, refer to [J.1.5.1 Procurement: Consulting Services](#cJ1_5_1_procurement_consulting), [J.1.5.2 Procurement: Professional Services](#cJ1_5_2_procurement_professional) and to [J.4 Audit Services](#cJ4_audit_services), in this Publication, for specific evaluation factors for the procurement of [consulting services](#definition_consulting_services), [professional services](#definition_professionalservices), and audit services, respectively.)

#### N.5.2.1 Example: Texas School Districts

This Section, N.5.2.1 Example: Texas School Districts, provides supplemental technical information or guidance. It is included for informational purposes.

According to TEA’s FASRG, with limited exceptions, [Texas Education Code § 44.031](https://statutes.capitol.texas.gov/Docs/ED/htm/ED.44.htm#44.031) requires Texas school districts to consider specific factors when making [contracts](#definition_contract) for goods and services:

* Purchase price
* Reputation of the vendor and of the vendor's goods or services
* Quality of the vendor's goods or services
* Extent to which the goods or services meet the district's needs
* Vendor's past relationship with the district
* Impact on the ability of the district to comply with laws and rules relating to historically underutilized businesses
* Total long-term cost to the district to acquire the vendor's goods or services
* For a contract for goods and services (other than goods and services related to telecommunications and information services, building construction and maintenance, or instructional materials) whether the vendor or the vendor's ultimate parent company or majority owner: (A) has its principal place of business in this state; or (B) employs at least 500 persons in this state
* Any other relevant factor specifically listed in the request for bids or proposals.

(Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the TEA FASRG.)

#### N.5.2.2 Example: Texas State Agencies

This Section, N.5.2.2 Example: Texas State Agencies, provides supplemental technical information or guidance. It is included for informational purposes.

The State of Texas Procurement & Contract Management Guide for Texas state agencies observes that when determining best value when using competitive bidding, the most important factors are purchase price and whether the goods or services meet the required specifications. Other possible factors identified by that Guide are:

* Installation costs
* Life cycle costs
* Quality and reliability of the property or services offered
* Delivery terms
* Indicators of probable performance, such as past performance, financial resources, ability to perform, experience or demonstrated capability and responsibility
* Ability to provide reliable maintenance agreements and support
* Employee training costs associated with a purchase
* Effect of a purchase on the [grantee’s](#definition_grantee) productivity
* Other factors relevant to determining the best value in the context of the specific purchase

The preceding list is provided for informational purposes. State agencies should refer to their own procurement procedures and procurement personnel when determining appropriate evaluation factors. TWC does not monitor other state agencies’ conformance to applicable state procurement requirements but may consider whether a state agency performing grant activities for TWC complied with its own procurement procedures when conducting procurements under that agreement.

(Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement & Contract Management Guide.)

#### N.5.2.3 Example: Federal Agencies

This Section, N.5.2.3 Example: Federal Agencies, provides supplemental technical information or guidance. It is included for informational purposes.

Relating to procurement by competitive proposals, [48 C.F.R. § 15.304](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-sec15-304.pdf) (2019) of the FAR recognizes that “the evaluation factors and significant subfactors that apply to an acquisition and their relative importance are within the broad discretion of agency acquisition officials,” but establishes minimum requirements that include the following:

* Price or cost to the Government shall be evaluated in every source selection
* The quality of the product or service shall be addressed in every source selection through consideration of one or more non-cost evaluation factors such as:
* Past performance (the FAR makes this mandatory for all acquisitions expected to exceed the [simplified acquisition threshold](#definition_simplified_acq_threshold), unless the contracting officer documents the reason it is not an appropriate evaluation factor for the acquisition)
* Compliance with solicitation requirements
* Technical excellence
* Management capability
* Personnel qualifications
* Prior experience
* Small business participation under [contracts](#definition_contract) that required subcontracting plans

(Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the FAR.)

## N.6 Evaluation Team Selection

### N.6.1 Overview

This Section, N.6.1 Overview, provides supplemental technical information or guidance. It is included for informational purposes.

[Grantees](#definition_grantee) should establish a committee of evaluators to score responses received when conducting procurement by competitive proposals. An [evaluation team](#definition_evaluation_team) is not required when making selection based on price alone. A grantee should exercise professional judgement and adhere to its procurement procedures when determining whether to use an evaluation team in connection with procurements conducted by small purchase procedures.

Section N.6 Evaluation Team Selection, in this Publication, includes information about non-scoring and scoring evaluators, the number of evaluators to select, evaluator identification, selecting evaluators, and selecting technical advisors.

### N.6.2 Evaluation Team

This Section, N.6.2 Evaluation Team, provides supplemental technical information or guidance. It is included for informational purposes.

Consistent with the standard covered in [L.2 Identify Requirements & Evaluation Factors](#cL2_id_reqs_and_evaluation_factors), in this Publication, it is important that members of the [evaluation team](#definition_evaluation_team) evaluate responses against the evaluation factors specified in the solicitation. Selecting evaluators before receiving responses helps avoid appearance that a specific evaluator might have been chosen because of their relationship to the submitter of a particular response. The exact timing of committee selection will vary according to the grantee’s own procedures. [Grantees](#definition_grantee) may select evaluators from their own personnel or use external evaluators.

The following paragraphs provide more information about the selection of evaluators.

Refer to [N.3 Selection Process](#cN3_selection_process), [N.7 Evaluation: Sealed Bids (Bid Tabulation)](#cN7_evaluation_sealedbids_bidtabulation), and [N.8 Evaluation: Competitive Proposals (Evaluation Team)](#cN8_evaluation_competitive_proposals), in this Publication, for information about the evaluation process, including reiteration that evaluators must have no conflicts of interest in connection with the procurement.

### N.6.3 Non-Scoring & Scoring Evaluators

This Section, N.6.3 Non-Scoring & Scoring Evaluators, provides supplemental technical information or guidance. It is included for informational purposes.

This Section is based on information from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

An [evaluation team](#definition_evaluation_team) may consist of scoring members only, or a mix of non-scoring and scoring members. The approach may vary by procurement. Not every evaluation team will include non-scoring members.

Non-scoring members are individuals that are directly involved in the evaluation but don’t score responses. An example of a non-scoring member is an individual who serves as a technical advisor. (Refer to [N.6.7 Selecting Technical Advisors](#cN6_7_selecting_technical_advisors), in this Publication, for more information about technical advisors.) Additionally, the committee chair might be a non-scoring member. The [grantee’s](#definition_grantee) contract developer or other personnel having qualifications to oversee the scoring might serve as the committee chair. As another example, the individual who will function as the contract manager or grant manager might also serve as either a non-scoring or scoring member.

### N.6.4 Number of Evaluators

This Section, N.6.4 Number of Evaluators, provides supplemental technical information or guidance. It is included for informational purposes.

This Section includes information from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

[Grantees](#definition_grantee) will follow their own procedures and use their own judgement to determine the number of scoring committee members needed. Consistent with the State of Texas Procurement and Contract Management Guide that applies to Texas state agencies, TWC generally recommends that grantees’ [evaluation teams](#definition_evaluation_team) consist of at least three scoring members (which helps avoid the effects of potential individual bias). The State of Texas Procurement and Contract Management Guide observes that the norm for state agencies is three (3) to five (5) scoring members.

The size of three (3) to five (5) scoring members is a recommendation only. Procedures that require only two (2) evaluators are not inherently considered to be out of compliance with UG and UGMS procurement standards, but evaluations may receive closer scrutiny for evidence of evaluator bias or significant scoring deviations that affect selection. Similarly, there is no restriction on the maximum number of scoring members in the evaluation team. If a grantee’s procurement procedures or judgement require a larger number, that requirement will prevail over the TWC recommendation for three (3) to five (5) scoring members.

### N.6.5 Evaluator Identification

This Section, N.6.5 Evaluator Identification, provides supplemental technical information or guidance. It is included for informational purposes.

As reflected in [Q.3 Procurement Records](#cQ3_procurement_records), in this Publication, the procurement records are required to document the history of the procurement. It is common to identify the evaluators in the procurement record. For example, the State of Texas Procurement and Contract Management Guide specifically requires Texas state agencies to note both scoring and non-scoring members in the procurement file. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

TWC advises that each scoring member’s evaluation sheets should identify the respective evaluator, either by name or unique identifier. Consistent with the information in the preceding paragraph, it is important that all members of the team, both non-scoring and scoring, be identified by name in the [grantee’s](#definition_grantee) procurement records. If scoring members are each assigned a unique identifier, such as a letter or number, for use in identifying themselves on their evaluation scores, the procurement records should also identify each member’s identifier. Such documentation can help demonstrate the grantee’s assertions about the absence of conflicts of interest.

### N.6.6 Selecting Evaluators

This Section, N.6.6 Selecting Evaluators, provides supplemental technical information or guidance. It is included for informational purposes.

This Section includes information from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

Consistent with information in the State of Texas Procurement and Contract Management Guide for Texas state agencies, TWC advises [grantees](#definition_grantee) to select [evaluation team](#definition_evaluation_team) members for their disciplinary expertise and knowledge of the property or services being procured; however, as discussed in [N.6.7 Selecting Technical Advisors](#cN6_7_selecting_technical_advisors), in this Publication, technical advisors may be used to help evaluators understand responses when necessary.

TWC includes this recommendation because of the significant role that the evaluation team plays in award selection. The State of Texas Procurement and Contract Management Guide also suggests that it is important that each evaluator be able to critically read and evaluate each response using the evaluation factors and weights published in the solicitation, and be able to document, in a clear, concise manner, their conclusions as to whether each response meets, exceeds or does not meet published evaluation factors.

TWC makes no requirement that grantees’ procurement records include written rationale for the grantee’s selection of each individual evaluator; however, TWC compliance monitors may more closely examine a grantee’s selection procedures if cause arises to do so—such as if the connection between a specific member’s day-to-day duties or experience and the specific procurement is not apparent, and their scores differed noticeably from those of other scoring members, especially if that evaluator’s score made the difference in selection between two or more offers receiving scores that were very close in value.

### N.6.7 Selecting Technical Advisors

This Section, N.6.7 Selecting Technical Advisors, provides supplemental technical information or guidance. It is included for informational purposes.

The information in this Section is based on information in the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

A technical advisor is an individual who is not a member of the [evaluation team](#definition_evaluation_team) but who lends expertise needed to enable the evaluation team to understand the responses received from a solicitation. For example, a [grantee](#definition_grantee) employee or other individual having expertise in information security might help evaluators understand responses to a procurement for information technology, or a grantee employee or other individual having expertise in accounting might assist evaluators’ reviews of a respondent’s financial capability. Another example of a technical advisor is a grantee employee or other individual that responds to scoring members’ questions about the allowability of specific costs or activities.

Refer to [N.8 Evaluation: Competitive Proposals (Evaluation Team)](#cN8_evaluation_competitive_proposals), in this Publication, for more information about technical advisors’ involvement in evaluations.

## N.7 Evaluation: Sealed Bids (Bid Tabulation)

This Section, N.7 Evaluation: Sealed Bids (Bid Tabulation), provides supplemental technical information or guidance. It is included for informational purposes.

This Section includes information from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

When conducting procurement by sealed bids (formal advertising) bids should be tabulated at the time of bid opening whenever practical.

Bid tabulation uses a tabular format to make a side-by-side record of the bid details of the bids received. The tabulation should occur at the time of bid opening whenever practical. If not practical to do so at the time of bid opening, the reason should be noted in the procurement record, and the tabulation should occur as soon thereafter as practicable. The [grantee’s](#definition_grantee) procurement procedures should address bid tabulation and when it occurs. If the grantee’s procedures permit bid tabulation to occur after bid opening (rather than at the time of bid opening), but do not specify a timeframe, then, consistent the State of Texas Procurement and Contract Management Guide for Texas state agencies, TWC considers no more than three (3) days from the bid opening date to be a reasonable time to tabulate the bids received.

Consistent with the State of Texas Procurement and Contract Management Guide for Texas state agencies, TWC considers it a best practice to have one person prepare the bid tabulation and then have the contract developer or person in a similar position to review or “certify” the tabulation. The review verifies—(1) that data was accurately transcribed to the bid tabulation sheet, (2) the mathematical accuracy of calculations, and (3) that evaluation of the tabulation was conducted according to the grantee’s procurement procedures.

If the bids will be evaluated solely on objective criteria, such as unit price, extended price, and warranty, then TWC considers it acceptable that the evaluation—that is reviewing the bid tabulation and making a recommendation based on the results—be performed by the grantee’s contract developer or person in a similar position, unless specified otherwise by the grantee’s procedures. Such approach is consistent with instructions that the State of Texas Procurement and Contract Management Guide provides to Texas state agencies.

TWC acknowledges that the columns on the bid tabulation sheet may be customized to the grantee’s respective procurement, but at a minimum bid tabulation would include the following columns:

* One or more columns for the product or service description
* A column for the quantity that the grantee specified in the Invitation for Bids (IFB)
* A column for each bidder that contains the respective bidder’s name, with sub-columns beneath that, for each separate product or service description specified in the IFB, which identify—(1) the unit price offered by the bidder, and (2) the extended price based on the quantity that the grantee specified in the IFB

Other information that might be included on the tabulation may include, but is not necessarily limited to the following, as applicable:

* Confidential or proprietary declarations by the bidder
* HUB Status
* Manufacturer/brand offered and product number
* Number of days for delivery after receipt of an order
* Warranty
* Comments/remarks, such as to include indicators for disqualification or non-responsiveness
* An award column to indicate the bidder receiving the award for any given item or services, if multiple awards will be made

The preceding list is adapted from information in the State of Texas Procurement and Contract Management Guide.

## N.8 Evaluation: Competitive Proposals (Evaluation Team)

### N.8.1 Overview

This Section, N.8.1 Overview, provides supplemental technical information or guidance. It is included for informational purposes.

[Grantees](#definition_grantee) are encouraged to consider the information in Section N.8 Evaluation: Competitive Proposals (Evaluation Team), in this Publication, when developing procedures for evaluation of competitive proposals.

When conducting procurement by competitive proposals responses and making awards based on best value (considering price and other factors), proposals are evaluated by an [evaluation team](#definition_evaluation_team).

Section N.8 Evaluation: Competitive Proposals (Evaluation Team), in this Publication, provides information about the selection of a [contractor (vendor)](#definition_contractor) or [subgrantee (subrecipient)](#definition_subgrantee) when performing evaluations by an evaluation team. It covers a range of topics that include the following: evaluators and conflicts of interest, [evaluation team](#definition_evaluation_team) kickoff meeting, evaluator packages, evaluation location, independent evaluation, evaluation of the price component, the scoring matrix, reference checks, competitive range determinations, oral presentations, requesting a best and final offer, evaluation team recommendation, and award selection. Also refer to [N.6 Evaluation Team Selection](#cN6_evaluation_team_selection), in this Publication.

The information in N.8 Evaluation: Competitive Proposals (Evaluation Team), in this Publication, is adapted from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

### N.8.2 [Reserved]

This Section is reserved for future use.

### N.8.3 Evaluators & Non-Disclosure/Conflicts of Interest

This Section, N.8.3 Evaluators & Non-Disclosure/Conflicts of Interest, provides supplemental technical information or guidance. It is included for informational purposes.

This Section includes information from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

As covered in [D.3 Conflicts of Interest](#cD3_conflicts_of_interest), in this Publication, evaluators must have no actual or apparent conflict of interest in connection with the procurement. Additionally, securing procurement files and non-disclosure of procurement information are activities that promote full and open competition. Refer to [E.1 Full & Open Competition](#cE1_full_and_open_competition), in this Publication, for information about the UG and UGMS standard for the promotion of full and open competition.

Consistent with information in the State of Texas Procurement and Contract Management Guide for Texas state agencies, TWC recognizes it as a best practice to provide evaluators with the names of each respondent and their [subcontractors](#definition_subcontractor) (or subrecipients and partners, if appropriate) before providing the committee with copies of respondents’ responses for evaluation.

Evaluators should be required to sign a non-disclosure agreement and conflict of interest disclosure statement before receiving procurement documents. The signed statement should be retained in the [grantee’s](#definition_grantee) procurement records. Such statements are not explicitly required by UG and UGMS, but their presence provides documentary evidence of an effort to comply with the UG and UGMS standards that prohibit conflicts of interest and require promotion of full and open competition.

It is permissible for evaluators to have been involved in procurement planning activities.

Refer to the State of Texas Procurement and Contract Management Guide for more information about instructions that it provides to Texas state agencies with respect to nondisclosure agreements and conflict of interest disclosures.

### N.8.4 Evaluation Team Kickoff Meeting

This Section, N.8.4 Evaluation Team Kickoff Meeting, provides supplemental technical information or guidance. It is included for informational purposes.

This Section is adapted from information from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

It is a good management practice to meet with the [evaluation team](#definition_evaluation_team) and any technical advisors to explain expectations before providing evaluators with respondent’s submissions.

Before the evaluation team begins evaluating responses, it is a good management practice for the contract developer (or [grantee](#definition_grantee) personnel having similar responsibilities) to meet with the evaluation team and any technical advisors. During the meeting the team should receive information about the following:

* Instructions about the evaluation process and scoring matrix
* If using a numbering or alpha system to identify evaluators or track responses, an explanation of that system
* Evaluators’ responsibilities, emphasizing confidentiality and process integrity
* Avoidance of [technical leveling](#definition_technical_leveling), [technical transfusion](#definition_technical_transfusion), or other improper activities

The evaluation team should not receive a complete evaluator package until each team member has signed a non-disclosure statement and a preliminary assessment of real conflicts of interest and [apparent conflicts of interest](#definition_apparentconflictofinterest) has been conducted. Technical advisors and non-scoring members of the evaluation team should adhere to the same non-disclosure and conflict of interest restrictions that apply to scoring members of the evaluation team. Refer to [D.3 Conflicts of Interest](#cD3_conflicts_of_interest), in this Publication, for information about conflicts of interest

### N.8.5 Evaluator Packages

This Section, N.8.5 Evaluator Packages, provides supplemental technical information or guidance. It is included for informational purposes.

This Section includes information from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

Evaluators should be provided with all information needed to evaluate respondents’ submissions.

It is important that each evaluator be provided with the following:

* The solicitation
* Addenda to the solicitation (if any)
* Published Question and Answer documents (if any)
* A list of the names of the respondents
* A copy of each response that was determined to be responsive following the Administrative Review

The preceding list is based on information in the State of Texas Procurement and Contract Management Guide.

The State of Texas Procurement and Contract Management Guide also recognized it is as a good management practice to include a copy of the signed non-disclosure statement (to remind evaluators of their responsibilities), and a copy of the [evaluation team](#definition_evaluation_team) briefing document. A sample briefing document and sample non-disclosure statement can be viewed in Appendix 18 to the State of Texas Procurement and Contract Management Guide. If a [grantee](#definition_grantee) chooses to model these samples, it will need to customize the content to its own organization’s use and procurement.

If a numbering or alpha system will be used to identify evaluators or track responses, the copies of the responses that are provided to each evaluator should be clearly marked according to that system. This is also based on information in the State of Texas Procurement and Management Guide.

### N.8.6 Evaluation Location

This Section, N.8.6 Evaluation Location, provides supplemental technical information or guidance. It is included for informational purposes.

This Section includes information from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

The [grantee](#definition_grantee) procurement procedures or authorized procurement personnel will dictate whether to require evaluators to review and score respondents’ submissions in a common workspace or permit evaluators to perform their work in separate workspaces.

Neither the UG and UGMS, nor TWC prescribe whether evaluators score respondents’ submissions in a single common workspace or in different workspaces.

One option available to grantees is to require evaluators to perform their evaluations in the same workspace at the same time—which may facilitate questions by among the scoring evaluators and with the team lead and technical advisors. During the scoring, such communications should be limited to questions needed to understand information related to the evaluation factors.

Another option available to grantees is to permit evaluators to score the responses from their respective workspaces and meet for group discussion at scheduled times. In these scenarios, individual evaluators may ask questions to the contract developer (or grantee personnel having similar responsibilities). The contract developer (or grantee personnel having similar responsibilities) responds to the team or obtains input from authorized technical advisors and responds to the team. Alternatively, questions can be held until the team comes together for that purpose.

Grantees procedures may vary by procurement. Grantees should follow their own procurement procedures providing that they safeguard the integrity of the procurement process.

### N.8.7 Independent Evaluation

#### N.8.7.1 Individual Scoring

This Section, N.8.7.1 Individual Scoring, provides supplemental technical information or guidance. It is included for informational purposes.

It is important that evaluators individually score each responsive submission on its own merits, using the evaluation criteria specified in the solicitation, without influence from other evaluators or sources. Evaluators will record results on a scoring matrix. Evaluations should be documented in the procurement records.

The following paragraphs describe actions that occur as part of the [evaluation team](#definition_evaluation_team) review.

#### N.8.7.2 Basis for Scoring

This Section, N.8.7.2 Basis for Scoring, provides supplemental technical information or guidance. It is included for informational purposes.

Consistent with the UG and UGMS standard covered in [L.2 Identify Requirements & Evaluation Factors](#cL2_id_reqs_and_evaluation_factors), in this Publication, scoring will be based on the requirements and evaluation criteria specified in the solicitation. Each evaluator will evaluate the proposals based on that evaluator’s personal view of the response. Other information—such as written clarifications from the respondents, material from oral presentations made by the respondents, and reference checks performed by authorized personnel—may be considered if specifically authorized by appropriate [grantee](#definition_grantee) personnel and consistent with the solicitation. Evaluators should not conduct their own independent research into a respondent.

This Section incorporates information from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

#### N.8.7.3 Use of Technical Advisors

This Section, N.8.7.3 Use of Technical Advisors, provides supplemental technical information or guidance. It is included for informational purposes.

The [evaluation team](#definition_evaluation_team) may request assistance of technical advisors (if any) authorized to support the evaluation process. Such requests should channel through the contract developer (or [grantee](#definition_grantee) personnel having similar responsibilities) and be limited to information related to the evaluation factors. Doing so promotes the integrity of the evaluation process. Additionally, technical advisors should not discuss the solicitation with anyone, including the evaluation team, outside of evaluation team meetings. Refer to [N.6.7 Selecting Technical Advisors](#cN6_7_selecting_technical_advisors), in this Publication, for information about the selection of technical advisors.

This Section incorporates information from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

#### N.8.7.4 Clarification of Responses

This Section, N.8.7.4 Clarification of Responses, provides supplemental technical information or guidance. It is included for informational purposes.

This Section incorporates information from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

In some instances, a response might contain conflicting information, ambiguities, or clerical errors that require clarification from the respondent to facilitate scoring. If the [evaluation team](#definition_evaluation_team) determines that a respondent’s submission requires clarification for this purpose, a common approach is to permit the evaluation team to submit clarifying questions for the respondent to the contract developer (or other [grantee](#definition_grantee) personnel having similar responsibilities). If that individual or the grantee’s legal counsel agree that the clarification is necessary, they or the grantee’s legal counsel may contact the respondent’s authorized representative. The contract developer then distributes the information provided by the respondent’s authorized representative back to the team. It is important that the communications back-and-forth with the respondent’s authorized representative be in writing.

It is not appropriate to use the clarification process to “cure” deficiencies in the respondent’s submission or to permit a respondent to revise its submission; nor is it a negotiation. Use should be restricted to communication needed to understand the information provided by the submission. The contact with the respondent should be clear that the purpose of the communication is to obtain clarification, and that the communication does not constitute negotiation.

#### N.8.7.5 Minor Technicalities

This Section, N.8.7.5 Minor Technicalities, provides supplemental technical information or guidance. It is included for informational purposes.

This Section incorporates information from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

The [grantee](#definition_grantee) may waive minor technicalities of submitted responses if permitted by the solicitation. If an evaluator identifies a minor technicality during the review, the entire [evaluation team](#definition_evaluation_team) should be informed about the technicality so that the team uses the same evaluation standards.

#### N.8.7.6 Evaluator-to-Evaluator Communications

This Section, N.8.7.6 Evaluator-to-Evaluator Communications, provides supplemental technical information or guidance. It is included for informational purposes.

This Section incorporates information from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

Evaluator-to-evaluator communications about the evaluation of respondents’ submissions should occur during team meetings only and be limited to such matters as gaining clarification about the response and evaluation factors. Pressuring an evaluator to change evaluation scores should be strictly prohibited by a [grantee](#definition_grantee). Changes to evaluation scores should be limited to those made by the respective evaluator at their own choosing, such as because of overlooked or misunderstood information.

Evaluator-to-evaluator communications about responses should not occur outside of a team meeting. Discussion about responses should occur only during a team meeting with all scoring members present. Grantee procedures or evaluator guidelines should address any consequences of being absent from team meetings, failing to meet evaluation deadlines, and other inappropriate actions. Such consequences, when appropriate, may include removal of the evaluator from the team, or removal of the evaluator’s scoring from the team’s scores.

Discussions about respondents’ submissions should be limited to clarifying information related to the evaluation factors. This includes circumstances in which one or more evaluator’s scores differ significantly from the majority of the team, and the team meets to discuss the outliers and ensures that all evaluators had the same understanding of the evaluation factors. If, as a result, an evaluator realizes that he or she overlooked or misunderstood information, that member may be permitted to provide a revised scoring matrix.

If a score is changed, TWC recommends that the original score should be marked through with a single line so that the original score remains legible. The new score can then be written above or to the side of the original score along with the evaluator’s initials, date the change was made, and an explanation for the change. The original score should not be erased or marked over with concealing ink or correction tape.

#### N.8.7.7 Evaluator-to-Respondent Communications

This Section, N.8.7.7 Evaluator-to-Respondent Communications, provides supplemental technical information or guidance. It is included for informational purposes.

This Section incorporates information from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

It is important that evaluators and technical advisors have no communications with a respondent during the evaluation process. If communication with a respondent becomes necessary, such as to obtain clarification about information in a respondent’s proposal as it pertains to the scoring of the evaluation factors, only the contract developer (or other authorized [grantee](#definition_grantee) personnel) should communicate with respondent. If one of the respondents is a current [contractor (vendor)](#definition_contractor), it is important that the contract developer (or other authorized grantee personnel) address practices to be used in the handling of existing necessary business communications to avoid an appearance of impropriety in the procurement process.

### N.8.8 Price Component

This Section, N.8.8 Price Component, provides supplemental technical information or guidance. It is included for informational purposes.

The information in this Section is adapted from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

When the price component of a respondent’s submission will be evaluated against a reasonableness standard (rather than on lowest price, for example), [grantees](#definition_grantee) are encouraged (but not required) to have the [evaluation team](#definition_evaluation_team) review and score the entire response, including the price component.

The price component of a respondent’s submission is typically evaluated using either objective criteria—such as a comparison of unit price and extended price for the same quantity of the same item—or reasonableness criteria. The use of objective price criteria is common when conducting procurement by sealed bids (formal advertising). Reasonableness criteria is common when conducting procurement by competitive proposals.

When the price component will be evaluated using only a mathematical formula, such as in the unit price and extended price example above, TWC does not prohibit a grantee from permitting its contract developer (or grantee personnel having similar responsibilities) to perform the tabulation.

In contrast, TWC recommends that when using reasonableness criteria, it is a good practice for the evaluation team to perform the entire evaluation, including evaluation of the price component. Exceptions to this recommendation include circumstances in which such review of the price component is prohibited by a grantee’s own procedures or external requirements governing the grantee’s procurements, a grantee’s established procurement practices apply a different approach for all of its other procurements, or if the evaluation team lacks the technical expertise to make a competent evaluation. The TWC recommendation is based on the observation in the State of Texas Procurement and Contract Management Guide that having the evaluation team score the entire response, inclusive of the price component, will “facilitate a more comprehensive evaluation of the response (e.g., ensure that the proposed pricing aligns with the proposed products and services).”

Refer to [O. Cost/Price Analysis](#cO0_cost_price_analysis), in this Publication, for more information about evaluation of the price component.

### N.8.9 Scoring Matrix

This Section, N.8.9 Scoring Matrix, provides supplemental technical information or guidance. It is included for informational purposes.

Information in this Section is adapted from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

The State of Texas Procurement and Contract Management Guide for Texas state agencies describes the scoring matrix as follows:

The scoring matrix is a standardized form used by all the evaluation committee members to record the scores for each the response based on the evaluation criteria and weights published in the solicitation and, if applicable, unpublished subcriteria. It is best practice for the scoring matrix to be finalized prior to publishing the solicitation. However, if time does not permit the scoring matrix to be finalized prior to publication of the solicitation, the scoring matrix must be completed prior to the receipt of responses.

Appendices 18 and 19 to the State of Texas Procurement and Contract Management Guide include a “Sample Evaluation Committee Master Score Sheet” and a “Sample Evaluation Committee Member Scoring Matrix,” respectively.

As also reflected in the State of Texas Procurement and Contract Management Guide, some procurements may entail multiple scoring rounds—such as a first round to score the respondents’ responses, and a second round, if applicable, for oral presentations. In such cases, evaluators should record their scores for each round at the completion of that round. Consistent with the State of Texas Procurement and Contract Management Guide, TWC considers it a best practice to label each scoring matrix with the number or date of the respective scoring round. Refer to [N.8.12 Oral Presentations](#cN8_12_oralpresentations), in this Publication, for information about oral presentations.

### N.8.10 Reference Check

This Section, N.8.10 Reference Check, provides supplemental technical information or guidance. It is included for informational purposes.

Reference checks should be performed when the solicitation requires respondents to include customer references with their response submissions to the [grantee](#definition_grantee).

Grantees that require customer references in a procurement should have procedures for the verification of those references. In the absence of such procedures, the following information is provided for grantee guidance and consideration.

The following information is adapted from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

As a matter of practicality, if a grantee decided to include a requirement in the solicitation for respondents to include customer references in their responses to that solicitation, the grantee should use those references to perform a reference check. TWC discourages grantees from requesting customer references if the grantee does not intend to perform a check.

If circumstances arise after issuance of the solicitation—for example if events following the solicitation unexpectedly shorten the procurement timeline—the grantee will need to decide, before the solicitation closing date (deadline for respondents to submit responses to the solicitation), whether it will perform the check. If the grantee required respondents to include customer references and later determined that it would not be able to perform reference checks, the grantee should include a written explanation of the determination in the grantee’s procurement records. Doing so improves the grantee’s defense if claims later arise that checks were avoided to give unfair advantage to the selected entity (such as if a protester were to cite the selected entity as having a record of low customer satisfaction).

Points to consider when a solicitation requires customer references include the following:

* Reference check questions should be prepared before the solicitation closing date (keeping in mind the types of questions to which the grantee itself would respond if asked to provide a customer reference to another entity for a [contractor (vendor)](#definition_contractor) that the grantee had used)
* The same questions should be asked of each customer reference (promoting consistency and fairness to all respondents)
* It is permissible for the contract developer (or grantee personnel having similar responsibilities) or a subcommittee of the [evaluation team](#definition_evaluation_team) to perform reference checks
* Information obtained from the reference checks should be documented in writing and retained in the procurement records

Appendix 20 to the State of Texas Procurement and Contract Management Guide includes a sample Reference Check Form. If a grantee chooses to model its approach on that sample, the grantee will need to customize that sample to its own organization and procurement.

### N.8.11 Competitive Range Determination

This Section, N.8.11 Competitive Range Determination, provides supplemental technical information or guidance. It is included for informational purposes.

Except UG and UGMS references, the following information is adapted from the State of Texas Procurement and Contract Management Guide for Texas state agencies and the Federal Acquisition Regulation (FAR) for federal agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide and the FAR.)

If a competitive range is determined as a means of narrowing the field of respondents, the rationale for the competitive range determination should be documented in the procurement file.

As described in the State of Texas Procurement and Contract Management Guide for Texas state agencies, competitive range refers to identification of responses whose evaluation scores fall within a range that can be “reasonably considered for award selection.”

Competitive range determinations are common in public procurements. The UG and UGMS are silent on competitive range determinations specifically, except to require appropriate documentation in the procurement records. As reflected in [Q.3 Procurement Records](#cQ3_procurement_records), in this Publication, the UG and UGMS require that [grantees](#definition_grantee) must maintain records sufficient to detail the history of a procurement, including records relating to [contractor (vendor)](#definition_contractor) selection or rejection. The competitive range determination, if used, is part of the contractor selection process and as such should be documented in the procurement records, including the rationale for the determination.

Grantees that use a competitive range determination for procurements should have procurement procedures for doing so. In the absence of such procedures, the following information is provided for grantee guidance and consideration.

Determination of a competitive range would generally be used for procurements for which a grantee conducts multiple rounds of evaluations. It would typically be determined after the [evaluation team](#definition_evaluation_team) scores the respondents’ submissions in response to the solicitation, and function to “narrow the field of respondents that will participate in subsequent evaluation activities such as oral presentations.”

When making a competitive range determination, the State of Texas Procurement and Contract Management Guide for state agencies suggests examining the results of the evaluation team scores for a “natural break” in the scores, to segregate the highest scoring responses.

Provisions at [48 C.F.R. § 15.306(c)(2)](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-sec15-306.pdf) (2019) of the FAR for federal agencies acknowledge that in some cases “the number of most highly rated proposals that might otherwise be included in the competitive range exceeds the number at which an efficient competition can be conducted.” The FAR advises public procurement officers in federal agencies that in such cases, the number of respondents in the competitive range may be further limited to “the greatest number that will permit an efficient competition among the most highly rated proposals,” provided that the solicitation notified offers that “the competitive range can be limited for purposes of efficiency.” If a grantee takes such action, TWC recommends that it do so in consultation with its legal counsel and include written rationale for limiting the competition to the resulting number in the grantee’s procurement records.

### N.8.12 Oral Presentations

This Section, N.8.12 Oral Presentations, provides supplemental technical information or guidance. It is included for informational purposes.

Except references to the UG and UGMS, the information in this Section is adapted from information published in the State of Texas Procurement and Contract Management Guide. Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

If a [grantee](#definition_grantee) will use oral presentations in the selection process, it is important that the grantee include that information in the solicitation. The oral presentation materials and evaluations must be documented in the procurement file.

As described in the State of Texas Procurement and Contract Management Guide for state agencies, oral presentations refer to an opportunity for respondents to a solicitation to point out the strengths and unique aspects of their respective response and to respond to clarification questions that the grantee has about those responses. They may also include product demonstrations, when appropriate.

The use of oral presentations is common in public procurements. The UG and UGMS are silent on oral presentations specifically, but, as covered in [L.2 Identify Requirements & Evaluation Factors](#cL2_id_reqs_and_evaluation_factors), in this Publication, do require that solicitations include all requirements that offers must fulfill and all other factors to be used in evaluating offers. Additionally, as reflected in [Q.3 Procurement Records](#cQ3_procurement_records), in this Publication, the UG and UGMS require that grantees must maintain records sufficient to detail the history of a procurement, including records relating to [contractor (vendor)](#definition_contractor) selection or rejection. Oral presentations, if used, are part of the selection process and as such should be documented in the procurement records.

Grantees will determine whether and when to use oral presentations. It is important that grantees that use oral presentations have procurement procedures for doing so. The following information is provided for grantee guidance and consideration. The following information is adapted from the State of Texas Procurement and Contract Management Guide for state agencies.

If a grantee anticipates that oral presentations might be used, it would need to:

* Communicate that possibility in the solicitation;
* Describe how the grantee will determine who it will invite to make oral presentations; and
* Outline how the grantee will notify respondents of the time and place for the presentations.

(Procurement practices include both an approach in which invitation for oral presentation is extended to all respondents, and an approach in which invitation for oral presentation is extended to top ranked respondents in the competitive range only.)

Before oral presentations occur, the [evaluation team](#definition_evaluation_team) should prepare its list of clarification questions to be asked of the presenting respondents.

It is important that oral presentations be fair to respondents. For example, the time permitted for each presentation and the agenda format should be the same for all presenting respondents. A best practice for determining the order of the presentations is to draw names. This is because some presenters might believe that an advantage exists from the order in which they present. Drawing names for the presentation order helps promote impartiality.

After the oral presentations occur, it is a best practice to provide written questions to each of the presenting respondents to document the oral clarifications that each respondent provided during its presentation. It is a good management practice to require that the respondents’ replies be signed by an authorized representative of the respondent.

Subsequently, the members of the same evaluation team that performed the original evaluation of respondents’ responses to the solicitation will independently complete another scoring matrix for each of the presenting respondents, which will be based on the evaluation factors and weights specified in the solicitation, and take into account the additional information obtained from the oral presentations.

### N.8.13 Best and Final Offer

This Section, N.8.13 Best and Final Offer, provides supplemental technical information or guidance. It is included for informational purposes.

Except for references to the UG and UGMS, this Section is based on information published in the State of Texas Procurement and Contract Management Guide for Texas state agencies, and the Federal Acquisition Regulation (FAR). (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide and the FAR.)

If a [grantee](#definition_grantee) will use a Best and Final Offer (BAFO) option in the selection process, it is important that the grantee include that information in the solicitation. The BAFO responses and evaluations are part of the selection process and for that reason, it is important that they be documented in the procurement file.

The use of BAFO procedures sometimes occurs in public procurements. The UG and UGMS are silent on standards for BAFO procedures specifically, but, as covered in [L.2 Identify Requirements & Evaluation Factors](#cL2_id_reqs_and_evaluation_factors), in this Publication, do require that solicitations include all requirements that offers must fulfill and all other factors to be used in evaluating offers. Additionally, as reflected in [Q.3 Procurement Records](#cQ3_procurement_records), in this Publication, the UG and UGMS require that grantees must maintain records sufficient to detail the history of a procurement, including records relating to [contractor (vendor)](#definition_contractor) selection or rejection. BAFO procedures, if used, are part of the contractor selection process and as such should be documented in the procurement records.

Grantees will determine whether and when to use BAFO procedures. BAFO procedures may occur regardless of whether a grantee uses oral presentations. For example, a grantee not using oral presentations might progress from the [evaluation team’s](#definition_evaluation_team) scoring of respondent’s original submissions to the solicitation, to competitive range determination, to BAFO procedures. (BAFO procedures would be used if selection could not be made based on the evaluation team’s scoring of respondents’ original submissions.) Alternatively, a grantee using both oral presentations and BAFO procedures would progress from competitive range determination to oral presentations, and if selection could be made at that point, to BAFO procedures.

Grantees that use a BAFO process need to have procurement procedures for doing so. The following information is provided for grantee guidance and consideration. Except where indicated otherwise, the following information is adapted from the State of Texas Procurement and Contract Management Guide for Texas state agencies.

After competitive range determinations occur, and oral presentations are complete (if used), a grantee may decide to hold “discussions” with the respondents within the competitive range, and at the conclusion of the discussions give each equal opportunity to submit revisions to their original responses in the form of a BAFO. BAFO procedures, if used, are a negotiation tool that ties into [contract](#definition_contract) or [subgrant](#definition_subgrant).

As described in [48 C.F.R. § 15.306(d)](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-sec15-306.pdf) (2019) of the FAR, “discussions” are negotiations that take place after establishment of the competitive range. Negotiations “are exchanges…that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract.”

Provisions in 48 C.F.R. § 15.306(d) (2019) of the FAR reflect the following:

* “Discussions” occur with each respondent within the competitive range
* “Discussions” are tailored to each respondent’s offer
* The primary objective of “discussions” is to maximize ability to obtain best value based on the requirements and evaluation factors in the solicitation
* At a minimum, “discussions” would be used to indicate or discuss with each of the respondents any “deficiencies, significant weaknesses, and adverse past performance information to which the” respondent “has not yet had an opportunity to respond”
* “Discussions” may also be used to discuss other aspects of the respondent’s offer that could “be altered or explained to enhance materially the proposal’s potential for award”
* “Discussions” need not cover every area where the offer could be improved
* If, after “discussions” begin, a respondent that was “originally in the competitive range is no longer considered to be among the most highly rated offerors being considered for award, that offeror may be eliminated from the competitive range whether or not all material aspects of the proposal have been discussed, or whether or not the offeror has been afforded an opportunity to submit a proposal revision”

Provisions at 48 C.F.R. § 15.306(e) (2019) of the FAR include the following limits on exchanges (including discussions leading up to BAFOs), requiring that personnel must not engage in conduct that:

* Favors one offeror over another
* Reveals an offeror’s technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror’s intellectual property to another offeror
* Reveals an offeror’s price without that offeror’s permission (however, a respondent may be informed that its price is considered to be too high or too low). “It is also permissible” at this juncture “to indicate to all offerors the cost or price that the Government’s price analysis, market research, and other reviews have identified as reasonable”
* Reveals the names of individuals providing reference information about an offeror’s past performance
* Knowingly furnishes selection information

When using BAFO procedures, revisions are typically requested by the grantee by making a formal request to respondents to submit a BAFO. The grantee’s request would include a submission deadline and instruct the respondents as to exactly what respondents should submit.

The FAR and State of Texas Procurement and Contract Management Guide for state agencies diverge slightly on actions that might occur after the BAFOs are received. Under [48 C.F.R. § 15.307](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-sec15-307.pdf) (2019) of the FAR, respondents invited to submit a BAFO are to be advised that “the Government intends to make award without obtaining further revisions.” In contrast, the State of Texas Procurement and Contract Management Guide observes that “after consideration of all BAFO responses, agencies may choose to “down select” to a smaller number of respondents with which to commence negotiations.” This illustrates how public purchasing practices can vary, and the importance that grantees maintain procurement procedures applicable to their organization.

Practically speaking, in considering UG and UGMS, a final evaluation team review of the BAFO submissions would occur, again using the evaluation factors identified in the solicitation document.

### N.8.14 Evaluation Team Recommendation

This Section, N.8.14 Evaluation Team Recommendation, provides supplemental technical information or guidance. It is included for informational purposes.

This Section includes information from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

After the evaluation process is complete, the chair of the [evaluation team](#definition_evaluation_team) should prepare, sign and date the master scoring matrix that summarizes the scoring results, and make a recommendation to either award the [contract](#definition_contract) or [subgrant](#definition_subgrant) to the highest ranked respondent without discussion, tentatively award to the highest ranked respondent subject to successful completion of negotiations or cancel the solicitation. It is recommended that each member of the evaluation team review the master scoring matrix to verify the accuracy of the scoring. Extra care should be taken to ensure that the raw data from evaluators’ independent evaluations was accurately transcribed into the mathematical formulas and that the formulas were properly loaded (if electronic aids are used). If the solicitation permits, the evaluation team may recommend that the [grantee](#definition_grantee) make a contract or subgrant to more than one respondent; provided that the awarded respondents are the highest ranked in the evaluation.

### N.8.15 Award Selection

This Section, N.8.15 Award Selection, provides supplemental technical information or guidance. It is included for informational purposes.

[Grantee](#definition_grantee) procurement procedures should identify who in its organization has ultimate authority for award selection and how selection will be made.

The decision-maker for award selection will vary from grantee to grantee, ranging from the organization’s oversight board, to the head of the grantee’s organization, to the grantee’s chief contracting officer, or another position designated for that purpose. The distribution of responsibilities associated with that function may also vary among grantees.

As a good management practice, that party, or other designated personnel should, prior to selection:

* Ensure consistency among the solicitation requirements, notices to offerors, proposal preparation instructions, evaluation factors and subfactors, solicitation provisions or [contract](#definition_contract)/award clauses, and data requirements
* Ensure that proposals were evaluated based solely on the factors and subfactors contained in the solicitation
* Consider the recommendations of advisory panels or committees, board members, etc.
* Select the source or sources whose proposal is the best value

This recommendation considers information in [48 C.F.R. § 15.303](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-sec15-503.pdf) (2019) of the Federal Acquisition Regulation (FAR) for federal agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the FAR.)

### N.8.16 Documenting the Evaluation & Selection Process

This Section, N.8.16 Documenting the Evaluation & Selection Process, provides supplemental technical information or guidance. It is included for informational purposes.

The UG and UGMS require that [grantees](#definition_grantee) retain records documenting the significant history of its procurements. Refer to [Q.3 Procurement Records](#cQ3_procurement_records), in this Publication, for information about procurement documentation.

## N.9 Ties

### N.9.1 Overview

This Section, N.9.1 Overview, provides supplemental technical information or guidance. It is included for informational purposes.

[Grantee](#definition_grantee) procedures should address how its entity handles situations in which two or more offers receive the same score after evaluation, or have the same price (if award is based on price alone).

No uniform procurement requirement prescribes how to handle ties in a public procurement. The UG and UGMS are both silent on ties. Examples of ways that some public entities handle ties follow.

### N.9.2 Examples

#### N.9.2.1 Example 1: Federal Agencies

This Section, N.9.2.1 Example 1: Federal Agencies, provides supplemental technical information or guidance. It is included for informational purposes.

The following example is based on the FAR requirements that apply to federal agencies. It is provided for illustration purposes only, to demonstrate one public purchasing practice for resolving ties.

Under [48 C.F.R. § 14.408-6](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-sec14-408-6.pdf) (2019) of the FAR, when making procurement by sealed bids (formal advertising), the FAR requires covered federal agencies to make award using the following order of priority when “two or more low bids are equal in all respects”:

1. Small business concerns that are also labor surplus area concerns
2. Other small business concerns
3. Other business concerns

If after employing the preceding order of priority, two or more bidders “remain equally eligible…award shall be made by a drawing by lot limited to those bidders.” In doing so, the FAR requires that the bidders involved “be given an opportunity to attend the drawing.” The FAR also requires that the drawing “be witnessed by at least three persons” and that “the contract file shall contain the names and addresses of the witnesses and the person supervising the drawing.”

Lastly, when an award is made using the priorities in 48 C.F.R. § 14.408-6 (2019), the FAR requires that the resulting [contract](#definition_contract) include “a written agreement…that the [contractor (vendor)](#definition_contractor) will perform, or cause to be performed, the contract in accordance with the circumstances justifying the priority used to break the tie or select bids for a drawing by lot.”

(Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the FAR.)

#### N.9.2.2 Example 2: State Agencies

This Section, N.9.2.2 Example 2: State Agencies, provides supplemental technical information or guidance. It is included for informational purposes.

The following example is based on the State of Texas Procurement and Contract Management Guide for Texas state agencies. It is provided for illustration purposes only, to demonstrate one public purchasing practice for resolving tie bids. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

The State of Texas Procurement and Contract Management Guide for Texas state agencies describes steps that employ the use of claimed preferences, giving priority in the following sequence: Texas agricultural product, Texas product, Texas bidder, U.S. product (see Note). Using those preferences, an award determination is made as follows:

* If a tie exists between two or more offers having the same preferences and the offers are the same price, “the award for any tied item is determined by drawing lots, tossing a coin, or drawing names with two witnesses to oversee the tiebreaking activity”
* If a tie exists between two or more offers having the same price but different preferences, “the award is based on the priority for goods and/or for services,” such that if one offers a Texas agricultural product, and the other offers another Texas product that is not a Texas agricultural product, award would be made to the offer of the Texas agricultural product.

Note: If employing preferences, the use of the above-identified preferences—Texas agricultural product, Texas product, Texas bidder, U.S. product—or any other geographical preference would not be appropriate under TWC grant awards (except where Buy America preference is statutorily required). The UG and UGMS require that [grantees](#definition_grantee) must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except in cases where applicable federal statutes mandate or encourage geographic preference. (Refer to [E.2 Geographic Preference](#cE2_geographic_preference), in this Publication.) The state’s use of geographical preference, as described above, is permissible under the UG and UGMS because the UG and UGMS require states to follow the same procurement policies and procedures that it uses for procurements from its non-federal funds, while grantees’ procedures must conform to the procurement standards in UG and UGMS (which prohibit use of geographic preference, except in some cases involving procurement of architectural and engineering services). (Refer to [C. Written Procurement Procedures](#cC0_written_procedures), in this Publication.)

# O. Cost/Price Analysis

## O.1 Cost Analysis and Price Analysis

This Section, O.1 Cost Analysis and Price Analysis, provides supplemental technical information or guidance. It is included for informational purposes.

[Cost analysis](#definition_costanalysis) and/or [price analysis](#definition_priceanalysis) are important steps toward assuring that the cost to the TWC grant award is reasonable. Refer to [Chapter 8: Cost Principles](https://twc.texas.gov/business/fmgc/financial-manual-grants-contracts-chapter-8-cost-principles.html), in the FMGC, for discussion about reasonable costs. The UG and UGMS establish procurement standards for performing cost analysis and price analysis in connection with [contract](#definition_contract) cost and price. As reflected in [A.6.3 Application to Selection of Subgrantees](#cA6_3_applicability_subgrantee_selection), in this Publication, TWC also requires adherence to these UG and UGMS standards for cost and price analysis with respect to the selection of [subgrantees (subrecipients)](#definition_subgrantee) for [subgrants](#definition_subgrant).

### O.1.1 Basic Standard\*

Policy:

[Grantees](#definition_grantee) must perform [cost analysis](#definition_costanalysis) or [price analysis](#definition_priceanalysis) in connection with every procurement action and [subgrant](#definition_subgrant) in excess of the [simplified acquisition threshold](#definition_simplified_acq_threshold), including [contract modifications](#definition_contractmod). The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the grantee must make independent estimates before receiving bids or proposals. Profit, if any, must be negotiated as a separate element of the price. No grantee or [subgrantee (subrecipient)](#definition_subgrantee) may earn or keep any profit resulting from a TWC grant award, unless expressly authorized by the terms and conditions of the [TWC grant award](#definition_twc_grant_award) or subgrant, respectively.

For procurements that grantees perform under [federal awards](#definition_federal_award), the UG specifies that grantees must perform a cost or price analysis in connection with every procurement action in excess of the simplified acquisition threshold, including contract modifications. Similarly, UGMS states that a cost or price analysis must be performed in connection with **every** procurement action, including contract modifications; however, makes subsequent reference to bids and proposals (which are responses received when conducting procurement by sealed bids or competitive proposals; both of which are required for procurements that exceed the simplified acquisition threshold). For that reason, TWC interprets the UGMS requirement to be consistent with the UG. Thus, for both federal awards and [state awards](#definition_stateaward), grantees must perform a cost or price analysis in connection with every procurement action in excess of the simplified acquisition threshold.

The UG and UGMS both provide that the method and degree of analysis required depends on the facts surrounding the particular procurement situation, but as a starting point, the grantee must make independent estimates before receiving bids or proposals. Refer to [F.6 Independent Estimate](#cF6_independent_estimate), in this Publication, for information about independent estimates.

TWC considers a contract modification that does not impact cost or price to not require the grantee to perform a cost or price analysis in connection with that modification, for example a modification that makes a no-cost contract or subgrant extension, or a modification that updates or revises compliance requirements with no impact to cost or price. TWC does not consider the exercise of a renewal option according to the terms agreed upon in the original award to be a contract modification. However, before exercising a renewal option, a grantee should have procedures in place to consider whether doing so is in the best interest of the programs involved, price and other factors considered.

The UG and UGMS procurement standards for cost and price analysis also require that profit, if any, must be negotiated as a separate element of the price. Additionally, the UG cost principles and TWC restrict grantees and subgrantees from earning or keeping profit unless expressly authorized by the terms and conditions of the TWC grant award or subgrant, respectively.

Refer to [O.1.2 Cost Analysis](#cO1_2_cost_analysis), [O.1.3 Price Analysis](#cO1_3_price_analysis), [O.1.4 Profit Negotiation](#cO1_4_profit_negotiation), [O.1.5 Profit & Grants/Subgrants](#cO1_5_profit_grants_subgrants), and [O.1.6 Allowable Costs](#cO1_6_cost_analysis_allowable_costs), in this Publication, for additional compliance detail on this topic.

The UG and UGMS establish the requirements described in this Section, O.1.1 Basic Standard, with respect to the making of [contracts](#definition_contract) to [contractors (vendors)](#definition_contractor). TWC requires grantee adherence to the same standards when making [subgrants](#definition_subgrant) to [subgrantees (subrecipients)](#definition_subgrantee).

Reference:

[2 C.F.R. § 200.323(a)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-323.pdf) (cost/price analysis); [2 C.F.R. § 200.400(g)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-400.pdf) (profit under grant awards); [UGMS, Part III, §\_\_.36(f)(1)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf) (cost/price analysis)

### O.1.2 Cost Analysis\*

This Section, O.1.2 Cost Analysis, provides additional compliance detail for [O.1.1 Basic Standard](#cO1_1_cost_price_analysis_basic_standard), relating to [cost analysis](#definition_costanalysis) and [price analysis](#definition_priceanalysis).

The UGMS describes [cost analysis](#definition_costanalysis) as verifying proposed cost data, the projections of the data and the evaluation of the specific elements of costs and profit. The UGMS requires that a cost analysis must be performed in the following instances:

* When the offeror is required to submit the elements of its estimated cost (for example for [contracts](#definition_contract) for [professional services](#definition_professionalservices), [consulting services](#definition_consulting_services) and architectural/engineering services)
* When adequate price competition is lacking and for [noncompetitive procurements](#definition_noncompetitiveproc), including [contract modifications](#definition_contractmod) or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation

Refer to [J.1 Consulting, Professional & Legal Services](#cJ1_consulting_professional_legal_svcs) and [J.3 Special: Architectural, Engineering & Land Surveying Services](#cJ3_architectural_engineering_surveying), in this Publication, for more information about the procurement of professional services, consulting services, and architectural/engineering services.

Refer to [O.1.2.1 Cost Data](#cO1_2_1_cost_data), in this Publication, for supplemental technical information about this topic.

The UG and UGMS establish the requirements described in this Section, O.1.2 Cost Analysis, with respect to the making of [contracts](#definition_contract) to [contractors (vendors)](#definition_contractor). TWC requires grantee adherence to the same standards when making [subgrants](#definition_subgrant) to [subgrantees (subrecipients)](#definition_subgrantee).

Reference:

[UGMS, Part III, §\_\_.36(d)(4)(ii) and (f)(1)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

#### O.1.2.1 Cost Data

This Section, O.1.2.1 Cost Data, provides supplemental technical information or guidance. It is included for informational purposes.

When performing a cost analysis “cost” refers to the individual cost elements that sum to the price being offered. When performing a cost analysis, a [grantee](#definition_grantee) evaluates cost data, such as labor and benefits, overhead, general and administrative costs, materials and other costs that make up the price being offered. It requires the grantee to use professional judgement, knowledge, and experience to determine if the costs, and ultimately the bottom-line price, are fair and reasonable. Comparison against the independent estimate is also useful. (Refer to [F.6 Independent Estimate](#cF6_independent_estimate), in this Publication, for information about independent estimates.) It may also include evaluation of the proposed costs against the respondent’s proposal to determine whether the price might be inadequate to perform the proposed work, such as if the respondent omitted significant costs or certain cost data appear inconsistent with the work to be performed. Doing so can pose a risk of the entity later requesting more money or terminating the award early because they cannot afford to perform the work at the proposed price.

There is no uniform format or procedure for conducting or documenting the cost analysis. It may vary by grantee and procurement according to each grantee’s procedures.

### O.1.3 Price Analysis\*

This Section, O.1.3 Price Analysis, provides additional compliance detail for [O.1.1 Basic Standard](#cO1_1_cost_price_analysis_basic_standard), relating to [cost analysis](#definition_costanalysis) and [price analysis](#definition_priceanalysis).

The UGMS provides that the price analysis required under O.1.1 Basic Standard, in this Publication, will be used to determine the reasonableness of the proposed contract price in all instances where cost analysis is not required.

The UG and UGMS establish the requirements described in this Section, O.1.3 Price Analysis, with respect to the making of [contracts](#definition_contract) to [contractors (vendors)](#definition_contractor). TWC requires grantee adherence to the same standards when making [subgrants](#definition_subgrant) to [subgrantees (subrecipients)](#definition_subgrantee).

Reference:

[UGMS, Part III, §\_\_.36(f)(1)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

#### O.1.3.1 Price Data

This Section, O.1.3.1 Price Data, provides supplemental technical information or guidance. It is included for informational purposes.

Unlike [cost analysis](#definition_costanalysis), [price analysis](#definition_priceanalysis) does not involve evaluation of individual cost data that sum to the price being offered. When performing a price analysis, a [grantee](#definition_grantee) compares the bottom-line price proposed by an offeror against the prices proposed by other respondents, market research, the independent estimate, or other reasonable data to determine whether the price is comparable to market prices and is otherwise reasonable for the work to be performed.

There is no uniform format or procedure for conducting or documenting the price analysis. It may vary by grantee and procurement according to each grantee’s procedures.

### O.1.4 Profit Negotiation\*

This Section, O.1.4 Profit Negotiation, provides additional compliance detail for [O.1.1 Basic Standard](#cO1_1_cost_price_analysis_basic_standard), relating to [cost analysis](#definition_costanalysis) and [price analysis](#definition_priceanalysis).

The UG and UGMS require that [grantees](#definition_grantee) must negotiate profit as a separate element of the price in the following instances:

* In all cases where a [cost analysis](#definition_costanalysis) is performed
* For all [contracts](#definition_contract) in which there is no price competition

The UG and UGMS also provide that to establish a fair and reasonable profit, consideration must be given to all of the following:

* The complexity of the work to be performed
* The risk borne by the [contractor (vendor)](#definition_contractor)
* The contractor’s investment
* The amount of subcontracting
* The quality of its record of past performance
* Industry profit rates in the surrounding geographical area for similar work

As covered in [F.5.3.3. Prohibited Contract Types](#cF5_3_3_prohibited_contract_types), in this Publication, the UG and UGMS prohibit [cost plus percentage of cost contracts](#definition_costpluspercentageofcost) and [percentage of construction cost contracts](#definition_costplusconstruction).

The UG and UGMS establish the requirements described in this Section, O.1.4 Profit Negotiation, with respect to the negotiation of profit under contracts with contractors (vendors). TWC applies the same standard with respect to the negotiation of profit, under a [subgrant](#definition_subgrant) to a [subgrantee (subrecipient)](#definition_subgrantee). See also [O.1.5 Profit & Grants/Subgrants](#cO1_5_profit_grants_subgrants), in this Publication, if negotiating profit under a subgrant.

Reference:

[2 C.F.R. § 200.323(b)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-323.pdf); [UGMS, Part III, §\_\_.36(f)(2)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

### O.1.5 Profit & Grants/Subgrants\*

This Section, O.1.5 Profit & Grants/Subgrants, provides additional compliance detail for [O.1.1 Basic Standard](#cO1_1_cost_price_analysis_basic_standard), relating to [cost analysis](#definition_costanalysis) and [price analysis](#definition_priceanalysis).

A [grantee](#definition_grantee) is not permitted to earn profit under a [TWC grant award](#definition_twc_grant_award) unless the TWC grant award explicitly permits the grantee to earn or keep any profit resulting from that award.

If negotiating a fee (profit) with a [subgrantee (subrecipient)](#definition_subgrantee), the subgrantee must be a for-profit entity, the fee must not exceed ten percent (10%) of the [subgrant’s](#definition_subgrant) estimated contract price (excluding the fee (profit)), and the profit must be specifically authorized by the terms and conditions of the resulting subgrant.

Each of these points is discussed in the paragraphs that follow.

* Profit must be authorized by the terms and conditions of the subgrant.

By definition, program income is income earned by the grantee that is directly generated by a supported activity or earned as a result of the grant award during the period of performance. The UG and UGMS contain specific requirements for the use of program income, which do not include retaining it as profit. The permission relating to profit retention pertains to the UG cost principle policy provision that states: “The non-Federal entity may not earn or keep any profit resulting from Federal financial assistance, unless explicitly authorized by the terms and conditions of the Federal award. See also § 200.307 Program income.” ([2 C.F.R. § 200.400(g)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-400.pdf)) Based on the UG definitions of “non-Federal entity,” “Federal financial assistance,” and “federal award,” this UG provision explicitly prohibits grantees and subgrantees (subrecipients) from earning or keeping any profit resulting from a TWC grant award (or subgrant made under that award), unless expressly authorized by the terms and conditions of the federally funded TWC grant award or subgrant, respectively. The UG makes this requirement applicable to [federal awards](#definition_federal_award) that TWC makes, and any subgrants made under those awards. TWC also extends this requirement to [state awards](#definition_stateaward) that it makes, and to any subgrants made under those awards.

* Subgrantees must not be permitted to earn profit unless the subgrantee is a for-profit entity.

Only for-profit subgrantees will be permitted to earn profit. For all other subgrantees, any amounts earned which are in excess of the award amount constitute program income. (Refer to [Chapter 5: Program Income](https://twc.texas.gov/business/fmgc/financial-manual-grants-contracts-chapter-5-program-income.html), in the FMGC, for information about program income.)

* The profit must not exceed ten percent (10%) of the subgrant’s estimated contract price, excluding the fee (profit).

This limit is based on similar provisions in the FAR ([48 C.F.R. § 15.404-4(c)(4)(i)(C)](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-sec15-404-4.pdf)) (2019). When negotiating profit with a subgrantee, consideration must be given to the same factors that are described in [O.1.4 Profit Negotiation](#cO1_4_profit_negotiation), in this Publication. The fee will be prenegotiated (not agreed upon after the fact). Note that, as covered in [F.5.3.3. Prohibited Contract Types](#cF5_3_3_prohibited_contract_types), in this Publication, the UG and UGMS prohibit [cost plus percentage of cost contracts](#definition_costpluspercentageofcost) and [percentage of construction cost contracts](#definition_costplusconstruction). Such contract types must also not be used when making [subgrants](#definition_subgrant). This means that while profit is limited to ten percent (10%) of a subgrant’s estimated contract price, the method by which that amount is earned cannot be based on expenditures; it must be tied to the subgrantee’s performance. In this capacity, the pre-negotiated fee/profit functions as a motivator to stimulate performance.

### O.1.6 Allowable Costs\*

This Section, O.1.6 Allowable Costs, provides additional compliance detail for [O.1.1 Basic Standard](#cO1_1_cost_price_analysis_basic_standard), relating to [cost analysis](#definition_costanalysis) and [price analysis](#definition_priceanalysis).

For [contracts](#definition_contract) that a [grantee](#definition_grantee) makes under a [TWC grant award](#definition_twc_grant_award), contract costs or prices that are based on estimated costs are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the grantee under applicable cost principles. For [federal awards](#definition_federal_award), the UG provides that a grantee may reference its own cost principles that comply with federal cost principles in Subpart E—Cost Principles in the UG.

This requirement relates to [cost reimbursement contracts](#definition_costreimbursementcontract) and contracts for which the contract price is based on negotiated cost estimates. For cost reimbursement contracts, it requires that the costs incurred and reimbursed under the contract be allowable costs. For contracts for which the contract price is based on negotiated cost estimates, it requires that the estimates be limited to estimates of costs that are allowable in accordance with applicable cost principles.

The UG and UGMS establish the requirements described in this Section, O.1.6 Allowable Costs, with respect to the making of [contracts](#definition_contract) to [contractors (vendors)](#definition_contractor). TWC requires adherence to the same standards when making [subgrants](#definition_subgrant) to [subgrantees (subrecipients)](#definition_subgrantee).

Reference:

[2 C.F.R. § 200.323(c)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-323.pdf); [UGMS, Part III, §\_\_.36(f)(3)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

# P. Pre-Award Considerations

## P.1 Awards to Responsible Parties\*

Policy:

[Grantees](#definition_grantee) must award [contracts](#definition_contract) and [subgrants](#definition_subgrant) only to responsible parties possessing the ability to perform successfully under the terms and conditions of a proposed procurement.

The UG and UGMS require that grantees must award contracts only to responsible [contractors (vendors)](#definition_contractor) possessing the ability to perform successfully under the terms and conditions of a proposed procurement. In doing so, consideration must be given to matters such as integrity, compliance with public policy, record of past performance, and financial and technical resources.

The same is relevant for subgrants that grantees make to [subgrantees (subrecipients)](#definition_subgrantee).

Also see [P.2 Suspension & Debarment](#cP2_suspension_debarment) and [P.3 Pre-Award Reviews](#cP3_preaward_reviews), in this Publication.

Reference:

[2 C.F.R. § 200.318(h)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf); [UGMS, Part III, §\_\_.36(b)(8)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

In general, a responsible party is one that is capable of performing all award requirements in full compliance with the award terms and applicable laws, rules and ethical standards.

## P.2 Suspension & Debarment

### P.2.1 Basic Standard\*

Policy:

A [grantee](#definition_grantee) must not make or permit any [subgrant](#definition_subgrant) or [contract](#definition_contract), at any tier, to any party that is debarred, suspended or otherwise excluded from or ineligible to participate in federal assistance programs or state contracts, as identified by the federal System for Award Management or the debarred vendor list maintained by the Texas State Comptroller of Public Accounts.

Before making a contract or subgrant under a grant award from TWC, a grantee must verify that the entity receiving the contract or subgrant is not suspended, debarred, or otherwise ineligible to receive the award. Reverification must occur before exercising a renewal. A printout of the check must be in the procurement records at the time of award and again at the time of execution of a renewal option that exists under the award.

The UG makes grantees of [federal awards](#definition_federal_award) subject to the non-procurement debarment and suspension regulations implementing [Executive Order 12549](https://www.archives.gov/federal-register/codification/executive-order/12549.html) and Executive Order 12689 ([54 FR 34131; August 18, 1989](https://www.govinfo.gov/content/pkg/FR-1989-08-18/pdf/FR-1989-08-18.pdf)). Those regulations are codified at [2 C.F.R. Part 180](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part180.pdf). Similarly, UGMS requires all grantees to adhere to Executive Order 12549, and applies the associated award prohibitions to all awards (grants and contracts) at any tier (any subgrant or [subcontract](#definition_subcontract) made under a covered grant or contract).

Therefore, grantees must not:

* Make or permit any subgrant or contract at any tier (subgrant, contract, subcontract) to any party which is debarred or suspended or otherwise excluded from or ineligible for participation in federal assistance programs under Executive Order 12549
* Make or permit any subgrant or contract at any tier to any party barred from participating in State contracts pursuant to [Texas Government Code § 2155.077](http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.2155.htm#2155.077), as implemented by [34 TAC §§ 20.581-20.587](http://texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=5&ti=34&pt=1&ch=20&sch=G&rl=Y)

Grantees must use the following to conduct a search for such persons or entities prior to awarding a subgrant or contract:

* [System for Award Management (SAM](https://sam.gov)) maintained by the U.S. General Services Administration (GSA)
* [Debarred Vendor List](https://comptroller.texas.gov/purchasing/programs/vendor-performance-tracking/debarred-vendors.php) maintained by the Texas Comptroller of Public Accounts

(Note: Some sources still reference the governmentwide Excluded Parties List System (EPLS) as the system for checking federal exclusions. The GSA deactivated EPLS in November 2012. At the same time SAM replaced EPLS as the system for checking federal suspension, debarment and other exclusions.)

Pursuant to UG, grantees of federal awards are subject to federal guidelines and regulations implementing Executive Orders 12549 and 12689. Those requirements are set forth at 2 C.F.R. Part 180, entitled “OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement),” and in federal agencies’ implementing regulations.

Reference:

[2 C.F.R. § 200.213](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-213.pdf); [2 C.F.R. § 200.318(h)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf); [Appendix II to 2 C.F.R. Part 200](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part200-appII.pdf) (paragraph H); [UGMS, Part III, §\_\_.35](https://comptroller.texas.gov/purchasing/docs/ugms.pdf); TWC Agency-Board Agreement § 5.4 and any subsequent amendments

Refer to [P.2.2 Federal Debarment & Suspension Regulations (2 C.F.R. Part 180)](#cP2_2_federal_suspension_debar) and [P.2.3 Sate Debarment Requirements](#cP2_3_state_suspension_debar), in this Publication, for more information about federal and state debarment and suspension.

### P.2.2 Federal Debarment & Suspension Regulations (2 C.F.R. Part 180)

This Section, P.2.2 Federal Debarment & Suspension Regulations (2 C.F.R Part 180), provides supplemental technical information or guidance. It is included for informational purposes.

This subsection provides an overview of the federal non-procurement debarment and suspension regulations at [2 C.F.R. Part 180](https://www.gpo.gov/fdsys/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part180.pdf) and federal agencies’ implementing regulations. The overview is included in this Publication for informational purposes. The provisions at 2 C.F.R. Part 180 apply to [procurement transactions](#definition_procurement_transaction) (such as [contracts](#definition_contract)) and non-procurement transactions (such as grants and [subgrants](#definition_subgrant)) that occur under [federal awards](#definition_federal_award). These requirements do not apply to [state awards](#definition_stateaward). In the event of conflict between this summary and the actual text in 2 C.F.R. Part 180 or federal agencies’ implementing regulations, including any subsequent changes, the provisions at 2 C.F.R. Part 180 or federal agencies’ implementing regulations prevail.

#### P.2.2.1 Purpose of Suspension and Debarment

This Section, P.2.2.1 Purpose of Suspension and Debarment, provides supplemental technical information or guidance. It, including the cited source reference, is included for informational purposes.

Suspension and debarment are serious actions taken at the federal or state level to protect the public interest and program integrity by doing business only with responsible parties.

Reference:

[2 C.F.R. § 180.125](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec180-125.pdf); [34 TAC § 20.581(a)](http://texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=5&ti=34&pt=1&ch=20&sch=G&rl=Y)

#### P.2.2.2 History of Federal Suspension and Debarment Requirements

This Section, P.2.2.2 History of Federal Suspension and Debarment Requirements, provides supplemental technical information or guidance. It, including the cited source reference, is included for informational purposes.

On February 18, 1986, President Reagan issued [Executive Order (EO) 12549](https://www.archives.gov/federal-register/codification/executive-order/12549.html), requiring federal agencies to “participate in a system for debarment and suspension” for grants, cooperative agreements and other federal assistance and benefits. On August 15, 1989, President George H.W. Bush issued EO 12689 ([54 FR 34131; August 18, 1989](https://www.govinfo.gov/content/pkg/FR-1989-08-18/pdf/FR-1989-08-18.pdf)), giving EO 12549 government-wide effect and extending coverage to federal procurement activities (federal contracts). Federal regulations at [2 C.F.R. Part 180](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part180.pdf) implement EO 12549 and EO 12689, and are supplemented by federal agencies’ implementing regulations. Parties excluded from participation in federally funded grants and contracts under these executive orders are identified in the federal System for Award Management, known as SAM. UG makes [grantees](#definition_grantee) of [federal awards](#definition_federal_award) subject to 2 C.F.R. Part 180. As authorized and in some cases required by state law, TWC supplements UG with UGMS. Where UGMS is more restrictive or contains additional requirements to those in UG, TWC requires grantees to conform to UGMS.

Reference:

[EO 12549](https://www.archives.gov/federal-register/codification/executive-order/12549.html); EO 12689 ([54 FR 34131; August 18, 1989](https://www.govinfo.gov/content/pkg/FR-1989-08-18/pdf/FR-1989-08-18.pdf)); [2 C.F.R. Part 180](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part180.pdf); [2 C.F.R. § 200.213](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-213.pdf)

#### P.2.2.3 Suspension & Debarment Triggers

This Section, P.2.2.3 Suspension & Debarment Triggers, provides supplemental technical information or guidance. It, including the cited source reference, is included for informational purposes.

Federal regulations at [2 C.F.R. Part 180](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part180.pdf) describe actions for which a federal agency may suspend or debar an entity under [EO 12549](https://www.archives.gov/federal-register/codification/executive-order/12549.html) and EO 12689 ([54 FR 34131; August 18, 1989](https://www.govinfo.gov/content/pkg/FR-1989-08-18/pdf/FR-1989-08-18.pdf)).

Causes for debarment that are outlined in the regulations include, but are not limited to the following:

* Conviction of or civil judgment for fraud, certain criminal offenses
* Violating antitrust statutes
* Embezzlement
* Lack of business integrity
* Violations so severe as to impact the integrity of a program
* History of unsatisfactory performance
* Willful violations of statutory and regulatory requirements
* Failure to pay a significant debt to the federal government
* Violation of the Drug-Free Workplace Act of 1988
* Knowingly doing business with an ineligible entity
* Other reasons, including reasons of such a serious or compelling nature that it affects the entity’s present responsibility

Causes for suspension are also outlined in 2 C.F.R. Part 180 and include indictment for certain activities, or adequate evidence to suspect any cause for debarment.

Entities may also be excluded from or otherwise ineligible for reasons other than suspension and debarment.

Reference:

[EO 12549](https://www.archives.gov/federal-register/codification/executive-order/12549.html); EO 12689 ([54 FR 34131; August 18, 1989](https://www.govinfo.gov/content/pkg/FR-1989-08-18/pdf/FR-1989-08-18.pdf)); [2 C.F.R. Part 180, including 2 C.F.R. §§ 180.700 and 180.800](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part180.pdf); [2 C.F.R. § 200.213](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-213.pdf); [UGMS, Part III, §\_\_.35](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

#### P.2.2.4 Transactions Subject to Federal Debarment & Suspension Guidelines & Regulations

This Section, P.2.2.4 Transactions Subject to Federal Debarment & Suspension Guidelines & Regulations, provides supplemental technical information or guidance. It, including the cited source references, is included for informational purposes.

Transactions that are subject to the federal debarment, suspension, and exclusion guidelines in [2 C.F.R. Part 180](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part180.pdf) and implementing federal non-procurement debarment and suspension regulations are referred to as covered transactions. Under 2 C.F.R. Part 180 and the implementing regulations for HHS, DOL and ED, as supplemented by UGMS, covered transactions are non-procurement transactions (e.g. [subgrants](#definition_subgrant)) at any tier (with limited exceptions) and all tiers of [contracts](#definition_contract) and [subcontracts](#definition_subcontract) made under any covered non-procurement transaction.

For purposes of grant awards that TWC makes with federal funds, and subgrants, contracts and subcontracts arising under those grant awards, this means:

* TWC must not make grant awards to excluded entities
* TWC [grantees](#definition_grantee) must not make subgrants or contracts to excluded entities
* An entity that receives a subgrant (at any tier) must not make subgrants or contracts to excluded entities
* An entity that receives a contract under a grant or subgrant (at any tier) must not make subcontracts to excluded entities
* An entity that receives a subcontract from a [contractor (vendor)](#definition_contractor) or another subcontractor must not make subcontracts to excluded entities

The applicability of UGMS makes this list more restrictive than what otherwise applies under 2 C.F.R. Part 180 and the HHS, DOL and ED regulations.

More specifically, for this purpose, [2 C.F.R. § 180.970](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec180-970.pdf) defines non-procurement transaction as “any transaction, regardless of type (except procurement contracts), including, but not limited to the following:

* Grants
* Cooperative agreements
* Scholarships
* Fellowships
* Contracts of assistance
* Loans
* Loan guarantees
* Subsidies
* Insurances
* Payments for specified uses
* Donation agreements”

The guidelines also state that “a non-procurement transaction at any tier does not require the transfer of Federal funds.”

The guidelines at [2 C.F.R. § 180.210](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec180-210.pdf) and [2 C.F.R. § 180.215](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec180-215.pdf) exclude the following non-procurement transactions from coverage:

* An award made directly by the federal government to a foreign government or foreign government entity, public international organization, an entity owned (in whole or in part) or controlled by a foreign government, or any other entity consistent wholly or partly of one or more foreign governments or foreign governmental entities
* A benefit to an individual as a personal entitlement without regard to the individual’s present responsibility (but benefits received in an individual’s business capacity are not excepted)
* Federal employment
* A transaction that a federal agency needs to respond to a national or agency-recognized emergency or disaster
* A permit, license, certificate or similar instrument issued as a means to regulate public health, safety or the environment, unless a federal agency specifically designates it to be a covered transaction
* An incidental benefit that results from ordinary governmental operations
* Any other transaction if—the application of an exclusion to the transaction is prohibited by law or if a federal agency’s regulation exempts it from coverage under 2 C.F.R. Part 180

While federal regulations specify dollar thresholds, such transactions are covered regardless of the dollar amount of the transaction, pursuant to more restrictive provisions in UGMS. Specifically, although the federal regulations at 2 C.F.R. Part 180 apply the award prohibition to contracts expected to equal or exceed $25,000, UGMS prohibits making “any award (contract or subgrant) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in federal assistance programs under Executive Order 12549 ‘Debarment and Suspension.’”

Reference:

[2 C.F.R. §§ 180.210-180.220](https://www.gpo.gov/fdsys/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part180.pdf) (OMB); [2 C.F.R. § 376.220](https://www.gpo.gov/fdsys/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part376.pdf) (HHS); [2 C.F.R. §§ 417.210-417.220](https://www.gpo.gov/fdsys/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part417.pdf) (USDA); [2 C.F.R. § 2998.220](https://www.gpo.gov/fdsys/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part2998.pdf) (DOL); [2 C.F.R. § 3485.220](https://www.gpo.gov/fdsys/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part3485.pdf) (ED); [UGMS, Part III, §\_\_.35](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

#### P.2.2.5 Verifying that a Party is not Excluded or Disqualified

This Section, P.2.2.5 Verifying that a Party is not Excluded or Disqualified, provides supplemental technical information or guidance. It, including the cited source reference, is included for informational purposes.

Before entering into a covered transaction with an entity at the next lowest tier, federal regulations require that the entity making the subaward ([subgrant](#definition_subgrant)), [contract](#definition_contract) or [subcontract](#definition_subcontract) must verify that the person to whom it intends to make that subaward, contract or subcontract is not excluded or disqualified. For [federal awards](#definition_federal_award), TWC requires that this be accomplished by checking SAM exclusions.

Reference:

[2 C.F.R. § 180.300](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec180-300.pdf)

#### P.2.2.6 Applicability for Subcontracts and Subgrants

This Section, P.2.2.6 Applicability for Subcontracts and Subgrants, provides supplemental technical information or guidance. It, including the cited source reference, is included for informational purposes.

Before entering into a covered transaction with an entity at the next lower tier, federal regulations require that the [grantee](#definition_grantee), subrecipient, [contractor (vendor)](#definition_contractor) or [subcontractor](#definition_subcontractor) making the subaward or [subcontract](#definition_subcontract) must require the subrecipient or subcontractor receiving the subaward or subcontract to:

* Comply with Subpart C of federal nonprocurement debarment and suspension regulations, as a condition of participation in the transaction by including a term or condition in the [subgrant](#definition_subgrant) or [contract](#definition_contract) that requires compliance with [2 C.F.R. Part 180](https://www.gpo.gov/fdsys/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part180.pdf), as supplemented by [2 C.F.R. Part 376](https://www.gpo.gov/fdsys/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part376.pdf) (HHS), [2 C.F.R. Part 417](https://www.gpo.gov/fdsys/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part417.pdf) (USDA), [2 C.F.R. Part 2998](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part2998.pdf) (DOL) or [2 C.F.R. 3485](https://www.gpo.gov/fdsys/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part3485.pdf) (ED), as applicable, as supplemented by [UGMS](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)
* Pass the same requirements to each entity with whom the subrecipient or subcontractor enters into a covered transaction at the next lower tier

Reference:

[2 C.F.R. § 180.330 (OMB)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec180-330.pdf); [2 C.F.R. § 376.332](https://www.gpo.gov/fdsys/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part376.pdf) (HHS); [2 C.F.R. § 417.332](https://www.gpo.gov/fdsys/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part417.pdf) (USDA); [2 C.F.R. § 2998.332](https://www.gpo.gov/fdsys/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part2998.pdf) (DOL); [2 C.F.R. § 3485.330](https://www.gpo.gov/fdsys/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-part3485.pdf) (ED); [UGMS, Part III, §\_\_.35](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

#### P.2.2.7 Debarment & Suspension During Award

This Section, P.2.2.7 Debarment & Suspension During Award, provides supplemental technical information or guidance. It, including the cited source reference, is included for informational purposes.

If a federal agency excludes a person with whom a [grantee](#definition_grantee) is already doing business, the grantee may continue the transaction if it was in existence when the federal agency excluded the entity. However, such grantee is not required to continue the transactions and may consider termination. The grantee should decide whether to terminate and the type of termination action, if any, only after thorough review to ensure that the action is proper and appropriate.

A grantee may not renew or extend covered transactions (other than no-cost time extensions) with any excluded entity, unless the federal agency responsible for the transaction grants an exception under [2 C.F.R. § 180.135](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec180-135.pdf).

Reference:

[2 C.F.R. § 180.310](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec180-310.pdf)

#### P.2.2.8 Remedies for Noncompliance

This Section, P.2.2.8 Remedies for Noncompliance, provides supplemental technical information or guidance. It, including the cited source reference, is included for informational purposes.

If a [grantee](#definition_grantee), [subgrantee (subrecipient)](#definition_subgrantee), [contractor (vendor)](#definition_contractor) or [subcontractor](#definition_subcontractor) knowingly enters into a covered transaction with an excluded entity, the federal agency responsible for the transaction to that entity may disallow costs, annul or terminate the transaction, issue a stop work order, debar or suspend the entity or take other remedies.

Reference:

[2 C.F.R. § 180.325](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec180-325.pdf)

### P.2.3 State Debarment Requirements

Suspension and debarment are serious actions taken at the federal or state level to protect the public interest and program integrity by doing business only with responsible parties.

Reference:

[2 C.F.R. § 180.125](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec180-125.pdf); [34 TAC § 20.581(a)](http://texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=5&ti=34&pt=1&ch=20&sch=G&rl=Y)

State law authorizes the Texas Comptroller of Public Accounts to debar an entity from participation in certain state contracts and directs the Texas State Comptroller of Public Accounts to adopt rules. The rules specify the reasons for which debarment may occur and the procedures that will be used.

Debarred parties are placed on the state’s Debarred Vendor List.

Unless otherwise required by state law or the Texas State Comptroller of Public Accounts, TWC does not require a [grantee](#definition_grantee) to immediately terminate an active award with an entity if that entity is placed on the Debarred Vendor List during the award period; however, TWC does prohibit any new award, extension (other than a no-cost time extension) or renewal with that entity while it is on the Debarred Vendor List.

Reference:

[Texas Government Code § 2155.077](http://www.statutes.legis.state.tx.us/Docs/GV/htm/GV.2155.htm#2155.077); [34 TAC §§ 20.581-20.587](http://texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=5&ti=34&pt=1&ch=20&sch=G&rl=Y)

## P.2a Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment\*

Policy:

Effective August 13, 2020, for [federal awards](#definition_federal_award) that TWC makes, [grantees](#definition_grantee) and [subgrantees (subrecipients)](#definition_subgrantee) must comply with the prohibition on certain telecommunications and video surveillance services or equipment as set forth in 2 C.F.R. §200.216 ([85 FR 49506](https://www.govinfo.gov/content/pkg/FR-2020-08-13/pdf/2020-17468.pdf)) and Section 889 of [Public Law 115-232](https://www.govinfo.gov/content/pkg/PLAW-115publ232/pdf/PLAW-115publ232.pdf).

Effective August 13, 2020, the UG requires compliance with the federal prohibition on certain telecommunications and video surveillance services or equipment set forth in Section 889 of Public Law 115–232, entitled, “John S. McCain National Defense Authorization Act for Fiscal Year 2019.”

Under that prohibition, the UG prohibits grantees and subgrantees from obligating or expending grant funds to procure or obtain, extend or renew a [contract](#definition_contract) to procure or obtain, or enter into a contract (or extend or renew a contract) to procure or obtain equipment, services, or systems that use “covered telecommunications equipment or services” as a substantial or essential component of any system, or as critical technology as part of any system.

The UG specifies that “covered telecommunications equipment or services” has the meaning in Section 889 of Public Law 115–232. Under UG and that law, “covered telecommunications equipment” means any of the following:

* Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities)
* For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities)
* Telecommunications or video surveillance services provided by such entities or using such equipment
* Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country

Effective November 12, 2020, the OMB also amended the UG to add a new cost principle in 2 C.F.R. §200.471 (85 FR 49506), entitled “Telecommunications Costs and Video Surveillance Costs.” Although that change takes effect November 12, 2020, it is also referenced by 2 C.F.R. §200.216 to specify that costs prohibited by 2 C.F.R. §200.216, effective August 13, 2020, are unallowable costs, and to clarify that “costs incurred for telecommunications and video surveillance services or equipment” include but are not limited to “phones, internet, video surveillance, [and] cloud servers.”

Reference:

[85 FR 49506](https://www.govinfo.gov/content/pkg/FR-2020-08-13/pdf/2020-17468.pdf) (August 13, 2020)

## P.3 Pre-Award Reviews

### P.3.1 Pre-Award Reviews for Subgrants\*

Policy:

A [grantee](#definition_grantee) should conduct a pre-award review prior to making a [subgrant](#definition_subgrant), to determine the risk associated with a particular [subgrantee (subrecipient)](#subgrantee), including consideration of the adequacy of its financial management system. [Local workforce development boards](#definition_board) must also comply with requirements in TWC rules.

A pre-award review occurs prior to making a subgrant. The UG observes that a pre-award review helps evaluate the risk posed by an entity before the entity receives the subgrant, and adds that the review may incorporate the results of the evaluation of the entity’s eligibility for the award or the quality of its application. The UGMS also specifically establishes that the grantee may evaluate an applicant’s financial management system prior to making a subgrant and any time subsequent to award.

In some cases, a pre-award review might identify a risk that is so great that it results in the grantee deciding not to make the subgrant to a particular entity. In other cases, the grantee might determine it to be possible to mitigate the effects of an identified risk by including specific conditions in the subgrant.

This Section, P.3 Pre-Award Reviews, includes the UG and UGMS standards for evaluating risks posed by an entity. Refer to [P.4 Specific Conditions to Mitigate Risk](#cP4_ris_mitigation_conditions), in this Publication, for the UG and UGMS standards for imposing specific conditions on a subgrantee (subrecipient) to mitigate risk. Also refer to [P.1 Awards to Responsible Parties](#cP1_awards_to_responsible_parties) and [P.2 Suspension & Debarment](#cP2_suspension_debarment), in this Publication.

The UG establishes that in evaluating risks posed by an entity applying or competing for a subgrant of [federal award](#definition_federal_award) funds, a grantee may use a risk-based approach and may consider any items such as the following:

* Financial stability
* Quality of management systems and ability to meet the management standards prescribed in 2 C.F.R. Part 200
* History of performance. (The entity’s record in managing federal awards, if it is a prior [recipient](#definition_grantee) or subgrantee of federal awards, including timeliness of compliance with applicable reporting requirements, conformance to the terms and conditions of previous federal awards, and if applicable, the extent to which any previously awarded amounts will be expended prior to future awards)
* Reports and findings from audits performed under Subpart F of the UG and any other audits
* The entity’s ability to effectively implement statutory, regulatory, or other requirements imposed on subgrantees

The UG specifically identifies the results of this review as being one of the circumstances for including specific conditions in the subgrant, as described in [P.4 Specific Conditions to Mitigate Risk](#cP4_ris_mitigation_conditions), in this Publication.

Similar to the UG, UGMS establishes that any entity may be considered “high-risk” if the entity making the award determines that the entity has any of the following qualities:

* Has a history of unsatisfactory performance
* Is not financially stable
* Has a management system which does not meet the management standards set forth in Part III of UGMS
* Has not conformed to the terms and conditions of previous awards
* Is otherwise not responsible

Also similar to the UG, UGMS requires that if the grantee determines that an award will be made to a high-risk entity, special conditions and/or restrictions shall correspond to the high-risk condition and shall be included in the award.

In addition to the pre-award review, the requirements relating to governmentwide suspension and debarment apply. Refer to [P.2 Suspension & Debarment](#cP2_suspension_debarment), in this Publication, for information about those requirements.

Reference

[2 C.F.R. § 200.205(b) – (d)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-205.pdf); [2 C.F.R. § 200.207](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-207.pdf); [2 C.F.R. § 200.331(c)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-331.pdf); [UGMS, Part III, §\_\_.12](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

[Local workforce development boards](#definition_board) are also subject to requirements for the performance of fiscal integrity reviews of [workforce service providers](#definition_workforceserviceprovider), as discussed in [P.3.2 Special: Workforce Development Boards & Workforce Service Providers](#cP3_2_boards_and_wsp_preaward), in this Publication.

### P.3.2 Special: Workforce Development Boards & Workforce Service Providers\*

This Section, P.3.2 Special: Workforce Development Boards & Workforce Services Providers, provides additional compliance detail for [P.3.1 Pre-Award Reviews for Subgrants](#cP3_1_preaward_reviews_policy).

The TWC rules at 40 TAC § 802.21 require [local workforce development boards](#definition_board) to perform fiscal integrity evaluations of [workforce service providers](#definition_workforceserviceprovider) and set forth requirements for the performance of such reviews as follows. As used in the following list, the term “contracts” includes both “[contracts](#definition_contract)” and “[subgrants](#definition_subgrant),” as those terms are defined in this Publication.

* A local workforce development board shall develop fiscal integrity evaluation indicators designed to appraise the fiscal integrity of its workforce service providers
* A local workforce development board shall assess its workforce service providers to ensure the providers meet the requirements of the local workforce development board’s fiscal integrity evaluation based on the following schedule:
* Contracts under $100,000—the fiscal indicators must be verified prior to the award of the contract and at each renewal of the contract
* Contracts between $100,000 and $500,000—the fiscal indicators must be verified prior to the award of the contract, at each renewal of the contract, and not less than biennially
* Contracts over $500,000—the fiscal indicators must be verified prior to the award of the contract, at each renewal of the contract/subgrant, and not less than once annually
* The fiscal integrity evaluation shall include provisions for ensuring that workforce service providers are meeting performance measures in compliance with requirements contained in:
* Federal and state statutes and regulations and directives of TWC or its three-member Commission
* The UG and its implementing regulations, and UGMS; and
* Any other safeguards a local workforce development board has identified that are designed to ensure the proper and effective use of funds placed under the control of its workforce service providers.
* The fiscal integrity evaluation shall also include the review and consideration of the prospective or renewing workforce service provider’s prior three-year financial history before the local workforce development board awards or renews a workforce service contract. The review shall include any adverse judgments or findings, such as administrative audit findings; monitoring findings of TWC’s three-member commission, TWC, or local workforce development board; or sanctions by a local workforce development board or court of law
* The fiscal integrity evaluation may include provisions such as accounting for program income in accordance with federal regulations, resolving questioned costs and the repayment of disallowed costs in a timely manner, and safeguarding fixed assets, as well as those referenced in the FMGC. (Refer to [Chapter 5: Program Income](https://twc.texas.gov/business/fmgc/financial-manual-grants-contracts-chapter-5-program-income.html), in the FMGC, for information about program income.)

The fiscal integrity evaluation may be accomplished by relying on the work of other reviews, audits, or examinations, to the extent that such work meets the rule’s stated objectives and requirements. Where the previous work only partially meets the rule’s objectives and requirements, additional work is required prior to making the award, but may build upon work performed for the other reviews, audits, or examinations.

To meet the intent of the purpose for the fiscal integrity evaluation, the work of a review, audit, or examination that will be relied on to satisfy performance of the fiscal integrity evaluation will need to have been performed within the last few months of the contract/subgrant that is being considered for renewal, or for a new contract/subgrant, within a few months prior to the contract’s/subgrant’s start date (i.e., 40 TAC § 802.21 requires that the evaluation be performed prior to award and at each renewal.)

Note: The content in this Section reflects the Chapter 802 rules as last adopted November 26, 2019. In the event of conflict between the representation of these rules in this Publication or subsequent rule change, the TWC rule, as codified in Title 40 of the Texas Administrative Code (TAC) prevails.

Reference:

[40 TAC § 802.21](http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=40&pt=20&ch=802&rl=21)

## P.4 Specific Conditions to Mitigate Risk\*

This Section, P.4 Specific Conditions to Mitigate Risk, provides additional compliance detail relating to the oversight of [subgrantees (subrecipients)](#definition_subgrantee).

Grantees must consider imposing additional specific subgrant conditions as needed, in accordance with the following information.

The UG provides that a grantee may impose additional specific award conditions under the following circumstances:

* Based on the risk criteria described in [P.3.1 Pre-Award Reviews for Subgrants](#cP3_1_preaward_reviews_policy) in this Publication
* When the entity has a history of failure to comply with the general or specific terms and conditions of a federal award
* When the entity fails to meet expected performance goals as set forth in the grant award
* When the entity is not otherwise responsible

The UG and UGMS provide that the additional award conditions may include items such as the following:

* Requiring payments as reimbursements rather than advance payments
* Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given period of performance
* Requiring additional, more detailed financial reports
* Requiring additional project monitoring
* Requiring the entity to obtain technical or management assistance
* Establishing additional prior approvals

When imposing specific conditions, the UG and UGMS require the grantee to notify the subgrantee (subrecipient) as to the following:

* The nature of the additional requirements
* The reason why the additional requirements are being imposed
* The nature of the action needed to remove the additional requirement, if applicable
* The time allowed for completing the actions if applicable
* The method for requesting reconsideration of the additional requirements imposed

The UGMS requires that such notification must be in writing and be provided to the subgrantee as early as possible.

The UG and UGMS require that any specific conditions must be promptly removed once the conditions that prompted them have been corrected.

Reference:

[2 C.F.R. § 200.205](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-205.pdf); [2 C.F.R. § 200.207](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-207.pdf); [2 C.F.R. § 200.331(c)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-331.pdf); [UGMS, Part III, §§\_\_.12 and \_\_.13](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## P.5 Negotiation

This Section, P.5 Negotiation, provides supplemental technical information or guidance. It is included for informational purposes.

Of the acquisition approaches and special acquisition approaches described in [H. Acquisition Approaches](#cH0_acquisition_approaches) and [I. Procurement Methods](#cI0_procurement_methods), in this Publication, a [grantee](#definition_grantee) may allow for negotiation under all except for procurement by sealed bids (formal advertising). The exclusion of procurement by sealed bids (formal advertising) applies unless only one (1) qualified bid is received and information exists which indicates that the respondent submitted its offer in anticipation of the absence of competition.

When conducting negotiations, care should be taken not to materially alter the requirements of the published solicitation or inadvertently change the advertised procurement objectives. Such changes create an unlevel playing field if other respondents could have responded differently to the solicitation if the changes had been part of the original solicitation, or if the change could have resulted in a different or larger vendor pool. Grantees should consult their own legal counsel if it appears that a change proposed as part of negotiations alters the requirements of the solicitation.

Grantees should also take care not to engage in other activities that create an unlevel playing field, such as:

* [Technical leveling](#definition_technical_leveling)
* [Technical transfusion](#definition_technical_transfusion)
* Disclosing competing respondent’s costs or prices
* Informing a respondent of its price standing relative to other respondents

The preceding information in this Section is adapted from the State of Texas Procurement and Contract Management Guide for Texas state agencies. (Refer to [A.5 Sources](#cA5_sources), in this Publication, for more information about references to the State of Texas Procurement and Contract Management Guide.)

Consistent with the standards in [Q.3 Procurement Records](#cQ3_procurement_records), it is important that grantees document negotiations in the records for the procurement.

# Q. Administrative & Post Award

## Q.1 Protests & Settlement of Other Issues\*

Policy:

The [grantee](#definition_grantee) is responsible, in accordance with good administrative practice, and sound business judgment, for settling all contractual and administrative issues arising out of its procurements (including [subgrants](#definition_subgrant)). Grantees must have protest procedures in place.

The UG and UGMS require that the grantee alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of its procurements.

The UG and UGMS identify issues for which the grantee is responsible, specifying that such issues include, but are not limited to the following:

* Source evaluation
* Protests
* Disputes
* Claims

The UG and UGMS also specify that these standards do not relieve the grantee of any contractual responsibilities under its [contracts](#definition_contract).

Furthermore, UG specifies that the [federal awarding agency](#definition_federalawardingagency) will not substitute its judgment for that of the grantee unless the matter is primarily a federal concern. Similarly, under UGMS, a [state awarding agency](#definition_stateawardingagency) will not substitute its judgment for that of the grantee unless the matter is primarily a state concern. Consistent with these provisions, TWC will not substitute its judgment for that of the grantee unless the matter is primarily a matter of federal or state concern.

Consistent with UG and UGMS, violations of law will be referred to the local, state or federal authority having proper jurisdiction.

Reference:

[2 C.F.R. § 200.318(k)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf); [UGMS, Part III, §\_\_.36(b)(11)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

The UGMS requires that grantees must have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protester must exhaust all administrative remedies with the grantee before pursuing a protest with TWC or a federal awarding agency.

Reference:

[UGMS, Part III, §\_\_.36(b)(12)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

The UG and UGMS establish the requirements described in this Section, Q.1 Protests & Settlement of Other Issues, with respect to contracts that grantees make to [contractors (vendors)](#definition_contractor). TWC requires grantee adherence to the same standards when making subgrants to [subgrantees (subrecipients)](#definition_subgrantee).

## Q.2 Oversight of Contracts & Subgrants

### Q.2.1 Basic Standard\*

Policy:

[Grantees](#grantee) are responsible for contract oversight and oversight of [subgrants](#definition_subgrant).

Refer to [Q.2.2 Contract Oversight](#cQ2_2_contract_oversight) and [Q.2.3 Oversight of Subgrants](#cQ2_3_subgrant_oversight), in this Publication, for additional compliance details on this topic.

### Q.2.2 Contract Oversight\*

This Section, Q.2.2 Contract Oversight, provides additional compliance detail for [Q.2.1 Basic Standard](#cQ2_1_oversight_basic_standard), relating to grantee oversight of contracts and subgrants.

The UG and UGMS require that [grantees](#definition_grantee) must maintain oversight to ensure that [contractors (vendors)](#definition_contractor) perform in accordance with the terms, conditions and specifications of their [contracts](#definition_contract) or purchase orders.

Reference:

[2 C.F.R. § 200.318(b)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf); [UGMS, Part III, §\_\_.36(b)(2)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

TWC observes that the extent of contract oversight may vary by the nature and dollar amount of the contract.

### Q.2.3 Oversight of Subgrants\*

This Section, Q.2.3 Oversight of Subgrants, provides additional compliance detail for [Q.2.1 Basic Standard](#cQ2_1_oversight_basic_standard), relating to grantee oversight of contracts and subgrants.

[Grantees](#definition_grantee) are responsible for the oversight of [subgrants](#definition_subgrant) to ensure that subgrants are used for authorized purposes in compliance with applicable requirements and assure that performance goals are achieved.

When a grantee uses grant funds to make a subgrant to another entity, the grantee is a [pass-through entity](#definition_passthruentity) for the subgrant that it makes. Similarly, if a [subgrantee (subrecipient)](#definition_subgrantee) makes a subgrant to another entity, the subgrantee that made the new subgrant is a pass-through entity for purposes of the subgrant that it made. TWC is a pass-through entity for purposes of the [federal awards](#definition_federal_award) that it makes.

The UG requires that all pass-through entities must:

* Evaluate each subgrantee’s (subrecipient’s) risk of noncompliance considering such factors as the subgrantee’s (subrecipient’s) experience with the same or similar subgrants, the results of previous audits, whether the subgrantee (subrecipient) has new personnel, whether the subgrantee (subrecipient) has new or substantially changed systems, and the extent and results of [federal awarding agency](#definition_federalawardingagency) monitoring (if applicable)
* If a high risk is identified, consider imposing specific subgrant conditions on the subgrantee (subrecipient) until the risk is resolved
* Use the results of the risk assessment to determine the appropriate subgrantee (subrecipient) monitoring
* Monitor subgrantees (subrecipients) as necessary to ensure that the subgrant is used for authorized purposes in compliance with applicable requirements and that subgrant performance goals are achieved
* Include the following in subgrantee (subrecipient) monitoring: reviewing financial and performance reports required by the grantee, ensuring that the subgrantee takes timely and appropriate action on all deficiencies pertaining to the subgrant, and issuing a management decision for audit findings pertaining to the subgrant
* Depending on the results of the risk assessment, use appropriate tools to ensure proper accountability and compliance with program requirements and the achievement of performance goals, including the provision of training and technical assistance, performing on-site reviews of a subgrantee’s (subrecipient’s) program operations, and arranging for agreed-upon-procedures engagements
* Verifying that subgrantees (subrecipients) receive audits in accordance with the audit requirements in UG and UGMS
* Consider whether the results of audit and monitoring necessitate adjustments to the pass-through entity’s own records
* Consider taking enforcement action against noncompliant subgrantees (subrecipients)

Note: Relating to the evaluation of each subgrantee’s (subrecipient’s) risk of noncompliance, note that the nature of some programs, services and/or transactions will impact the risk assessment evaluation (inherent risk).

Refer to [P.3 Pre-Award Reviews](#cP3_preaward_reviews), in this Publication, for additional information about risk assessment and imposing specific subgrant conditions on a grantee. Refer to [Chapter 19: Monitoring](https://twc.texas.gov/financial-manual-grants-contracts-chapter-19-monitoring) and [Chapter 20: Single Audit](https://twc.texas.gov/financial-manual-grants-contracts-chapter-20-single-audit), in the FMGC, for more information about subrecipient monitoring and audit oversight.

Reference:

[2 C.F.R. § 200.331(b)-(h)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-331.pdf)

#### Q.2.3.1 Subgrant Oversight Effects

This Section, Q.2.3.1 Subgrant Oversight Effects, provides supplemental technical information or guidance. It is included for informational purposes.

[Grantee](#definition_grantee) oversight of [subgrants](#definition_subgrant) helps ensure that grant funds are used for their intended purpose, and helps guards against waste, fraud, and abuse.

Grantee oversight of [subgrantees (subrecipients)](#definition_subgrantee) involves more comprehensive review because the subgrantee is carrying out part of a grant award on the grantee’s behalf, and as such is subject to all of the same compliance requirements as the grantee (with the exception of those that vary by entity type or the dollar amount involved). As indicated by the list in [Q.2.3 Oversight of Subgrants](#cQ2_3_subgrant_oversight), in this Publication, grantee oversight includes evaluation of each subgrantee’s risk of noncompliance, compliance monitoring, audit oversight, and the provision of technical assistance.

## Q.3 Procurement Records\*

Policy:

[Grantees](#definition_grantee) must maintain records sufficient to detail the history of procurement. Records will be retained and made available to authorized entities in accordance with applicable administrative requirements.

These records must include, but are not necessarily limited to the following:

* Rationale for the method of procurement
* Selection of [contract](#definition_contract) type
* Contractor selection or rejection
* Basis for the contract price

Reference:

[2 C.F.R. § 200.318(i)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf); [UGMS, Part III, §\_\_.36(b)(9)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

Refer to [Appendix K](https://twc.texas.gov/business/fmgc/financial-manual-grants-contracts-appendix-k-record-retention-access-requirements.html), in the FMGC, for information about record retention and requirements to provide authorized representatives with access to records. Also refer to the [TWC grant award](#definition_twc_grant_award). Some TWC grant awards may specify longer retention periods.

# Policy Statements

## Internal Controls

1. [Grantees](#definition_grantee) must have internal controls for purchasing and procurement that provide reasonable assurance that transactions are properly recorded and accounted for, transactions are executed in accordance with applicable requirements, and grant assets are safeguarded. ([B.3.1](#cB3_1_internal_controls_basic_standard))

## Written Procurement Procedures

1. [Grantees](#definition_grantee) (other than [States](#definition_state)) must have written procurement procedures that result in procurements that conform to applicable federal law, the procurement standards set forth in the UG and UGMS, and other applicable requirements. A grantee that is a [State](#definition_state) must follow the same procurement policies and procedures that it uses for procurements from its non-federal funds, with the exception that for [federal awards](#definition_federal_award), the State must also adhere to UG requirements for the procurement of recovered materials and ensure that every purchase order or contract includes the clauses required by the contract provisions identified in the UG. ([C.1.1](#cC1_1_basic_standard_procedures))

## Standards of Conduct

1. Each [grantee](#definition_grantee) must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award, and administration of [contracts](#definition_contract) and [subgrants](#definition_subgrant). Such standards must also include disciplinary actions addressing violations. In addition to standards established by the UG and UGMS, [local workforce development boards](#definition_board) must comply with standards set forth in TWC rule. ([D.2.2](#cD2_2_basic_standards_of_conduct))

## Conflicts of Interest

1. No employee, officer, or agent of a [grantee](#definition_grantee) may participate in the selection, award, or administration of a [contract](#definition_contract) or [subgrant](#definition_subgrant) if such person has a real conflict of interest or [apparent conflict of interest](#definition_apparentconflictofinterest). In addition to standards established by the UG and UGMS, [local workforce development boards](#definition_board) must comply with standards set forth in TWC rule. ([D.3.2](#cD3_2_basic_conflicts_of_interest))

## Organizational Conflicts of Interest

1. [Grantees](#definition_grantee) must conform to the UG standards regarding [organizational conflicts of interest](#definition_org_conflict_of_interest). ([D.4](#cD4_org_conflicts_of_interest))

## Acceptance of Gifts

1. Employees, officers and agents of the [grantee](#definition_grantee) must neither solicit nor accept gratuities, favors or anything of monetary value from [contractors (vendors)](#definition_contractor) or [subgrantees (subrecipients)](#definition_subgrantee), potential contractors or subgrantees (subrecipients), or parties to [subcontracts](#definition_subcontract) or [subgrants](#definition_subgrant). Grantees may set standards for situations in which the financial interest is not substantial, or the gift is an unsolicited item of nominal intrinsic value. [Local workforce development boards](#definition_board) and their [workforce service providers](#definition_workforceserviceprovider) must also comply with additional requirements in TWC rules. ([D.5](#cD5_gifts))

## Full and Open Competition

1. All [procurement transactions](#definition_procurement_transaction) must be conducted in a manner providing full and open competition consistent with the standards in UG, UGMS and this Publication. Except where specified otherwise, selection of [subgrantees (subrecipients)](#definition_subgrantee) must also be conducted in a manner providing full and open competition. ([E.1.2](#cE1_2_competition_basic_standard))

## Geographic Preference

1. [Grantees](#definition_grantee) must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in cases where applicable federal statutes mandate or encourage geographic preference. ([E.2.1](#cE2_1_geopref_basic_standard))

## Buy American Act

1. When required by program statute or regulation, or the grant award, a [grantee](#definition_grantee) must comply with applicable provisions of the federal Buy American Act or similar laws, and ensure that the requirement is included in [contracts](#definition_contract) and [subgrants](#definition_subgrant), as appropriate. ([E.3.1](#cE3_1_buy_american_basic_standard))

## Procurement of Recovered Materials

1. State agencies and political subdivisions of the [State](#definition_state) that receive [federal awards](#definition_federal_award), and their [contractors (vendors)](#definition_contractor), must comply with Section 6002 of the Solid Waste Disposal Act, as amended. ([E.4](#cE4_recovered_materials))

## Minority Businesses, Women’s Business Enterprises, Labor Surplus Area Firms; Historically Underutilized Businesses

1. [Grantees](#definition_grantee) must take all necessary affirmative steps to assure that minority businesses, women’s business enterprises and [labor surplus area firms](#definition_labor_surplus_area_firm) are used when possible. Additional requirements may apply to some grantees. ([E.5.1](#cE5_1_hubs_basic_standard))

## Unnecessary/Duplicative Items

1. [Grantees](#definition_grantee) must avoid acquisitions of unnecessary or duplicative items. ([F.2.1](#cF2_1_duplicative_purchases_basic))

## Lease vs. Purchase/Other Analysis

1. [Grantees](#definition_grantee) must perform appropriate analysis to determine the most economical approach to meet the needs of a specific purchase. ([F.3.1](#cF3_1_lease_purchase_basic_standard))

## Independent Estimates

1. [Grantees](#definition_grantee) must make independent estimates before receiving bids or proposals under the sealed bids (formal advertising), competitive proposals, and noncompetitive proposals methods of procurement. ([F.6.1](#cF6_1_independent_est_basic_standard))

## Procurement Thresholds

1. [Grantees](#definition_grantee) must not divide (break out or split) procurements to circumvent the [micro-purchase threshold](#definition_micropurchase_threshold) or [simplified acquisition threshold](#definition_simplified_acq_threshold). ([G.1.1](#cG1_1_micro_and_smallpurchase_thresholds))

## Consolidating/Breaking Out Procurement

1. [Grantees](#definition_grantee) should consider consolidating or breaking out procurements when doing so would enable the grantee to obtain a more economical purchase. ([G.2.1](#cG2_1_basic_standard_consolidation))

## Time & Materials Contracts

1. A [grantee](#definition_grantee) may use a Time & Materials (T&M) contract only after a determination that no other [contract](#definition_contract) is suitable, provided, in addition, that the contract includes a ceiling price that the [contractor (vendor)](#definition_contractor) exceeds at its own risk. ([F.5.3.2](#cF5_3_2_time_and_materials_basic))

## Prohibited Contract Types

1. [Grantees](#definition_grantee) must not use [cost plus percentage of cost contracts](#definition_costpluspercentageofcost) or [percentage of construction cost contracts](#definition_costplusconstruction) for [contracts](#definition_contract) or [subgrants](#definition_subgrant) made under [TWC grant awards](#definition_twc_grant_award). ([F.5.3.3](#cF5_3_3_prohibited_contracts))

## Fixed Amount Subawards

1. Under a [federal award](#definition_federal_award), a [grantee](#definition_grantee) must not make a [fixed amount award](#definition_fixed_amount_award) that exceeds the [simplified acquisition threshold](#definition_simplified_acq_threshold) unless prior approval was obtained from the [federal awarding agency](#definition_federalawardingagency), through TWC. Fixed amount subawards must meet corresponding standards of the UG. ([F.5.3.4](#cF5_3_4_fixed_amount_subawards))

## Excess & Surplus Property

1. [Grantees](#definition_grantee) are encouraged to use federal and state excess and surplus property in lieu of purchasing new property whenever such use is feasible and reduces project costs. ([H.3](#cH3_excess_surplus_property))

## Intergovernmental & Inter-Entity Agreements

1. To foster greater economy and efficiency, and in accordance with efforts to promote cost effective use of shared services across the Federal Government, [grantees](#definition_grantee) are encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services. Such actions must adhere to the UG and UGMS procurement standards, including standards for full and open competition. ([H.5](#cH5_intergovernmental_contracts))

## Procurement by Micro-purchase Procedures

1. [Grantee](#definition_grantee) procedures may permit procurement by micro-purchase procedures for purchases of [supplies](#supplies) and services, the [aggregate cost](#definition_aggregatecost) of which will not exceed the [micro-purchase threshold](#definition_micropurchase_threshold). Micro-purchases may be awarded without soliciting competitive quotations if the grantee considers the price to be reasonable. However, grantees must distribute micro-purchases equitably among [qualified suppliers](#definition_qualified_sources), to the extent practicable. ([I.1.2](#cI1_2_micropurchase_basic_standard))

## Procurement by Small Purchase Procedures

1. [Grantees](#definition_grantee) may permit procurement by small purchase procedures for relatively simple purchases of services, [supplies](#definition_supplies) or other property (tangible and intangible) that do not cost more than the [simplified acquisition threshold](#definition_simplified_acq_threshold) in the aggregate. Small purchases may be made with informal procurement methods that obtain price or rate quotations (without public advertisement) from an adequate number of [qualified sources](#definition_qualified_sources). ([I.2.1](#cI2_1_spp_basic_standard))

## Procurement by Sealed Bids (Formal Advertising)

1. Procurement under the sealed bid method must be conducted in accordance with applicable administrative requirements. This includes requirements that bids must be publicly solicited and a [firm-fixed-price contract](#definition_firmfixedpricecontract) (lump sum or unit price) must be awarded to the responsible bidder whose bid, conforming to all the material terms and conditions of the Invitation for Bids (IFB), is the lowest in price (for [federal awards](#definition_federal_award)) or best value to the state (for [state awards](#definition_stateaward)). ([I.3](#cI3_procurement_sealed_bids))

## Procurement by Competitive Proposals

1. Procurement by the competitive proposals must be conducted in accordance with applicable administrative requirements. This includes publicizing the solicitation, identifying all evaluation factors and their relative importance in the solicitation, and selecting the offeror whose proposal is most advantageous (“best value”) after considering price and other factors. It is normally conducted with more than one (1) source submitting an offer, and either a [fixed price type contract](#fixedpricecontract) or [cost reimbursement type contract](#costreimbursementcontract) is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. ([I.4](#cI4_procurement_competitive_proposals))

## Procurement by Noncompetitive Proposals

1. Procurement by noncompetitive proposals must not be used except in the limited circumstances permitted by the UG and UGMS; i.e., sole source, public exigency or emergency, authorized in writing, or inadequate competition. Justification must be included in the procurement records. [Grantees](#definition_grantee) should have a bias toward competition and should scrutinize justification before conducting procurement by noncompetitive proposals. ([I.5.1](#cI5_1_noncomp_basic_standard))

## DOL Consultant Fee Limit

1. When specified by a grant award that TWC makes with DOL funds, any consultant fees paid under that award or under any [subgrant](#definition_subgrant) financed by that TWC grant award must not exceed the consultant fee limit imposed by the DOL Employment & Training Administration (ETA)—$710 per day (representing an eight-hour workday)—except with prior written approval from TWC. (TWC must obtain DOL concurrence before granting the approval.) ([J.2.1](#cJ2_1_DOL_consultant_basic))

## Bonding

1. [Grantees](#definition_grantee) must include appropriate bonding requirements in [contracts](#definition_contract) and [subgrants](#definition_subgrant) that they make. A grantee’s bonding policy must adequately protect the federal and/or state government’s interest. ([K.1.1](#cK1_1_bonding_basic_standard))

## Contract/Award Clauses & Provisions

1. [Grantees](#definition_grantee) must require that applicable clauses, provisions, and requirements be included in all [subgrants](#definition_subgrant) and [contracts](#definition_contract). ([K.2.1](#cK2_1_clauses_basic_standard))

## Federal Funding Disclosure Statement

1. If required by the terms and conditions of the [TWC grant award](#definition_twc_grant_award), a [grantee](#definition_grantee) must comply with a federally-imposed federal funding disclosure requirement when issuing requests for proposals, bid solicitations, and other covered communications. ([L.5](#cL5_federal_funding_disclosure))

## Identify Requirements & Evaluation Factors

1. [Grantees](#definition_grantee) must have written procedures for [procurement transactions](#definition_procurement_transaction) and awarding of [subgrants](#definition_subgrant), which ensure that all solicitations—1) incorporate a clear and accurate description of the technical requirements for the property or services being procured, and 2) identify all requirements that offerors must fulfill and all other factors to be used in evaluating the bids or proposals. ([L.2](#cL2_id_reqs_and_evaluation_factors))

## Pass-Through Entity Review

1. The UG and UGMS authorize a [pass-through entity](#definition_passthruentity) to require a pre-procurement review of technical specifications or pre-procurement review of procurement documents, if the pass-through entity determines such review is needed. Where TWC or another pass-through entity requires such review, the TWC [grantee](#definition_grantee) (or [subgrantee (subrecipient)](#definition_subgrantee)) involved must adhere to the review requirements, except where it otherwise becomes exempted from such reviews under the UG and UGMS. ([L.10.1](#cL10_1_reviews_basic_standard))

## Cost/Price Analysis

1. [Grantees](#definition_grantee) must perform [cost analysis](#definition_costanalysis) or [price analysis](#definition_priceanalysis) in connection with every procurement action and [subgrant](#definition_subgrant) in excess of the [simplified acquisition threshold](#definition_simplified_acq_threshold), including [contract modifications](#definition_contractmod). The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the grantee must make independent estimates before receiving bids or proposals. Profit, if any, must be negotiated as a separate element of the price. No grantee or [subgrantee (subrecipient)](#definition_subgrantee) may earn or keep any profit resulting from a TWC grant award, unless expressly authorized by the terms and conditions of the TWC grant award or subgrant, respectively. ([O.1.1](#cO1_1_cost_price_analysis_basic_standard))

## Awards to Responsible Parties

1. [Grantees](#definition_grantee) must award [contracts](#definition_contract) and [subgrants](#definition_subgrant) only to responsible parties possessing the ability to perform successfully under the terms and conditions of a proposed procurement. ([P.1](#cP1_awards_to_responsible_parties))

## Pre-Award Reviews

1. A [grantee](#definition_grantee) should conduct a pre-award review prior to making a [subgrant](#definition_subgrant), to determine the risk associated with a particular [subgrantee (subrecipient)](#subgrantee), including consideration of the adequacy of its financial management system. [Local workforce development boards](#definition_board) must also comply with requirements in TWC rules. ([P.3.1](#cP3_1_preaward_reviews_policy))

## Suspension & Debarment

1. A [grantee](#definition_grantee) must not make or permit any [subgrant](#definition_subgrant) or [contract](#definition_contract), at any tier, to any party that is debarred, suspended or otherwise excluded from or ineligible to participate in federal assistance programs or state contracts, as identified by the federal System for Award Management or the debarred vendor list maintained by the Texas State Comptroller of Public Accounts. ([P.2.1](#cP2_1_suspension_debarment_basic))

## Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment

1. Effective August 13, 2020, for [federal awards](#definition_federal_award) that TWC makes, [grantees](#definition_grantee) and [subgrantees (subrecipients)](#definition_subgrantee) must comply with the prohibition on certain telecommunications and video surveillance services or equipment as set forth in 2 C.F.R. §200.216 ([85 FR 49506](https://www.govinfo.gov/content/pkg/FR-2020-08-13/pdf/2020-17468.pdf)) and Section 889 of [Public Law 115-232](https://www.govinfo.gov/content/pkg/PLAW-115publ232/pdf/PLAW-115publ232.pdf). ([P.2a](#cP2a_0_prohibition_telecom_surveillance))

## Protests & Settlement of Other Issues

1. The [grantee](#definition_grantee) is responsible, in accordance with good administrative practice, and sound business judgment, for settling all contractual and administrative issues arising out of its procurements (including [subgrants](#definition_subgrant)). Grantees must have protest procedures in place. ([Q.1](#cQ1_protests_disputes_settlements))

## Oversight of Contracts & Subgrants

1. [Grantees](#grantee) are responsible for contract oversight and oversight of subgrants. ([Q.2.1](#cQ2_1_oversight_basic_standard))

## Procurement Records

1. [Grantees](#definition_grantee) must maintain records sufficient to detail the history of procurement. Records will be retained and made available to authorized entities in accordance with applicable administrative requirements. ([Q.3](#cQ3_procurement_records))

# Acronyms & Abbreviations

A/E: Architectural/Engineering Services

AEFLA: Adult Education and Family Literacy Act, Title II of WIOA

AEL: Adult Education and Literacy

C.F.R.: Code of Federal Regulations

DOL: U.S. Department of Labor

DOLETA: DOL Employment and Training Administration

ED: U.S. Department of Education

FAR: Federal Acquisition Regulation

FASRG: Texas Education Agency’s “Financial Accountability System Resource Guide”

FMGC: TWC’s Financial Manual for Grants and Contracts

HUB: Historically Underutilized Businesses

HHS: U.S. Department of Health and Human Services

IFB: Invitation for Bids

LSA: Labor Surplus Area

OCTAE: ED’s Office of Career, Technical, and Adult Education

OMB: Office of Management and Budget

RESEA: Reemployment Services and Eligibility Assessment program

RFI: Request for Information

RFP: Request for Proposals

SCSEP: Senior Community Service Employment Program

TAA: Trade Adjustment Act

TAC: Texas Administrative Code

TANF: Temporary Assistance for Needy Families

TEA: Texas Education Agency

TWC: Texas Workforce Commission

UG: OMB’s “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards,” codified at Title 2, Part 200 of the Code of Federal Regulations

UGMS: Uniform Grant Management Standards, published by the Texas Comptroller of Public Accounts

U.S.C.: United States Code

USDA: U.S. Department of Agriculture

WIOA: Workforce Innovation and Opportunity Act

# Glossary

The following definitions clarify the meaning and usages of various terms used in this Publication and are applicable and binding for that purpose only.

## Aggregate cost

For purposes of determining the [simplified acquisition threshold](#definition_simplified_acq_threshold) (small purchase threshold) and [micro-purchase threshold](#definition_micropurchase_threshold), the term “aggregate cost” has the meaning described in Aggregate Dollar Limit in [G.1 Procurement Thresholds](#cG1_procurement_thresholds), in this Publication.

## Apparent Conflict of Interest

In general, “apparent conflict of interest” means a situation when someone could reasonably conclude that a conflict of interest exists regardless of whether it actually does; a situation or relationship that could reasonably appear to other parties to be likely to cause the impartiality of a professional’s judgment to be compromised.

Reference: TWC

As used within the context of TWC rule in 40 TAC Chapter 802, the phrase “appearance of a conflict of interest” has meaning set forth in those rules, as follows.

A circumstance in which a board member of a [local workforce development board](#definition_board), employee of a local workforce development board, [workforce service provider](#definition_workforceserviceprovider), or [workforce service provider employee in a decision-making position](#definition_wsp_decisionmakingposition) appears to be:

1. influenced by considerations of one or more of the following: gain to the person, entity, or organization for which the person has an employment interest, substantial financial interest, or other interest, whether direct or indirect (other than those consistent with the terms of the [contract](#definition_contract) [see Note]); or
2. motivated by design to gain improper influence over TWC’s three-member Commission, the Agency (as defined in TWC rule at 40 TAC § 800.2), or the local workforce development board.

Note: As used in this definition, the term “contract” includes a TWC grant award and a [subgrant](#definition_subgrant).

Refer to [D.3 Conflicts of Interest](#cD3_conflicts_of_interest), in this Publication, for more information about requirements relating to conflicts of interest.

Reference: [40 TAC § 802.2(2)](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf)

## Assistance Organization

As defined by the [Texas Government Code §2175.001(1)](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2175.htm#2175.001), “assistance organization” refers to:

* a nonprofit organization that provides educational, health, or human services or assistance to homeless individuals;
* a nonprofit food bank that solicits, warehouses, and redistributes edible but unmarketable food to an agency that feeds needy families and individuals;
* Texas Partners of the Americas, a registered agency with the Advisory Committee on Voluntary Foreign Aid, with the approval of the Partners of the Alliance office of the Agency for International Development;
* a group, including a faith-based group, that enters into a financial or nonfinancial agreement with a health or human services agency to provide services to that agency’s clients;
* a [local workforce development board](#definition_board) created under [Section 2308.253, Texas Government Code](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2308.htm#2308.253);
* a nonprofit organization approved by the Supreme Court of Texas that provides free legal services for low-income households in civil matters;
* the Texas Boll Weevil Eradication Foundation, Inc., or an entity designated by the commissioner of agriculture as the foundation’s successor entity under [Section 74.1011, Texas Agriculture Code](https://statutes.capitol.texas.gov/Docs/AG/htm/AG.74.htm#74.1011);
* a nonprofit computer bank that solicits, stores, refurbishes, and redistributes used computer equipment to public school students and their families; and
* a nonprofit organization that provides affordable housing.

Reference: [Texas Government Code § 2175.001(1)](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2175.htm#2175.001)

## Bidders List

Refer to Grantee’s Bidders List in [M.2 Bidders List](#cM2_bidders_list), in this Publication. See also “[vendors list](#definition_vendorslist).”

## Bid Guarantee

A “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 must, upon acceptance of the bid, execute such contractual documents as may be required within the time specified. Bid guarantees are generally required to be in an amount equivalent to five percent of the amount bid.

Reference: [2 C.F.R. § 200.325(a)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-325.pdf); [UGMS, Part III, §\_\_.36(h)(1)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## Board Decision-Making Position

As used in Commission rule at 40 TAC Chapter 802, “board decision-making position” means a position with a [local workforce development board](#definition_board) that has final decision-making authority or final recommendation authority on matters that directly affect [workforce service providers](#definition_workforceserviceprovider). A board decision-making position is one that performs the function of a local workforce development board’s executive director, deputy executive director, chief financial officer, lead contract manager, or lead contract monitor.

Reference: [40 TAC § 802.2(3)](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf)

## Board (Local Workforce Development Board)

“Board” refers to a local workforce development board created under [Texas Government Code § 2308.253](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2308.htm#2308.253).

## Conflict of Interest

As used in Chapter 802 of TWC rule, “conflict of interest” means a circumstance in which a board member of a [local workforce development board](#definition_board), local workforce development board employee, [workforce service provider](#definition_workforceserviceprovider), or workforce service provider’s employee is in a decision-making position and has a direct or indirect interest, particularly a [substantial financial interest](#definition_substantial_financial_interes) that influences the individual's ability to perform job duties and fulfill responsibilities. Refer also to the definitions of “[board decision-making position](#definition_board)” and “[workforce service provider employee in a decision-making position,](#definition_wsp_decisionmakingposition)” in this Glossary.

Reference: [40 TAC § 802.2(4)](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf)

## Consulting Services

“Consulting service” means the service of studying or advising a state agency under a [contract](#definition_contract) that does not involve the traditional relationship of employer or employee.

Refer to [J.1 Consulting, Professional & Legal Services](#cJ1_consulting_professional_legal_svcs) and [J.2 DOL Consultant Fee Limit](#cJ2_DOL_consultant_fee_limit) for additional details.

Reference: [Texas Government Code § 2254.021(1)](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2254.htm#2254.021)

## Contract Modification

TWC defines “contract modification” as a contract action that changes the scope, amount, or terms and conditions of a [contract](#definition_contract). Exercise of a renewal option according to the terms agreed upon in the existing contract terms is not a contract modification.

For purposes of this Publication, the term “contract modification” also includes changes to the scope, amount, or terms and conditions of an agreement that is a [subgrant](#definition_subgrant).

Modifications that exceed the scope or dollar value of the procurement may be subject to enhanced scrutiny as to whether it would have affected competition if it had been included in the solicitation.

Reference: TWC

## Contract

For purposes of distinguishing between the nature of the contractual relationships entered into with [contractors (vendors)](#definition_contract) versus those with [subgrantees (subrecipients)](#definition_subgrantee), the term “contract” refers to a legal instrument between a [grantee](#definition_grantee) and a contractor (vendor) by which the grantee purchases property or services needed to carry out a project or program under a TWC grant award. For purposes of this distinction, the term “contract” does not include a legal instrument that is in substance a subaward ([subgrant](#definition_subgrant)) to a [subgrantee (subrecipient)](#definition_subgrantee) which is made in order for the subgrantee to carry out part of a [federal award](#definition_federal_award) or [state award](#definition_stateaward).

For [TWC grant awards](#definition_twc_grant_award), grantee procedures for soliciting and selecting subgrantees (subrecipients) are frequently required to conform to the same standards that the UG and UGMS set forth for the procurement of contractors (vendors). The definitions of “contract,” “contractor,” “subgrant” and “subgrantee” are significant because this Publication uses those terms to identify applicable requirements.

Reference: [2 C.F.R. § 200.22](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-22.pdf); [UGMS, Part II, Attachment A, B.8 and Part III, §\_\_.3](https://comptroller.texas.gov/purchasing/docs/ugms.pdf); TWC

## Contractor (Vendor)

“Contractor” means an entity that receives a [contract](#definition_contract). Also referred to as a vendor. Not a [subgrantee (subrecipient)](#definition_subgrantee).

The distinction between a contractor versus a subgrantee is based on the nature of the relationship rather than the name of the legal instrument used to enter into that agreement. Characteristics of contractors (vendors) and subrecipients are established in 2 C.F.R. § 200.330—Subrecipient and Contractor Determinations, and in UGMS, Part III, §\_\_.3 (Definitions, “subgrant”) and Part IV, §\_\_.210—Subrecipient and Vendor Determinations. See also, [Chapter 20: Single Audit](https://twc.texas.gov/financial-manual-grants-contracts-chapter-20-single-audit) in TWC’s Financial Manual for Grants and Contracts.

Reference: [2 C.F.R. § 200.23](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-23.pdf); [UGMS, Part III, §\_\_.3 and Part IV, §\_\_.105](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## Cost Analysis

“Cost analysis” refers to verifying proposed cost data, the projections of the data and the evaluation of the specific elements of costs and profit to determine reasonableness, allocability and allowability of the costs.

Refer to Cost Analysis in [O. Cost/Price Analysis](#cO0_cost_price_analysis), in this Publication, for more information.

Reference: [UGMS, Part III, §\_\_.36(d)(4)(ii)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## Cost Plus Percentage of Construction Contract

“Cost plus percentage of construction contract” means a [contract](#definition_contract) in which the amount of profit paid is calculated as a percentage of construction cost, so that profit increases commensurate with increases in cost.

Reference: TWC

## Cost Plus Percentage of Cost Contract

“Cost plus percentage of cost contract” means a [contract](#definition_contract) (or [subgrant](#definition_subgrant)) in which the amount of profit paid is calculated as a percentage of cost, so that profit increases commensurate with increases in cost.

Reference: TWC

## Cost Reimbursement Contract

“Cost reimbursement contracts” are contracts that provide for payment of allowable incurred costs, to the extent prescribed in the [contract](#definition_contract) (or [subgrant](#definition_subgrant)).

This term may also be used to describe a [subgrant](#definition_subgrant).

Reference: [48 C.F.R. § 16-301-1](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-sec16-301-1.pdf) (2019)

## Equipment

“Equipment” means an article of non-expendable, tangible [personal property](#definition_personalproperty) (including information technology systems) having a useful life of more than one year and an acquisition cost which equals the lesser of (a) the capitalization level established by the organization for financial statement purposes, or (b) $5,000.

(For Supplemental Nutrition Assistance Program Employment and Training funds, equipment means an article of tangible personal property that has a useful life of more than two years and an acquisition cost of $500 or more, if it was purchased prior to May 17, 1995 for OMB Circular A-87, or May 19, 1998, for OMB Circular A-122. If purchased after these dates, it shall have the definition above.)

Reference: [20 C.F.R. § 200.33](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-33.pdf); [UGMS, Part II, Attachment B, Item 20, (a)(2) and Part III, §\_\_.3](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## Existing Contract/Award

As used in this Publication, “existing contract/award” refers to a valid, active [contract](#definition_contract) or [subgrant](#definition_subgrant) in existence (or valid contract or subgrant known to be coming into existence) when the [grantee](#definition_grantee) identified its present acquisition need, which would remain active (or could be appropriately amended to remain active) for a sufficient length of time to complete the needed acquisition between the start and end dates of that contract. It includes, but is not necessarily limited to, contracts that the grantee procured for its own use, and in some cases, contracts that other entities procured for use by multiple entities if such multiple entities include the grantee, and contracts that one entity permits another entity to piggyback on.

Reference: TWC

## Evaluation Team

“Evaluation team” and “evaluation committee” refer to evaluation of quotations or offers by more than one person.

Reference: TWC

## Federal Award

“Federal award” means a grant award or subaward ([subgrant](#definition_subgrant)) funded with federal grant funds, whether received directly from a [federal awarding agency](#definition_federalawardingagency), or a [pass-through entity](#definition_passthruentity).

Reference: [2 C.F.R. § 200.38](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-38.pdf)

## Federal Awarding Agency

“Federal awarding agency” refers to the Federal agency that provides a [federal award](#definition_federal_award) directly to a non-federal entity. For example, for federal awards that TWC receives from DOL, DOL is the federal awarding agency.

Reference: [2 C.F.R. § 200.37](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-37.pdf)

## Firm-Fixed-Price Contract

“Firm-fixed-price contract” means a type of [fixed-price contract](#definition_fixedpricecontract) that gives a [contractor](#definition_contractor) full responsibility for costs and resulting profit or loss. For example, as described in 48 C.F.R. § 16.202 (2019) of the Federal Acquisition Regulation, “a firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor’s (vendor’s) cost experience in performing the [contract](#definition_contract). This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss. It provides maximum incentive for the contractor to control costs and perform effectively and imposes a minimum administrative burden upon the contracting parties.” As described in this Publication, the method of procurement by sealed bids (formal advertising), requires use of a firm-fixed-price contract.

Reference: [48 C.F.R. § 16.202](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-sec16-202.pdf) (2019)

## Fixed Amount Award

“Fixed amount award” refers to a type of grant agreement under which the [federal awarding agency](#definition_federalawardingagency) or [pass-through entity](#definition_passthruentity) provides a specific level of support without regard to actual costs incurred under the [federal award](#definition_federal_award). This type of federal award reduces some of the administrative burden and record-keeping requirements for both the [grantee](#definition_grantee) or [subgrantee](#definition_subgrantee) receiving it and the federal awarding agency or pass-through entity. Accountability is based primarily on performance and results.

Reference: [2 C.F.R. § 200.45](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-45.pdf)

## Fixed-Price Contract

“Fixed-price contract” is a method of contracting in which a set price is paid for specified deliverables regardless of the [contractor’s (vendor’s)](#definition_contractor) actual costs incurred. In general, a type of [contract](#definition_contract) under which the payment amount does not depend on the resources used or time expended by the contractor (vendor) in performing the contract. Compare to a [cost reimbursement contract](#definition_costreimbursementcontract). Examples of fixed-price contracts include [firm-fixed-price contracts](#definition_firmfixedpricecontract), fixed-price contracts with economic price adjustment, fixed-price [incentive contracts](#definition_incentivecontract), fixed-price contracts with prospective price redetermination, fixed-ceiling-priced contracts with retroactive price determination, and firm-fixed-price level-of-effort term contracts.

Reference: [48 C.F.R. Subpart 16.2 (Fixed-Price Contracts)](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-part16-subpart16-2.pdf) (2019)

## Grantee (Recipient)

Depending on the context—“grantee” or “recipient” means: (1) An organization receiving financial assistance directly from a [federal awarding agency](#definition_federalawardingagency) or [state awarding agency](#definition_stateawardingagency) to carry out a project or program; or (2) an entity that receives a [federal award](#definition_federal_award) or [state award](#definition_stateaward) from TWC.

Reference: [2 C.F.R. § 200.86](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-86.pdf); [UGMS, Part IV, §\_\_.105](https://comptroller.texas.gov/purchasing/docs/ugms.pdf); TWC

## Immediate Family

As used in TWC rule at 40 TAC Chapter 802, relating to conflicts of interests of board members of [local workforce development boards](#definition_board), “immediate family” means any person related within the first degree of affinity (marriage) or consanguinity (blood) to the person involved.

TWC assigns the same meaning to the use of “immediate family” as used in the UG and UGMS conflict of interest provisions at [2 C.F.R. § 200.318(c)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf) and [UGMS, Part III, §\_\_.36(b)(3)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf).

Refer to [D.3 Conflicts of Interest](#cD3_conflicts_of_interest), in this Publication, for more information about conflicts of interest.

Reference: [40 TAC § 802.41(e)(1)](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf)

## Incentive Contracts

“Incentive contracts” refer to a [fixed price contract](#definition_fixedpricecontract) or [cost reimbursement contract](#definition_costreimbursementcontract) that makes the [contractor (vendor)](#definition_contractor) responsible for performance costs, but for which a negotiated profit or fee is tailored to the specific uncertainties associated with performance of the [contract](#definition_contract).

Reference: TWC

## Indian Tribe

“Indian tribe” has the meaning defined by UG and UGMS—“any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. Chapter 33), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. 450b(e)). See annually published Bureau of Indian Affairs list of Indian Entities Recognized and Eligible to Receive Services.”

Reference: [2 C.F.R. § 200.54](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-54.pdf); [UGMS, Part IV, §\_\_.105](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## Intangible Personal Property

“Intangible personal property” means [personal property](#definition_personalproperty) having no physical existence such as trademarks, copyrights, patents and patent applications and property, such as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership (whether the property is tangible or intangible).

Reference: [2 C.F.R. § 200.59](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-59.pdf)

## Labor Surplus Area Firm

A “labor surplus area firm” is a firm located in a Labor Surplus Area (LSA). LSAs are announced annually in the Federal Register for each Federal Fiscal Year (October 1 - September 30).

The term, labor surplus area, means a civil jurisdiction that has a civilian average annual unemployment rate during the previous two calendar years of twenty percent (20%) or more above the average annual civilian unemployment rate for all states (including Puerto Rico) during the same 24-month reference period. If the National annual average unemployment rate during the referenced period is less than six percent (6%) then the qualifying rate is six percent (6%). If the national annual average unemployment rate during the referenced period is above ten percent (10%) then the qualifying rate is ten percent (10%).

For more information about LSAs and the current list of LSAs, visit the DOLETA’s LSA page at <https://www.doleta.gov/programs/lsa.cfm>.

## Local Government

Unless indicated otherwise, “local government” has the meaning defined in UG—any unit of government within a [state](#definition_state), including a: (a) county; (b) borough; (c) municipality; (d) city; (e) town; (f) township; (g) parish; (h) local public authority, including any public housing agency under the United States Housing Act of 1937; (i) special district; (j) school district; (k) intrastate district; (l) council of governments, whether or not incorporated as a nonprofit corporation under state law; and (m) any other agency or instrumentality of a multi-, regional, or intrastate or local government.

Note: Consistent with the definition of “local government” in Texas Government Code § 783.003, the UGMS definition of the term specifically excludes school districts and other special-purpose districts. However, as authorized, TWC has extended UGMS to these and all other categories of TWC grantees. The UGMS definition is otherwise consistent with the UG definition. Therefore, as used in this Publication, the UG definition applies regardless of whether the TWC grant award is a [federal award](#definition_federal_award), [state award](#definition_stateaward), or financed by a mix of federal and state grant funds.

Reference: [2 C.F.R. § 200.64](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-64.pdf); [UGMS, Part II, Attachment A, B.18, Part III, §\_\_.3, and Part IV, §\_\_.105](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## Manifestation of Mutual Assent

“Manifestation of mutual assent” means that the parties to a [contract](#definition_contract) must manifest by words or conduct that they have agreed to enter into a contract. The usual method of showing mutual assent is by offer and acceptance.

This term is also relevant for [subgrants](#definition_subgrant) made by TWC [grantees](#definition_grantee).

Reference: TWC

## Micro-purchase

“Micro-purchase” means a purchase of [supplies](#definition_supplies) or services made using simplified acquisition procedures, the aggregate amount of which does not exceed the [micro-purchase threshold](#definition_micropurchase_threshold). Micro-purchase procedures comprise a subset of a grantee’s small purchase procedures. The [grantee](#definition_grantee) uses such procedures in order to expedite the completion of its lowest-dollar small purchase transactions and minimize the associated administrative burden and cost.

Refer to [I.1 Procurement by Micro-purchase Procedures](#cI1_procurement_micropurchase_procedures), in this Publication, for information about micro-purchase procedures.

Reference: [2 C.F.R. § 200.67](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-67.pdf)

## Micro-purchase Threshold

Unless the Office of Management and Budget (OMB) specifies or approves an exception for a higher threshold under the UG, the micro-purchase threshold is set by the Federal Acquisition Regulation (FAR) at [48 C.F.R. Subpart 2.1 (Definitions)](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-part2-subpart2-1.pdf) (2019). The threshold is periodically adjusted for inflation.

For [micro-purchases](#definition_micropurchase) that [grantees](#definition_grantee) made under grant awards from TWC between April 2011 and December 31, 2019, TWC fixed the micro-purchase threshold at $3,000. Effective January 1, 2020, TWC increased the micro-purchase threshold for TWC grant awards to $10,000 under the authority of [OMB Memorandum M-18-18](https://www.whitehouse.gov/wp-content/uploads/2018/06/M-18-18.pdf).

Any subsequent change to the provisions at 48 C.F.R. Subpart 2.1 of the FAR to adjust the micro-purchase threshold is automatically incorporated into this Publication by reference. Additionally, any subsequent uniform UG exception that the OMB officially announces (such as by OMB Memorandum) to change the micro-purchase threshold from the amount established at 48 C.F.R. Subpart 2.1 of the FAR is also automatically incorporated by reference.

Reference: [2 C.F.R. § 200.67](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-67.pdf)

## Noncompetitive Procurement

“Noncompetitive procurement” means procurement by noncompetitive proposals as described in [I.5 Procurement by Noncompetitive Proposals](#cI5_proc_by_noncompetitive_proposals), in this Publication.

## Organizational Conflicts of Interest

As used in the UG and UGMS, “organizational conflict of interest” means that because of relationships with a parent company, affiliate, or subsidiary organization, the TWC [grantee](#definition_grantee) (or a [subgrantee](#definition_subgrantee)) is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

Reference: [20 C.F.R. § 200.318(c)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-318.pdf)

## Pass-through Entity

“Pass-through entity” means a non-federal entity that provides a [federal award](#definition_federal_award) ([subgrant](#definition_subgrant)) to a [subgrantee (subrecipient)](#definition_subgrantee) to carry out part of a federal program; or a non-state entity that provides a [state award](#definition_stateaward) (subgrant) to a subgrantee (subrecipient) to carry out part of a state program.

Reference: [2 C.F.R. § 200.74](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-74.pdf); [UGMS, Part IV, §\_\_.105](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## Payment Bond

“Payment bond” means a bond executed in connection with a [contract](#definition_contract) to assure payment as required by statute of all persons supplying labor and material in the execution of the work provided for in the contract. It is usually for 100 percent of the contract price.

Reference: [2 C.F.R. § 200.325(c)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-325.pdf); [UGMS, Part III, §\_\_.36(h)(3)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## Performance Bond

“Performance bond” means a bond executed in connection with a [contract](#definition_contract) to secure fulfillment of all the [contractor’s (vendor’s)](#definition_contractor) obligations under such contract. It is usually for 100 percent of the contract price.

Reference: [2 C.F.R. § 200.325(b)](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-325.pdf); [UGMS, Part III, §\_\_.36(h)(2)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## Personal Property

“Personal property” means property of any kind except [real property](#definition_realproperty). It may be tangible, having physical existence (such as [supplies](#definition_supplies) or [equipment](#definition_equipment)), or [intangible](#definition_intangibleproperty), having no physical existence such as copyrights, patents, or securities.

Reference: [2 C.F.R. § 200.78](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-78.pdf)

## Price Analysis

“Price analysis” refers to a comparison of price quotations or offers; i.e., overall price as it compares with the quotations or offers of other competitors, market prices, etc.

Reference: TWC

## Procurement Transaction

“Procurement transaction” refers to a procurement that results in a [contract](#definition_contract) with a [contractor (vendor)](#definition_contractor).

Reference: TWC

## Professional Services

“Professional services” means services—

* within the scope of the practice, as defined by state law of: accounting, architecture, landscape architecture, land surveying; medicine; optometry; professional engineering; real estate appraising; or professional nursing; or
* provided in connection with the professional employment or practice of a person who is licensed or registered as: a certified public accountant; an architect; a landscape architect; a land surveyor; a physician, including a surgeon; an optometrist; a professional engineer; a state certified or state licensed real estate appraiser; or a registered nurse; or
* provided by a person lawfully engaged in interior design, regardless of whether the person is registered as an interior designer under [Chapter 1053, Texas Occupations Code](https://statutes.capitol.texas.gov/Docs/OC/htm/OC.1053.htm).

Reference: [Texas Government Code § 2254.002(2)](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.2254.htm#2254.002)

## Real Property

“Real property” means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and [equipment](#definition_equipment).

Note: The acquisition of land and buildings, and the construction (erection) of buildings is generally not allowable under TWC grant awards. Refer to [Chapter 13: Property](https://twc.texas.gov/financial-manual-grants-contracts-chapter-13-property) in the FMGC, the terms and conditions of TWC grant awards, and individual program requirements. Some awards also prohibit the use of grant funds to make improvements as well as non-capital alterations to real property.

Reference: [2 C.F.R. § 200.85](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-85.pdf); [UGMS, Part III, §\_\_.3](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## Qualifications-Based Procurement

“Qualifications-based procurement” means a procurement whereby selection is based on qualifications only, with a fair and reasonable price subsequently being negotiated with the most [qualified source](#definition_qualified_sources).

See also [I.4 Acquisition: Procurement by Competitive Proposals](#cI4_procurement_competitive_proposals), [J.5.3 Broker Selection (Insurance)](#cJ5_3_insurance_broker_selection), and [L.1.5 Request for Qualifications](#cL1_5_request_for_qualifications), in this Publication.

Reference: TWC

## Qualified Sources (Qualified Suppliers)

With respect to procurement, “qualified sources” or “qualified suppliers” generally refers to suppliers that have the abilities, attributes, qualities, etc., that are necessary to perform the required work or to provide the needed property or services.

Also refer to [P.2 Suspension & Debarment](#cP2_suspension_debarment), in this Publication.

Reference: TWC

## Simplified Acquisition Threshold

“Simplified acquisition threshold” means the dollar amount below which a TWC [grantee](#definition_grantee) may purchase property or services using small purchase methods. Grantees entities adopt small purchase procedures to expedite the purchase of items costing less than the simplified acquisition threshold as established by the UG. As established by the UG, the simplified acquisition threshold for [federal awards](#definition_federal_award) is set by the Federal Acquisition Regulation (FAR) at [48 C.F.R. Subpart 2.1 (Definitions)](https://www.govinfo.gov/content/pkg/CFR-2019-title48-vol1/pdf/CFR-2019-title48-vol1-part2-subpart2-1.pdf) (2019) and in accordance with 41 U.S.C. § 1908. The threshold is periodically adjusted for inflation. TWC applies the same threshold to [state awards](#definition_stateaward) (see Note).

For small purchase procurements that grantees made under TWC grant awards between March 1, 2013 and December 31, 2019, TWC fixed the simplified acquisition threshold at $150,000. Effective January 1, 2020, TWC increased the simplified acquisition threshold for TWC grant awards to $250,000 under the authority of [OMB Memorandum M-18-18](https://www.whitehouse.gov/wp-content/uploads/2018/06/M-18-18.pdf).

Any subsequent change to the provisions at 48 C.F.R. Subpart 2.1 of the FAR to adjust the simplified acquisition threshold is automatically incorporated into this Publication by reference. Additionally, any subsequent uniform UG exception that the OMB officially announces (such as by OMB Memorandum) to change the simplified acquisition threshold to the amount established at 48 C.F.R. Subpart 2.1 of the FAR is also automatically incorporated by reference.

Note: TWC presumes that UGMS recognizes the same simplified acquisition threshold as the UG. State law in [Chapter 783, Texas Government Code](https://statutes.capitol.texas.gov/Docs/GV/htm/GV.783.htm), mandates that the administrative requirements set forth in UGMS be based on OMB Circular A-102. That Circular was superseded by the UG. Unlike the UG, UGMS does not formally define “simplified acquisition threshold” or “small purchase threshold.” The UGMS discussion of the threshold can be found in UGMS, Part III, §\_\_.36(d)(1), which states in part, “As of April 2000, the federal small purchase threshold had risen to $100,000…” Like the UG, OMB Circular A-102, adhered to the “simplified acquisition threshold” as set forth in the FAR. With the UG superseding OMB Circular A-102, TWC presumes that the UGMS adheres to the same threshold as the UG.

Reference: [2 C.F.R. § 200.88](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-88.pdf); [UGMS, Part III, §\_\_.36(d)(1)](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## Sole Source Procurement

“Sole source procurement means” a type of [noncompetitive procurement](#definition_noncompetitiveproc) for which competition does not exist because a particular entity is the sole source supplier of the needed good or service, and no other good or service will satisfy the need; i.e., the [grantee](#definition_grantee) needs a good or service to have a distinctive characteristic, that characteristic is not shared by other products or services, and there is only one responsible supplier of the good or service that has the needed characteristic.

Reference: TWC

## State

For purposes of determining applicability of the UG and UGMS, “state” has the meaning defined in UG—any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any agency or instrumentality thereof exclusive of [local governments](#definition_localgovernment).

Reference: [2 C.F.R. § 200.90](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-90.pdf); [UGMS, Part II, Attachment A, B.20 and Part III, §\_\_.3](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## State Award

“State award” means a grant award or subaward ([subgrant](#definition_subgrant)) for which the funding source is state general revenue or other state (non-federal) funds.

Reference: [UGMS, Part IV, §\_\_.105](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## State Awarding Agency

“State awarding agency” means the Texas state agency making a [state award](#definition_stateaward) to a [grantee](#definition_grantee). For purposes of state awards that TWC makes, TWC is the state awarding agency.

Reference: [UGMS, Part IV, §\_\_.105](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## Subcontract

“Subcontract” means a [contract](#definition_contract) between a [contractor (vendor)](#definition_contractor) and a [subcontractor](#definition_subcontractor), or between one subcontractor and another subcontractor, in which the entity receiving the subcontract performs all or part of the work obligations of the contractor or subcontractor that made the subcontract. See also “[subcontractor](#definition_subcontractor).” Not a [grantee](#definition_grantee) or [subgrantee (subrecipient)](#definition_subgrantee).

Reference: TWC

## Subcontractor

As used in this Publication, the term “subcontractor” refers to a type of [contractor (vendor)](#definition_contractor). A subcontractor enters into a [contract](#definition_contract) with either a principal contractor (also known as a prime contractor) or another subcontractor to perform all or part of the work obligations of that contractor or subcontractor. Not a [grantee](#definition_grantee) or [subgrantee (subrecipient)](#definition_subgrantee).

Reference: TWC

## Subgrant (Subaward)

“Subgrant” means an award that a [pass-through entity](#definition_passthruentity) provides to a [subgrantee (subrecipient)](#definition_subgrantee) for the subgrantee to carry out part of the [federal award](#definition_federal_award) or [state award](#definition_stateaward) received by the pass-through entity. Also referred to as a subaward. The term does not include payments to a [contractor (vendor)](#definition_contractor) or payments to an individual that is a beneficiary of a federal or state program.

Reference: [2 C.F.R. § 200.92](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-92.pdf); [UGMS, Part III, §\_\_.3](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## Subgrantee (Subrecipient)

“Subgrantee” means an entity that receives a subaward ([subgrant](#definition_subgrant)) from a [pass-through entity](#definition_passthruentity) to carry out part of a federal and/or state program, but does not include an individual that is a beneficiary of such program. A subrecipient may also be a [recipient](#definition_grantee) of other [federal awards](#definition_federal_award) and/or [state awards](#definition_stateaward) directly from a [federal awarding agency](#definition_federalawardingagency) or [state awarding agency](#definition_stateawardingagency), respectively. For example, an entity that receives a subgrant of TWC grant funds from a TWC [grantee](#definition_grantee) or another pass-through entity is a subgrantee.

The distinction between a [contractor (vendor)](#definition_contractor) versus a [grantee](#definition_grantee) or subgrantee is based on the nature of the relationship rather than the name of the legal instrument used to enter into that agreement. Characteristics of contractors (vendors) and subgrantees (subrecipients) are established in [2 C.F.R. § 200.330](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-330.pdf)—Subrecipient and Contractor Determinations and in UGMS, Part III, §\_\_.3 (Definitions, “subgrant”) and Part IV, §\_\_.210—Subrecipient and Vendor Determinations. See also, [Chapter 20: Single Audit](https://twc.texas.gov/financial-manual-grants-contracts-chapter-20-single-audit), in TWC’s Financial Manual for Grants and Contracts.

Reference: [2 C.F.R. § 200.93](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-93.pdf); [UGMS, Part III, §\_\_.3](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## Substantial Interest

As used in TWC rule at 40 TAC Chapter 802, relating to conflicts of interests of board members of [local workforce development boards](#definition_board):

* A person has a “substantial interest” in a business entity if: (i) the person owns 10 percent or more of the voting stock or shares of the business, owns 10 percent or more, or owns $5,000 or more, of the fair market value of a business; or (ii) funds received by the person from the business exceed 10 percent of the person's gross income for the previous year.
* A person has a “substantial interest” in [real property](#definition_realproperty) if the interest is an equitable or legal ownership with a fair market value of $2,500 or more.
* A person has a “substantial interest” if the board member is related to a person in the first degree of affinity or consanguinity who has a substantial interest as defined in this rule.

Reference: [40 TAC § 802.41(e)(2)](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf)

## Substantial Financial Interest

As used in TWC rule at 40 TAC Chapter 802, “substantial financial interest” means an interest in a business entity in which a person:

1. owns 10% or more of the stock, shares, fair market value, or other interest in the business entity;
2. owns more than $5,000 of the fair market value of the business entity;
3. owns real property if the interest is an equitable or legal ownership with a fair market value of $2,500 or more used for the business entity;
4. receives funds from the business entity that exceed 10% of the person’s gross income for the previous year;
5. is a compensated member of the board of directors or other governing board of the business entity;
6. serves as an elected officer of the business entity; or
7. is related to a person in the first degree by consanguinity or affinity, as determined by Chapter 573, Texas Government Code, who has a substantial financial interest in the business entity, as listed in subparagraph (A) through (F) of this definition.

As used in this definition, the TWC rule defines first degree of consanguinity or affinity as the person’s parent, child, adopted child, or spouse.

Reference: [40 TAC § 802.2(14)](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf)

## Supplies

“Supplies” means all [personal property](#definition_personalproperty) excluding [equipment](#definition_equipment), [intangible personal property](#definition_intangibleproperty) and debt instruments, and inventions of a [grantee](#definition_grantee) that were first conceived or reduced to practice under a [federal award](#definition_federal_award) or [state award](#definition_stateaward).

Reference: [2 C.F.R. § 200.94](https://www.govinfo.gov/content/pkg/CFR-2020-title2-vol1/pdf/CFR-2020-title2-vol1-sec200-94.pdf); [UGMS, Part III, §\_\_.3](https://comptroller.texas.gov/purchasing/docs/ugms.pdf)

## Technical Leveling

During proposal evaluation or award negotiation, technical leveling is an approach, which should be avoided. As described in the State of Texas Procurement and Contract Management Guide for Texas state agencies, “technical leveling is helping a respondent to bring its response up to the level of other responses through successive rounds of discussion, usually by pointing out weaknesses in the response.”

Reference: [State of Texas Procurement and Contract Management Guide](https://comptroller.texas.gov/purchasing/publications/procurement-contract.php)

## Technical Transfusion

During proposal evaluation or award negotiation, technical transfusion is an approach, which should be avoided. As described in the State of Texas Procurement and Contract Management Guide for Texas state agencies, “technical transfusion is the disclosure of technical information or approaches by one respondent to other competitors in the course of discussion.”

Reference: [State of Texas Procurement and Contract Management Guide](https://comptroller.texas.gov/purchasing/publications/procurement-contract.php)

## TWC Grant Award

A [federal award](#definition_federal_award) or [state award](#definition_stateaward) that TWC makes to a [grantee](#definition_grantee).

Reference: TWC

## Vendors List

“Vendors list” refers to a list of competitively procured persons, firms, or products that is used in acquiring goods and services.

Reference: TWC

## Workforce Service Provider

As used in TWC rule at 40 TAC Chapter 802, “workforce service provider” means an entity or individual under [contract](#definition_contract) with a [local workforce development board](#definition_board) to operate: 1) one or more Workforce Solutions Offices, or 2) one or more programs (e.g. child care) or components of one or more programs (e.g., issuing checks for youth participating in summer employment or performing child care billing).

Note: As used in this definition, the term “contract” has the meaning in this Glossary and also includes a [subgrant](#definition_subgrant).

Reference: [40 TAC § 802.2(15)](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf)

## Workforce Service Provider Employee in a Decision-Making Position

As used in TWC rule at 40 TAC Chapter 802, “workforce service provider employee in a decision-making position” means a position with a [workforce service provider](#definition_workforceserviceprovider) that includes the ability to commit or bind the provider to a particular course of action with respect to carrying out the provider's duties and activities under the [contract](#definition_contract).

Note: As used in this definition, the term “contract” has the meaning in this Glossary and also includes a [subgrant](#definition_subgrant).

Reference: [40 TAC § 802.2(16)](https://twc.texas.gov/files/twc/rules-chapter-802-integrity-twc.pdf)