



Ms. Deidre A. Harrison
Acting Controller
Office of Federal Financial Management/
Office of Management and Budget (OMB)
Executive Office of the President
725 17th St NW
Washington, DC 20503

RE: 2 CFR 200, OMB-2023-0007
Request for Information

Dear Ms. Harrison,

The American Council of Engineering Companies (ACEC) – the business association of the nation’s engineering industry – is responding to the referenced Office of Management and Budget’s (OMB) request for information (RFI). Our member firms are concerned with different agencies’ interpretation of procurement rules for engineering and design-related services. Specifically, CFR 2, Section 200.319 (b), which states, “In order to ensure objective contractor performance and eliminate unfair competitive advantage, 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.” While examples are provided, the agencies vary in their interpretation of unfair competitive advantage, including the exclusion of firms that have assisted in the successful application for federal grants and loans.

ACEC is a federation of 51 state and regional councils representing thousands of firms employing more than 600,000 engineers, architects, land surveyors and other specialists. Our member firms contribute to the economic development of communities across the nation by supporting local agencies on a wide range of infrastructure projects, to include the continued implementation of the Infrastructure Innovation and Jobs Act (IIJA).

The Council has raised concerns previously over an interpretation of CFR 2, Section 200.319 by certain agencies. Especially when our agency clients’ interpretations prevent making procurement decisions for engineering services based on the needs of specific projects. Section 200.319 provides specific examples of situations considered to be restrictive to competition, all of which involve direct actions that favor the contractors involved. Assisting and/or preparing applications for federal assistance involve preliminary technical work that is used for information and planning which is provided to all potential offerors for follow-on services if the applications are successful.

As an example, the Economic Development Administration (EDA) has used this provision to preclude engineering firms that develop a Preliminary Engineering Report (PER) for an EDA application from competing for the final design or other phases of the project. Its 2020 Public Works and Economic Adjustment Assistance, Notice of Funding Opportunity, Section H.3 states,

“The general rule for Federal financial assistance is that contractors that develop draft specifications, requirements, statements of work, invitations for bids or requests for proposals are prohibited from competing for the final procurement. **For instance, a professional engineer or architect who prepared the Preliminary Engineering Report for an EDA application would be excluded from bidding on the same work under the award** [bolding provided for emphasis].”

The result is forcing the most qualified engineering firms to forgo either assisting with project applications or pursuing projects after they are awarded funding. This approach is inefficient, unnecessary, and inconsistent with how other federal agencies have addressed the question of how local agencies should engage engineering services for various phases of projects. It is inaccurate to interpret the development of a PER or assisting with funding applications with the development of “draft specifications, requirements, statements of work, invitations for bids or requests for proposals” under the Uniform Guidance. Since the contents of the PER are made available to all potential offerors, there is no unfair competitive advantage.

More appropriately, the Federal Highway Administration policy permits state and local agencies to use the same firm to perform both preliminary engineering and final design on the same project.¹ There is no conflict of interest as long as the agency is not obligated to proceed with final design for any alternative approach addressed in the preliminary engineering, that all reasonable alternatives will be evaluated and given appropriate consideration, and relevant NEPA decision documents have been issued prior to proceeding with final design.

ACEC recommends that OMB clarify CFR 2, Section 200.319 by stating that services provided by an engineering firm, as part of an application for federal funds, does not create an unfair competitive advantage for that firm.

We appreciate your consideration of these recommendations. If you have any questions, please contact Dan Hilton at dhilton@acec.org.

¹ “Procurement, Management, and Administration of Engineering and Design Related Services - Questions and Answers,” Section VIII. Conflicts of Interest, found at <https://www.fhwa.dot.gov/programadmin/172qa.pdf>.