



## Comparison of Ohio Procurement Law and Federal Uniform Guidance



This document is intended to provide a comparison of the procurement rules and regulations prescribed by both federal law and state law, as they relate to Ohio counties using ARPA funds. Counties must comply with both state and federal law, where possible. Where federal requirements are more restrictive than state law, federal law must be followed. Where state law is more restrictive than federal requirements, state law must be followed.

The information presented in this chart was prepared by Bricker Graydon LLP as a service to the County Commissioners Association of Ohio. This information is intended solely for informational purposes of CCAO and its members. The contents herein are not intended to constitute legal advice to, and may not be relied upon by, any party. Readers should engage legal counsel to provide legal advice related to any specific transaction.

Federal Law	State Law
<b>GENERAL REQUIREMENTS</b>	
County must maintain a contract administrative system for oversight of contract compliance. <i>2 C.F.R. § 200.318(b)</i>	No equivalent.
County must avoid unnecessary/duplicative purchases and <b>consider</b> consolidating or breaking out procurements to achieve a more economical purchase, and consider consolidating or breaking out procurements to achieve a more economical purchase. <i>2 C.F.R. § 200.318(d)</i>	Contract cannot be divided for the purpose of avoiding competitive bidding requirements. Separate contracts must be “conceptually separate and unrelated to each other, or encompass independent or unrelated needs.” <i>R.C. 153.55</i>
County is <b>encouraged</b> to use federal surplus property where feasible instead of purchasing new property. <i>2 C.F.R. § 200.318(f)</i>	Competitive bidding not required when the purchase is from the federal government. <i>R.C. 307.86(C)</i>

Federal Law	State Law
<p>County is <b>encouraged</b> to use value engineering for construction contracts where applicable.</p> <p><i>2 C.F.R. § 200.318(g)</i></p>	<p>No equivalent.</p>
<p>County (and not federal government) is responsible for the settlement of all contractual and administrative issues arising out of procurements, including protests, disputes, and claims.</p> <p><i>2 C.F.R. § 200.318(k)</i></p>	<p>No equivalent.</p>
<p>Must ensure full and open competition and avoid measures that restrict competition, including:</p> <ul style="list-style-type: none"> <li>• Unreasonable requirements</li> <li>• Unnecessary experience and bonding requirements</li> <li>• Noncompetitive pricing between companies</li> <li>• Noncompetitive awards to consultants on retainer</li> <li>• Organizational conflicts of interest</li> <li>• Specifying only brand name without permitting equal products</li> <li>• Arbitrary actions</li> </ul> <p><i>2 C.F.R. § 200.319(b)</i></p>	<p>No equivalent.</p>
<b>CONTRACT COSTS AND PRICE</b>	
<p>County must:</p> <ul style="list-style-type: none"> <li>• Perform a cost or price analysis for every procurement over \$250,000 (depth of the analysis is dependent on the facts of the procurement).</li> <li>• Perform an independent estimate of costs for every procurement over \$250,000 prior to receiving bids or proposals.</li> <li>• Negotiate profit as a separate element of price where non-competitive procurement is used.</li> <li>• Costs must conform to the cost principles in 2 C.F.R. §§ 200.400-475 (i.e. be "reasonable and necessary").</li> </ul> <p><i>2 C.F.R. § 200.324</i></p>	<p>For county buildings and bridges, contract documents and an estimate of project cost to be filed in the County Auditor's office.</p> <p>County cannot award a contract where bids exceed 10% of the published estimate.</p> <p><i>R.C. 153.12, 153.28</i></p>

Federal Law	State Law
<b>ALLOWABLE PROCUREMENT METHODS</b>	
<p><u>"Micro-Purchases"</u></p> <p>Competitive procurement is not necessary for the smallest value contracts; County need only determine that the price is "reasonable." The default threshold is \$10,000, but County may raise this threshold to \$50,000 through self-certification process.</p> <p>(Note: County cannot divide a larger purchase into smaller, lower cost contracts to trigger micro-purchase and avoid competitive procurement.)</p> <p><i>2 C.F.R. §§ 200.67, 200.320(a)</i></p>	<p>No bidding necessary for purchases less than \$50,000.</p> <p>(Note: County cannot divide a larger purchase into smaller, lower cost contracts to trigger micro-purchase and avoid competitive procurement.)</p> <p><i>R.C. 307.86</i></p>
<p><u>"Small Purchases"</u></p> <p>A "middle ground" process that applies to purchases over \$10,000, but less than \$250,000. County must obtain an "adequate number" (i.e., at least two) price quotations before awarding contract.</p> <p>County must award to the lowest quote from a "responsible" vendor.</p> <p>(Note: County cannot divide a larger purchase into smaller, lower cost contracts to trigger small purchase and avoid competitive procurement.)</p> <p><i>2 C.F.R. §§ 200.88, 200.320(b)</i></p>	<p>No direct equivalent; purchase is either above the \$50,000 threshold, and therefore subject to bidding, or below the \$50,000 threshold, and therefore not subject to bidding.</p> <p>(Note: There is a disconnect between state and (default) federal law on these thresholds:</p> <ul style="list-style-type: none"> <li>• Under \$10,000 – State and federal law agree; no competition necessary.</li> <li>• Between \$10,000 and \$50,000 – Federal law is more restrictive; County must solicit "adequate" number of quotes.</li> <li>• Over \$50,000 – State law is more restrictive; competitive procurement required.</li> </ul> <p>This inconsistency can be remedied by the County raising the micro-purchase threshold to \$50,000 through self-certification process.)</p> <p><i>R.C. 307.86</i></p>

Federal Law	State Law
<p><u>Sealed Bidding</u></p> <p>For purchases over \$250,000, County must engage in formal competitive procurement. One option is sealed bidding.</p> <p>Process:</p> <ul style="list-style-type: none"> <li>• Bids must be publically advertised for a “sufficient time” before bid opening;</li> <li>• A complete set of drawings and specifications must be made available to bidders;</li> <li>• County must receive at least two responsible bids in response;</li> <li>• County must solicit bids from “adequate number of known suppliers”;</li> <li>• County must open bids at public opening, at date and time advertised;</li> <li>• County must award contract to the “lowest responsive, responsible” bidder; and</li> <li>• County may reject any and all bids for “sound documented reasons.”</li> </ul> <p><i>2 C.F.R. §§ 200.88, 200.320(c)</i></p>	<p>County must bid all purchases in excess of \$50,000, unless an exception applies or another procurement method is used.</p> <p>Process:</p> <ul style="list-style-type: none"> <li>• Legal notice must be published once a week for not less than two consecutive weeks preceding the day of the opening of the bids in a newspaper of general circulation within the county; <ul style="list-style-type: none"> <li>○ May eliminate second publication in some circumstances where County published notice on website;</li> </ul> </li> <li>• Full and accurate drawings and specification, and cost estimate, must be prepared by design professional prior to bidding; <ul style="list-style-type: none"> <li>○ Plans for some improvements (courthouses, jails, county homes, bridges, children’s homes) must be approved by Commissioners and other County officials prior to bidding.</li> </ul> </li> <li>• Bids must be opened at a public hearing’</li> <li>• County must award contract to “lowest and best” bidder; and</li> <li>• County may reject any and all bids.</li> </ul> <p><i>R.C. 153.31, 153.36, 153.37, 153.38, 153.39; 307.87(A), 307.92.</i></p>

Federal Law	State Law
<p><u>Competitive Proposals</u></p> <p>For purchases over \$250,000, County may use a competitive proposal process in lieu of sealed bidding.</p> <p>Process:</p> <ul style="list-style-type: none"> <li>• RFP must be publicly advertised;</li> <li>• RFP must identify all evaluation criteria and relative importance;</li> <li>• County must consider all proposals received "to the maximum extent practical";</li> <li>• Proposals must be solicited from an "adequate number of qualified sources";</li> <li>• County must award contract to the firm with the "most advantageous proposal," considering price and other factors identified in the RFP.</li> </ul> <p><a href="#">2 C.F.R. § 200.320(d)</a></p>	<p>Ordinarily, County may not use a Request for Proposal process in lieu of bidding. RFP processes only apply where an alternative delivery model is being used.</p> <p>Construction Manager at Risk and Design-Build use a similar two-step process:</p> <ul style="list-style-type: none"> <li>• County must publically advertise a Request for Qualifications (30 days for CMR; no time requirement for D-B);</li> <li>• County evaluates all qualifications received to "short-list" three most qualified firms through and "evaluation committee";</li> <li>• County issues a Request for Proposals to the short-listed firms;</li> <li>• Evaluation committee interviews the short-listed firms;</li> <li>• Evaluation committee evaluates the proposals received to determine the "best value" firm, considering price and other factors;</li> <li>• Commissioners approve the evaluation committee's best value recommendation.</li> </ul> <p><a href="#">R.C. 9.33 et seq., 153.67, 153.692</a></p>

Federal Law	State Law
<p><u>Qualifications-Based Selection for Architectural and Engineering (A/E) Services</u></p> <p>Special selection process is applicable to the procurement of architectural and engineering professional services.</p> <p>Process:</p> <ul style="list-style-type: none"> <li>• County must publically advertise a Request for Qualifications (RFQ);</li> <li>• County must consider all qualifications received “to the maximum extent practical”;</li> <li>• County must solicit qualifications from an “adequate number of qualified sources”;</li> <li>• RFQ must include all factors to be considered in evaluation, but price may not be included as a factor;</li> <li>• County may then attempt to negotiate a contract with the “most qualified” firm.</li> </ul> <p><i>2 C.F.R. §§ 200.319(b); 200.320(d)(5)</i></p>	<p>Identical qualifications-based selection process for procurement of architectural or engineering services.</p> <p>Process:</p> <ul style="list-style-type: none"> <li>• RFQ must be publically advertised; <ul style="list-style-type: none"> <li>◦ No specified time frame for RFQ;</li> </ul> </li> <li>• RFQ must include all factors to be considered in evaluation, but price may not be included as a factor;</li> <li>• County may then attempt to negotiate a contract with the “most qualified” firm.</li> </ul> <p>State law also allows County to institute a “prequalification file” for A/E services, and County may award A/E contracts less than \$50,000 to pre-qualified firm whose qualifications have been submitted in the preceding twelve months.</p> <p><i>R.C. 153.65 et seq.</i></p>

Federal Law	State Law
<p><u>Exceptions to Bidding/RFP</u></p> <p>Four exceptions to formal competitive procurement, where contract is over \$250,000:</p> <ul style="list-style-type: none"> <li>• The procurement is only available from a single source;</li> <li>• A public exigency or emergency will not permit the delay resulting from the publicizing of a competitive solicitation;</li> <li>• The County requests a waiver of competitive selection from the Federal awarding agency (i.e., U.S. Treasury), and the agency expressly authorizes such noncompetitive procurement; or</li> <li>• The County attempts to bid or RFP the procurement, but gets only one response; County may enter into contract with such firm.</li> </ul> <p><a href="#">2 C.F.R. § 200.320(f)</a></p>	<p>Four exceptions to bidding requirement, where contract exceeds \$50,000:</p> <ul style="list-style-type: none"> <li>• <i>Real and Present Emergency.</i> Commissioners must determine by a unanimous vote that a real and present emergency exists, and document the reasons for the emergency in the board minutes, and one of the following must apply: <ul style="list-style-type: none"> <li>○ The estimated cost is less than \$100,000, and the County solicits at least three proposals; or</li> <li>○ There is actual physical disaster to structures, radio communications equipment, or computers; or</li> <li>○ The product to be purchased is personal protective equipment and the purchase is completed during the period of the emergency declared by Executive Order 2020-01D, issued March 9, 2020;</li> </ul> </li> <li>• <i>Energy Conservation Measures.</i> Competitive bidding is not required when the county implements energy conservation measures; County must request proposals from at least three vendors.</li> <li>• <i>Certain Professional Services.</i> Competitive bidding is not required for procuring the "services of an accountant, architect, attorney at law, physician, professional engineer, construction project manager, consultant, surveyor, or appraiser."</li> <li>• <i>Other Procurement Method Used.</i> County need not bid work if using another competitive procurement method (e.g. cooperative purchasing, construction manager at risk, design-build)</li> </ul> <p><a href="#">R.C. 307.86; 307.041(C)</a></p>

Federal Law	State Law
<p><u>Cooperative Purchasing Programs</u></p> <p>Encouraged to use inter-local and cooperative agreements where appropriate.</p> <p>County is responsible to ensure that the underlying contract procured by the cooperative agency was procured in accordance with the Uniform Guidance requirements.</p> <p><a href="#">2 C.F.R. § 200.318(e)</a></p>	<p>Three cooperative purchasing programs are available:</p> <ul style="list-style-type: none"> <li>• <i>Joint Purchasing.</i> County may participate in a joint purchasing program operated by or through a national or state association of political subdivisions in which the County is eligible for membership. <ul style="list-style-type: none"> <li>○ NOTE: Ohio Attorney General has opined that Joint Purchasing Programs may not be used for “construction services.”</li> </ul> </li> <li>• <i>State Term Contracting.</i> County may participate in contracts entered by the Department of Administrative Services or other state agencies for the purchase of supplies and services. <ul style="list-style-type: none"> <li>○ NOTE: The Ohio Auditor of State has provided <a href="#">training</a> (slides 27 to 29) and <a href="#">FAQs</a> suggesting local governments may proceed with caution in state cooperative purchasing programs. Local governments should review this guidance prior to undertaking state cooperative purchases using Federal Funds.</li> </ul> </li> <li>• <i>Council of Governments.</i> County may participate in a contract awarded by a regional council of governments which establishes unit prices for construction services and awarded by the COG through a competitive procurement process. <ul style="list-style-type: none"> <li>○ Cannot be used for new construction, only repairs, renovations, additions, or demolition.</li> <li>○ County cannot use this process if it previously solicited bids for the work.</li> </ul> </li> </ul> <p><a href="#">R.C. 9.48, 125.04, 167.081</a></p>

Federal Law	State Law
<b>AWARDING OF THE CONTRACT</b>	
<p><u>Standard of Award</u></p> <p>Must award contracts to responsible contractor possessing the ability to perform successfully under the contract, including such factors as integrity, compliance with public policy, record of past performance, and financial and technical resources.</p> <p><i>2 C.F.R. § 200.318(h)</i></p>	<p>County must award contracts to the “lowest and best” bidder. Ohio courts cannot substitute their judgment for that of public officials in determining which party is the “lowest and best bidder,” and, in the absence of evidence to the contrary, Commissioners will be presumed to have properly made determination.</p> <p><i>R.C. 307.90</i></p>
<p><u>Written Selection Procedures</u></p> <p>Must have written selection procedures that:</p> <ul style="list-style-type: none"> <li>• incorporate a clear and accurate description of good/service; and</li> <li>• identify all bidder/proposer requirements and all evaluation criteria</li> </ul> <p><i>2 C.F.R. § 200.319(d)</i></p>	<p>Consistent with State Procurement Statutes for bidding, Construction Manager at Risk, and Design Build selection processes.</p>
<p><u>Prequalified Bidders</u></p> <p>If prequalified bidder lists are used, enough qualified firms must be included to ensure maximum competition; cannot preclude potential bidders from qualifying during the solicitation period.</p> <p><i>2 C.F.R. § 200.319(e)</i></p>	<p>No equivalent; County may not limit which bidders are entitled to submit bids. However, prequalification of subcontract bidders is utilized under the State Construction Manager at Risk and Design Build Project Delivery Models.</p>
<p><u>Selection Documentation</u></p> <p>County must maintain records of procurement, including rationale for method of procurement, selection of contract type, contractor selection or rejection, and basis for contract price.</p> <p><i>2 C.F.R. § 200.318(i)</i></p>	<p>All records related to the procurement are subject to the Ohio Public Records Act.</p> <p><i>R.C. 149.43</i></p>

Federal Law	State Law
<p><u>Debarred Contractors</u></p> <p>County cannot award contracts or sub-contracts to companies debarred or suspended by federal agency or State of Ohio.</p> <p><i>2 C.F.R. § 200.318(h)</i></p>	<p>County cannot award contracts or sub-contracts to companies debarred by the State of Ohio.</p> <p><i>R.C. 153.02</i></p>
<p><u>Time and Materials Pricing</u></p> <p>County cannot enter into "time and materials" contracts, unless contract includes a fixed "not-to-exceed" price.</p> <p><i>2 C.F.R. § 200.318(j)</i></p>	<p>County cannot enter into "time and materials" contracts, unless contract includes a fixed "not-to-exceed" price.</p> <p><i>R.C. 5705.41</i></p>
<p><u>Cost-Plus Pricing</u></p> <p>County cannot award contract based on "cost plus percentage of cost" or "percentage of construction cost contracts."</p> <p><i>2 C.F.R. § 200.324(d)</i></p>	<p>County cannot award contract based on "cost plus percentage of cost" or "percentage of construction cost contracts."</p> <p>NOTE: Construction manager at risk and design-build do not trigger this prohibition, as those entities' compensation are limited by a "guaranteed maximum price."</p> <p><i>R.C. 5705.41</i></p>
<p><u>Local Preference</u></p> <p>County cannot use in-state or local geographic preferences (except for architectural/engineering services).</p> <p><i>2 C.F.R. § 200.319(b)</i></p>	<p>Slightly more restrictive but generally consistent with State statutes and case law.</p>

Federal Law	State Law
<p><u>Minority Businesses Preference</u></p> <p>County must take affirmative steps to <b>encourage</b> small and minority firms and women-owned businesses to participate in procurements (but no preference given), including all of the following:</p> <ul style="list-style-type: none"> <li>• Include on solicitation lists</li> <li>• Solicit when such firms are potential bidders</li> <li>• Divide total contract requirements where economically feasible to enable more minority participation</li> <li>• Establish delivery schedules to encourage participation</li> <li>• Use SBA and Minority Business Development Agency of US Dept. of Commerce</li> <li>• Require prime contractors to take the same affirmative steps.</li> </ul> <p><i>2 C.F.R. § 200.321</i></p>	<p>County should "consider," but not prefer, whether a contractor or vendor is a minority business enterprise and may not discriminate during selection process.</p> <p><i>R.C. 153.59</i></p>
<b>CONTRACTING REQUIREMENTS</b>	
<p><u>Required Contract Provisions</u></p> <p>All contracts must include the specific provisions required in 2 C.F.R. Part 200, Appendix II.</p> <p><i>2 C.F.R. pt. 200, App'x II</i></p>	<p>All contracts must contain a provision specifying a completion date and provide for liquidated damages in the event the contractor fails to timely complete the work.</p> <p><i>R.C. 153.19</i></p>
<p><u>Prevailing Wages</u></p> <p>The Davis-Bacon Act does not apply, and federal prevailing wages are not required, for projects <i>solely</i> funded by ARPA funds.</p> <p>(NOTE: A project that is funded by <i>other</i> sources of federal funds may nonetheless be subject to the Davis-Bacon Act.)</p> <p><i>U.S. Treasury, Coronavirus State and Local Fiscal Recovery Funds Interim Final Rule, eff. May 17, 2021; Coronavirus State and Local Fiscal Recovery Funds Final Rule, eff. April 1, 2022</i></p>	<p>Contractors must pay all laborers state prevailing wage rates, and comply with other wage and hour requirements, unless Davis-Bacon Act applies.</p> <p><i>R.C. Chapter 4115</i></p>

Federal Law	State Law
<p><u>Bonding Requirements</u></p> <p>For contracts subject to sealed bidding or competitive proposals, bidders must provide:</p> <ul style="list-style-type: none"> <li>• A bid bond with a penal sum equal to at least 5% of bid; and</li> <li>• Performance and payment bonds equal to 100% of contract price for winning bidder.</li> </ul> <p><a href="#">2 C.F.R. § 200.325</a></p>	<p>For sealed bidding, all bidders must provide a bid guaranty in the form of either:</p> <ul style="list-style-type: none"> <li>• The statutory bid bond, with a penal sum equal to at least 10% of the bid; or</li> <li>• A certified check, cashier's check, or irrevocable letter of credit in an amount equal to 10% of the bid.</li> </ul> <p>Where a successful bidder provided a certified check, cashier's check, or letter of credit with its bid, the bidder must provide the County with a contract bond, in the statutory form, prior to commencement of construction.</p> <p>Construction managers at risk and design-builders must provide payment and performance bonds, equal to 100% of the GMP, in the statutory form.</p> <p><a href="#">R.C. 9.334, 153.34, 153.57, 153.571, 153.693</a></p>