

December 4, 2023

Honorable Steven Mackey, Policy Analyst
OMB Office of Federal Financial Management
Office of Management and Budget
Executive Office of the President
725 17th St., NW
Washington, DC 20503

Re: Office of Management and Budget.
Executive Office of the President.
[Docket Number 2023-0017]
Proposed revisions to Title 2 of the Code of Federal Regulation (CFR), subtitle A,
chapters I and II.
Proposed rule; notification of proposed guidance.

The Local Opportunities Coalition alongside supporting partner organizations represent a broad range of stakeholders from across the country unified in maximizing the benefits of federal dollars for local communities and workers. Our organizations represent and serve a variety of constituencies that are working hard to rebuild and recover from the devastating impacts of the pandemic, the climate crisis, and economic instability. We are very pleased to see the recent Notice of Proposed Rulemaking from the Office of Management and Budget (OMB) which proposes updates to certain provisions in Title 2 of the Code of Federal Regulations (CFR), Subtitle A, Chapters I and II.

We are supportive of the Biden Administration's decision to make substantial updates to the OMB's Uniform Guidance provisions. We are particularly pleased to see updates made to certain provisions that provide clarity to recipients of federal assistance¹ on how they may be permitted to use a scoring mechanism to create quality jobs for their communities and promote greater racial and gender equity in their spending. The proposed updates to the Uniform Guidance also remove the ban on geographic preferences, which were previously excluded despite having no basis in legislative text.² This new guidance clarifies that local hire programs are not, in fact, anti-competitive, but rather help create equitable on-ramps to quality careers and can help grow the middle-class, and bolster local economies and communities.³

¹ In this letter, the term "recipient" or "recipient of assistance" refers to "recipients" and "subrecipients" as defined in 2 C.F.R. 200.1.

² Scott L. Cummings and Madeline Janis, Preemption By Procurement, U.C.L.A. Law Review, (Aug. 2023).

³ UCLA Labor Center, Exploring Targeted Hire: An Assessment of Best Practices in the Construction Industry, at 15 (Mar. 2014); see also Kathleen Mulligan-Hansel, Making Development Work for Local Residents: Local Hire Programs and Implementation Strategies that Serve Low-Income Communities, Powerswitch Action (formerly Partnership for Working Families), at 4 (July 2008); Seattle Finance & Administrative Services, 2020 Priority Hire Annual Report: Purchasing and Contracting, (May 2021).

1. Overview

The Uniform Guidance controls hundreds of billions of dollars in federal grant spending annually. Section 200.319 of the Uniform Guidance states that all federally-assisted procurement transactions “must be conducted in a manner providing full and open competition.” Since the 1980s, Section 200.319 has been interpreted in a manner that prevents states and local governments from utilizing the full range of their procurement powers to promote locally-driven values and strong workforce and equity provisions.

Misguided and ideologically driven conceptions of “full and open competition” have promoted the myth that contract specifications unrelated to price will limit the number of bidders on any project, thereby reducing efficiency and raising prices. The Reagan Administration used this rationale to constrain recipients through a number of federal initiatives and by promoting an overall narrative of “efficiency” (i.e., cost-cutting) above all other factors. The Reagan-era interpretation of competition became the ruling factor in procurement, without any empirical evidence that prohibiting contract specifications beyond low price would create better overall outcomes, and despite years of reports demonstrating that these types of contract specifications do not impact competition. Section 200.319(a) has unnecessarily restricted the power of states and municipalities to act in their own interests.⁴

This lack of clarity has prevented recipients of federal financial assistance from using their procurement powers to create transformational change for their communities. States and municipalities that have attempted to enact locally driven policies through their procurement contracts have been blocked by judicial and administrative interpretations of the competition rule.⁵ Contract provisions as diverse and wide-ranging as local hiring goals, requiring domestic partner benefits⁶, disclosures from contractors around their predecessors’ participation in slavery⁷, and anti-corruption “pay-to-play” provisions,⁸ have all been blocked by overly-broad interpretations of the competition rule. Faced with the prospect of losing critical federal assistance needed for necessary procurement purchases, states and localities have relented to the competition rule for decades. Recipients of federal financial assistance, from cities to states to tribal governments, have been forced to drastically limit the application of community-driven policies incentivizing local sourcing, environmental sustainability, community involvement, racial and gender equity and good jobs in federally-assisted contracting.

The updated Uniform Guidance from the OMB does much to clarify the rules of the road for tribal, state, and local government grantees and will help promote uniformity among the federal awarding agencies and avoid confusion among recipients of assistance. By permitting geographic preference through local sourcing and local hire, OMB’s Uniform Guidance would be in line

⁴ Id. at 2.

⁵ See, e.g., *City of Cleveland v. Ohio*, 508 F.3d 827(6th Cir. 2007).

⁶ Letter for Virginia Seitz, Assistant Attorney General, Office of Legal Counsel, from Robert S. Rivkin, General Counsel, Department of Transportation (Oct. 3, 2012).

⁷ See Letter from Jeffrey A. Rosen, U.S. Dep’t of Transp., Gen. Couns., to Jessica F. Heinz, City of L.A., Assistant City Att’y (June 25, 2004).

⁸ See Certification of Assistant U.S. Attorney Daniel J. Gibbons at 22, *New Jersey v. Mineta*, No. 05-228 (D.N.J. 2005). Exhibit 10 is the final legal opinion from the Federal Highway Administration to the New Jersey Department of Transportation.

with DOT’s policy on local hire for construction jobs, which was included in the IIJA. Moreover, permitting the use of a scoring mechanism in the bidding process will allow local agencies to reward bids that help create quality jobs. This type of uniformity across the federal awarding agencies removes the administrative burden for local agencies to institute these policies in non-federal funding opportunities, and allows them to dedicate more agency resources towards mission work. This clarity is more important now than ever before. The IIJA, CHIPS and Science Act, and IRA collectively will fund hundreds of billions of dollars’ worth of construction activities through various agencies including the DOT, Department of Commerce, Department of Energy, Environmental Protection Agency, Department of the Interior, and others. Recipients of assistance under such programs can operate under this uniform framework.

2. Updated Guidance

Earlier this year, our organizations submitted comments to the Request for Information issued by OMB regarding this proposed update with recommendations on how Chapter II, Part 200, titled “Uniform Guidance, the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards” (Uniform Guidance) could be revised to provide greater clarity and simplicity to support recipients of federal assistances⁹ on how they may be permitted to use federal assistance to create quality jobs for their communities, promote greater racial and gender equity in their spending, and protect workers through workforce transition plans. We are very pleased to see many of our specific recommendations included in the proposed rule, including:

- **Section 200.318(h)** Requires non-federal agencies to award contracts only to responsible contractors by requiring them to consider contractor integrity which includes proper classification of employees. Ensuring that workers are properly classified is crucial to protecting workers’ rights. According to the U.S. Department of Labor (DOL) report, as many as 30 percent of employers have misclassified workers, affecting potentially millions of workers nationwide.¹⁰ When employers misclassify employees as independent contractors, employees are denied important legal protections such as the right to a minimum wage and overtime pay, unemployment insurance, worker’s compensation, and protections under OSHA and anti-discrimination laws.
- **Section 200.318(i)** Permits the use of Project Labor Agreements (PLAs) or other pre-hire collective bargaining agreements. PLA provisions make sense for contractors working under the PLA, and for owners using a PLA to construct their projects. They ensure economic and efficient construction, while also serving as a tool for promoting career opportunities and economic development in underserved communities. Studies by Powerswitch Action (formerly the Partnership for Working Families) and UCLA found

⁹ In this letter, the term “recipient” or “recipient of assistance” refers to “recipients” and “subrecipients” as defined in 2 C.F.R. 200.1

¹⁰ Lalith De Silva, et al., Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs, Planmatics, Inc., Prepared for the US Department of Labor Employment and Training Administration (2000), p. iii, <https://wdr.doleta.gov/owsdrr/00-5/00-5.pdf>

that such PLAs increase employment and retention of local workers, foster middle-class career paths, and reduce poverty in the communities in which such PLAs are used.¹¹

- **Section 200.318(I)** This section also permits non-federal agencies to ensure the contracted project provides community benefits. There is overwhelming evidence that provisions that raise lasting community benefits have been used to ensure the efficient and timely completion of government projects, raise industry standards, and create good jobs for local communities.¹²
- **Section 200.318(I)** As noted, this section permits contractors to use hiring preferences for workers in target populations. Agencies can use targeted hire policies to target disadvantaged communities who may benefit from equitable hiring practices. Individuals with barriers to employment may include populations underrepresented in the infrastructure workforce and residents in high-poverty or high-unemployment areas. Jurisdictions such as Los Angeles¹³ and Seattle¹⁴ have already adopted such policies. With this updated federal guidance, such jurisdictions can apply these policies under one uniform policy to both non-federally-assisted and federally-assisted projects, which will further reduce their administrative burden.
- **Section 200.318(I)** This section also permits construction contractors to use local hiring practices to ensure jobs created benefit workers in the local economy. Local hire policies, in which government funds are used to hire local workers on construction projects, can help marginalized communities address historic inequities by providing access to quality careers in construction. Such policies also help build a middle-class tax base and revitalize local economies.¹⁵ One report that examined nine case-study projects concluded that local hire provisions, when properly implemented, can create significant new job opportunities for low-income local residents.¹⁶
- **Section 200.318(I)** This section permits employees of an incumbent contractor first right of refusal under a successor contract. Not only will this provision prevent the unnecessary replacement of knowledgeable, incumbent workers with lower-paid, inexperienced, or temporary workers, it will also provide stability to federal awarding agencies, recipients of federal assistance, contracted workers, their families, and their communities.
- **Section 200.319(c)** This section also removes the prohibition in the Uniform Guidance on using geographic preference requirements. Prior guidance has been interpreted as a ban on local hire goals and policies. Local hire policies are not anti-competitive and the updated regulation will promote consistency among federal awarding agencies. This

¹¹ Id. at 3; see also Sabrina Owens-Wilson, *Constructing Buildings & Building Careers: How Local Governments in Los Angeles are Creating Real Career Pathways for Local Residents*, Powerswitch Action (formerly Partnership for Working Families), (Nov. 2010).

¹² Id.

¹³ LA Metro Website, *Project Labor Agreement & Construction Careers Policy*, (last visited Mar. 3, 2023), <https://www.metro.net/about/placcp/#project-information-and-placcp-reports>.

¹⁴ City of Seattle website, *Purchasing and Contracting: Priority Hire*, (last visited Mar. 7, 2023), <https://www.seattle.gov/purchasing-and-contracting/priority-hire>.

¹⁵ UCLA Labor Center, *Exploring Targeted Hire: An Assessment of Best Practices in the Construction Industry*, at 15 (Mar. 2014); see also Kathleen Mulligan-Hansel, *Making Development Work for Local Residents: Local Hire Programs and Implementation Strategies that Serve Low-Income Communities*, Powerswitch Action (formerly Partnership for Working Families), at 4 (July 2008); Seattle Finance & Administrative Services, *2020 Priority Hire Annual Report: Purchasing and Contracting*, (May 2021).

¹⁶ Mulligan-Hansel, *supra* note 14, at 17.

section also permits non-federal agencies to contract with small locally owned businesses, further reinvesting in the local economy.

- **Section 200.319(f)** This section also proposes an update which states that recipients and subrecipients will not be prohibited from incorporating a scoring mechanism that rewards bidders committing to specific numbers and types of U.S. jobs, as well as certain compensation and benefits. This clarification of the Uniform Guidance expressly authorizes recipients to make such inquiries of bidders, to require living wages on their contracts, and to incorporate a job quality scoring credit or other best-value procurement model in their bids, such as the U.S. Jobs Plan (USJP), which has been previously approved by the federal government.¹⁷ The USJP has been used by government purchasers of manufactured equipment to evaluate location, job creation numbers, information on wages and benefits to be paid, on-the-job training opportunities for all non-temporary employees, and inclusive hiring commitments in bids.
- **Section 200.323(b)** This new section encourages recipients and subrecipients of federally-assisted procurement opportunities to use sustainable products and services in their projects, in line with Executive Order 14057, which establishes that it is the policy of the Administration to lead by example and pursue whole-of-government approach on sustainability and expanding American technologies, industries, and jobs that support sustainability and climate resilience. By encouraging awarded recipients to practice sustainable administrative practices, federally-assisted projects can shift the nation's preparedness and resilience to the effects of a changing climate, including financial management strategies.
- **Section 200.324** Clarifies that when a recipient or subrecipient performs a cost-benefit analysis for the procurement contract, this analysis must include contract modifications, including an analysis on the potential workforce impacts if the project will displace public sector employees. The enforcement of this language will better inform agencies on how a project may impact incumbent workers.
- **Section 200.455(b)** This new section stipulates that any contractor receiving federal funds cannot use those funds towards influencing employees not to form a union. This is an important provision to ensure the protection of workers' right to concerted activities within federally-funded projects.

We support these proposed changes, and urge OMB to ensure these recommendations are included in the final rule.

While we were excited to see many of our recommendations reflected in the proposed rule, we would strongly encourage OMB to include a couple of additional recommendations in the final rule. We believe that these additional policy changes are necessary to provide clarity for the communities we serve, promote uniformity among federal awarding agencies, reduce the administrative burden for recipients of assistance, and allow the Biden Administration to achieve

¹⁷ Secretary Anthony R. Foxx, *Letter from U.S. Transportation Secretary Anthony Foxx, U.S. Employment Plan* (Feb. 18, 2016), https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/S10-160211-003_F.pdf.

its policy priorities of improving equity through the federal government. Specifically, we recommend OMB include the following changes in the final rule:

- ***Living wages.*** The OMB should add new language to 2 CFR §200.318(l) for non-federal agencies to clarify that it is permissible for recipients of federal funds to take steps to ensure that employees of contractors are paid a living wage and benefits on federally-funded contracts. Specifically, we suggest that the OMB insert language clarifying that non-federal agencies: “may require that contractor’s and sub-contractor’s employees are paid wages and benefits in accordance with prevailing wage and benefits standards or living wage standards that may be prescribed by state or local law sufficient to recruit and retain a stable, productive, and competitively-compensated service workforce.” This addition, alongside the updated guidance in §200.319(f) authorizing the implementation of a scoring mechanism, will allow states and cities to use their procurement power to create high-road jobs with family-sustaining wages and benefits. State and local minimum wage increases in the U.S. and the 2014 executive order that raised wages for federal contractors have resulted in an additional \$150 billion in the pockets of 26 million workers of which nearly half are women of color.¹⁸ Additionally, higher minimum wages have been shown to reduce child poverty and have negligible disemployment effects.¹⁹
- ***PLAs, local hire, community benefits “shall” be allowed - not simply “may.”*** We also suggest that the OMB revise its language in Section 2 CFR § 200.318(l) to clarify that it is the intention of the OMB to permit recipients and subrecipients of federal funds to use the practices laid out in §200.318(l) so long as they are consistent with applicable laws, regulations, and requirements. To do so, we suggest that the OMB adjust the language in §200.318(l) to: “Federal agencies *will allow* recipients and subrecipients to use such practices if consistent with the U.S. Constitution, applicable Federal statutes and regulations, the objectives and purposes of the applicable Federal financial assistance program, and other requirements of this part.” This language will provide greater clarity to recipients that they will be able to administer policies like PLAs, local hire, community benefits, and local hire without further administrative approval and not permit federal agencies that may have policy objections to overrule otherwise legal and appropriate state or local incentives or requirements in federally-funded contracts.
- ***Add “service” to applicable contractors who are permitted to use local hire policies.*** In Section 2 CFR § 200.318(l), we suggest that the OMB add “service” to the applicable contractors who may use hiring preferences for disadvantaged communities. By adding “service” to this language, local hire policies can apply more broadly to industries beyond just construction.

¹⁸ Yannet Lathrop. National Employment Law Project, Quantifying the Impact of the Fight for \$15 (Jul. 2021). <https://www.nelp.org/publication/quantifying-the-impact-of-the-fight-for-15-150-billion-in-raises-for-26-million-workers-with-76-billion-going-to-workers-of-color>.

¹⁹ Sarah Minton, et al. The URban Institute, Reducing Child Poverty in the US (Apr. 2019) https://www.urban.org/sites/default/files/publication/100181/reducing_child_poverty_in_the_us_an_updated_analysis_0.pdf.

- ***Include stronger community engagement language.*** In Section 2 CFR §200.202(b) we suggest including stronger language around community engagement in program planning and design by adding the language: "Federal agencies are encouraged to engage in meaningful public consultation and engagement with stakeholders and give the public an opportunity to provide input in the development of its plan."

Taken together, these updates will substantially increase the ability of state and local agencies to use their procurement processes to create fulfilling, safe, high-road jobs for workers in their communities - especially for people of color, women, returning citizens, veterans, and other workers facing barriers to employment. We believe that these policy changes provide clarity for the communities we serve, promote uniformity among federal awarding agencies, reduce the administrative burden for recipients of assistance, and allow the Biden Administration to achieve its policy priorities of improving equity through the federal government.

Sincerely,

Action Together New Jersey
 AFT New Jersey
 Alabama Interfaith Power & Light
 Alabama NAACP
 ALIGN
 Alliance of the Southeast (Youth Leadership Committee)
 Americans for Financial Reform Education Fund
 Beverly Scott and Associates, LLC
 BlueGreen Alliance
 C40 Cities
 Center for American Progress
 Center for Law and Social Policy
 Center for Neighborhood Technology
 Center for Progressive Reform
 Center on Race, Poverty & the Environment
 Center for Sustainable Neighborhoods
 Central Alabama Labor Federation
 Central Coast Climate Justice Network (C3JN)
 Chicago Jobs with Justice
 Chicago Workers Collaborative
 Citizen Action of Wisconsin
 Civic Impact Group
 Climate Reality Project: Chicago Metro Chapter
 Coalition for a South Works CBA
 Colorado Jobs with Justice
 Communication Workers of America, AFL-CIO
 Community Change

Connecticut Roundtable on Climate and Jobs
Consortium for Worker Education
Construction Trades Workforce Initiative
Democratic Municipal Officials
Dream.org
E2 (Environmental Entrepreneurs)
Earthjustice
East Bay Alliance for a Sustainable Economy (EBASE)
Eastern Atlantic States Regional Council of Carpenters
eBooks By Crooks Publishers
Economic Opportunity Institute
Economic Policy Institute
Elevate
Elevate Newark
Emerald Cities Collaborative
Energy Alabama
Every Texan
Faith in Action Alabama
Figure 8 Investment Strategies
Forward Together Wisconsin
FREE Arizona
Good Jobs First
Greater Birmingham Ministries
Green Homeowners United
GreenFaith
Healthy Environment Alliance of Utah (HEAL Utah)
HIRE360
Housing and Community Development Network of NJ
Illinois Environmental Council
In the Public Interest
Indivisible Highland Park
Institute for Policy Studies, Global Economy Project
International Association of Sheet Metal, Air, Rail and Transportation Workers
International Brotherhood of Electrical Workers (IBEW)
International Brotherhood of Electrical Worker (IBEW) Local 595s
International Campaign for Responsible Technology
International Union of Painters and Allied Trades (IUPAT)
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)
Ironbound Community Corporation
ISAIAH (MN)
Jersey Renews Coalition
Jobs to Move America
Jobs with Justice Education Fund
Jubilee Homes of Syracuse Inc.
Justice in Employment and Labor Law (Seattle University School of Law)

JustLeadershipUSA
Kentucky Equal Justice Center
Kimberly Haven Consulting
Let's Green CA!
Little Listeners of the Carolina's
Local Progress
Long Beach Alliance for Clean Energy
Long Beach Gray Panthers
Los Angeles Alliance for a New Economy (LAANE)
Los Angeles Regional Food Bank
Manufacturing Renaissance
Massachusetts Action for Justice
Metropolitan Planning Council
Michigan League For Public Policy
Minnesota Budget Project
MnM Consulting
MomsRising
MOSES
Move LA
National Center for Law and Economic Justice
National Council of Jewish Women, Greater Philadelphia
National Employment Law Project
National Fund for Workforce Solutions
National Skills Coalition
National Women's Law Center
Natural Resources Defense Council (NRDC)
Network Lobby for Catholic Social Justice
New America, Center on Education & Labor
New Jersey Environmental Justice Alliance
New Jersey Policy Perspective
New Jersey Sustainable Business Council
New York Lawyers for the Public Interest
Newark Green Team
Newark Science and Sustainability, Inc.
NJ Work Environment Council
Norwescap, Inc.
One Northside
People's Action
People's Justice Council
PolicyLink
Public Advocacy for Kids (PAK)
Public Justice Center
Respiratory Health Association
Restaurant Opportunities Centers United
Romero Institute
Roots 2 Empower

San Diego for Every Child
Sanctuary Foundation For Veterans A NJ Nonprofit Corporation
Service Employees International Union (SEIU)
Sierra Club
Somerville Stands Together
South Bronx Unite
Southern Poverty Law Center Action Fund
Susan Mason Consulting LL
The Alabama Center for Rural Organizing
The Greenlining Institute
The International Brotherhood of Boilermakers
The Labor, Employment, & Benefits Policy Team of The Century Foundation
UAW Region 4
UAW Region 6
UCLA Labor Center
Unemployed Workers United
Union of Concerned Scientists
United Today, Stronger Tomorrow
Urban Jobs Task Force of Syracuse
Urban Sustainability Directors Network
Vote Solar
Warehouse Workers for Justice
WeCount!
Wind of the Spirit, Immigrant Resource Center
WindSolarUSA, Inc.
Workers Defense Project
Working Family Solidarity
Working Partnerships USA
Workplace Justice Lab@RU
Workplace Justice Project at Loyola Law Clinic
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