

HDLI's 2015 General Counsel Forum

New Procurement Rules

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List of Resources Provided

1. This Outline – prepared by Lisa Walker, Esq.
2. Joint Interim Final Rule –collected by Lisa Walker, Esq., (provided electronically and available online at <http://www.gpo.gov/fdsys/pkg/FR-2014-12-19/pdf/2014-28697.pdf>)
3. Redline changes to old Part 85 - prepared by Shayla Simmons, Esq. (provided electronically)
4. Procurement Powerpoint – prepared by Shayla Simmons, Esq. (attached)
- a. COFAR Website summaries, guidance, & videos – available online at <https://cfo.gov/COFAR/>

I. Joint Interim Final Rule (electronically provided)

A. Issued by OMB and applicable to all Federal award-making agencies including HUD. Found in the Federal Register at 79 FR 75867-76106 (12/17/14).

B. Titled *Federal Awarding Agency Regulatory Implementation of Office of Management and Budget's Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*. Alternatively referred to as the “Omni Guidance,” the “Omni Circular,” “Super Circular,” and the “Uniform Grant Guidance”

C. Removes existing HUD procurement regulations: 2 CFR Part 2400, 24 CFR Parts 84 and 85, RIN 2501–AD54 (drug-free workplace requirements), and replaces them with new omnibus governmental regulations at **2 CFR 200**.

- D. Supersedes, among other circulars:
- A-87, “Cost Principles for State, Local and Indian Tribal Governments” (2 CFR Part 225) and 51 FR 552 (January 6, 1986)
 - A-102, “Grant Awards and Cooperative Agreements with State and Local Governments”
 - A-110, “Uniform Administrative Requirements for Awards and Other Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations” (codified at 2 CFR 215)
 - A-122, “Cost Principles for Non-Profit Organizations” (2 CFR Part 230)
 - A-133, “Audits of States, Local Governments and Non-Profit Organizations
 - Everything else: (§200.105) *Effect on other issuances. For Federal awards subject to this Part, all administrative requirements, program manuals, handbooks and other non-regulatory materials that are inconsistent with the requirements of this Part must be superseded upon implementation of this Part by the Federal agency, except to the extent they are required by statute or authorized in accordance with the provisions in § 200.102 Exceptions.*
 - Treatment of HUD’s existing Procurement Handbook (7460.8 rev-2)?

D. **Grandfathering:** *“Federal awards made prior to December 26, 2014 will continue to be governed by the regulations in effect and codified in 24 CFR part 85 (2013 edition) or as provided by the terms of the Federal award.*

Where the terms of a Federal award made prior to December 26, 2014 state that the award will be subject to regulations as may be amended, the Federal award shall be subject to 2 CFR part 200.”

E. **OMB Review (§ 200.109)** - *OMB will review this Part at least every five years after December 26, 2013.*

II. **General Thoughts For Discussion**

A. Revision of existing staff procurement policy/procedures

1. Identification of contracts subject to new/old regulations

B. Staff training

1. COFAR Website summaries, guidance, & videos – <https://cfo.gov/COFAR/>
2. Other

C. Establishing adequate internal controls (see below)

III. **Significant New Regulations Not Previously Covered in Part 85** (Redline changes to old Part 85 regs electronically provided)

A. Many new definitions

What does this one mean?

§ 200.22 Contract. *Contract means a legal instrument by which a non-Federal entity purchases property or services needed to carry out the project or program under a Federal award. The term as used in this Part does not include a legal instrument, even if the non-Federal entity considers it a contract, when the substance of the transaction meets the definition of a Federal award or subaward (see § 200.92 Subaward).*

B. **§ 200.102 Exceptions**

(a) With the exception of Subpart F— Audit Requirements of this Part, OMB may allow exceptions for classes of Federal awards or non-Federal entities subject to the requirements of this Part when exceptions are not prohibited by statute. However, in the interest of maximum uniformity, exceptions from the requirements of this Part will be permitted only in unusual circumstances. Exceptions for classes of Federal awards or non-Federal entities will be published on the OMB Web site at www.whitehouse.gov/omb.

(b) Exceptions on a case-by-case basis for individual non-Federal entities may be authorized by the Federal awarding agency or cognizant agency for indirect costs except where otherwise required by law or where OMB or other approval is expressly required by this Part. No case-by-case exceptions may be

granted to the provisions of Subpart F—Audit Requirements of this Part.

C. **Notices of funding opportunities** (§200.203)

1. Sets forth specific requirements for content of NOFAs

D. **Internal Controls** (§200.303)

1. *Should be in compliance with guidance in “Standards for Internal Control in the Federal Government” issued by the Comptroller General of the United States and the “Internal Control Integrated Framework”, issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO). [Staff training]*
2. *Take reasonable measures to **safeguard protected personally identifiable information and other information the Federal awarding agency or pass-through entity designates as sensitive or the non-Federal entity considers sensitive** consistent with applicable Federal, state and local laws regarding privacy and obligations of confidentiality. [Staff training]*
3. Contains **standards governing the use of banks and other institutions as depositories of advance payments.**

E. **Program Income** (§200.307)

*(d) Property. **Proceeds from the sale of real property or equipment are not program income**; such proceeds will be handled in accordance with the requirements of Subpart D—Post Federal Award Requirements of this Part, Property Standards §§ 200.311 Real property and 200.313 Equipment, or as specifically identified in Federal statutes, regulations, or the terms and conditions of the Federal award.*

(e) Use of program income. If the Federal awarding agency does not specify in its regulations or the terms and conditions of the Federal award, or give prior approval for how program income is to be used, paragraph (e)(1) of this section must apply. For Federal awards made to IHEs and nonprofit research institutions, if the Federal awarding agency does not specify in its regulations or the terms and

conditions of the Federal award how program income is to be used, paragraph (e)(2) of this section must apply. In specifying alternatives to paragraphs (e)(1) and (2) of this section, the Federal awarding agency may distinguish between income earned by the recipient and income earned by subrecipients and between the sources, kinds, or amounts of income. When the Federal awarding agency authorizes the approaches in paragraphs (e)(2) and (3) of this section, program income in excess of any amounts specified must also be deducted from expenditures.

F. Period of performance (§ 200.309)

A non-Federal entity may charge to the Federal award only allowable costs incurred during the period of performance and any costs incurred before the Federal awarding agency or pass-through entity made the Federal award that were authorized by the Federal awarding agency or pass-through entity.

G. Insurance coverage (§ 200.310)

The non-Federal entity must, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired or improved with Federal funds as provided to property owned by the non-Federal entity. Federally-owned property need not be insured unless required by the terms and conditions of the Federal award.

H. Procurement Standards (§ 200.317)

When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with § 200.322 Procurement of recovered materials and ensure that every purchase order or other contract includes any clauses required by section § 200.326 Contract provisions. All other non-Federal entities, including subrecipients of a state, will follow §§ 200.318 General procurement standards through 200.326 Contract provisions.

1. **Mandated Witten Standards** of Conduct and Organizational Conflicts of Interest Policies
2. **Competition** (§ 200.319)

*In order to ensure objective contractor performance and eliminate unfair competitive advantage, **contractors that develop or draft specifications, requirements, statements of work, and invitations for bids or requests for proposals must be excluded from competing** for such procurements.*

3. Same Five types of Procurement: (§ 200.320)

(1) Micro purchase (less than \$3000)- make sure there is equitable distribution

(2) Small purchase (less than \$150,000) - Only need more than one price quote as documentation. No requirement for cost or price analysis.

(3) Sealed bid

(4) Competitive proposal

(5) Non competitive proposal

4. Procurement of recovered materials. (§ 200.322)

A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR Part 247 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; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

5. Contract cost and price. (§ 200.323)

*(a) The non-Federal entity must perform a cost or price analysis in connection with **every procurement action in excess of the Simplified Acquisition Threshold** including contract modifications.*

6. Financial reporting (§ 200.327).

Unless otherwise approved by OMB, the Federal awarding agency may solicit only the standard, OMB-approved governmentwide data elements for collection of financial information (at time of publication the Federal Financial Report or such future collections as may be approved by OMB and listed on the OMB Web site). This information must be collected with the frequency required by the terms and conditions of the Federal award, but no less frequently than annually nor more frequently than quarterly except in unusual circumstances, for example where more frequent reporting is necessary for the effective monitoring of the Federal award or could significantly affect program outcomes, and preferably in coordination with performance reporting.

7. Reporting on real property (§ 200.329).

*The Federal awarding agency or pass-through entity must require a non-Federal entity to **submit reports at least annually on the status of real property in which the Federal government retains an interest, unless the Federal interest in the real property extends 15 years or longer.** In those instances where the Federal interest attached is for a period of 15 years or more, the Federal awarding agency or pass-through entity, at its option, may require the non-Federal entity to report at **various multi-year frequencies** (e.g., every two years or every three years, not to exceed a five-year reporting period; or a Federal awarding agency or pass-through entity may require annual reporting for the first three years of a Federal award and thereafter require reporting every five years).*

8. Subrecipient Monitoring and Management/Subrecipient and contractor determinations (§ 200.330).

The non-Federal entity may concurrently receive Federal awards as a recipient, a subrecipient, and a contractor, depending on the substance of its agreements with Federal awarding agencies and pass-through entities. Therefore, a pass-through entity must make case-by-case determinations whether each agreement it makes for the disbursement of Federal program funds casts the party receiving the funds in the role of a subrecipient or a contractor. The Federal awarding agency may supply and require recipients to comply with additional guidance to support these determinations provided such guidance does not conflict with this section.

9. Requirements for pass-through entities (§ 200.331).

All pass-through entities must:

(a) Ensure that every subaward is clearly identified to the subrecipient as a

subaward and includes the following information at the time of the subaward and if any of these data elements change, include the changes in subsequent subaward modification. When some of this information is not available, the pass-through entity must provide the best information available to describe the Federal award and subaward. [Regulation sets forth the required information]

10. Requests for transfer of records (§ 200.334).

The Federal awarding agency must request transfer of certain records to its custody from the non-Federal entity when it determines that the records possess long-term retention value. However, in order to avoid duplicate recordkeeping, the Federal awarding agency may make arrangements for the non-Federal entity to retain any records that are continuously needed for joint use.

11. Methods for collection, transmission and storage of information (§ 200.335).

In accordance with the May 2013 Executive Order on Making Open and Machine Readable the New Default for Government Information, the Federal awarding agency and the non-Federal entity should, whenever practicable, collect, transmit, and store Federal award-related information in open and machine readable formats rather than in closed formats or on paper. The Federal awarding agency or pass-through entity must always provide or accept paper versions of Federal award-related information to and from the non-Federal entity upon request. If paper copies are submitted, the Federal awarding agency or pass-through entity must not require more than an original and two copies. When original records are electronic and cannot be altered, there is no need to create and retain paper copies. When original records are paper, electronic versions may be substituted through the use of duplication or other forms of electronic media provided that they are subject to periodic quality control reviews, provide reasonable safeguards against alteration, and remain readable.

12. Cost Principles (§ 200.400 et seq.).

13. Employee Compensation (§ 200.430)

14. Fringe Benefits (§ 200.431)

15. Conferences (§ 200.432)

A conference is defined as a meeting, retreat, seminar, symposium, workshop or event **whose primary purpose is the dissemination of technical information beyond the non-Federal entity and is necessary and reasonable for successful performance under the Federal award.** Allowable conference costs paid by the **non-Federal entity as a sponsor or host of the conference** may include rental of facilities, speakers' fees, costs of meals and refreshments, local transportation, and other items incidental to such conferences unless further restricted by the terms and conditions of the Federal award. As needed, the costs of identifying, but not providing, locally available dependent-care resources are allowable. Conference hosts/sponsors must exercise discretion and judgment in ensuring that conference costs are appropriate, necessary and managed in a manner that minimizes costs to the Federal award. The Federal awarding agency may authorize exceptions where appropriate for programs including Indian tribes, children, and the elderly. See also §§ 200.438 Entertainment costs, 200.456 Participant support costs, 200.474 Travel costs, and 200.475 Trustees.

16. Entertainment (§ 200.438)

Costs of entertainment, including amusement, diversion, and social activities and any associated costs are **unallowable, except where specific costs that might otherwise be considered entertainment have a programmatic purpose and are authorized** either in the approved budget for the Federal award or with **prior written approval** of the Federal awarding agency.

16. Lobbying (§ 200.450)

(a) The cost of certain influencing activities associated with obtaining grants, contracts, cooperative agreements, or loans is an unallowable cost. Lobbying with respect to certain grants, contracts, cooperative agreements, and loans is governed by relevant statutes, including among others, the provisions of 31 U.S.C. 1352, as well as the common rule, "New Restrictions on Lobbying" published at 55 FR 6736 (February 26, 1990), including definitions, and the Office of Management and Budget "Governmentwide Guidance for New Restrictions on Lobbying" and notices published at 54 FR 52306 (December 20, 1989), 55 FR 24540 (June 15, 1990), 57 FR 1772 (January 15, 1992), and 61 FR 1412 (January 19, 1996).

17. Memberships, subscriptions, and professional activity costs (§ 200.454).

(a) Costs of the non-Federal entity's membership in business, technical, and professional organizations are allowable.

(b) Costs of the non-Federal entity's subscriptions to business, professional, and technical periodicals are allowable.

(c) Costs of membership in any civic or community organization are allowable with prior approval by the Federal awarding agency or pass-through entity.

(d) Costs of membership in any country club or social or dining club or organization are unallowable.

(e) Costs of membership in organizations whose primary purpose is lobbying are unallowable. See also § 200.450 Lobbying.

18. Professional Services (§ 200.459)

(a) Costs of professional and consultant services rendered by persons who are members of a particular profession or possess a special skill, and who are not officers or employees of the non-Federal entity, are allowable, subject to paragraphs (b) and (c) when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Federal government. In addition, legal and related services are limited under § 200.435 Defense and prosecution of criminal and civil proceedings, claims, appeals and patent infringements.

(b) In determining the allowability of costs in a particular case, no single factor or any special combination of factors is necessarily determinative. However, the following factors are relevant:

(1) The nature and scope of the service rendered in relation to the service required.

(2) The necessity of contracting for the service, considering the non-Federal entity's capability in the particular area.

(3) The past pattern of such costs, particularly in the years prior to Federal awards.

(4) The impact of Federal awards on the non-Federal entity's business (i.e., what new problems have arisen).

(5) Whether the proportion of Federal work to the non-Federal entity's total business is such as to influence the non-Federal entity 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.

(6) Whether the service can be performed more economically by direct

employment rather than contracting.

(7) The qualifications of the individual or concern rendering the service and the customary fees charged, especially on non-federally funded activities.

(8) Adequacy of the contractual agreement for the service (e.g., description of the service, estimate of time required, rate of compensation, and termination provisions).

(c) In addition to the factors in paragraph (b) of this section, to be allowable, retainer fees must be supported by evidence of bona fide services available or rendered.

19. Training and Education Costs (§ 200.472)

The cost of training and education provided for employee development is allowable.

20. Travel Costs (§ 200.474)

(a) General. Travel costs are the expenses for transportation, lodging, subsistence, and related items incurred by employees who are in travel status on official business of the non-Federal entity. Such costs may be charged on an actual cost basis, on a per diem or mileage basis in lieu of actual costs incurred, or on a combination of the two, provided the method used is applied to an entire trip and not to selected days of the trip, and results in charges consistent with those normally allowed in like circumstances in the non-Federal entity's non-federally-funded activities and in accordance with non-Federal entity's written travel reimbursement policies.

21. Audit Requirements (§ 200.500 et seq.)



2 CFR Part 200
A comparison to 24 CFR part 85



Definitions that are of interest

- Contract
- Cooperative Agreement
- Grant Agreement
- Supplies
- Third-party in-kind contributions



Internal Controls

- **Must** establish and maintain effective internal control over the federal award that provides **reasonable assurance** that the non-federal entity is managing the award in compliance with federal statutes, regulations, and the terms and conditions of the federal award.
 - **should** be in compliance with Standard for Internal Control in the Federal Government and Internal Control Integrated Framework
- **Must** take prompt action when instances of noncompliance are identified
- **Must** take reasonable measures to safeguard protected personally identifiable information as well as any information that is designated as sensitive
- Computing devices under \$5,000 are allowable as direct costs, but **must** be essential and allocable.
- 200.430 Compensation – Personal Services
 - Strengthens the requirements to maintain standard for internal controls over salaries and wages AND additional flexibility in how non-Federal entities implement processes to meet those standards.

Procurement Standards

- Generally the same as 24 CFR part 85, but emphasis on methodology to increase competition.

Procurement Standards

- 5 main criteria for procurement
 - Documented procurement policy
 - Purchases must be necessary
 - Full and Open Competition
 - Must have a conflict of interest policy
 - Documentation

Procurement Standards

- 5 types of Procurement
 - Micro purchase (less than \$3000)
 - Should make sure there is equitable distribution
 - Small purchase (less than \$150,000)
 - Only need more than one price quote as documentation.
 - No requirement for cost or price analysis
 - Sealed bid
 - Competitive proposal
 - Non competitive proposal

Procurement Standards

- Grace Period for implementation
- 200.318
 - Procurement procedures should avoid duplicative purchases
 - Enter into inter-entity agreements for shared goods and services
- 200.335
 - Whenever practicable – collect, transmit and store award-related information in open and machine readable formats
- 200.449
 - Can be reimbursed for financing costs associated with patent and computer software

Written Procedures

- 200.302 Financial Management
 - Written procedures to implement the requirement of 200.305 Payment
 - Written procedures for determining the allowability of costs in accordance with Subpart E – Cost Principles
- 200.305 Payment
 - Written procedures that minimize the time elapsing between the transfer of fund and disbursement

Sections Requiring a Close Read

- 200.305 Payment
 - A section on Standards governing the use of banks and other institutions as depositories of advance payments
 - Advance payments must be deposited in interest-bearing accounts and interest earned must be remitted annually to the Department of Health and Human Services, but interest amounts up to \$500 per year may be retained for administrative expense.

Sections Requiring A Close Read

- 200.306 Cost Sharing or Matching
 - Voluntary cost sharing is not expected and cannot be used as a factor during the merit review of proposals
 - Required Criteria:
 - Verifiable from the records
 - Not included as contribution for another federal award
 - Are necessary and reasonable for accomplishment of project or program objectives
 - Are allowable under Subpart E- Cost Principles
 - Are not paid by the Federal government under another award
 - Are provided for in the approved budget
 - The value of donated property:
 - Donated land and buildings must not exceed fair market value at the time of donation
 - Donated equipment must not exceed fair market value of equipment of the same age and condition at the time of donation
 - Donated space must not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality
 - Loaned equipment must not exceed fair rental value

Sections Requiring a Close Read

- 200.308 Revision of budget and program plans
 - Largely the same as 24 CFR part 85
 - Recipients are required to report deviations from budget or project scope or objective and request prior approvals for budget and program plan reviews.

Sections Requiring a Close Read

- 200.312 Federally-owned and exempt property
 - Title to federally-owned property remains vested in the Federal government.

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Sections Requiring a Close Read

- 200.318 General Procurement Standards
- Largely the same as 24 CFR part 85
- Requirement to have written standards of conduct covering organizational conflicts of interest
- Organizational conflicts of interest means that because of relationship with a parent company, affiliate, or subsidiary organization, the entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

Sections Requiring a Close Read

- 200.320 Methods of procurement to be followed
- Largely the same as 24 CFR part 85
- Procurement by micro-purchases is acquisition of supplies or services which do not exceed \$3,000 (or \$2,000 in the case of acquisition for construction subject to the Davis-Bacon Act)
 - May be awarded without soliciting competitive quotes if the price is reasonable.

Sections Requiring a Close Read

- 200.327 Financial Reporting
- 200.329 Reporting on real property
- 200.335 Methods for collection transmission and storage of information

Most Helpful New Section – Subpart E Cost Principles

- A comprehensive list of pretty much any type of cost you can think of
- Special Considerations for States, Local Governments and Indian Tribes
 - 200.416 Cost allocation plans and indirect cost proposals
 - 200.417 Interagency service

Second Most Helpful Section – Subpart F Audit Requirements

- According to the COFAR, the goal of course is to improve transparency and accountability by :
 - Increasing audit threshold from \$500,000 to \$750,000
 - Strengthening risk-based approach to determine major programs
 - Providing for greater transparency of audit results
 - Strengthening agency us of the single audit process
 - Providing for public outreach to focus Compliance Supplement on requirements of highest risk

**Second Most Helpful Section –
Subpart F Audit Requirements**

- 200.518 Major Program Determination
 - Focuses audits on the areas with internal control deficiencies that have been identified as having material weaknesses
- 200.520 Criteria for a Low-Risk Auditee
 - Unmodified opinions on statements in accordance with GAAP
 - No material weaknesses
 - Timely filing with Federal Audit Clearinghouse
 - No Audit reporting of concern
 - No waivers
- 200.512 Report Submission
 - Must be submitted electronically to the Federal Audit Clearinghouse
 - Must ensure that reports do not include protected personally identifiable information
- Compliance Supplement
 - Explains exactly what is to be tested

Most Helpful Resource

- <https://cfo.gov/COFAR/>
 - Includes trainings on:
 - Internal Controls
 - Procurement
 - Single Audit
 - Administrative Requirements
 - Indirect Costs
 - Cost principles
