

First Amendment to the 2008 FCC-USAC Memorandum of Understanding

The following amends and replaces Sections I, II, III.A, IV.B and VI and Attachment E of the *2008 Memorandum of Understanding Between the Federal Communications Commission and the Universal Service Administrative Company*, effective as of September 9, 2008, and the *Procedures for Approval of USAC Contract Modifications entered into between the FCC and USAC*, effective March 12, 2012:

I. PURPOSE AND PARTIES

The Federal Communications Commission (“Commission”) and the Universal Service Administrative Company (“USAC” or “the USF Administrator”) enter into and agree to comply with this Memorandum of Understanding (“MOU”) to facilitate the efficient management, oversight and execution of the Commission’s federal universal service program, also known as the Universal Service Fund (“USF”). The Commission is responsible for the effective and efficient management and oversight of the USF, including USF policy decisions. USAC plays a critical role in the success of the USF programs both through effective administration of the programs and by providing timely and relevant information and analysis to the FCC to inform and support the policy-making process. This MOU includes the following Attachments: USAC Confidential Information Use and Disclosure Agreement (Attachment A) (“USAC Confidentiality Agreement”), USAC Financial Reports (Attachment B), USAC Programmatic Reports/Data (Attachment C), USAC Performance Measures (Attachment D), and Procurement Standards (Attachment E). The foregoing five Attachments, and all appendices thereto, are incorporated herein by reference and made a part of this MOU.

II. [RESERVED]

III. OPERATING RELATIONSHIP BETWEEN THE USAC AND THE COMMISSION

A. USAC

The Commission designated USAC as the USF Administrator in 1997 and made USAC the permanent Administrator in 1998 to administer the four universal service programs: high cost, low income, rural health care, and schools and libraries. USAC is responsible for the daily administration of the USF consistent with the Communications Act of 1934, as amended, including section 254, 47 U.S.C. 254, the rules, orders, and written directives and other instructions, promulgated by the Commission or its authorized bureaus and offices, this MOU, and other law as applicable, including government and Commission accounting requirements.¹ The monies of the USF are federal funds.

USAC will track and retain, and will provide the Commission upon request, with records of the expenditures that USAC, its contractors, and its vendors incurred in connection with (i) review, investigation, or any other work associated with USF fraud or alleged fraud against the USF, including but not limited to expenditures related to audits, support of Department of

¹ See 47 C.F.R. Part 54, Universal Service

Justice and FCC (including Office of the Inspector General (“OIG”)) investigations, civil or criminal prosecutions, remission and/or restitution proceedings, and review and consideration of settlement proposals, and (ii) processing and disbursement of improper payments of universal service funds to beneficiaries that engaged in fraud, or other improper behavior that adversely affected the USF. USAC shall ensure that these records and supporting documentation are maintained in a manner that will allow expenditures to be related to each subject contributor, service provider, or beneficiary.

All property (personal, real, and intangible) acquired by USAC at any time in the course of its administration of the USF including, but not limited to, software, data, computer equipment, furniture, and office furnishings, shall, subject to applicable law, be transferred to the Commission or Commission designee in the event that USAC is no longer designated as the USF Administrator.

USAC shall continue to report to, coordinate with, and seek any necessary approvals from the Commission with respect to bankruptcy, fraud, and other litigation that could affect the integrity of the USF. In addition, USAC shall cooperate with the OIG so that it can fulfill its responsibilities with respect to the activities of USAC.

SECTIONS III B. TO IV A. ARE NOT CHANGED FROM 2008 MOU

IV. B. FCC OVERSIGHT OF USAC PROCUREMENTS

1. Annual Procurement Plan. USAC shall, on an annual basis, provide the FCC a procurement plan no later than December 1 of each year. The procurement plan shall include all anticipated procurements and contract modifications for the upcoming fiscal year with an actual or anticipated value in excess of \$100,000. The plan shall include for each procurement: the procurement name; explanation of need for the procurement; a description of the goods and/or services to be procured; estimated cost; whether a full and open competition will be conducted or the justification for a non-competitive action. The procurement plan shall also address USAC’s planned efforts to utilize small businesses, minority businesses, and women’s business enterprises (see 2 C.F.R. § 200.32).

2. Quarterly Reporting. USAC shall provide to the FCC on a quarterly basis, a report showing the status of USAC procurement activity and advance notice of any upcoming procurement activity. The report shall identify all procurements and contract modifications (contracts or contract modifications awarded or executed in the past 90 days, in-process, and anticipated over the next 120 days) with an actual or anticipated value in excess of \$100,000. To the extent that a procurement(s) above this threshold arises after submission of a quarterly report and needs to be completed prior to the next quarterly report, USAC shall promptly notify the Managing Director and/or his or her designee via email once the need for such procurement is known. The quarterly report shall include for each ongoing procurement: the procurement name; a description of the goods and/or services to be procured; the status of the procurement; the contract type (fixed price, labor-hour, time and materials, etc.); whether a full and open competition will be conducted, if not, the justification for other than full and open competition (including a non-competitive action); the estimated award date; and the estimated contract value (including all option years). For each completed procurement

action, the report shall also include: the name of the contractor; the date of award or contract modification; the value of the modification or awarded contract (including all priced option years); and the size status of the contractor (under the North American Industry Classification System (NAICS) code applicable to the procurement). USAC and the FCC shall meet monthly, as needed, to review this report and any other pertinent procurement information requested by the FCC.

3. Procurement Review. Competitive procurements and procurement activities greater than \$500,000 including contract modifications that cause the total value of a contract to exceed \$500,000, shall be approved in advance at the discretion of the Managing Director. Non-competitive contracting actions exceeding \$100,000 require advance approval of the Managing Director. In addition, the Managing Director reserves the right to review any other USAC procurement upon request consistent with the Commission's universal service oversight responsibilities.

4. Transparency. USAC shall post all competitive solicitations in excess of \$25,000 on the USAC and FedBizOpps websites. In addition, USAC shall post a summary of each contract award in excess of \$25,000 on the USAC website. Each summary shall include the name and address of the awardee, award date, a short description of the work, contract type, contract value, and contract term (including option periods).

5. Annual Procurement Report. USAC shall provide a fiscal year-end procurement report for procurements in excess of \$100,000 no later than February 1 of each year. For each completed procurement for the past fiscal year, the report shall include: (1) the award amount (including option periods); (2) a short description of the goods or services procured; (3) an explanation of any cost savings achieved or the cost effectiveness of the selection, as applicable; (4) an explanation of the impact of the contract on program performance, including the application of any contractual incentives or penalties, as applicable; (5) a description of the full and open competition that was achieved (including the number of proposals received) or the justification for conducting other than a full and open competition (including a non-competitive award); and (6) the size status of the awardee; and (7) whether USAC considered the selection excellent, good, fair, poor, very poor, with a narrative supporting the rating selected.

6. Agreed-upon procedures review. A review of USAC procurement activities shall be included in the annual agreed-upon procedures review. In addition, USAC procurement activities shall be reviewed periodically through USAC's Office of Management and Budget Circular A-123 internal control program.

7. Procurement Standards and Procedures. Except as set forth below, USAC shall implement and adhere to the procurement standards and procedures set forth in 2 C.F.R. §§ 200.318-.321, 200.323, and 200.325-.326, & App. II to 2 C.F.R. Part 200 of (including any amendments to these sections during the term of the MOU), for the procurement of supplies and other expendable property, equipment, real property leases, and services with Federal funds. As used in these procurement standards: the terms "non-Federal entity" and "recipient" shall refer to USAC; the term "Federal awarding agency" shall refer to the FCC; the terms "under Federal Awards" or "under the Federal award" shall refer to contracts awarded with Federal funds; and the micro-purchase and simplified acquisition thresholds are defined in 2 C.F.R. §§ 200.67 and 200.88. The Parties agree to cooperate in resolving any ambiguities regarding the application of the 2 C.F.R. Part 200 procurement standards to USAC. USAC shall abide by these standards for all

procurements absent waiver of any provision by the FCC or by agreement of the Parties. A copy of the current procurement standards is set forth in Attachment E. (These regulations, and any subsequent amendments, are available at <http://www.gpo.gov/>).

8. By statute the Universal Service Fund is exempt from the Antideficiency Act until December 31, 2015, unless Congress acts to extend it. If the current exemption or a future Congressional extension expires, or upon the written instruction of the Managing Director, USAC shall not enter into contracts that constitute open-ended commitments of universal service funds. Under such circumstances USAC contracts shall:

- i) establish USAC's maximum legal commitment at the time of award, either by establishing a firm fixed price or a not-to-exceed price that the contractor exceeds at its own risk;
- ii) not include any commitment by USAC to provide indemnification of any other party unless such indemnification has a stated not-to-exceed amount and such amount is considered a part of the total contract price for USAC Board of Directors and, if applicable, FCC staff approval purposes;
- iii) not include any provision authorizing another party to unilaterally increase the contract price; and
- iv) not include any provision authorizing automatic renewal or extension of the contract without prior written authorization of USAC, except for items contracted on a month-to-month basis, provided that USAC: (a) includes a maximum duration or financial commitment in month-to-month contracts; and (b) does not extend such contracts into any period during which the Universal Service Fund is not exempt from the federal Antideficiency Act.

9. Transferability of Intellectual Property Rights. To ensure compliance with 47 C.F.R. § 54.702(l), USAC shall include appropriate language in its contracts to ensure that its intellectual property rights may be transferred to the FCC or a party identified by the FCC in the event that USAC's participation in administering the universal service support mechanisms ends.

10. Contract Administration. USAC shall provide information regarding contractor performance upon reasonable request by the FCC, and shall cooperate with any review or oversight audit by the FCC or the Comptroller General regarding USAC's contracting practices and/or USAC's contractors' performance.

11. Conflicts of Interest. In addition to complying with the conflict of interest requirements in 2 C.F.R. § 200.318(c), USAC, as well as its employees, officers, directors, contractors, subcontractors, consultants, agents, or representatives, shall not award any noncompetitive contracts to a USAC affiliate, including but not limited to NECA or its successors or assigns, or to any entity that has a representative serving on the board of USAC or NECA. In competitive procurements, allowing participation by NECA will be considered on a case-by-case basis after assessing potential organizational conflicts of interest.

12. Performance-Based Contracting. USAC shall use performance-based contracting for the procurement of services when feasible to establish meaningful and measurable performance standards. To give effect to the performance standards, USAC shall include financial incentives and penalties in its performance based contracts.

13. Training. USAC shall ensure that all employees involved in procurement activities receive training designed to ensure such activities are consistent with the provisions of this Section IV.B.

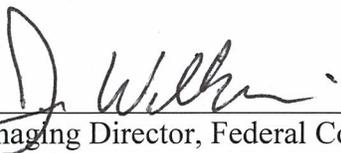
14. Competition Advocate. USAC shall maintain a competition advocate position to perform duties consistent with applicable provisions in this Section. The Competition Advocate shall submit an annual report to the Board and the FCC.

[SECTIONS IV.C. TO V. ARE NOT CHANGED FROM 2008 MOU]

VI. REVISION AND DURATION

This First Amendment to the MOU will become effective upon signature by both parties below, and the MOU, as amended by this First Amendment, will remain in effect for two years from the later of the dates set forth below, unless revised or terminated by mutual agreement in writing between the Commission and USAC. The Board of Directors of USAC or officials at the FCC may, at any time, propose changes, modifications, or revisions to the MOU.

The Parties acknowledge and agree that continuous and consistent administration of the USF is vital to the accomplishment of the missions of the Commission and the USF. USAC agrees to furnish all necessary services and personnel to ensure the continuity and consistency of USF administration in the event of any revision or termination of this or any subsequent MOU or any other relevant change to USF administration. The Parties will act in good faith to provide for such continuity and consistency of USF administration in such an event and to provide for reasonable reimbursement for the expenses incurred by USAC in providing such continuity and consistency.



Managing Director, Federal Communications Commission

11/14/2014
Date



Chief Executive Officer, Universal Service Administrative Company

11/14/14
Date

ATTACHMENT E
PROCUREMENT STANDARDS

§ 200.318 General procurement standards.

(a) The non-Federal entity must use its own documented procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(b) Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(c)(1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the performance of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent must participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity must neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.

(2) If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

(d) The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(e) To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal government, the non-Federal entity is 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.

(f) The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(g) The non-Federal entity is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(h) The non-Federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(i) The non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(j)(1) The non-Federal entity may use time and material type contracts only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and material type contract means a contract whose cost to a non-Federal entity is the sum of:

(i) The actual cost of materials; and

(ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

(2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

(k) The non-Federal entity 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 procurements. These issues

include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction.

§ 200.319 Competition.

(a) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. 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. Some of the situations considered to be restrictive of competition include but are not limited to:

- (1) Placing unreasonable requirements on firms in order for them to qualify to do business;
- (2) Requiring unnecessary experience and excessive bonding;
- (3) Noncompetitive pricing practices between firms or between affiliated companies;
- (4) Noncompetitive contracts to consultants that are on retainer contracts;
- (5) Organizational conflicts of interest;
- (6) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement; and
- (7) Any arbitrary action in the procurement process.

(b) The non-Federal entity 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 those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(c) The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations:

(1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be 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; and

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

(d) The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

§ 200.320 Methods of procurement to be followed.

The non-Federal entity must use one of the following methods of procurement.

(a) Procurement by micro-purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed \$3,000 (or \$2,000 in the case of acquisitions for construction subject to the Davis-Bacon Act). To the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.

(b) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.

(c) Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions

of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (c)(1) of this section apply.

(1) In order for sealed bidding to be feasible, the following conditions should be present:

- (i) A complete, adequate, and realistic specification or purchase description is available;
- (ii) Two or more responsible bidders are willing and able to compete effectively for the business; and
- (iii) 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.

(2) If sealed bids are used, the following requirements apply:

- (i) The invitation for bids will be publicly advertised and bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids;
- (ii) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;
- (iii) All bids will be publicly opened at the time and place prescribed in the invitation for bids;
- (iv) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, 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; and

(v) Any or all bids may be rejected if there is a sound documented reason.

(d) Procurement by competitive proposals. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

- (1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical;
- (2) Proposals must be solicited from an adequate number of qualified sources;
- (3) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;
- (4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and
- (5) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement 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.

(e) [Reserved]

(f) Procurement by noncompetitive proposals. Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:

- (1) The item is available only from a single source;
- (2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
- (3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or
- (4) After solicitation of a number of sources, competition is determined inadequate.

§ 200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.

(a) The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

(b) Affirmative steps must include:

- (1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
- (2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
- (3) 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;

(4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

(5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

(6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.

§ 200.322 [Reserved].

§ 200.323 Contract cost and price.

(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. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

(b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under Subpart E—Cost Principles of this Part. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.

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

§ 200.324 [Reserved].

§ 200.325 Bonding requirements.

For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the non-Federal entity provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

(a) A bid guarantee from each bidder equivalent to five percent of the bid price. The "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 will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.

(b) A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(c) A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

§ 200.326 Contract provisions.

The non-Federal entity's contracts must contain the applicable provisions described in Appendix II to Part 200—Contract Provisions for non-Federal Entity Contracts Under Federal Awards.

Appendix II to Part 200—Contract Provisions for Non-Federal Entity Contracts Under Federal Awards

In addition to other provisions required by the Federal agency or non-Federal entity, all contracts made by the non-Federal entity under the Federal award must contain provisions covering the following, as applicable.

(A) Contracts for more than the simplified acquisition threshold currently set at \$150,000, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

(B) All contracts in excess of \$10,000 must address termination for cause and for convenience by the non-Federal entity

including the manner by which it will be effected and the basis for settlement.

(C) Equal Employment Opportunity. Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of “federally assisted construction contract” in 41 CFR Part 60–1.3 must include the equal opportunity clause provided under 41 CFR 60–1.4(b), in accordance with Executive Order 11246, “Equal Employment Opportunity” (30 FR 12319, 12935, 3 CFR Part, 1964–1965 Comp., p. 339), as amended by Executive Order 11375, “Amending Executive Order 11246 Relating to Equal Employment Opportunity,” and implementing regulations at 41 CFR part 60, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.”

(D) Davis-Bacon Act, as amended (40 U.S.C. 3141–3148). When required by Federal program legislation, all prime construction contracts in excess of \$2,000 awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 3141–3144, and 3146–3148) as supplemented by Department of Labor regulations (29 CFR Part 5, “Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction”). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The non-Federal entity must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland “Anti-Kickback” Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States”). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency.

(E) Contract Work Hours and Safety Standards Act (40 U.S.C. 3701–3708). Where applicable, all contracts awarded by the non-Federal entity in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

(F) Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of “funding agreement” under 37 CFR § 401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency.

(I) Debarment and Suspension (Executive Orders 12549 and 12689)—A contract award (see 2 CFR 180.220) must not be made to parties listed on the governmentwide Excluded Parties List System in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR Part 1986 Comp., p. 189) and 12689 (3 CFR Part 1989 Comp., p. 235), “Debarment and Suspension.” The Excluded Parties List System in SAM contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.

(J) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)—Contractors that apply or bid for an award of \$100,000 or more must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.

(K) See § 200.322 Procurement of recovered materials.