



# Procurement During Uninterrupted Crises

Michael Brustein, Bonnie Graham

www.bruman.com

#### **Virtual Spring Forum 2022**

Planning for Uninterrupted Crises

1

Brustein & Manasevit, PLLC
Planning for Uninterrupted Crises



#### **Panelists**

#### **Tami Pierson**

Assistant Director
Audits and Investigations
Division
California Department of
Education

#### H. Dean Zajic

State and Federal Programs
Coordinator
Special Education and Title
Services
Kansas State Department of
Education

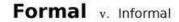
Brustein & Manasevit, PLLC © 2022. All rights reserved



#### Methods of Procurement 200.320

- Grantee must have and use documented procurement procedures for the following methods:
  - (a) Informal procurement methods
    - Micro-purchase
    - Small purchase procedures
  - (b) Formal procurement methods
    - Competitive sealed bids
    - Competitive proposals
  - (c) Noncompetitive proposals

Brustein & Manasevit, PLLC © 2022. All rights reserved.







J

3

Brustein & Manasevit, PLLC Planning for Uninterrupted Crises



# Informal Procurement 200.320(a)

- Use when value does not exceed \$250,000 (simplified acquisition threshold), or a lower threshold established by a non-federal entity
- Procurement of property or services required under federal award
- Purpose: to expedite completion and minimize administrative burden and cost

Brustein & Manasevit, PLLC © 2022. All rights reserved.



### Informal Procurement, 200.320(a)(1) Micro-purchases

- Threshold: \$10,000 or lower State rule
- Distribution. "To the maximum extent practicable, the non-federal entity should distribute ... among qualified suppliers."
- Awards. May be awarded without price or rate quotes if nonfederal entity "considers the price to be reasonable based on research, experience, purchase history or other information and documents its files accordingly."

Brustein & Manasevit, PLLC @ 2022. All rights reserved.

5

5

Brustein & Manasevit, PLLC
Planning for Uninterrupted Crises



#### Informal Procurement, 200.320(a)(1) Micro-purchases (cont.)

- Thresholds. Determined and documented by grantee, based on internal controls, risk, and procedures. Authorized by state, local laws. May be higher than threshold in FAR (\$10,000).
  - Nonfederal entity may self-certify threshold up to \$50,000, if:
    - Low-risk auditee for most recent audit (200.520)
    - Annual internal institutional risk assessment to identify, mitigate and manage financial risks; or
    - For public institutions, a higher threshold consistent with state law
  - Over \$50,000, must have approval of cognizant agency indirect costs

Brustein & Manasevit, PLLC © 2022. All rights reserved



#### Informal Procurement, 200.320(a)(2) Small Purchases

- Used when for purchases greater than micro-purchase threshold, but less than simplified acquisition threshold (\$250,000).
- Price or rate quotations from "adequate number of qualified sources" as determined appropriate by non-federal entity
- Thresholds. Established based on internal controls, risk and procedures, and documented. Cannot exceed the threshold in FAR (\$250,000) but may be lowered.

Brustein & Manasevit, PLLC @ 2022. All rights reserved.

7

7

Brustein & Manasevit, PLLC
Planning for Uninterrupted Crises



### Simplified Acquisition Threshold in Emergency??

- 2 CFR 200.1 defines simplified acquisition threshold by cross referencing the Federal Acquisition Rules. Under FAR, the threshold is \$250,000 except for:
  - Threshold increases to **\$800,000** for supplies and services "to support a response to an emergency or major disaster" ... for contracts "awarded and performed ... inside the US"
  - If no state/local requirement that is more restrictive, is ESSER/GEER/HEERF subject to higher threshold???

Brustein & Manasevit, PLLC © 2022. All rights reserved.



# Formal Procurement, 200.320(b)

- Used for purchases that exceed small purchase threshold (\$250,000, or lower, if set by the non-federal entity)
  - Require documented procedures
  - Require public advertising
- Two options:
  - 1. Sealed bids
  - 2. Proposals

Brustein & Manasevit, PLLC @ 2022. All rights reserved

9

9

Brustein & Manasevit, PLLC
Planning for Uninterrupted Crises

# Noncompetitive Proposals 200.320(c)

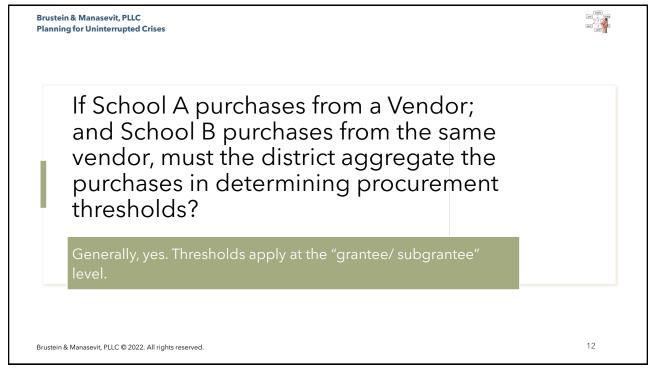


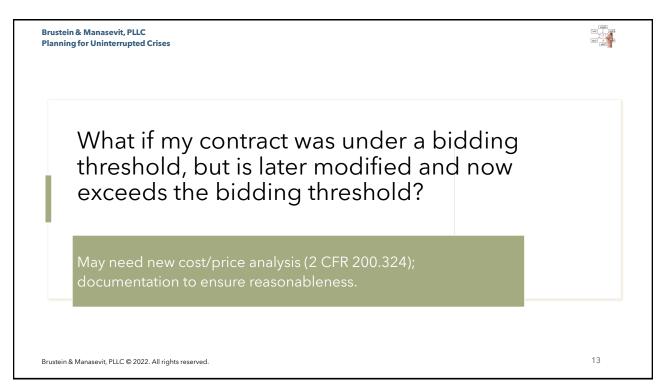
#### Appropriate only when:

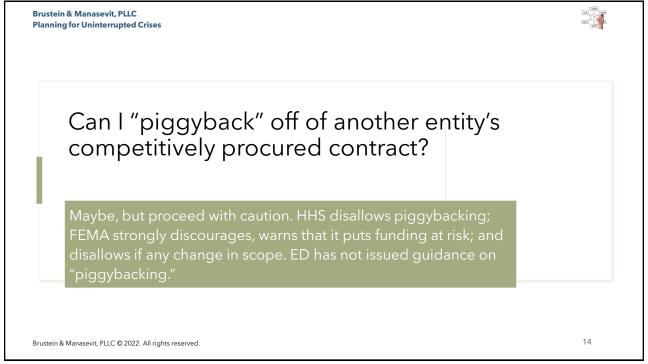
- Micro-purchases
- The item is only available from a single source;
- There is a public emergency for the requirement that will not permit delay resulting from publicizing a competitive solicitation;
- The Federal awarding agency or pass-through expressly authorizes noncompetitive procurement in response to a written request from non-Federal entity; or
- After soliciting a number of sources, competition is determined inadequate.

Brustein & Manasevit, PLLC © 2022. All rights reserved.

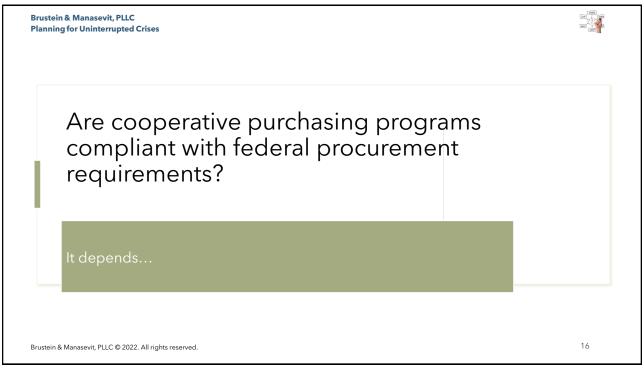














### 2 CFR 200.318(e)

 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. Competition requirements will be met with documented procurement actions using strategic sourcing, shared services, and other similar procurement arrangements.

Brustein & Manasevit, PLLC @ 2022. All rights reserved

17

17

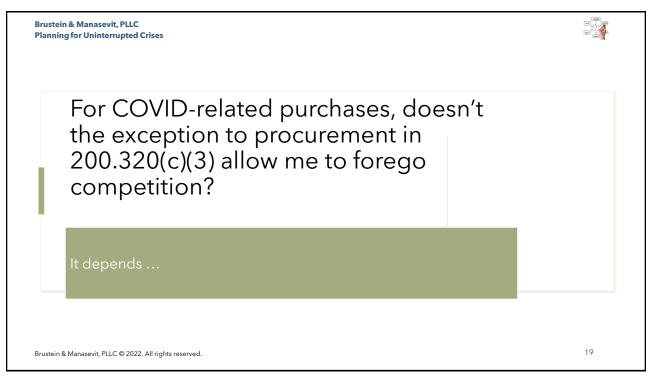
Brustein & Manasevit, PLLC Planning for Uninterrupted Crises



## What about pre-qualified lists?

- 2 CFR 200.319(e)
  - 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.

Brustein & Manasevit, PLLC © 2022. All rights reserved



Brustein & Manasevit, PLLC
Planning for Uninterrupted Crises



# Exigency or emergency - what's the difference? (FEMA clarification)

- Exigency: there is a need to avoid, prevent or alleviate serious harm or injury, financial or otherwise, to the entity; and using competitive procurement proposals would prevent the urgent action required to address the situation
- Emergency: threat to life, public health or safety, or improved property requires immediate action to alleviate the threat
  - https://www.fema.gov/news-release/20200514/procurement-under-grants-under-exigent-or-emergency-circumstances

Brustein & Manasevit, PLLC © 2022. All rights reserved



### FEMA example of exigent circumstances:

A tornado impacts a city in June and causes widespread and catastrophic damage, including damage to a city school. The city wants to repair the school and have it ready for use by the beginning of the school year in September. The city estimates, based on past experience, that awarding a contract using a sealed bidding process would require at least 90 days, and the city's engineer estimates that the repair work would last another 60 days. This would extend the project beyond the beginning of the school year. Rather than conducting a sealed bidding process, the city—in compliance with state and local law—wants to sole source with a contractor it has contracted with previously. The city can demonstrate that this constitutes an "exigent circumstance" because use of a sealed bidding process would cause an unacceptable delay and thus procurement by noncompetitive methods was necessary based on the particular situation.

Brustein & Manasevit, PLLC © 2022. All rights reserved

21

21

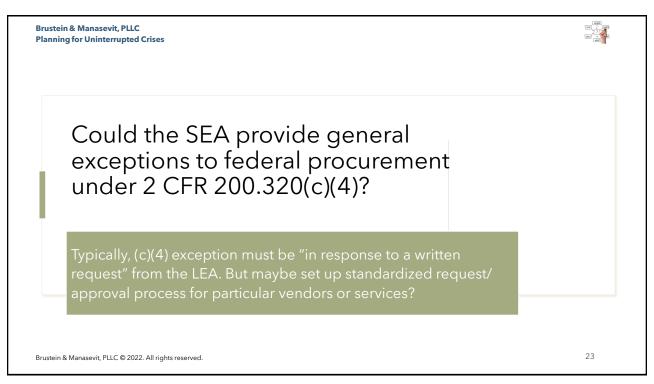
Brustein & Manasevit, PLLC
Planning for Uninterrupted Crises

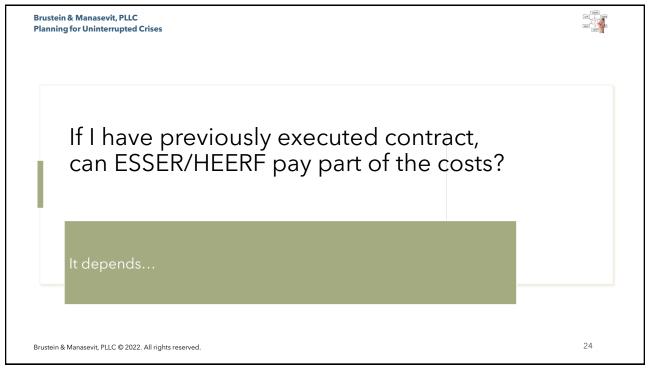


**ESSER Guidance**: Do Federal procurement requirements permit noncompetitive procurements, if necessary, to enable an SEA or LEA to use ARP ESSER funds to operate a summer enrichment program in 2021?

• Yes, "Consistent with 200.320(c)(2), an LEA may determine that its response to the COVID-19 pandemic qualifies as a public exigency or emergency that does no permit the delay that would result from competitive bidding. Under these circumstances, ... an LEA could use noncompetitive procurement. The LEA should consult with its SEA before using this authority."

Brustein & Manasevit, PLLC © 2022. All rights reserved.







# Previously planned projects/ contracts - can ESSER/HEERF pay part?

- Avoid acquisition of unnecessary or duplicative items (consolidating or breakout out procurement to obtain more economical purchase); 200.318(d)
- Use excess and surplus property in lieu of purchasing new equipment and property, whenever such use is feasible and reduces project costs; 200.318(f)

Brustein & Manasevit, PLLC © 2022. All rights reserved

25

25

Brustein & Manasevit, PLLC
Planning for Uninterrupted Crises



# Previously planned projects/ contracts - can ESSER/HEERF pay part? (cont.)

 Other considerations: Prior approval, 200.439; contract terms and conditions; Davis-Bacon Wage requirements; project timelines; "necessary, reasonable and allocable"; "prevent, prepare for and respond to the coronavirus"

Brustein & Manasevit, PLLC © 2022. All rights reserved.



#### LEGAL DISCLAIMER

This presentation is intended solely to provide general information and does not constitute legal advice or a legal service. This presentation does not create a client-lawyer relationship with Brustein & Manasevit, PLLC and, therefore, carries none of the protections under the D.C. Rules of Professional Conduct. Attendance at this presentation, a later review of any printed or electronic materials, or any follow-up questions or communications arising out of this presentation with any attorney at Brustein & Manasevit, PLLC does not create an attorney-client relationship with Brustein & Manasevit, PLLC. You should not take any action based upon any information in this presentation without first consulting legal counsel familiar with your particular circumstances.

Brustein & Manasevit, PLLC @ 2022. All rights reserved