

Field Manual

Procurement Disaster Assistance
Team (PDAT)

*Procurement Information for FEMA
Public Assistance Award Recipients and
Subrecipients*

2019



FEMA



FEMA PROCUREMENT DISASTER ASSISTANCE TEAM

FIELD MANUAL



Washington, D.C.

September 2019



www.fema.gov/procurement-disaster-assistance-team

Table of Contents

1. Manual Overview.....	6
1.1 Introduction	6
A. Purpose of the Field Manual.....	6
B. How to Navigate the Field Manual	7
1.2 Background	8
A. Definitions and Key Players.....	8
B. Authority.....	15
C. Overview of Contracts.....	16
2. Applicability of the Federal Procurement under Grant Standards	20
2.1 Procurement by State Entities.....	21
2.2 Procurement by Non-State Entities.....	22
3. General Procurement Under Grant Standards	27
3.1 Mandatory Standards.....	28
A. Maintain Oversight.....	28
B. Written Standards of Conduct	28
C. Need Determination	33
D. Contractor Responsibility Determination.....	35
E. Maintain Records	38
F. Settlement of Issues.....	40
G. Time and Materials Contracts.....	42
3.2 Encouraged Standards.....	44
A. Use of Federal Excess and Surplus Property	44
B. Use of Value Engineering.....	45
C. Use of Intergovernmental or Inter-Entity Agreements.....	45
4. Competition	47
4.1 Restrictions to Competition	48
4.2 Geographic Preferences	54
4.3 Written Procedures.....	57
4.4 Prequalified Lists.....	58

5.	Methods of Procurement.....	61
5.1	Procurement by Micro-Purchases.....	61
5.2	Procurement by Small Purchases.....	63
5.3	Procurement by Sealed bidding.....	64
5.4	Procurement by Competitive Proposals.....	67
5.5	Procurement by Noncompetitive Proposals.....	71
6.	Socioeconomic Contracting.....	80
6.1.	Affirmative Steps.....	80
6.2	Definitions for Socioeconomic Firms.....	82
7.	Procurement of Recovered Materials.....	86
8.	Cost or Price Analysis.....	90
8.1	Price Analysis.....	90
8.2	Cost Analysis.....	91
8.3	Cost Plus a Percentage of Cost (CPPC) Contracts.....	93
9.	Federal Awarding Agency or Pass-Through Entity Review.....	96
9.1	Pre-Award Procurement Review.....	96
9.2	Exemption.....	97
9.3	Post-Award Procurement Review.....	98
10.	Bonding Requirements.....	99
A.	Bid Guarantee.....	100
B.	Performance Bond.....	100
C.	Payment Bond.....	101
11.	Contract Provisions.....	102
11.1	Required Provisions.....	103
11.2	FEMA Recommended Provisions.....	109
12.	Beyond the Basics: Important Procurement Considerations.....	112
12.1	Considerations for Indian Tribal Governments.....	113
12.2	Contract Changes/Modifications.....	116
12.3	Design-Bid-Build and Design-Build Contracts.....	118
12.4	Construction Manager at Risk (CMAR) Delivery Method.....	120
12.5	Cooperative Purchasing.....	121

- A. Joint Procurements 122
- B. Using Another Jurisdiction’s Contract (Piggybacking)..... 124
- C. Cooperative Purchasing Program 125
- 12.6 Prepositioned Contracts 129
- 12.7 Mutual Aid Agreements..... 130
- 12.8 Purchasing Agents 132
- 13. Remedies for Procurement Noncompliance..... 134
 - A. Remedies for Noncompliance..... 134
 - B. Specific Conditions 135



1. Manual Overview

1.1 Introduction

A. Purpose of the Field Manual

This Field Manual lists, describes, and exemplifies the mandatory requirements for Federal Emergency Management Agency (FEMA) Public Assistance (PA) applicants using federal funding to finance the procurement of property and services.

The financial assistance provided through the PA Program is subject to the federal procurement under grant standards under the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* found at 2 C.F.R. §§ 200.317-326.¹ The Procurement Disaster Assistance Team (PDAT) developed this Manual primarily to support FEMA staff in providing accurate and consistent information to PA applicants on how to comply with these federal procurement requirements.

This version of the Manual merges and streamlines relevant content from the *Field Manual*² and the *Supplement to the Field Manual*.³ While this document is intended to serve as a practical field reference, it is not all encompassing, nor does it have the force and effect of law, regulation, or FEMA policy.

The information provided in the Manual is not intended to be, nor does it provide or constitute legal advice for applicants. This document is only intended to serve as a

¹ Adopted by DHS at 2 C.F.R. § 3002.10. 79 Fed. Reg. 75871 (Dec. 19, 2014).

² Field Manual – Public Assistance Grantee and Subgrantee Procurement Requirements under 44 C.F.R. Pt. 13 And 2 C.F.R Pt. 215, December 2014.

³ Procurement Guidance for Recipients and Subrecipients under 2 C.F.R Part 200 (*Uniform Rules*) Supplement to the Public Assistance Procurement Disaster Assistance Team (PDAT) Field Manual, June 21, 2016.

reference material for the federal procurement under grant standards identified in the *Uniform Rules*, 2 C.F.R. Part 200. Adherence to, application of, or use of this document with regard to a procurement subject to federal award funds does not guarantee the legal sufficiency of any procurement, nor does it ensure that an award or subaward will not be audited or investigated. If you are an applicant, all legal questions concerning the sufficiency of a procurement in terms of federal procurement standards should be referred to your servicing legal counsel.

B. How to Navigate the Field Manual

- This Manual is structured according to the progression of the federal procurement under grant standards from 2 C.F.R. §§ 200.317-326.
- Throughout this document, you will encounter icons to help identify key definitions, examples, tools and/or resources, and common Department of Homeland Security Office of Inspector General (OIG) audit findings.



Definition



Example



Tools/Resources



Common OIG Audit Finding

- [Internal hyperlinks](#) connect sections that are complementary within the Manual.
- [External hyperlinks](#) connect the Manual with relevant external references or resources.
- Orange boxes indicate highly important paragraphs.

1.2 Background

A. Definitions and Key Players

Below are the definitions of key terms that will be used throughout this document.

- **Contract**

A legal instrument by which a PA applicant purchases property or services needed to carry out the project or program under a federal award.⁴ A contract, for the purposes of this Field Manual, does not mean a federal award or subaward.



- **Contractor**

Contractor means an entity that receives a contract.⁵

- **DHS**

The Department of Homeland Security (DHS) is a cabinet department established to protect the United States against a diversity of threats. FEMA is a component of DHS.

- **DHS OIG**

Congress enacted the Inspector General Act of 1978 to ensure integrity and efficiency in government. The Act creates Offices of Inspector General within various departments and agencies, among other things. With the creation of DHS, a new Office of Inspector General was created in the Department.

DHS OIG conducts independent audits, investigations, and inspections of the programs and operations of DHS and makes recommendations. DHS OIG has broad authority to audit FEMA programs and activities. This includes recipients and subrecipients. DHS OIG is on the lookout for indications of noncompliance. Some of the most common findings resulting from OIG audits involve:

- Noncompetitive contracting practices;
- Failure to include required contract provisions;
- Failure to perform required procedures to ensure small and minority businesses, women-owned enterprises, and labor surplus area firms are used when possible; and



⁴ 2 C.F.R. § 200.22.

⁵ 2 C.F.R. § 200.23.

- The improper use of cost-plus-percentage-of-cost contracting.
- **Federal Awarding Agency**
The federal agency that provides a federal award directly to a non-Federal entity (NFE).⁶
- **FEMA**
The Federal Emergency Management Agency (FEMA) is a federal agency within the Department of Homeland Security (DHS). FEMA is headed by an Administrator. FEMA's statutory mission is to reduce the loss of life and property and protect the Nation from all hazards, including natural disasters, acts of terrorism, and other man-made disasters, by leading and supporting the Nation in a risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation.⁷ Among other things:
 - FEMA administers its programs and carries out its activities through its headquarters offices in Washington, D.C.; ten Regional Offices; Area Offices for the Pacific, Caribbean, and Alaska; various Recovery Offices; and temporary Joint Field Offices.
 - FEMA provides federal financial assistance through various assistance programs. Each program is not only governed by the enabling laws, implementing regulations, and FEMA policies for those programs, but also a wide range of cross-cutting laws, executive orders, and other regulations. As the Federal awarding agency for these programs, FEMA is responsible for the proper management and administration of these programs as otherwise required by law and enforcing the terms of the agreements it enters with NFEs that receive FEMA financial assistance, consistent with the requirements at 2 C.F.R. Part 200.
- **Federal Award (for purposes of this Manual, used interchangeably with "FEMA Award")**
The financial assistance that a non-Federal entity receives either directly from a Federal awarding agency or indirectly from a pass-through entity.⁸

⁶ 2 C.F.R. § 200.37.

⁷ See Homeland Security Act of 2002, Pub. L. No. 107-296, § 503 (2002) (codified as amended at 6 U.S.C. § 313).

⁸ 2 C.F.R. § 200.38(a)(1).

- **Grant Agreement (for purposes of this Manual, used interchangeably with “FEMA Award Agreement”)**⁹

A legal instrument of financial assistance between a Federal awarding agency or pass-through entity and an NFE that, consistent with 31 U.S.C. §§ 6302, 6304:

- Is used to transfer anything of value from the Federal awarding agency or pass-through entity to the NFE to carry out a public purpose authorized by a law of the United States (*see* 31 U.S.C. § 6101(3)); and
- Does not include an agreement that provides only:
 - Direct United States government cash assistance to an individual;
 - A subsidy;
 - A loan;
 - A loan guarantee; or
 - Insurance.

- **Indian Tribe (for the purposes of this Manual, used interchangeably with “Indian Tribal Government”)**

Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. Chapter 33), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. 450b(e)).¹⁰ See annually published Bureau of Indian Affairs list of Indian Entities Recognized and Eligible to Receive Services.

⁹ 2 C.F.R. § 200.51. Under the Public Assistance Program, the Grant Agreement is known as the FEMA-State/Territorial/Tribe Agreement. 44 C.F.R. § 206.32(d). The *FEMA-State Agreement* means a formal legal document stating the understandings, commitments, and binding conditions for assistance applicable as the result of the major disaster or emergency declared by the President.

¹⁰ 2 C.F.R. § 200.54. Under the Public Assistance Program, the definition for Indian Tribal Government excludes Alaskan Native Corporations, the ownership of which is vested in private individuals. 44 C.F.R. § 206.201(h).

- **Local Government**

*Local government*¹¹ means any unit of government within a state, including a:

- County;
- Borough;
- Municipality;
- City;
- Town;
- Township;
- Parish;
- Local public authority, including any public housing agency under the United States Housing Act of 1937;
- Special district;
- School district;
- Intrastate district;
- Council of governments, whether or not incorporated as a nonprofit corporation under state law; and
- Any other agency or instrumentality of a multi-, regional, or intra-state or local government.

- **Micro-purchase**

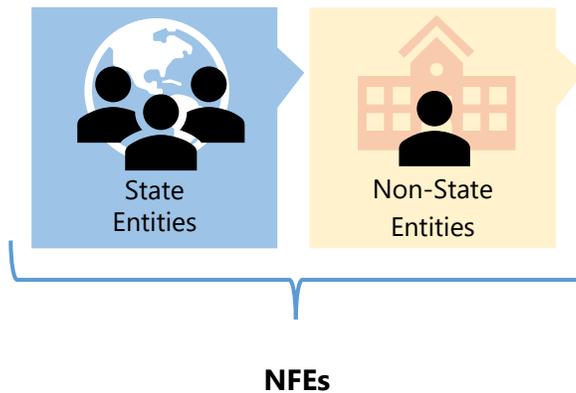
Micro-purchase means a purchase of supplies or services using simplified acquisition procedures, the aggregate amount of which does not exceed the micro-purchase threshold. Micro-purchase procedures comprise a subset of an NFE's small purchase procedures. NFEs use such procedures to expedite the completion of their lowest-dollar small purchase transactions and minimize the associated administrative cost and burden. The federal micro-purchase threshold is set by the Federal Acquisition Regulation at 48 C.F.R. Subpart 2.1 (Definitions).¹² As of June 2018, the federal micro-purchase threshold is set at \$10,000.¹³

¹¹ 2 C.F.R. § 200.64.

¹² 2 C.F.R. § 200.67.

¹³ 41 U.S.C. § 1902(a)(1); The Office of Management and Budget, Memorandum for Chief Financial Officers and Heads of Small Executive Agencies (M-18-18) (June 20, 2018), *available at* <https://www.whitehouse.gov/wp-content/uploads/2018/06/M-18-18.pdf> (increasing the micro-purchase and simplified acquisition threshold under federal assistance awards).

- Non-Federal Entity (NFE)



A state, local government, Indian Tribe, institution of higher education (IHE), or eligible private nonprofit organization (PNP) that carries out a federal award as a recipient or subrecipient.¹⁴ **For the purposes of this Field Manual, NFEs include state and non-state entities.**

- Non-State Entity

A *non-state entity* is an eligible PA applicant that does not meet the definition of a "state."

- Nonprofit Organization (for the purposes of this manual, used interchangeably with "Private Nonprofit Organization or PNP")

*Nonprofit organization*¹⁵ means any corporation, trust, association, cooperative, or other organization, not including institutions of higher education (IHE), that:

- Is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest;
- Is not organized primarily for profit; and
- Uses net proceeds to maintain, improve, or expand the operations of the organization.

- Public Assistance (PA) Applicant

An NFE submitting an application for financial assistance under the PA Program, including entities that would be a recipient and entities that would be a subrecipient under a federal award.

¹⁴ 2 C.F.R. § 200.69.

¹⁵ 2 C.F.R. § 200.70. Under the Public Assistance Program, some institutions of higher education, as defined in 2 C.F.R. § 200.55, may meet the definition of a Private Nonprofit Organization. 44 C.F.R. § 206.221(f);

- **Public Assistance (PA) Program**

FEMA has administratively combined some of the Stafford Act authorities under the umbrella of its Public Assistance (PA) Program. Under its PA Program, FEMA provides financial assistance through federal awards to a state, territorial, or Indian Tribal Government (recipients), which in turn carry out work directly and/or process subawards to other eligible Public Assistance applicants (subrecipients).

- **Recipient**

An NFE that receives a federal award directly from a Federal awarding agency to carry out an activity under a federal program. The term recipient does not include subrecipients.¹⁶ A recipient is responsible for administering the federal award in accordance with applicable federal laws. Examples of recipients include state, Indian Tribal, or territorial governments.

- **Pass-Through Entity**

A recipient that provides a subaward to a subrecipient to carry out part of a federal program is known as the pass-through entity.¹⁷ Pass-through entities are responsible for processing subawards to subrecipients and ensuring subrecipient compliance with the terms and conditions of the FEMA award agreement.

- **Robert T. Stafford Disaster Relief and Emergency Assistance Act**

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) authorizes FEMA, among other things, to provide financial assistance to states, local governments, Indian Tribal Governments, and certain private nonprofit organizations (PNPs) for debris removal, emergency protective measures, and permanent restoration of infrastructure following a presidential declaration of an emergency or major disaster.¹⁸

- **Simplified Acquisition Threshold (SAT)**

Simplified acquisition threshold means the dollar amount below which an NFE may purchase property or services using small purchase methods. NFEs adopt small purchase procedures to expedite the purchase of items costing less than the simplified acquisition threshold. The federal simplified acquisition threshold is set by the Federal Acquisition

¹⁶ 2 C.F.R. § 200.86.

¹⁷ 2 C.F.R. § 200.74.

¹⁸ 42 U.S.C. §§ 5121, et seq.

Regulation at 48 C.F.R. Subpart 2.1.¹⁹ As of June 2018, the federal simplified acquisition threshold is set at \$250,000.²⁰

- **State (for the purposes of this Manual, used interchangeably with “State Entity”)**
State means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any agency or instrumentality thereof exclusive of local governments.²¹
- **Subaward**
An award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a federal award received by the pass-through entity. It does not include payments to a contractor or payments to an individual that is a beneficiary of a federal program. A subaward may be provided through any form of legal agreement, including an agreement that the pass-through entity considers a contract.²²
- **Subrecipient**
An NFE that receives a subaward from a pass-through entity to carry out part of a federal program but does not include an individual that is a beneficiary of such program.²³
- **Uniform Rules**
The series of regulations found at 2 C.F.R. Part 200 that establishes *Uniform Administrative Requirements, Cost Principles, and Audit Requirements* for federal awards to NFEs. The *Uniform Rules* are referred to by several names throughout the remaining portions of this document. Some of the names include: standards; requirements; rules; and regulations.

¹⁹ 2 C.F.R. § 200.88.

²⁰ Section 805 codified at 41 U.S.C. § 134; OMB Memo (M-18-18), available at <https://www.whitehouse.gov/wp-content/uploads/2018/06/M-18-18.pdf>.

²¹ 2 C.F.R. § 200.90. Some institutions of higher education, as defined by 2 C.F.R. § 200.55, may meet the definition of a State.

²² 2 C.F.R. § 200.92.

²³ 2 C.F.R. § 200.93.

B. Authority

FEMA provides federal assistance through several financial assistance programs under the authority of various federal laws. Although this Field Manual covers the federal procurement rules that are generally applicable to several FEMA programs, it is primarily focused on the PA Program.

The PA Program is authorized by the Robert T. Stafford Disaster to Relief and Emergency Assistance Act, Pub. L. No. 93-288, §§ 402, 403, 406, 407, and 502 (1974) (codified as amended at 42 U.S.C. §§ 5170a, 5170b, 5172, 5173, and 5192) (Stafford Act). The implementing regulations for the PA Program are set forth at 44 C.F.R. Part 206, Subparts C, G, H, I, and M. FEMA has also issued the *Public Assistance Program and Policy Guide* (PAPPG), which includes most of the policy relating to PA.

As a condition of receiving reimbursement for contractor costs relating to FEMA's federal assistance program, an NFE must comply with all applicable federal laws, regulations, and executive orders. Each NFE is responsible for managing and administering its federal awards in compliance with the applicable requirements, including but not limited to the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* codified at 2 C.F.R. Part 200 (*Uniform Rules*), which DHS adopted at 2 C.F.R. § 3002.10.²⁴ Specifically, the regulations at 2 C.F.R. §§ 200.317-326 set forth the procurement standards that NFEs must follow when using FEMA financial assistance to conduct procurements of real property, goods, or services.

Related Tools and Resources



- ✓ [FEMA Public Assistance Program and Policy Guide \(PAPPG\)](#)
- ✓ [The Uniform Rules](#)
- ✓ [Top 10 Procurement under Federal Awards Mistakes](#)
- ✓ [OIG DHS Audit Reports related to FEMA](#)

²⁴ 79 Fed. Reg. 75871 (Dec. 19, 2014).

C. Overview of Contracts

- **Use of Contractors by Recipients and Subrecipients**

Recipients and subrecipients often use contractors to help carry out their PA award projects. For example, a subrecipient may receive financial assistance under a PA award to repair a building damaged by a major disaster, and it may then award a contract to a construction company to complete the work. FEMA generally views contractor costs as an “allowable cost” under the PA Grant Program.

Such a contract is a commercial transaction between the recipient or subrecipient and its contractor, and there is privity, or a legally recognized relationship, of contract between the recipient or subrecipient and its contractor. The federal government, however, is not a party to that contract and has no privity of contract with that contractor. The federal government’s legal relationship is only with the recipient, not with the subrecipient or contractors. Therefore, there is no contractual liability on the part of the federal government to the recipient’s or subrecipient’s contractor.

- **Role of The Federal Government in Recipient and Subrecipient Contracting**

Although the federal government is not a party to a recipient’s or subrecipient’s contract, it determines eligibility and reimbursement for a recipient’s or subrecipient’s contracting with outside sources under the PA Program. Recipients and subrecipients that use PA funding must comply with the procurement under grant requirements imposed by federal law, executive orders, federal regulations, and terms of the grant award.²⁵

²⁵ See Illinois Equal Employment Opportunity Regulations for Public Contracts, B-167015, 54 Comp. Gen. 6 (1974) (“It is clear that a grantee receiving Federal funds takes such funds subject to any statutory or regulatory restrictions which may be imposed by the Federal Government. (citations omitted). Therefore, although the Federal Government is not a party to contracts awarded by its grantees, a grantee must comply with conditions attached to the grant in awarding federally assisted contracts.”); see also *King v. Smith*, 392 U.S. 309, 333 n. 34 (1968) (“There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any State law or regulation inconsistent with such Federal terms and conditions is to that extent invalid.”).

- Definition of Contract and Distinction from Subaward



A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.²⁶ There are three elements necessary to form a contract:

- Mutual assent (known as offer and acceptance);
- Consideration or a substitute; and
- No defenses to formation.

Contracts are generally governed by the common law, although contracts for the sale of goods (movable, tangible property) are governed by Article 2 of the Uniform Commercial Code as well as the common law.

The term “**contract**” is generic and includes several different varieties or types.²⁷ For example, contracts can be categorized by subject matter (construction, research, supply, service) or by the manner in which they can be formed and accepted (such as bilateral or unilateral). Recipients and subrecipients are free to select the type of contract they award consistent with the federal procurement under grant rules and federal law, applicable state, Tribal, and local laws and regulations, and within the bounds of good commercial business practice.

The regulation provides that a contract is for obtaining goods and services for the NFE’s own use and creates a procurement relationship with the contractor.²⁸ Characteristics indicative of a **procurement relationship between the NFE and a contractor** include when the contractor:

1. Provides the goods and services within normal business operations;
2. Provides similar goods or services to many different purchasers;
3. Normally operates in a competitive environment;
4. Provides goods or services that are ancillary to the operation of the federal program; and

²⁶ Restatement (Second) of Contract, § 1 (1981).

²⁷ *Id.*

²⁸ See 2 C.F.R. § 200.22.

5. Is not subject to compliance requirements of the federal program as a result of the agreement, though similar requirements may apply for other reasons.²⁹

- **Contract Payment Obligations**

There are generally three types of contract payment obligations: fixed-price, cost-reimbursement, and **time and materials (T&M)**. Because the *Uniform Rules* do not define or fully describe these types of contracts, the following provides a general overview of these contracts that is largely based on the concepts and principles from the Federal Acquisition Regulation (FAR).

- **Fixed Price and Cost-Reimbursement Contracts**

With regard to fixed price and cost-reimbursement contracts, the specific contract types range from firm-fixed price, in which the contractor has full responsibility for the performance costs and resulting profit (or loss), to a cost-plus-fixed-fee, in which the contractor has minimal responsibility for the performance costs, and the negotiated fee (profit) is fixed. In between these two ends of the spectrum, there are various incentive contracts in which the contractor's responsibilities for the performance costs and the profit or fee incentives offered are tailored to the uncertainties involved in contract performance.

Fixed price contracts provide for a firm price or, in appropriate cases, an adjustable price.³⁰ The risk of performing the required work at the fixed price is borne by the contractor.³¹ Firm-fixed price contracts are generally appropriate where the requirement (such as scope of work) is well-defined and of a commercial nature.³² Construction contracts, for example, are often firm-fixed price contracts. Time and materials contracts and labor-hour contracts are not firm-fixed price contracts.³³

²⁹ 2 C.F.R. 200.330(b).

³⁰ 48 C.F.R. Subpart 16.2 (Fixed-Price Contracts). A fixed price contract can be adjusted, but this normally occurs only through the operation of contract clauses providing for equitable adjustment or other revisions of the contract price under certain circumstances. 48 C.F.R. § 16.203 (Fixed-Price Contracts with Economic Price Adjustment).

³¹ *Bowsher v. Merck & Co.*, 460 U.S. 824, 826 at n. 1 (U.S. 1983) ("A pure fixed-price contract requires the contractor to furnish the goods or services for a fixed amount of compensation regardless of the costs of performance, thereby placing the risk of incurring unforeseen costs of performance on the contractor rather than the Government.").

³² 48 C.F.R. § 16.202-2.

³³ 48 C.F.R. § 16.201(b).

Cost-reimbursement contracts provide for payment of certain incurred costs to the extent stipulated in the contract.³⁴ They normally provide for the reimbursement of the contractor for its allowable costs, with an agreed-upon fee.³⁵ There is a limit to the costs that a contractor may incur at the time of contract award, and the contractor may not exceed those costs without the recipient's or subrecipient's approval or at the contractor's own risk.



In a cost-reimbursement contract, the recipient or subrecipient bears more risk than in a firm-fixed price contract.³⁶ A cost-reimbursement contract is appropriate when the details of the required scope of work are not well-defined.³⁷ There are many variations of cost-reimbursement contracts, such as cost-plus-fixed-fee, cost-plus-incentive-fee, and cost-plus-award-fee contracts.³⁸ However, the **cost plus a percentage of cost type contract**, which is discussed in detail later on in this manual, is strictly prohibited for non-state entities.³⁹

³⁴ 48 C.F.R. Subpart 16.3 (Cost-Reimbursement Contracts).

³⁵ 48 C.F.R. Subpart 16.3.

³⁶ *Kellogg Brown & Root Servs. v. United States*, 742 F.3d 967, 971 (Fed. Cir. 2014) (“...cost-reimbursement contracts are intended to shift to the Government the risk of unexpected performance costs...”).

³⁷ 48 C.F.R. § 16.301-2(a).

³⁸ 48 C.F.R. Subpart 16.3.

³⁹ See 2 C.F.R. § 200.323(d); DHS Office of Inspector General, Report No. OIG-14-44-D, *FEMA Should Recover \$5.3 Million of the \$52.1 Million of Public Assistance Grant Funds Awarded to the Bay St. Louis Waveland School District in Mississippi-Hurricane Katrina*, p. 4 (Feb. 25, 2014) (“Federal regulations prohibit cost-plus-percentage-of-cost contracts because they provide no incentive for contractors to control costs—the more contractors charge, the more profit they make.”).

2. Applicability of the Federal Procurement under Grant Standards

The procurement under grant standards set forth at 2 C.F.R. §§ 200.317-326 apply to all FEMA awards issued on or after December 26, 2014.⁴⁰ Failure to follow the *Uniform Rules* found in 2 C.F.R. Part 200 when procuring and selecting contractors places PA applicants at risk of not receiving full reimbursement for associated disaster costs. This Field Manual focuses on the procurement standards set forth in 2 C.F.R. Part 200. For procurement guidance associated with disasters declared *before* December 26, 2014, please refer to 44 C.F.R. § 13.36 (for states, local, and Indian Tribal Governments) or 2 C.F.R. §§ 215.40-48 (for institutions of higher education, hospitals, and other nonprofit organizations).⁴¹

There are different sets of procurement rules that apply to state and non-state entities. A PA applicant, therefore, **must first determine if it is a state or non-state entity as defined under the federal procurement rules**. Additional guidance for determining an NFE's entity type and identifying the procurement standards applicable to that entity type can be found

⁴⁰ An elective grace period was extended to NFEs under 2 C.F.R. § 200.110, allowing NFEs to affirmatively elect to use the previous procurement standards applicable to FEMA awards found at 44 C.F.R. Part 13 (for states, local, and Indian Tribal Governments) or 2 C.F.R. Part 215 (for institutions of higher education, hospitals, and other nonprofit organizations) until the completion of two additional fiscal years after December 26, 2014. This grace period was subsequently extended for one additional year through fiscal years beginning on or after December 26, 2017. See Federal Register Vol. 82, No. 94, 22609 (May 17, 2017). Such NFEs were required to document this decision in their internal procurement policies, including the date upon which the NFE would transition to the new procurement standards. This elective grace period expired upon the completion of three additional fiscal years after December 26, 2014.

⁴¹ See *Field Manual (Based on Procurement Standards in Effect for Disaster Declarations Issued BEFORE December 26, 2014)*.

in the subsections below. Applicants should consult their legal counsel with any questions regarding their entity type.

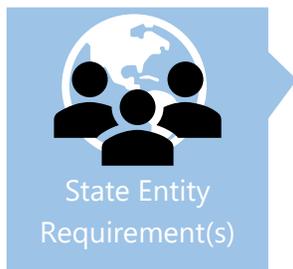
2.1 Procurement by State Entities

The federal procurement standards applicable to state entities are set forth in 2 C.F.R. § 200.317. “**State**”⁴² means:



- Any state of the United States,
- The District of Columbia,
- The Commonwealth of Puerto Rico,
- U.S. Virgin Islands,
- Guam,
- American Samoa,
- The Commonwealth of the Northern Mariana Islands, and
- Any agency or instrumentality thereof exclusive of local governments.

When procuring property or services under a financial assistance award, a state entity must:



- Follow the same policies and procedures it uses for procurements from its non-federal funds;
- Comply with 2 C.F.R. § 200.322 (Procurement of Recovered Materials); and
- Ensure that every purchase order or other contract includes any clauses required by 2 C.F.R. § 200.326 (Contract Provisions).⁴³

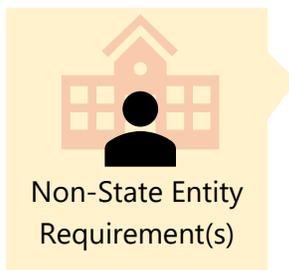
As such, the federal procurement rules at 2 C.F.R. § 200.317 require state entities to follow their own procurement policies and procedures, comply with the Environmental Protection Agency (EPA) guidelines regarding procurement of recovered materials requirements, and include all necessary contract provisions regardless of whether that agency is acting as recipient or subrecipient under a FEMA award. A state entity must also follow all other applicable federal law, executive orders, and implementing regulations when procuring services or property under a FEMA award.

⁴² 2 C.F.R. § 200.90. Some institutions of higher education, as defined by 2 C.F.R. § 200.55, may meet the definition of a State.

⁴³ 2 C.F.R. § 200.317.

Even if a state complies with its own policies and procedures used for procurement from non-federal funds when it procures property or services under a FEMA award, FEMA will still evaluate the procurement to determine whether the costs conform to the *Cost Principles* at 2 C.F.R. Part 200, Subpart E.⁴⁴ For example, while state entities are not prohibited by the federal rules to award a cost plus a percentage of cost contract, FEMA may still question the contract costs as unreasonable since this type of contract incentivizes the contractor to drive up costs to increase profit. A state must use the *Cost Principles* at 2 C.F.R. Part 200, Subpart E as a guide in the pricing of fixed-price contracts and subcontracts where costs are used in determining the appropriate price.⁴⁵ Please refer to FEMA PA for guidance regarding cost reasonableness.

2.2 Procurement by Non-State Entities



The federal procurement under grant standards applicable to non-state entities when procuring property or services under an award or cooperative agreement are set forth in 2 C.F.R. §§ 200.318-326. Non-state entities are eligible PA applicants that do not meet the “state” definition found at 2 C.F.R. § 200.90.

⁴⁴ A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness is particularly important when the NFE is predominantly federally-funded. In determining reasonableness of a given cost, consideration must be given to:

- a. Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the NFE or the proper and efficient performance of the federal award.
- b. The restraints or requirements imposed by such factors as: sound business practices; arm's-length bargaining; federal, state, local, Tribal, and other laws and regulations; and terms and conditions of the federal award.
- c. Market prices for comparable goods or services for the geographic area.
- d. Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the NFE, its employees, where applicable its students or membership, the public at large, and the federal government.
- e. Whether the NFE significantly deviates from its established practices and policies regarding the incurrence of costs, which may unjustifiably increase the federal award's cost.

⁴⁵ 2 C.F.R. § 200.401.

Non-state entities include:

- Local⁴⁶ and Tribal⁴⁷ governments,
- Institutions of higher education (IHEs)⁴⁸ that do not meet the definition of state,
- Hospitals⁴⁹ that do not meet the definition of state instrumentality,
- Houses of worship, and
- Other private nonprofit organizations (PNPs).

Although an Indian Tribal Government may potentially be either a recipient or subrecipient under the Stafford Act and other FEMA financial assistance programs, Indian Tribal Governments are not defined as a “state” at 2 C.F.R. § 200.90. In turn, Indian Tribes must comply with the federal procurement under grant standards applicable to non-state entities. Each of the federal procurement under grant requirements applicable to non-state entities will be expanded upon in this Field Manual.

A non-state entity must use its own documented procurement procedures which reflect applicable local, state, and/or Tribal laws and regulations, provided that the procurements conform to applicable federal law and the standards identified in the *Uniform Rules*.⁵⁰ The requirements identified in this Field Manual only address the federal procurement standards and not the other requirements established and made applicable through the *Uniform Rules*.

The federal procurement under grant standards are relatively brief. They only address certain, limited procurement concepts and do not focus on all possible procurement issues. Where the federal procurement under grant standards do not address a specific procurement issue, a non-state entity must abide by the applicable local, state, and/or Tribal procurement standards or regulations – whichever applies to the particular non-state entity. **However, where a *difference* exists between a federal procurement standard and a local, state, and/or Tribal procurement standard or regulation, the non-state entity must apply the rule(s) that allow for compliance with all applicable layers.**

⁴⁶ 2 C.F.R. § 200.64.

⁴⁷ 2 C.F.R. § 200.54.

⁴⁸ 2 C.F.R. § 200.55.

⁴⁹ 2 C.F.R. § 200.52.

⁵⁰ 2 C.F.R. § 200.318(a).

Example: Non-State Entity Application of the Rules



Scenario: *Non-state entity procurement under grant standards may, in some cases, be more restrictive than the federal procurement standards at 2 C.F.R. §§ 200.318-326. For example, the regulation at 2 C.F.R. § 200.320(b) allows a non-state entity to use procurement by small purchase procedures when the total value of services, property, or other property acquired remains below the simplified acquisition threshold or SAT. The federal simplified acquisition threshold is \$250,000 as of June 2018,⁵¹ but it may be the case that the applicable local, state, and/or Indian Tribal procurement standards and regulations do not permit small purchase procedures for acquisitions over \$50,000. Which simplified acquisition threshold is a non-state entity required to comply with in this scenario?*

Answer: In such a circumstance where there is a difference between local, state, and/or Tribal procurement standards and these federal procurement under grant standards, the non-state entity is required to follow the rule(s) that allows compliance with all applicable layers. A more permissive federal procurement standard would not control over a more restrictive applicable local, state, and/or Tribal standard. In this scenario, complying with the \$50,000 threshold allows for compliance at all levels.

Note that this concept of differing and following the rule that allows compliance with all applicable layers **only applies to non-state entities**. This underscores the importance of an NFE's evaluation of whether it is a state or non-state entity as defined under the federal procurement rules. State entities will always follow the procurement standards found at 2 C.F.R. § 200.317, which directs them to utilize their own procurement standards, comply with applicable guidelines regarding procurement of recovered materials as set forth in 2 C.F.R. § 200.322, and include all necessary contract provisions required by 2 C.F.R. § 200.326. Conversely, non-state entities must adhere to their own procurement policies and procedures, applicable state and/or Tribal laws, and the federal procurement under grant requirements found at 2 C.F.R. §§ 200.318-326.

⁵¹ See 2 C.F.R. § 200.88. While the simplified acquisition threshold is periodically adjusted for inflation, it was adjusted to \$250,000 as of June 2018. OMB Memo (M-18-18), available at <https://www.whitehouse.gov/wp-content/uploads/2018/06/M-18-18.pdf>.

Example: Differing Procurement Standards for State vs. Non-State Entities – Geographic Preference



Scenario: *The President declares a major disaster for the State of Z as the result of a hurricane, and the declaration authorizes the PA Program for all counties in the State. The hurricane damaged a building of the State Z Agency of Transportation. Following approval of a Project Worksheet to repair the damaged building, State Z Agency of Transportation procures the services of a contractor to complete the repairs to the building by following the same policies and procedures it uses for procurements from its non-federal funds when it procures construction services. The State Z Agency, when evaluating the bids for the work, uses a state statutorily imposed geographic preference and awards a contract, and the contract includes all clauses required by federal law, regulation, and executive order. Is the use of the geographic preference by State Z Agency permissible under 2 C.F.R. § 200.317?*

Answer: Yes, the use of the geographic preference is permissible under 2 C.F.R. § 200.317. The federal regulation at 2 C.F.R. § 200.317 provides, in relevant part, that a state must follow the same policies and procedures it uses for procurements from its non-federal funds when it procures property and services under a PA award. In this case, the State Z Agency of Transportation followed these procedures, which included adhering to a statutorily imposed geographic preference when evaluating the bids.⁵²

It is important to recognize that the procurement standards are different for state and non-state entities. As it relates to non-state entities, the federal procurement under grant standards at 2 C.F.R. § 200.319(b) prohibit the use of statutorily or administratively imposed local, state, and/or Tribal geographic preferences in the evaluation of bids or proposals, except in those cases where applicable federal statutes expressly mandate or encourage geographic preferences. However, because the state is not subject to regulation at 2 C.F.R. § 200.319, the regulation bears no applicability to the question presented in this scenario.

⁵² Whether or not a geographic preference regime imposed by a state raises Constitutional issues under the dormant commerce clause is outside the scope of this Field Manual.

Example: Waivers of Local, State, and/or Tribal Procurement Standards for Non-State Entities



Scenario: *As a result of, or in anticipation of, a disaster or emergency, NFEs may, pursuant to their own rules, waive their own procurement standards or regulations. Do such waivers apply to the federal procurement under grant rules for non-state entities?*

Answer: No. Even though the appropriate NFE may have waived local, state, and/or Tribal procurement standards or regulations, the NFE cannot waive the applicable *federal* procurement under grant standards. Where local, state, and/or Tribal procurement standards or regulations have been waived pursuant to the NFE's own legal requirements, the federal procurement under grant rules found at 2 C.F.R. §§ 200.318-326 continue to apply to a non-state entity regardless of such a waiver by an NFE.

Note for state entities: The federal procurement under grant standards require, in part, that state entities follow their own procurement policies and procedures. Therefore, a state entity following its own legal requirements regarding a waiver may be compliant with the standards set forth in 2 C.F.R. § 200.317.

Related Tools and Resources



- ✓ [State Entity FAQs](#)
- ✓ [Electronic Federal Procurement Under Grant Standards](#)
- ✓ [Electronic Federal Cost Principles \(2 C.F.R. Part 200, Subpart E\)](#)
- ✓ [Public Assistance Reasonable Cost Evaluation Fact Sheet](#)

3. General Procurement Under Grant Standards



Non-State Entity Requirement(s)

The procurement under grant standards at 2 C.F.R. § 200.318 set forth various general standards for **non-state entities**, some of which are mandatory and some of which are encouraged. There are eleven general procurement standards; eight are mandatory. Each of these general procurement standards will be discussed in Chapter 3 as follows:

Mandatory Standards

- Maintain Oversight
- Written Standards of Conduct
 - Gifts
 - Conflict of Interest
- Need Determination
- Contractor Responsibility Determination
- Maintain Records
- Settlement of Issues
- Time and Materials Contracts

Encouraged Standards

- Use of Intergovernmental or Inter-Entity Agreements
- Use of Federal Excess/Surplus Property
- Value Engineering

3.1 Mandatory Standards

Non-state entities are at risk of not receiving or keeping full reimbursement for associated disaster costs if they fail to comply with the **mandatory general procurement under grant standards**.

A. Maintain Oversight

A non-state entity *must* maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.⁵³

If a non-state entity lacks qualified personnel within its organization to undertake such oversight as required by 2 C.F.R. § 200.318(b), then FEMA expects the non-state entity to acquire the necessary personnel to provide these services. Contractors selected to perform procurement functions on behalf of the non-state entity are subject to the *Uniform Rules*.

Examples of this oversight include making sure contractors comply with contract terms and conditions, invoices are correct, and goods and services are received.

B. Written Standards of Conduct

FEMA expects an applicant, when contracting under a PA award, to ensure that procurement transactions are conducted in a manner beyond reproach, at arm's length, with impartiality, and without preferential treatment. The regulations require non-state entities to have written standards of conduct covering conflicts of interests and governing the actions of employees engaged in the **selection, award**, and administration of contracts. These standards must include disciplinary actions in the event of violations of the standards of conduct.⁵⁴

- **Gifts**

The officers, employees, and agents of non-state entities may neither solicit nor accept gifts or gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. This would include entertainment, hospitality, loans, and forbearance. It would also include services as well as gifts of training, transportation,

⁵³ 2 C.F.R. § 200.318(b).

⁵⁴ 2 C.F.R. § 200.318(c)(1).

local travel, lodgings, and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.

- *De Minimis Exception*

A non-state entity may set standards for accepting gratuities in situations in which the financial interest is not substantial, or the gift is an unsolicited item of nominal value. The regulations do not provide any additional clarity as to what comprises “substantial” or “nominal intrinsic value,” such that the content of any such exception is left to the discretion of the non-state entity. The Standards of Conduct for Employees of the Executive Branch provide a useful guide in analyzing a non-state entity’s exception.⁵⁵ However, the non-state entity will need to look to applicable local, state, and/or Tribal requirements and consult its servicing attorney to determine if other applicable rules speak to a specific dollar amount for a *de minimis* exception.

- *Conflicts of Interests*

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. The purpose of this prohibition is to ensure, at a minimum, that employees involved in the award and administration of contracts are free of undisclosed personal or organizational conflicts of interest—both in appearance and fact.

- *Real Conflict of Interest*

A real conflict of interest arises when an employee, officer, 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 aforementioned individuals, has a financial or other interest or a tangible personal benefit from a firm considered for a contract.

- *Financial Interest*

Although the term “financial interest” is not defined or otherwise described in the regulation, a financial interest can be considered to be the potential for gain or loss to 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 these parties as a result of the particular procurement. The prohibited financial interest may arise from:

⁵⁵ Cf. 5 C.F.R. § 2635.203(b) (defining “gift” under the Standards of Conduct for Employees of the Executive Branch).

- a. Ownership of certain financial instruments or investments such as stock, bonds, or real estate; or
 - b. A salary, indebtedness, job offer, or similar interest that might be affected by the particular procurement.
- **Apparent Conflict of Interest**

An apparent conflict of interest is *an existing situation or relationship that creates the appearance* that an 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.
- **Organizational Conflicts of Interest**

If a non-state entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian Tribe, the non-state entity must also maintain written standards of conduct covering organizational conflicts of interest. One type of organizational conflict of interest occurs when, because of relationships with a parent company, affiliate, or subsidiary organization, the non-state entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.⁵⁶

Disciplinary Actions

The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-state entity. For example, the disciplinary action for a non-state entity employee may be dismissal.

Another possible way to resolve a conflict of interest, if allowed under the non-state entity's procurement procedures and other applicable laws, is recusal. A recusal may be appropriate when an employee involved in awarding a contract has a financial interest or other business or personal relationship with a contractor bidding for the award. By removing that employee from the contractor selection process, a non-state entity may be able to resolve the conflict. A non-state entity is encouraged to check its state and local procurement rules regarding conflicts of interest and document any recusals in writing to include in its procurement file.

⁵⁶ 2 C.F.R. § 200.318(c)(2).

Real Conflict of Interest Example:



Scenario: *City of A suffered a devastating tornado which caused significant damage to its courthouse. In response, City of A formed a committee to issue a Request for Proposals (RFP) to rebuild the courthouse. The Mayor of City of A served as the head of the committee. The Mayor's brother owns a prominent construction company in City of A called Construction Co.; Construction Co. submitted a proposal for the project, and City of A awarded it the contract to rebuild the courthouse. Did City of A violate the federal procurement regulations?*

Answer: Yes. The regulation at 2 C.F.R. § 200.318(c)(1) prohibits real conflicts of interest which includes, among other things, awarding contracts to any employee or member of his or her immediate family with a financial interest in a firm considered for a contract. Here, the Mayor's brother, a member of the Mayor's immediate family, has a financial interest in Construction Co. because he owns the company. Therefore, City of A violated the federal procurement regulations.

Apparent Conflict of Interest Example:



Scenario: *Town of Y procured concrete from Company Z because Company Z offered the best rates and the most competitive delivery schedule. The owner of Company Z and the Town of Y's Purchasing Officer were college roommates. Did Town of Y violate the federal procurement regulations?*

Answer: Yes. The regulations at 2 C.F.R. § 200.318(c)(1) prohibit both real and apparent conflicts of interest. Even though Town of Y procured goods from Company Z based on its rates and delivery schedule, the relationship between owner of Company Z and Town of Y's Purchasing Officer creates the appearance that an employee of Town of Y has a personal interest in awarding the contract to Company Z. Therefore, Town of Y violated the federal procurement regulations.

Organizational Conflict of Interest Example:



Scenario: *A hospital in the Town of E sustained structural damage during a hurricane. The hospital owns several subsidiary companies, including a local construction firm. Because of its relationship with the hospital, the construction firm is privy to detailed information regarding the work needed.*

The hospital issued an Invitation for Bids (IFB) and decided to award its contract to the local construction firm. Did the hospital violate the federal procurement regulations?

Answer: Yes. The regulation at 2 C.F.R. § 200.318(c)(2) requires written standards of conduct regarding these types of organizational conflicts of interests, and 2 C.F.R. § 200.319(a)(5) prohibits procurements involving organizational conflicts of interests. This means that a non-state entity is unable or appears to be unable to be impartial in conducting a procurement action because of a relationship between a parent company, affiliate, or subsidiary organization that is not a state, local government, or Indian Tribe. In this case, the hospital was unable or appeared to be unable to be impartial in awarding a contract to its subsidiary construction firm, which was not a state, local government, or Indian Tribe. Therefore, the hospital violated the federal procurement regulations.

Recusal Example:



Scenario: *Nonprofit X suffered significant flooding to its headquarters building following a hurricane in City Y. As a result, Nonprofit X issued an Invitation for Bids for mold remediation companies to assess the damage. A procurement specialist of Nonprofit X is part owner of a mold remediation company that plans to bid for the contract to repair the headquarters building. The procurement specialist of Nonprofit X recused herself and did not participate in the evaluation or selection of mold remediators. Nonprofit X documented the procurement specialist's recusal and included documentation in its procurement file when seeking federal reimbursement. Did Nonprofit X violate the federal procurement under grant regulations?*

Answer: No. Even though the procurement specialist had a conflict of interest because she had a financial interest in the mold remediation company as part owner, Nonprofit X resolved the conflict of interest by recusal. By excluding the procurement specialist from the evaluation and selection of mold remediation companies, Nonprofit X was able to comply with the federal procurement under grant rules governing conflicts of interest.

C. Need Determination

A non-state entity must avoid the acquisition of unnecessary or duplicative items and procure goods and services using the most economical approach when feasible.⁵⁷ To this end, the federal procurement regulations instruct a non-state entity to do the following:

- **Avoid Unnecessary or Duplicative Items**

A non-state entity must have procedures to avoid the acquisition of unnecessary or duplicative supplies or services. A non-state entity must limit its procurements to its current and reasonably expected needs to carry out the scope of work under a FEMA award. A non-state entity may not add items or quantities unrelated to the scope of work or procure additional items for use at a later date.⁵⁸

- **Consolidate or Break Out Procurements**

A non-state entity should consider consolidating or breaking out procurements to obtain a more economical purchase.

- **Lease Versus Purchase Analysis**

A non-state entity must, where appropriate, make an analysis of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach. FEMA may review any costs used in the comparison for reasonableness, realistic current market conditions, and based on the expected useful service life of the asset.

Example: Breaking Out Procurements



Scenario: *County of X solicited and received unit price quotes from 13 debris removal contractors for various types debris removal work.*

- *Contractor A submitted the lowest bid for removing and disposing of vegetative debris.*

⁵⁷ 2 C.F.R. § 200.318(d).

⁵⁸ A non-state entity may award advance contracts before an incident occurs for the potential performance of work under a Stafford Act emergency or major disaster. These are also known as prepositioned or pre-awarded contracts. These types of contracts are eligible for reimbursement when used to support response and recovery efforts pursuant to a financial assistance award. See additional considerations [here](#).

- Contractor B submitted the lowest bid for removing and disposing of construction and demolition debris.
- Contractor C submitted the lowest bid for both tasks **combined**. Although the combined total was the lowest bid, the unit price quotes for vegetative debris and construction and demolition debris (each elements of the combined bid) were actually higher than Contractors A and B, respectively.

County of X considered the bids submitted and realized that it would be able to obtain a more economical purchase if it broke up these purchases into separate procurement actions awarded to Contractor A and B. The County awarded the vegetative debris removal work to Contractor A and the construction and demolition debris removal work to Contractor B. Is County of X in compliance with the federal procurement under grant rules by breaking up their procurement in order to obtain a more cost-effective purchase?

Answer: Yes. In this scenario, the County broke up their procurement into two activities and awarding two contracts (one for vegetative debris removal work and another for construction and demolition debris removal work) to contractors that had the lowest bid for each of the two tasks. This decision resulted in a more economic purchase overall. By awarding two separate contracts, the County saved costs that would otherwise be unnecessary for efficient contract performance.

Note: Non-state entities may break down procurements to obtain a more economical purchase or permit maximum participation by small and minority businesses, women's business enterprises, and labor surplus area firms, when economically feasible. However, **non-state entities are not allowed to break down procurements in an effort to avoid the additional procurement requirements that apply to larger purchases.**

Procurement of Unnecessary Items Example:



Scenario: This year, the Island of X experienced widespread power outages due to a Super Typhoon striking the region. In particular, the Island's airport lost power for weeks. A functioning airport is essential for Island residents because they rely on imported goods and supplies to function. The airport requires four generators to restore power. This is the third year in a row that the Island of

X suffered a Typhoon and the third consecutive year that the airport lost power for an extended period of time. To get the airport up and running, and to prepare for potential damage from future Typhoons, the Island procured eight generators using PA funds. Did the Island of X comply with the federal procurement regulations?

Answer: No. Pursuant to 2 C.F.R. § 200.318(d), the Island is prohibited from procuring unnecessary or duplicative items. In this case, the Island needed only four generators to meet its current requirement of restoring power to the airport. The federal procurement regulations do not allow for the acquisition of duplicative items or stockpiling items for future use. Therefore, the Island of X violated the federal procurement regulations.

D. Contractor Responsibility Determination

A non-state entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement.⁵⁹ FEMA requires the non-state entity to document its determination that a prospective contractor qualifies as responsible, as well as its basis for such determination. In making a responsibility determination, the non-state entity must consider such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.⁶⁰

- **Contractor Integrity**

A contractor must have a satisfactory record of integrity and business ethics. In analyzing a contractor's integrity, the non-state entity may consider whether the contractor has:

- Committed fraud or a criminal offense in connection with obtaining or attempting to obtain a contract;
- Committed embezzlement, theft, forgery, bribery, falsification or destruction of records, or tax evasion;
- Committed any other offense indicating lack of business integrity or business honesty that seriously and directly affects the present responsibility of the contractor; or
- Been indicted for any of the above-mentioned offenses.

⁵⁹ 2 C.F.R. § 200.318(h).

⁶⁰ 2 C.F.R. § 200.318(h).

- **Public Policy**

A contractor must have complied with the public policies of the federal government as well as the public policies of appropriate states, local governments, or Indian Tribal Governments. The non-state entity should look at the contractor's past and current compliance with matters such as:

- Equal opportunity and nondiscrimination laws and
- Applicable prevailing wage laws, regulations, and executive orders.

- **Record of Past Performance**

A contractor must be able to demonstrate that it has sufficient resources (i.e., personnel and subcontractors), with adequate experience, to perform the required work. In addition, the contractor must provide that it has adequate past experience carrying out similar work. Adequate past experience can be demonstrated by:

- Having the necessary organization, accounting, and operational controls;
- Adhering to schedules, including the administrative aspects of performance;
- Exhibiting business-like concern for the interest of the customer; and
- Meeting quality requirements.

- **Financial Resources**

A contractor must have adequate financial resources to perform the contract or the ability to obtain such resources. In making this evaluation, a non-state entity could analyze:

- The existing cash flow of the contractor;
- Account receivables; and
- Other financial data.

- **Technical Resources**

A contractor must have or be able to acquire the required construction, production, and/or technical facilities, equipment, and other resources to perform the work under the contract.

- **Suspension and Debarment**



Non-state entities, as well as state entities, must ensure the contractor is not suspended or debarred.⁶¹ NFEs must not make any award or permit any award at any tier to parties listed on the government-wide exclusions in the System for Award Management (SAM), which can be found at www.sam.gov/SAM. All contracts must also include the suspension and debarment clause.

Related Tools and Resources



- ✓ [Contract Provisions Template](#)
- ✓ [Suspension and Debarment FAQs](#)

Example: Sealed Bidding and the Selection of Responsible Contractors



Scenario: *A non-state entity, conducting a solicitation using the sealed bidding method, received the lowest bid from Contractor X. In conducting a responsibility determination, the non-state entity has found that Contractor X previously committed fraud in obtaining a contract and does not have adequate financial resources to perform the required work within the new contract. Is the non-state entity required to award the contract to Contractor X because it was the lowest bid?*

Answer: No. Pursuant to 2 C.F.R. § 200.318(h), a non-state entity is required to award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. In so doing, the non-state entity must look at contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. Here the contractor's integrity is at issue due to committing fraud previously. Also, Contractor X does not have adequate financial resources to perform the required work. The non-state entity must document its

⁶¹ *Id.*; See also 2 C.F.R. § 200.213.

determination that Contractor X is not responsible and must also document its basis for this determination.

E. Maintain Records



A non-state entity is required to maintain records sufficient to detail the history of a procurement.⁶² These records include, but are not limited to, the rationale for the method of procurement, the selection of the contract type, the contractor selection or rejection, and the basis for the contract price.⁶³

Additionally, the non-state entity's records must also include the contract document and any contract modifications with the signatures of all parties.

- **Rationale for Method of Procurement**

A non-state entity must document its rationale for the method of procurement used for each contract (i.e., micro-purchase procedures, small purchase procedures, the sealed bidding method, the competitive proposal method or the noncompetitive proposal method). If utilizing the noncompetitive proposal method, the non-state entity must justify why this method was necessary.

- **Contract Type**

A non-state entity must document its rationale for selecting the type of contract used for the procurement (i.e., fixed price, cost reimbursement, or time and materials). If utilizing a time and materials contract, the non-state entity must ensure compliance with 2 C.F.R. § 200.318(j).

- **Contractor Selection**

A non-state entity must document its rationale for contractor selection or rejection, including a written responsibility determination for the successful contractor.

- **Price**

A non-state entity must document the basis for the contract price. In addition to adequate market research (including independent cost estimates), non-state entities

⁶² 2 C.F.R. § 200.318(i).

⁶³ 2 C.F.R. § 200.318(i).

must include cost or price analysis documentation for contracts exceeding the simplified acquisition threshold.

- **Other Documentation**

A non-state entity should also include the following documentation in its procurement file, as appropriate:

- Acquisition planning information and other pre-solicitation documents;
- The statement of work/scope of services;
- A list of sources solicited;
- Copies of published notices of proposed contract action;
- Copies of the solicitation documents, as well as any addenda or amendments;
- The notice to unsuccessful bidders or offers and a record of any debriefing;
- A record of protests, disputes and claims;
- Copies of bid, performance, payment, and other bond documents;
- The notice to proceed; and
- The steps it took to comply with the affirmative socioeconomic steps required by 2 C.F.R. § 200.321.

The *Uniform Rules* provide that FEMA, DHS Office of Inspector General, the Comptroller General of the United States, and the pass-through entity, or any of their authorized representatives, must have the right of access to any documents, papers, or other records of all NFEs which are pertinent to the FEMA award in order to make audits, examinations, excerpts, and transcripts.⁶⁴ All NFEs must acknowledge and agree to comply with applicable provisions governing DHS access to records, accounts, documents, information, facilities and staff. All NFEs must require any contractors, successors, transferees, and assignees also acknowledge and agree to comply with the regulation.⁶⁵

⁶⁴ 2 C.F.R. § 200.336; DHS Standard Terms and Conditions.

⁶⁵ DHS Standard Terms and Conditions.

Example: Records Must Detail the History of the Procurement



Scenario: *Hurricane John made landfall in the Town of X, causing widespread damage. As a result, the Town entered into a contract to rebuild its courthouse. The lowest bid was \$950,000 from Contractor Y, but when the Town reviewed the bid from Contractor Y, they determined that the bid was not responsive to the requirements. Specifically, the Town required the work to be completed within one year and Contractor Y would not be able to complete the work for one year and six months. The Town reviewed the bid from Contractor Z, the second lowest bidder, and determined it to be responsive and chose to award the contract to Contractor Z. Two years later, the DHS OIG requested the procurement file from the Town regarding the courthouse construction project. The Town included the documentation in their procurement file, but failed to include its rationale behind selecting Contractor Z. The employee who worked on the procurement no longer works for the Town and the Town is unable to locate any additional documentation. Is the Town in compliance with the federal procurement under grant regulations?*

Answer: No, the Town is not in compliance with the federal procurement under grant regulations. Pursuant to 2 C.F.R. § 200.318(i), a non-state entity must maintain records sufficient to document the procurement history, which includes documenting its rationale for contractor selection. Here, the Town did not award the contract to the lowest bidder based on the lack of responsiveness of its bid. The Town is required to document and maintain this information in its procurement file.

F. Settlement of Issues

A non-state entity alone is responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements.⁶⁶ These issues include, but are not limited to, source evaluation, protests, disputes, and claims.⁶⁷

⁶⁶ 2 C.F.R. § 200.318(k).

⁶⁷ 2 C.F.R. § 200.318(k).

The *Uniform Rules* do not relieve the non-state entity of any contractual responsibilities under its contracts.⁶⁸ Additionally, FEMA will not substitute its judgment for that of the non-state entity in resolving contractual and administrative issues unless the matter is primarily a federal concern.⁶⁹ A matter that is “**primarily of federal concern**” includes, but is not limited to, noncompliance with:

- Any federal law;
- Any of the procurement standards within 2 C.F.R. §§ 200.318-326;
- Any other federal regulation;
- Any federal executive order; or
- Any other impropriety, waste, fraud, or abuse.

FEMA and the non-state entity must refer violations of law to the local, state, or federal authority having proper jurisdiction.⁷⁰

Additional Requirement

*“Notwithstanding any other provision of law, the Administrator of the Federal Emergency Management Agency shall not reimburse a State or local government, Indian Tribal Government . . . , or the owner or operator of a private nonprofit facility . . . for any activities made pursuant to a contract entered into after August 1, 2017, **that prohibits the Administrator or the Comptroller General of the United States from auditing or otherwise reviewing all aspects relating to the contract.**”* (Sec. 1225 of the Disaster Recovery Reform Act of 2018)

Example: NFE is Responsible for the Settlement of Issues



Scenario: *The City of X utilized the competitive proposal method in procuring an engineer to assist in rebuilding a bridge that was damaged in a hurricane. In its Request for Proposals (RFP), the City listed 5 evaluation factors and assigned percentage points to each. The City gave 25 percent to past experience specific to bridges. The City received 4 proposals and selected Contractor Z because it scored*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

the highest percentage based on the evaluation factors set forth in the RFP. Contractor Y submitted a proposal but was not awarded the contract. Contractor Y disagrees with the award selection and believes the City did not properly weigh its past experience. As a result, Contractor Y files a protest. Will FEMA assist the City of X in resolving the protest?

Answer: No, the City is required to defend itself against the protest on its own pursuant to 2 C.F.R. § 200.318(k).

G. Time and Materials Contracts

A **time and materials (T&M) contract** is a contract whose cost to a non-state entity is:

- The sum of the actual cost of materials; and
- Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.⁷¹



No fee or profit is allowed except as part of the fixed billing rate for direct labor hours, such that materials are billed at cost.

A non-state entity may use a time and materials contract only after determining that:

- No other contract is suitable; and
 - The contract includes a ceiling price that the contractor exceeds at its own risk.⁷²
- The ceiling price must not be so high as to render it meaningless as a cost control measure.

A time and materials contract provides no incentive for the contractor to control costs or find labor efficiencies, because the contractor's profit increases as the labor hours increase. Therefore, a ceiling price is required when using time and materials contracts. The federal procurement regulations require the non-state entity to assert a high degree of oversight to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.⁷³

⁷¹ 2 C.F.R. § 200.318(j)(1).

⁷² 2 C.F.R. § 200.318(j)(1).

⁷³ 2 C.F.R. § 200.318(j)(2).



In some cases, a time and materials contract may be appropriate in the immediate response to an incident to protect lives or public health and safety, as it may be impossible to accurately estimate the extent or duration of the required scope of work or to anticipate costs with any reasonable degree of confidence in the immediate aftermath of the incident. Such a contract must still include a contract ceiling price and the non-state entity should transition into a more appropriate pricing structure as soon as possible. Specifically, after a period of exigency or emergency has ended, the non-state entity should normally be able to formulate a detailed scope of work to allow a contract to be competitively awarded and/or transitioned to a firm fixed price pricing structure.

Example: Use of a Time and Materials Contract



Scenario: *The electrical distribution system in the Town of X is destroyed in Hurricane John. The Town of X does not know the extent of the damage and therefore cannot fully define the scope of work. The Town of X enters into a contract with Contractor X to repair the damage.*

The contract includes:

- *The hourly rates for all employees of Contractor X;*
- *The hourly rates to use the equipment that may be needed for repairs; and*
- *The cost of all materials that may be needed for the repairs.*

The Town of X has determined that no other contract type is suitable based on the unclear scope of work, and the Town of X is prepared to assert a high degree of oversight over the contractor. However, the contract does not include a ceiling price because the magnitude of the work is unclear at the time of entering into the contract. Is this contract type permitted?

Answer: No, this is a time and materials contract and is not permitted as it is structured. Here, the contractor is paid based on the cost of materials, the cost of equipment, and the hourly rates of employees needed to complete the work, making this a time and materials contract.

The Town of X determined that no other contract type is suitable based on the unclear scope of work; however, the contract does not include a ceiling price. Without a ceiling price, the contractor does not have an incentive to control costs or find labor efficiencies. Even if the Town of X asserted a high degree of oversight to obtain reasonable assurance

that the contractor is using efficient methods and effective costs controls, this does not negate the requirement of including a ceiling price.

3.2 Encouraged Standards

In addition to the mandatory requirements, the federal government encourages non-state entities to utilize additional standards whenever deemed practical by the entity. The encouraged standards are in place to incentivize PA applicants to use cost effective methods to obtain goods and services. Unlike the mandatory requirements, the encouraged standards are not required.

A. Use of Federal Excess and Surplus Property

The General Services Administration (GSA) carries out the Federal Surplus Personal Property Donation Program⁷⁴ under which GSA will donate surplus federal property to eligible “public agencies.”⁷⁵

The federal rules encourage the use of federal surplus property by non-state entities as an alternative to purchasing new equipment whenever it is feasible and reduces project costs.⁷⁶

The process for requesting surplus property for donation varies depending on what type of eligible entity is making the request, but as a general matter, most prospective donation recipients should submit requests directly to the appropriate State Agency for Surplus Property (SASP). The SASP is the state agency responsible for fair and equitable distribution of property transferred by GSA.⁷⁷ For most public and nonprofit activities, the SASP determines if the applicant is an eligible entity and able to receive such donations.

⁷⁴ 41 C.F.R. Part 102-37 (Donation of Surplus Personal Property).

⁷⁵ 40 U.S.C. § 549(c)(3); 41 C.F.R. § 102-37.380(b).

⁷⁶ 2 C.F.R. § 200.318(f).

⁷⁷ 40 U.S.C. § 549(a)(3); 41 C.F.R. pt. 102-37, Subpart D (State Agency for Surplus Property).

B. Use of Value Engineering

The federal rules encourage non-state applicants to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions.⁷⁸

Value engineering is a systematic and creative analysis of each contract item or task to ensure that essential functions are provided at an overall lower cost. Simply stated, it promotes the substitution of materials and methods with less expensive alternatives without sacrificing functionality. This is normally associated with construction or production contracts.

Under value engineering clauses, contractors are incentivized to submit change proposals that reduce the cost of contract performance by promising the contractor a share of the savings.⁷⁹

C. Use of Intergovernmental or Inter-Entity Agreements

To foster greater economy and efficiency, the federal procurement under grant rules encourage the use of intergovernmental or inter-entity agreements, where appropriate, for the procurement or use of shared goods and services.⁸⁰ Non-state entities are encouraged to collaborate on procurement actions for goods and services where the result will lead to cost savings. Entities wishing to utilize intergovernmental agreements must be able to demonstrate that the procurements complied with all applicable federal procurement under grant rules. Examples of encouraged intergovernmental or inter-entity agreements include joint procurements and cooperative purchasing programs.



It is important to note that the practice of using another jurisdiction's contract, or "**piggybacking**," through an intergovernmental or inter-entity agreement may lead to a non-compliance with the federal procurement under grant standards. The use of piggybacking is only permissible under strict circumstances.

⁷⁸ 2 C.F.R. § 200.318(g).

⁷⁹ 48 C.F.R. § 48.102.

⁸⁰ 2 C.F.R. § 200.318(e).

Related Tools and Resources



- ✓ [PDAT: GSA Fact Sheet](#)
- ✓ [GSA Programs for State and Local Governments](#)
- ✓ [Purchasing Goods or Services through Cooperative Programs](#)

4. Competition



Non-State Entity Requirement(s)

The federal procurement rules set forth at 2 C.F.R. § 200.319 require non-state entities to conduct all procurement transactions in a manner providing “full and open competition.” Although not defined in the regulation, “full and open competition” generally means that a complete requirement is publicly solicited, and all **responsible contractors** are permitted to compete.

There are numerous benefits to full and open competition, including:

- Increasing the probability of reasonable pricing from qualified contractors;
- Preventing favoritism, collusion, fraud, waste, and abuse; and
- Allowing the opportunity for **small and minority firms, women’s business enterprises, and labor surplus area firms** to participate in federally-funded work.

Failure to provide for full and open competition will be scrutinized by FEMA regardless of whether such procurement results in the same or lower price than if conducted through full and open competition. Non-state entities failing to provide for full and open competition is a common OIG audit finding.



This chapter provides additional information on the full and open competition requirements of 2 C.F.R. § 200.319 and identifies prohibited practices that are restrictive of competition and, in turn, are non-compliant with the federal procurement under grant rules.

4.1 Restrictions to Competition

The federal procurement under grant standards have identified seven situations that are considered restrictive of competition and, therefore, must be avoided by non-state entities.⁸¹

The list below of other prohibited restrictions is an illustrative and non-exclusive list, such that FEMA may consider other situations as restrictive of competition, even if they are not specifically listed. These seven situations include:

A. Unreasonable Requirements

Non-state entities must not place unreasonable requirements on firms for them to qualify to do business.⁸² Solicitation documents must reflect the non-state entity's actual needs and not include unnecessary requirements that unduly restrict competition.

B. Requiring Unnecessary Experience or Excessive Bonding

Non-state entities must not require unnecessary experience and excessive bonding.⁸³ As it relates to experience, this could include requiring unnecessary levels or years of experience for the contractors to be in business, the contractors' workforce, or the contractors' key personnel on a project.

As it relates to bonding, non-state entities must not require excessive bonding because it increases the costs incurred by the contractor and is restrictive of competition. This is particularly the case with regard to small businesses as they may not have the bonding capacity to compete for projects requiring excessive bonding. Businesses with a limited record of performance may also have difficulty obtaining bonds. When non-state entities are contracting for construction and facility improvement projects, certain federal bonding requirements may apply.

Even though bonding can be expensive, a non-state entity might determine it is desirable to use bid, performance, or payment bonds for work other than construction or facility improvement or in excess of those amounts set forth at 2 C.F.R. § 200.325. In these

⁸¹ 2 C.F.R. § 200.319(a).

⁸² 2 C.F.R. § 200.319(a)(1).

⁸³ 2 C.F.R. § 200.319(a)(2).

instances, because bonding requirements can limit contractor participation, the non-state entity's bonding requirements must be reasonable and not unduly restrictive.

Example: Requiring Unnecessary Experience or Excessive Bonding



Scenario: *As the result of a hurricane, the President declares a major disaster for the State of Z. The declaration authorizes Public Assistance for all counties in the State. The hurricane damaged a highway in County X and FEMA approves a project worksheet for repair of the highway. The scope of work under the project includes repair of potholes caused by the storm. There are multiple construction companies qualified and willing to compete for the project, including Company A which has been in operation for six years. County X, after having worked with Company D on many previous road projects, would prefer to award the contract to Company D. Company D has been in operation for eighteen years. County X places a requirement in the pothole repair roadwork solicitation that potential construction companies have a minimum fifteen years of experience. Company A does not qualify to compete for County X's solicitation. Is County X compliant with the full and open competition requirements of 2 C.F.R. § 200.319?*

Answer: No, 2 C.F.R. § 200.319(a)(2) prohibits requiring unnecessary experience and excessive bonding. In this scenario, both Company A and Company D are qualified to complete the pothole repair roadwork. However, the solicitation document required fifteen years of experience which was unnecessary under these circumstances. The experience requirement was used to restrict competition and was not required for the project in question.

C. Noncompetitive Pricing Practices

Noncompetitive pricing practices between firms or between affiliated companies is prohibited.⁸⁴ Non-state entities must undertake reasonable efforts to ensure that prospective contractors have not engaged in noncompetitive pricing practices when responding to a solicitation. If noncompetitive pricing practices are identified, the activity should be reported to FEMA. A common noncompetitive pricing practice is "bid rigging."

⁸⁴ 2 C.F.R. § 200.319(a)(3).

Bid rigging occurs when conspiring competitors raise prices under a process where a purchaser acquires goods or services by soliciting competing bids. Competitors agree in advance who will submit the lowest priced or winning bid on a contract. Bid rigging takes many forms, but conspiracies usually fall into one or more of the following categories: bid suppression, complementary bidding, and bid rotation.

- In **bid suppression** schemes, one or more competitor(s), who otherwise would be expected to bid or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.
- **Complementary bidding**, also known as "cover" or "courtesy" bidding, occurs when some competitors agree to submit bids that are either too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer's acceptance but are merely designed to give the appearance of genuine competitive bidding while making the designated winning competitor's bid appear most attractive. Complementary bidding schemes are a frequent form of bid rigging. They defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.
- In **bid rotation** schemes, all conspirators submit bids but take turns being the low bidder. The terms of the rotation may vary. For example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator, or allocating volumes that correspond to the size of each conspirator company.

D. **Noncompetitive Contracts to Contractors on Retainer**

Non-state entities must not make noncompetitive awards to consultants that are on retainer contracts.⁸⁵ A retainer contract is generally any form of agreement for general, unspecified services or broad types of services (e.g., architectural and engineering) entered into in advance of work to be done. Under such agreement, the contractor remains available when the client needs services during a specified period or regarding a specified matter. It is restrictive of competition to use PA financial assistance funds and award a noncompetitive contract to a consultant that is already on retainer, specifically for property or services not specified under the retainer contract.

⁸⁵ 2 C.F.R. § 200.319(a)(4).

Example: Use of Architect-Engineering Firm on Retainer



Scenario: *As the result of a tornado and straight-line winds, the President declares a major disaster for the County of Y. The declaration authorizes Public Assistance for all towns in County Y. The winds damaged a building in Town W and FEMA approves a project worksheet for repair of the building. The scope of work under the project includes architectural and engineering services, because of the complexity of the project. Town W has had the same architectural and engineering firm (Firm) on a retainer contract that was originally awarded 20 years earlier and has used that firm for all “needed professional services related to construction.” The retainer contract simply provides for Firm to provide any and all architectural and engineering services needed by Town W, and the contract was not procured in compliance with the federal procurement requirements at 2 C.F.R. §§ 200.318-326. Following approval of the Public Assistance project, Town W orders the architectural and engineering services from Firm, and the services are subject to the rates in the existing contract between Firm and Town W. Does Town W’s procurement comply with the full and open competition requirements of 2 C.F.R. § 200.319?*

Answer: No. Town W did not conduct the original procurement through full and open competition and in compliance with 2 C.F.R. §§ 200.318-326. Non-state entities must not make a noncompetitive award to a contractor that is on retainer.⁸⁶ Town W made a noncompetitive contract award for work to be done under a FEMA PA award to a consultant that was already on retainer in noncompliance with the full and open competition requirement found at 2 C.F.R. § 200.319(a)(4).

Note: Please see the section on [prepositioned contracts](#) for additional information on allowed use of existing contracts for PA awards.

E. [Organizational Conflicts of Interest](#)

Non-state entities must ensure that procurements are free from organizational conflicts of interest.⁸⁷ In some cases, an organizational conflict of interest means that, because of relationships with a parent company, affiliate, or subsidiary organization, a non-state entity is unable or appears to be unable to be impartial in conducting a procurement action

⁸⁶ 2 C.F.R. § 200.319(a)(4).

⁸⁷ 2 C.F.R. § 200.319(a)(5).

involving a related organization.⁸⁸ In other cases, an organizational conflict of interest means a circumstance where a potential contractor has either impaired objectivity, unequal access to information, or the ability to set the ground rules.

An organizational conflict of interest can also occur when contractors compete for awards for which they have developed or drafted specifications, requirements, statements of work, invitations for bids, or requests for proposals. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that have developed or drafted the documents listed above **must be excluded** from competing for such requirements.⁸⁹

FEMA expects non-state entities to analyze each planned acquisition to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible and avoid or mitigate potential conflicts.

Situations in which organizational conflicts of interest arise can be broadly categorized into the following three categories: circumstances of impaired objectivity, unequal access to information, and biased ground rules.

- **Impaired objectivity** arises where a contractor is unable, or potentially unable, to provide impartial and objective assistance or advice to the non-state entity due to other relationships, contracts, or circumstances. This compromises circumstances where a contractor's work under one contract could result in it evaluating itself through an assessment of performance under another contract or an evaluation of proposals. The concern is that the firm's ability to render impartial advice could appear to be undermined by its relationship with the entity whose work product is being evaluated.
- **Unequal access to information** occurs when a contractor has access to nonpublic information as part of its performance under another agreement with the non-state entity and where that information may provide the contractor with a competitive advantage.
- **Biased ground rules** issues arise where a contractor has in some sense set the ground rules for a contract as part of its performance of work under another agreement with the non-state entity. An example of such a situation would be where a contractor prepares a statement of work or specifications for a non-state entity and later competes

⁸⁸ 2 C.F.R. § 200.318(c)(2).

⁸⁹ 2 C.F.R. § 200.319(a).

for that contract. Such a contractor, whether intentionally or not, can restrict competition in favor of itself by drafting the specifications in such a way that will make their own later bid the most attractive.

Example: Organizational Conflict of Interest



Scenario: *County X, lacking the technical knowledge surrounding the equipment necessary to complete a project under the Public Assistance Program, seeks the assistance of The Greatest Tractor Company to draft a statement of work for the acquisition of a tractor. The County copied the statement of work drafted by The Greatest Tractor Company and included it in a request for proposals (RFP). After advertising the RFP, the County received 14 proposals, including a proposal submitted by The Greatest Tractor Company. The Greatest Tractor Company's proposal best responded to the requirements in the RFP and was the most advantageous for County X's project. County X awards the contract to The Greatest Tractor Company after rating their proposal the highest. Is County X's award to The Greatest Tractor Company compliant with the federal procurement under grant rules?*

Answer: No; 2 C.F.R. § 200.319(a) states 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. In this case, The Greatest Tractor Company had an unfair advantage because it drafted the RFP's statement of work and subsequently competed for the procurement. In order to ensure a fair procurement process, County X should have excluded The Greatest Tractor Company from competing for the tractor award.

Related Tools and Resources



The *Uniform Rules* do not provide further explanations of organizational conflicts of interest, but for insight on the types of situations in which organizational conflicts of interest arise, FEMA looks to the FAR Subpart 9.5 and the decisions of the Comptroller General. These situations can be broadly categorized into the following three groups: unequal access to information, biased ground rules, and impaired objectivity.

F. Specifying Only a Brand Name Product

It is restrictive of competition for non-state entities to specify only a “brand name” product instead of allowing “an equivalent” product to be offered.⁹⁰ When it is impractical or uneconomical to write a clear and accurate description of the technical requirements of the good or services to be acquired, non-state entities may use a “brand name or equivalent” description as a means to define the performance or other pertinent requirements of the procurement. If a non-state entity determines that only a brand name product is acceptable to fulfill a requirement, then that determination must be documented and justified in the same manner as a noncompetitive procurement.

G. Any Arbitrary Action in the Procurement Process

Non-state entities must not engage in any arbitrary actions in the procurement process.⁹¹ “Arbitrary” generally refers to an action or decision founded on prejudice or preference rather than on reason or fact; or something that is otherwise unreasonable or unsupported.⁹² Arbitrary actions can include, among other things, discretionary actions that show preference or prejudice towards certain contractors in a manner not consistent with full and open competition.

4.2 Geographic Preferences

During a procurement, non-state entities are prohibited from using geographic preferences in the evaluation of bids or proposals. This prohibition extends to the use of statutorily or administratively imposed local, state and/or Tribal geographic preferences.⁹³ Prohibited geographic preferences come in a variety of forms; the most common are as follows:

- **Exclusion of Contractors from Outside a Geographic Area**

A non-state entity might exclude from consideration all contractors incorporated or primarily doing business outside the local, state, and/or Tribal geographic area in which the non-state entity is located. In other words, the non-state entity simply sets aside the contract for an in-state or local contractor.

⁹⁰ 2 C.F.R. § 200.319(a)(6).

⁹¹ 2 C.F.R. § 200.319(a)(7).

⁹² See Black’s Law Dictionary 119 (9th ed. 2009).

⁹³ 2 C.F.R. 200.319(b).

- **Price Matching**
Price matching is where a non-state entity will allow a local vendor—within a certain percentage of the lowest bid to a solicitation—to match the lowest bid. If the local vendor does not match the bid, then the non-state entity awards the contract to the next lowest bidder.
- **Reducing Bids**
Reducing bids, under the sealed bidding method of procurement, is when a non-state entity considers the bid submitted by a local business to be less than the actual bid amount, usually reduced by a certain percentage, during the evaluation of bids. For example, a preference may deem a bid submitted by a resident business to be five percent lower than the bid actually submitted.
- **Adding Weight to Evaluation Factor**
A non-state entity may add weight on evaluation factors to an in-state or local business as part of a procurement by competitive proposals. For example, a local preference may provide that, “the jurisdiction shall award an additional five percent of total weight on all evaluation factors to a resident business.”
- **Set Asides**
A local jurisdiction may simply set aside certain contracts for only resident companies.

There are, however, several exceptions to geographic preferences set forth in the regulation. These exceptions are as follows:

A. State Licensing Requirements

Non-state entities are permitted to require contractors to be licensed in accordance with state licensing requirements.⁹⁴

B. Architectural and Engineering Contracts

Non-state entities may use geographic location as a selection criterion when contracting for architectural and engineering services.⁹⁵ This exception is permissible if use of the geographic location, given the nature and size of the project, provides for an appropriate number of qualified firms competing for the contract.

⁹⁴ *Id.*

⁹⁵ *Id.*

C. Mandated by Federal Law

Non-state entities may use a local, state, and/or Tribal geographic preference in the evaluation of bids or proposals where applicable federal statutes expressly mandate or encourage use of such geographic preference.⁹⁶

- **Indian Self-Determination and Education Act**

Indian Tribal preferences are permissible if certain requirements are met under the Indian Self-Determination and Education Assistance Act.⁹⁷ Pursuant to this Act, an Indian Tribal Government acting as either a recipient or subrecipient may give a preference in the award of contracts funded in whole or in part with PA funding to businesses falling within the meaning of “Indian organizations” or “Indian-owned economic enterprises,” as further defined by section 3 of the Indian Financing Act of 1974.⁹⁸ This determination must be documented by the Indian Tribal Government claiming such an exception.

Note on Section 307 of the Stafford Act: The federal laws establishing or governing FEMA grant and cooperative agreement programs *do not* mandate or encourage geographic preferences by non-state entities. Non-state entities often mistakenly believe that Section 307 of the Stafford Act encourages local preferences in their award of response and recovery contracts under a grant.⁹⁹ Section 307, however, only applies to procurements conducted by FEMA or other federal agencies.

Example: Use of Geographic Preference in Evaluation of a Bid or Proposal



Scenario: *After a severe hurricane, the President declares a major disaster for the State of Z. The declaration authorizes Public Assistance for every county within the State of Z. As a result of the storm, Town X, located within State Z, sustained severe damage to its town hall facility. Following approval of a Project Worksheet to repair the damaged building, the Town solicits bids for the work to repair the building. The Town, when evaluating the bids for the work, uses a*

⁹⁶ *Id.*

⁹⁷ Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5307(b).

⁹⁸ Indian Financing Act of 1974, 25 U.S.C. § 1452(e) and (f).

⁹⁹ Stafford Act, § 307. Codified as 42 U.S.C. § 5150.

state statutorily imposed geographic preference that results in an award to a local contractor. Is this permissible?

Answer: No. The use of the geographic preference in this situation is not permissible. The federal regulation at 2 C.F.R. § 200.319(b) provides that a non-state entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state or local geographic preferences in the evaluation of bids or proposals, “except in those cases where applicable federal statutes expressly mandate or encourage geographic preference.” In this instance, no federal statute authorized the preference. The Town, therefore, has violated the federal procurement standards at 2 C.F.R. § 200.319(b), even though the geographic preference was required by state law.

4.3 Written Procedures

The federal procurement rules require all non-state entities to have written procedures for procurement transactions.¹⁰⁰ These written procedures must ensure that all solicitation documents meet the following requirements:

A. Clear and Accurate Description of Requirements

Solicitations must incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured.¹⁰¹ These descriptions enable potential contractors to understand the requirements and prepare sound proposals to satisfy those requirements.

B. Nonrestrictive Specifications

The description of technical requirements must not unduly restrict competition.¹⁰²

¹⁰⁰ 2 C.F.R. § 200.319(c).

¹⁰¹ 2 C.F.R. § 200.319(c)(1).

¹⁰² 2 C.F.R. § 200.319(c)(1).

C. Qualitative Requirements

The description of technical requirements may include a statement of the qualitative nature of the product or services to be procured, and when necessary, it must describe the minimum essential characteristics to satisfy the intended use of the product or service.¹⁰³

D. Product Specifications

Detailed product specifications should be avoided, if possible.¹⁰⁴ When it is impractical or uneconomical to draft a clear and accurate description of the technical requirements without a detailed product specification, a “brand name or equivalent” description may be used to define the performance or other requirements of a procurement. Additionally, the required features of the named brand must be clearly stated in the solicitation.¹⁰⁵

E. Identify All Requirements/Evaluation Factors

Solicitations must identify all requirements that potential contractors must fulfill as well as other factors to be used in evaluating bids or proposals.¹⁰⁶

4.4 Prequalified Lists

Non-state entities may use prequalified lists of persons, firms, and products when purchasing under a FEMA PA award.¹⁰⁷ These prequalified lists, however, are not contracts. They are tools to aid in the procurement of future requirements by allowing non-state entities to review the qualifications of prospective contractors prior to a contract award. The federal rules set forth two requirements that non-state entities must meet when using such a list.

¹⁰³ 2 C.F.R. § 200.319(c)(1).

¹⁰⁴ 2 C.F.R. § 200.319(c)(1).

¹⁰⁵ 2 C.F.R. § 200.319(c)(1).

¹⁰⁶ 2 C.F.R. § 200.319(c)(2).

¹⁰⁷ 2 C.F.R. § 200.319(d).

- First, they must ensure that all prequalified lists are current and include enough qualified sources to ensure maximum full and open competition.¹⁰⁸
- Second, they must not exclude potential bidders or offerors from qualifying during the solicitation period.¹⁰⁹

Since prequalified lists are not contracts, non-state entities must still comply with all of the other applicable federal procurement under grant rules when awarding a contract.¹¹⁰ While a non-state entity may submit a solicitation directly to those contractors identified on a prequalified list, they must also publicly issue the solicitation pursuant to the applicable federal rules. They must also allow any additional interested contractors to submit their qualifications and, if deemed qualified, submit their bids or proposals in response to the solicitation. The solicitation, evaluation, and subsequent award of a contract or contracts must also conform to the federal procurement standards at 2 C.F.R. §§ 200.318-326.

Example: Solicitations Using a Prequalified List



Scenario: *The Town of Z, following a public solicitation for a Request for Qualifications, pre-qualifies five contractors to perform debris removal in their jurisdiction in the case of a disaster. A year later, the President declares a major disaster because of a hurricane and the declaration authorizes Public Assistance in the county in which the Town is located. The hurricane generated large quantities of debris. The Town solicits sealed bids for debris removal services only from the list of prequalified contractors and does not allow other contractors to qualify during the solicitation period. Does this procurement meet the requirements of full and open competition under the federal rules?*

Answer: No. The procurement did not meet the requirements of full and open competition. In this instance, the Town used a prequalified list and did not allow other contractors to qualify to be on the list during the solicitation period. This is noncompliant with 2 C.F.R. § 200.319(d). It may be the case, however, that awarding a short-term, noncompetitive debris removal contract to one of the contractors on the prequalified list

¹⁰⁸ *Id.*

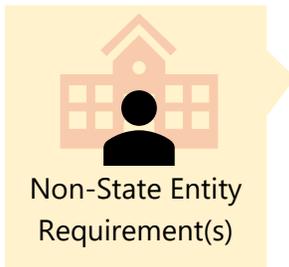
¹⁰⁹ *Id.*

¹¹⁰ 2 C.F.R. §§ 200.318-326.

may be permissible if an exigent or emergency circumstance would make full and open competition infeasible.¹¹¹ If the contract is for a long-term operation lasting weeks or months, however, the contract should be competitively bid in a manner that complies with full and open competition as soon as possible.

¹¹¹ 2 C.F.R. § 200.320(f)(2).

5. Methods of Procurement



Non-state entities must use one of the following five methods of procurement: procurement by micro-purchases; procurement by small purchase procedures; procurement by sealed bids; procurement by competitive proposals; or procurement by noncompetitive proposals.

A non-state entity may use different terminology for procurement methods, so it is important to compare the requirements and procedures rather than names when determining what the applicable local, state, and/or Tribal requirements are.

5.1 Procurement by Micro-Purchases

Procurement by micro-purchase is the acquisition of supplies, property, or services where the aggregate dollar amount does not exceed the **micro-purchase threshold**.¹¹² The federal micro-purchase threshold is \$10,000 as of June 2018.¹¹³

Micro-purchase procedures comprise a subset of a non-state entity's small purchase procedures. A non-state entity uses such procedures to expedite the completion of its

¹¹² 2 C.F.R. § 200.67 – The micro-purchase threshold is adjusted from time to time.

¹¹³ Section 41 U.S.C. § 1902(a)(1); OMB Memo (M-18-18), available at <https://www.whitehouse.gov/wp-content/uploads/2018/06/M-18-18.pdf>.

lowest-dollar small purchase transactions and minimize the associated administrative burden and cost.

Non-state entities should consult their servicing legal counsel to determine whether any applicable local, state, and/or Tribal equivalent threshold is lower than the federal micro-purchase threshold.

A. When to Use

A non-state entity wishing to purchase supplies or services by micro-purchase should not exceed the federal micro-purchase threshold, or the comparable state/local/Tribal threshold, whichever is lowest. In other words, a non-state entity must follow the most restrictive micro-purchase rules.

B. Applicable Procedures

- **Competition**

A non-state entity may award micro-purchases without soliciting competitive quotations if it considers the price to be fair and reasonable. To the extent practicable, a non-state entity must distribute micro-purchases equitably among qualified suppliers.

- **Prohibited Divisions**

A non-state entity must not divide or reduce the size of its procurement to avoid the additional procurement requirements applicable to larger acquisitions. See need determination.

- **Documentation**

A non-state entity must document its determination that the price is fair and reasonable, and the basis for that determination.

- **Responsibility**

A non-state entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the solicitation and contract.

5.2 Procurement by Small Purchases

Procurement by small purchase procedures is a relatively simple and informal procurement method for securing services, supplies, or property that **does not exceed the simplified acquisition threshold**.¹¹⁴ The simplified acquisition threshold is \$250,000 as of June 2018.¹¹⁵

Non-state entities should consult their servicing legal counsel to determine whether any applicable local, state, and/or Tribal equivalent threshold is lower than the federal simplified acquisition threshold.

A. When to Use

A non-state entity wishing to purchase supplies or services by small purchase should not exceed the simplified acquisition threshold, or the comparable state/local/Tribal threshold, whichever is lowest. In other words, a non-state entity must follow the **most restrictive** small purchase rules.

Contracts resulting from small purchase procedures should be **fixed price** or **not-to-exceed cost-reimbursement contracts** with assurances that the scope of work can be completed for less than the simplified acquisition threshold.

B. Applicable Procedures

- **Competition**

A non-state entity must obtain price or rate quotations from an adequate number of qualified sources. What is an adequate number of sources will depend upon the facts and circumstances of the procurement, but in no case should this be less than three.

- **Prohibited Divisions**

A non-state entity must not split a larger procurement merely to bring the cost of a procurement under the **simplified acquisition threshold**. Similarly, a non-state entity may not intentionally limit the size of a procurement to only a portion of a known requirement to lower the cost of a procurement to under the simplified acquisition

¹¹⁴ 2 C.F.R. § 200.88 – The small purchase threshold is adjusted from time to time.

¹¹⁵ Section 805 codified at 41 U.S.C. § 134; OMB Memo (M-18-18), available at <https://www.whitehouse.gov/wp-content/uploads/2018/06/M-18-18.pdf>.

threshold and then, to fulfill the entire requirement, issue a follow-on change order that brings the procurement above the simplified acquisition threshold.

- **Documentation**

A non-state entity must document the procurement history as detailed in 2 C.F.R. § 200.318(i). Documentation should include an independent estimate of the costs of the procurement that indicates the total estimated cost to fall below the simplified acquisition threshold.

- **Responsibility**

A non-state entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the solicitation and contract.

C. **Future Changes that Cause the Contract to Exceed the Simplified Acquisition Threshold**

It may be the case that a non-state entity properly used small purchase procedures to acquire services or property below the simplified acquisition threshold, but later needs to modify the contract to an amount above the threshold to cover unforeseen circumstances or an unexpected overrun in the quantity of work.

Such a change may be permissible under certain facts and circumstances, particularly where such a change falls within the scope of the original contract. The non-state entity should document its justification. FEMA may utilize this justification along with the non-state entity's independent estimate completed before the procurement in reviewing whether the non-state entity's decision to use small purchase procedures was permissible.

5.3 Procurement by Sealed bidding

Procurement by sealed bidding is a method where bids are publicly solicited through formal advertising. Under this procurement method, the solicitation document used is often known as the invitation for bids (IFB). Sealed bidding is often utilized when the non-state entity's requirements are known and specific in detail. As a result, a firm fixed price contract (either

lump sum or unit price) is awarded to the responsible bidder who submits the lowest price bid that also conforms to all of the terms and conditions of the solicitation.¹¹⁶

A. When to Use

The sealed bid method is the preferred method for procuring construction services and is appropriate when the following conditions are present:

- Complete, adequate, and realistic specifications or purchase descriptions are available;¹¹⁷
- Two or more responsible bidders are willing and able to compete effectively for the business;¹¹⁸
- The procurement lends itself to a fixed price contract;¹¹⁹ and
- The non-state entity primarily selects the successful bidder on the basis of price.¹²⁰

This includes the price-related factors included within the solicitation. Other than the **responsibility determination**, the non-state entity may not select a contractor on the basis of non-price-related factors.

B. Applicable Procedures

- **Public Advertisement**

A local or Indian Tribal Government must publicly advertise the IFB. The regulation does not provide specific guidance regarding the required method of advertising, such as the number of times the advertisement must be published, the target circulation of any advertising, or the number of days for potential bidders to provide their submission. The precise manner of advertising depends upon the facts and circumstances of the procurement, subject to any applicable local, state, and/or Tribal requirements.¹²¹

- **Adequate Number of Sources**

Non-state entities must solicit bids from an adequate number of known suppliers. The regulation does not provide specific guidance regarding the method for soliciting additional bids or what constitutes an adequate number of qualified sources. These

¹¹⁶ 2 C.F.R. § 200.320(c).

¹¹⁷ 2 C.F.R. § 200.320(c)(1)(i).

¹¹⁸ 2 C.F.R. § 200.320(c)(1)(ii).

¹¹⁹ 2 C.F.R. § 200.320(c)(1)(iii).

¹²⁰ *Id.*

¹²¹ 2 C.F.R. § 200.320(c)(2)(i).

determinations will depend upon the facts and circumstances of the procurement, subject to any relevant local, state, and/or Tribal requirements.¹²²

- **Precise Specifications**

The IFB must define the items or services including any specifications and pertinent attachments so potential bidders can properly respond.¹²³

- **Sufficient Response Time**

The entity must provide potential bidders sufficient time to prepare and submit bids prior to the date set for bid opening. The regulation does not provide specific guidance regarding how much time is required. This determination is subject to any relevant local, state, and/or Tribal requirements.¹²⁴

- **Bid Opening**

All bids must be opened at the date, time, and location established in the IFB.¹²⁵ For local and Indian Tribal Governments, the bids must be opened publicly.

- **Bid Selection**

After the official bid opening procedures are completed, the non-state entity will award a firm fixed price contract to the lowest price bid provided by a responsive and responsible bidder. If specified in the bidding documents, the non-state entity may consider discounts, transportation costs, and life cycle costs in determining which bid is the lowest. The non-state entity will only use payment discounts to determine the low bid when prior experience indicates such discounts are usually taken advantage of.¹²⁶

- **Documentation**

If using the Sealed Bidding method of procurement, the non-state entity must document the procurement history.¹²⁷ They may also reject any or all bids if there is a sound documented reason.¹²⁸ The regulations do not provide guidance regarding what that entails, but some of the circumstances under which a non-state entity may reject an individual bid include but are not limited to:

¹²² *Id.*

¹²³ 2 C.F.R. § 200.320(c)(2)(ii).

¹²⁴ 2 C.F.R. § 200.320(c)(2)(i).

¹²⁵ 2 C.F.R. § 200.320(c)(2)(iii).

¹²⁶ 2 C.F.R. § 200.320(c)(2)(iv).

¹²⁷ 2 C.F.R. § 200.318(i).

¹²⁸ 2 C.F.R. § 200.320(c)(2)(v).

- The bid fails to conform to the essential requirements or applicable specifications as outlined in the IFB;
- The bid fails to conform to the delivery schedule as outlined in the IFB;
- The bid imposes conditions that would modify the requirements as outlined in the IFB;
- The non-state entity determines that the bid price is unreasonable;
- The bid is submitted by a suspended or debarred vendor; and/or
- A bidder fails to furnish a bid guarantee when such a guarantee is required.

5.4 Procurement by Competitive Proposals

Procurement by the competitive proposal is an acceptable method of procurement, where non-state entities cannot base the contract award exclusively on price or price-related factors due to the nature of the service or property to be acquired.¹²⁹

A. When to Use

Competitive proposals are an acceptable method of procurement when:

- The nature of the procurement does not lend itself to sealed bidding;
- The non-state entity expects more than one source willing and able to submit an offer or proposal; and
- Either a fixed-price or cost-reimbursement contract is appropriate.¹³⁰

The solicitation document used is often known as a request for proposals (RFP). Although generally not used for actual construction, alteration, or repair to real property, the competitive proposal method is most often used for professional services related to construction projects. These services include program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, and related services. The competitive proposals method of procurement is appropriate when the following conditions are present:

¹²⁹ 2 C.F.R. § 200.320(d).

¹³⁰ 2 C.F.R. § 200.320(d).

- The non-state entity cannot base the contract award exclusively on price or price-related factors due to the nature or the service or property to be acquired;
- The requirements are less definitive, more development work is required, or there is a greater risk of performance;
- Technical capability, past performance, and prior experience considerations play a dominant role in source selection; and/or
- Separate discussions with individual offerors are expected to be necessary after they have submitted proposals. This is a key distinction from the sealed bidding method of procurement where such discussions with individual bidders are prohibited and the contract will be awarded based on price and price-related factors alone.

B. Applicable Procedures

- **Public Advertisement**

The non-state entity must publicize their request for proposals.¹³¹ The precise manner of the advertising depends upon the facts and circumstances of the procurement, subject to local, state, and/or Tribal requirements.

- **Disclosure of Evaluation Factors**

Within the advertisement, the non-state entity must identify all evaluation factors and their relative importance.¹³² The following provides several considerations for developing evaluation factors:

- The evaluation factors for a specific procurement should reflect the subject matter and elements that are most important to the non-state entity.
- The evaluation factors may include such things as technical design, technical approach, length of delivery schedules, past performance, and quality of proposed personnel.
- The non-state entity may use any one or a combination of source selection approaches as permitted under local, state, and/or Tribal laws, regulations, and procedures, and these approaches will often differ based on the relative importance of price or cost for the procurement.
- If permitted by the non-state entity, written procurement procedures, and applicable local, state, and/or Tribal law, the non-state entity may award a contract to the

¹³¹ 2 C.F.R. 200.320(d)(1).

¹³² *Id.*

offeror whose proposal offers the “best value” to them. The solicitation must, in addition to the items described above, inform potential offerors that the award will be made on a “best value” basis, which should include a statement that the non-state entity reserves the right to award the contract to other than the lowest-priced offeror.

- The request for proposals must identify evaluation factors and their relative importance; however, they need not disclose numerical or percentage ratings or weights.
- FEMA does not require any specific evaluation factors or analytic process. Notwithstanding, the evaluation factors must support the purposes of the grant or cooperative agreement.

- **Consideration of Proposals**

The non-state entity must consider any response to a publicized request for proposals to the maximum extent practical.¹³³

- **Adequate Sources**

In addition to publicizing the request for proposals, non-state entities must solicit proposals from an adequate number of qualified sources,¹³⁴ providing them with sufficient response time before the date set for the receipt of proposals. Determining an adequate number of sources will depend upon the facts and circumstances of the procurement, subject to relevant local, state, and/or Tribal requirements.

- **Written Method of Evaluation**

The non-state entity must have a written method for conducting their technical evaluations of the proposals received and for selecting offerors.¹³⁵

- When evaluating proposals, FEMA expects the non-state entity to consider all evaluation factors specified in its solicitation documents and evaluate offers only on the evaluation factors included in the solicitation documents.
- A non-state entity may not modify its evaluation factors after proposals have been submitted without re-opening the solicitation.

¹³³ *Id.*

¹³⁴ 2 C.F.R. 200.320(d)(2).

¹³⁵ 2 C.F.R. 200.320(d)(3).

- In awarding a contract that will include options, FEMA expects the non-state entity to evaluate proposals for any option quantities or periods contained in the solicitation if it intends to exercise those options after the contract is awarded.
- **Award**
The contract will be awarded to the responsible contractor whose proposal is most advantageous to the program with price and other factors considered.¹³⁶

C. Considerations for Architectural/Engineering Services

When seeking architectural and/or engineering professional services only, non-state entities are permitted to use competitive proposal procedures for a qualifications-based procurement. Under this method, price is not used as an evaluative factor. The non-state entity evaluates each competitors' qualifications and selects the most qualified competitor. The contract award is subject to negotiation of fair and reasonable compensation.¹³⁷ If the parties fail to agree on a fair and reasonable price, the non-state entity may conduct negotiations with the next most qualified offeror. If necessary, the non-state entity will then conduct negotiations with successive offerors in descending order until a contract award can be made to the offeror whose price is believed to be fair and reasonable. This method, where price is not used as a selection factor, can only be used in procurement of architectural/engineering professional services and cannot be used to purchase other types of services (even if an architectural/ engineering firm is the one providing those other types of services).¹³⁸

FEMA considers the following to fall within the scope of architectural/engineering professional services, thus making them eligible for a qualifications-based procurement:

- Professional services of an architectural or engineering nature, as defined by applicable state law, and which the state law requires to be performed or approved by a registered architect or engineer;
- Professional services of an architectural or engineering nature associated with design or construction of real property;

¹³⁶ 2 C.F.R. 200.320(d)(4).

¹³⁷ 2 C.F.R. § 200.320(d)(5).

¹³⁸ *Id.*

- Other professional services of an architectural or engineering nature or services incidental thereto (including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals and other related services) that logically or justifiably require performance by registered architects or engineers or their employees; and
- Professional surveying and mapping services of an architectural or engineering nature.

5.5 Procurement by Noncompetitive Proposals

The federal procurement under grant rules set forth requirements that must be met for a non-state entity to use a noncompetitive proposal, or sole-source, method of procurement. Procurement by noncompetitive proposals is a procurement method in which solicitation of a proposal occurs only from one source or a limited number of sources.¹³⁹ A non-state entity may use procurement by noncompetitive proposals only when one or more of the following circumstances, or exceptions to full and open competition, apply:



A. Single Source

A non-state entity may be able to use the single source exception to full and open competition if the item required is only available from one source. In other words, the item or service is only available from one contractor and no other property or service will satisfy the non-state entity's requirement.¹⁴⁰

The non-state entity may use its own judgment in determining whether this condition has been met, but it must document its rationale in the procurement record. The following is a non-exhaustive list of instances in which FEMA might consider property or services as available from only one source:

¹³⁹ 2 C.F.R. § 200.320(f).

¹⁴⁰ 2 C.F.R. § 200.320(f)(1).

- **Patents or Restricted Data** – There are patent or data rights restrictions that would preclude competition.
- **Substantial Duplication of Costs** – In the case of a sole-source award to an existing contractor already performing work before a major disaster, there would be a substantial duplication of costs that would not be expected to be recovered through competition. This situation would arise, for example, if a contractor was in the middle of constructing a facility when the facility was damaged by a major disaster, and the scope of work under the PA project was to repair the construction work completed as of the date of the incident.
- **Compatible Equipment** – The non-state entity previously had a system or piece of technology installed that was damaged by a major disaster, and the non-state entity has to order the replacement part from the same manufacturer or else it would need to replace the entire system and retrain staff. As an example, an emergency radio system might be installed and part of the system is damaged by a major disaster, but only one company makes parts that are compatible with the installed radio system.

Example: Noncompetitive Procurement due to One Source



Scenario: *Hurricane Daniel made landfall in the City of Y, and as a result, damaged a 1930s battleship that had since been decommissioned and turned into a museum. After assessing the damage, the City of Y realized that the mooring equipment needed to be replaced. Unfortunately, 1930s battleship parts are not readily available, and when conducting its market research, the City of Y learned that there is only one company that can produce the mooring equipment required. The City of Y awarded a contract to this company on a sole-sourced basis for the mooring equipment. Is this procurement permissible under the federal procurement under grant rules?*

Answer: Yes. A non-state entity may use procurement by noncompetitive proposals when an item is only available from a single source. Because there is only one producer of the mooring equipment required, the non-state entity may be able to sole-source the contract award using the single source exception to full and open competition. The non-state entity must document its justification for sole sourcing in its procurement file.

B. Public Emergency or Exigency

A non-state entity may be able to use the emergency or exigency exception to full and open competition if it determines that a public exigency or emergency will not permit a delay resulting from competitive solicitation.¹⁴¹ The non-state entity may use its own judgment in determining whether this condition has been met but must document its rationale in the procurement record.

When referring to procurement activity, FEMA defines both exigency and emergency as situations that demand immediate aid or action. The differences between the two situations are outlined below:

- **Exigency**

In the case of an exigency, there is a need to avoid, prevent, or alleviate serious harm or injury, financial or otherwise, to the applicant, and use of competitive procurement proposals would prevent the urgent action required to address the situation. Thus, a noncompetitive procurement may be appropriate.

- **Emergency**

In the case of an emergency, there is a threat to life, public health or safety, improved property, or some other form of dangerous situation that requires immediate action to alleviate the threat. Emergency conditions are generally more short-lived than exigency circumstances.

Use of the public exigency or emergency exception **is only permissible during the actual exigent or emergency circumstances**. Exigent or emergency circumstances will vary for each incident, and therefore, it is difficult to determine in advance or assign a particular time frame when noncompetitive procurements may be warranted. Exigent or emergency circumstances may exist for two days, two weeks, two months, or even longer in some cases. Non-state entities must ensure that work performed under the noncompetitively procured contracts is specifically related to the exigent or emergency circumstance in effect at the time of procurement. Importantly, because the exception to competitive procurement is available only while the exigent or emergency circumstances exist, applicants should, upon awarding a noncompetitive contract, immediately begin the process of competitively procuring similar goods and services to transition to the competitively procured contracts as soon as the actual exigent or emergency circumstances cease to exist.

¹⁴¹ 2 C.F.R. § 200.320(f)(2).

FEMA may review a non-state entity's justification that exigent or emergency circumstances warrant an exception to full and open competition.

Example: Noncompetitive Procurement due to Public Emergency



Scenario: *A tornado impacts the City of X and causes widespread and catastrophic damage, including loss of life, loss of power, damage to public and private structures, and millions of cubic yards of debris across the City, leaving almost the entire jurisdiction inaccessible. The City needs to begin debris clearance activities immediately to restore access to the community and support search and rescue operations and power restoration. Is there an exception to full and open competition that might allow the City to procure debris clearance activities using a noncompetitive proposal?*

Answer: Yes. This would be an example of an “emergency” circumstance. There is a threat to life, public health or safety, improved property, or some other form of dangerous situation that requires immediate action to alleviate the threat.

Use of the public emergency exception is only permissible during the actual emergency circumstance. Once the emergency circumstances cease to exist, the City is expected to transition to a more appropriate method of contracting using full and open competition. Failure to properly transition to a more appropriate method of contracting at the cessation of the emergency circumstance is noncompliant with the federal procurement under grant rules.

Example: Noncompetitive Procurement due to Public Exigency



Scenario: *A tornado impacts the City of Z 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 and the city school would have to remain closed as a result. 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 documents that its noncompetitive proposal is justifiable based on the public exigency not*

permitting the delay that would result from competitive solicitation. Is there an exception to full and open competition that might allow for this noncompetitive procurement?

Answer: Yes. A non-state entity may be able to use the exigency exception to full and open competition if it demonstrates that there is a situation that demands immediate aid or action and a delay caused by a competitive solicitation would further the threat. In this scenario, the delay in repairing the school caused by the competitive procurement process would result in the school remaining closed past the beginning of the school year. This closure may lead to a severe economic hardship on the community because if the school does not open on time, students may have to stay home, leading to parents staying home to look after their children. If the City can adequately justify that the noncompetitive procurement was needed to prevent a severe economic harm to the community, it may be able to use the exigent circumstances exception.

C. Federal Awarding Agency or Pass-Through Entity Approval

A non-state entity may use a sole-sourced procurement if FEMA or the pass-through entity expressly authorizes the noncompetitive proposal in response to a written request from the non-state entity.¹⁴² While identified as a potential exception to full and open competition under the noncompetitive procurement process, approval for this exception has been exceptionally rare at both the FEMA and pass-through entity levels.

D. Inadequate Competition

A non-state entity may use the noncompetitive proposal method when, after the solicitation of a number of sources, the non-state entity determines competition to be inadequate.¹⁴³

Competition is “inadequate” when a non-state entity has complied with all procurement under grant standards and the receipt of a single offer or bid, single responsive offer or bid, or no responsive bids or proposals is caused by conditions outside the non-state entity’s control. FEMA will not, on other hand, consider competition inadequate where a non-state entity did not sufficiently publicize the requirement, solicited only a few sources that chose not to submit a proposal, set unduly restrictive specifications, took arbitrary actions, or failed to take other actions that resulted in the inadequate competition. In those cases, adequate

¹⁴² 2 C.F.R. § 200.320(f)(3).

¹⁴³ 2 C.F.R. § 200.320(f)(4).

competition may very well be possible, but the non-state entity failed to take the proper steps and actions to ensure such competition.

It is important for a non-state entity to document its justification for why there is inadequate competition and why it moved forward with a noncompetitive award without revising or cancelling the solicitation and re-soliciting offers or bids. In making this justification, it may be necessary for a non-state entity to:

- Evaluate whether it sufficiently publicized the invitation for bids or request for proposals and/or solicited an adequate number of firms.
- Speak to those firms solicited to find out why they did not submit offers or bids. If the reason is an overly restrictive specification or delivery requirement, then the non-state entity will need to evaluate whether it should cancel the solicitation, change that specification to allow for more bids or offers, and re-solicit bids or offers. If the non-state entity chooses to move forward with the award in light of the restrictive specification, then it should document in the procurement file why the restrictive specification or delivery requirement was necessary and could not be modified so as to enable additional competition.

Example: Inadequate Competition



Scenario: *Among other jurisdictions, the City of Y is impacted by a tornado that caused severe damage to its City Hall building. The City of Y advertised its requirement for repair work, but only one contractor submitted a bid in response. The City of Y contacted potential contractors asking why they did not submit a bid and realized that most contractors had already committed their resources to other impacted areas. The City of Y documented its efforts to contact potential contractors in its procurement file and awards a noncompetitive contract to the only contractor that submitted a bid. Is this noncompetitive procurement permissible under the federal procurement under grant regulations?*

Answer: Yes. A non-state entity may use procurement by noncompetitive proposals when competition is determined to be inadequate; however, it must document its justification for why competition was inadequate as well as why it moved forward with a noncompetitive award without revising or cancelling the solicitation.

A non-state entity using procurement by noncompetitive proposals, due to any one of the four circumstances mentioned above, must take the following steps:

- **Justification and Documentation**

The non-state entity must adequately document the procurement history and justification for the sole source contract in light of the requirement for full and open competition.

- **Negotiation of Profit**

The non-state entity must negotiate profit as a separate element of the price.¹⁴⁴

- **Ensure Compliance with Additional Requirements**

Although the non-state entity is not required to comply with the full and open competition requirement by entering into an allowable sole-source procurement, it must ensure compliance with all other applicable federal procurement under grant requirements (e.g., cost or price analysis, time and materials considerations, contract provisions, etc.).

Additional Considerations when Procuring with Noncompetitive Proposals:

- Where there is sufficient justification warranting a non-state entity to use procurement through noncompetitive proposals, FEMA will generally consider it infeasible for the non-state entity to take the **six affirmative steps** to assure that minority businesses, small businesses, women's business enterprises, and labor surplus area firms are used in those circumstances.
- When a non-state entity makes a change to an existing contract that is beyond the scope of the original contract (a **cardinal change**), then the non-state entity has essentially made a sole-source award that must be justified in the same manner as making an original award through solicitation of a proposal from only one source.

¹⁴⁴ 2 C.F.R. § 200.323(b).

Suggested Elements for Noncompetitive Procurement Justification

1. Identify which of the four circumstances listed in 2 C.F.R. § 200.320(f) justify a noncompetitive procurement:
 - The item is available only from a single source;
 - The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
 - The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-state entity; or
 - After solicitation of a number of sources, competition is determined inadequate.
2. Provide a brief description of the product or service being procured, including the expected dollar amount of the procurement.
3. Explain why a noncompetitive procurement is necessary. If the noncompetitive procurement is based on exigent or emergency circumstances, then the justification should explain the nature of the public exigency or emergency, including specific conditions and circumstances that clearly illustrate why procurement other than through noncompetitive proposals would cause unacceptable delay in addressing the public exigency or emergency. Failure to plan for transition to competitive procurement cannot be the basis for continued use of noncompetitive procurement based on public exigency or emergency.
4. State how long the noncompetitively procured contract will be used for the defined scope of work, and the impact on that scope of work should the noncompetitively procured contract not be available for that amount of time (e.g., how long do you anticipate the exigency or emergency circumstances will continue; how long will it take to identify your requirements and award a contract that complies with all procurement requirements; or how long would it take another contractor to reach the same level of competence).
5. Describe the specific steps taken to determine that full and open competition could not have been met, or was not used, for the scope of work (e.g., research conducted to determine that the good or service required is only available from one source).
6. Describe any known conflicts of interest and any efforts that were made to identify possible conflicts of interest before the noncompetitive procurement occurred. If no efforts were made, explain why.

7. Include any other information justifying the use of noncompetitive procurement in the specific instance.

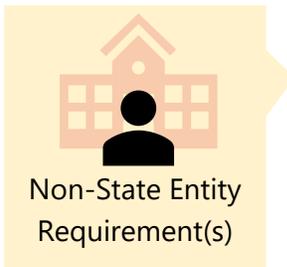
NOTE: A separate justification is required for each instance of noncompetitive procurement.

Related Tools and Resources



- ✓ [Exigent or Emergency Circumstances Procurement for Public Assistance Fact Sheet](#)

6. Socioeconomic Contracting



Non-state entities must take all necessary affirmative steps to assure that small and minority businesses, women’s business enterprises, and labor surplus area firms are used when possible.¹⁴⁵



Notably, this is not a rule that allows for a set-aside, but rather is a requirement aimed to ensure maximum participation by these types of firms.

6.1. Affirmative Steps

A non-state entity must, at a minimum, take the following six “**affirmative steps**” to assure that minority firms, small businesses, women’s business enterprises, and labor surplus firms are used when possible:

1. Solicitation Lists

A non-state entity must place small and minority businesses and women’s business enterprises on solicitation lists.¹⁴⁶ A non-state entity must provide documentation of all prequalified lists or solicitation lists used in the procurement.

¹⁴⁵ 2 C.F.R. § 200.321.

¹⁴⁶ 2 C.F.R. § 200.321(b)(1).

2. Soliciting

A non-state entity must assure that it solicits small and minority businesses and women's business enterprises whenever they are potential sources.¹⁴⁷ A non-state entity must provide documentation to demonstrate compliance with this step (any communication, email, etc.).

3. Dividing Requirements

A non-state entity must divide total requirements, *when economically feasible*, into smaller tasks or quantities to permit maximum participation by small and minority businesses and women's business enterprises.¹⁴⁸ When applying this requirement, it is important to recognize that intentionally dividing up a large procurement into smaller parts in an effort to fall beneath the simplified acquisition threshold or the micro-purchase threshold is prohibited. Additionally, bundling requirements so that small businesses, minority businesses and women's business enterprises would be unable to compete is prohibited.

4. Delivery Schedules

A non-state entity must establish delivery schedules, *where the requirement permits*, which encourage participation by small and minority businesses and women's business enterprises.¹⁴⁹

5. Obtaining Assistance

A non-state entity must use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce.¹⁵⁰

6. Prime Contractor Requirements

A non-State entity must require the prime contractor, if subcontracts are anticipated or let, to take the five previous affirmative steps.¹⁵¹ FEMA recommends that the non-state

¹⁴⁷ 2 C.F.R. § 200.321(b)(2).

¹⁴⁸ 2 C.F.R. § 200.321(b)(3).

¹⁴⁹ 2 C.F.R. § 200.321(b)(4).

¹⁵⁰ 2 C.F.R. § 200.321(b)(5).

¹⁵¹ 2 C.F.R. § 200.321(b)(6).

entity include this requirement in the solicitation as well as in the contract to ensure contractor compliance.

A non-state entity must document its compliance with the six affirmative steps discussed above. Examples of documentation include prequalified or solicitation lists used, communications, emails, online searches, etc.

Additional Considerations regarding Socioeconomic Contracting:

- A recurring issue within the context of the socioeconomic affirmative steps is whether a non-state entity may set-aside a certain percentage of its contracting for small businesses, minority firms, and women’s business enterprises. Non-state entities must conduct all procurements in a manner providing full and open competition and there are no provisions for specific exceptions to this requirement in the case of small businesses, minority firms, women’s business enterprises, or labor surplus area firms. As such, **set-asides and other quotas are impermissible.**
- When complying with the Indian Self-Determination and Education Assistance Act, if using the preference, **Indian Tribal Governments** are considered to have met and do not need to take additional steps to comply with the socioeconomic affirmative steps found within the federal procurement under grant rules.

6.2 Definitions for Socioeconomic Firms

The federal procurement under grant rules do not define the terms small business, minority business, women’s business enterprises, or labor surplus area firms. FEMA will accept the meaning of small business, women’s business enterprise, minority business, or labor surplus area firm established under applicable local, state, and/or Indian Tribal laws and regulations. Where local, state, and/or Indian Tribal laws and regulations do not provide such definitions, FEMA uses the following definitions:



- **Small Business**

A business that is independently owned and operated and is qualified as a small business under the Small Business Administration criteria and size standards at 13 C.F.R. Part 121.

- **Women’s Business Enterprise**

A business enterprise that is (a) at least 50 percent owned by one or more women, or in the case of a publicly owned business, at least 51 percent of the stock is owned by one or more women; and (b) whose management and daily operations are controlled by one or more women.¹⁵²

- **Minority Business**

A business that is (a) at least 51 percent owned by one or more minority group members, or in the case of a publicly owned business, at least 51 percent of the stock is owned by one or more minority group members; and (b) whose management and daily operations are controlled by one or more minority group members.¹⁵³

- **Labor Surplus Area Firm**

A firm that, together with its first-tier subcontractors, will perform primarily in labor surplus areas.

Labor Surplus Area- The Department of Labor’s Employment and Training Administration has defined labor surplus areas (LSA) as localities that have a civilian average annual unemployment rate during the previous two calendar years of 20 percent or more above the average annual civil unemployment rate for all states during that same period.¹⁵⁴

Example: Awarding to Small Businesses without Taking Affirmative Steps



Scenario: *Severe storms and flooding caused approximately \$3.2 million in damage to numerous facilities in the County of X. County X did not take the socioeconomic affirmative steps, but it awarded the architectural and engineering contract to a small business and was in the process of awarding a debris removal contract to another small business when the OIG began an audit. Is County X in compliance with the federal procurement under grant regulations?*

¹⁵² 13 C.F.R. Part 127.

¹⁵³ 13 C.F.R. § 124.103, 13 C.F.R. § 124.1002, and 13 C.F.R. § 124.105.

¹⁵⁴ 20 C.F.R. §§ 654.4-654.5.

Answer: No, County X is not in compliance with the federal procurement regulations. County X was required to take the socioeconomic affirmative steps regardless of who it ended up awarding the contracts to. The rules do not require County X to award the contracts to small businesses, minority owned businesses, women’s business enterprises, or labor surplus area firms. Rather, the rules require County X to solicit these types of businesses when they are potential sources to allow them to fully engage in the process. Awarding the contracts to a disadvantaged business does not negate the requirement of the federal procurement under grant rules.

Example: Following State Equal Opportunity Requirements Instead of Federally Required Affirmative Steps



Scenario: *A hurricane devastated the Town of Y, causing almost \$4 million in damage. Town of Y had no requirement to reach out to disadvantaged firms, and the applicable state laws required Town of Y to be equal opportunity and affirmative action employers. Town of Y followed the state laws and awarded four of its contracts to women-owned and small business enterprises. Town of Y did not take the specific socioeconomic affirmative steps outlined in the federal procurement under grant rules. Is Town of Y in compliance with the federal procurement rules?*

Answer: No, Town of Y is not in compliance with the federal procurement under grant rules. Town of Y, as a non-state entity, is required to follow its own rules, which reflect applicable state and local laws and regulations, provided that the procurement conforms to applicable federal law. Therefore, Town of Y is required to follow its own rules, but it must also follow the federal rules. Pursuant to the federal procurement under grant rules, Town of Y was required to take the socioeconomic affirmative steps regardless of who it awarded its contracts to. Awarding the contracts to a disadvantaged business does not negate the requirement of the rules.

Example: Taking Socioeconomic Affirmative Steps during a Public Emergency Situation



Scenario: *A tornado devastated the City of Z, leaving the streets scattered with debris. The main street leading to the hospital was covered with debris and impassable. City of Z determined this was a public emergency and entered into a sole-source contract with Contractor B to remove the debris from the street so that the hospital was accessible. Due to the emergency, City of Z did not take the socioeconomic affirmative steps. Is City of Z in compliance with the federal procurement under grant regulations?*

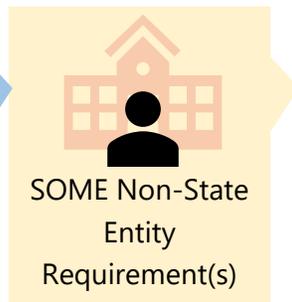
Answer: Yes, provided that City of Z can adequately show that this situation qualified as an emergency exception allowing it to sole source, it is not required to follow the socioeconomic affirmative steps. Generally, if utilizing the emergency/exigency exception to competitive procurements, the non-state entity is not required to take the socioeconomic affirmative steps since time is of the essence and the situation will not permit such a delay.

Related Tools and Resources



- ✓ [Quick Guide to SBA Search Tools](#)
- ✓ [Small Business Administration \(SBA\)](#)
- ✓ [Dynamic Small Business Search](#)
- ✓ [Department of Commerce: Minority Business Development Agency \(MBDA\)](#)
- ✓ [Department of Labor: Labor Surplus Areas](#)

7. Procurement of Recovered Materials



An NFE that is a state agency or agency of a political subdivision of a state and its contractors must comply with Section 6002 of the Solid Waste Disposal Act.¹⁵⁵ This means all state entities (including territorial governments) and local governments.

The requirements of Section 6002 include:

- Procuring only items designated in guidelines of the EPA at 40 C.F.R. Part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 in a single instance or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000;
- Procuring solid waste management services in a manner that maximizes energy and resource recovery; and
- Establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.¹⁵⁶

¹⁵⁵ Pub. L. No. 89-272 (1965) (codified as amended by the Resource Conservation and Recovery Act at 42 U.S.C. § 6962).

¹⁵⁶ 2 C.F.R. § 200.322.

7.1 Inapplicability to Indian Tribes and Private Nonprofit NFEs

The requirements of Section 6002 and its implementing regulations at 40 C.F.R. Part 247 do not apply to procurements by Indian Tribes or private nonprofit NFEs.¹⁵⁷

7.2 EPA Product Designation

EPA is required to designate products that are or can be made with recycled materials, and to recommend best practices for buying these products.¹⁵⁸ EPA has currently designated 61 products across eight categories, which are construction products, landscaping products, non-paper office products, paper products, park and recreation products, transportation products, vehicular products, and miscellaneous products.¹⁵⁹

- Once EPA designates a product, Section 6002(c)(1) of the Solid Waste Disposal Act¹⁶⁰ requires state entities (including territorial governments) and local governments to procure that designated item composed of the highest recovered material content level practicable, consistent with maintaining a satisfactory level of competition, considering such guidelines.¹⁶¹
- State entities (including territorial governments) and local governments may decide not to procure such items if they are not available in a reasonable period of time, fail to meet reasonable performance standards, or are only available at an unreasonable price.¹⁶²

7.3 Affirmative Procurement Program

Section 6002(i) of the Solid Waste Disposal Act¹⁶³ provides that each state entity (including territorial governments) and local government that purchases items designated by EPA must establish an affirmative procurement program, containing four specific elements, for

¹⁵⁷ *Id.*

¹⁵⁸ Section 6002(e) of the Solid Waste Disposal Act (codified as amended at 42 U.S.C. § 6962(e)).

¹⁵⁹ See 40 C.F.R. Part 247, Subpart B.

¹⁶⁰ Codified as amended at 42 U.S.C. § 6962(c)(1).

¹⁶¹ 40 C.F.R. § 247.2(d).

¹⁶² See Section 6002(c) of the Solid Waste Disposal Act (codified as amended at 42 U.S.C. § 6962(c)); 40 C.F.R. § 247.2(d).

¹⁶³ Codified as amended at 42 U.S.C. § 6962(i).

procuring such items containing recovered materials to the maximum extent practicable.¹⁶⁴ The four required elements of the affirmative procurement program are:

- A recovered materials preference program;
An example of a recovered materials preference program would be where an entity places language in a Request for Proposals (RFP) establishing a category and point scale for the use of recovered materials. The entity then awards maximum points to the vendor offering an item composed of the highest percentage of recovered materials practicable.
- An agency program to promote the preference program adopted as required by element 1;
- A program for requiring estimates of the total percentage of recovered material utilized in the performance of a contract; certification of minimum recovered material content actually utilized, where appropriate; and reasonable verification; and
- Annual review and monitoring of the effectiveness of an agency's affirmative procurement program.

7.4 Solid Waste Disposal Services

Section 6002(f) of the Solid Waste Disposal Act¹⁶⁵ requires state entities (including territorial governments) and local governments, to the maximum extent practicable, to manage or arrange for the procurement of solid waste management services in a manner which maximizes energy and resource recovery.

7.5 Certifications

Section 6002(c)(3) of the Solid Waste Disposal Act¹⁶⁶ and 40 C.F.R. § 247.4 provide that a state entity (including territorial governments) and local government must require that their vendors:

¹⁶⁴ See also 40 C.F.R. § 247.6.

¹⁶⁵ Codified as amended at 42 U.S.C. § 6962(f).

¹⁶⁶ Codified as amended at 42 U.S.C. § 6962(c)(3).

- Certify that the percentage of recovered materials to be used in the performance of the contract will be at least the amount required by applicable specifications or other contractual requirements; and
- Estimate the percentage of the total material utilized for the performance of the contract which is recovered materials (for contracts greater than \$100,000).

Related Tools and Resources



- ✓ [U.S. Environmental Protection Agency's Comprehensive Procurement Guideline Program](#)
- ✓ [Contract Provisions Template](#)

8. Cost or Price Analysis



Non-State Entity Requirement(s)

Non-state entities must perform and document a cost or price analysis in connection with every procurement action above the **simplified acquisition threshold**, including contract modifications.¹⁶⁷

There are many benefits to a non-state entity performing a cost or price analysis, including decreasing the likelihood of unreasonably high or low prices, contractor misrepresentations, and errors in pricing relative to scope of work.

8.1 Price Analysis

A price analysis is the examination and evaluation of the total amount of a proposed price without evaluating its separate cost elements and proposed profit. This type of analysis is typically used when acquiring commercial items or when using the procurement through sealed bidding method. Techniques may include:

- Comparing offers with one another;
- Comparing prior proposed prices and contract prices with current proposed prices for the same or similar goods or services;
- Comparing offers with competitive published price lists, published market prices, or similar indexes;

¹⁶⁷ 2 C.F.R. § 200.323(a).

- Comparing proposed prices with independently developed estimates of the non-state entity; and
- Comparing proposed prices with prices of the same or similar items obtained through market research.

Example: Price Analysis Techniques



Scenario: *A tornado tore through a residential area of the Town of Y and destroyed 400 family homes. As a result, the Town of Y decided to procure tent shelters to provide temporary housing to the residents who lost their homes. The Town conducted an independent estimate and determined that the procurement would exceed the simplified acquisition threshold of \$250,000. After advertising its requirement and receiving multiple offers, the Town compared the offeror prices with one another as required by its procurement policies and procedures. This analysis led Town of Y to obtaining a fair and reasonable price for the tent shelters. Is Town of Y's price analysis technique compliant with the federal procurement under grant rules?*

Answer: Yes. In this scenario, Town of Y conducted a price analysis in accordance with their own procurement policies and procedures, which helped ensure a fair and reasonable price for the tent shelters. The federal procurement under grant rules do not impose specific price analysis techniques on non-state entities; therefore, the non-state entity is responsible for selecting the technique that will ensure a reasonable price and compliance with applicable rules.

8.2 Cost Analysis

A cost analysis is the review and evaluation of the separate cost elements or line items (such as labor hours, overhead, materials, etc.) and proposed profit in a proposal to determine a fair and reasonable price for a contract. Some of the ways in which a cost analysis can be performed include:

- Verification and evaluation of the cost elements that make up the total price; and
- Comparison of costs proposed by contractors.



The method and degree of analysis is dependent on the facts surrounding the procurement situation but, as a starting point, non-state entities must make independent cost estimates *before* receiving bids or proposals. Additionally, a non-state entity must negotiate profit as a separate element of the price for each contract in which there is no price competition, and in all cases where a cost analysis is performed.¹⁶⁸

Costs or prices based on estimated costs for contracts are allowable only to the extent that costs are allowable under the federal *Cost Principles* at 2 C.F.R. Part 200, Subpart E.¹⁶⁹

Example: Cost Analysis in Competitive Proposals Method of Procurement



Scenario: *The City of X experienced a severe hurricane that caused large quantities of debris to be scattered throughout its jurisdiction, 90% of which was vegetative debris. The City completed an independent estimate and determined that the cost of the debris removal effort would exceed the simplified acquisition threshold of \$250,000. The City advertised its request for proposals and listed price as its most important evaluation factor. The City conducted a cost analysis by comparing the proposed rates with one another:*

Line Item	Contractor 1	Contractor 2	Contractor 3	Contractor 4
<i>Vegetative Debris</i>	<i>\$25/Cubic Yard</i>	<i>\$20/Cubic Yard</i>	<i>\$50/Cubic Yard</i>	<i>\$60/Cubic Yard</i>
<i>Construction and Demolition Debris</i>	<i>\$50/Cubic Yard</i>	<i>\$50/Cubic Yard</i>	<i>\$50/Cubic Yard</i>	<i>\$50/Cubic Yard</i>
<i>Hazardous Waste Removal</i>	<i>\$60/Cubic Yard</i>	<i>\$60/Cubic Yard</i>	<i>\$60/Cubic Yard</i>	<i>\$60/Cubic Yard</i>
<i>White Goods</i>	<i>\$20/Cubic Yard</i>	<i>\$25/Cubic Yard</i>	<i>\$60/Cubic Yard</i>	<i>\$25/Cubic Yard</i>
<i>Profit</i>	<i>\$3/Cubic Yard</i>	<i>\$5/Cubic Yard</i>	<i>\$10/Cubic Yard</i>	<i>\$7/Cubic Yard</i>
<i>Admin. Costs</i>	<i>\$1/ Cubic Yard</i>	<i>\$.50/ Cubic Yard</i>	<i>\$2/Cubic Yard</i>	<i>\$1/Cubic Yard</i>

¹⁶⁸ 2 C.F.R. § 200.323(b).

¹⁶⁹ 2 C.F.R. § 200.323(c).

Which Contractor's proposal is most likely to yield the most economical price in City of X's cost analysis?

Answer: Contractor 2's proposal will yield the most economical price for City of X because 90% of the debris removal work required is for vegetative debris. Contractor 2 offered the most economical rate for vegetative debris removal and maintained comparable rates for the other types of debris removal work.

8.3 Cost Plus a Percentage of Cost (CPPC) Contracts

Non-state entities are prohibited from using cost plus a percentage of cost or cost plus a percentage of construction cost contracts.¹⁷⁰



A cost plus a percentage of cost (CPPC) contract is a cost-reimbursement contract containing some element that commits the non-state entity to pay the contractor an amount (in the form of either profit or cost), undetermined at the time of the contract award, based on a percentage of future costs.

A. Four-Part Analysis

FEMA will use the following four-part analysis to determine if a contract is a prohibited CPPC or percentage of construction cost contract:

- Payment is made at a pre-determined percentage rate;
- The pre-determined percentage rate is applied to actual performance costs;
- The contractor's entitlement is uncertain at the time of contracting; and
- The contractor's entitlement increases commensurately with increased performance costs.¹⁷¹

¹⁷⁰ 2 C.F.R. § 200.323(c).

¹⁷¹ *Federal Aviation Administration—Request for Advance Decision*, B-195173, 58 Comp. Gen. 654 (1979); *Marketing Consultants International Limited*, B-183705, 55 Comp. Gen. 554 (1975).



The prohibition against CPPC contracts also applies to subcontracts of the prime contractor in the case where the prime contract is a cost-reimbursement type contract or subject to price redetermination. Additionally, the inclusion of a ceiling price does not make these forms of contracts acceptable.

The purpose for this rule is to prohibit contracts that incentivize a contractor to increase its profits by increasing performance costs.

B. Considerations for State Entities using CPPC Contracts

Although the federal procurement regulations do not expressly prohibit state entities from using cost plus a percentage of cost contracts when otherwise permissible under state law, state entities should exercise caution before entering into this contract type. All entities, state and non-state, must abide by the *Cost Principles* found in 2 C.F.R. Part 200, Subpart E to ensure that all costs are reasonable. FEMA scrutinizes CPPC contracts because they often lead to unreasonable costs.

Example: Contractor Charges Percentage Mark-Up



Scenario: *Hurricane John causes damage and widespread loss of power throughout City of X. Rushing to award a contract for the repair work, the City entered into what it thought was a time and materials contract with Contractor A for power line repairs. After the work was completed, the contractor invoiced the city at the rates agreed upon plus a 15% mark-up. Careful review of the contract revealed that the City had agreed to pay the contractor a 15% mark-up on all incurred costs to account for profit. Was City of X's contract with Contractor A compliant with the federal procurement under grant rules?*

Answer: No, the City of X inadvertently entered into a prohibited cost plus a percentage of cost contract. Contractor A had no incentive to control costs because its profits increased as the cost of labor and materials increased, and it may have incurred additional costs in an effort to drive up mark-up costs. Consequently, this type of contract is beneficial for a contractor but is less than ideal for a non-state entity.

Related Tools and Resources



- ✓ [Public Assistance Reasonable Cost Evaluation Job Aid](#)

9. Federal Awarding Agency or Pass-Through Entity Review



Non-State Entity Requirement(s)

As the Federal awarding agency, FEMA is responsible for monitoring the financial assistance execution and ensuring proper performance under the FEMA award. FEMA may, in exercising this responsibility, conduct both pre- and post- procurement reviews of a non-state entity's procurements for compliance with the federal procurement regulations.¹⁷²

9.1 Pre-Award Procurement Review

FEMA or the pass-through entity may conduct pre-procurement reviews of a non-state entity's procurements consistent with the terms of 2 C.F.R. §§ 200.317-326.

A. Technical Specifications

A non-state entity must make available, upon request by FEMA or a pass-through entity, technical specifications of proposed procurements by the non-state entity where FEMA or the pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review will generally take place before the time the specification is incorporated into a solicitation document. However, if the non-state entity requests a procurement review after a solicitation has been developed,

¹⁷² 2 C.F.R. § 200.324.

FEMA or a pass-through entity may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.¹⁷³

B. Procurement Documents

Upon request by FEMA or a pass-through entity, the non-state entity must make procurement documents available, such as requests for proposals, invitations for bids, or independent cost estimates, when any of the following conditions are present:

- The non-state entity's procurement procedures fail to comply with the procurement standards in 2 C.F.R. §§ 200.317-326;
- The procurement is expected to exceed the simplified acquisition threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;
- The procurement is expected to exceed the simplified acquisition threshold and specifies a "brand name" product;
- The proposed contract is more than the simplified acquisition threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or
- A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.¹⁷⁴

9.2 Exemption

A non-state entity is exempt from pre-procurement review if FEMA or the pass-through entity determines that the non-state entity's procurement process complies with the federal procurement regulations. There are two possible methods for a non-state entity to use this exemption.

A. FEMA or Pass-Through Entity Review

The non-state entity may request that its procurement system be reviewed by FEMA or a pass-through entity to determine whether it meets the federal procurement standards for it to be certified.¹⁷⁵ Generally, these reviews must occur when there is continuous high-dollar

¹⁷³ 2 C.F.R. § 200.324(a).

¹⁷⁴ 2 C.F.R. § 200.324(b).

¹⁷⁵ 2 C.F.R. § 200.324(c)(1).

funding and when third party contracts are awarded on a regular basis. In all cases where a pass-through entity reviews a non-state entity's procurement system, the pass-through entity must provide the results of that review to FEMA.

B. Self-Certification

The non-state entity may self-certify its procurement system. Such self-certification must not limit FEMA's right to review. Under a self-certification process, FEMA may rely on written assurances from the non-state entity that it complied with the federal procurement standards. The non-state entity must cite specific policies, procedures, regulations, or standards as being in compliance with these requirements and have its system available for review. A non-state entity may still request review by FEMA or a pass-through entity even if it self-certifies.¹⁷⁶

9.3 Post-Award Procurement Review

FEMA may review a non-state entity's procurement documents after the contract award as part of FEMA's authority and responsibility to monitor financial assistance execution and ensure proper performance and compliance with the terms and conditions of the FEMA award. Such a review may occur during close-out of an individual project under a FEMA award or through a FEMA audit or monitoring visit.¹⁷⁷

¹⁷⁶ 2 C.F.R. § 200.324(c)(2).

¹⁷⁷ 2 C.F.R. § 200.336.

10. Bonding Requirements



Non-State Entity Requirement(s)

Non-state entities must follow certain federal bonding rules when awarding construction¹⁷⁸ or facility improvement contracts and subcontracts exceeding the **simplified acquisition threshold**.¹⁷⁹ If the procurement does not meet either of these conditions, then the federal bonding rules below do not apply.



Although not defined in the federal procurement under grant rules, a **“bond”** is generally a written instrument executed by a contractor (the “principal”), and a second party (the “surety” or “sureties”) to assure fulfillment of the principal’s obligations to a third party (the “obligee”), identified in the bond. If the principal’s obligations are not met, the bond assures payment, to the extent stipulated, of any loss sustained by the obligation.¹⁸⁰

FEMA or the pass-through entity may accept the bonding policy and requirements of the non-state entity after making a determination that the federal interest is adequately protected. If this determination has not been made, the non-state entity must meet the following bid guarantee, performance bond, and payment bond requirements:

¹⁷⁸ 41 C.F.R. § 60-1.3, “construction work.”

¹⁷⁹ 2 C.F.R. § 200.325.

¹⁸⁰ 48 C.F.R. § 28.001, “bond.”

A. Bid Guarantee

A bid guarantee means a form of security assuring that the bidder:

- Will not withdraw a bid within the period specified for acceptance; and
- Will execute a written contract and furnish required bonds, including any necessary coinsurance or reinsurance agreements, within the time specified in the bid, unless a longer time is allowed, after receipt of the specified forms.¹⁸¹

The existence of a bid guarantee provides a non-state entity assurance that the bidder has the financial means to accept the job for the price quoted in the bid and that the bidder, should it be successful in its bid, will enter into the required contract and execute the required performance and payment bonds. The requirements for a bid guarantee¹⁸² are as follows:

- Each bidder must provide a bid guarantee equivalent to five percent of the bid price;
- The bid guarantee must be a firm commitment that, upon acceptance of the bid, the bidder will execute such contractual documents as may be required within the time specified; and
- The bid guarantee must be in the form of a bid bond, certified check, or other negotiable instrument.

If the bidder is awarded the contract but fails to enter into the contract as agreed, the bid guarantee will provide financial protection to the non-state entity by paying the difference between the bidder's offer and the next closest offer. Requiring a bid guarantee ensures that contractors will not submit frivolous bids, in that they will be obligated to either perform the job or compensate the non-state entity.

B. Performance Bond

The contractor must provide a performance bond for 100 percent of the contract price.¹⁸³ A performance bond is to be executed in connection with the contract and its purpose is to protect the non-state entity from losses sustained should the contractor fail to fulfill its obligations under the contract.

¹⁸¹ 48 C.F.R. § 28.001 "bid guarantee."

¹⁸² 2 C.F.R. § 200.325(a).

¹⁸³ 2 C.F.R. § 200.325(b).

C. Payment Bond

The contractor must provide a payment bond for 100 percent of the contract price.¹⁸⁴ A payment bond is executed in connection with a contract to assure payment as required by law for all persons supplying labor and materials in the execution of the work provided for in the contract. If the contractor does not fulfill its obligation in paying for the labor and supplies, the bond assures payment of any loss sustained by the obligation.

Example: Applicability of the Federal Bonding Requirements



Scenario: *City of M, located in State of X, is conducting a procurement through sealed bidding for debris removal services. City of M advertises and holds open the solicitation for several weeks. The City eventually awards the contract to the contractor with the lowest price on a cost-reimbursement basis. The estimated total cost of the contract is \$400,000. Neither FEMA nor the State of X has certified the bonding policy and requirements of the City of M. Is the City's procurement subject to the bonding requirements of 2 C.F.R. § 200.325?*

Answer: No, City of M's procurement is not subject to the bonding requirements found at 2 C.F.R. § 200.325. The bonding requirements are *only* applicable to contracts and subcontracts for construction or facility improvements above the simplified acquisition threshold (currently \$250,000). While the estimated total of the contract exceeds \$250,000, the contract is not for construction or facility improvement.

Note: Although the federal bonding requirements are only required for construction or facility improvement contracts or subcontracts above the **simplified acquisition threshold**, an entity can still have bonding requirements for other contract types provided that the requirements are not **excessive** or **arbitrary**.

¹⁸⁴ 2 C.F.R. § 200.325(c).

11. Contract Provisions



This chapter only highlights and provides background on the required provisions. For sample language, definitions, and references, please see the Procurement Disaster Assistance Team's [Contract Provisions Template](#).



The federal rules require that NFE (state and non-state) contracts contain the applicable provisions described in Appendix II to the Uniform Rules (*Contract Provisions for Non-Federal Entity Contracts Under Federal Awards*).¹⁸⁵

Additionally, the *Uniform Rules* authorize FEMA to require additional provisions for NFE contracts. FEMA, pursuant to this authority, recommends several provisions:

- Access to records;
- Changes/modifications;
- Permission required for use of DHS's seal, logo, or flag;
- Compliance with federal law, regulations, and executive orders;
- No obligation by the federal government; and
- Program fraud and false or fraudulent statements or related acts.

FEMA is permitted to require additional contract provisions.¹⁸⁶

¹⁸⁵ 2 C.F.R. § 200.326.

¹⁸⁶ 2 C.F.R. Part 200, Appendix II.

11.1 Required Provisions

A. Contract Remedies¹⁸⁷

NFEs must include contract provisions addressing administrative, contractual, or legal “remedies” in instances where contractors violate or breach contract terms and provide for sanctions and penalties as may be appropriate. This requirement only applies to contracts in excess of the simplified acquisition threshold, which is currently \$250,000.¹⁸⁸

A “remedy” is the right of a contracting party when the other party does not fulfill its contractual obligations.¹⁸⁹ Parties may seek various judicial remedies for breach of contract, including damages, specific performance, and rescission or restitution.¹⁹⁰ Appendix II to 2 C.F.R. Part 200 simply requires the NFE to spell out the remedies for breach of contract.

B. Termination for Cause and Convenience¹⁹¹

All contracts in excess of \$10,000 must address termination for cause and for convenience by the NFE, including the manner by which it will be effected and the basis for settlement.

“Termination for convenience” is the exercise of an NFE’s right to completely or partially terminate the contractor’s performance of work under a contract when it is in the NFE’s interest.¹⁹² On the other hand, “termination for cause” (or “default”) is the exercise of a party’s right to completely or partially terminate a contract because of the other party’s actual or anticipated failure to perform its contractual obligations.¹⁹³

C. Equal Employment Opportunity¹⁹⁴

Except as otherwise provided under 41 C.F.R. Part 60, all contracts that meet the definition of “federally assisted construction contract” in 41 C.F.R. § 60-1.3 must include the equal opportunity clause provided under 41 C.F.R. § 60-1.4(b), in accordance with Executive Order

¹⁸⁷ 2 C.F.R. Part 200, Appendix II(A).

¹⁸⁸ 2 C.F.R. Part 200, Appendix II(A).

¹⁸⁹ Restatement (Second) of Contracts, Ch. 16 (Remedies) (1981).

¹⁹⁰ *Id.*

¹⁹¹ 2 C.F.R. Part 200, Appendix II(B).

¹⁹² 48 C.F.R. § 2.101.

¹⁹³ 48 C.F.R. § 2.101.

¹⁹⁴ 2 C.F.R. Part 200, Appendix II(C).

11246, *Equal Employment Opportunity* (30 Fed. Reg. 12319, 12935, 3 C.F.R. Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, *Amending Executive Order 11246 Relating to Equal Employment Opportunity*, and implementing regulations at 41 C.F.R. Part 60 (Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor).

- A “**federally assisted construction contract**” is any agreement or modification thereof between any applicant and a person for construction work which is paid for in whole or in part with funds obtained from the government or borrowed on the credit of the government pursuant to any federal program involving a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the government for a grant, contract, loan, insurance, or guarantee under which the applicant itself participates in the construction work.¹⁹⁵
- “**Construction work**” is the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services.¹⁹⁶ The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.

D. Davis-Bacon Act¹⁹⁷

Appendix II to 2 C.F.R. Part 200 requires that NFEs include a contract clause providing for the compliance with the Davis-Bacon Act (40 U.S.C. §§ 276a to 276a-7) as supplemented by Department of Labor regulations at 29 C.F.R. pt. 5.¹⁹⁸ This requirement, however, only applies to construction contracts awarded by NFEs in excess of \$2,000 when required by federal grant program legislation.¹⁹⁹

In this case, the sections of the Stafford Act authorizing the **Public Assistance Grant Program** do not require compliance with the **Davis-Bacon Act**. As such, there is no

¹⁹⁵ 41 C.F.R. § 60-1.3.

¹⁹⁶ *Id.*

¹⁹⁷ 2 C.F.R. Part 200, Appendix II(D).

¹⁹⁸ *Id.*

¹⁹⁹ 44 C.F.R. § 13.36(i)(5).

requirement for NFEs to place this clause into its PA grant contracts for compliance with the Davis-Bacon Act.

E. Copeland Anti-Kickback Act²⁰⁰

NFE contracts must include a provision for compliance with the Copeland “Anti-Kickback” Act (18 U.S.C. § 874²⁰¹ and 40 U.S.C. § 3145²⁰²), as supplemented by Department of Labor regulations at 29 C.F.R. Part 3 (Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States). This requirement applies only in situations where the Davis-Bacon Act also applies. In situations where language for compliance with the Davis-Bacon Act is not required to be included, neither is language for compliance with the Copeland Anti-Kickback Act.

F. Contract Work Hours and Safety Standards Act²⁰³

Where applicable (see 40 U.S.C. §§ 3701-3708), all contracts awarded by an NFE in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. §§ 3702 and 3704, as supplemented by Department of Labor regulations at 29 C.F.R. Part 5.²⁰⁴ Under 40 U.S.C. § 3702, each contractor must be required

²⁰⁰ 2 C.F.R. Part 200, Appendix II(D).

²⁰¹ 18 U.S.C. § 874 (Kickbacks from Public Works Employees) (“Whoever, by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever induces any person employed in the construction, prosecution, completion or repair of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, to give up any part of the compensation to which he is entitled under his contract of employment, shall be fined under this title or imprisoned not more than five years, or both.”).

²⁰² 40 U.S.C. § 3145 (Regulations Governing Contractors and Subcontractors):

(a) In General.—The Secretary of Labor shall prescribe reasonable regulations for contractors and subcontractors engaged in constructing, carrying out, completing, or repairing public buildings, public works, or buildings or works that at least partly are financed by a loan or grant from the Federal Government. The regulations shall include a provision that each contractor and subcontractor each week must furnish a statement on the wages paid each employee during the prior week.

(b) Application.—Section 1001 of title 18 applies to the statements.

²⁰³ 2 C.F.R. Part 200, Appendix II(E).

²⁰⁴ See 2 C.F.R. Part 200, Appendix II(E).

to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible, provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Further, no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous.

G. Rights to Inventions Made Under a Contract or Agreement²⁰⁵

If a federal award meets the definition of “funding agreement”²⁰⁶ and the NFE wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the NFE must comply with the requirements of 37 C.F.R. Part 401 (Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements), and any implementing regulations issued by that federal agency.

The Public Assistance Grant Program does not authorize any work associated with experimental, developmental, or research work, such that patent rights, copyrights, and rights in data would not be implicated. Therefore, there is no Rights to Inventions clause requirement for PA grant contracts.

H. Clean Air Act and the Federal Water Pollution Control Act²⁰⁷

Contracts in excess of \$150,000 must contain a provision that requires the contractor to agree to comply with all applicable standards, orders, or regulations issued pursuant to the

²⁰⁵ 2 C.F.R. Part 200, Appendix II(F).

²⁰⁶ The regulation at 37 C.F.R. § 401.2(a) defines “funding agreement” as any contract, grant, or cooperative agreement entered into between any Federal agency, other than the Tennessee Valley Authority, and any contractor for the performance of experimental, developmental, or research work funded in whole or in part by the Federal government. This term also includes any assignment, substitution of parties, or subcontract of any type entered into for the performance of experimental, developmental, or research work under a funding agreement as defined in the preceding sentence.

²⁰⁷ 2 C.F.R. Part 200, Appendix II(G).

Clean Air Act (42 U.S.C. §§ 7401-7671q.) and the Federal Water Pollution Control Act as amended (33 U.S.C. §§ 1251-1387). Violations must be reported to FEMA and the Regional Office of the Environmental Protection Agency.

I. Suspension and Debarment²⁰⁸

NFEs and contractors are subject to the debarment and suspension regulations implementing Executive Order 12549, *Debarment and Suspension* (1986) and Executive Order 12689, *Debarment and Suspension* (1989) at 2 C.F.R. Part 180 and the Department of Homeland Security's regulations at 2 C.F.R. Part 3000 (Non-procurement Debarment and Suspension).

Generally, an "excluded" party cannot receive a federal grant award or a contract (including subawards and subcontracts) under a "covered transaction."²⁰⁹ This includes parties that receive federal funding indirectly, such as contractors to recipients and subrecipients.

- **Covered Transactions**- A "covered transaction" includes the following contracts for goods or services:
 - The contract is awarded by a recipient or subrecipient in the amount expected to equal or exceed \$25,000.
 - The contract requires the approval of FEMA, regardless of amount.
 - The contract is for federally-required audit services.²¹⁰
- **Exclusions**- The two forms of exclusion are "suspension" and "debarment"²¹¹ and they can be extended to include subsidiaries, parent companies, and other individuals.²¹²
 - **Suspension** is an action taken by the Suspension and Debarment Official (SDO) that excludes a party from participating in a covered transaction for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue.²¹³ Suspension may be based on indictments, information, or adequate evidence involving crimes, fraud, poor performance,

²⁰⁸ 2 C.F.R. Part 200, Appendix II(H); 2 C.F.R Part 180.

²⁰⁹ 2 C.F.R. §§ 180.200 and 945.

²¹⁰ See 2 C.F.R. § 180.220.

²¹¹ 2 C.F.R § 180.700 and 800.

²¹² 2 C.F.R. § 180.625.

²¹³ 2 C.F.R. §§ 180.985 and 1015.

nonperformance, or false statements.²¹⁴ Suspensions require immediate action by the agency to protect the public interest.²¹⁵

- **Debarment** is an action taken by the SDO to exclude parties from participating in a covered transaction for a specified period, typically three years.²¹⁶ Debarment may be based on convictions, civil judgments, as well as other causes.²¹⁷ Pursuant to DHS regulations, recipients, subrecipients, and contractors must include a term or condition in any lower-tier covered transaction into which they enter that requires the participant of the lower-tier transaction to:
 - Comply with Subpart C of the OMB guidance in 2 C.F.R. Part 180; and
 - Include a similar term or condition in any covered transaction into which it enters at the next lowest tier.²¹⁸

J. Byrd Anti-Lobbying Amendment²¹⁹

A Byrd Anti-Lobbying Amendment contract clause is required in all contracts, and a certification is required for contracts above \$100,000. The clause requires that each tier certify to the tier above that it will not and has not used federally appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any federal contract, grant or any other award covered by 31 U.S.C. § 1352. FEMA's regulation at 44 C.F.R. Part 18 implements the requirements of 31 U.S.C. § 1352 and provides, in Appendix A to Part 18, a copy of the [certification](#) that is required to be completed by each entity as described in 31 U.S.C. § 1352. Each tier must also disclose any lobbying with non-federal funds that takes place in connection with obtaining any federal award. Such disclosures are forwarded from tier to tier up to the Federal awarding agency.

²¹⁴ 2 C.F.R. §§ 180.700 and 180.800.

²¹⁵ 2 C.F.R. § 180.700(c).

²¹⁶ 2 C.F.R. § 180.925.

²¹⁷ 2 C.F.R. § 180.800.

²¹⁸ 2 C.F.R. §§ 3000.332 and 437.

²¹⁹ 2 C.F.R. Part 200, Appendix II(l).

Contractors that apply or bid for a contract of \$100,000 or more under a federal grant must file the required [certification](#).²²⁰

K. Procurement of Recovered Materials²²¹

An NFE that is a state agency or agency of a political subdivision of a state and its contractors must comply with Section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act.²²²

This requirement applies to all contracts awarded by NFEs under FEMA grant and cooperative agreement programs.

11.2 FEMA Recommended Provisions

In addition to the federally required contract provisions, FEMA **recommends** that NFEs include the following contract provisions in their contracts when receiving reimbursement under a PA award:

A. Access to Records

All NFEs must acknowledge and agree to comply with applicable provisions governing DHS access to records, accounts, documents, information, facilities, and staff. NFEs must give DHS/FEMA access to, and the right to examine and copy, records, accounts, and other documents and sources of information related to the federal financial assistance award and permit access to facilities, personnel, and other individuals and information as may be necessary, as required by DHS regulations *and* other applicable laws or program guidance.²²³ Additionally, Section 1225 of the Disaster Recovery Reform Act of 2018 prohibits FEMA from

²²⁰ See 2 C.F.R. Part 200, Appendix II(I); 31 U.S.C. § 1352; and 44 C.F.R. Part 18.

²²¹ 2 C.F.R. Part 200, Appendix II(J).

²²² See 2 C.F.R. Part 200, Appendix II(J); and 2 C.F.R. § 200.322.

²²³ See, e.g., DHS Standard Terms and Conditions: Version 9.2 (2019), available at <https://www.dhs.gov/publication/fy15-dhs-standard-terms-and-conditions> DHS Standard Terms and Conditions: Version 9.2 (2019).

providing reimbursement to any local, state, Tribal or territorial government, or private non-profit for activities made pursuant to a contract that purports to prohibit audits or internal reviews by the FEMA administrator or Comptroller General.

FEMA recommends that NFEs include an Access to Records clause in contracts that acknowledges the legal requirements above which grant DHS and FEMA access to financial and procurement documents to ensure compliance with federal regulations.

B. Changes/Modifications

To be eligible for FEMA assistance under the NFE's FEMA award or cooperative agreement, the cost of any change, modification, change order, or constructive change must be allowable, allocable, within the scope of its grant or cooperative agreement, and reasonable for the completion of project scope.

Therefore, FEMA recommends that an NFE include a changes clause in its contract that describes how, if at all, changes can be made by either party to alter the method, price, or schedule of the work without breaching the contract. The language of the clause may differ depending on the nature of the contract and the end-item procured.

C. DHS Seal, Logo, and Flags

NFEs must obtain permission prior to using the DHS seal(s), logos, crests, or reproductions of flags or likenesses of DHS agency officials.²²⁴

FEMA recommends that all NFEs place in their contracts a provision that a contractor shall not use the DHS seal(s), logos, crests, or reproductions of flags or likenesses of DHS agency officials without specific FEMA pre-approval.

D. Compliance with Federal Law, Regulations, and Executive Orders

The NFE and its contractors are required to comply with all federal laws, regulations, and executive orders.

FEMA recommends that all NFEs place into their contracts an acknowledgement that FEMA financial assistance will be used to fund the contract along with the requirement that the

²²⁴ *Id.*

contractor will comply with all applicable federal law, regulations, executive orders, and FEMA policies, procedures, and directives.

E. No Obligation by the Federal Government

FEMA is not a party to any transaction between the NFE and its contractor. FEMA is not subject to any obligations or liable to any party for any matter relating to the contract. FEMA recommends that the NFE include a provision in its contract that states that the Federal Government is not a party to the contract and is not subject to any obligations or liabilities to the NFE, contractor, or any other party pertaining to any matter resulting from the contract.

F. Program Fraud and False or Fraudulent Statements or Related Acts

NFEs must comply with the requirements of The False Claims Act (31 U.S.C. §§ 3729-3733) which prohibits the submission of false or fraudulent claims for payment to the federal government.²²⁵

FEMA recommends that the NFE include a provision in its contract that the contractor acknowledges that 31 U.S.C. Chap. 38 (Administrative Remedies for False Claims and Statements) applies to its actions pertaining to the contract.

Related Tools and Resources



- ✓ [Appendix II to Part 200: Contract Provisions for NFE Contracts under Federal Awards](#)
- ✓ [Contract Provisions Template](#)

²²⁵ See DHS Standard Terms and Conditions: Version 9.2 (2019); and 31 U.S.C. §§ 3801-3812.

12. Beyond the Basics: Important Procurement Considerations

Frequently, NFEs seek guidance regarding complex issues that are not explicitly outlined in the federal procurement under grant rules. It is important to note that the federal rules exist to protect government funds and must be followed in all procurements under grants, no matter their complexity or structure. This section includes common examples of advanced procurement actions and how FEMA interprets the *Uniform Rules* to apply in the following scenarios:

- Indian Tribal Government Procurements
- Contract Changes/Modifications
- Design-Bid-Build and Design-Build Contracts
- Construction Manager at Risk (CMAR) Delivery Method
- Cooperative Purchasing
 - Joint Procurements
 - Piggybacking
 - Cooperative Purchasing Program
- Prepositioned Contracts
- Mutual Aid Agreements
- Purchasing Agents

Where the federal procurement under grant standards do not address a specific procurement issue, a **non-state entity must abide by the applicable local, state, and/or Tribal procurement standards or regulations** – whichever applies to the particular non-state entity.

12.1 Considerations for Indian Tribal Governments

Indian Tribal Governments are eligible PA applicants that may serve as the recipient or the subrecipient of PA funds. It is important to note, however, that in both capacities, they are required to comply with the federal procurement under grant rules applicable to non-state entities; which include provisions for competition, methods of procurement, conflicts of interest, cost or price analyses, bonding requirements, etc.²²⁶



The *Uniform Rules* define an Indian Tribe, or “federally recognized Indian Tribe” as any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. Chapter 33), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. 450b(e)).²²⁷

A. Indian Tribal Preferences When Awarding Contracts

Although the federal procurement under grant rules require that applicants conduct their procurement transactions in a manner providing for *full and open competition*,²²⁸ Indian Tribal preferences may be permissible if certain requirements are met under the Indian Self-Determination and Education Assistance Act.

The Indian Self-Determination and Education Assistance Act sets forth federal policy allowing Indian Tribal Governments to apply preference in the award of contracts and subcontracts to “Indian organizations” or “Indian-owned economic enterprises” in connection with the administration of a PA award.²²⁹

²²⁶ 2 C.F.R. §§ 200.318-326.

²²⁷ 2 C.F.R. § 200.54. Under the Public Assistance Program, the definition for Indian Tribal Government excludes Alaskan Native Corporations, the ownership of which is vested in private individuals. 44 C.F.R. § 206.201(h).

²²⁸ 2 C.F.R. § 200.319.

²²⁹ 25 U.S.C. 450e(7)(b)(1) and (2).



- An **Indian organization** is the governing body of any federally recognized Indian Tribe or an entity established or recognized by such a governing body.
- An **Indian-owned economic enterprise** is any commercial, industrial, or business activity established or organized by a member of a federally recognized Indian Tribe for the purpose of profit, provided that such Indian Tribal ownership constitutes 51 percent or higher of the enterprise.²³⁰

Indian Tribal Governments using a permissible preference are required to document that they have met the requirements under the Indian Self-Determination and Education Act. They must also ensure compliance with the remainder of federal procurement under grant rules, as well as any applicable Tribal laws.²³¹

B. Inapplicability of the Socioeconomic Affirmative Steps

When complying with the Indian Self-Determination and Education Assistance Act, **if using the preference**, Indian Tribal Governments are considered to have met and do not need to take additional steps to comply with the socioeconomic affirmative steps found within the federal procurement under grant rules.

Other Indian Tribal Procurement Considerations

- **Inapplicability of the Procurement of Recovered Materials Provision**
The procurement of **recovered materials provision**²³² applies only to state entities or political subdivisions of a state and its contractors. Indian Tribal Governments are not required to comply with this provision.

²³⁰ 41 U.S.C. § 2000e-2(i)(1982).

²³¹ 2 C.F.R. §§ 200.318-326.

²³² 2 C.F.R. § 200.322.

- **Indian Tribal Preference in Employment**

An exception to Title VII of the Civil Rights Act of 1964 allows an Indian Tribe or any business enterprise on or near an Indian Tribal reservation to apply Indian Tribal preferences in employment.²³³ This exception is often referenced in contracts awarded by Indian Tribal Governments and is compliant with the federal procurement under grant standards.

- **Reasonable Costs**

Although Indian Tribal preferences may be permissible when awarding contracts and subcontracts under the Indian Self-Determination and Education Assistance Act, Indian Tribal Governments still have a responsibility, under the PA program, to ensure that costs are reasonable and document such a determination.

Example: Indian Tribal Preference When Awarding a Contract



Scenario: *The Indian Tribal Government of Y, as the result of a flood, sustains damages to many of its government buildings. When evaluating proposals for the repair work, Indian Tribal Government of Y applies a preference percentage to Indian-owned economic enterprises competing for the award. Indian Tribal Government of Y documents in its procurement file how the preference meets the requirements under the Indian Self-Determination and Education Assistance Act. Was the use of the Indian Tribal preference permissible under the federal procurement under grant rules?*

Answer: Yes, the use of the Indian Tribal preference was permissible. The Indian Self-Determination and Education Assistance Act provides that an Indian Tribal Government may apply preferences in the award of contracts and subcontracts to “Indian organizations” or “Indian-owned economic enterprises” in connection with the administration of a PA award.

²³³ 41 U.S.C. § 2000e-2(i)(1982).

Related Tools and Resources



- ✓ [FEMA Public Assistance Program and Policy Guide \(PAPPG\)](#)

12.2 Contract Changes/Modifications



A **contract “change”** is any addition, subtraction, or modification of work, costs, or time required under a contract during contract performance. There are many reasons why an NFE may wish to make changes to an existing contract. For example, during performance, changes may be required to fix inaccurate or defective specifications, react to unforeseen circumstances, or modify the work orders/parameters/etc. to ensure the contract meets the NFE’s requirements.

All contract changes must be within the scope of the original contract. NFEs are not restricted from making minor adjustments contemplated fairly and reasonably by the parties when they entered into the contract. “Cardinal changes,” however, present a problem.

A **cardinal change** is a significant modification in contract work (property or services), costs, or time that causes:

- A major deviation from the original purpose of the work or the intended method of achievement; or
- A revision of contract work, costs, or time so extensive, significant, or cumulative that the contractor is required to perform very different work from that described in the original contract.

Generally, FEMA will view a cardinal change to a contract as a noncompetitive award and evaluate whether the NFE meets the necessary conditions for using the [procurement through noncompetitive proposal method \(sole sourcing\)](#). If an NFE performs a cardinal change without meeting the exceptions to competitive procurements, then the NFE is noncompliant with the federal procurement under grant rules.

Issues related to impermissible cardinal changes may arise within the context of an NFE using an existing contract or obtaining assigned contract rights from another jurisdiction. However, recognizing a cardinal change to a contract can be difficult. Assigning a specific percentage, dollar value, number of changes, or other objective measure that would apply to all cases to identify cardinal changes poses several challenges. In determining whether an NFE has made a prohibited cardinal change, FEMA generally evaluates whether the change is “within the general scope of the contract” and “within the scope of competition” on a case-by-case basis.

- **Scope of the Contract**

In determining whether changes are beyond the scope of the contract, FEMA will usually compare the total work performed by the contractor to the work called for by the original contract. This includes evaluating the nature of the work being performed, the additional amount of effort the contractor is required to perform, the difference in cost, and the period of performance for the change in order for FEMA to assess the change’s cumulative impact on the contract’s quantity, quality, cost, and delivery terms.

- **Scope of Competition**

In determining whether changes are beyond the scope of competition, FEMA will usually evaluate whether there is a material difference between the modified contract and the contract that was originally competed. Consideration will be given to whether the solicitation for the original contract adequately advised offerors of the potential for the type of changes at issue or whether the changes are of a nature that potential offerors would have reasonably anticipated.

Example: Out of Scope Changes



Scenario: *A powerful storm impacts the City of Z, resulting in flooding and damaging portions of the City’s sidewalk. The City of Z plans to use a preexisting contract to replace 5 miles of damaged sidewalk at an estimated expense of \$4 million. A review of the existing contract indicates that disaster related repairs were anticipated, but the contract limits repairs to 1.5 miles in the City’s center and contains a not-to-exceed clause of \$750,000. Can the City of Z modify its existing contract in order to perform the anticipated repair of its sidewalks?*

Answer: No. In this scenario, the new requirement for sidewalk repairs would more than double the services contemplated in the preexisting contract and increase the contract value above the “not-to-exceed amount” by over 300%. This contract modification would be viewed as a noncompetitive (sole-sourced) award to the contractor because the new contract work deviates significantly from the original requirements solicited through full and open competition.

12.3 Design-Bid-Build and Design-Build Contracts

A. Design-Bid-Build

The design-bid-build procurement process is the most common system used to award construction projects in the United States. Under this delivery method:

- An architect completes a fully detailed design;
- A solicitation for construction bids is advertised based upon the complete design; and
- The lowest eligible and responsible bidder is selected to complete the construction project.

In this process, the three phases of planning, design, and construction run sequentially, and the construction contractor is not involved until the construction stage.

Non-state entities may use design-bid-build procurement procedures under the PA program if permitted by local, state, and/or Indian Tribal laws and regulations. This process involves two separate and distinct solicitations and contract awards.

- The first solicitation and contract award are for the **complete building designs, drawings, and/or specifications**.
- This is followed by a second solicitation and contract award for **construction** associated with the complete building designs, drawings, and/or specifications.

Both procurements must comply with all the federal procurement under grant rules.

A contractor that is awarded a contract to *develop* designs, drawings, and/or specifications is **prohibited** from competing for and receiving an award for the associated *construction portion* of the work.²³⁴

B. Design-Build Contracts

The design-build procurement process consists of contracting for **design and construction simultaneously** with a contract awarded to a single contractor, or contractor team, that will be responsible for both the project's design and construction. The federal procurement under grant rules allow the use of design-build contracts if permitted by local, state, and/or Indian Tribal laws and regulations.

For design-build contracts, a non-state entity must separate the various contract activities to be undertaken, classify them as either design or construction, and, then, calculate the estimated total value of each.

The non-state entity must use the procurement method appropriate for the services having the greatest cost (e.g., architectural and engineering services or construction services). Consideration should be given to the following factors:

- Construction costs normally comprise a greater estimated total value than design costs. If this is the case, FEMA expects the non-state entity to use procurement by competitive proposals or sealed bidding for the entire procurement rather than a qualifications-based procurement by competitive proposals.
- If architectural and engineering services are predominant (which is usually not the case), then the non-state entity may use sealed bidding, procurement by competitive proposals, or a qualifications-based procurement by competitive proposals.

²³⁴ 2 C.F.R. § 200.319(a).

12.4 Construction Manager at Risk (CMAR) Delivery Method

Under a typical CMAR delivery method, an applicant hires a construction firm (or construction manager) early in the design and planning process to later oversee the project's construction.²³⁵ The construction manager advises the design firm during the project's design and planning phases and often acts as the general contractor during the construction phase to select, schedule, and sequence subcontractors to complete the required construction work.

The method is known as construction manager "at risk" because, during the design phase, the applicant and construction manager negotiate a **guaranteed maximum price** (GMP) and the construction manager will be responsible for any costs that exceed that amount. While CMAR can be a complex process and the specifics of the delivery method will vary by jurisdiction, if done properly, it can yield time and cost efficiencies by obtaining construction manager input during the design phase and beginning aspects of a construction project before the full design is complete.

Certain CMAR procedures may be inconsistent with the federal procurement under grant rules and it is the NFE's responsibility to ensure compliance when using this delivery method under the PA program. Because there is no uniform CMAR standard across jurisdictions, particularly regarding the construction phase and the evaluation thereof, FEMA will review the use of CMAR on a case-by-case basis to ensure that the method utilized conforms to the requirements outlined by the federal procurement under grant rules.

Price as a Selection Factor for CMAR

Price must be considered for the whole procurement, and the entirety of the work needs to have a price component, unless such items are excepted by the federal rules as **architectural and engineering services**. When procuring a construction manager, non-state entities should review anticipated project costs and determine if a majority of the costs are for actual construction costs or for Architectural/Engineering professional services. If a **majority of the costs** are for the actual cost of construction, then non-state entities must consider the price for the entire project (design, planning, and construction phases) such that there is no part of the construction manager selection (including the initial selection of qualified contractors) that is done without consideration of cost competition. Because the majority of costs when

²³⁵ This delivery method is sometimes referred to as "CM/GC," given that the selected construction manager becomes a project's general contractor.

using CMAR are often for actual construction costs, not Architectural/Engineering services, using a qualifications-based procurement for the CMAR approach may violate the federal procurement rules.

Related Tools and Resources



[PDAT: CMAR Fact Sheet](#)

12.5 Cooperative Purchasing



Cooperative purchasing is an arrangement for acquiring goods or services that involves aggregating the demand of two or more entities to obtain a more economical purchase.

Cooperative purchases can take many forms, such as joint procurements, piggybacking, or the various state and county cooperative purchasing agreements, and cooperative purchasing programs.

NFEs may enter into cooperative purchases; however, they must follow the federal procurement under grant rules. **The responsibility is on the NFE to ensure compliance with the rules applicable to its entity type and be mindful that the rules are different for state entities and non-state entities.**

A. Joint Procurements

The federal procurement under grant rules encourage non-state entities to enter into state and local intergovernmental agreements for procurement or use of common goods and services.²³⁶ FEMA has interpreted this regulation as encouraging applicants to collaborate in joint procurements.



A **joint procurement** is a method of contracting in which two or more purchasers agree from the outset to use a single solicitation document and enter into a single contract with a vendor for the delivery of goods or services. This is typically done to obtain advantages unavailable for smaller procurements. Joint procurements encourage NFEs to foster greater economy and efficiency by allowing the opportunity for a cost-effective use of shared resources.

Upon contract award, a non-state entity responsible for undertaking the joint procurement may assign responsibility to the other participants for administering those parts of the contract affecting their goods or services. This process, however, does not relieve a participating non-state entity from the requirement to comply with all federal procurement under grant rules applicable to it. In other words, each party acting under a joint procurement must ensure that all applicable federal procurement under grant rules are met in order to maximize the potential for reimbursement for all eligible expenses incurred under the procurement. It is also important to note that a joint procurement is not the same as "piggybacking."

Example: Joint Procurement between Non-State Entities



Scenario: *Two neighboring counties have decided to prepare for the upcoming hurricane season. From past experience, they know that it is relatively difficult to find serious bidders since both counties are considerably smaller than the surrounding counties in their area. To increase the potential for bidders and promote economic efficiency, they have agreed to enter into a joint solicitation for debris removal services covering both counties. Following the solicitation and receipt of bids, both entities evaluate the responses and jointly award a contract to the debris removal contractor of their choosing. A major disaster declaration occurs a week later, and they both use the*

²³⁶ 2 C.F.R. § 200.318(e).

contract to carry out debris removal services for the following two weeks. Are the two counties allowed to enter into this type of joint procurement?

Analysis: Yes. In this scenario, both entities worked together from the start to prepare the solicitation and conduct the evaluation process. Both entities are parties to the agreement, and the scope of work expressly includes the performance of services in both counties. Presuming that the procurement meets all other requirements of 2 C.F.R. §§ 200.318-326, this contract could be used by both counties for debris removal services during a major disaster.

Joint Procurements between State and Non-State Entities

A state entity may enter into a joint procurement with non-state entities for goods and services to be used by both parties under a PA award.

When a state is entering into a procurement with local entities, it is important to remember that the contract must be procured in compliance with both state and local procurement regulations, as well as the federal procurement under grant rules found at 2 C.F.R. §§ 200.318-326. This is a very important caveat because the state would only be required to comply with 2 C.F.R. § 200.317 if it was procuring the goods or services solely for its own use.

Since the state is procuring with non-state entities, the purchase must comply with the federal procurement under grant regulations that are applicable to all entity types participating in the joint procurement.

B. Using Another Jurisdiction's Contract (Piggybacking)



There are times when an NFE sets up a contract with a vendor, and a second NFE wants to use the first entity's contract. FEMA refers to the assignment of contracts from one jurisdiction to another in circumstances like this as "**piggybacking**." FEMA discourages the use of piggyback contracts because it is often challenging for an entity to piggyback off another's contract while remaining in compliance with the federal procurement under grant rules. Although FEMA generally discourages the use of piggyback contracts, an NFE that obtains contractual rights through assignment²³⁷ may use the contract after first determining that:

- The original contract was procured in compliance with the federal procurement under grant rules that would apply to the entity seeking reimbursement;
- The original contract contains appropriate assignability provisions that allow the assignment of all or a portion of the specified deliverables under the terms originally advertised, competed, evaluated, and awarded, or contains other appropriate assignment provisions;
- The scope of work to be performed falls within the scope of work under the original contract, and there are no **cardinal changes** to the contract; and
- The contract price is fair and reasonable.

Non-State Entities and Piggybacking

If the above-mentioned criteria are not met, and a non-state entity enters into a piggyback contract, FEMA will view the contract as noncompetitive. A non-state entity can only sole-source or conduct a noncompetitive procurement when it meets certain **exceptions**.²³⁸ If a non-state entity enters into a piggyback contract when it does not meet the above-mentioned criteria or the exceptions for noncompetitive procurements, then the non-state entity is noncompliant with the federal procurement under grant rules.

²³⁷ An "assignment" is the transfer of contract rights from one party to another. Black's Law Dictionary 138 (9th Ed. 2009) (defining "assignment of rights").

²³⁸ 2 C.F.R. § 200.320(f).

State Entities and Piggybacking

Under the federal procurement under grant rules, a state entity must follow its own rules in determining the appropriateness of piggybacking and whether it can enter into a noncompetitive contract if the above-mentioned criteria are not met.

Example: Using Another Jurisdiction's Contract



Scenario: *City of Z and City of W are two cities located in the State of M. The two cities are approximately 50 miles from one another. On January 23, 2019, a major storm impacts both cities, and both require debris removal services. The City of Z procured a contract with Jackson Debris Removal in May 2018. The contract includes the use of 10 trucks for debris removal. The City of W was not able to procure a contract pre-disaster but requires the use of five trucks for debris removal and would like to use the City of Z's contract to address that need. The City of Z's contract includes an assignment provision, indicating that the City of W can use the contract. The demands of the January 23, 2019 storm require City of Z to use all 10 trucks for its debris removal. Assuming that City of Z followed all procurement standards and the price is reasonable, can the City of W use the Jackson Debris Removal contract to use five trucks?*

Answer: No. The City of W cannot use the contract because it would exceed the original negotiated quantity amount. City of Z needs 10 trucks and City of Z needs five trucks, with a total need of 15 trucks. The original contract's scope of work is only for 10 trucks, such that the cumulative need exceeds the scope of the contract. As such, City of W's use of the contract would result in an out of scope modification to the original contract.

C. Cooperative Purchasing Program

Cooperative purchasing programs come in many forms, combining the requirements of their members to reduce administrative time/expenses and leverage the benefits of volume purchases. An example of a cooperative purchasing program is the U.S. General Services Administration's GSA Advantage Program. Entities may sign up to use a cooperative purchasing program through a cooperative purchasing agreement. Program membership may provide entities with access to lists of agreements or contracts for goods and services at pre-negotiated rates or prices. Typically, the member then purchases the goods or services by negotiating with participating vendors and placing purchase orders or entering into

contracts based on the rates or prices listed in the cooperative purchasing program's agreements or contracts with vendors.

- **Cooperative Purchasing by a State Entity**

If a state entity procures goods or services through cooperative purchasing, the entity must ensure compliance with the state's procurement rules. The state entity also must comply with the procurement of recovered materials requirements,²³⁹ and must ensure the purchase order or contract includes all required contract provisions.²⁴⁰

- **Cooperative Purchasing by a Non-State Entity**

While the federal procurement under grant rules encourage the use of cooperative purchasing where appropriate, non-state entities should exercise caution when using such programs and work closely with the procuring entity to ensure compliance with the federal procurement standards found at 2 C.F.R. §§ 200.318-326. For example, if a non-state entity enters into a cooperative purchase with a state entity, the non-state entity must ensure the state's procurement complied with the federal procurement under grant rules for non-state entities.²⁴¹ A non-state entity that decides to use a cooperative purchasing program must document and explain how its use of the program complied with all federal procurement under grant rules and applicable state, Tribal, and local procurement rules and policies.

- **Micro-Purchases and Small Purchases**

If a non-state entity wishes to purchase goods and services through a cooperative purchase where the total cost does not exceed the simplified acquisition threshold, the non-state entity must ensure that the purchase complies with the federal procurement under grant rules for **micro-purchases** or **small purchases** (depending on the cost of the purchase).²⁴²

- **Purchases Above the Simplified Acquisition Threshold**

If a non-state entity procures goods or services above the simplified acquisition threshold through cooperative purchasing, unless there is an emergency or exigency

²³⁹ 2 C.F.R. § 200.322.

²⁴⁰ 2 C.F.R. § 200.326.

²⁴¹ 2 C.F.R. §§ 200.318-326.

²⁴² 2 C.F.R. § 200.320 (a), (b).

circumstance, the non-state entity must ensure compliance with the federal procurement under grant rules for **sealed bidding** or **competitive proposals**.²⁴³

- **Methods of Procurement**- Sealed bidding and competitive proposals require that non-state entities publicly advertise or publicize the solicitations, solicit bids from an adequate number of known suppliers, and award contracts to the responsible, responsive firm with the lowest price (for sealed bidding) or to the responsive firm whose proposal is most advantageous to the program with price and other factors considered (for competitive proposals).
- **Scope of Work Requirements**- A non-state entity must ensure that the solicitation used in a cooperative purchase includes a clear and accurate description of the scope of work or goods to be procured. Additionally, a cooperative purchase that places overly restrictive requirements in the solicitation risks noncompliance with the full and open competition standard.²⁴⁴
- **Geographic Preferences**- Any **geographic preferences** that a cooperative purchase uses in evaluating bids or proposals, and any additional terms and conditions in a pre-negotiated agreement that favor or give preference to local suppliers could violate 2 C.F.R. § 200.319(b) and be restrictive of competition.²⁴⁵
- **Compliance with all other Federal Rules**- The non-state entity must ensure compliance with all applicable Federal procurement standards when acquiring goods and services through a cooperative purchasing program. These include that **socioeconomic affirmative steps** are taken during the cooperative purchase,²⁴⁶ the purchase order or contract includes all required contract provisions,²⁴⁷ and an independent cost estimate is conducted pre-solicitation, and a **cost or price analysis**,²⁴⁸ etc.

²⁴³ 2 C.F.R. § 200.320 (c), (d).

²⁴⁴ 2 C.F.R. § 200.319.

²⁴⁵ 2 C.F.R. § 200.319(b).

²⁴⁶ 2 C.F.R. § 200.321.

²⁴⁷ 2 C.F.R. § 200.326.

²⁴⁸ 2 C.F.R. § 200.323.

Example: Non-State Entity use of a State-led Cooperative Purchasing Program



Scenario: *The courthouse and city hall in the Town of X, which is in State of Y, are flooded during a hurricane. As a result, the Town of X needs to replace all the furniture in both buildings with an estimated cost of \$350,000. The Town researches and finds a cooperative purchasing program in which State of Y procures goods and allows local entities within the state to purchase from by way of purchase orders. The State procures the goods in compliance with its own rules and does not have any state requirements to take the socioeconomic affirmative steps. One of the contracts is for furniture, and the Town purchases the furniture needed in the amount of \$350,000. The Town does not take the socioeconomic affirmative steps prior to entering into the purchase order. Is the Town in compliance with the federal procurement under grant regulations?*

Answer: No, the Town of X is not in compliance with the federal procurement under grant rules. The responsibility is on the Town to ensure the procurement follows the federal procurement under grant rules applicable to it as a non-state entity. Here, the State of Y conducted the procurement and was not required to take the socioeconomic affirmative steps. The Town of X was required to take the socioeconomic affirmative steps and failure to do so is noncompliant with the federal procurement under grant rules.

Related Tools and Resources



- ✓ [Purchasing Goods or Services through Cooperative Programs](#)
- ✓ [PDAT: GSA Fact Sheet](#)

12.6 Prepositioned Contracts

FEMA encourages NFEs to award prepositioned contracts, or advance contracts, before an incident occurs for the potential performance of work under the PA Program. The use of prepositioned contracts allows applicants to conduct a deliberate procurement process outside of the pressure and immediate demands of a disaster. It also helps to ensure that NFEs have contractors ready to perform work quickly after an incident occurs when needed most.

When using prepositioned contracts, NFEs must ensure that:

- The contract was procured in compliance with the applicable procurement under grant rules for its entity type (state or non-state entity rules);
- The work to be performed falls within the scope of work of the prepositioned contract and the new work does not create a cardinal change to the prepositioned contract. The contract's scope of work must adequately encompass the type and extent of future work.

A. Non-State Entities and Prepositioned Contracts

If the above-mentioned scope considerations are not met when a non-state entity utilizes a prepositioned contract, FEMA will view the contract as a noncompetitive, or sole-sourced, procurement because the new work was not originally competed. A non-state entity is permitted to conduct a noncompetitive procurement under exceptional circumstances.²⁴⁹ If a non-state entity uses a prepositioned contract, but it is unable to meet the above-mentioned criteria or the exceptions for noncompetitive procurements, then the non-state entity is noncompliant with the federal procurement under grant rules.

B. State Entities and Prepositioned Contracts

Under the federal procurement under grant rules, a state entity must follow its own rules in determining the appropriateness of utilizing a prepositioned contract and whether it can enter into a noncompetitive contract if the above-mentioned criteria are not met.

²⁴⁹ 2 C.F.R. § 200.320(f).

Example: Prepositioned Contract



Scenario: *Powerful storms impact the City of P, resulting in torrential rainfall, flooding and damage to much of the City's infrastructure. Eight miles of underground natural gas pipelines were damaged. Although the damage did not result in a public emergency/exigency to meet the noncompetitive procurement exception, City of P plans on using a contractor under an existing contract to repair and replace the eight miles of damaged pipelines for \$3 million. The prepositioned contract was procured in compliance with the federal procurement under grant rules. Additionally, a review of the existing contract indicates that disaster-related repairs were anticipated. The contract limits such repair work to no more than 10 miles and includes a not-to-exceed clause of \$5 million. Under this scenario, can the City of P use its existing contract to repair the damaged pipeline?*

Answer: Yes. In this scenario, the City of P wishes to use the prepositioned contract for work that was contemplated in the original contract. The required work would not result in an out-of-scope modification of the original contract and was procured in compliance with the federal procurement under grant rules.

12.7 Mutual Aid Agreements

NFEs lacking sufficient resources to respond to an incident may request resources from another jurisdiction through a "mutual aid" agreement. FEMA refers to the entity requesting resources as the "requesting entity" and to the entity providing the requested resource as the "providing entity."²⁵⁰ NFEs that wish to use mutual aid services must ensure that their agreements are in compliance with PA Policy. The PA Program generally **does not** treat a mutual aid agreement as a procurement for the purposes of 2 C.F.R. Part 200; however, PA staff will review mutual aid agreements on a case by case basis to determine whether the federal procurement under grant rules apply.

²⁵⁰ Public Assistance Program and Policy Guide, Ch. 2: V.H (April 2018).

Examples: Mutual Aid Work Performed Through Contract



Scenario 1: *The City of X (requesting entity) requests 30 police officers from the City of W (providing entity) to perform law enforcement operations immediately following a tornado in the requesting entity's jurisdiction. This request is pursuant to an existing mutual aid agreement for police support. The providing entity contracts with a bus company to transport the police officers to the requesting entity's jurisdiction and includes the costs of this transportation along with its force account labor costs in its bill to the providing entity. Is this agreement subject to the federal procurement under grant rules?*

Analysis: No. Such contract services are incidental to the law enforcement services performed by the providing entity, and FEMA would not treat this instance as a mutual aid agreement so long as all other requirements of FEMA PA policy are met.



Scenario 2: *The City of Z is impacted by a tornado that generates widespread debris throughout the jurisdiction. Rather than entering into a contract directly with a debris removal contractor, the City of Z enters into an agreement with the City of Y, which already has a debris removal contract, to obtain rights to its contractor. The agreement assigns contractor rights to City of Z for 120 days. After the agreement is executed, the Contractor performs debris removal throughout the City of Z for 90 days. Would this agreement be treated as a procurement?*

Analysis: Yes. Since City of Z is exclusively entering into the agreement to acquire rights to City of Y's contract, the PA Program may treat this agreement as a piggyback contract, rather than a mutual aid agreement; hence, this agreement will be subject to the federal procurement under grant standards at 2 C.F.R. §§ 200.318-326.

Related Tools and Resources



- ✓ [FEMA Public Assistance Program and Policy Guide \(PAPPG\)](#)

12.8 Purchasing Agents



A purchasing agent is an agent of an NFE that assists with the procurement of goods and services. The purchasing agent may assist the entity during the procurement process by conducting market research, preparing solicitations, evaluating bids or proposals, negotiating contracts, and screening information about products, among other tasks.

If the NFE lacks qualified personnel within its organization to undertake the various procurement tasks required to comply with the federal procurement under grant rules, FEMA expects the entity to acquire the necessary services from sources outside the organization. The federal procurement under grant rules do not require an NFE to perform these tasks itself through full-time staff or otherwise prohibit an NFE's use of a third-party's services, such as a purchasing agent during the procurement process.

A. Non-State Entities and Purchasing Agents

Non-state entities are required to follow their own documented procurement procedures provided that they conform with the federal procurement under grant rules.²⁵¹ If the non-state entity anticipates using a purchasing agent for its procurements, the entity should ensure that its procurement procedures allow for the use of a purchasing agent.

When using a purchasing agent, a non-state entity must ensure that it has written standards of conduct covering **conflicts of interest**.²⁵² These standards apply to both the non-state entity as well as the purchasing agent conducting a procurement on their behalf. A purchasing agent shall not participate in the selection, award, or administration of a contract supported by a FEMA award if he or she has a conflict of interest in the procurement process.

There are two contract administration requirements that cannot be satisfied by purchasing agents:

1. The non-state entity must **maintain oversight** over procurements to ensure that contractors perform in accordance with the terms, conditions, and specifications of the contract;²⁵³ and

²⁵¹ 2 C.F.R. § 200.318(a).

²⁵² 2 C.F.R. § 200.318(c)(1).

²⁵³ 2 C.F.R. § 200.318(b).

2. The non-state entity must serve as the responsible party regarding the settlement and satisfaction of all contractual and administrative issues arising out of the procurements entered into in support of a PA award.²⁵⁴ This includes disputes, claims, protests of award, source evaluation, or other matters of a contractual nature.

B. State Entities and Purchasing Agents

Under the federal procurement under grant rules, a state entity must follow its own rules in determining the appropriateness of using purchasing agents.

²⁵⁴ 2 C.F.R. § 200.318(k).

13. Remedies for Procurement Noncompliance



When an NFE fails to comply with the federal procurement standards, FEMA has the authority to address the noncompliance by imposing conditions or remedy actions on the recipient. The *Uniform Rules* set out the specific conditions and remedies available to FEMA to address any such noncompliance.

This section explains how FEMA staff may administratively implement some of the remedy actions and specific conditions.

A. Remedies for Noncompliance²⁵⁵

1. Temporarily withhold cash payments pending correction of the deficiency—place a hold or stop payment on the grant award in the appropriate award payment system pending the recipient’s submission of satisfactory documentation as to correction of the noncompliance;
2. Disallow all or part of the cost of the activity or action not in compliance if the recipient has already drawn down money;

²⁵⁵ 2 C.F.R. § 200.338.

3. Wholly or partly suspend or terminate the federal award²⁵⁶—FEMA may suspend or terminate the federal award if a recipient fails to comply with the terms and conditions of a federal award. If FEMA determines in the case of partial termination that the reduced or modified portion of the federal award will not accomplish the purposes for which the federal award was made, FEMA may terminate the federal award in its entirety;
4. Initiate suspension or debarment proceedings;
5. Withhold further federal awards for the FEMA grant with respect to the recipient, under one or more programs, and for specified periods of time; or
6. Take other remedies that may be legally available—for example, FEMA may request the recipient change the designated official who manages the grant for the recipient.

B. Specific Conditions²⁵⁷

1. Require payment on a reimbursement basis rather than advance payment—impose controlled drawdowns by placing all funds on hold and only releasing funds for drawdown when the recipient provides a request for reimbursement and full support documentation for the requested payment;
2. Withhold authority from the recipient to proceed to later phases of its project until FEMA receives satisfactory evidence of acceptable performance within a given period of performance—place a hold or stop payment on the grant award in the appropriate Award Payment System pending the recipient’s submission of satisfactory documentation as to acceptable performance;
3. Require additional, more detailed financial or program progress reports—may require more frequent reports and/or additional information in reports on an as needed basis or on a recurring schedule as deemed appropriate based on the noncompliance and circumstances;

²⁵⁶ 2 C.F.R. § 200.339.

²⁵⁷ 2 C.F.R. § 200.207.

4. Require additional project monitoring—require technical assistance visits, desk reviews or site visits to ensure recipients or subrecipients are taking the appropriate corrective actions to correct noncompliance or if there is a need to continue monitoring as a result of noncompliance;
5. Require the NFE to get technical assistance or management assistance—require the recipient or subrecipient to obtain specialized technical or management assistance, including, but not limited to, webinars targeted at specific issues or concerns, training from FEMA’s Procurement Disaster Assistance Team, or hiring a contractor to review the recipient’s financial systems and make recommendations; or
6. Establish additional prior approvals.

Related Tools and Resources



- ✓ **OIG Summary Reports on Procurement Noncompliance:**
 - [OIG-18-29-D Lessons Learned from Prior Reports on Disaster-related Procurement and Contracting](#)
 - [OIG-16-126-D FEMA Can Do More to Improve Public Assistance Grantees’ and Subgrantees’ Compliance with Federal Procurement Rules](#)

