

March 13, 2023

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

Re: Office of Management and Budget  
Executive Office of the President  
Docket Number 2023-02158  
Proposed revisions to Title 2 of the Code of Federal Regulation, Subtitle A, Chapters I and II  
Notice; request for information.

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The Local Opportunities Coalition and 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 submitting these comments on how the Office of Management and Budget (OMB) can update certain provisions in Title 2 of the Code of Federal Regulation (CFR), Subtitle A, Chapters I and II to provide clarity to recipients of federal assistance<sup>1</sup> 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.

For decades, states and localities have used contract provisions in their non-federal procurements to raise industry standards and connect good local jobs and lasting community benefits to major public investments. However, the current regulations from OMB prevent recipients of federal financial assistance from using those same tools to create transformational change, despite the overwhelming evidence that these types of provisions have been used to ensure the efficient and timely completion of government projects and create good jobs for local communities. It is important that the Biden Administration move forward with this update quickly to ensure recipients of federal financial assistance are able to fully maximize the benefits to their communities from the historic legislative investments of the Infrastructure Investment and Jobs Act (IIJA), Inflation Reduction Act (IRA), and CHIPS and Science Act, as well as landmark policies implemented by the Biden Administration, such as the Justice40 Initiative.

Specifically, our recommendations relate to Chapter II, Part 200, titled “Uniform Guidance, the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards” (Uniform Guidance). Chapter II includes sections on procurement standards and includes requirements that govern how states and localities must administer their federally-assisted procurements. Although states and localities around the country would like to support the Biden Administration’s goals of using federally-assisted procurement as a tool to address historic inequities,<sup>2</sup> ambiguous and restrictive language

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<sup>1</sup> In this letter, the term “recipient” or “recipient of assistance” refers to “recipients” and “subrecipients” as defined in 2 C.F.R. 200.1

<sup>2</sup> Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, (Jan. 20, 2021), which specifically called for an examination of “potential barriers that underserved communities and individuals may face in taking advantage of agency procurement and contracting opportunities,” <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

in certain sections of the Uniform Guidance have created barriers. Such problematic sections include Sections 200.319(a) and 200.319(b), which have been interpreted very broadly to the detriment of recipients, and Section 200.319(c), which prohibits recipients of assistance from implementing local hire policies on federally-assisted projects.

A few key changes to those sections of the Uniform Guidance will 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.

## 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 community values of 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.<sup>3</sup> Section 200.319(a) has unnecessarily restricted the power of states and municipalities to act in their own interests.

This overly broad interpretation of “full and open competition” in Sections 200.319(a) and (b) contradicts at least three other sections in the Uniform Guidance:

- Section 200.320(b)(2) allows recipients of federal financial assistance to use a competitive proposal process that includes multiple criteria so long as the bid criteria are advertised ahead of time. The language suggests that such criteria may include non-economic factors. The OMB, however, has never clarified whether a recipient of assistance has the authority to adopt economic development or service delivery related factors in their federally-assisted purchases.
- Section 200.317 requires each state to use the “same policies and procedures it uses for procurements from its non-Federal funds.” Yet, Section 200.319 prohibits states from invoking policies and procedures – such as geographic hiring preferences – designed to benefit frontline communities that will be directly impacted by federally-assisted projects.

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<sup>3</sup> Kevin Duncan & Jeffrey Waddoups, *Unintended Consequences of Nevada’s Ninety-Percent Prevailing Wage Rule*, *Labor Studies Journal* 45 (2) (2020), <https://journals.sagepub.com/doi/10.1177/0160449X19897961>; Michael C. Rubenstein, *Impact of the Maryland Living Wage*, Maryland Department of Legislative Services (2008), [https://dlslibrary.state.md.us/publications/OPA/1/IMLW\\_2008.pdf](https://dlslibrary.state.md.us/publications/OPA/1/IMLW_2008.pdf); Karla Walter, Divya Vijay & Malkie Wall, *Federal Contractors Are Violating Workers’ Rights and Harming the U.S. Government*, Center for American Progress, (Jan. 21, 2022), <https://www.americanprogress.org/article/federal-contractors-are-violating-workers-rights-and-harming-the-u-s-government/>; Karla Walter, David Madland, Paul Sonn & Tsedeye Gebreselassie, *Contracting that Works*, Center for American Progress, (Nov. 13, 2015), <https://www.americanprogressaction.org/article/contracting-that-works-2/#:~:text=A%202003%20survey%20of%20New,with%20no%20workplace%20law%20violations.>

- Section 200.322 encourages recipients of federal financial assistance to adopt preferences in their federally-assisted procurement for projects that create or preserve US-based jobs.

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 strong equitable policies through their procurement contracts have been blocked by judicial and administrative interpretations of the competition rule.<sup>4</sup> Contract provisions as diverse and wide-ranging as local hiring goals, requiring domestic partner benefits<sup>5</sup>, disclosures from contractors around their predecessors' participation in slavery<sup>6</sup>, and anti-corruption "pay-to-play" provisions,<sup>7</sup> 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 innovative policies incentivizing racial equity, local sourcing, environmental sustainability, community involvement and good jobs in federally-assisted contracting.

## **2. OMB Should Rescind its Regulation Barring Local Hire Policies Because Such Policies are Not Anti-Competitive and the Regulation's Withdrawal Will Promote Consistency Among Federal Awarding Agencies.**

Section 200.319(c) provides that recipients of federal assistance shall not use "statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except where applicable Federal statutes expressly mandate or encourage geographical preference." This regulation has been interpreted as a ban on local hire goals and policies. Local hire policies, in which government funds are used to hire local workers on construction projects, can help marginalized communities address historic inequities by creating on-ramps to quality careers in construction. Such policies also help build a middle-class tax base and revitalize local economies.<sup>8</sup> 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.<sup>9</sup>

Coalition partners – such as NABTU, LIUNA, IUPAT, and SMART – understand first-hand the social benefits of local hire policies. For decades, NABTU and its affiliated unions have been incorporating local hire provisions in their project labor agreements (PLA). PLAs are comprehensive agreements that have been used in the construction industry for over 70 years to achieve uniform labor standards, stability, and efficiency on large construction projects. PLA local hire 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

<sup>4</sup> See, e.g., *City of Cleveland v. Ohio*, 508 F.3d 827(6th Cir. 2007).

<sup>5</sup> Letter for Virginia Seitz, Assistant Attorney General, Office of Legal Counsel, from Robert S. Rivkin, General Counsel, Department of Transportation (Oct. 3, 2012)

<sup>6</sup> 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).

<sup>7</sup> 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

<sup>8</sup> 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).

<sup>9</sup> Mulligan-Hansel, *supra* note 14, at 17.

development in underserved communities. A 2011 study of PLAs found that, out of a sample of 185 PLAs, more than 100 such agreements included provisions for the hiring of local area residents, minorities, and women.<sup>10</sup> The study’s sample represents less than 25 percent of all PLAs. The actual number of PLAs with local hire provisions is much larger.

Studies by Powerswitch Action (formerly the Partnership for Working Families) and UCLA found 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.<sup>11</sup> Given these benefits, it should come as no surprise that many state and local governments use goals, requirements, and incentives to encourage employment of local residents on public works projects – e.g., Detroit, St. Louis, San Francisco, Seattle, New Orleans, Idaho, and Illinois. Unfortunately, Section 200.319(c) of the Uniform Guidance has been interpreted as prohibiting such local governments from including local hire provisions in their federally-assisted contracts for construction.

Opponents of local hire policies claim that such measures are anti-competitive. In 2021, however, researchers from the policy center Jobs to Move America (JMA) released a report dispelling such misconceptions. JMA’s report investigated whether local hire provisions in federally-assisted contracts impact the number of bids received.<sup>12</sup> The report analyzed the Obama-Biden Administration’s Local Hire Pilot Program, which for the first time allowed local hiring provisions to be included on a select number of Department of Transportation construction projects. In the report, JMA compared nine of the local hire pilot projects with projects that did not have a local hire requirement within the same geographic area. The analysis found that not only did allowing local hire on a federally-assisted contract *not* systematically impact bid prices or reduce the number of bidders on construction projects, these types of pro-worker and pro-equity contract provisions created important societal benefits for local communities.

Moreover, the rescission of Section 200.319(c) will help promote consistency among the various federal agencies that administer federal assistance programs. Currently, recipients of grants from the U.S. Department of Transportation (DOT) are authorized to implement local or other geographical or economic hiring preferences relating to the use of labor on federally-assisted construction projects. 23 U.S.C. §114 note; *see also id.* §140(d). Such policies may include prehire agreements such as PLAs. 23 U.S.C. §114 note. DOT’s enabling statute expressly states that such policies “shall not be considered to unduly limit competition.” *Id.* Based on the above, it is clear that Congress understood the societal value of such measures and the significance of JMA’s findings.

To promote uniformity among the federal awarding agencies and avoid confusion among recipients of assistance, OMB should bring its Uniform Guidance in line with DOT’s policy on local hire and rescind Section 200.319(c) in its entirety.<sup>13</sup> Clarity and uniformity across the federal awarding agencies 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

<sup>10</sup> Maria Figueroa, Jeff Grabelsky, Ryan Lamare, *Community Workforce Provisions in PLAs: A Tool for Building Middle-Class Careers*, Cornell University ILR School, at 3 (Oct. 2011).

<sup>11</sup> *Id.* at 4; *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).

<sup>12</sup> Christy Veeder, PHD, *Empirical Analysis of USDOT’s Local Labor Hiring Pilot Program*, Jobs to Move America, (Mar. 2, 2021), <https://jobstomoveamerica.org/resource/analysis-of-usdot-local-labor-hiring-pilot-local-hire-increases-opportunities-for-disadvantaged-workers-strengthens-local-economies/>.

<sup>13</sup> *See also* U.S. DOT, Bipartisan Infrastructure Law – Section 25019(a) “Local Hiring Preference for Construction Jobs,” (updated Jun. 8, 2022), <https://www.fhwa.dot.gov/construction/hiringpreferences/qanda060822/>.

of the Interior, and others. It is critical that recipients of assistance under such programs operate under a uniform framework.

Finally, the withdrawal of OMB's ban on local hire requirements will also reduce administrative burdens for recipients of assistance who are currently forced to modify and alter existing procurement standards for the purpose of satisfying Section 200.319(c). For example, the Los Angeles County Metropolitan Transportation Authority (LA Metro) was forced to establish two completely separate labor agreements and implementation processes in order to adapt to the OMB's prohibition on local hire requirements.<sup>14</sup>

### **3. OMB Regulations Should Permit Recipients of Assistance to Implement Policies that Address Barriers to Employment, Promote Quality Jobs, and Protect Jobs Through Workforce Transition Plans.**

Because Section 200.319(a) has been interpreted broadly by the federal government, states and cities have been reluctant to use their procurement powers to enact policies that will address barriers to employment, promote quality jobs, and protect jobs through workforce transition plans. The Uniform Guidance should be updated to clarify that recipients are, in fact, authorized to include certain standards in their procurement contracts.

While the elimination of 200.319(c) will permit geographic preferences, recipients of federal assistance will benefit from greater clarity on the types of contract provisions they are allowed to include to reduce barriers to employment. For example, in addition to local hire goals, many jurisdictions - such as Los Angeles<sup>15</sup> and Seattle<sup>16</sup> - currently use targeted hire policies on their non-federally-assisted contracts. Allowing such jurisdictions to apply one uniform policy to both non-federally-assisted and federally-assisted projects will further reduce their administrative burden. OMB should therefore clarify the Uniform Guidance by expressly authorizing recipients to hire individuals with barriers to employment. Such individuals may include populations underrepresented in the infrastructure workforce and residents in high-poverty or high-unemployment areas.

Recipients of federal financial assistance also need further clarity on whether they are permitted to include job quality standards in their procurement processes. OMB's overly broad reading of the phrase "full and open competition" in Section 200.319(a) has discouraged states and cities from asking non-economic questions in their federally-assisted procurement transactions - e.g., questions concerning wages paid to workers, or a bidder's history of compliance with federal and state laws. OMB should clarify the Uniform Guidance by expressly authorizing 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.<sup>17</sup> 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.

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<sup>14</sup> 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>.

<sup>15</sup> Id.

<sup>16</sup> City of Seattle website, *Purchasing and Contracting: Priority Hire*, (last visited Mar. 7, 2023), <https://www.seattle.gov/purchasing-and-contracting/priority-hire>.

<sup>17</sup> 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](https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/S10-160211-003_F.pdf).

To help reduce the burden of enforcement, the Uniform Guidance should also expressly authorize recipients of assistance to collaborate with community organizations on enforcement of the above contract provisions.

OMB should also include a new provision in the Uniform Guidance giving recipients of federal assistance express authorization to include, in their procurement transactions, provisions preventing the displacement or unnecessary relocation of qualified workers on service contracts. Jurisdictions such as Los Angeles, Philadelphia, and New York have adopted such policies. Such an amendment will bring the Uniform Guidance in line with the smart procurement policy underlying Executive Order 14055, titled *Nondisplacement of Qualified Workers Under Service Contracts*,<sup>18</sup> Our proposal will allow state and local governments to ensure that when federally-assisted service contracts change over to a new contractor, qualified employees working on the predecessor contract have a right of first refusal of employment under the successor contract. Not only will this provision prevent knowledgeable, incumbent workers from being replaced 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.<sup>19</sup>

In addition, OMB can help reduce administrative burdens in the long run by clarifying that its current cost analysis requirement in Section 200.324(a) includes a requirement that recipients who enter into service contracts that will displace public sector employees prepare a written analysis comparing the projected cost of providing the service in-house and the cost of the proposed contract. This analysis should include all contract costs, including direct costs, indirect costs, overhead costs, transition costs, and the costs of overseeing and monitoring the contract for the life of the contract. This provision would help reduce administrative burden in the long run by requiring a standardized process for cost analyses and ensuring that service contracts that outsource public functions truly save public dollars. Currently, the utilization of such cost analyses varies greatly among non-federal governmental entities. And those governmental entities that do utilize cost analysis often fail to include the full costs of contracting that the governmental entity incurs, such as the cost to manage the procurement process or oversee the contract. This requirement would ensure that non-federal governmental entities are making contracting decisions based on accurate assessments of fiscal impact, helping ensure that federal dollars are used wisely.

Recipients should also be required to ensure that their contractors will properly classify workers on federally-assisted contracts. According to a U.S. Department of Labor (DOL) report, as many as 30 percent of employers have misclassified workers, affecting potentially millions of workers nationwide.<sup>20</sup> 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, protections under OSHA and anti-discrimination laws. This proposal is consistent with the recommendation of the White House Task Force on Worker Organizing and Empowerment that the

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<sup>18</sup>Executive Order 14055, *Nondisplacement of Qualified Workers Under Service Contracts*, 86 FR 66397, (Nov. 18, 2021),

<https://www.federalregister.gov/documents/2021/11/23/2021-25715/nondisplacement-of-qualified-workers-under-service-contracts>; see also Wage and Hour Division, Department of Labor, Notice of Proposed Rulemaking, *Nondisplacement of Qualified Workers Under Service Contracts*, (Jul. 15, 2022).

<sup>19</sup> On the issue of displacement, OMB should be aware that due to the unique nature of the manufacturing industry, hyperlocal sourcing policies may have unintended negative impacts on responsible and well-established manufacturing facilities in the region. OMB should therefore encourage recipients of federal assistance to consider how hyperlocal sourcing requirements in their procurement transactions will impact those manufacturing facilities in the region that offer good family-supporting jobs.

<sup>20</sup> 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>.

government continue to prioritize action to prevent and remedy the misclassification of workers as independent contractors.<sup>21</sup>

We are pleased to see that the administration is working to finalize the update to the Uniform Guidance by December 2023, and we look forward to working with the administration to ensure this timeline is met. Our suggestions are largely framed in a way to give recipients of federal financial assistance authorization to include pro-worker and pro-equity policies in their procurement contracts if they so choose. Our hope is that this set of authorizations will provide states and localities with more clarity on the types of progressive, innovative policies they can apply to federally assisted contracts.

Taken together, many of these recommendations 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.

Sincerely,

Alabama State Conference of the NAACP  
 American Federation of State, County and Municipal Employees (AFSCME)  
 Americans for Financial Reform Education Fund  
 Center for American Progress  
 Center for Law and Social Policy (CLASP)  
 Communications Workers of America Union (CWA)  
 Community Change Action  
 Conservation Alabama  
 Economic Policy Institute  
 Every Texan  
 Georgia Stand-Up  
 Greater Birmingham Ministries  
 Iowa Federation of Labor, AFL-CIO  
 Inland Empire Labor & Community Center at UC-Riverside  
 Institute for Policy Studies, Global Economy Project  
 International Association of Sheet Metal, Air, Rail, and Transportation Workers (SMART)  
 International Union of Painters and Allied Trades (IUPAT)  
 In the Public Interest  
 Jobs to Move America  
 Jobs with Justice  
 Laborers International Union of North America (LIUNA)  
 Los Angeles Alliance for a New Economy (LAANE)  
 Massachusetts Action for Justice  
 National Employment Law Project  
 National League of Cities  
 Network Lobby for Catholic Social Justice  
 New America, Center on Education and Labor  
 New Jersey Policy Perspective

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<sup>21</sup>Vice President Kamala Harris & Secretary of Labor Marty J. Walsh, *White House Task Force on Worker Organizing and Empowerment: Report to the President*, (Feb. 7, 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/02/White-House-Task-Force-on-Worker-Organizing-and-Empowerment-Report.pdf>.

North America's Building Trades Unions (NABTU)  
North Carolina Justice Center  
The People's Justice Council  
PolicyLink  
PowerSwitch Action  
Restaurant Opportunities Centers United  
Service Employees International Union (SEIU)  
United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)  
Urban Jobs Task Force of Syracuse  
Women Employed  
Working Family Solidarity, Chicago  
Workplace Justice Lab at Rutgers University