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# PROCUREMENT AND PURCHASING:
## Recent Developments in State and Federal Laws and Regulations

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## I. New Conflict of Interest Disclosure Requirements

Chapter 171 of the Local Government Code, which addresses disclosure and recusal requirements when a school board member or first degree relative has a substantial interest in a business entity, was not amended by the Legislature in 2015. Also, Chapter 553 of the Texas Government Code, dealing with disclosure of an ownership interest in real property by a trustee that the school district is interested in purchasing, was not amended by the Legislature in 2015. The appropriate forms that address the disclosure requirements under Chapter 176 of the Local Government Code and Chapter 553 of the Texas Government Code are included as exhibits at the TASB BBFA policy code.

### A. Amendments to Local Government Code Chapter 176

The Legislature did, however, substantially amend Chapter 176 of the Local Government Code, which includes conflict disclosure requirements that are independent of Chapter 171 of the Local Government Code and Chapter 553 of the Government Code. Chapter 176 of the LGC was initially enacted in 2005, with "cleanup" amendments in 2007. From the beginning, Chapter 176 has required the Texas Ethics Commission to promulgate two forms for mandatory use, a "Conflicts Disclosure Statement (Form CIS)" for use by local government officers, and a "Conflict of Interest Questionnaire (Form CIQ)" for use by vendors. The 2015 legislation, House Bill 23, made significant changes to the reporting requirements for both local government officers and vendors.

#### 1. Officer Disclosure - Form CIS

**Local Government Officers**

Under prior law, in the school district context, a "local government officer" covered by

the disclosure requirement included the members of the board of trustees, the superintendent, and any other school district employee who the board required to file the form. Now, the reporting requirement includes the trustees and the superintendent, as well as any "agent of a local governmental entity who exercises discretion in the planning, recommending, selecting or contracting of a vendor." Loc. Gov't Code § 176.001(4). The term "agent" includes, but is not limited to, employees. It includes any third party "who undertakes to transact some business or manage some affair for another person." Sec. 176.001(1).

**Disclosure Threshold/Taxable Income**

The amended law continues in effect the prior requirement that a local government officer shall file the CIS if a vendor enters into a contract with the local government, or the local government is considering entering into a contract with a vendor, and the vendor has an employment or other business relationship with the local government officer or a family member of the officer (defined to be anyone related to the officer within the first degree of consanguinity or affinity) that results in the officer or family member receiving taxable income, other than investment income, that exceeds the amount of $2,500.00 during the twelve-month period immediately preceding the date that the officer becomes aware that the contract between the local government and the vendor is executed, or that the local government is considering entering into a contract with the vendor.

**Gifts**

Under prior law, the CIS also had to be filed if the officer, or a family member, had received one or more gifts having an aggregate value of more than $250.00 in the preceding twelve-month period. H.B. 23 lowered this amount from $250.00 to $100.00.

Under prior law, a gift given to the officer by a family member of the officer was not reportable. Thus, if a family member of the officer was the vendor, the gift was not reportable. This exclusion was eliminated by H.B. 23; however, the definition of "gift" still excludes "a benefit received on account of kinship . . . independent of the official status of the recipient." Loc. Gov't Code § 176.001 (2-b).

Also under prior law, food, lodging, transportation and entertainment "accepted as a guest" were excluded from the reporting requirement. Under the amended law, the value of lodging, transportation and entertainment now counts towards the $100.00 threshold; only food accepted as a guest is still excluded. It is included in the definition of "gift," but excluded from the reporting requirement by Section 176.003 (a-1). Food received by the officer from the vendor, but not as a "guest," counts toward the reporting threshold.

**Family Relationship**

H.B. 23 also added an entirely new basis for disclosure: that the vendor "has a family relationship with the local government officer." Loc. Gov't Code § 176.003(a)(2)(C). Recall that the term "vendor" is defined to include the agent of a vendor. "Family relationship" is defined to mean any relationship within the third degree of consanguinity or the second degree of affinity, as defined in Subchapter B, Chapter 573, of the Government Code. This is much broader than the definition of "family member," which is limited to the first degree of consanguinity or affinity.

## 2. Vendor Disclosure - Form CIQ

**Vendor Disclosure Requirements**

H.B. 23 adds a specific definition of "vendor" to mean "a person who enters or seeks to

enter into a contract with a local governmental entity," including the "agent of a vendor."

The vendor disclosure requirements have been expanded to mirror the expanded disclosure requirements by local government officers, including the lower gift threshold and if the vendor (or any vendor agent) has a "family relationship" with the local government officer. Loc. Gov't Code § 176.006(a).

The prior law also required the vendor on the Form CIQ to describe each employment or business relationship between the vendor and any other corporation or business entity with respect to which a local government officer of the local governmental entity served as an officer or director, or held an ownership interest of 10% or more. H.B. 23 lowered the ownership percentage threshold by the officer from 10% to 1%.

**Person who is Both a Local Government Officer and a Vendor**

H.B. 23 added a provision specifically addressing the situation where a person serves both as a local government officer and as a vendor. It requires that the person file a Form CIQ if the person enters or seeks to enter into a contract with a local governmental entity, or is an agent of a person who enters or seeks to enter into such a contract. Loc. Gov't Code § 176.006(e).

**Timing of Filing**

H.B. 23 carries forward the grace period for filing of the required forms of seven days after the date on which the officer or the vendor becomes aware of the facts that require either an initial filing or an updated filing.

**Criminal Penalties**

Previously, the failure to file either by the officer or the vendor was a Class C misdemeanor across the board; now, it is a Class C misdemeanor if the contract is for less than

$1 Million, or there is no amount stated in the contract; a Class B misdemeanor if the contract amount is at least $1 Million but less than $5 Million; and a Class A misdemeanor if the contract amount is $5 Million or more. Loc. Gov't Code § 176.013(c). The Code provides an exception to criminal liability if the required form is filed "not later than the seventh business day after" receipt of "notice from the local governmental entity of the alleged violation."

**Option to Void Contract**

H.B. 23 also adds a provision to the effect that the governing body of a local governmental entity may, at its discretion, declare a contract void if it is determined that a vendor failed to file a required Conflict of Interest Questionnaire. Loc. Gov't Code § 176.013(e).

**New Forms**

The amended law went into effect September 1, 2015. The Texas Ethics Commission issued new Forms CIQ and CIS on August 7, 2015, but these were revised again effective November 30, 2015. Only the forms showing a revision date of 11/30/2015 should be used. Both forms and accompanying instructions are attached.

### B. Government Code § 2252.908 – Disclosure of Interest parties by Business Entity Vendors

The 84th Legislature also passed H.B. 1295, which includes addition of a new Section 2252.908 to the Government Code. It provides that a governmental entity may not enter into a contract (including an amended, extended, or renewed contract) that requires a vote or action by the entity's governing body, or has a value of $1 Million or more, unless the business entity submits a disclosure of interested parties at the time the business entity submits the signed contract to the governmental entity. Note that this timing presupposes that a school district will not sign the contract until after the vendor has signed and submitted the disclosure form.

The Texas Ethics Commission is required by the law to adopt rules and a disclosure form. The rules were adopted to be effective December 24, 2015, and the law went into effect January 1, 2016. 2 Tex. Admin. Code Ch. 46.

An "interested party" means any person who has a controlling interest in the business entity, or "who actively participates in facilitating the contract or negotiating the terms of the contract, including a broker, intermediary, adviser, or attorney for the business entity." "Controlling interest" has been defined by the Texas Ethics Commission at 2 Tex. Admin. Code § 46.3(c) as (1) ownership interest exceeding 10 percent; (2) membership on a board of directors having not more than 10 members; or (3) service as one of the four most highly compensated officers of the business entity, or as an officer of a business entity having four or less officers.

The promulgated form, Texas Ethics Commission Form 1295, provides blanks for listing each "interested party," including whether the interested party has a controlling interest in the business entity, and/or served as an intermediary broker, attorney, etc. for the business entity, and also contemplates the possibility that there could be "no interested party" as defined by the statute. A copy of Form 1295 is attached.

The Form 1295 includes a blank for the "identification number used by the governmental entity . . . to track or identify the contract." This requirement is not included in the Government Code language, but is included in the Texas Ethics Commission rule. 2 Tex. Admin. Code 46.5(4).

The rules require that the business entity complete and sign the Form 1295, and submit it to the governmental entity. The disclosures are to be made under oath.

Once the governmental entity receives the completed disclosure form, the governmental

entity must submit it to the Texas Ethics Commission electronically within 30 days after the contract between the business entity and the governmental entity becomes binding. The Texas Ethics Commission shall make the disclosure forms received by it available on its website.

## II. Federal Procurement Rule.

### A. Applicability

The Department of Education "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," part of the Education Department General Administrative Regulations ("EDGAR"), were formerly codified at 34 CFR Part 80. 34 CFR § 80.36 was captioned "Procurement."

Formerly, each federal agency had its own procurement rules, which were generally quite similar. Effective December 26, 2014, the Federal Office of Management and Budget ("OMB"), codified Title 2 of the Code of Federal Regulations, Part 200, which is generally applicable to administration of all federal grant funds. The Procurement Standards are codified at Sections 200.317 – 200.326. A copy is attached. The new federal procurement standards are similar to the former procurement rules.

On September 10, 2015, OMB amended 2 CFR § 200.110(a), to provide an (optional) grace period of "two additional fiscal years after" December 26, 2014, prior to mandatory application of the new procurement rules. The two-year grace period applies only to the procurement portion of the new EDGAR. TEA has issued a "To the administrator addressed" letter, dated January 7, 2016, addressing transition issues and under what circumstances the pre-December 26, 2014 regulations continue to apply to other parts of EDGAR.

Note that "TEA recommends that LEA's implement the new EDGAR rules in the 2015-

16 school year to take advantage of new flexibility since the new rules are not significantly different than the existing rules." New EDGAR Regulations Frequently Asked Questions (Texas Education Agency, Nov. 23, 2015) (hereinafter "TEA FAQ"), #9.7 (a copy of the FAQ's applicable to procurement is attached).

TEA advises that multi-year contracts that do not comply with the new rules should not be carried forward beyond the date of implementation of the new rules. TEA FAQ #7.34. Note further, and importantly, that OMB states that if an entity "chooses to use the previous procurement standards for" the grace period, then the "entity must document this decision in their internal procurement policies." The grace period does not have the effect of cleaning up any past noncompliance with the prior/current rules.

Section **200.318** (corresponding to prior 34 CFR § 80.36) provides that a district should use its own procurement procedures under state and local laws and regulations, "provided that the procurements conform to applicable Federal law and the standards identified in this part." This means that if federal funds are involved, a district must use the most restrictive procurement rules, be they federal, state, or local.

## B. Conflict of Interest Requirements

Conflicts of interest are addressed at **§ 200.318(c)(1)**. It is quite stringent. It provides as follows:

> The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent may 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 may 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 a non-Federal entity.

The prior EDGAR conflict of interest rule was stated at 34 CFR § 80.36(b)(3), and was substantially similar to the new rule, although the new rule utilizes somewhat stronger language in a couple of places.

Note that the Federal conflict of interest requirements are very stringent, and do not set thresholds such as under state law. A district "may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value," but in the absence of such standards, there would be no minimal threshold, as long as there is a "financial or other interest in or a tangible personal benefit from" a firm considered for a contract, or solicitation or acceptance of any "gratuities, favors, or anything of monetary value." TASB Policy CBB (Legal) restates the conflicts rule, but does not itself set any such standards.

A district "must disclose in writing any potential conflict of interest to the Federal awarding agency or pass-through entity." **2 CFR 200.112**. Disclosure must also be made in a timely manner in writing to the Federal awarding agency or pass-through entity of "all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award." **2 CFR 200.113**. Failure to make required disclosures can result in various remedies, including suspension or debarment.

PRACTICE POINTER: School districts should carefully review their local board policies to ensure that they have addressed these federal requirements. Policy writers should be

aware that in the TASB Policy Reference Manual, applicable conflict of interest rules are spread out over several different policy codes: state law applicable to trustees is stated at BBFA and BBFB; state law requirements as to employees are at DBD; whereas the federal rule is summarized at CBB.

### C. Interlocal Agreements

Section **200.318(e)** (corresponding to former § 80.36(a)(5)) provides that to "foster greater economy and efficiency, . . . 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." Bear in mind, however, that Section 200.319(a) provides that all "procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section." TEA advises that the purchasing cooperative "must follow the same state and federal procurement rules that would apply if the local LEA made the procurement," and that once "it has been verified that the purchasing cooperative has followed the most restrictive of the state or federal procurement rules," then the LEA may purchase through the cooperative. TEA FAQ #7.14. In order to satisfy the documentation requirement (see below), TEA recommends that the LEA maintain "a signed certification statement or an email" from the purchasing cooperative, "stating that the rules were followed." TEA FAQ #7.28. We have received in the past informal guidance from USDE to the effect that if more than one vendor is on the list of approved vendors, the local educational agency ("LEA") should talk to more than one vendor on the approved list in order to obtain the best value.

### D. Selection Criteria, Documentation, and Specifications

Section **200.318(h)** (corresponding to former § 80.36(b)(8)) lists non-cost factors that "will" be considered in determining to whom to make an award: "contractor integrity, compliance with public policy, record of past performance, and financial and technical resources." Compare this list to the mandatory list in Section 44.031(b) of the Education Code – all items on both lists must be considered when spending federal funds.

It also refers to **2 CFR § 200.213**, "Suspension and debarment," which in turn cites **2 CFR part 180**. Basically, a district may not award federal funds to any entity that has been suspended or debarred. Specific verification requirements are discussed at TEA FAQ #7.19: checking SAM.gov on the day the contract is signed (and documenting the result), requiring vendor certification, or including appropriate assurance in the contract with the vendor.

Section **200.318(i)** (corresponding to former § 80.36(b)(9)) requires maintenance of "records sufficient to detail the significant history of procurement," including those sufficient to show the "rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price." Note that the Education Code does not have an express comparable documentation requirement. Some of the legislative history behind the 2007 amendment to Section 44.031(b), however, stated that the supporters of that legislation believed that districts "would be responsible for demonstrating that they gave due consideration to each factor outlined in the statute," and that "[p]roviding evidence of this consideration would be enough to protect districts from charges of making improper contract decisions." House Research Organization, Bill Analysis, Tex. H.B. 273, 80th Leg. (2007).

Section **200.318(j)** (corresponding to former § 80.36(b)(10)) allows the use of "time and materials type contracts" only after a determination that no other type of contract is suitable, and

only if the contract "includes a ceiling price that the contractor exceeds at its own risk."

Section **200.319** (corresponding to former § 80.36(c)(1) and (2)) states specific requirements intended to ensure that procurements are "conducted in a manner providing full and open competition." These include a basic requirement that "contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements."

These also include prohibition against requiring "unnecessary experience and excessive bonding, . . . Noncompetitive contracts to consultants that are on retainer contracts;" and solicitations specifying only a "brand name" without allowing "an equal" product and describing the performance or other relevant requirements of the procurement. A "brand name or equivalent description" may be used only if it is otherwise "impractical or uneconomical to make a clear and accurate description of the technical requirements," and in that event the "specific features of the named brand which must be met by offers must be clearly stated." The solicitation should describe "technical requirements," but "[d]etailed product specifications should be avoided if at all possible." The product description may not contain "features which unduly restrict competition."

The rule also prohibits "the use of statutorily or administratively imposed state" or "local geographical preferences in the evaluation of bids or proposals," except where expressly required or encouraged by Federal statutes. Thus, the Nonresident Bidders law, Tex. Gov't Code § 2252.001 *et. seq.*, should not be used in connection with procurements involving federal funds. An exception to the general prohibition is made for procurement of architectural and engineering services, provided that "its application leaves an appropriate number of qualified firms, given the

nature and size of the project, to compete for the contract." Moreover, TEA advises that vendor ability to "access the location in a timely manner" could be a legitimate selection factor, depending on the nature of good or service being procured. TEA FAQ #7.30.

**E. Procurement Methods**

Section **200.320** (corresponding to former § 80.36(d)) describes the acceptable methods of procurement that may be utilized.

Subsection (a) allows **"micro-purchases,"** currently defined by Section **200.67** to be a purchase in the aggregate amount of up to $3,500, subject to periodic adjustment. *See* 2 CFR § 200.67, which incorporates 48 CFR § 2.101. Such purchases, if "practicable," must be distributed "equitably among qualified suppliers," and may be awarded without soliciting competitive quotes "if the non-Federal entity considers the price to be reasonable." Note that the prior rules did not include a comparable provision; this is an example of the new rules providing greater flexibility.

Subsection (b) allows **"small purchase procedures"** for purchase amounts that do not exceed the "Simplified Acquisition Threshold," currently $150,000 (see **§ 200.88**). Price quotes must be obtained "from an adequate number of qualified sources." Note that such "small purchases" are not exempt from the other Procurement Standards, even though more informal procurement methods are allowed. Note also that for purchases between $50,000 and $150,000, the more restrictive rules in Chapter 44 of the Education Code apply.

Subsection (c) describes the **sealed bid** method of procurement, which requires "formal advertising," whereby the bid 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." This is

described as the "preferred method for procuring construction."

Subsection (d) describes the **competitive proposal** procurement method. It provides that this method "is generally used when conditions are not appropriate for the use of sealed bids." A procurement by competitive proposals must "be publicized and identify all evaluation factors and their relative importance." The District must have a "method for conducting technical evaluations of the proposals," and the contract must be awarded "to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered." In contrast to the sealed bid procurement method, the Rule does not expressly require that price necessarily be the predominant factor in determining which proposal "is most advantageous." Note that under procurement by competitive proposals, the relative importance to be given to price, and all other evaluation factors, must be identified in the RFP. This is consistent with construction-related procurements under Chapter 2269 of the Government Code; but goes beyond what is required under Chapter 44 of the Education Code.

Subsection 200.320(d)(5) permits procurement based on qualifications, "subject to negotiation of fair and reasonable compensation," but only for architect and engineer professional services. This avoids conflict with the Professional Services Procurement Act ("PSPA"), Tex. Gov't Code § 2254.004, but only as to architectural or engineering professional services ("A/E professional services"). The only professional service where there appears to be a direct conflict would involve land surveying services, for which it would seem that federal funds would be used only very rarely. Nonetheless, in case of conflict, the more restrictive federal rule controls.

Finally, subparagraph (f) describes **noncompetitive proposal** procurement. It is

normally used in the sole source context. It may also be used where a "public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation," but this would only be true if also allowed by state law. *Compare* Tex. Educ. Code §§ 44.031(h), 44.0312(c). Note that TEA states that the notion that an item "is available only from a single source . . . is hard to document and prove when questioned." TEA FAQ #7.11. The documentation "must include how the subrecipient determined the noncompetitive procurement is the appropriate procurement method." TEA FAQ #7.35. TEA further notes that an "affidavit or sole source letter is not sufficient documentation that the item or service is only available from a single source," and that "sole source must be proven and adequately documented, and will seldom be used in federal procurements." TEA FAQ #7.16. The rule includes a safe harbor provision: if the federal agency (USDE) or the pass-through entity (TEA) "expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity."

**F. HUB's**

Section **200.321** (corresponding to former § 80.36(e)) requires, where Federal funds are used, that a district, as either a grantee or subgrantee, take "affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible." These terms are not defined in the rule itself, but perhaps the one with which most persons would be the least familiar is "labor surplus area firms." A "labor surplus area" is an area which can be a city or an entire county, with a relatively high unemployment rate as compared to the country as a whole, as determined by the Secretary of Labor. The Secretary of Labor's website contains information on the methodology for determining labor surplus areas, as

well as a list of labor surplus areas for the current federal fiscal year. www.doleta.gov/programs/lsa.cfm. The current list includes approximately 30 Texas cities and counties, or parts thereof.

Subsection (e) lists six affirmative steps, which relate to providing to HUB's a meaningful opportunity to participate in the district's procurement process. Note, however, that none of these affirmative steps go so far as to require a school district to actually purchase an item from a HUB where the purchase price is greater from the HUB than it would be from another prospective vendor. These HUB Guidelines do not overrule other Procurement Standards, such as section 200.319, requiring that all procurement transactions "will be conducted in a manner providing full and open competition"; and section 200.320(c), requiring that where procurement is by sealed bids, the contract is to be "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."

Of course, if a school district were to grant a specific preference to a prospective vendor simply because it was a HUB, and award a contract to it even if it did not offer the best value, it could face not only an audit with an unfavorable outcome, but also litigation over a claim of reverse discrimination from a competitor who submitted a lower bid. In the United States Supreme Court case of *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), a minority firm was awarded a subcontract, even though it was not the low bidder. The low bidder, which was not a HUB, filed suit, claiming reverse discrimination. The Supreme Court held that a government contracting program granting a preference to a racial minority must be reviewed under a standard of "strict scrutiny," whereby a racial preference would be constitutional only if

the program is narrowly tailored to further a compelling governmental interest; and that in order to be valid, the unit of government granting the racial preference must be able to demonstrate that its program is specifically tailored to attempt to remedy a documented history of racial discrimination in the specific area in question. The Supreme Court vacated the lower courts' rulings against the subcontractor, and remanded the case to the trial court to take further evidence to determine whether the HUB-preference program in question met the "strict scrutiny" test. The case made two more trips to the Supreme Court, but ultimately, the subcontractor obtained a ruling that the Department of Transportation's Disadvantaged Business Enterprise program, as it was administered in 1997, was unconstitutional. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001).

In a prior decision, the Supreme Court had held, in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989), that a city's HUB set-aside program in construction contracting, in which 30% of subcontracts were to be set aside for HUB's, or minority subcontractors, was unconstitutional and constituted reverse discrimination, where there was insufficient evidence that the set-aside plan was justified by a compelling governmental interest. The evidentiary record in that case did not reveal prior discrimination by the city itself in awarding contracts, and therefore the 30% set-aside was not narrowly tailored to accomplish a specific remedial purpose.

Section 44.031(b) of the Education Code lists eight factors that "shall" be considered by a district in determining to which vendor to award a contract. Factor No. 6 reads as follows:

> The impact on the ability of the district to comply with laws and rules relating to historically underutilized businesses.

This subsection does not in and of itself impose any requirement on a district to consider the HUB status of a vendor. It simply allows a district to take HUB status into consideration, to

the extent such status is relevant to the district's compliance with other "laws and rules," such as 2 CFR § 200.321.

### G. Cost Analysis

Section **200.323** (corresponding to prior § 80.36(f)) provides that districts "must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold" (now $150,000). As a "starting point, the non-Federal entity must make independent estimates before receiving bids or proposals." Profit must be negotiated "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." The "cost plus a percentage of cost" and the "percentage of construction cost methods of contracting must not be used."

### H. Contract Provisions and Faith-Based Organizations

Section **200.326** incorporates Appendix II to Part 200 (corresponding to prior § 80.36(i)), which includes ten provisions that must be expressly addressed in contracts awarded by a district to successful vendors.

The former rule, at Section 80.36(j) specifically addressed contracting with faith-based organizations. That issue does not appear to be addressed in the new rules.