

Recovery and Resilience after the Helene Disaster

CDBG-DR

Procurement and Contracting, Part I

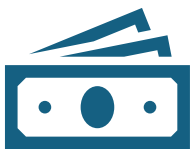
Crista M. Cuccaro
UNC School of Government
Assistant Professor

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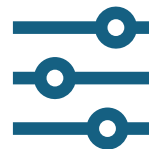


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Where we're going...



Part I:
Procurement by Subrecipients
(That's You!)



Part II:
Crosscutting Federal
Requirements

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Part I Roadmap

- Refresher on Regulatory Landscape
- Procurement under State and Federal Law
- Exceptions to Competitive Procurement

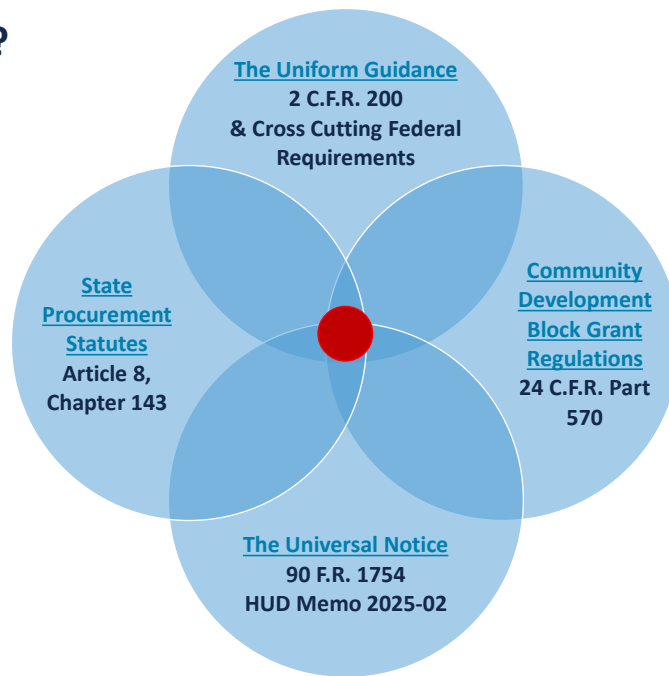
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Refresher on the Regulatory Landscape

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Where are we?



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One Rule to Rule Them All? The Uniform Guidance, 2 C.F.R. 200

- “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards”
- Includes procurement standards found in 2 C.F.R. 200.317 to 327
- Specifies method of competition, prohibitions on restricting competition, and required contract provisions



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Crosscutting Federal Requirements

- Davis-Bacon and Related Acts
- Section 3
- Uniform Relocation Assistance
- Section 104(d)
- Debarment and Suspension
- Byrd Anti-Lobbying Amendment

Note: The Build America, Buy America (BABA) domestic content requirements do not apply to CDBG-DR funding



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CDBG Program Administrative Requirements 24 C.F.R. 570.489(g)



- When procuring property or services to be paid for in whole or in part with CDBG funds, the State shall follow its procurement policies and procedures
- The State must establish requirements for procurement policies and procedures for units of general local government, based on full and open competition—and can default to the Uniform Guidance, 2 C.F.R. Part 200

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The Universal Notice 90 F.R. 1754

- Pre-appropriation notice from HUD that governs the process, procedures, timelines, waivers, and alternative requirements for the use of CDBG-DR funds
- CDBG-DR grants are generally subject to the CDBG regulations found in 24 C.F.R. Part 570—with some modification
- Most of the requirements in the Universal Notice are applicable to the State as the grantee, such as having a Residential Anti-Displacement and Relocation Assistance Plan (RARAP) or publishing contracts funded with CDBG-DR funds on a public website



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State Procurement Statutes Chapter 143, Article 8

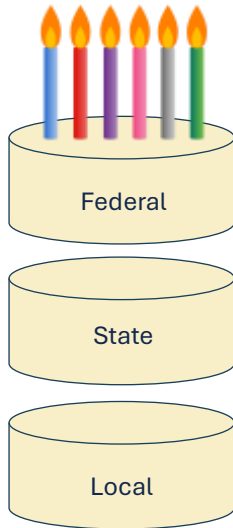


- Procedure for letting of public contracts, G.S. 143-129
- When counties, cities, towns and other subdivisions may let contracts on informal bids, G.S. 143-131
- Requirements for Certain Building Contracts, G.S. 143-128
- Withdrawal of Bid, G.S. 143-129.1
- Minimum Number of Bids for Public Contracts, G.S. 143-132
- E-Verify Compliance, 143-133.3

Remember to also follow your local procurement policy!

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Remember the Most Restrictive Rule



- Federal, state, and local procurement regulations may be inconsistent (and in some cases, are contradictory!)
- Where an inconsistency exists, follow the most restrictive rule as long as it allows for compliance at all levels

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CDBG-DR Funded Programs

Housing:
Owner-
Occupied

Housing:
Multifamily

Housing:
Workforce

Infrastructure

Economic
Development

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Procurement by Subrecipients (That's You!)

Contractor (2 C.F.R. § 200.331(b))	Subrecipient (2 C.F.R. § 200.331(a))
1. Provides the goods and services within normal business operations	1. Determines who is eligible to receive what Federal assistance
2. Provides similar goods or services to many different purchasers	2. Has its performance measured in relation to whether objectives of a Federal program were met
3. Normally operates in a competitive environment	3. Has responsibility for programmatic decision-making
4. Provides goods and services that are ancillary to the operation of the Federal program	4. Is responsible for adherence to applicable Federal program requirements specified in the Federal award
5. Is not subject to compliance requirements of the Federal program as a result of the agreement, though similar requirements may apply for other reasons	5. In accordance with its agreement, uses the Federal funds to carry out a program for a public purpose specified in authorizing statute, as opposed to providing goods or services for the benefit of the pass-through entity

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Procurement by Subrecipients: Housing

Housing

- Multi-family rental housing--reconstruction or rehabilitation activities and new construction
- Construction of workforce housing for purchase by LMI households
- Eligible applicants are private developers, local governments, public or non-profit organizations, and CHDOs/CBDOs
- Competitive application process for workforce housing and large multi-family projects (8 or more units)

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Procurement by Subrecipients: Housing



\$12.4 million of CDBG-DR funding used by the City of Houston towards
\$33 million construction of South Rice Apartments in Houston, TX

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Procurement by Subrecipients: Infrastructure

Infrastructure

- “Infrastructure projects that will help impacted communities become more resilient to current and future natural hazards”
- Eligible applicants are local governments in the MID counties
- Competitive application process

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Procurement by Subrecipients: Infrastructure



\$2,567,032.00 of CDBG-DR funding to create naturalized floodplain area
in Pine Grove, PA

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Procurement by Subrecipients: Economic Development

Economic Development

- Projects will carry out revitalization activities in commercial areas
 - Acquisition, demolition, site preparation, or rehabilitation of commercial structures
 - Assistance to small businesses for rehabilitation and improvements
 - Facade improvements
 - Mixed-use projects with housing components
- Eligible applicants are local governments or non-profit organizations
- Competitive application process

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Procurement by Subrecipients: Economic Development



\$3.3 million of combined CDBG-DR funds and FEMA funding to reconstruct Las Piedras Public Plaza in Puerto Rico

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Remember the Need For State Law Authority

- Chapter 160A: Municipalities
- Chapter 153A: Counties
- Chapter 160D: Community Development
- Chapter 158: Economic Development
- NC Constitution



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A Reminder About Choice Limiting Actions, 24 C.F.R. 58.22

A choice-limiting action is any activity that a grantee undertakes, including committing or expending HUD or non-HUD funds, that reduces or eliminates a grantee's opportunity to choose project alternatives that would avoid or minimize environmental impacts or enhance the quality of the human environment.

Examples of choice-limiting actions include:

- Acquisition
- Leasing
- Rehabilitation
- Demolition
- New construction
- Ground disturbance work such as clearing or grading

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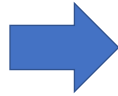
Procurement under State and Federal Law

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The Procurement Puzzle: Essential Questions to Ask

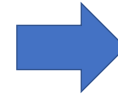
WHAT...

- Is the authority for expenditure?
- Is the source of funding?
- Is being procured?
- Is the cost?



WHAT...

Is the
procurement
method?



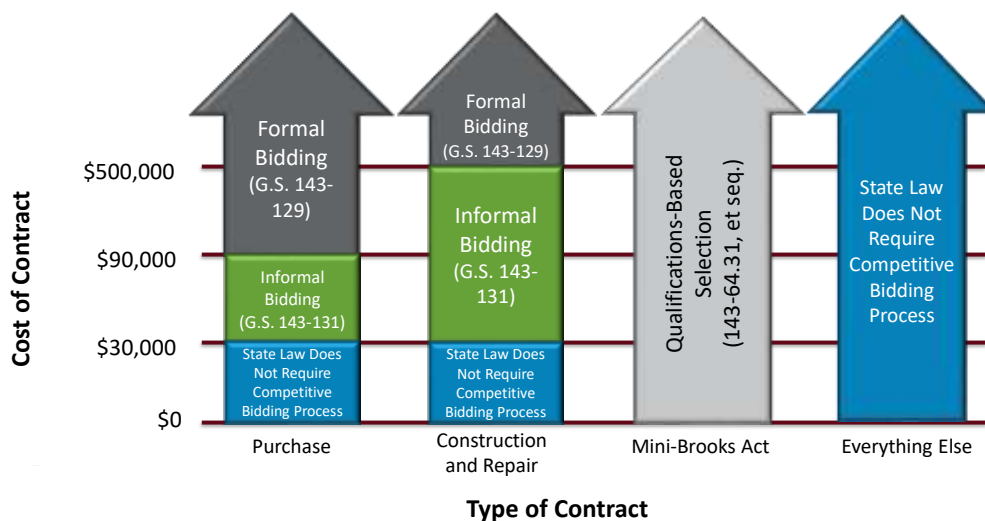
HOW...

Do we procure,
step-by-step?



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Methods of Procurement: North Carolina Law



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Methods of Procurement: The Uniform Guidance, 2 C.F.R. 200.320

1. Informal Procurement Methods

- Micro-Purchase
- Simplified Acquisitions

2. Formal Procurement Methods

- Sealed Bids
- Competitive Proposals

3. Non-Competitive Proposals

- Micro-purchase
- Single source (AKA sole source)
- Emergency
- Approval by federal agency
- Inadequate competition after solicitation

- ✓ **Micro-purchase threshold** is \$10,000 unless a local government self certifies a higher threshold
- ✓ **Simplified acquisition threshold** is \$250,000 unless a lower threshold exists under state law

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Increasing the Micro-Purchase Threshold

- Micropurchase threshold defined at 2 C.F.R. 200.1
- Default threshold is \$10,000 and micropurchases can be awarded without soliciting competitive quotes if the price is reasonable
- 2 C.F.R. 200.320(a)(1)(iv) allows a local government to increase the micropurchase threshold up to \$50,000 to align with a higher threshold consistent with state law
- State law allows does not impose competition for purchases and construction or repair until \$30,000
- State law does not impose competition for general services



Decision Point

Increasing the micropurchase threshold can simplify procurement under the UG.

For more info from the SOG about increasing micropurchase threshold, including a sample self-certification, [see here](#).

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Key Expectations of Procurement under the UG

2 C.F.R. 200.318



- Full and open competition is mandatory
- Must have conflict of interest and procurement policies in place
- Must avoid purchase of unnecessary or duplicative items
- Must award contracts only to responsible contractors
- ***Contractors that develop specifications, requirements, statements of work, or invitations for bids or proposals must be excluded from bidding***
- Must maintain proper documentation and records regarding procurements
- Emphasis on the use of interlocal cooperative agreements
- Extremely limited use of time and material contracts



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At a Glance: Applying the Most Restrictive (or Specific) Rule

The Uniform Guidance is More Restrictive

- Services require competitive procurement
- Default micro-purchase threshold (\$10,000) is lower than NC informal bidding threshold for purchases and construction or repair (but can be increased)
- Formal (sealed) bidding threshold is \$250,000 for construction or repair, which is lower than NC threshold
- Fewer allowances for noncompetitive procurement

North Carolina Law is More Restrictive

- The formal (sealed) bidding threshold of \$90,000 for the purchase of goods
- Three-bid minimum for formal construction or repair contracts
- Procedural requirements for Historically Underutilized Business (HUB) participation statutes for “building projects” of \$300,000 or more
- Formal bidding statute requires place and timing for publication
- Governing board approval is required for formal procurement (but can be delegated for purchases)

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Procurement in Practice: A Sanitary Sewer Lines Project



- The City of Coatesdale has been awarded \$1,499,228.00 for its Northwest Sanitary Sewer Lines Project
- Scope includes replacing sewer lines, replacing sanitary sewer manholes, lining and rehabilitating sanitary sewer lines, lining sanitary manhole covers, and replacing paving
- The City will also begin and finish rehabilitation on a damaged lift station and support the 79.17% Low-Moderate Income (LMI) service area surrounding the station by installing a new emergency electrical generator

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Pre-Procurement Considerations

Conflict of Interest Policy, 2 C.F.R. 200.318(c)(1)

Maintain **written** standards of conduct covering conflicts of interest and governing the actions of employees engaged in the selection, award and administration of contracts.

Procurement Policy, 2 C.F.R 200.318(a)

Have and use **documented** procurement procedures, consistent with federal, state, and local laws and regulations for the acquisition of property or services under a Federal award or subaward. Policy must conform to the procurement standards in 2 C.F.R. 200.317 – 200.327.



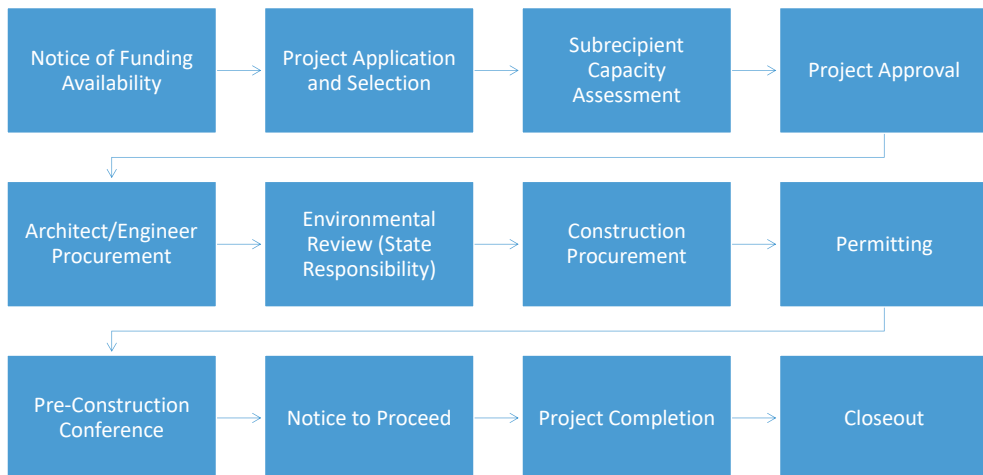
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The Lifecycle of a Construction Project



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The Lifecycle of a CDBG-DR Construction Project



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Starting with Design: A Sanitary Sewer Lines Project

- Start by procuring A/E services using a **Request for Qualifications** (RFQ)
- Subrecipient is soliciting firms' qualifications and will select the **best qualified firm** without regard to price
- **Cannot solicit price** (except unit price) or new work product
- Subrecipient must "announce" requirements publicly, but no specific time period or place for publication is required
- Negotiate a "**fair and reasonable fee**" with best qualified firm; if negotiations fail, proceed to next best qualified firm



G.S. 143-64.31
2 C.F.R. 200.320(b)(2)

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Reminder: A/E Services May Be Required by State Law G.S. 133-1.1(a)

For some projects involving public building and public funds, specifications must be **drawn and sealed** by a licensed architect or engineer:

Type of Project	Cost
Non-structural building repair	\$300,000 or more
Structural building repair	\$135,000 or more
New construction/additions	\$135,000 or more
Repair of life safety systems	\$100,000 or more

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Procuring A/E Services: A Few Warnings

2 C.F.R. 200.319(b) states the following: “To ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids must be excluded from competing on those procurements.”

- State law does not have an equivalent prohibition

G.S. 143-64.32 provides an exception to the Mini Brooks Act that allows local governments to procure A/E services without evaluating qualifications if the fee is under \$50,000

- The Uniform Guidance does not have an equivalent exception



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Procuring Construction Services: A Sanitary Sewer Lines Project

Several Steps Needed before Solicitation

- ✓ Perform cost or price analysis
- ✓ Socioeconomic contracting considerations
- ✓ Obtain Davis-Bacon wage determinations (more on this in Part II)



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Performing a Cost or Price Analysis (CPA), 2 C.F.R. 200.324(a)

- Subrecipient must perform a CPA for every procurement transaction above the simplified acquisition threshold
- Price analysis is based upon the total cost of a contract
- Cost analysis examines the component parts of a contract

Step 1: Develop an independent estimate **prior** to soliciting bids or proposals

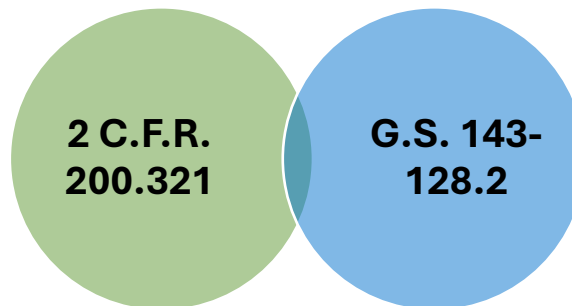
Step 2: Compare received offers against the independent estimate and, if applicable, to other offers to determine that the pricing is **reasonable**

SOG blog post with CPA templates available [here](#).

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Socioeconomic Contracting, 2 C.F.R. 200.321

“When possible, the recipient or subrecipient should ensure that small businesses, minority businesses, women's business enterprises, veteran-owned businesses, and labor surplus area firms are considered [...].”



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Encouraging Participation by Historically Underutilized Businesses, G.S. 143-128.2



A building project?

- HUBs defined by [G.S. 143-128.4](#)
- Formal HUB requirements of [G.S. 143-128.2](#) apply to “building projects” costing \$300,000+ without State funds or \$100,000+ if State grant funds are included
- Four basic requirements of local governments:
 - Goal-setting
 - Good faith efforts
 - Requiring bidders to make good faith efforts
 - Reporting activity to HUB Office

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Procuring Construction Services: Advertising

Advertisement in “newspaper of general circulation” or electronically advertised

Advertisement must be published to allow no less than 7 full days to lapse *in between* publication date and date of bid opening

Advertisement must include:

- Time and place where specifications may be obtained
- Date, time, and place of bid opening
- Reservation of unit’s right to reject all bids



G.S. 143-129(b)

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Consider This: Electronic Advertising

Decision Point

Authorizing electronic advertisement can streamline the publication process required under state law.

“Electronic means” is not defined, but common practice is to publish on the unit’s website and eVP.

For a sample resolution, [see here](#).



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Procuring Construction Services: Public Bid Opening

- Bids must be sealed
- Bids must be received by date and time of the advertised public bid opening
- Bids for construction or repair work must be in paper form
- Bids for construction or repair work must be accompanied by a bid bond or other security in the amount of 5% of the bid
- Bids must be opened in public



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Three-Bid Minimum, G.S. 143-132

- Under state law, formal construction or repair contracts are subject to three-bid minimum
- If three bids are not received, the solicitation must be readvertised
- Upon readvertisement, if three bids are not received, the unit can award to the LRRB



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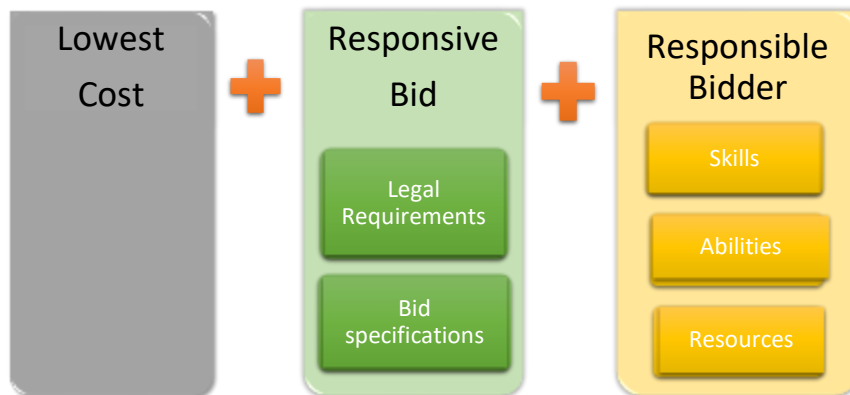
Three-Bid Minimum, G.S. 143-132

To Count or Not to Count: 3-Bid Minimum Rule

DEFECT	DOES NOT COUNT (cannot "consider or accept")	DOES COUNT (But Must Reject)
Late	✓	
No bid bond	✓	
HUB – No Affidavit A/B or does not list HUBs on bid		✓
Not sealed or not in paper form		✓
Does not substantially conform to specs		✓
Did not attend mandatory pre-bid meeting		✓
Not prequalified (if using prequalification)		✓
Not licensed		✓

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Procuring Construction Services: Bid Evaluation



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Procuring Construction Services: Contract Award

Board approval required by statute, but board can delegate awarding authority for purchase contracts to administrative official or employee

Board can NOT delegate authority to award construction or repair contracts in the formal range

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Procuring Construction Services: Bonds Required

G.S. 44A-26

Required for 100% of cost of each contract costing over \$50,000 on projects costing over \$300,000

Must be executed by NC-licensed surety

2 C.F.R. 200.326

P&P bonds required for 100% of the contract price

Performance Bond

- Secures contractor's performance
- Protects local government

Payment Bond

- Ensures payment to subcontractors
- Protects subcontractors

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Sealed Bidding for Construction: A Combination Approach

- Required starting at \$250,000
- Cost or price analysis required
- Bid bond for at least 5% of the bid cost
- Performance and payment bonds for 100% of the cost of the contract(s) for any contracts over \$50,000
- HUB requirements for "building projects"
- Apply the three-bid minimum
- Governing board approval required
- Publish in newspaper for at least 7 days (electronic advertising is authorized)

The UG

State law

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Construction Contracts Require More under State Law

- Notice of licensure requirements; GC required for projects costing \$40,000 or more
- Retainage allowed for contracts over \$100,000, G.S. 143-134.1
- Construction notice in writing, G.S. 160A-499.4 (cities); G.S. 153A-457 (counties)
- Dispute resolution required in contracts for building construction, regardless of cost

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What about Alternative Construction Delivery Methods?

- **Construction Manager at Risk (CMAR)**
 - **Design-Build (DB)**
 - **Design-Build Bridging (DBB)**
-
- State law requires procurement of these alternative methods using qualifications-based selection under the Mini-Brooks Act
 - The Uniform Guidance requires price to be solicited for services other than A/E and qualifications-based selection **cannot** be used when services provided by A/E firms are a potential source to perform the work
 - ***Not clear that a subrecipient can comply with both state law and the Uniform Guidance—proceed with caution and consult your attorney***



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Competitive Proposals (RFPs) under the Uniform Guidance

- Applies when the value of procurement of property or services exceeds the Simplified Acquisition Threshold (“SAT”) **or** a lower threshold established under state or local law **and** when the conditions for sealed bidding are inappropriate
- Public notice required, but no time or place specified
- Identify all evaluation factors and their relative importance
- Procuring agency must have a written method of conducting evaluations and making selections
- Solicitation from an “adequate number” of qualified vendors

The SAT is \$250,000 for each type of contract except those for the purchase of goods, which is \$90,000

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Document, document, document!

- [2 C.F.R. 200.318\(i\)](#): Records Showing Procurement History, Rationale for Method, Basis for Selection of Contract Type, Contractor, and Price
- [24 C.F.R. 506](#): Records to be Maintained



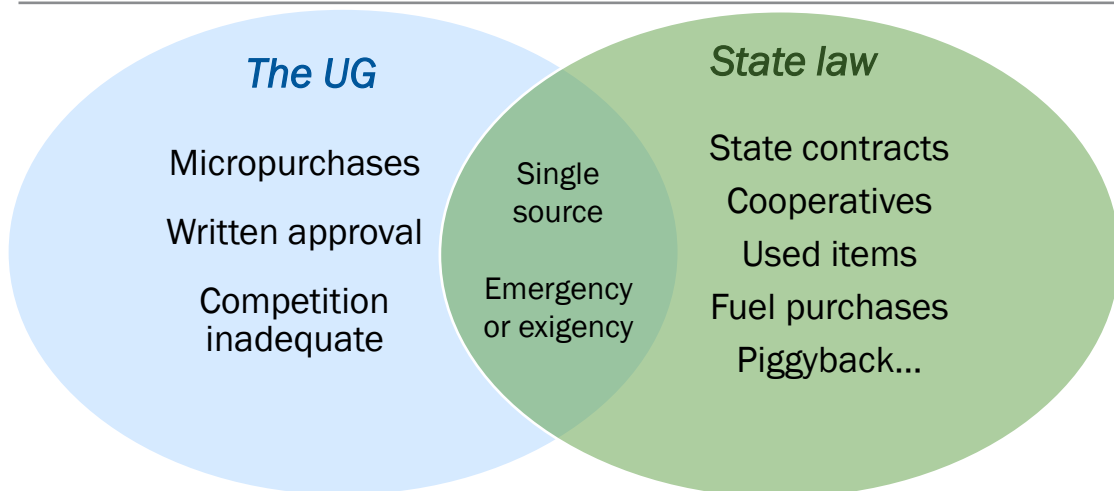
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Exceptions to Competitive Procurement

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Non-Competitive Procurement is the Exception



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Emergency under North Carolina Law, G.S. 143-129

- Applies to purchase and construction and repair contracts in the formal and informal ranges
- Applies in the event of a “special emergency involving the health and safety of the people or their property”
- Emergency must be imminent or existing, not generally anticipated to occur in the future
- Cannot rely upon emergency exception if competitive bidding will not exacerbate harm
- Governing board approval **not** required



Emergency under North Carolina Law, G.S. 166A-19.3

- Broad definition for emergency, ranging from weather-related incidents to technological failures
- Must involve actual or imminent threat of widespread or severe damage, injury, or loss of life or property
- Recently modified to add “supply chain disruption” that creates a significant threat to a local government's ability to acquire products or services required to provide or restore essential services, such as electricity and water
 - Using this “exception” requires the governing board to adopt an emergency declaration regarding the supply chain disruption
 - See the [City of Gastonia](#) for an example of a supply chain emergency declaration

Sole-Sourcing Under North Carolina Law, G.S. 143-129(e)

- Applies to purchase contracts in the formal and informal range
- Applies when:
 - (1) performance or price competition for a product are not available;
 - (2) a product is available from only one source of supply; or
 - (3) standardization or compatibility is the overriding consideration
- Governing board approval is **required** for contracts in formal and informal range

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Procurement Resources Available to You

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The Partners are Here to Support You!

- School of Government Sample [Uniform Guidance Procurement Policy](#)
- School of Government [Federal and State Procurement Chart](#)
- School of Government [Most Restrictive Rule Summary](#)
- School of Government [blog posts about procurement](#)
- School of Government [Sample Conflict of Interest Policy](#) (ARPA)



NORTH CAROLINA
DEPARTMENT of
COMMERCE

