Procurement Under Grants Policy Guide

Procurement Policy for Recipients and Subrecipients of FEMA Financial Assistance

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FEMA

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Contents

FOREWORD

All Federal Emergency Management Agency (FEMA) awards, also known as grants, are subject to the Federal Procurement Standards under the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* found in Part 200 of Title 2 of the Code of Federal Regulations (C.F.R.) sections 200.317 – 200.327 2 C.F.R. §§ 200.317 – 200.327.[1] This Procurement Under Grants Policy Guide (PUGPG) provides guidance regarding the mandatory requirements for FEMA award recipients and subrecipients using federal grant funding to finance the procurement of property and services.

Grants and cooperative agreements are the principal funding mechanism FEMA uses to support States, Tribes, territories, local governments, eligible nonprofits and for-profit organizations, and individuals when preparing for and recovering from emergencies and disasters.[2] These funds are administered through many different programs to help ready communities across the nation for when disaster strikes. Some of FEMA's grant programs include the following:

- **Disaster Assistance Programs:** When an area receives a presidential declaration of an emergency or major disaster, then its state, local, tribal, and territorial (SLTT) governments, and certain types of nonprofit organizations may be eligible for federal financial assistance. This assistance is administered through FEMA's programs, including, but not limited to, the Public Assistance (PA), the Fire Management Assistance Grant (FMAG), and the Individual Assistance (IA) programs.

- **Hazard Mitigation Assistance Programs:** These programs provide funding for eligible mitigation measures that, through sustainable action, reduces or eliminates long-term risk to people and property from future disasters. Mitigation planning breaks the cycle of disaster damage, reconstruction, and repeated damage by employing long-term solutions that reduce the impact of disasters in the future. Examples include the Hazard Mitigation Grant Program (HMGP) and Flood Mitigation Assistance (FMA).

- **Preparedness Programs:** These programs improve the capacity of citizens and first responders to build and sustain efforts to prepare for, protect against, respond to, recover from, and mitigate terrorism and other high-consequence disasters and emergencies. Examples include the Assistance to Firefighter Grants (AFG) Program and Homeland Security Grant Program (HSGP).

Recipients and subrecipients of FEMA grant funding often require awarding work to contractors to ensure projects are completed on time and on budget. It is critical to the mission of emergency

[1] Adopted by DHS at 2 C.F.R. § 3002.10. 79 Fed. Reg. 75871 (Dec. 19, 2014); Revised 2 C.F.R. Part 200 (Oct. 1, 2024).
[2] FEMA grant programs provide assistance to for-profit entities are governed by case program regulations and guidance, and typically parallel the 2 C.F.R. Part 200 requirements.

management that any contracts funded through a FEMA award are awarded in a fair and competitive manner, ensuring that all responsible contractors can compete for the work under a FEMA award.

The Procurement Disaster Assistance Team (PDAT), within FEMA Grant Programs Directorate (GPD), Office of Enterprise Grant Services (EGS), Procurement Under Grants (PUG) Division, developed this version of the PUGPG to provide accurate and updated guidance to support both FEMA staff and FEMA award recipients and subrecipients in understanding and complying with the Federal Procurement Standards.

This version of the PUGPG will:

- Exemplify the Agency's mission statement: ***Helping people before, during, and after disasters;***
- Improve accessibility to all users of this Guide, providing clear and understandable language to enhance comprehension of the Federal Procurement Standards;
- Provide guidance regarding the Office of Management and Budget (OMB) revisions and final guidance to the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (*Uniform Rules*), 2 C.F.R. Part 200 on Oct. 1, 2024;
- Illustrate how certain rules apply to an award recipient and/or subrecipient with real world examples; and
- Give additional resources, tools, and guidance to help all users develop further knowledge of the procurement under grants subject matter.

Additionally, a list of changes and clarifications from the FY21 PDAT Field Manual is included below:

List of Changes and Clarifications

Administrative & Policy
Retitled PDAT Field Manual as the Procurement Under Grants Policy Guide (PUGPG), used synonymously with "Guide" in this document.
Replaced "non-Federal entity/NFE" with "recipient" or "subrecipient".
Updated real world examples to include new FEMA grant programs and unique procurement scenarios applicable to the corresponding Federal Procurement Standard.
Incorporated updated guidance for requirements incorporating language from updated FEMA policies and external federal agencies.
Corrected grammar, punctuation, and language, consistent with plain language standards.

Enhanced appendices to feature various PUG tools and resources as well as external federal agency guidance and support documents.
Consistent with existing requirements for States in 2 C.F.R. § 200.317, Indian Tribes now follow their own policies and procedures. Additionally, States or Indian Tribes that do not have procurement policies and procedures must follow 2 C.F.R. §§ 200.318 – 200.327.
Added "board member" in the context of conflicts of interest, 2 C.F.R. § 200.318(c).
OMB clarified recipients and subrecipients must consider several factors when determining if a contractor is responsible and adds guidance that contractors appropriately classify employees consistent with the Fair Labor Standards Act, 2 C.F.R. § 200.318(h).
Added paragraph (1) requiring that written procedures for procurement transactions ensure that solicitations are made in accordance with 2 C.F.R. § 200.319(b).
Removed "requests for proposals" from 2 C.F.R. § 200.319(b).
Included new definition of "double dipping," defined under 2 C.F.R. § 200.319(b) as the procurement action by which a local government or nonprofit hires a contractor to develop the scope of work and specifications of a contract or solicitation and then the same contractor submits a bid or proposal for that work under a FEMA award. This action is prohibited.
Relocated the list of situations considered to be restrictive of competition from 2 C.F.R. § 200.319(b) to 2 C.F.R § 200.319(c).
Removed mention of geographic preferences as OMB no longer features this prohibition in the Federal Procurement Standards when evaluating bids or proposals, previously found at 2 C.F.R. § 200.319(c).
Added a sentence stating that in establishing or amending prequalified lists, the recipient or subrecipient must consider objective factors that evaluate price and cost to maximize competition, 2 C.F.R. § 200.319(e).
Added a new paragraph at 2 C.F.R. § 200.319(f), to state that recipients and subrecipients are not prohibited from incorporating a scoring mechanism that rewards bidders committing to specific numbers and types of U.S. jobs, as well as certain compensation and benefits.
Changed the name of "small purchases" method of procurement to "simplified acquisitions," 2 C.F.R. § 200.320(a)(2).
Included language concerning the requirements for certain FEMA grant programs under the Build America Buy America Act (BABAA) per 2 C.F.R. § 200.322(c), 2 C.F.R. Part 184.

When determining an adequate number of qualified contracting sources, FEMA encourages at least three price or rate quotations when using competitive procurement procedures.
FEMA or a pass-through entity may approve a subrecipient's written request to procure a product or service through a noncompetitive proposal method. In cases where FEMA or a pass-through entity approves a request to use a noncompetitive proposal, the approval must be consistent with all applicable state, local, and federally recognized tribal laws and regulations, as well as FEMA's or the pass-through entity's and subrecipient's written procurement standards.
Added additional language to 2 C.F.R. § 200.324(a) to establish that the recipient or subrecipient may consider potential workforce impacts in their procurement analysis if the procurement transaction will potentially displace public sector employees.
Removed requirement for recipients to negotiate profit as a separate element of the price for each contract in which there is no price competition.

APPLICABILITY

Over the past three decades, FEMA has awarded more than $347 billion to states, Tribal Nations, territories, local governments, and eligible nonprofits to support essential response and recovery efforts.[3] Recipients and subrecipients of FEMA awards are subject to the Federal Procurement Standards found at 2 C.F.R. §§ 200.317 – 200.327, which apply to contracts under FEMA awards or Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act)[4] disaster declarations. This version of the PUGPG is applicable to FEMA awards (non-disaster grants) with a federal award date found in the Notice of Award Letter and Stafford Act disaster declarations issued on or after Oct. 1, 2024.[5]

Periodically, OMB will revise sections of the *Uniform Rules* including the Federal Procurement Standards. In the past, FEMA released prior versions of this Guide that aligned with the Federal Procurement Standards in effect at that time. Those versions remain applicable for awards and disaster declarations based on the date they were issued or declared. It is important for recipients

[3] FEMA's Disaster Relief Fund: Budgetary History and Projections, Publication 58840. Congressional Budget Office, November, https://www.cbo.gov/publication/58840.

[4] Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288 (1974) (codified as amended at 42 U.S.C. §§ 5121-5207).

[5] Approval for Application of New OMB Revisions to Title 2 of the Code of Federal Regulations to Hurricane Helene Declarations, FEMA, Oct. 17, 2024. Hurricane Helene made landfall on Sept. 26, 2024, with disaster declarations occurring both before and after the new OMB revisions went into effect on Oct. 1, 2024. To streamline the grant rules applicable to Hurricane Helene declarations, FEMA has decided to amend Hurricane Helene FEMA-State/Tribe Agreements issued prior to Oct. 1, 2024, to ensure the new OMB revisions apply uniformly to all Hurricane Helene-related declarations no matter the declaration date.

and subrecipients to apply the correct federal rules that correspond to the FEMA grant award date or the date of the disaster declaration of a Stafford Act disaster grant.

To identify the appropriate version of the Guide applicable to a specific procurement, recipients and subrecipients should reference the federal award date for the non-disaster grant award or the disaster declaration date of the disaster grant. To find the disaster declaration date, visit Disasters and Other Declarations | FEMA.gov. The chart below provides a link to the corresponding FEMA guidance based on the federal award date or disaster declaration date.

Although versions before the FY21 Field Manual are only applicable to FEMA's Public Assistance Program, all FEMA award recipients and subrecipients are encouraged to review these resources since they provide guidance on the Federal Procurement Standards unless restricted by statute.

FEMA will monitor the implementation of this policy through close coordination with various program offices, regional staff, and as appropriate, interagency partners and non-federal stakeholders. FEMA will consider feedback, as appropriate, from these entities when issuing updates to this policy.

Stacey N. Street
Acting Deputy Assistant Administrator
Grant Programs Directorate

Federal Award Date or Disaster Declaration Date	FEMA Policy
Before Dec. 26, 2014	FY14 Field Manual
Dec. 26, 2014 – Nov. 11, 2020	FY16 Field Manual Supplement
Dec.26, 2014 – Nov. 11, 2020	FY19 Field Manual
Nov.12, 2020 – Sep. 30, 2024	FY21 Field Manual
Oct. 1, 2024 - Present	FY25 PUGPG (this Guide)

Chapter 1: Introduction

1. Overview

This version of the PUGPG incorporates relevant content from both the *2014 Field Manual*, the *2016 Supplement to the Field Manual*,[6] the *2019 Field Manual*,[7] *and the 2021 PDAT Field Manual*.[8] However, this version now supersedes previous resources following OMB revisions of *OMB Guidance for Federal Financial Assistance found in Title 2 of the Code of Federal Regulations*. These revisions are applicable to all FEMA awards issued on or after Oct. 1, 2024, unless specifically indicated otherwise. These revisions include changes to the Federal Procurement Standards, which govern how FEMA award recipients and subrecipients must purchase under a FEMA award. For FEMA declarations made on, or awards issued prior to Oct. 1, 2024, and after Nov. 12, 2020, please reference the previous Federal Procurement Standards. Please note that the PUGPG is not encompassing of all FEMA grant program policy, nor does it have the force and effect of federal law and regulation. However, it is intended to serve as a practical guide regarding procurement under a FEMA award with the full authority and effect of FEMA policy.

The information provided in the PUGPG is designed to serve as a foundational reference for both FEMA staff involved in the various aspects of administering FEMA awards as well as the recipients and subrecipients procuring property and services as identified in the *Uniform Rules*. FEMA does not intend this guide to provide or constitute legal advice to its award recipients and subrecipients. Adherence to, application of, or use of the PUGPG regarding a procurement under a FEMA award does not guarantee legal sufficiency of any procurement, nor does it ensure that an award or subaward will not be audited, monitored, or investigated. All legal questions concerning the sufficiency of a procurement under a FEMA award should be referred to the recipient's or subrecipient's legal counsel.

As a condition of receiving reimbursement for contractor costs relating to FEMA's federal assistance programs, FEMA award recipients and subrecipients must comply with all applicable federal laws, regulations, executive orders, and grant award terms and conditions. Each recipient or subrecipient 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,*

[6] 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.
[7] Field Manual – Procurement Information for FEMA Public Assistance Award Recipients and Subrecipients, Oct. 2019.
[8] Procurement Disaster Assistance Team (PDAT) Field Manual: Procurement Information for FEMA Award Recipients and Subrecipients, Oct. 2021.

and Audit Requirements for Federal Awards codified at 2 C.F.R. Part 200, which the U.S. Department of Homeland Security (DHS) adopted at 2 C.F.R. § 3002.10.[9] Specifically, the regulations at 2 C.F.R. §§ 200.317 – 200.327 set forth the procurement standards that each recipient and subrecipient must follow when using FEMA financial assistance to conduct procurements of real property, goods, or services.

2. Applicability

The Federal Procurement Standards set forth at 2 C.F.R. §§ 200.317 – 200.327 apply to all grant awards with a federal award date on or after Oct.1, 2024, and disaster declaration dates on or after Oct. 1, 2024.[10] Failure to follow the *Uniform Rules* found in 2 C.F.R. Part 200 when procuring and selecting contractors places FEMA award recipients and subrecipients at risk of not receiving either their full reimbursement for associated contract costs or having expended funds recouped by FEMA. The PUGPG focuses on the procurement standards set forth in 2 C.F.R. Part 200. For procurement guidance associated with disasters declared before Oct.1, 2024, please refer to the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*.

3. Navigating the Procurement Under Grants Policy Guide (PUGPG)

The PUGPG is structured according to the progression of the Federal Procurement Standards listed in 2 C.F.R. §§ 200.317 – 200.327. Throughout the PUGPG, icons are used to help identify key definitions, examples, tools/resources, and common DHS Office of Inspector General (OIG) audit findings.

Definition

Examples

Tools/Resources

Common OIG Findings

- Internal hyperlinks connect sections that are complementary within the PUGPG.

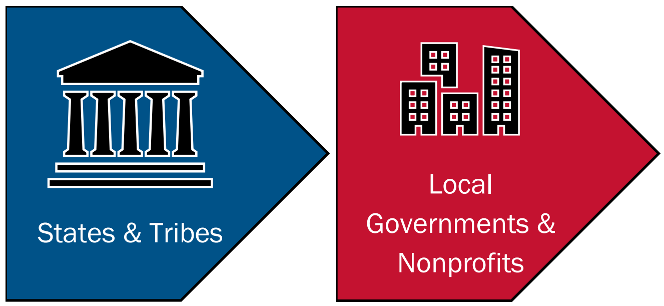
[9] 79 Fed. Reg. 75871 (Dec. 19, 2014); 85 Fed. Reg. 49506 (Aug. 13, 2020).
[10] 89 Fed. Reg. 30046.

- External hyperlinks connect the PUGPG with relevant external references or resources.

- Blue boxes indicate important terms or sections to know and understand.

- Gray boxes indicate an example where procurement under a FEMA award is being used.

- Graphics indicate the applicability of which recipient or subrecipient is subject to this rule:



4. Applying the Rules

Rule	Citation	Applicability
Procurements by States and Indian Tribes	§ 200.317	States & Tribes
General procurement standards	§ 200.318	Local Governments & Nonprofits
Competition	§ 200.319	Local Governments & Nonprofits
Procurement methods	§ 200.320	Local Governments & Nonprofits
Contracting with small businesses, minority businesses, women's business enterprises, veteran-owned businesses, and labor surplus area firms	§ 200.321*	States & Tribes; Local Governments & Nonprofits

Domestic Preferences for procurements	§ 200.322	States & Tribes; Local Governments & Nonprofits
Procurement of recovered materials	§ 200.323	States & Local Governments
Contract cost and price	§ 200.324	Local Governments & Nonprofits
Federal agency or pass-through entity review	§ 200.325	Local Governments & Nonprofits
Bonding requirements	§ 200.326	Local Governments & Nonprofits
Contract provisions	§ 200.327	States & Tribes; Local Governments & Nonprofits

***NOTE:** FEMA recommends recipients and subrecipients work with their general counsel on the application of 2 C.F.R. § 200.321, as it is no longer required by the Federal Procurement Rules.

Questions regarding this policy may be directed to the assigned FEMA program analyst or grants management specialist or FEMA Grants News at FEMA-Grants-News@fema.dhs.gov.

Related Tools and Resources

- ✓ Federal Procurement Standards (as of Oct. 1, 2024)
- ✓ U.S. Department of Homeland Security Office of the Inspector General Audit Reports related to FEMA
- ✓ FEMA Grants
- ✓ Public Assistance Program and Policy Guide (PAPPG)
- ✓ Preparedness Grants Manual
- ✓ Fire Management Assistance Grant Program Guide (FMAG)
- ✓ Hazard Mitigation Assistance Program (HMGP) and Policy Guidance

Chapter 2: Applicability of the Federal Procurement Standards

1. Overview of Contracts

1.1. Use of Contractors by Recipients and Subrecipients

Recipients and subrecipients often use contractors to help carry out their FEMA award projects. For example, a subrecipient may receive federal financial assistance under a FEMA award to repair a building damaged by a major disaster. The subrecipient may then hire a construction company to complete the work. FEMA generally views contractor costs as an allowable cost[11] under the FEMA award if the costs are deemed eligible under the grant program and are reasonable.

A contract is a commercial transaction between the recipient or subrecipient and their contractors, creating a legal relationship between them. FEMA's legal relationship is with the award recipient, not the recipient or subrecipient and their contractors or subcontractors.

1.2. Role of FEMA in Recipient and Subrecipient Contracting

Although FEMA 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 FEMA award. Recipients and subrecipients that use FEMA award funding must comply with the Federal Procurement Standards, federal law, executive orders, federal regulations, and terms of the FEMA award.

1.3. Definition of Contract

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. There are three elements necessary to form a contract:

- Mutual assent;
- Consideration or a substitute; and
- No defenses to formation;[12] such as duress, misrepresentation or fraud, mistake, and unconscionability.

[11] 2 C.F.R. § 200.403.
[12] Restatement (Second) of Contracts § 1 (Am. L. Inst. 1981).

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

The term "contract" is general and includes several different varieties or types.[13] For example, contracts can be categorized by subject matter, such as construction, research, supply, service, or by the way they can be formed and accepted, such as bilateral or unilateral. Recipients and subrecipients can choose the type of contract they award, as long as it aligns with the Federal Procurement Standards, federal, applicable state, tribal, and local laws and regulations, and within the bounds of good commercial business practice.

The *Uniform Rules* provide that a contract is for obtaining goods and services for the recipient's or subrecipient's own use and creates a procurement relationship with the contractor.[14] Characteristics indicative of a procurement relationship between the recipient or subrecipient 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
5. Is not subject to compliance requirements of the federal program because of the agreement; however, similar requirements may apply for other reasons.[15]

1.4. 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).

1.5. Fixed Price and Cost-Reimbursement Contracts

Fixed price and cost-reimbursement contracts include a variety of contracts ranging from firm-fixed price contracts, where the contractor has full responsibility for the performance costs and resulting profit or loss, to cost-plus-fixed fee contracts, where the contractor has minimal responsibility for the performance costs and the negotiated fee or profit is fixed. There are also various incentive contracts where the responsibilities of the contractor for performance costs and the profit or fee incentives are tailored to the uncertainties involved in contract performance.

[13] 2 C.F.R. § 200.1, *Contract*.
[14] 2 C.F.R. § 200.331(b).
[15] *Id.*

Fixed price contracts provide for a firm price or, in appropriate cases, an adjustable price.[16] The contractor bears the risk of performing the required work at the fixed price.[17] Firm-fixed price contracts are generally appropriate where the requirement, such as scope of work, is well-defined and of a commercial nature.[18] For example, Construction contracts are often firm-fixed price contracts. **NOTE:** T&M contracts and labor-hour contracts are not firm-fixed price contracts.[19]

Cost-reimbursement contracts provide for payment of certain incurred costs as specified in a contract.[20] They normally reimburse the contractor for allowable costs, with an agreed-upon fee.[21] There is a limit to the costs that a contractor may incur at the time of contract award, known as a ceiling price. The contractor may not exceed the ceiling price without the recipient's or subrecipient's approval, or the contractor does so at their own risk.

In a cost-reimbursement contract, the recipient or subrecipient bears more risk than in a firm-fixed price contract.[22] A cost-reimbursement contract is appropriate when the details of the required scope of work are not well-defined.[23] There are many variations of cost-reimbursement contracts, such as cost-plus-fixed-fee, cost-plus-incentive-fee, and cost-plus-award-fee contracts.[24] However, the cost plus a percentage of cost (CPPC) contract, which is discussed in detail in Chapter 8 of this Guide, is strictly prohibited for local governments and nonprofits.[25]

2. Procurement by Entity

The Federal Procurement Standards apply differently based on the type of recipient or subrecipient. Therefore, a FEMA award recipient or subrecipient must first determine if it is a State, Indian Tribe, local government, or nonprofit as defined under the Federal Procurement Standards. Additional guidance for determining recipient or recipient type and which Federal Procurement Standards to apply are listed below.

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[16] *See generally*, 48 C.F.R. § 16.2. 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.
[17] Bowsher v. Merck & Co., 460 U.S. 824, 826 n.1 (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.").
[18] 48 C.F.R. § 16.202-2.
[19] 48 C.F.R. § 16.201(b).
[20] 48 C.F.R. § 16.3.
[21] 48 C.F.R. § 16.303.
[22] Kellogg Brown & Root Servs., Inc. v. United States, 742 F.3d 967, 971 (Fed. Cir. 2014) ("[C]ost-reimbursement contracts are intended to shift to the Government the risk of unexpected performance costs[.]").
[23] 48 C.F.R. § 16.306.
[24] 48 C.F.R. §§ 16.304 - 16.306.
[25] 2 C.F.R. § 200.324(c).

2.1. Procurement by States and Indian Tribes

The Federal Procurement Standards applicable to States and Indian Tribes are set forth in 2 C.F.R. § 200.317. States are defined as:

- 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.[26]

Indian Tribe means any Indian Tribe, band, Tribal 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. § 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. *See* 25 § U.S.C. 5304(e). This includes any Indian Tribe identified in the annually published Bureau of Indian Affairs list of "*Indian Entities Recognized and Eligible to Receive Services"* and other entities that qualify as an Alaska Native village or regional village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act.[27]

Consistent with the existing requirements for States in 2 C.F.R. § 200.317, Indian Tribes must follow the same policies and procedures used for procurements with non-federal funds. In addition to adhering to their own policies and procedures, Indian Tribes must also comply with rules for Domestic Preferences (§ 200.322) and Required Contract Provisions (§ 200.327). **NOTE:** Requirements under the Build America Buy America Act (BABAA) apply to infrastructure projects under certain FEMA grant programs.

[26] 2 C.F.R. § 200.1 *State*.
[27] 2 C.F.R. 200.1 § *Indian Tribe*.

While an additional rule for Procurement of Recovered Materials (§ 200.323) is also referenced in 2 C.F.R. § 200.317, this requirement only applies to state agencies and political subdivisions of states and not to Indian Tribes. The 2024 OMB guidance also requires that States and Indian Tribes follow the Federal Procurement Standards at 2 C.F.R. §§ 200.318 – 200.327 if they do not have their own procurement policies or procedures.

Even if States or Indian Tribes comply with their own policies and procedures used for procurement from non-federal funds when they procure 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.[28] For example, while States and Indian Tribes are not prohibited by the federal rules from awarding a CPPC contract, FEMA may still question the reasonableness of the contract's costs since this type of contract incentivizes the contractor to drive up costs to increase profit.[29] States and Indian Tribes 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.

Additionally, while more prescriptive conflict of interest rules may apply to local governments and nonprofits, FEMA, pursuant to its authorities, requires that all recipients and subrecipients, including States and Indian Tribes, maintain written conflicts of interest rules, including organizational conflicts of interest rules, governing the actions of their procurement professionals and disclose any potential conflict of interest to FEMA in writing.[30] *See* State and Indian Tribe Checklist.

2.2. Additional Considerations for Indian Tribes

Indian Tribes may serve as a recipient or subrecipient under a FEMA award. It is important to note that in both capacities, they are required to comply with the applicable Federal Procurement Standards.

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 Tribes to apply preference in the awarding of contracts and subcontracts to “Indian organizations” or “Indian-owned economic enterprises” in connection with the administration of any federal award.[31]

[28] 2 C.F.R. § 200.404 (“A cost is reasonable if it does not exceed an amount that a prudent person would incur under the circumstances prevailing when the decision was made to incur the cost.”).
[29] 2 C.F.R. § 200.401.
[30] 2 C.F.R. § 200.112.
[31] 25 U.S.C. § 5307(b).

An Indian organization is the governing body of any federally recognized Indian Tribe or an entity established or recognized by such a governing body.[32] 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% or higher of the enterprise.[33]

Indian Tribes using a permissible preference are required to document that they have met the requirements under the Indian Self-Determination and Education Act.[34] They must also ensure compliance with the remainder of Federal Procurement Standards, as well as any applicable tribal laws.[35]

Other Indian Tribal Procurement Considerations

- **Inapplicability of the Procurement of Recovered Materials Provision:** The procurement of recovered materials provision[36] applies only to States or political subdivisions of a state and its contractors. Indian Tribes are not required to comply with this provision.
- **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.[37] This exception is often referenced in contracts awarded by Indian Tribes and is compliant with the Federal Procurement 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 Tribes still have a responsibility, under the FEMA award, to ensure that costs are reasonable and document such a determination.[38]

[32] 25 U.S.C. § 5304(l).

[33] 25 U.S.C. § 1452(e).

[34] 2 C.F.R. §§ 200.400(d) and 200.403(g).

[35] 2 C.F.R. § 200.317.

[36] 2 C.F.R. § 200.323.

[37] 25 U.S.C. § 5307(b).

[38] 2 C.F.R. § 200.404.

Example: State and Indian Tribes Awarding Contracts

Scenario: The Indian Tribe of Y, as the result of a flood, sustains damages to many of its government buildings. When evaluating proposals for the repair work, Indian Tribe of Y applies a preference percentage to Indian-owned economic enterprises competing for the award. Indian Tribe of Y documents in its procurement file how the preference meets the requirements under their own tribal procurement rules. Was the preference given to Indian-owned economic enterprises permissible under the Federal Procurement Standards?

Answer: Yes. The use of the Indian tribal preference was permissible. Because both States and Indian Tribes are subject to their own state and tribal procurement rules, the Indian Tribe of Y 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 FEMA award subject to 2 C.F.R. § 200.317.

2.3. State and Indian Tribe Checklist

The below checklist features a series of questions to assist States and Indian Tribes in considering certain factors when purchasing under a FEMA award. These factors include, but are not limited to, the procurement dollar amount and required contract provisions to ensure compliance with the Federal Procurement Standards. If you responded "**no**" to any of the questions below, your organization's procurement may not be compliant with the Federal Procurement Standards. It is recommended that you visit the Purchasing Under a FEMA Award Resource Library for assistance with compliance matters.

NOTE: Separate checklists applicable to local governments and nonprofits will be provided in the corresponding chapter of this Guide.

Requirement		Supporting Documentation
Did your organization comply with its own procurement policies and procedures?	*Yes* ☐ *No* ☐	Procurement policy ☐
Is the price fair and reasonable?	*Yes* ☐ *No* ☐	Evidence of market research ☐ Short narrative on letterhead ☐ Other: (ex: receipt, invoice) ☐

If the purchase is over $25,000, did your organization ensure the contractor was not suspended or debarred? *See* 2 C.F.R. § 180 for additional information.	*Yes* ☐ *No* ☐	Printout of SAM.gov search ☐ Copy of suspension and debarment (S&D) certification ☐ Contract with applicable S&D clause ☐
Required Contract Provisions		
NOTE: The Federal Procurement Standard at 2 C.F.R. § 200.327 requires that recipient and subrecipient contracts contain the applicable provisions described in Appendix II to Part 200 of the Uniform Rules *(Contract Provisions for Non-Federal Entity Contracts Under Federal Awards).*		
If the contract is over $250,000,did your organization include a Remedies clause? **NOTE:** AFG recipients must include a penalty clause in all contracts for any AFG-funded vehicle.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in the contract document. Pg.:
If the contract is more than $10,000, did your organization include a Termination for Cause and Convenience clause?	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in the contract document. Pg.:
If the contract is for construction work and more than $2,000, did your organization include the required Davis-Bacon Act Clause? **NOTE:** This clause **only** applies to the following FEMA grant programs: EMPG, HSGP, NSGP, THSGP, PSGP, IPR, HHPD, Safeguarding Tomorrow RLF, and TSGP.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in the contract document. Pg.:
If the contract is for construction or repair work more than $2,000, did your organization include the required Copeland Anti-Kickback Act Clause? **NOTE:** This clause is **only** required in situations where the Davis-Bacon Act also applies.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in the contract document. Pg.:
If the contract meets the definition of "funding agreement", did your organization include the required Rights to Inventions Made Under a Contract or Agreement clause?	*Yes* ☐ *No* ☐	Indicate the page number where a FEMA representative can locate the clause in the contract document.

NOTE: This clause is **not** required under the PA, HMGP, FMA, PDM, FMAG, HMGP Post Fire, CCP, DCM, IHP-ONA, or Safeguarding Tomorrow RLF programs, as FEMA Awards under these programs do not meet the definition of "funding agreement".	*N/A* ☐	Pg.:
If the contract involves the employment of mechanics or laborers, and is in excess of $100,000, did your organization include the required Contract Work Hours and Safety Standards Act clause?	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in the contract document. Pg.:
If the contract is in excess of $150,000, did your organization include a Clean Air Act clause?	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in the contract document. Pg.:
If the contract is in excess of $150,000, did your organization include a Federal Water Pollution Control Act clause?	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in the contract document. Pg.:
If the contract is in excess of $25,000, did your organization include a Suspension and Debarment clause? *See* 2 C.F.R. § 180 for additional requirements.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in the contract document. Pg.:
If the contract is in excess of $100,000, did your organization include the required clause and Byrd Anti-Lobbying Certification to be signed and filed by the contractor?	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in the contract document. Pg.:
Did your organization include a Recovered Materials clause? *See* 2 C.F.R. § 200.323. **NOTE:** This clause is only applicable to state agencies and political subdivisions of a state.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in the contract document. Pg.:

Did your organization include a clause restricting use of covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system? *See* 2 C.F.R. § 200.216 for additional requirements.	*Yes* ☐ *No* ☐	Indicate the page number where a FEMA representative can locate the clause in the contract document. Pg.:
If the contract is for the purchase of goods, materials, or products, did your organization include a domestic preference clause? *See* 2 C.F.R. § 200.322.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in the contract document. Pg.:
Did your organization include a clause and self-certification of contracts and subcontracts for infrastructure projects subject to the BABAA requirements? *See* 2 C.F.R. Part 184. **NOTE:** Not applicable to most disaster grant programs including PA, HMGP, and IA. *See* grant programs subject and not subject to BABAA requirements.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause and self-certification in the contract document. Pg.:
Did your organization consider including the FEMA **recommended** provisions outlined in PDAT's Contract Provisions Guide? This is **not** a requirement, and contracts will not be deemed noncompliant for failure to include these provisions.		

2.4. Procurement by Local Governments and Nonprofits

Local governments and nonprofits must follow the Federal Procurement Standards at 2 C.F.R. §§ 200.318 – 200.327, even if they are subrecipients of a state or Indian Tribe. These standards are applicable to local governments and nonprofits when procuring property or services under an award or cooperative agreement. **NOTE:** States and Indian Tribes are subject to these same standards if they do not have written procurement policies and procedures.

Local governments are eligible FEMA award recipients and subrecipients that do not meet the definitions of a State or Indian Tribe. Examples of these include but are not limited to:

- County;
- Municipality;
- Borough;
- City;

- Town;
- Township;
- Parish;
- Local public authority, including any public housing agency under the United States Housing Act of 1937;
- Special 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.

Additionally, recipients and subrecipients that do not meet the state definition of a State, Indian Tribe, or local government would be subject to the Federal Procurement Standards at 2 C.F.R. §§ 200.318 – 200.327. Examples of these include:

- Institutions of Higher Education (IHEs) that do not meet the definition of state or Indian Tribe,
- Hospitals that do not meet the definition of state instrumentality, and
- Other nonprofits.

As set forth in 2 C.F.R. § 200.318(a), local governments and nonprofits must use their own documented procurement procedures which reflect applicable State, local, and tribal laws and regulations, provided that the procurements conform with applicable federal statutes and regulations, the objectives and purposes of the applicable federal financial assistance program, and other requirements of this part.

The Federal Procurement Standards only address certain, limited procurement concepts, and do not focus on all possible procurement issues. Where the Federal Procurement Standards do not address a specific procurement issue, local governments and nonprofits must abide by the applicable state, local, and/or tribal procurement standards or regulations.[39] However, where a difference exists between a federal procurement standard and a state, local, and/or tribal procurement standard or regulation, the local government or nonprofit should apply the rule(s) that allow for compliance with all applicable levels of governance. Each of the Federal Procurement Standards applicable to local governments and nonprofits will be expanded upon in each chapter of the PUGPG.

[39] 2 C.F.R. § 200.318(a).

Example: Application of the Rules to Local Governments and Nonprofit Procurements

Scenario: Local government and nonprofit procurement standards may, in some cases, be more restrictive than the Federal Procurement Standards. For example, the regulation at 2 C.F.R. § 200.320(a)(2) allows a local government or nonprofit to use procurement by simplified acquisitions when the total value of services, property, or other property acquired is higher than the micro-purchase threshold, currently set at $10,000, and below the federal Simplified Acquisition Threshold (SAT), which is $250,000 as of June 2018.[40] However, it may be the case that the applicable state, local, and/or Indian tribal procurement standards and regulations do not permit small purchase procedures for acquisitions over $100,000. Which acquisition threshold must a local government or nonprofit comply with in this scenario?

Answer: In such a circumstance where there is a difference between state, local, and/or tribal procurement standards and these Federal Procurement Standards, the local government or nonprofit is required to follow the rule(s) that allows compliance with all applicable levels of governance. A more permissive federal procurement standard would not control over a more restrictive applicable state, local, and/or tribal standard. In this scenario, complying with the $100,000 threshold allows for compliance at all levels.

NOTE: This concept of differing and following the rule that allows compliance with all applicable levels only applies to local governments and nonprofits. This underscores the importance of a recipient's or subrecipient's evaluation of whether it is subject to the Federal Procurement Standards applicable to States or Indian Tribes or those applicable to local governments and nonprofits.

States and Indian Tribes will always follow the Federal Procurement Standards at 2 C.F.R § 200.317, which directs them to utilize their own procurement standards; provide a preference for the purchase of goods, products, or materials produced in the United States as required by 2 C.F.R. § 200.322; comply with applicable guidelines regarding procurement of recovered materials as set forth in 2 C.F.R. § 200.323; and include all necessary contract provisions required by 2 C.F.R. § 200.327. If a State or Indian Tribe does not have procurement policies and procedures, they must follow 2 C.F.R. §§ 200.318 – 200.327. Furthermore, local governments and nonprofits must adhere to their own procurement policies and procedures, applicable state and/or tribal laws, and the Federal Procurement Standards. FEMA recommends recipients and subrecipients work with their general

[40] 2 C.F.R. § 200.1 *Simplified acquisition threshold* (SAT); 48 C.F.R. § 2.101 Simplified acquisition threshold. While the SAT is periodically adjusted for inflation, as of June 2018, the threshold is set at $250,000. Office of Mgmt. & Budget, Exec. Office of the President, OMB Memorandum M-18-18, Memorandum for Chief Financial Officers and Heads of Small Executive Agencies (2018), https://www.whitehouse.gov/wp-content/uploads/2018/06/M-18-18.pdf.

counsel on the application of 2 C.F.R. § 200.321 as it is no longer required by the Federal Procurement Rules.

Example: Waivers of Local, State, and/or Tribal Procurement Standards

Scenario: Recipients and subrecipients, pursuant to their own rules, may waive their own procurement standards or regulations due to, or in anticipation of, a disaster or emergency. Can recipients and subrecipients waive the Federal Procurement Standards?

Answer: A recipient or subrecipient can waive their own procurement standards or regulations according to their own legal requirements. Regardless of these waivers, the Federal Procurement Standards may not be waived. Therefore, a recipient and/or subrecipient cannot waive the Federal Procurement Standards.

NOTE: Recipient and subrecipients must follow the Federal Procurement Standards found at 2 C.F.R. §§ 200.317 – 200.327. How ever, federal regulations allow for noncompetitive procurements under certain circumstances, including when a local government or nonprofit determines that immediate actions required to address the public exigency or emergency cannot be delayed by a competitive solicitation. More information regarding emergency and exigency circumstances are addressed later within this Guide.

Related Tools and Resources

- ✓ Federal Procurement Under Grant Standards (Oct. 1, 2024)
- ✓ 2 C.F.R. Part 200, Subpart E
- ✓ PAPPG
- ✓ FEMA Tribal Affairs

Chapter 3: General Procurement Standards

Local Governments & Nonprofits

The Federal Procurement Standards at 2 C.F.R. § 200.318 set forth the General Procurement Standards for local governments and nonprofits. Some of these standards are mandatory, while others are encouraged by the Federal Procurement Standards. There are 11 general procurement standards: eight are mandatory, three are encouraged.

Mandatory Standards	Encouraged Standards
▪ Maintain Oversight	▪ Use of Federal Excess/Surplus Property
▪ Written Standards of Conduct	▪ Value Engineering
▪ Gifts	▪ Strategic Sourcing
▪ Conflicts of Interest	
▪ Need Determination	
▪ Contractor Responsibility Determination	
▪ Maintain Records	
▪ T&M Contracts	

1. Mandatory Standards

Local governments and nonprofits must use their own documented procurement procedures that reflect applicable state, local, and tribal laws and regulations, provided the procurement conforms to applicable federal law and the standards set forth in 2 C.F.R. Part 200.

NOTE: Local governments and nonprofits must comply with all other applicable federal laws, regulations, executive orders, and the Federal Procurement Standards in 2 C.F.R. §§ 200.318 – 200.327 when procuring services or property under a FEMA award. The requirements in this Guide only address the Federal Procurement Standards. Additional information on FEMA remedies for recipient and subrecipient noncompliance is outlined in Chapter 13 of this Guide.

1.1. Maintain Oversight

Local governments and nonprofits must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.[41] If a local government or nonprofit lacks qualified personnel to provide this oversight, as required by 2 C.F.R. § 200.318(b), then FEMA expects local governments and nonprofits to acquire the necessary personnel.

Contractors selected to perform procurement functions on behalf of local governments and nonprofits are subject to the *Uniform Rules*. Examples of this oversight include but are not limited to the following: making sure contractors comply with contract terms and conditions, invoices are correct, and goods and services are received.

1.2. Written Standards of Conduct

FEMA expects a recipient or subrecipient, when contracting under a FEMA award, to ensure that procurement transactions are conducted impartially and without preferential treatment.[42] The regulations require local governments and nonprofits to have written standards of conduct covering conflicts of interest and governing the actions of employees engaged in the selection, award, and administration of contracts. These standards must include disciplinary actions for violations of the standards of conduct.[43]

1.3. Gifts

The employees, officers, agents, and board members of local governments and nonprofits may not solicit or accept gifts, gratuities, favors, or anything of monetary value from contractors. [44] This includes entertainment, hospitality, loans, and forbearance. This also includes services as well as gifts such as training, transportation, personal travel, lodgings, and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.

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[41] 2 C.F.R. § 200.318(b).

[42] 2 C.F.R. § 200.318(c).

[43] 2 C.F.R. § 200.318(c)(1).

[44] *Id.*

1.3.1. *DE MINIMIS* GIFTS EXCEPTION

Local governments and nonprofits may set standards for accepting gratuities in situations where the financial interest is not substantial, or a gift is an unsolicited item of nominal value.[45] Federal regulations do not clarify or define "substantial" or "nominal value," so local governments and nonprofits must use their discretion. The Standards of Ethical Conduct for Employees of the Executive Branch may provide a useful guide in analyzing local government and nonprofit exceptions.[46] However, local governments and nonprofits will need to look to applicable state, local, and/or tribal requirements and consult their servicing attorney to determine if other applicable rules speak to a specific dollar amount for a *de minimis* exception.

1.4. Conflicts of Interests

No employee, officer, agent, or board member with a real or apparent conflicts of interest may participate in the selection, award, or administration of a contract supported by a federal award.[47] 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 fact and appearance.

1.4.1. REAL CONFLICT OF INTEREST

A real conflict of interest arises when an employee, officer, agent, or board member, any member of their immediate family, their 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.

Although the term "financial interest" is not defined or otherwise described in the *Uniform Rules*, a financial interest can be considered to be the potential for gain or loss to the employee, officer, agent, or board member, any member of their immediate family, their 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:

- Ownership of certain financial instruments or investments like stock, bonds, or real estate; or
- A salary, indebtedness, job offer, or similar interest that might be affected by the procurement.

45 *Id.*

46 5 C.F.R. §§ 2635.204 and 2635.304.

47 2 C.F.R. § 200.318(c).

Example: Real Conflict of Interest

Scenario: Green County, a subrecipient, does an annual review of its historic properties and identifies several structural problems at its main courthouse. Working in conjunction with its State Historic Preservation Office, Green County forms a committee to issue a Request for Proposal (RFP) to rebuild the courthouse. One of the County Commissioners is selected to serve as the chair of the committee. This County Commissioner's spouse owns a prominent construction company, which is also in Green County, called Historic Renovation & Construction Co. After submitting a proposal for the project, Green Country awards this company a contract to rebuild the courthouse. Did the subrecipient, Green County, violate the Federal Procurement Standards?

Answer: Yes. 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 their immediate family with a financial interest in a firm considered for a contract. Here, the County Commissioner's spouse, a member of their immediate family, has a financial interest in Historic Renovation & Construction Co. because the spouse owns the company. Therefore, Green County violated the Federal Procurement Standards.

1.4.2. APPARENT CONFLICT OF INTEREST

An apparent conflict of interest is an existing situation or relationship that creates the appearance that an employee, officer, agent, or board member, any member of their immediate family, their 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.

Example: Apparent Conflict of Interest

Scenario: A township operating under a FEMA grant award procures concrete from a company that offers the best rates along with the most competitive delivery schedule. The owner of the company was the college roommate of the township's purchasing officer. Did the township, which is a subrecipient, violate the Federal Procurement Standards?

Answer: Per 2 C.F.R. § 200.318(c)(1), both real and apparent conflicts of interest are prohibited. Although the township based its decision on rates and delivery schedule, the relationship between the owner of the company and the township's purchasing officer creates the appearance of personal interest when awarding the contract. Therefore, the township violated the Federal Procurement Standards.

1.4.3. ORGANIZATIONAL CONFLICTS OF INTEREST

If a recipient or subrecipient has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian Tribe, the local government or nonprofit 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 recipient or subrecipient is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.[48]

Furthermore, recipients and subrecipients must ensure that procurements under a FEMA award do not feature an organizational conflict of interest.[49] In some cases, an organizational conflict of interest means that, because of relationships with a parent company, affiliate, or subsidiary organization, a local government or nonprofit is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.[50] In other cases, an organizational conflict of interest means a circumstance where a potential contractor has either impaired objectivity, unequal access to information, or lacks the ability to set the ground rules. *See* double dipping.

FEMA expects recipients and subrecipients 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: impaired objectivity, unequal access to information, and biased ground rules.[51]

- **Impaired Objectivity:** This occurs when a contractor is unable, or potentially unable, to provide impartial and objective assistance or advice to the recipient or subrecipient due to other relationships, contracts, or circumstances. This includes 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.

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[48] 2 C.F.R. § 200.318(c)(2).

[49] 2 C.F.R. § 200.319(c)(5).

[50] 2 C.F.R. § 200.318(c)(2).

[51] FAR 9.500-9.508

- **Unequal Access to Information**: This occurs when a contractor has access to nonpublic information as part of its performance under another agreement with the recipient or subrecipient, and that information may provide the contractor with a competitive advantage.
- **Biased Ground Rules:** This arises when 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 recipient or subrecipient. An example of such a situation would be where a contractor prepares a statement of work or specifications for a recipient or subrecipient and later competes 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: A private nonprofit (PNP) hospital located within a township sustains structural damage during a hurricane. The hospital owns several subsidiary companies, including a local construction firm. Due to this relationship with the hospital, the construction firm is privy to detailed information regarding the type of structural work needed. The hospital issues an Invitation for Bids (IFB) and decides to award the contract to its own subsidiary local construction firm. Did the hospital violate the Federal Procurement Standards?

Answer: Yes. 2 C.F.R. § 200.318(c)(2) requires written standards of conduct regarding these types of organizational conflicts of interests. 2 C.F.R. § 200.319(c)(5) prohibits procurements involving organizational conflicts of interests. In this case, the hospital was unable, or appeared 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 Standards.

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.

1.4.4. DISCIPLINARY ACTIONS

The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, agents, or board members of a local government or nonprofit.[52] For example, the disciplinary action for an employee of a local government or nonprofit may be dismissal.

Another possible way to resolve a conflict of interest, if allowed under a local government's or nonprofit'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 local government or nonprofit may be able to resolve the conflict. Local governments and nonprofits are encouraged to check their state and local procurement rules regarding conflicts of interest and document any recusals in writing to include in its procurement file.

Example: Recusal

Scenario: A PNP suffers significant flooding in its headquarters building following a Major Hurricane Disaster Declaration in a large city. The PNP then issues an IFB to find mold remediation companies that can assess the flooding damage in the building. One of the procurement specialists working for the PNP has partial ownership of the company that specializes in mold remediation which plans to bid on the contract. The procurement specialist chooses to recuse themself and does not participate in the evaluation or contract selection process. The PNP documents this recusal and includes the documentation in its procurement file when seeking federal reimbursement. Did the PNP violate the Federal Procurement Standards?

Answer: No. Although the procurement specialist has a conflict of interest, due to having a financial interest as partial owner of a mold remediation company, it was resolved by way of recusal. The PNP was able to comply with the Federal Procurement Standards and avoid a conflict of interest by excluding the procurement specialist from the evaluation and selection process. Therefore, the PNP did not violate the Federal Procurement Standards.

1.5. Need Determination

Local governments and nonprofits must avoid the acquisition of unnecessary or duplicative items and procure goods and services using the most economical approach. Consideration should be given

[52] 2 C.F.R. § 200.318(c)(1).

to consolidating or breaking out procurements to obtain a more economical purchase.[53] To this end, the Federal Procurement Standards instruct local governments and nonprofits to do the following:

1.5.1. AVOID UNNECESSARY OR DUPLICATIVE ITEMS

Local governments and nonprofits must have procedures to avoid the acquisition of unnecessary or duplicative supplies or services.[54] Local governments and nonprofits must limit its procurements to its current and reasonably expected needs to carry out the scope of work under a FEMA award.[55] Local governments and nonprofits may not add items or quantities unrelated to the scope of work or procure additional items for later use. Advance contracts may be awarded 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, which are eligible for reimbursement when used to support response and recovery efforts pursuant to a financial assistance award.

Example: Procurement of Unnecessary Items

Scenario: An island municipality experiences widespread electrical outages due to a super typhoon striking the region. As a result, the municipality's airport goes without power for weeks. The airport is essential because the community relies on imported goods and supplies to successfully function and operate. A total of four generators are required to fully restore power to the airport.

Since this is the third consecutive year the island municipality has major outages at their airport due to a major typhoon, they decide to purchase eight generators using FEMA grant funding. Their reasoning is to maintain continuity of operations at the airport and to enhance preparedness for future typhoons. Did the island municipality comply with 2 C.F.R. § 200.318?

Answer: No. Pursuant to 2 C.F.R. § 200.318(d), the island municipality is prohibited from procuring unnecessary or duplicative items. In this case, the Island only needs four generators to meet its requirement of restoring power to the airport. The Federal Procurement Standards do not allow for the acquisition of duplicative items or stockpiling items for future use. Therefore, the island municipality did not comply Federal Procurement Standards.

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[53] 2 C.F.R. § 200.318(d).

[54] *Id.*

[55] 2 C.F.R. § 200.403.

1.5.2. CONSOLIDATE OR BREAK OUT PROCUREMENTS

Local governments and nonprofits should consider consolidating or breaking out procurements to obtain a more economical purchase.[56]

Example: Breaking Out Procurements

Scenario: A county publicly solicits and then receives unit price quotes from 13 different contractors for debris removal work. Contractor Anna submits the lowest bid for the removal and disposal of vegetative debris. Contractor Bob submits the lowest bid for the removal and disposal of construction and demolition debris. Contractor Carlos submits the lowest bid for both types of debris removal. Although the combined total bid from Carlos is the lowest one, he has the higher per unit price quote when compared to Anna's disposal of vegetative debris and Bob's disposal of construction and demolition debris.

The county considers the bids submitted and realizes that it would be able to obtain a more economical purchase if it broke up these purchases into separate procurement actions. The county awards a vegetative debris removal contract to Anna and a construction and demolition debris removal contract to Bob. Is the county in compliance with the Federal Procurement Standards by breaking up their procurement 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.

1.5.3. LEASE VERSUS PURCHASE ANALYSIS

Local governments and nonprofits should, when appropriate, make an analysis between leasing and purchasing property or equipment to determine the most economical approach.[57] 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.

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[56] 2 C.F.R. § 200.318(d).

[57] *Id.*

1.6. Contractor Responsibility Determination

Local governments and nonprofits must award contracts only to responsible contractors that possess the ability to perform successfully under the terms and conditions of a proposed contract.[58] FEMA requires local governments and nonprofits to document their determination that a prospective contractor qualifies as responsible, as well as its basis for such determination. In making a contractor responsibility determination, local governments and nonprofits must consider such matters as contractor integrity, public policy compliance, proper classification of employees (see the Fair Labor Standards Act, 29 U.S.C. 201, Chapter 8), past performance record, and financial and technical resources when conducting a procurement transaction.[59]

1.6.1. CONTRACTOR INTEGRITY

A contractor must have a satisfactory record of integrity and business ethics.[60] In analyzing a contractor's integrity, local governments, and nonprofits 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.

1.6.2. PROPER CLASSIFICATION OF EMPLOYEES

Local governments and nonprofits must also consider proper classification of employees (*see* the Fair Labor Standards Act, 29 U.S.C. 201, chapter 8), when conducting a procurement transaction.[61]

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[58] 2 C.F.R. § 200.318(h).

[59] *Id.*

[60] *Id.*

[61] *Id.*

1.6.3. 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 Tribes.[62] Local governments and nonprofits should look at the contractor's past and current compliance with matters to include applicable prevailing wage laws, regulations, and executive orders (EO).

1.6.4. RECORD OF PAST PERFORMANCE

A contractor must be able to demonstrate that it has enough resources (i.e., personnel and subcontractors), with adequate experience, to perform the required work.[63] In addition, the contractor must provide that it has adequate prior experience carrying out similar work, which 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.

1.6.5. FINANCIAL RESOURCES

A contractor must have adequate financial resources to perform the contract or the ability to obtain such resources.[64] In making this evaluation, local governments, and nonprofits could analyze:

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

1.6.6. TECHNICAL RESOURCES

A contractor must have or be able to acquire the required construction, production, technical facilities, and/or equipment, and other resources to perform the work under the contract.[65]

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[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

1.6.7. SUSPENSION AND DEBARMENT

Local governments and nonprofits, as well as States and Indian Tribes, must ensure the contractor is not suspended or debarred.[66] Recipient and subrecipients 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). When entering into a covered transaction, recipients and subrecipients must verify that the contractor is not excluded or disqualified, which can be done by checking the SAM Exclusions List or by collecting a certification from that contractor.[67] Please note that all contracts under a FEMA award must include the suspension and debarment clause.

If, prior to a contract award, a contractor is in good standing on SAM (i.e., not suspended or debarred), and determined to be responsible, but was later found to be suspended or debarred, a recipient or subrecipient is not required to terminate the contract. However, the recipient or subrecipient must not extend, renew, or enter into a new contract with the suspended or debarred contractor. A recipient or subrecipient is not required to keep checking SAM during the contract period of performance, but should do so if deciding to extend, renew, or enter into a new contract with the contractor.

NOTE: The *Uniform Rules* do not require recipient or subrecipient contractors to be registered in SAM. However, if the contractors are registered, and have an exclusion associated with their profile, recipients and subrecipients must not award contracts to those vendors pursuant to the requirements.

Example: Sealed Bidding and the Selection of Responsible Contractors

Scenario: Douglas Parrish is conducting a solicitation for new firetrucks under the AFG Program. Using the sealed bidding method, Douglas Parrish received the lowest bid from Affordable Fire Vehicles, Inc. In conducting a responsibility determination, the Douglas Parrish found that Affordable Fire Vehicles, Inc. previously committed fraud in obtaining a contract and does not have adequate financial resources to perform the required work within the new contract. Is Douglas Parrish required to award the contract to Affordable Fire Vehicles, Inc. because it was the lowest bid?

Answer: No. Pursuant to 2 C.F.R. § 200.318(h), local governments and nonprofits are 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, Douglas Parrish must look at contractor integrity, compliance with public policy, record of past

[66] *Id.*; 2 C.F.R. § 200.214.

[67] 2 C.F.R. § 180.300.

performance, and financial and technical resources. Here the contractor's integrity is at issue due to committing fraud previously. Moreover, Affordable Fire Vehicles, Inc. does not have adequate financial resources to perform the required work. Douglas Parrish must document its determination that Affordable Fire Vehicles, Inc. is not responsible and must also document its basis for this determination.

1.7 Maintain Records

Local governments and nonprofits are required to maintain records sufficient to detail the history of each procurement transaction.[68] These records must include, but are not limited to, the rationale for the procurement method, the contract type selection, the contractor selection or rejection, and the basis for the contract price.[69] Additionally, local government and nonprofit records must also include the contract document and any contract modifications with the signatures of all parties. Contract documents pertinent to a federal award must be retained for three years from the date of submission of the final expenditure report pursuant to 2 C.F.R. § 200.334.

Records to be retained include but are not limited to, financial records, supporting documentation, and statistical records. FEMA or pass-through entities may not impose any other record retention requirements except for the following:

- The records must be retained until all litigation, claims, or audit findings involving the records have been resolved and final action taken if any litigation, claim, or audit is started before the expiration of the three-year period.[70]
- When the recipient or subrecipient is notified in writing by FEMA or the pass-through entity, cognizant agency for audit, oversight agency for audit, or cognizant agency for indirect costs to extend the retention period.
- The records for property and equipment acquired with the support of federal funds must be retained for three years after final disposition.
- The three-year retention requirement does not apply to the recipient or subrecipient when records are transferred to or maintained by FEMA.
- The records for program income earned after the period of performance must be retained for three years from the end of the recipient's or subrecipient's fiscal year in which the program

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[68] 2 C.F.R. § 200.318(i).

[69] *Id.*

[70] 2 C.F.R. § 200.334(a).

income is earned.[71] This only applies if FEMA or the pass-through entity requires the recipient or subrecipient to report on program income earned after the period of performance in the terms and conditions of the FEMA award.

- The records for indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates) must be retained according to the applicable option below:

  - *If submitted for negotiation.* When a proposal, plan, or other computation must be submitted to the Federal Government to form the basis for negotiation of an indirect cost rate (or other standard rates), then the three-year retention period for its supporting records starts from the date of submission.

  - *If not submitted for negotiation.* When a proposal, plan, or other computation is not required to be submitted to the Federal Government to form the basis for negotiation of an indirect cost rate (or other standard rates), then the three-year retention period for its supporting records starts from the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.[72]

1.7.1 RATIONALE FOR METHOD OF PROCUREMENT

Local governments and nonprofits must document their rationale for the method of procurement used for each contract (i.e., micro-purchases, simplified acquisitions, sealed bidding, proposals, or the noncompetitive proposal methods). If utilizing the noncompetitive proposal method, the local government or nonprofit must justify with documentation why this method was necessary.

1.7.2 RATIONALE FOR CONTRACT TYPE

Local governments and nonprofits must document their rationale for selecting the type of contract used for the procurement (i.e., fixed price, cost reimbursement, or T&M). If utilizing a T&M contract, the local government or nonprofit must ensure compliance with 2 C.F.R. § 200.318(j).[73]

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*

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[71] 2 C.F.R. § 200.334(e).

[72] 2 C.F.R. § 200.334(f).

[73] 2 C.F.R. § 200.318(i).

*a contract entered into after Aug. 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.*** " (*See* Sec. 1225 of the Disaster Recovery Reform Act of 2018).

1.7.3 CONTRACTOR SELECTION

Local governments and nonprofits must document their rationale for contractor selection or rejection, including a written responsibility determination for the successful contractor.[74]

1.7.4 PRICE

Local governments and nonprofits must document the basis for the contract price.[75] In addition to adequate market research, including independent cost estimates, local governments and nonprofits must include cost or price analysis documentation for contracts exceeding the federal SAT.[76]

1.7.5 OTHER DOCUMENTATION

Local governments and nonprofits should also include the following documentation in its procurement file:

- Solicitation documents such as RFPs or IFBs;
- FEMA or recipient or subrecipient review;
- The statement of work/scope of services;
- A list of sources solicited;
- Copies of published notices of proposed contract action and notices to proceed;
- Copies of contracts, change orders, summary of invoices, 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;

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[74] 2 C.F.R. § 200.320.

[75] 2 C.F.R. § 200.318(i).

[76] 2 C.F.R. § 200.324(a).

- Dates worked to validate that work was completed within award's period of performance;
- Documentation that substantiates a high degree of oversight such as weekly logs and records of performance meetings; and
- Copies of bid, performance, payment, and other bond documents.

The *Uniform Rules* provide that FEMA, DHS OIG, 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 recipients and subrecipients which are pertinent to the FEMA award in order to make audits, examinations, excerpts, and transcripts.[77] All recipients and subrecipients must acknowledge and agree to comply with applicable provisions governing DHS access to records, accounts, documents, information, facilities, and staff. All recipients and subrecipients must require any contractors, successors, transferees, and assignees to acknowledge and agree to comply with the regulation and applicable terms and conditions.[78]

Example: Records Must Detail the History of the Procurement

Scenario: A hurricane made landfall in a town, 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 Standards?

Answer: No, the town is not in compliance with the Federal Procurement Standards. Pursuant to 2 C.F.R. § 200.318(i), local governments and nonprofits must maintain records enough 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

[77] 2 C.F.R. § 200.337; FY 2025 DHS Standard Terms and Conditions.

[78] *Id.*

responsiveness of its bid. The town is required to document and maintain this information in its procurement file.

1.7.6 SETTLEMENT OF ISSUES

Local governments and nonprofits alone are responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements.[79] These issues include, but are not limited to, source evaluation, protests, disputes, and claims.[80]

The *Uniform Rules* do not relieve local governments and nonprofits of any contractual responsibilities under its contracts.[81] Additionally, FEMA will not substitute its judgment for that of the local government or nonprofit in resolving contractual and administrative issues unless the matter is primarily a federal concern.[82] A matter that is primarily of federal concern includes, but is not limited to, noncompliance with:

- Any federal law;
- Any of the Federal Procurement Standards;
- Any other federal regulation;
- Any federal executive order; or
- Any other impropriety, waste, fraud, or abuse.

FEMA and local governments and nonprofits must refer violations of law to the federal, state, local, and/or tribal authority having proper jurisdiction.[83]

Example: Recipients/Subrecipients are Responsible for the Settlement of Issues

Scenario: A city utilized the competitive proposal method in procuring an engineer to assist in rebuilding a bridge that was damaged in a hurricane. In its RFP, the city listed five evaluation factors and assigned percentage points to each. The city gave 25% to prior experience specific

[79] 2 C.F.R. § 200.318(k).

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

to bridges. The city received four proposals and selected Contractor Z because it scored 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 prior experience. As a result, Contractor Y files a protest. Will FEMA assist the city 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).

1.8 Time-and-Materials Contract

A T&M contract is a contract whose cost to a local government and nonprofit is:

- The sum of the actual cost of materials[84]; and
- Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.[85]

No fee or profit is allowed, except as part of the fixed billing rate for direct labor hours. Materials must be billed at cost, including allowable direct and indirect costs. A local government or nonprofit may use a T&M 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.[86]

The ceiling price should not be so high as to render it meaningless as a cost control measure.

A T&M 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 T&M contracts. The Federal Procurement Standards require local governments and nonprofits to assert a high degree of oversight to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.[87]

In some cases, a T&M 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

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[84] 2 C.F.R. § 200.318(j)(1)(i).

[85] 2 C.F.R. § 200.318(j)(1)(ii).

[86] 2 C.F.R. § 200.318(j)(1).

[87] 2 C.F.R. § 200.318(j)(2).

confidence in the immediate aftermath of the incident. Such a contract must still include a contract ceiling price,[88] and the local government or nonprofit should transition into a more appropriate pricing structure as soon as possible. Specifically, after a period of exigency or emergency has ended, the local government or nonprofit 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.

1.8.1 CONSIDERATIONS FOR STATE AND INDIAN TRIBES USING T&M CONTRACTS

While the Federal Procurement Standards allow state entities to use a T&M contract when permissible under state or tribal law, States or Indian Tribes should also maintain a high degree of oversight of this contract type. All recipients and subrecipients must abide by the *Cost Principles* in 2 C.F.R. Part 200, Subpart E to ensure that all costs are reasonable. FEMA cautions against the use of T&M contracts because they provide no positive incentive to the contractor for cost control or labor efficiency.

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 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 T&M 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

[88] 2 C.F.R. § 200.318(j)(1).

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.

2. Encouraged Standards

In addition to the mandatory requirements, the Federal Government encourages local governments and nonprofits to utilize additional standards whenever deemed practical by the entity. The encouraged standards are in place to incentivize FEMA award recipients to use cost effective methods to obtain goods and services. Unlike the mandatory requirements, the encouraged standards are not required.

2.1 Use of Federal Excess and Surplus Property

The General Services Administration (GSA) carries out the Federal Surplus Personal Property Donation Program,[89] which donates surplus federal property to eligible public agencies.[90] The federal rules encourage local governments and nonprofits to use the federal surplus property as an alternative to purchasing new equipment to reduce project costs.[91]

The process for requesting surplus property for donation varies depending on what type of eligible entity is making the request. Generally, 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.[92] For most public and nonprofit activities, the SASP determines if the recipient or subrecipient is an eligible entity and able to receive such donations.

2.2 Use of Value Engineering

The Federal Procurement Standards encourage local governments and nonprofits to use value engineering clauses in contracts for construction projects large enough to offer reasonable opportunities for cost reductions.[93] 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. It

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[90] 40 U.S.C. § 549(c)(3); 41 C.F.R. § 102-37.380(b).

[91] 2 C.F.R. § 200.318(f).

[92] 40 U.S.C. § 549(a)(3); 41 C.F.R. Part 102-37, Subpart D (State Agency for Surplus Property).

[93] 2 C.F.R. § 200.318(g).

promotes the substitution of materials and methods with less expensive alternatives without sacrificing functionality. With 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.[94]

2.3. Procurement Arrangements Using Strategic Sourcing

When appropriate for the procurement or use of common or shared goods and services, recipients and subrecipients are encouraged to enter into State and local intergovernmental agreements or inter-entity agreements for procurement transactions. These or similar procurement arrangements using strategic sourcing may foster greater economy and efficiency. Documented procurement actions of this type (using strategic sourcing, shared services, and other similar procurement arrangements) will meet the competition requirements of this part.[95] Recipients and subrecipients wishing to utilize intergovernmental agreements must be able to demonstrate that the procurements complied with all applicable Federal Procurement Standards. Examples of encouraged intergovernmental or inter-entity agreements include joint procurements and cooperative purchasing programs. *See* Cooperative Purchasing section.

3. Procurement Policy Checklist

The below checklist features a series of questions to assist local governments and nonprofits when checking for mandatory, encouraged, and non-prohibited procurement standards within their organization's procurement policies and procedures.

NOTE: This checklist is not an exhaustive list of all applicable federal requirements for local governments and nonprofits.

General Procurement Standards Mandatory Rules		Supporting Documentation
Does your organization have and use its own documented procurement procedures which reflect applicable state, local, tribal, and territorial laws and regulations, provided the procurement conforms to applicable Federal law and the standards set forth in 2 C.F.R. Part 200? *See* 2 C.F.R. § 200.318(a).	*Yes* ☐ *No* ☐	Documented procurement policies and procedures
Does your organization have policies and procedures requiring contractor oversight to ensure that contractors perform in accordance with the terms, conditions, and		Procurement policies and procedures should contain:

[94] 48 C.F.R. § 48.101(a)(1).

[95] 2 C.F.R. § 200.318(e).

specifications of the contract or purchase order? *See* [2 C.F.R. § 200.318(b).]	*Yes* ☐ *No* ☐	Procedures describing oversight ☐ Details of payment/invoice process ☐ Receiving/acceptance of good and services ☐ Reporting requirements ☐
Does your organization have written standards of conduct covering conflicts of interest and the actions of employee engaged in the selection, award, and administration of contracts? *See* [2 C.F.R. § 200.318(c).]	*Yes* ☐ *No* ☐	Written standards of conduct policies ☐
Does your organization have policies to ensure officers, employees, and agents of local governments and nonprofits may neither solicit nor accept gifts or gratuities, favors, or anything of monetary value from contractors or parties to subcontracts? *See* [2 C.F.R. § 200.318(c)(1).]	*Yes* ☐ *No* ☐	Review your organization's procurement policies and procedures to ensure that there is a prohibition on gifts. Examples of gifts may include: Entertainment and hospitality; ☐ Loans and forbearance; ☐ Travel, lodging and meals; and/or ☐ Apparel and training offerings. ☐ **NOTE:** Local governments and nonprofits may set standards for accepting gratuities when the financial interest is not substantial. *See* [*De Minimus Gift Exception.*]
Does your organization have policies to ensure no employee, officer, agent, or board member may participate in the selection, award, or administration of a contract supported by federal award if they have a real or apparent conflict of interest? *See* [2 C.F.R. § 200.318(c)(1).] **NOTE:** Policies may outline recusal processes by employees, officers, agents, or board members of a local government or	*Yes* ☐ *No* ☐	Review your organization's procurement policies and procedures for rules related to: Real conflict of interest; ☐ Apparent conflict of interest; and ☐

nonprofit involved in the awarding and administration to mitigate or avoid conflict of interest.		Organizational Conflict of Interest. ☐
Does your organization have procedures to avoid the acquisition of unnecessary or duplicative items and procedures to procure goods and services using the most economical approach when feasible? *See* 2 C.F.R. § 200.318(d).	*Yes* ☐ *No* ☐	Written procedures to avoid unnecessary or duplicative items. ☐
Did your organization award a contract only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement? *See* 2 C.F.R. § 200.318(h).	*Yes* ☐ *No* ☐	Review your organization's policies and procedures to ensure that contractor responsibility determination is required. Local governments and nonprofits must determine that selected contractors are responsible by documenting: Contractor integrity; ☐ Compliance with public policy; ☐ Record of past performance; ☐ Copy of certification; ☐ Contract with applicable; Clause; ☐ Financial and technical resources; ☐ and Contractor is not suspended or debarred by checking SAM.gov. ☐

Does your organization have procedures to settle all contractual and administrative issues arising out of procurements? *See* [2 C.F.R. § 200.318(k).]()	*Yes* ☐ *No* ☐	Procurement policies and procedures to ensure they document how issues will be settled between the local government or nonprofit and their contractor. ☐

Related Tools and Resources

- ✓ [GSA Programs for State and Local Governments]()
- ✓ [Contract Provisions Guide]()
- ✓ [OMB Guidelines on Suspension and Debarment]()

Chapter 4: Competition

Local Governments & Nonprofits

The Federal Procurement Standards set forth at 2 C.F.R. § 200.319 require local governments and nonprofits to conduct all procurement transactions for the acquisition of property or services required under a federal award in a manner providing “full and open competition” consistent with the standards in this section and the methods of procurement at 2 C.F.R. § 200.320. 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; and
- Preventing favoritism, collusion, fraud, waste, and abuse.

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. Local governments and nonprofits failing to provide for full and open competition is a common DHS 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 are noncompliant with the Federal Procurement Standards. **NOTE:** Noncompetitive procurements can only be awarded in accordance with 2 C.F.R. § 200.320(c), which is further explained in the Noncompetitive Procurement section in Chapter 5: Methods of Procurement of Procurement in this Guide.[96]

1. Restrictions to Competition

The Federal Procurement Standards identify seven situations that are considered restrictive of competition and must be avoided by local governments and nonprofits.[97] The list below of other prohibited restrictions is an illustrative and non-exhaustive list. FEMA may consider other situations as restrictive of competition, even if they are not specifically featured here in this list. These seven situations include:

96 2 C.F.R. § 200.319(g).

97 2 C.F.R. § 200.319(c).

1.1. Unreasonable Requirements

Local governments and nonprofits must not place unreasonable requirements on firms for them to qualify to do business.[98] Solicitation documents must reflect the local government's or nonprofit's actual needs and not include unnecessary requirements that unduly restrict competition.

1.2. Requiring Unnecessary Experience or Excessive Bonding

Local governments and nonprofits must not require unnecessary experience and excessive bonding.[99] 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, local governments and nonprofits must not require excessive bonding because it increases the costs incurred by the contractor and is restrictive of competition. This is particularly the case regarding 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 local governments and nonprofits are contracting for construction and facility improvement projects, certain federal bonding requirements may apply.

Even though bonding can be expensive, local governments and nonprofits 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. § 200.326](). In these instances, because bonding requirements can limit contractor participation, a local government's or a nonprofit'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

98 2 C.F.R. § 200.319(c)(1).

99 2 C.F.R. § 200.319(c)(2).

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.

1.3. Noncompetitive Pricing Practices

Noncompetitive pricing practices between firms or between affiliated companies are prohibited.[100] Local governments and nonprofits 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. Common noncompetitive pricing practices, identified by the U.S. Department of Justice (DOJ), include bid rigging, bid suppression, complementary bidding, and bid rotation.[101]

1.3.1. BID RIGGING

Bid rigging occurs when competitors conspire to raise prices in a bidding process. 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.

1.3.2. BID SUPPRESSION

In bid suppression schemes, one or more competitors, 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.

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[100] 2 C.F.R. § 200.319(c)(3).

[101] "Price Fixing, Bid Rigging, and Market Allocation Schemes: What They are and What to Look For," U.S. Department of Justice, Antitrust Division, https://www.justice.gov/atr/file/810261/dl.

1.3.3. COMPLEMENTARY BIDDING

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 unacceptable special terms. 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.

1.3.4. BID ROTATION

In bid rotation schemes, all conspirators submit bids but take turns being the lowest 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.

1.4. Noncompetitive Contracts to Contractors on Retainer

Local governments and nonprofits must not make noncompetitive awards to consultants that are on retainer contracts.[102] A retainer contract is generally any form of agreement for general, unspecified services or broad types of services such as architectural and engineering (A/E) , 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 FEMA 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.

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 FEMA Public Assistance (PA) 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

[102] 2 C.F.R. § 200.319(c)(4).

construction." The retainer contract simply provides for Firm to provide all architectural and engineering services needed by Town W, and the contract was not procured in compliance with the Federal Procurement Standards. Following approval of the PA 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 – 200.327. Local governments and nonprofits must not make a noncompetitive award to a contractor that is on retainer.[103] Town W made a noncompetitive contract award for work to be done under a FEMA 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(c)(4).

NOTE: Please see the section on prepositioned contracts for additional information on allowed use of existing contracts for FEMA awards.

1.5. Double Dipping

Local governments and nonprofits must ensure that procurements are free from organizational conflicts of interest.[104] In addition to the examples of organizational conflicts of interest as found in Chapter 3: General Procurement Standards of this Guide, an organizational conflict of interest can also occur when contractors compete for awards for which they have developed or drafted solicitation documents such as specifications, requirements, statements of work, or IFBs. To ensure objective contractor performance, contractors that have developed or drafted the documents listed above must be excluded from competing for such requirements.[105] This procurement practice, known as "double dipping," gives an unfair competitive advantage to the contractor that developed or drafted the solicitation documents and must be avoided.

The Federal Procurement Standards aim to prevent fraud, including the practice of double dipping. In addition to conducting the procurement in a full and competitive manner, local governments and nonprofits must ensure that contracts under a FEMA award are only awarded to responsible contractors.[106] *See* contractor responsibility determination.

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[103] 2 C.F.R. § 200.319(c)(4).

[104] 2 C.F.R. § 200.319(c)(5).

[105] 2 C.F.R. § 200.319(b).

[106] 2 C.F.R. § 200.318(h).

Example: “Double Dipping”

Scenario: County X, lacking the technical knowledge surrounding the equipment necessary to complete a project under the FEMA grant 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 an 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 Standards?

Answer: No. 2 C.F.R. § 200.319(b) states that contractors that develop or draft specifications, requirements, statements of work, or invitations for bids (ITB) 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. 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

FEMA award recipients and subrecipients play a critical role in helping to identify fraud and are highly encouraged to report suspicious activities at any time during the procurement process by contacting:

- FEMA Fraud and Investigation Division
  - Email: StopFEMAFraud@fema.dhs.gov
  - Phone: 1-866-223-0814
- DHS OIG Hotline
  - Email: https://hotline.oig.dhs.gov/#step-1
  - Phone: 1-800-323-8603
- FEMA S&D
  - Email: femas&d@fema.dhs.gov

- U.S. Department Justice National Center for Disaster Fraud Complaint Form
    - Phone: 1-866-720-5721

1.6. Specifying Only a Brand Name Product

It is restrictive of competition for local governments and nonprofits to specify only a "brand name" product instead of allowing "an equivalent" product to be offered.[107] When it is impractical or uneconomical to write a clear and accurate description of the technical requirements of the goods or services to be acquired, local governments and nonprofits may use a "brand name or equivalent" description as a means to define the performance or other pertinent requirements of the procurement. If a local government or nonprofit 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.

1.7. Any Arbitrary Action in the Procurement Process

Local governments and nonprofits must not engage in any arbitrary actions in the procurement process.[108] The term "arbitrary" generally refers to an action or decision that depends on individual discretion, or something that is otherwise made without consideration of or regard for facts, circumstances, fixed rules, or procedures.[109] 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.

2. Written Procedures

The Federal Procurement Standards require all local governments and nonprofits to have written procedures for procurement transactions.[110] These written procedures must ensure that all solicitation documents meet the following requirements:

2.1. Eliminate Unfair Competitive Advantage

Written procedures for procurement transactions must comply with 2 C.F.R. § 200.319(b) to ensure objective contractor performance and eliminate unfair competitive advantage. Accordingly, contractors that develop or draft specifications, requirements, statements of work, or IFBs under a FEMA award must be excluded from competing on those procurements.[111]

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[107] 2 C.F.R. § 200.319(c)(6).

[108] 2 C.F.R. § 200.319(c)(7).

[109] *Black's Law Dictionary* (12th ed. 2024).

[110] 2 C.F.R. § 200.319(d).

[111] 2 C.F.R. § 200.319(d)(1).

2.2. Clear and Accurate Description of Requirements

Solicitations must incorporate a clear and accurate description of the technical requirements for the property, equipment, or service being procured.[112] These descriptions enable potential contractors to understand the requirements and prepare sound proposals to satisfy those requirements.

2.3. Qualitative Requirements

The description of technical requirements may include a statement of the qualitative nature of the property, equipment, or service to be procured, and when necessary, it must describe the minimum essential characteristics to satisfy the intended use of that property, equipment, or service.[113]

2.4. Product Specifications

Detailed product specifications should be avoided, if possible.[114] 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.[115]

2.5. 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.[116]

2.6. Prequalified Lists

All prequalified lists of persons, firms, or products used in procurement transactions must be current and include enough qualified sources to ensure maximum open competition.[117] See the requirements section when using prequalified lists in Chapter 12: Beyond the Basics.

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[112] 2 C.F.R. § 200.319(d)(2).

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] 2 C.F.R. § 200.319(d)(3).

[117] 2 C.F.R. § 200.319(e).

2.7. Encouraging U.S. Jobs

To the extent consistent with applicable established practices, terms and conditions, and legal requirements, recipients and subrecipients are not prohibited from developing written procedures for procurement transactions that incorporate scoring mechanisms that reward bidders who commit to specific numbers and types of U.S. jobs, minimum compensation, benefits, on-the-job training for employees producing work products or providing services under a contract, and other worker protections. Recipients and subrecipients are also not prohibited from inquiring about these topics from bidders and evaluating their responses.[118]

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[118] 2 C.F.R. § 200.319(f).

Chapter 5: Methods of Procurement

When purchasing under a FEMA award, local governments and nonprofits must use one of the following five methods of procurement: micro-purchases, simplified acquisitions, sealed bids, proposals, or noncompetitive procurement.[119]

The *Uniform Rules* divide the methods of procurement into three categories: informal procurement methods, formal procurement methods, and noncompetitive procurements. Informal methods of procurement are to be used for purchases under the Federal SAT, whereas formal methods of procurement are to be exercised for purchases over the Federal SAT. **NOTE:** There is no threshold for a noncompetitive procurement. A local government or nonprofit 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 state, local, and/or tribal requirements are. For any of these methods, the recipient or subrecipient must maintain and use documented procurement procedures, consistent with the standards of this section and 2 C.F.R. §§ 200.318 and 200.319.

Method of Procurement		
Informal	**Formal**	**Noncompetitive**
▪ Micro-Purchases ▪ Simplified Acquisitions	▪ Sealed Bids ▪ Proposals	▪ Micro-Purchases ▪ Single Source ▪ Public Emergency or Exigency ▪ Federal Awarding Agency or Pass Through Entity Approval ▪ Inadequate Competition

[119] 2 C.F.R. § 200.320.

1. Informal Methods

Informal procurement methods for small purchases expedite the completion of transactions, minimize administrative burdens, and reduce costs. Informal procurement methods may be used when the value of the procurement transaction under the federal award does not exceed the Federal SAT. Recipients and subrecipients may also establish a lower threshold. Informal procurement methods include:

1.1. Procurement by Micro-Purchases

Procurement by micro-purchase is the acquisition of supplies, property, or services where the aggregate dollar amount of the transaction does not exceed the Federal micro-purchase threshold.[120] As of June 2018, the Federal micro-purchase threshold is $10,000.[121] Micro-purchase procedures are a subset of a local government's or nonprofit's small purchase procedures. These procedures expedite the completion of the lowest-dollar small purchase transactions and minimize the associated administrative burden and cost.

Local governments and nonprofits may self-certify a micro-purchase threshold up to $50,000 annually or request a micro-purchase threshold higher than $50,000 consistent with the requirements at 2 C.F.R. § 200.320(a)(1)(ii)-(v). However, local governments and nonprofits should consult their servicing legal counsel to determine whether any applicable state, local, and/or tribal equivalent threshold is lower than the Federal micro-purchase threshold. Self-certification must include a justification that clearly identifies the applicable micro-purchase threshold and provide FEMA with supporting documentation of any of the following:

- A qualification as a low-risk auditee, in accordance with the criteria in 2 C.F.R. § 200.520 for the most recent audit;
- An annual internal institutional risk assessment to identify, mitigate, and manage financial risks; or,
- For public institutions, a higher threshold is consistent with state law.[122]

Recipients or subrecipients requesting a micro-purchase threshold over $50,000 must receive approval from the cognizant agency for indirect costs.[123] The recipient or subrecipient must submit a

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120 2 C.F.R. § 200.1 *Micro-purchase threshold*; 48 C.F.R. § 2.101 "Micro-purchase threshold" – The micro-purchase threshold is adjusted from time to time.

121 Section 41 U.S.C. § 1902(a)(1); OMB Memo (M-18-18), *see* https://www.grants.gov/learn-grants/grant-policies/omb-grant-memoranda.html.

122 2 C.F.R. § 200.320(a)(1)(iv).

123 2 C.F.R. § 200.320(a)(1)(v).

request that includes the requirements in 2 C.F.R. §200.320(a)(1)(iv). The increased threshold is valid until any factor that was relied on in the establishment and rationale of the threshold changes.

"Splitting Procurements"

Local governments and nonprofits are prohibited from dividing or "splitting" large procurements into smaller purchases for the purposes of falling below the Federal SAT or micro-purchase threshold.

1.1.1. WHEN TO USE

Local governments and nonprofits wishing to purchase supplies or services by micro-purchase should not exceed the Federal micro-purchase threshold, or the applicable state/local/tribal threshold, whichever is lowest. In other words, local governments, and nonprofits must follow the micro-purchase threshold that allows for compliance at all levels.[124]

Micro-purchases may be awarded without soliciting competitive price or rate quotations if the recipient or subrecipient considers the price reasonable based on research, experience, purchase history, or other information, and maintains documents to support its conclusion. Purchase cards may be used as a method of payment for micro-purchases.

1.1.2. APPLICABLE PROCEDURES

- **Competition:** Local governments and nonprofits may award micro-purchases without soliciting competitive quotations if it considers the price to be fair and reasonable. To the extent practicable, local governments and nonprofits must distribute micro-purchases equitably among qualified suppliers.

- **Prohibited Divisions:** Local governments and nonprofits must not divide or reduce the size of its procurement to avoid the additional procurement requirements applicable to larger acquisitions. *See* needs determination.

- **Documentation:** Local governments and nonprofits must document their determination that the price is fair and reasonable, and the basis for that determination.

- **Responsibility:** Local governments and nonprofits must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the solicitation and contract.

[124] 2 C.F.R. § 200.320(a)(1)(iii).

1.2. Micro-Purchase Checklist

The below checklist features a series of questions to assist local governments and nonprofits consider certain factors when conducting a micro-purchase method of procurement under a FEMA award. These factors include, but are not limited to, the procurement dollar amount and required contract provisions to ensure compliance with the Federal Procurement Standards. *See* 2 C.F.R. § 200.320(a)(1).

NOTE: If you respond "**no**" to any of the questions below, your organization's procurement may not be compliant with the Federal Procurement Standards. It is recommended that you visit the Purchasing Under a FEMA Award Resource Library for assistance with compliance matters.

Requirement		Supporting Documentation
Is the price fair and reasonable?	*Yes* ☐ *No* ☐	Evidence of market research ☐ Short narrative on letterhead ☐ Other: (*ex: receipt, invoice)* ☐
Does your organization maintain records sufficient to detail the history of a procurement? *See* 2 C.F.R. § 200.318(i) . **NOTE:** Contract document must include any contract modifications with signatures (or acceptance) by all parties.	*Yes* ☐ *No* ☐	Review your organization's procurement file and records for: Rationale for the method of procurement; ☐ Selection of the contract type; ☐ Contractor selection or rejection; ☐ Basis for contract price; and ☐ Self-Certification up to $50,000 (*See* 2 C.F.R. § 200.320(a)(1)(ii)-(v).) ☐
Did your organization document its rationale for contractor selection or rejection? *See* 2 C.F.R. § 200.318(i).	*Yes* ☐ *No* ☐	Check for procurement file for: Scope of Work; ☐ List of sources solicited; and ☐ Copies of bid, performance, payment, and other documents. ☐

<table>
<tr><td>Did your organization enter a T&M contract?

NOTE: If your organization did not enter a T&M contract this question can be skipped. *See* T&M contracts section for more information.</td><td>*Yes* ☐

No ☐</td><td>If yes, did you include the following?

Justification explanation of why a T&M contract was the only suitable contract type; ☐

A contract ceiling price (that the contractor exceeds at own risk) clearly defined in the contract; ☐

How your organization maintained a high degree of oversight of this contract type (including daily or weekly logs, records of performance meetings, etc.); and ☐

A transition to a more appropriate contract type as soon as possible (if applicable). ☐</td></tr>
<tr><td>Did your organization ensure that a CPPC type was not used? CPPC contracts are prohibited by the Federal Procurement Standards. *See* 2 C.F.R. § 200.324(c).</td><td>*Yes* ☐

No ☐</td><td>Review the below to ensure they do not contain elements of CPPC contracts:

Contract ☐

Pricing schedule ☐</td></tr>
<tr><td colspan="3">**Required Contract Provisions**</td></tr>
<tr><td colspan="3">**NOTE:** The Federal Procurement Standard at 2 C.F.R. § 200.327 requires that recipient and subrecipient contracts contain the applicable provisions described in Appendix II to Part 200 of the Uniform Rules *(Contract Provisions for Non-Federal Entity Contracts Under Federal Awards).*</td></tr>
<tr><td>If the contract is for construction work and more than $2,000, did your organization include the required Davis-Bacon Act Clause?

NOTE: This clause **only** applies to the following FEMA grant programs: EMPG, HSGP, NSGP, THSGP, PSGP, IPR, HHPD, Safeguarding Tomorrow RLF, and TSGP.</td><td>*Yes* ☐

No ☐

N/A ☐</td><td>Indicate the page number where a FEMA representative can locate the clause in contract document.

Pg.:</td></tr>
</table>

If the contract is for construction or repair work more than $2,000, did your organization include the required Copeland Anti-Kickback Act Clause? **NOTE:** This clause is **only** required in situations where the Davis-Bacon Act also applies.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract meets the definition of "funding agreement", did your organization include the required Rights to Inventions Made Under a Contract or Agreement clause? **NOTE:** This clause is **not** required under the PA, HMGP, FMA, PDM, FMAG, HMGP Post Fire, CCP, DCM, IHP-ONA, or Safeguarding Tomorrow RLF programs, as FEMA Awards under these programs do not meet the definition of "funding agreement".	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
Did your organization include a clause restricting use of covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system? *See* 2 C.F.R. § 200.216.	*Yes* ☐ *No* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is for the purchase of goods, materials, or products, did your organization include a domestic preference clause? *See* 2 C.F.R. § 200.322.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
Did your organization include a clause and self-certification of contracts and subcontracts for infrastructure projects subject to the BABAA requirements? *See* 2 C.F.R. Part 184.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause and self-certification in the contract document. Pg.:
Did your organization consider including the FEMA **recommended** provisions outlined in PDAT's Contract Provision's Guide? This is **not** a requirement, and contracts will not be deemed noncompliant for failure to include these provisions.		

1.3. Procurement by Simplified Acquisitions

Procurement by simplified acquisition procedures is a relatively simple and informal procurement method for securing services, supplies, or property that does not exceed the Federal SAT,[125] currently set at $250,000.[126] Local governments and nonprofits should consult their servicing legal counsel to determine whether any applicable state/local/tribal equivalent monetary threshold is lower than the Federal SAT.

1.3.1. WHEN TO USE

Local governments and nonprofits should not exceed the Federal SAT or the lowest applicable state, local, or tribal threshold when purchasing supplies or services by simplified acquisitions. In other words, they must follow the monetary threshold that allows for compliance at all levels.

Contracts resulting from simplified acquisition 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 Federal SAT.

1.3.2. APPLICABLE PROCEDURES

- **Competition:** Local governments and nonprofits must obtain price or rate quotations from an adequate number of qualified sources. The recipient or subrecipient may exercise judgment in determining what number is adequate. An adequate number of sources will be determined by the local governments or nonprofits and will depend on the facts and circumstances of the procurement. FEMA encourages at least three price or rate quotations when using simplified acquisition procedures.

- **Prohibited Divisions:** Local governments and nonprofits must not split a larger procurement merely to bring the cost of a procurement under the Federal SAT. Similarly, local governments and nonprofits must not intentionally limit the size of a procurement to only a portion of the known requirement to lower the cost of a procurement to under the Federal SAT and then issue a follow-on change order to fulfill the entire requirement that brings the procurement above the simplified acquisition threshold.

- **Documentation:** Local governments and nonprofits 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 Federal SAT.

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125 2 C.F.R. § 200.1 *Simplified acquisition threshold*; 48 § C.F.R. 2.101 “Simplified acquisition threshold”. The simplified acquisition threshold is adjusted from time to time.

126 Section 805 codified at 41 U.S.C. § 134; OMB Memo (M-18-18), *see* https://www.grants.gov/learn-grants/grant-policies/omb-grant-memoranda.html.

- **Responsibility:** Local governments and nonprofits must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the solicitation and contract.

1.3.3. FUTURE CHANGES THAT CAUSE THE CONTRACT TO EXCEED FEDERAL SAT

It may be the case that a local government or nonprofit properly used simplified acquisition procedures to acquire services or property below the Federal SAT but later needs to modify the contract to an amount above the threshold to cover unforeseen circumstances or an unexpected overrun in costs.

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 local government or nonprofit should document its justification. FEMA may utilize this justification along with the local government's or nonprofit's independent estimate completed before the procurement in reviewing whether the local government's or nonprofit's decision to use simplified acquisition procedures was permissible.

1.4. Simplified Acquisitions Checklist

The below checklist features a series of questions to assist local governments and nonprofits in considering certain factors when conducting a simplified acquisition method of procurement under a FEMA award. These factors include but are not limited to the procurement dollar amount and required contract provisions to ensure compliance with the Federal Procurement Standards. *See* 2 C.F.R. § 200.320(a)(2).

NOTE: If you respond "**no**" to any of the questions below, your organization's procurement may not be compliant with the Federal Procurement Standards. It is recommended that you visit the Purchasing Under a FEMA Award Resource Library for assistance with compliance matters.

Requirement		Supporting Documentation
Is the price fair and reasonable?	*Yes* ☐ *No* ☐	Evidence of market research ☐ Short narrative on letterhead ☐ Other: (ex: receipt, invoice) ☐
Did your organization obtain price or rate quotations from an adequate number of qualified sources? *See* 2 C.F.R. § 200.320(a)(2)(i). **NOTE:** Adequate number is determined by the entity based on specific respective procurement circumstances. FEMA encourages at least three price or rate quotations when using simplified acquisition procedures.	*Yes* ☐ *No* ☐	Adequate number of qualified sources determined to be appropriate for this procurement: ____________ Justification Provided ☐

Did your organization ensure that a CPPC type was not used? CPPC contracts are prohibited by the Federal Procurement Standards. *See* 2 C.F.R. § 200.324(c).	*Yes* ☐ *No* ☐	Review the below to ensure they do not contain elements of CPPC contracts: Contract ☐ Pricing schedule ☐
Does your organization maintain records sufficient to detail the history of a procurement? *See* 2 C.F.R. § 200.318(i).	*Yes* ☐ *No* ☐	Review your organization's procurement file and records for: Rationale for the method of procurement; ☐ Selection of the contract type; ☐ Contractor selection or rejection; and ☐ Basis for contract price. ☐ **NOTE:** Contract document must include any contract modifications with signatures (or acceptance) by all parties.
Did your organization document its rationale for contractor selection or rejection? *See* 2 C.F.R. § 200.318(i).	*Yes* ☐ *No* ☐	Check for procurement file for: Scope of Work; ☐ List of sources solicited; and ☐ Copies of bid, performance, payment, and other documents. ☐
Did your organization enter a T&M contract? **NOTE:** If your organization did not enter a T&M contract this question can be skipped.	*Yes* ☐ *No* ☐	If yes, did you include the following? Justification explanation of why a T&M contract was the only suitable contract type; ☐ A contract ceiling price (that the contractor exceeds at own risk) clearly defined in the contract; ☐

<table>
<tr><td></td><td>How your organization maintained a high degree of oversight of this contract type (including daily or weekly logs, records of performance meetings, etc.); and ☐

A transition to a more appropriate contract type as soon as possible (if applicable). ☐</td></tr>
<tr><th colspan="2">Competition Requirements</th></tr>
<tr><td colspan="2">For more information on competition requirements see 2 C.F.R. § 200.319.</td></tr>
<tr><td>Did your organization ensure that it did not restrict competition by having unreasonable requirements. See 2 C.F.R. § 200.319(c). Examples of this include:

○ Solicitation documents must reflect actual needs and not place unreasonable requirements on firms to qualify to do business.
○ Unnecessary levels or years of experience for contractors to do business must not be required.
○ Excessive bonding increases the costs incurred by the contractor and limits the opportunity for target firms to compete for a contract under a FEMA award.
○ Specifying only a “brand name” product instead of allowing an “equivalent” or “compatible” product.

Yes ☐
No ☐</td><td>Review the following solicitation and advertising documents to include to determine if your organization restricted competition by setting parameters or evaluation factors determined to be unreasonable and therefore restrictive of competition.

Request for Proposal (RFP) ☐

Invitation for Bid (IFB) ☐

Request for Quote (RFQ) ☐

Advertisements ☐

Other: (ex: bonds, evaluations, scoring, etc.)</td></tr>
<tr><th colspan="2">Required Contract Provisions</th></tr>
<tr><td colspan="2">NOTE: The Federal Procurement Standard at 2 C.F.R. § 200.327 requires that recipient and subrecipient contracts contain the applicable provisions described in Appendix II to Part 200 of the Uniform Rules (Contract Provisions for Non-Federal Entity Contracts Under Federal Awards).</td></tr>
<tr><td>If the contract is over $250,000,did your organization include a Remedies clause?

NOTE: AFG recipients must include a penalty clause in all contracts for any AFG-funded vehicle.

Yes ☐
No ☐
N/A ☐</td><td>Indicate the page number where a FEMA representative can locate the clause in contract document.

Pg.:</td></tr>
</table>

If the contract is more than $10,000, did your organization include a Termination for Cause and Convenience clause?	Yes ☐ No ☐ N/A ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is for construction work and more than $2,000, did your organization include the required Davis-Bacon Act Clause? **NOTE:** This clause **only** applies to the following FEMA grant programs: EMPG, HSGP, NSGP, THSGP, PSGP, IPR, HHPD, Safeguarding Tomorrow RLF, and TSGP.	Yes ☐ No ☐ N/A ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is for construction or repair work more than $2,000, did your organization include the required Copeland Anti-Kickback Act Clause? **NOTE:** This clause is **only** required in situations where the Davis-Bacon Act also applies.	Yes ☐ No ☐ N/A ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract meets the definition of "funding agreement", did your organization include the required Rights to Inventions Made Under a Contract or Agreement clause? **NOTE:** This clause is **not** required under the PA, HMGP, FMA, PDM, FMAG, HMGP Post Fire, CCP, DCM, IHP-ONA, or Safeguarding Tomorrow RLF programs, as FEMA Awards under these programs do not meet the definition of "funding agreement".	Yes ☐ No ☐ N/A ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract involves the employment of mechanics or laborers, and is in excess of $100,000, did your organization include the required Contract Work Hours and Safety Standards Act clause?	Yes ☐ No ☐ N/A ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is in excess of $150,000, did your organization include a Clean Air Act clause?	Yes ☐ No ☐ N/A ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:

If the contract is in excess of $150,000, did your organization include a Federal Water Pollution Control Act clause?	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is in excess of $25,000, did your organization include a Suspension and Debarment clause? *See* 2 C.F.R. § 180 for additional requirements.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is in excess of $100,000, did your organization include the required clause and Byrd Anti-Lobbying Certification to be signed and filed by the contractor?	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
Did your organization include a Recovered Materials clause? *See* 2 C.F.R. § 200.323. **NOTE:** This clause is only applicable to state agencies and political subdivisions of a state.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
Did your organization include a clause restricting use of covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system? *See* 2 C.F.R. § 200.216 for additional requirements.	*Yes* ☐ *No* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is for the purchase of goods, materials, or products, did your organization include a domestic preference clause? *See* 2 C.F.R. § 200.322.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
Did your organization include a clause and self-certification of contracts and subcontracts for infrastructure projects subject to the BABAA requirements? *See* 2 C.F.R. Part 184. **NOTE:** Not applicable to most disaster grant programs including PA, HMGP, and Individual Assistance (IA).	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause and self-certification in the contract document. Pg.:

See grant programs subject and not subject to BABAA requirements.	
Did your organization consider including the FEMA **recommended** provisions outlined in PDAT's Contract Provision's Guide? This is **not** a requirement, and contracts will not be deemed noncompliant for failure to include these provisions.	

2. Formal Methods

Formal procurement methods are required when the value of the procurement transaction under a federal award exceeds the SAT of the recipient or subrecipient. Formal procurement methods are competitive and require public notice. The following formal methods of procurement are used for procurement transactions above the SAT determined by the recipient or subrecipient in accordance with 2 C.F.R. § 200.320(a)(2)(ii).

2.1. 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 known as the Invitation for Bid (IFB). Sealed bidding is often utilized when the local government's or nonprofit'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 and conforms to all the terms and conditions of the solicitation.[127]

2.1.1. WHEN TO USE

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

- Complete, adequate, and realistic specifications or purchase descriptions are available;[128]
- Two or more responsible bidders have been identified;[129]
- The procurement lends itself to a fixed price contract;[130] and

[127] 2 C.F.R. § 200.320(b)(1).

[128] 2 C.F.R. § 200.320(b)(1)(i)(A).

[129] 2 C.F.R. § 200.320(b)(1)(i)(B).

[130] 2 C.F.R. § 200.320(b)(1)(i)(C).

- The local government or nonprofit primarily selects the successful bidder based on price.[131]

This includes the price-related factors included within the solicitation. Other than the responsibility determination, a local government or nonprofit may not select a contractor based on non-price-related factors.

2.1.2. APPLICABLE PROCEDURES

- **Public Advertisement:** Local governments must publicly advertise the IFB.[132] 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 state, local, and/or tribal requirements.[133]

- **Adequate Number of Sources:** Local governments and nonprofits must obtain price or rate quotations from an adequate number of qualified sources. [134] An adequate number of sources will be determined by the local government or nonprofit and will depend on the facts and circumstances of the procurement, subject to relevant state, local, and/or tribal requirements. FEMA encourages at least three price or rate quotations when using sealed bidding procedures.

- **Precise Specifications:** The IFB must define the items or services including any specifications and pertinent attachments so potential bidders can properly respond.[135]

- **Sufficient Response Time:** The local government or nonprofit must provide potential bidders sufficient time to prepare and submit bids prior to the date set for bid opening. [136] The regulation does not provide specific guidance regarding how much time is required. This determination is subject to any relevant state, local, and/or tribal requirements.

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[131] *Id.*

[132] 2 C.F.R. 200.320(b)(1)(ii)(A).

[133] *Id.*

[134] *Id.*

[135] 2 C.F.R. § 200.320(b)(1)(ii)(B).

[136] 2 C.F.R. § 200.320(b)(1)(ii)(A).

- **Bid Opening:** All bids must be opened at the date, time, and location established in the IFB. Bids must be opened publicly by local governments. [137]

- **Bid Selection:** After the official bid opening procedures are completed, the local government or nonprofit 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 local government or nonprofit may consider discounts, transportation costs, and life cycle costs to determine which bid is the lowest. Local governments and nonprofits will only use payment discounts to determine the lowest bid when prior experience indicates such discounts are usually taken advantage of.[138]

- **Documentation:** If using the sealed bidding method of procurement, local governments and nonprofits must document the procurement history.[139] They may also reject any or all bids if there is a sound documented reason.[140] The regulations do not provide guidance regarding what that entails, but some of the circumstances under which a local government or nonprofit may reject an individual bid include but are not limited to:

    - 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 local government or nonprofit 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.

2.2. Sealed Bidding Checklist

The below checklist features a series of questions to assist local governments and nonprofits consider certain factors when conducting a sealed bidding method of procurement under a FEMA award. These factors include but are not limited to the procurement dollar amount and contract provisions to ensure compliance with the Federal Procurement Standards. *See* 2 C.F.R. § 200.320(b)(1).

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[137] 2 C.F.R. § 200.320(b)(1)(ii)(C).

[138] 2 C.F.R. § 200.320(b)(1)(ii)(D).

[139] 2 C.F.R. § 200.318(i).

[140] 2 C.F.R. § 200.320(b)(1)(ii)(E).

NOTE: If you respond "**no**" to any of the questions below, your organization's procurement may not be compliant with the Federal Procurement Standards. It is recommended that you visit the Purchasing Under a FEMA Award Resource Library for assistance with compliance matters.

Requirement		Supporting Documentation
If contract price exceeds $250,000, was an independent cost estimate completed before issuing the Invitation for Bids (IFB)/Invitation to Bid (ITB)? *See* 2 C.F.R. § 200.324(a).	*Yes* ☐ *No* ☐ *N/A* ☐	Evidence of Market Research ☐ Historical Data ☐ Other: ☐
Did your organization ensure that a CPPC type was not used? CPPC contracts are prohibited by the Federal Procurement Standards. *See* 2 C.F.R. § 200.324(c).	*Yes* ☐ *No* ☐	Review the below to ensure they do not contain elements of CPPC contracts: Contract ☐ Pricing schedule ☐
Does your organization maintain records sufficient to detail the history of a procurement? *See* 2 C.F.R. § 200.318(i).	*Yes* ☐ *No* ☐	Review your organization's procurement file and records for: Rationale for the method of procurement; ☐ Selection of the contract type; ☐ Contractor selection or rejection; and ☐ Basis for contract price. ☐ **NOTE:** Contract document must include any contract modifications with signatures (or acceptance) by all parties.
Did your organization document its rationale for contractor selection or rejection? *See* 2 C.F.R. § 200.318(i).	*Yes* ☐ *No* ☐	Check for procurement file for: Scope of Work; ☐ List of sources solicited; and ☐ Copies of bid, performance, payment, and other documents. ☐

Did your organization enter a T&M contract? **NOTE:** If your organization did not enter a T&M contract this question can be skipped.	*Yes* ☐ *No* ☐	If yes, did you include the following? ☐ Justification explanation of why a T&M contract was the only suitable contract type; ☐ A contract ceiling price (that the contractor exceeds at own risk) clearly defined in the contract; ☐ How your organization maintained a high degree of oversight of this contract type (including daily or weekly logs, records of performance meetings, etc.); and ☐ A transition to a more appropriate contract type as soon as possible (if applicable). ☐
Does the IFB/ITB contain a clear and accurate description of the goods/services to be procured? *See* 2 C.F.R. § 200.320(b)(1)(i)(A).	*Yes* ☐ *No* ☐	Solicitation Document ☐
Was the IFB/ITB publicly advertised? *See* 2 C.F.R. § 200.320(b)(1)(ii)(A). **NOTE:** Local governments are required to publicly advertise the IFB/ITB.	*Yes* ☐ *No* ☐ *N/A* ☐	Advertisement ☐
Did your organization solicit enough bids from an adequate number of qualified sources to satisfy the full and open competition requirement? *See* 2 C.F.R. § 200.320(b)(1)(ii)(A). **NOTE:** Adequate number is determined by the entity based on specific respective procurement circumstances. FEMA encourages at least three price or rate quotations when using sealed bidding.	*Yes* ☐ *No* ☐	Indicate the number of contractors solicited and the number you determine to be an adequate number of qualified sources: __________________
If the contract exceeds $250,000 and for construction or facility improvement work, does the solicitation outline and require all applicable federal bonding requirements? *See* 2 C.F.R. § 200.326.	*Yes* ☐ *No* ☐	Bond Certificates ☐

Did your organization provide enough time for contractors to prepare and submit bids? *See* 2 C.F.R. § 200.320(b)(1)(ii)(A). **NOTE:** The Federal Procurement Standards do not provide a time frame. This determination is subject to any relevant local, state, and/or tribal requirements.	*Yes* ☐ *No* ☐	Indicate how long contractors had to prepare and submit their bids: ________________
Did your organization establish the date, time, and location where the bids will be opened? *See* 2 C.F.R. § 200.320(b)(1)(ii)(C). **NOTE:** For local governments, bids must be opened publicly.	*Yes* ☐ *No* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract exceeds $250,000, was a cost or price analysis performed after receiving bids? *See* 2 C.F.R. § 200.324(a).	*Yes* ☐ *No* ☐ *N/A* ☐	Bid Tabulation ☐ Cost Analysis ☐
Did your organization award a **fixed-price** contract to the **lowest** responsible, responsive bid? *See* 2 C.F.R. § 200.320(b)(1)(ii)(D).	*Yes* ☐ *No* ☐	Bid Tabulation ☐ Contract ☐ If no, provide narrative detailing how you determined the bid to be unresponsive and/or irresponsible. ☐
Competition Requirements		
For more information on competition requirements see 2 C.F.R. § 200.319.		

<table>
<tr><td>Did your organization ensure that it did not restrict competition by having unreasonable requirements. See 2 C.F.R. § 200.319(c). Examples of this include:

○ Solicitation documents must reflect actual needs and not place unreasonable requirements on firms to qualify to do business.
○ Unnecessary levels or years of experience for contractors to do business must not be required.
○ Excessive bonding increases the costs incurred by the contractor and limits the opportunity for target firms to compete for a contract under a FEMA award.
○ Specifying only a “brand name” product instead of allowing an “equivalent” or “compatible” product.</td><td>Yes ☐

No ☐</td><td>Review the following solicitation and advertising documents to include to determine if your organization restricted competition by setting parameters or evaluation factors determined to be unreasonable and therefore restrictive of competition.

Request for Proposal (RFP) ☐

Invitation for Bid (IFB) ☐

Request for Quote (RFQ) ☐

Advertisements ☐

Other: (ex: bonds, evaluations, scoring, etc.)

☐</td></tr>
<tr><td colspan="3">Required Contract Provisions</td></tr>
<tr><td colspan="3">NOTE: The Federal Procurement Standard at 2 C.F.R. § 200.327 requires that recipient and subrecipient contracts contain the applicable provisions described in Appendix II to Part 200 of the Uniform Rules (Contract Provisions for Non-Federal Entity Contracts Under Federal Awards).</td></tr>
<tr><td>If the contract is over $250,000,did your organization include a Remedies clause?

NOTE: AFG recipients must include a penalty clause in all contracts for any AFG-funded vehicle.</td><td>Yes ☐

No ☐

N/A ☐</td><td>Indicate the page number where a FEMA representative can locate the clause in contract document.

Pg.:</td></tr>
<tr><td>If the contract is more than $10,000, did your organization include a Termination for Cause and Convenience clause?</td><td>Yes ☐

No ☐

N/A ☐</td><td>Indicate the page number where a FEMA representative can locate the clause in contract document.

Pg.:</td></tr>
<tr><td>If the contract is for construction work and more than $2,000, did your organization include the required Davis-Bacon Act Clause?

NOTE: This clause only applies to the following FEMA grant programs: EMPG, HSGP, NSGP, THSGP, PSGP, IPR, HHPD, Safeguarding Tomorrow RLF, and TSGP.</td><td>Yes ☐

No ☐

N/A ☐</td><td>Indicate the page number where a FEMA representative can locate the clause in contract document.

Pg.:</td></tr>
</table>

If the contract is for construction or repair work more than $2,000, did your organization include the required Copeland Anti-Kickback Act Clause? **NOTE:** This clause is **only** required in situations where the Davis-Bacon Act also applies.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract meets the definition of "funding agreement", did your organization include the required Rights to Inventions Made Under a Contract or Agreement clause? **NOTE:** This clause is **not** required under the PA, HMGP, FMA, PDM, FMAG, HMGP Post Fire, CCP, DCM, IHP-ONA, or Safeguarding Tomorrow RLF programs, as FEMA Awards under these programs do not meet the definition of "funding agreement".	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract involves the employment of mechanics or laborers, and is in excess of $100,000, did your organization include the required Contract Work Hours and Safety Standards Act clause?	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is in excess of $150,000, did your organization include a Clean Air Act clause?	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is in excess of $150,000, did your organization include a Federal Water Pollution Control Act clause?	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is in excess of $25,000, did your organization include a Suspension and Debarment clause? *See* 2 C.F.R. § 180 for additional requirements.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is in excess of $100,000, did your organization include the required clause and Byrd Anti-Lobbying Certification to be signed and filed by the contractor?	*Yes* ☐ *No* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document.

	N/A ☐	Pg.:
Did your organization include a Recovered Materials clause? *See* 2 C.F.R. § 200.323. **NOTE:** This clause is only applicable to state agencies and political subdivisions of a state.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
Did your organization include a clause restricting use of covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system? *See* 2 C.F.R. § 200.216 for additional requirements.	*Yes* ☐ *No* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is for the purchase of goods, materials, or products, did your organization include a domestic preference clause? *See* 2 C.F.R. § 200.322.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
Did your organization include a clause and self-certification of contracts and subcontracts for infrastructure projects subject to the BABAA requirements? *See* 2 C.F.R. Part 184. **NOTE:** Not applicable to most disaster grant programs including PA, HMGP, and IA. *See* grant programs subject and not subject to BABAA requirements.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause and self-certification in the contract document. Pg.:
Did your organization consider including the FEMA **recommended** provisions outlined in PDAT's Contract Provision's Guide? This is **not** a requirement, and contracts will not be deemed noncompliant for failure to include these provisions.		

2.3. Procurement by Proposals

Procurement by proposal is an acceptable method of procurement when local governments and nonprofits cannot base the contract award exclusively on price or price-related factors due to the nature of the service or property to be acquired.[141]

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[141] 2 C.F.R. § 200.320(b)(2).

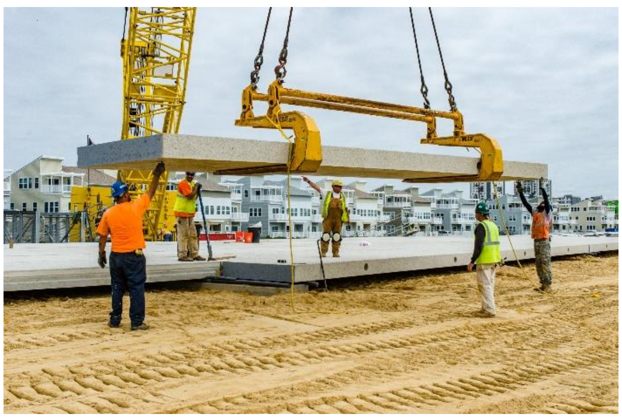
2.3.1. WHEN TO USE

Proposals are an acceptable method of procurement when the nature of the procurement does not lend itself to sealed bidding and either a fixed-price or cost-reimbursement contract is appropriate.[142]

The solicitation document used is often known as a Request for Proposal (RFP). Although generally not used for actual construction, alteration, or repair to real property, the 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, A/E, surveying, mapping, and related services. The proposal method of procurement is appropriate under the following conditions:

- Local governments and nonprofits cannot base the contract award exclusively on price or price-related factors due to the nature of 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 discussions with individual bidders are prohibited and the contract will be awarded based on price and price-related factors alone.

2.3.2. APPLICABLE PROCEDURES

- **Public Advertisement:** RFPs require public notice.[143] 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 state, local, and/or tribal requirements.[144]

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[142] *Id.*

[143] 2 C.F.R. § 200.320(b)(2)(i).

[144] *Id.*

- **Disclosure of Evaluation Factors:** Within the advertisement, local governments, and nonprofits must identify all evaluation factors and their relative importance.[145] 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 local government or nonprofit.
  - The evaluation factors may include such things as technical design, technical approach, length of delivery schedules, past performance, and quality of proposed personnel.
  - Local governments and nonprofits may use any one or a combination of source selection approaches as permitted under state, local, 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 local government or nonprofit, written procurement procedures, and applicable state, local, and/or tribal law, local governments and nonprofits may award a contract to the offeror whose proposal offers the "best value" to their procurement. The solicitation must also inform potential offerors that the award will be made on a "best value" basis, which should include a statement that the local government or nonprofit reserves the right to award the contract to other than the lowest-priced offeror.
  - The RFP 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, but the evaluation factors must support the purposes of the grant or cooperative agreement.
- **Consideration of Proposals:** Local governments and nonprofits must consider any response to a publicized request for proposals to the maximum extent practical.[146]
- **Adequate Number of Sources:** In addition to publicizing the request for proposals, local governments and nonprofits must solicit proposals from an adequate number of qualified sources,[147] 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 state, local, and/or tribal requirements. FEMA encourages at least three price or rate quotations when using procurement by proposals.

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[145] *Id.*

[146] 2 C.F.R. § 200.320(b)(2)(i).

[147] *Id.*

- **Written Method of Evaluation:** Local governments and nonprofits must have a written method for conducting their technical evaluations of the proposals received and for selecting offerors.[148] When evaluating proposals, FEMA expects local governments and nonprofits to consider all evaluation factors specified in its solicitation documents and evaluate offers only on the evaluation factors included in the solicitation documents.
  - Local governments and nonprofits may not modify its evaluation factors after proposals have been submitted without re-opening the solicitation. In awarding a contract that will include options, FEMA expects local governments and nonprofits 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 offeror whose proposal is most advantageous to the program with price and other factors considered.[149]

2.3.3. CONSIDERATIONS FOR ARCHITECTURAL/ENGINEERING SERVICES

The use of the proposal method of procurement is well suited for when a local government or nonprofit is soliciting for A/E professional services. Because proposal procedures are a qualifications-based procurement, and where price is not used as an exclusive factor, local governments and nonprofits are encouraged to use this method of procurement when purchasing under a FEMA award. For more information regarding A/E services, please see Chapter 12: Beyond the Basics of this Guide.

2.4. Proposals Checklist

The below checklist features a series of questions to assist local governments and nonprofits consider certain factors when conducting a proposal method of procurement under a FEMA award. These factors include but are not limited to the procurement dollar amount and contract provisions to ensure compliance with the Federal Procurement Standards. *See* 2 C.F.R. § 200.320(b)(2).

NOTE: If you respond "**no**" to any of the questions below, your organization's procurement may not be compliant with the Federal Procurement Standards. It is recommended that you visit the Purchasing Under a FEMA Award Resource Library for assistance with compliance matters.

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[148] *Id.*

[149] 2 C.F.R. 200.320(b)(2)(iii).

Requirement		Supporting Documentation
If contract price exceeds $250,000, was an independent cost estimate completed before issuing the Invitation for Bids (IFB)/Invitation to Bid (ITB)? *See* 2 C.F.R. § 200.324(a).	*Yes* ☐ *No* ☐ *N/A* ☐	Evidence of Market Research ☐ Historical Data ☐ Other: ☐
Did your organization ensure that a CPPC type was not used? CPPC contracts are prohibited by the Federal Procurement Standards. *See* 2 C.F.R. § 200.324(c).	*Yes* ☐ *No* ☐	Review the below to ensure they do not contain elements of CPPC contracts: Contract ☐ Pricing schedule ☐
Does your organization maintain records sufficient to detail the history of a procurement? *See* 2 C.F.R. § 200.318(i).	*Yes* ☐ *No* ☐	Review your organization's procurement file and records for: Rationale for the method of procurement; ☐ Selection of the contract type; ☐ Contractor selection or rejection; and ☐ Basis for contract price. ☐ **NOTE:** Contract document must include any contract modifications with signatures (or acceptance) by all parties.
Did your organization document its rationale for contractor selection or rejection? *See* 2 C.F.R. § 200.318(i).	*Yes* ☐ *No* ☐	Check for procurement file for: Scope of Work; ☐ List of sources solicited; and ☐ Copies of bid, performance, payment, and other documents. ☐

Did your organization enter a T&M contract? **NOTE:** If your organization did not enter a T&M contract this question can be skipped.	*Yes* ☐ *No* ☐	If yes, did you include the following? ☐ Justification explanation of why a T&M contract was the only suitable contract type; ☐ A contract ceiling price (that the contractor exceeds at own risk) clearly defined in the contract; ☐ How your organization maintained a high degree of oversight of this contract type (including daily or weekly logs, records of performance meetings, etc.); and ☐ A transition to a more appropriate contract type as soon as possible (if applicable). ☐
Does the RFP contain a clear and accurate description of the goods/services to be procured? *See* 2 C.F.R. § 200.320(b)(2).	*Yes* ☐ *No* ☐	RFP ☐
Does the RFP identify all evaluation factors and their relative importance, with price as one of the factors? *See* 2 C.F.R. § 200.320(b)(2)(iii).	*Yes* ☐ *No* ☐ *N/A* ☐	RFP ☐ Other: ____________________
Did your organization publicly advertise the RFP? *See* 2 C.F.R. § 200.320(b)(2)(i).	*Yes* ☐ *No* ☐	Advertisement ☐
Did your organization solicit enough proposals from an adequate number of qualified offerors to satisfy the full and open competition requirement? *See* 2 C.F.R. § 200.320(b)(2)(i).	*Yes* ☐ *No* ☐	Indicate the number you determine to be an adequate number of qualified offerors: __________
If contract price exceeds $250,000, was a price or cost analysis conducted after receiving proposals? *See* 2 C.F.R. § 200.324(a).	*Yes* ☐ *No* ☐ *N/A* ☐	Tabulation ☐ Cost Analysis ☐

<table>
<tr><td>If the contract exceeds $250,000 and for construction or facility improvement work, does the solicitation outline and require all applicable federal bonding requirements? See 2 C.F.R. § 200.326 for additional information.</td><td>Yes ☐

No ☐

N/A ☐</td><td>Bond Certificates ☐</td></tr>
<tr><td colspan="3">Competition Requirements</td></tr>
<tr><td colspan="3">For more information on competition requirements see 2 C.F.R. § 200.319.</td></tr>
<tr><td>Did your organization ensure that it did not restrict competition by having unreasonable requirements. See 2 C.F.R. § 200.319(c). Examples of this include:

○ Solicitation documents must reflect actual needs and not place unreasonable requirements on firms to qualify to do business.
○ Unnecessary levels or years of experience for contractors to do business must not be required.
○ Excessive bonding increases the costs incurred by the contractor and limits the opportunity for target firms to compete for a contract under a FEMA award.
○ Specifying only a “brand name” product instead of allowing an “equivalent” or “compatible” product.</td><td>Yes ☐

No ☐</td><td>Review the following solicitation and advertising documents to include to determine if your organization restricted competition by setting parameters or evaluation factors determined to be unreasonable and therefore restrictive of competition.

Request for Proposal (RFP) ☐

Invitation for Bid (IFB) ☐

Request for Quote (RFQ) ☐

Advertisements ☐

Other: (ex: bonds, evaluations, scoring, etc.)

☐</td></tr>
<tr><td colspan="3">Required Contract Provisions</td></tr>
<tr><td colspan="3">NOTE: The Federal Procurement Standard at 2 C.F.R. § 200.327 requires that recipient and subrecipient contracts contain the applicable provisions described in Appendix II to Part 200 of the Uniform Rules (Contract Provisions for Non-Federal Entity Contracts Under Federal Awards).</td></tr>
<tr><td>If the contract is over $250,000,did your organization include a Remedies clause?

NOTE: AFG recipients must include a penalty clause in all contracts for any AFG-funded vehicle.</td><td>Yes ☐

No ☐

N/A ☐</td><td>Indicate the page number where a FEMA representative can locate the clause in contract document.

Pg.:</td></tr>
<tr><td>If the contract is more than $10,000, did your organization include a Termination for Cause and Convenience clause?</td><td>Yes ☐

No ☐</td><td>Indicate the page number where a FEMA representative can locate the clause in contract document.</td></tr>
</table>

	N/A ☐	Pg.:
If the contract is for construction work and more than $2,000, did your organization include the required Davis-Bacon Act Clause? **NOTE:** This clause **only** applies to the following FEMA grant programs: EMPG, HSGP, NSGP, THSGP, PSGP, IPR, HHPD, Safeguarding Tomorrow RLF, and TSGP.	Yes ☐ No ☐ N/A ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is for construction or repair work more than $2,000, did your organization include the required Copeland Anti-Kickback Act Clause? **NOTE:** This clause is **only** required in situations where the Davis-Bacon Act also applies.	Yes ☐ No ☐ N/A ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract meets the definition of "funding agreement", did your organization include the required Rights to Inventions Made Under a Contract or Agreement clause? **NOTE:** This clause is **not** required under the PA, HMGP, FMA, PDM, FMAG, HMGP Post Fire, CCP, DCM, IHP-ONA, or Safeguarding Tomorrow RLF programs, as FEMA Awards under these programs do not meet the definition of "funding agreement".	Yes ☐ No ☐ N/A ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract involves the employment of mechanics or laborers, and is in excess of $100,000, did your organization include the required Contract Work Hours and Safety Standards Act clause?	Yes ☐ No ☐ N/A ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is in excess of $150,000, did your organization include a Clean Air Act clause?	Yes ☐ No ☐ N/A ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is in excess of $150,000, did your organization include a Federal Water Pollution Control Act clause?	Yes ☐ No ☐ N/A ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:

If the contract is in excess of $25,000, did your organization include a Suspension and Debarment clause? *See* 2 C.F.R. § 180 for additional requirements.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is in excess of $100,000, did your organization include the required clause and Byrd Anti-Lobbying Certification to be signed and filed by the contractor?	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
Did your organization include a Recovered Materials clause? *See* 2 C.F.R. § 200.323. **NOTE:** This clause is only applicable to state agencies and political subdivisions of a state.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
Did your organization include a clause restricting use of covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system? *See* 2 C.F.R. § 200.216 for additional requirements.	*Yes* ☐ *No* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is for the purchase of goods, materials, or products, did your organization include a domestic preference clause? *See* 2 C.F.R. § 200.322.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
Did your organization include a clause and self-certification of contracts and subcontracts for infrastructure projects subject to the BABAA requirements? *See* 2 C.F.R. Part 184. **NOTE:** Not applicable to most disaster grant programs including PA, HMGP, and IA. *See* grant programs subject and not subject to BABAA requirements.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause and self-certification in the contract document. Pg.:
Did your organization consider including the FEMA **recommended** provisions outlined in PDAT's Contract Provision's Guide? This is **not** a requirement, and contracts will not be deemed noncompliant for failure to include these provisions.		

3. Noncompetitive Procurement

The Federal Procurement Standards set mandatory requirements for local governments and nonprofits to use a noncompetitive procurement, also known as a sole-source procurement. Noncompetitive procurement is the solicitation of a proposal from one source or a limited number of sources.[150] Local governments and nonprofits may use a noncompetitive procurement only under certain circumstances or exceptions.

3.1. Procurement by Micro-Purchase

Micro-purchases, in addition to being an informal method of procurement, are also considered a noncompetitive procurement because micro-purchases may be awarded without soliciting competitive price or rate quotations. Although the price must still be reasonable, the justification requirements applicable to other noncompetitive procurements do not apply to micro-purchases.

3.2. Single Source

Local governments and nonprofits may use noncompetitive procurement when the procurement transaction can only be fulfilled by a single source. In other words, the item or service is only available from one contractor and no other property or service will satisfy local government or nonprofit requirement.[151]

Local governments and nonprofits may use their own judgment to determine whether this condition has been met, but they must document their rationale in the procurement record.[152] The following is a non-exhaustive list of instances in which FEMA might consider property or services as available from only one source.

3.2.1. PROCUREMENT OF REAL PROPERTY

The purchase or lease of real property is a unique transaction that might not readily allow use of one of the competitive methods of procurement. If the recipient or subrecipient is unable to conduct a competitive procurement, they may use a noncompetitive method in accordance with the requirements in this section. The appropriate method will depend on the facts and circumstances of each procurement.

3.2.2. PATENTS OR RESTRICTED DATA

There are patent or data rights restrictions that would preclude competition.

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150 2 C.F.R. § 200.320(c).

151 2 C.F.R. § 200.320(c)(2).

152 2 C.F.R. § 200.318(i).

3.2.3. SUBSTANTIAL DUPLICATION OF COSTS

In the case of a sole-source award to an existing contractor already performing work, there may be a substantial duplication of costs that would not be expected to be recovered through competition. For example, if a contractor was in the middle of constructing a facility and the scope of work under the project was to repair the construction work completed as of the date of awarding the contract.

3.2.4. COMPATIBLE EQUIPMENT

If a local government or nonprofit previously installed a system or piece of technology that needs repair, they may need to order the replacement part from the same manufacturer to avoid replacing the entire system and retrain staff. As an example, an emergency radio system might be installed and part of a communications system, but only one company makes parts that are compatible with the installed radio system.

Example: Noncompetitive Procurement due to Single Source

Scenario: The Town of A is a recipient of a Port Security Grant from FEMA. They need to purchase IT equipment to upgrade the County Sheriff's Office computer systems. The equipment must be compliant with and interoperable with the system already in place at the local Port Authority. The total cost is $75,000, and the equipment is only available from single manufacturer, Company B. The Town of A awarded a sole source contract to Company B for the IT equipment upgrade. Is this procurement permissible under the Federal Procurement Standards?

Answer: Yes. A local government or nonprofit may use procurement by noncompetitive proposals when an item is only available from a single source. Because there is only one producer of the required IT equipment, the Town of A can sole-source the contract award using the single source exception to full and open competition. It is important to keep in mind that local governments and nonprofits must document their justification for sole sourcing in its procurement file.

3.3. Public Emergency or Exigency

Local governments and nonprofits may be able to use the emergency or exigency exception to full and open competition if they determine that a public exigency or emergency will not permit a delay resulting from competitive solicitation.[153] Local governments and nonprofits may use their own judgment in determining whether this condition has been met but must document their rationale in

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[153] 2 C.F.R. § 200.320(c)(3).

the procurement record.[154] 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:** There is a need to avoid, prevent, or alleviate serious harm or injury, financial or otherwise, to the recipient or subrecipient, and use of competitive procurement proposals would prevent the urgent action required to address the situation. Thus, a noncompetitive procurement may be appropriate.

- **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 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.

Local governments and nonprofits 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, recipients or subrecipients 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.

FEMA may review a local government's or nonprofit's justification that exigent or emergency circumstances warrant an exception to full and open competition. An example of an emergency circumstance would be when a hospital loses power, and its backup generators fail at the same time. The loss of electricity to power critical equipment that keeps patients alive is a threat to life and a dangerous situation that would require immediate action to alleviate the threat. An example of an exigency circumstance would be when, following an incident, a central business district of a town could justify the use of a sole-source contract for debris removal citing exigency circumstances to help businesses reopen and to alleviate any further financial hardship.

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[154] 2 C.F.R. § 200.318(i).

3.3.1. WAIVERS

Recipients and subrecipients may waive their own procurement standards or regulations in anticipation or a result of a disaster or emergency. Despite the appropriate recipient or subrecipient waiving state, local, and/or tribal procurement standards or regulations, a local government or nonprofit cannot waive the applicable Federal Procurement Standards. **NOTE:** Where state, local, and/or tribal procurement standards or regulations have been waived pursuant to the local government's or nonprofit's s own legal requirements, the Federal Procurement Standards continue to apply to local governments and nonprofits regardless of such a waiver.

Example: Noncompetitive Procurement due to Public Emergency

Scenario: The weather in Eagle Township has been below freezing for the past two weeks, causing a pipe in the Township's emergency operations center to burst and flood the first floor. This flood destroyed half of the Township's radios that its emergency workers use to communicate with first response personnel. Eagle Township awarded a contract through a noncompetitive process to United Contractors, Inc. to help the emergency operations center come back online in order to support first responders in performing their duties. Under these circumstances, is this procurement permissible under the federal procurement under grant rules?

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 Township 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 Standards.

Example: Noncompetitive Procurement due to Public Exigency

Scenario: A tornado impacts a city in June and causes widespread and catastrophic damage, including damage to a city school. The city wants to repair the school and have it ready for use by the beginning of the school year in September. The city estimates, based on prior 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 local government or nonprofit 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.

3.4. Federal Awarding Agency or Pass-Through Entity Approval

A local government or nonprofit 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 local government or nonprofit.[155]

FEMA or a pass-through entity may approve a subrecipient's written request to procure a product or service through a noncompetitive proposal method. In cases where FEMA or a pass-through entity approves a request to use a noncompetitive proposal, the approval must be consistent with all applicable state, local, and federally recognized tribal laws and regulations, as well as FEMA's or the pass-through entity's and subrecipient's written procurement standards. Additionally, pass-through entities' and subrecipients' procurements must continue to comply with the requirements, even in cases where the pass-through entity approves a request to use noncompetitive proposals.

[155] 2 C.F.R. § 200.320(c)(4).

FEMA may review a pass-through entity's decision to allow a procurement using noncompetitive proposals, such as during the award monitoring process, in response to an audit finding or other similar circumstances, or for the reasons specified in 2 C.F.R. § 200.325. During its review, FEMA will inspect the written procurement records for the transaction, including the rationale for the method of procurement, selection of contract type, and contractor selection or rejection. FEMA will not substitute its judgment for that of the pass-through entity in cases where the pass-through entity has documented justification for allowing a noncompetitive procurement. However, FEMA will review the documented justification for approving the noncompetitive procurement to ensure it otherwise complies with the Federal Procurement Standards. FEMA may also require the pass-through entity to demonstrate that the decision to approve the noncompetitive proposal is consistent with applicable state, local, and federally recognized tribal laws and regulations, as well as all applicable written procurement standards. FEMA may also assess whether the costs incurred under the procurement are reasonable.

NOTE: 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.

3.5. Inadequate Competition

Local governments and nonprofits may use the noncompetitive procurement proposal method when, after the solicitation of an adequate number of sources, they determine competition to be inadequate.[156]

Competition is "inadequate" when a local government or nonprofit has complied with all procurement standards and the receipt of a single offer or bid, a single responsive offer or bid, or no responsive bids or proposals is caused by conditions outside the local government's or nonprofit's control. FEMA will not consider competition inadequate where a local government and nonprofit 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 competition may be possible, but the local government or nonprofit failed to take the proper steps and actions to ensure such competition.

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[156] 2 C.F.R. § 200.320(c)(5).

It is important for local governments and nonprofits 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 local governments and nonprofits to:

- Evaluate whether it sufficiently publicized the IFBs 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 a local government and nonprofit will need to evaluate whether it should:
    - Cancel the solicitation;
    - Change the specification to allow for more bids or offers; and
    - Re-solicit bids or offers.

If a local government or nonprofit chooses to move forward with the award considering the restrictive specification, then it should document in the procurement file the reason why the restrictive specification or delivery requirement was necessary and could not be modified 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 awarded a noncompetitive contract to the only contractor that submitted a bid. Is this noncompetitive procurement permissible under the Federal Procurement Standards?

Answer: Yes. A local government or nonprofit 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.

Local governments and nonprofits using procurement by noncompetitive proposals, due to any of the circumstances mentioned above (except micro-purchases), must take the following steps:

Justification and Documentation: Must adequately document the procurement history and justification for the sole source contract considering the requirement for full and open competition.

Ensure Compliance with Additional Requirements: Must ensure compliance with all other applicable federal procurement under grant requirements (e.g., cost or price analysis, T&M considerations, contract provisions, etc.). Although local governments and nonprofits are not required to comply with the full and open competition requirement by entering into an allowable sole-source procurement, it must still ensure compliance with these requirements.

Additional Consideration:

- When local governments and nonprofits makes a change to an existing contract that is beyond the scope of the original contract (cardinal change), then the local government or nonprofit 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 one source.

3.6. Suggested Elements for Noncompetitive Procurement Justification

1. Identify which of the four circumstances listed in 2 C.F.R. § 200.320(c) 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 local government or nonprofit; or
    - After solicitation of an adequate 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. This would include specific conditions and circumstances that clearly illustrate why a procurement other than through noncompetitive proposals would cause an 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. Organizations should evaluate a variety of possibilities, including but not limited to how long the exigency or emergency circumstances will continue; the length of time needed to identify requirements and award a contract that complies with all procurement requirements; and the length of time needed for 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.

3.7. Noncompetitive Procurement Checklist

The below checklist features a series of questions to assist local governments and nonprofits consider certain factors when conducting a noncompetitive method of procurement under a FEMA award. These factors include but are not limited to the procurement dollar amount and required contract provisions to ensure compliance with the Federal Procurement Standards. *See* 2 C.F.R. § 200.320(c).

NOTE: If you respond "**no**" to any of the questions below, your organization's procurement may not be compliant with the Federal Procurement Standards. It is recommended that you visit the Purchasing Under a FEMA Award Resource Library for assistance with compliance matters.

Requirement		Supporting Documentation
Does the noncompetitive procurement meet one of the five required exceptions or circumstances to full and open competition? *See* 2 C.F.R. § 200.320(c) for additional information on the circumstances permitting exception to competitive procurement requirements. **NOTE:** Micro-purchases are covered in a separate checklist. If using micro-purchases, please see the Micro-Purchase Checklist.	*Yes* ☐ *No* ☐	If yes, which one of the four exceptions (Mirco-Purchase not included) is being used? Single Source ☐ Public Emergency or Exigency ☐ FEMA or Pass-Through Entity Approval ☐ Inadequate Competition ☐

Did your organization provide written justification for the use of a noncompetitive method of procurement? *Yes* ☐ *No* ☐ **NOTE:** Award recipients and subrecipients can reference the suggested elements for noncompetitive procurement when drafting justifications.	Written justification on letterhead ☐
Does your organization maintain records sufficient to detail the history of a procurement? *See* 2 C.F.R. § 200.318(i). ☐	Review your organization's procurement file and records for: Rationale for the method of procurement; ☐ Selection of the contract type; ☐ Contractor selection or rejection; and ☐ Basis for contract price. ☐ **NOTE:** Contract document must include any contract modifications with signatures (or acceptance) by all parties.
Did your organization document its rationale for contractor selection or rejection? *See* 2 C.F.R. § 200.318(i). ☐	Check for procurement file for: Scope of Work; ☐ List of sources solicited; and ☐ Copies of bid, performance, payment, and other documents. ☐
Did your organization enter a T&M contract? *Yes* ☐ *No* ☐ **NOTE:** If your organization did not enter a T&M contract this question can be skipped.	If yes, did you include the following: Justification explanation of why a T&M contract was the only suitable contract type; ☐ A contract ceiling price (that the contractor exceeds at own risk) clearly defined in the contract; ☐ How your organization maintained a high degree of oversight of this contract type

		(including daily or weekly logs, records of performance meetings, etc.); and ☐ A transition to a more appropriate contract type as soon as possible (if applicable). ☐
Is the price fair and reasonable?	*Yes* ☐ *No* ☐	Evidence of market research ☐ Short narrative on letterhead ☐ Cost or Price Analysis ☐ Other: (*ex: receipt, invoice)* ☐
If the contract is more than $250,000, was a cost or price analysis conducted? *See* 2 C.F.R. § 200.324(a).	*Yes* ☐ *No* ☐ *N/A* ☐	Market reseach ☐ Historical data ☐
Did your organization ensure that a CPPC type was not used? CPPC contracts are prohibited by the Federal Procurement Standards. *See* 2 C.F.R. § 200.324(c).	*Yes* ☐ *No* ☐	Review the below to ensure they do not contain elements of CPPC contracts: Contract ☐ Pricing schedule ☐
If the contract is more than $250,000 and for construction or facility improvement work, does the solicitation outline and require all applicable federal bonding requirements? *See* 2 C.F.R. § 200.326 for additional information on the applicable bonding requirements.	*Yes* ☐ *No* ☐ *N/A* ☐	Bond Certificates ☐
Required Contract Provisions		
NOTE: The Federal Procurement Standard at 2 C.F.R. § 200.327 requires that recipient and subrecipient contracts contain the applicable provisions described in Appendix II to Part 200 of the Uniform Rules *(Contract Provisions for Non-Federal Entity Contracts Under Federal Awards)*.		

If the contract is over $250,000, did your organization include a Remedies clause? **NOTE:** AFG recipients must include a penalty clause in all contracts for any AFG-funded vehicle.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is more than $10,000, did your organization include a Termination for Cause and Convenience clause?	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is for construction work and more than $2,000, did your organization include the required Davis-Bacon Act Clause? **NOTE:** This clause **only** applies to the following FEMA grant programs: EMPG, HSGP, NSGP, THSGP, PSGP, IPR, HHPD, Safeguarding Tomorrow RLF, and TSGP.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is for construction or repair work more than $2,000, did your organization include the required Copeland Anti-Kickback Act Clause? **NOTE:** This clause is **only** required in situations where the Davis-Bacon Act also applies.	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract meets the definition of "funding agreement", did your organization include the required Rights to Inventions Made Under a Contract or Agreement clause? **NOTE:** This clause is **not** required under the PA, HMGP, FMA, PDM, FMAG, HMGP Post Fire, CCP, DCM, IHP-ONA, or Safeguarding Tomorrow RLF programs, as FEMA Awards under these programs do not meet the definition of "funding agreement".	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract involves the employment of mechanics or laborers, and is in excess of $100,000, did your organization include the required Contract Work Hours and Safety Standards Act clause?	*Yes* ☐ *No* ☐ *N/A* ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:

If the contract is in excess of $150,000, did your organization include a Clean Air Act clause?	Yes ☐ No ☐ N/A ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is in excess of $150,000, did your organization include a Federal Water Pollution Control Act clause?	Yes ☐ No ☐ N/A ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is in excess of $25,000, did your organization include a Suspension and Debarment clause? *See* 2 C.F.R. § 180 for additional requirements.	Yes ☐ No ☐ N/A ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is in excess of $100,000, did your organization include the required clause and Byrd Anti-Lobbying Certification to be signed and filed by the contractor?	Yes ☐ No ☐ N/A ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
Did your organization include a Recovered Materials clause? *See* 2 C.F.R. § 200.323. **NOTE:** This clause is only applicable to state agencies and political subdivisions of a state.	Yes ☐ No ☐ N/A ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
Did your organization include a clause restricting use of covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system? *See* 2 C.F.R. § 200.216 for additional requirements.	Yes ☐ No ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:
If the contract is for the purchase of goods, materials, or products, did your organization include a domestic preference clause? *See* 2 C.F.R. § 200.322.	Yes ☐ No ☐ N/A ☐	Indicate the page number where a FEMA representative can locate the clause in contract document. Pg.:

<table>
<tr><td>Did your organization include a clause and self-certification of contracts and subcontracts for infrastructure projects subject to the BABAA requirements? See 2 C.F.R. Part 184.

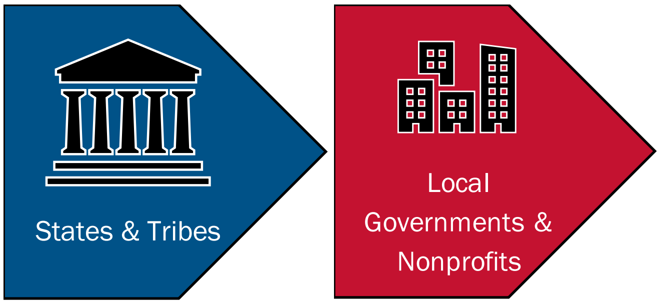
NOTE: Not applicable to most disaster grant programs including PA, HMGP, and IA. See grant programs subject and not subject to BABAA requirements.</td><td>Yes ☐

No ☐

N/A ☐</td><td>Indicate the page number where a FEMA representative can locate the clause and self-certification in the contract document.

Pg.:</td></tr>
<tr><td colspan="3">Did your organization consider including the FEMA recommended provisions outlined in PDAT's Contract Provision's Guide? This is not a requirement, and contracts will not be deemed noncompliant for failure to include these provisions.</td></tr>
</table>

Chapter 6: Domestic Preferences



Under the revised sections of the *OMB Guidance for Federal Financial Assistance*, recipients and subrecipients of FEMA grant funding, must comply with the rules at 2 C.F.R. § 200.322, *Domestic preferences for procurements,* when procuring goods and services under a FEMA award.

1. Domestic Preferences for Procurement

As stated in EO 14005 of Jan. 25, 2021 (Ensuring the Future Is Made in All of America by All of America's Workers) and EO 13858 of Jan. 31, 2019 (Strengthening Buy American Preferences for Infrastructure Projects), it is the Federal Government's policy to maximize the use of goods, products, and materials produced in the United States in federal procurements through the terms and conditions of federal financial assistance awards consistent with law.

1.1. Encouraged Domestic Preference Policies

All FEMA grant program recipients and subrecipients should provide a preference for the purchase, acquisition, or use of goods, products, or materials produced in the United States. This preference should be applied where appropriate, in a manner consistent with law, and to the greatest extent practicable under **all** of FEMA's grant awards. The preference includes, but is not limited to, iron, aluminum, steel, cement, and other manufactured products.[157]

Additionally, recipients and subrecipients are required to include a domestic preferences contract provision in all contracts and purchase orders for procurements made under grant awards or declarations issued on or after Nov.12, 2020. *See* the Contract Provisions Guide for sample language.[158]

[157] 2 C.F.R. § 200.322.

[158] 2 C.F.R. Part 200, Appendix II, § L (citing 2 C.F.R. § 200.322). The requirements of 2 C.F.R. § 200.322 must also be included in all subawards.

2. Required Domestic Preference Policy for Infrastructure, Build America, Buy America Act (BABAA)

2.1. Domestic Preference for Infrastructure

Many FEMA grant program recipients and subrecipients must provide a domestic preference for new infrastructure awards under FEMA financial assistance programs for infrastructure made on or after Jan. 2, 2023, as well as new funding FEMA obligates to existing awards or through renewal awards where the new funding is obligated on or after Jan. 2, 2023. A full list of the grant programs that FEMA has determined are subject to BABAA requirements are available on Programs and Definitions: Build America, Buy America Act | FEMA.gov.

New awards under FEMA financial assistance programs subject to the BABAA requirements made on or after Jan. 2, 2023, as well as new funding FEMA obligates to existing awards or through renewal awards on or after Jan. 2, 2023, must comply with the following domestic preference requirements[159]:

A. All iron and steel used in the project are produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.[160]

B. All manufactured products purchased with FEMA financial assistance must be produced in the United States.[161] For a manufactured product to be considered produced in the United States, the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States must be greater than 55% of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation.

C. In determining whether the cost of components for manufactured products is greater than 55% of the total cost of all components, use the following instructions:

   1. For components purchased by the manufacturer, the acquisition cost, including transportation costs to the place of incorporation into the manufactured product

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[159] BABAA §§ 70914(a), 70912(2);2 C.F.R. § 184.1(b); 2 C.F.R. §184.2(b). FEMA issued a 6-month general applicability waiver of the BABAA requirements to allow for an adjustment period. This waiver expired on Jan. 1, 2023.

[160] 2 C.F.R. § 184.3.

[161] *Id.*

(whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

2. For components manufactured by the manufacturer, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (a) of this section, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the manufactured product.[162]

D. All construction materials are manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States.[163]

2.2. Compliance

All Notices of Funding Opportunity (NOFOs) for FEMA financial assistance programs subject to BABAA must contain language explaining the BABAA requirements.[164] NOFOs are then incorporated as terms and conditions of the award. Recipients and subrecipients must refer to the relevant NOFO as well as specific terms and conditions in the award for BABAA requirements.[165] Where FEMA has previously published the NOFO without information about BABAA applicability, FEMA will add similar language directly to the applicable award when obligating the funding.

All FEMA awards, whether the program is subject to BABAA or not, will include the DHS Standard Terms and Conditions, which include BABAA language as well. If recipients or subrecipients are unsure whether BABAA applies to their funding, they should reach out to their FEMA grant program point of contact or fema-grants-buyamerica@fema.dhs.gov.

All recipient and subrecipient contracts under FEMA financial assistance awards for infrastructure issued on or after Jan. 2, 2023, as well as funds obligated to existing awards issued on or after Jan. 2, 2023, must include:

- A contract provision explaining the BABAA requirements; and,
- A self-certification where contractors can certify compliance with domestic preference requirements outlined in the BABAA Requirements section of this policy.[166]

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[162] 2 C.F.R. § 184.5.

[163] 2 C.F.R. § 184.6.

[164] OMB Memorandum M-24-02, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure.

[165] *Id.*; FEMA Policy 207-22-0001, Buy America Preference in FEMA Financial Assistance Programs for Infrastructure, available at https://www.fema.gov/sites/default/files/documents/fema_gpd-babaa-policy_042024.pdf/.

[166] 2 C.F.R. § 184.4(b).

- For the required contract provision and self-certification, recipients and subrecipients may draft their own provision and self-certification that meet the BABAA requirements to include in contracts and subcontracts. Alternatively, they may include language in the Appendix D, "BABAA Contract Provision and Self-Certification," in their contracts and subcontracts. Recipients and subrecipients should also consult their own contracting officials or legal counsel when incorporating any contract provision or self-certification.

2.3. Waivers

FEMA may waive the application of a domestic preference under a financial assistance program in any case in which the FEMA Administrator (or designee) finds that:

- Application of the BABAA requirements would be inconsistent with the public interest (a "public interest waiver");

- Types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (a "nonavailability waiver"); or

- The inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25% (an "unreasonable cost waiver").[167]

More information about FEMA's waiver criteria, types, and process can be found in "Buy America" Preference in FEMA Financial Assistance Programs for Infrastructure | FEMA.gov.

3. Definitions

"Produced in the United States" includes iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.[168]

''Manufactured products'' means items and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber.[169]

The requirements of this section must be included as a provision in all subawards and contracts (including purchase orders) for work or products under the FEMA award.

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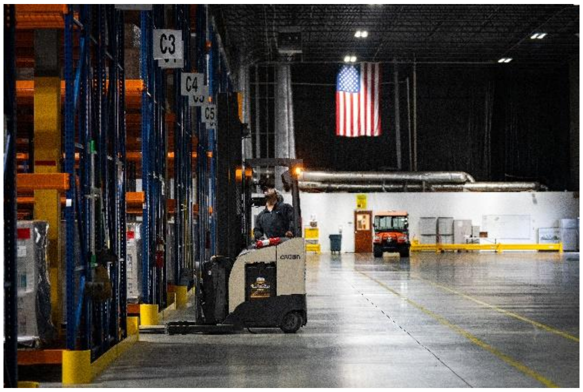
[167] BABAA § 70914(b); 2 C.F.R. § 184.7(a); 2 C.F.R. § 184.7.

[168] 2 C.F.R. § 322(b)(1).

[169] 2 C.F.R. § 322(b)(2).

4. The Buy American Act

The Buy American Act (BAA) requirements apply to ***all direct procurements*** made by the Federal Government, the District of Columbia, Puerto Rico, American Samoa, and the U.S. Virgin Islands. It does not apply to any other recipients or subrecipients using FEMA grant funding.[170]



The purpose of the Buy American Act is to protect domestic labor by mandating a preference for American-made goods in ***direct Federal Government*** purchases. Specifically, the Federal Government is required to purchase domestic "articles, materials, and supplies" when these items are intended for "public use" or are used in the construction, alteration, or repair of any "public building" or "public work" within the United States, unless a specific exception applies.[171] The terms "public building," "public use," and "public work" mean a public building of, use by, and public work of the Federal Government, the District of Columbia, Puerto Rico, American Samoa, and the U.S. Virgin Islands.[172]

The District of Columbia, the Commonwealth of Puerto Rico, American Samoa, and the U.S. Virgin Islands implement the BAA, including any exceptions, through their own procurement rules. Under 2 C.F.R. § 200.317, these governments must follow their own procurement regulations when seeking FEMA reimbursement under FEMA financial assistance awards.[173]

[170] 41 U.S.C. §§ 8301–8305.

[171] 41 U.S.C. § 8303.

[172] For example, a "public work" includes permanent housing construction performed by FEMA in American Samoa pursuant to Section 408 of the Stafford Act because the federal funds was used to serve the interests of the general public. Thus, the Buy American Act applies when contracting directly for the construction of permanent housing under Section 408 of the Stafford Act.

[173] The PAPPG recommends that these territorial governments consult their legal counsel when a project involves a public building or public works facility as the Buy American Act may apply to the procurement process.

Chapter 7: Procurement of Recovered Materials

The revised sections of the *OMB Guidance for Federal Financial Assistance* require a recipient or subrecipient to comply with 2 C.F.R. § 200.323, when procuring goods and services under a FEMA award. A recipient or subrecipient 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.[174] A political subdivision is the unit of government that the state determines to have met the State's legislative definition of a political subdivision.[175] **NOTE:** Indian Tribes and nonprofits are not subject to this requirement.

1. Recovered Materials

The requirements of Section 6002 include:

- Procuring only items designated in guidelines of the U.S. Environmental Protection Agency (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.[176]

[174] Pub. L. No. 89-272 (1965) (as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6962, and Executive Order 12873).

[175] 40 C.F.R. § 35.6015(a) *Political subdivision.*

[176] 2 C.F.R. § 200.323(a).

1.1. Inapplicability to Indian Tribes and Nonprofits

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 nonprofits.[177]

1.2. U.S. Environmental Protection Agency (EPA) Product Designation

The EPA is required to designate products that are or can be made with recovered materials, and to recommend best practices for buying these products.[178] Currently, the EPA has 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.[179]

Once EPA designates a product, Section 6002(c)(1) of the Solid Waste Disposal Act[180] requires States (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.[181]

States (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.[182]

1.3. Affirmative Procurement Program

Section 6002(i) of the Solid Waste Disposal Act[183] provides that each State government (including territorial governments) and local governments that purchase items designated by EPA must establish an affirmative procurement program, containing four specific elements, for procuring such

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[177] 2 C.F.R. § 200.323(a).

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

[179] 40 C.F.R. Part 247, Subpart B.

[180] Codified as amended at 42 U.S.C. § 6962(c)(1).

[181] 40 C.F.R. § 247.2(d).

[182] 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).

[183] Codified as amended at 42 U.S.C. § 6962(i).

items containing recovered materials to the maximum extent practicable.[184] The four required elements of the affirmative procurement program are:

- A recovered materials preference program, where an entity includes language in an RFP establishing a category and point scale for the use of recovered materials and 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;
- 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 utilized, where appropriate; and reasonable verification; and
- Annual review and monitoring of the effectiveness of an agency's affirmative procurement program.

1.4. Solid Waste Disposal Services

Section 6002(f) of the Solid Waste Disposal Act[185] requires States (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.

1.5. Certifications

Section 6002(c)(3) of the Solid Waste Disposal Act[186] and 40 C.F.R. § 247.4 provide that States (including territorial governments) and local governments must require that their vendors:

- 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

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[184] 40 C.F.R. § 247.6.

[185] Codified as amended at 42 U.S.C. § 6962(f).

[186] Codified as amended at 42 U.S.C. § 6962(c)(3).

- ✓ Contract Provisions Guide
- ✓ U.S. Environmental Protection Agency's Comprehensive Procurement Guideline Program

Chapter 8: Contract Cost and Price

Local governments and nonprofits must perform and document a cost or price analysis in connection with every procurement action above the Federal SAT, including contract modifications.[187] There are many benefits to local governments and nonprofits 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. The method of analysis is dependent on the facts surrounding the procurement situation; however, local governments and nonprofits must make their own estimates before receiving bids or proposals.[188] For example, the recipient or subrecipient should consider potential workforce impacts in their analysis if the procurement transaction will displace public sector employees.[189]

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;
- Comparing proposed prices with independently developed estimates created by the local government or nonprofit; and
- Comparing proposed prices with prices of the same or similar items obtained through market research.

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[187] 2 C.F.R. § 200.324(a).

[188] *Id.*

[189] *Id.*

Example: Price Analysis Techniques

Scenario: Following the damage and graffiti of several local places of worship with hateful speech, Church Y decided to procure security equipment and enhancements to its physical property. Church Y conducted an independent estimate and determined that the procurement would exceed the Federal SAT. After advertising its requirement and receiving multiple offers, Church Y compared the offeror prices with one another as required by its procurement policies and procedures. This analysis led Church Y to obtain a fair and reasonable price for the desired security equipment and enhancements. Is Church Y's price analysis technique compliant with the Federal Procurement Standards?

Answer: Yes. In this scenario, Church Y conducted a price analysis in accordance with their own procurement policies and procedures, which helped ensure a fair and reasonable price for the security equipment. The Federal Procurement Standards do not impose specific price analysis techniques on local governments and nonprofits; therefore, local governments and nonprofits are responsible for selecting the technique that will ensure a reasonable price and compliance with applicable rules.

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; however, local governments and nonprofits must make independent cost estimates before receiving bids or proposals. Costs or prices based on estimated costs for contracts are allowable only to the extent that costs are allowable under the Federal *Cost Principles* in the *Uniform Rules* located at 2 C.F.R. Part 200, Subpart E.[190]

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[190] 2 C.F.R. § 200.324(b).

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

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

Answer: The proposal from Contractor 2 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.

3. Cost Plus a Percentage of Cost Contracts (CPPC)

Local governments and nonprofits are prohibited from using a CPPC contract or percentage of construction costs contract.[191]

A CPPC contract is a cost-reimbursement contract containing some element that commits a local government or nonprofit 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.

3.1. Four-Part Analysis

FEMA will use the following four-part analysis to determine if a contract is a prohibited CPPC contract 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.[192]

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.

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 what it thought was a T&M

[191] 2 C.F.R. § 200.324(c).

[192] *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).

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 Standards?

Answer: No, the City of X inadvertently entered a prohibited CPPC 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 to drive up mark-up costs. Consequently, this type of contract is beneficial for a contractor but is less than ideal for a local government or nonprofit.

3.2. Considerations for States and Indian Tribes using CPPC Contracts

Although the Federal Procurement Standards do not expressly prohibit States and Indian Tribes from using CPPC contracts when otherwise permissible under state or tribal law, States and Indian Tribes should exercise caution before entering this contract type. All recipients and subrecipients must abide by the *Cost Principles* found in the *Uniform Rules* located at 2 C.F.R. Part 200, Subpart E to ensure that all costs are reasonable. States and Indian Tribes should exercise caution when using CPPC contracts because they often lead to unreasonable costs.

Related Tools and Resources

- ✓ PAPPG

Chapter 9: Federal Awarding Agency/Pass-Through Entity Review

As the federal awarding agency, FEMA is responsible for monitoring the financial assistance execution and ensuring proper performance under the FEMA award. While exercising this responsibility, FEMA may conduct both pre- and post- procurement reviews of procurements by local governments and nonprofits for compliance with the Federal Procurement Standards.[193]

1. Pre-Award Procurement Review

FEMA or the pass-through entity may conduct pre-procurement reviews of a local government's and nonprofit's procurements consistent with the terms of 2 C.F.R. §§ 200.318 – 200.327.[194]

1.1. Technical Specifications

Upon request by FEMA or a pass-through entity, a local government or nonprofit must make available technical specifications of proposed procurements by the local government or nonprofit 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 should take place before the time the specification is incorporated into a solicitation document. However, if a local government or nonprofit requests a procurement review after a solicitation has been developed, FEMA or a pass-through entity may still review the specifications. Such reviews should be limited to the technical aspects of the proposed purchase.[195]

1.2. Procurement Documents

Upon request by FEMA or a pass-through entity, the local government or nonprofit must make procurement documents available, such as RFPs, IFBs, or independent cost estimates, when any of the following conditions are present:

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[193] 2 C.F.R. § 200.325.

[194] *Id.*

[195] 2 C.F.R. § 200.325(a).

- The local government's or nonprofit's procurement procedures fail to comply with the procurement standards in 2 C.F.R. §§ 200.318 – 200.327;
- The procurement is expected to be more than the Federal SAT, is to be awarded without competition or only one bid is expected in response to a solicitation;
- The procurement is expected to be more than the Federal SAT and specifies a "brand name" product;
- The proposed contract is more than the Federal SAT, and a sealed bid procurement is to be awarded to an entity 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 Federal SAT.[196]

2. Exemption

Local governments and nonprofits are exempt from pre-procurement review if FEMA or the pass-through entity determines that the local government's or nonprofit's procurement process complies with the Federal Procurement Standards. There are two possible methods for local governments and nonprofits to use this exemption.

2.1. FEMA or Pass-Through Entity Review

Local governments and nonprofits may request FEMA or a pass-through entity to review whether its procurement system meets the Federal Procurement Standards for certification. Generally, these reviews must occur when there is continuous high-dollar funding and when third-party contracts are awarded on a regular basis. In all cases where a pass-through entity reviews a local government's or nonprofit's procurement system, the pass-through entity must provide the results of that review to FEMA.[197]

2.2. Self-Certification

Local governments and nonprofits may self-certify its procurement system. FEMA may rely on written assurances from the local government or nonprofit that it complied with the Federal Procurement Standards. Local governments and nonprofits must cite specific policies, procedures, regulations, or

[196] 2 C.F.R. § 200.325(b).

[197] 2 C.F.R. § 200.325(c)(1).

standards as being compliant with these requirements and have its system available for review. Self-certification does not limit FEMA's right to review the system. Local governments and nonprofits may still request review by FEMA or a pass-through entity even if it self-certifies.[198]

3. Post-Award Procurement Review

FEMA may review a local government's or nonprofit'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, through a FEMA audit or monitoring visit.[199]

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[198] 2 C.F.R. § 200.325(c)(2).

[199] 2 C.F.R. §§ 200.334 – 200.338.

Chapter 10: Bonding Requirements

Local Governments & Nonprofits

Local governments and nonprofits must follow certain federal bonding rules when awarding construction or facility improvement contracts and subcontracts exceeding the Federal SAT.[200] FEMA or the pass-through entity may accept the recipient's or subrecipient's bonding policy and requirements for construction or facility improvement contracts or subcontracts exceeding the Federal SAT. Before doing so, FEMA or the pass-through entity must determine that the federal interest is adequately protected.[201] If such a determination has not been made, the minimum requirements must be as follows.

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 obligee.[202] The rules also do not define construction work. FEMA will accept the meaning of construction work established under applicable state, local, and/or tribal laws and regulations. If state, local, and/or tribal laws, and regulations do not provide such definitions, FEMA uses the definition set forth at 41 C.F.R. § 60-1.3.

1. 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.[203]

The existence of a bid guarantee provides a local government or nonprofit assurance that the bidder has the financial means to accept the job for the price quoted in the bid and that the bidder will

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[200] 2 C.F.R. § 200.326.

[201] *Id.*

[202] 48 C.F.R. § 28.001, "bond."

[203] 48 C.F.R. § 28.001 "bid guarantee."

enter the required contract and execute the required performance and payment bonds if successful in its bid. The requirements for a bid guarantee[204] are as follows:

- Each bidder must provide a bid guarantee equivalent to 5% 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 the contract as agreed, the bid guarantee will provide financial protection to the local government or nonprofit 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, so they will be obligated to either perform the job or compensate the local government or nonprofit.

2. Performance Bond

The contractor must provide a performance bond for 100% of the contract price.[205] A performance bond is to be executed in connection with the contract and its purpose is to protect the local government or nonprofit from sustaining losses if the contractor fails to fulfill its requirements under the contract.

3. Payment Bond

The contractor must provide a payment bond for 100% of the contract price.[206] 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.

[204] 2 C.F.R. § 200.326(a).

[205] 2 C.F.R. § 200.326(b).

[206] 2 C.F.R. § 200.326(c).

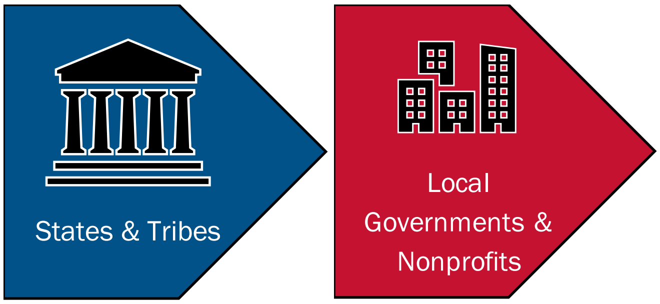
Example: Applicability of the Federal Bonding Requirements

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. § 200.326?

Answer: No. City of M's procurement is not subject to the bonding requirements found at 2 C.F.R. § 200.326. The bonding requirements are only applicable to contracts and subcontracts for construction or facility improvements above the Federal SAT. While the estimated total of the contract exceeds $250,000, the contract is not for construction or facility improvement.

Although the federal bonding requirements are only required for construction or facility improvement contracts or subcontracts above the Federal SAT, an entity can still have bonding requirements for other contract types provided that the requirements are not excessive or arbitrary.

Chapter 11: Contract Provisions



This chapter highlights and provides background on the required provisions. For sample language, definitions, and references, please see the Contract Provisions Guide. The Federal Procurement Standards require recipient and subrecipient contracts contain the applicable provisions described in Appendix II to Part 200 of the Uniform Rules (*Contract Provisions for Non-Federal Entity Contracts Under Federal Awards*).[207]

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

- Access to records;
- Changes and modifications;
- Permission required for the use of DHS seal, logo, or flags;
- Compliance with federal law, regulations, executive orders, and acknowledgement of federal funding;
- No obligation by the Federal Government;
- Program fraud and false or fraudulent statements or related acts;
- Copyrightable subject matter; and,
- BABAA for A/E Contracts.

NOTE: FEMA is permitted to require additional contract provisions.[208]

[207] 2 C.F.R. § 200.327.

[208] 2 C.F.R. Part 200, Appendix II.

1. Required Provisions

1.1. Contract Remedies[209]

Recipients and subrecipients 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 more than the Federal SAT.[210]

A "remedy" is the right of a contracting party when the other party does not fulfill its contractual obligations.[211] Parties may seek various judicial remedies for breach of contract, including damages, specific performance, and rescission or restitution.[212] Appendix II to 2 C.F.R. Part 200 simply requires the recipient or subrecipient to spell out the remedies for breach of contract.

1.2. Termination for Cause and Convenience[213]

Contracts for more than $10,000 must address termination for cause and for convenience by the recipient or subrecipient, including how it will be carried out and the basis for settlement. For contracts at or below $10,000, FEMA suggests including a termination for cause provision, but this is not required.

"Termination for convenience" is the exercise of a recipient's or subrecipient's right to completely or partially terminate the contractor's performance of work under a contract when it is in the recipient's or subrecipient's interest.[214] On the other hand, "termination for cause" (or "default") is the exercise of a party's right to terminate a contract completely or partially because of the other party's actual or anticipated failure to perform its contractual obligations.[215]

1.3. Davis-Bacon Act[216]

Appendix II to 2 C.F.R. Part 200 requires that recipients and subrecipients include a contract clause providing for the compliance with the Davis-Bacon Act (40 U.S.C. §§ 3141-3148) as supplemented by DOL regulations at 29 C.F.R. Part 5.[217] This requirement, however, only applies to construction

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209 2 C.F.R. Part 200, Appendix II § A.

210 *Id.*

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

212 *Id.*

213 2 C.F.R. Part 200, Appendix II § B.

214 48 C.F.R. § 2.101.

215 *Id.*

216 2 C.F.R. Part 200, Appendix II § D.

217 *Id.*

contracts awarded by recipients and subrecipients in excess of $2,000 when required by federal grant program legislation.[218]

The Davis-Bacon and Copeland Anti-Kickback Acts only apply to the Emergency Management Preparedness Grant Program, Homeland Security Grant Program, Nonprofit Security Grant Program, Tribal Homeland Security Grant Program, Port Security Grant Program, Transit Security Grant Program, Intercity Passenger Rail Program, Safeguarding Tomorrow Revolving Loan Fund, and High Hazard Potential Dams Grant Program. These Acts do not apply to other FEMA grant and cooperative agreement programs, such as the PA Program. However, if the recipient's or subrecipient's own procurement standards include equivalents to or adopt the Davis-Bacon and Copeland Anti-Kickback Acts, under those circumstances, they should be applied to the recipient or subrecipient.

1.4. Copeland Anti-Kickback Act[219]

Recipient and subrecipient contracts must include a provision for compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. § 874[220] and 40 U.S.C. § 3145[221]), 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.

1.5. Contract Work Hours and Safety Standards Act[222]

Where applicable, all contracts awarded by the recipient or subrecipient of more than $100,000 that involve the employment of mechanics or laborers must include a provision for compliance with

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[218] *Id.*

[219] 2 C.F.R. Part 200, Appendix II § D.

[220] 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.").

[221] 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.

[222] 2 C.F.R. Part 200, Appendix II § E.

statutory requirements on work hours and safety standards.[223] Under 40 U.S.C. § 3702, each contractor must base wages for every mechanic and laborer on a standard 40-hour work week. Work over 40 hours is allowed, so long as the worker is paid at least one and a half times the base pay rate for all hours worked over 40 in the work week. Additionally, for construction work, under 40 U.S.C. § 3704, work surroundings and conditions for laborers and mechanics must not be unsanitary or unsafe. Relevant definitions are at 40 U.S.C. § 3701 and 29 C.F.R. § 5.2.

1.6. Rights to Inventions Made Under a Contract or Agreement[224]

If a federal award meets the definition of "funding agreement"[225] and the recipient or subrecipient 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 recipient or subrecipient 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.

This requirement does not apply to the Public Assistance Grant Program, Hazard Mitigation Grant Program, Flood Mitigation Assistance, Building Resilient Infrastructure and Communities, Pre-Disaster Mitigation Grant Program, Fire Management Assistance Grant Program, Hazard Mitigation Grant Program Post-Fire, Crisis Counseling Assistance and Training Grant Program, Disaster Case Management Grant Program, Federal Assistance to Individuals and Households – Other Needs Assistance Grant Program, or Safeguarding Tomorrow Revolving Loan Fund as FEMA awards under these programs do not meet the definition of "funding agreement."

1.7. Clean Air Act and the Federal Water Pollution Control Act[226]

Contracts more than $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 Clean Air Act (42 U.S.C. §§ 7401-7671q.), which includes all applicable standards, orders, or regulations issued pursuant to the Clean Air Act, 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 EPA.

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[223] 40 U.S.C. §§ 3702, 3704. The Contract Work Hours and Safety Standards Act is supplemented by Department of Labor regulations at 29 C.F.R. Part 5. *See* 2 C.F.R. Part 200, Appendix II, §E.

[224] 2 C.F.R. Part 200, Appendix II § F.

[225] The regulation at 37 C.F.R. § 401.2(a) defines "funding agreement" as any contract, grant, or cooperative agreement entered 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 for the performance of experimental, developmental, or research work under a funding agreement as defined in the preceding sentence.

[226] 2 C.F.R. Part 200, Appendix II § G.

1.8. Suspension and Debarment[227]

Contracts expected to be equal to or exceed $25,000 must contain a suspension and debarment clause. Recipient and subrecipient 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 DHS 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."[228] 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.
  - It is a subcontract for $25,000 or more.[229]
- **Exclusions**: The two forms of exclusion are "suspension" and "debarment"[230] and they can be extended to include subsidiaries, parent companies, and other individuals.[231]

Suspension is an action taken by the Suspension and Debarment Official (SDO) that excludes a person from participating in a covered transaction for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue.[232] Suspension may be based on indictments, convictions, or adequate evidence involving crimes, fraud, poor performance, nonperformance, or false statements.[233] Suspensions require immediate action by the agency to protect the public interest.[234]

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[227] 2 C.F.R. Part 200, Appendix II § H; 2 C.F.R Part 180.

[228] *Id.*

[229] 2 C.F.R. § 180.220.

[230] 2 C.F.R § Part 180 Subpart G and Part 180 Subpart H.

[231] 2 C.F.R. § 180.625.

[232] 2 C.F.R. §§ 180.985 and 180.1015.

[233] 2 C.F.R. § 180.715(b).

[234] 2 C.F.R. § 180.700(c).

Debarment is an action taken by the SDO to exclude parties from participating in a covered transaction for a specified period, typically three years.[235] Debarment may be based on convictions, civil judgments, as well as other causes.[236] 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.[237]

1.9. Byrd Anti-Lobbying Amendment[238]

Recipient and subrecipients who intend to award contracts of more than $100,000, and their contractors who intend to award subcontracts of more than $100,000, must include a contract provision prohibiting the use of federal appropriated funds to influence officers or employees of the Federal Government. Contractors that apply or bid for a contract for more than $100,000 must also file the required certification regarding lobbying.[239]

Each tier certifies to the tier above that it will not and has not used federal appropriated funds to pay any person or organization for influencing or attempting to influence an employee of a federal agency, a Member of Congress, an employee of Congress, or an employee of a Member of Congress in connection with receiving any federal contract, grant, or other award covered by 31 U.S.C. § 1352.

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[235] 2 C.F.R. § 180.925.

[236] 2 C.F.R. § 180.800.

[237] 2 C.F.R. §§ 3000.332 and 3000.437.

[238] 2 C.F.R. Part 200, Appendix II § I.

[239] 2 C.F.R. Part 200, Appendix II, § I (citing 31 U.S.C. § 1352); 44 C.F.R. § 18.110.

The required certification form is found in FEMA regulations.[240] Each tier must also disclose any lobbying with non-federal funds that takes place in connection with obtaining any federal funding. These disclosures are forwarded from tier to tier, all the way up to the federal agency.[241]

1.10. Procurement of Recovered Materials[242]

A recipient or subrecipient that is a state agency or an agency of a political subdivision of a state, and the recipient's or subrecipient's contractors must comply with Section 6002 of the Solid Waste Disposal Act.[243] Applicable recipients and subrecipients must include a contract provision requiring compliance with this requirement.[244] This includes contracts awarded by a state agency or political subdivision of a state and its contractors for certain items, as designated by the Environmental Protection Agency, with a purchase price greater than $10,000.[245] Additional requirements are listed in the Contract Provisions Guide.

NOTE: This contract provision is not a requirement for Indian Tribes and nonprofits.

1.11. Prohibition on Contracting for Covered Telecommunications Equipment or Services[246]

Section 889(b)(1) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (FY 2019 NDAA) and 2 C.F.R. § 200.216, as implemented by FEMA Policy 405-143-1, Prohibitions on Expending FEMA Award Funds for Covered Telecommunications Equipment or Services (Interim), prohibit the obligation or expending of federal award funds on certain telecommunication products or from certain entities for national security reasons. Effective Aug. 13, 2020, FEMA recipients and subrecipients, as well as their contractors and subcontractors, may not obligate or expend any FEMA award funds to:

- Procure or obtain any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology of any system;

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[240] 44 C.F.R. §§ 18.100, 18.110; 44 C.F.R. Part 18, Appendix A. FEMA's regulations at 44 C.F.R. Part 18 implement 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.

[241] 44 C.F.R. §§ 18.100, 18.110; 44 C.F.R. Part 18, Appendix B. The specific form for disclosures is referenced in Appendix B to 44 C.F.R. Part 18 and is SF-LLL, also available at https://www.grants.gov/forms/forms-repository/sf-424-family.

[242] 2 C.F.R. Part 200, Appendix II § J.

[243] Pub. L. No. 89-272 (1965) (codified as amended by the Resource Conservation and Recovery Act at 42 U.S.C. § 6962). 2 C.F.R. § 200.323.

[244] 2 C.F.R. Part 200, Appendix II, § J (citing 2 C.F.R. § 200.323).

[245] 2 C.F.R. Part 200, Appendix II, § J; 2 C.F.R. § 200.323; 40 C.F.R. Part 247.

[246] 2 C.F.R. Part 200, Appendix II § K; and 2 C.F.R. § 200.216.

- Enter into, extend, or renew a contract to procure or obtain any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology of any system; or

- Enter into, extend, or renew contracts with entities that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.

1.12. Domestic Preferences for Procurements[247]

Recipients and subrecipients should, to the greatest extent practicable and consistent with law, provide a preference for the purchase, acquisition, or use of goods, products or materials produced in the United States. This includes, but is not limited to, iron, aluminum, steel, cement, and other manufactured products.

1.13. Buy America Requirements

BABAA requires all federal agencies, including FEMA, to ensure that no federal financial assistance for "infrastructure" projects is provided unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.[248]

The BABAA contract provision and self-certification are required for contracts and subcontracts for infrastructure projects that are subject to the BABAA requirements unless the requirement is waived.[249]

2. FEMA Recommended Provisions

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

2.1. Access to Records

All recipients and subrecipients must acknowledge and agree to comply with applicable provisions governing DHS access to records, accounts, documents, information, facilities, and staff. Recipients and subrecipients 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

[247] 2 C.F.R. Part 200, Appendix II § L; and 2 C.F.R. § 200.322.

[248] Section 70914 of Pub. L. 117-58 §§ 70901-52; 2 C.F.R. § 200.322(c); 2 C.F.R. § 184.1(b).

[249] 2 C.F.R. § 184.4.

may be necessary, as required by DHS regulations *and* other applicable laws or program guidance.[250]

Additionally, Section 1225 of the Disaster Recovery Reform Act of 2018 prohibits FEMA from providing reimbursement to any state, local, tribal or territorial government, or nonprofit for activities made pursuant to a contract that purports to prohibit audits or internal reviews by the FEMA administrator or U.S. Comptroller General.

FEMA recommends that recipients and subrecipients 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.

2.2. Changes and Modifications

To be allowable under a FEMA award, the cost of any contract change, modification, amendment, addendum, change order, or constructive change must be necessary, allocable, within the scope of the award, reasonable for the scope of work, and otherwise allowable.[251]

Therefore, FEMA recommends that recipients and subrecipients 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.

2.3. DHS Seal, Logo, and Flags

Recipients and subrecipients must obtain permission prior to using the DHS seal(s), logos, crests, or reproductions of flags or likenesses of DHS agency officials.[252] FEMA recommends that all recipients and subrecipients insert 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 in their contracts.

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

The recipient or subrecipient and its contractors are required to comply with all federal laws, regulations, and executive orders. FEMA recommends that all recipients and subrecipients insert an

[250] FY 2025 DHS Standard Terms and Conditions.

[251] 2 C.F.R. § 200.403.

[252] FY 2025 DHS Standard Terms and Conditions.

acknowledgement that FEMA financial assistance will be used to fund the contract along with the requirement that the contractor will comply with all applicable federal law, regulations, executive orders, and FEMA policies, procedures, and directives in their contracts.

2.5. No Obligation by the Federal Government

FEMA is not a party to any transaction between the recipient or subrecipient 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 recipient or subrecipient 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 recipient or subrecipient, contractor, or any other party pertaining to any matter resulting from the contract.

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

Recipients and subrecipients 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.[253] FEMA recommends that the recipient or subrecipient 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.

2.7. Copyright

2 C.F.R. § 200.315 concerns intangible property and requires that a recipient or subrecipient provide certain licenses with respect to copyright to the federal agency. 2 C.F.R. § 200.315(b) provides "a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use [any work that is subject to copyright] for federal purposes, and to authorize others to do so" to the federal agency 2 C.F.R. § 200.315(d) provides to the Federal Government the rights to "obtain, reproduce, publish, or otherwise use" data produced under a federal award and to authorize others to do the same.

2.8. BABAA for Architecture and Engineering (A/E) Contracts

In accordance with BABAA requirements, FEMA must ensure that no federal financial assistance for infrastructure projects is awarded unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.[254] Although A/E professional services are not considered infrastructure, FEMA recommends that A/E contracts under

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[253] *Id.;* 31 U.S.C. §§ 3801-3812.

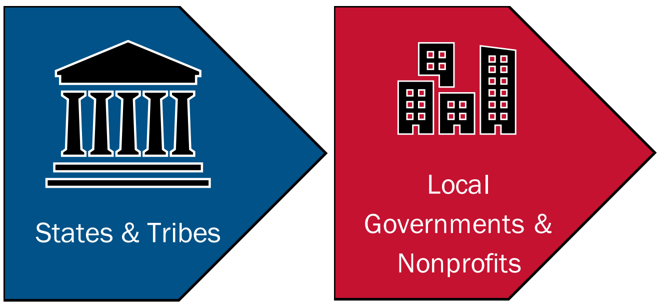
[254] Section 70914 of Pub. L. 117-58 §§ 70901-52; 2 C.F.R. § 200.322(c); 2 C.F.R. Part 184.1(b).

FEMA grants that are subject to BABAA include a statement requiring contractors and subcontractors to implement a Buy America Preference in their planning and design of an infrastructure project.

Related Tools and Resources

- ✓ Appendix II to Part 200: Contract Provisions for Non-Federal Entity Contracts under Federal Awards
- ✓ Contract Provisions Guide

Chapter 12: Beyond the Basics: Important Procurement Considerations



Recipients and subrecipients often seek guidance regarding complex issues that are not explicitly outlined in the Federal Procurement Standards. 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:

- Contract Changes/Modifications
- Design-Bid-Build and Design-Build Contracts
- Construction Manager at Risk (CMAR) Delivery Method
- Cooperative Purchasing Program
  - Cooperative Purchasing
  - Joint Procurements
  - Piggybacking
- Prepare Before a Disaster
  - Prepositioned Contracts
- Mutual Aid Agreements
- Purchasing Agents
- Prohibition on Covered Telecommunications Equipment and Services

When the Federal Procurement Standards do not address a specific procurement issue, local governments and nonprofits must abide by the applicable state, local, and/or tribal procurement standards or regulations – whichever applies to the specific local government or nonprofit.

1. 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 a recipient or subrecipient 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 recipient's or subrecipient's requirements.

All contract changes should be within the scope of the original contract. Recipient and subrecipients are not restricted from making minor adjustments contemplated fairly and reasonably by the parties when they entered the contract. Cardinal changes 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 recipient or subrecipient meets the necessary conditions for using the procurement through noncompetitive proposal method (sole sourcing). If a recipient or subrecipient performs a cardinal change without meeting the exceptions to competitive procurements, then the recipient or subrecipient is noncompliant with the Federal Procurement Standards.

Issues related to impermissible cardinal changes may arise within the context of a recipient or subrecipient 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 a recipient or subrecipient 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.

1.1. Scope of the Contract

In determining whether changes are beyond the scope of the contract, FEMA may compare the total work performed by the contractor to the work called for in the original contract. This includes evaluating the nature of the work being performed, the additional amount of effort the contractor is required to perform for the work, 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.

1.2. Scope of Competition

In determining whether changes are beyond the scope of the contract, FEMA may 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 may 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 five 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.

2. Construction Contracting

Recipients and subrecipients often contract for services to design and construct projects under a FEMA award. This includes for A/E professional services under design-bid-build and design-build contracts to include using a CMAR delivery method. This section explains each procurement practice.

2.1. Architectural and Engineering Services

When seeking A/E professional services only, local governments and nonprofits may use proposal procedures for a qualifications-based procurement. Under this method, price is not used as an evaluative factor. The local government or nonprofit evaluate each offeror's qualifications and selects the most qualified offeror. The contract award is subject to negotiation of fair and reasonable compensation.[255] If the parties fail to agree on a fair and reasonable price, the local government and nonprofit may conduct negotiations with the next most qualified offeror.

If necessary, the local government or nonprofit 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 A/E professional services and cannot be used to purchase other types of services (even if an A/E firm is the one providing those other types of services).[256]

FEMA considers the following to fall within the scope of A/E professional services 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;
- Other professional services of an architectural or engineering nature or related services (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.

2.2. 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;

[255] 2 C.F.R. § 200.320(b)(2)(iv).

[256] *Id.*

- 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.

Local governments and nonprofits may use design-bid-build procurement procedures under a FEMA award if permitted by state, local, and/or 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.[257]

2.3. 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 team will be responsible for both the project's design and construction. The Federal Procurement Standards allow the use of design-build contracts if permitted by state, local, and/or tribal laws and regulations.

For design-build contracts, local governments and nonprofits should separate the various contract activities to be undertaken, classify them as either design or construction, and then calculate the estimated total value of each.

> Local governments and nonprofits should 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 generally expects local governments and nonprofits to use

[257] 2 C.F.R. § 200.319(b).

procurement by sealed bidding for the entire procurement rather than a qualifications-based procurement by proposals.

- If A/E services are predominant (which is unusual), then the local government or nonprofit may use sealed bidding, procurement by competitive proposals, or a qualifications-based procurement by competitive proposals.

2.4. Construction Manager at Risk Delivery Method

Under a typical CMAR delivery method, a recipient or subrecipient hires a construction firm or construction manager early in the design and planning process to later oversee the project's construction.[258] 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 the recipient or subrecipient and construction manager negotiate a guaranteed maximum price (GMP) during the design phase 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 Standards, and it is the responsibility of the recipient or subrecipient to ensure compliance when using this delivery method under a FEMA award. Because there is no uniform CMAR standard across jurisdictions, particularly regarding the construction phase and its evaluation, 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.

2.4.1. 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 A/E services.[259]

When procuring a construction manager, local governments and nonprofits should review anticipated project costs and determine if the majority of costs are for actual construction costs or for architectural and engineering professional services. If a majority of the costs are for the actual cost of construction, then local governments and nonprofits should consider the price for the entire project (design, planning, and construction phases) to ensure that no part of the construction

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

[259] 2 C.F.R. § 200.320(b)(2)

manager selection (including the initial selection of qualified contractors) is done without consideration of cost competition. Because the majority of costs when using CMAR are often for actual construction costs, not A/E services, using a qualifications-based procurement for the CMAR approach may violate the Federal Procurement Standards.

3. 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.

Recipients and subrecipients may enter cooperative purchases; however, they must follow the Federal Procurement Standards. The responsibility is on the recipient or subrecipient to ensure compliance with the rules applicable to its entity type (State/Indian Tribe or Local Government/Nonprofit).

3.1. Joint Procurements

The Federal Procurement Standards encourage local governments and nonprofits to enter into state and local intergovernmental agreements for procurement or use of common goods and services.[260] FEMA has interpreted this regulation as encouraging recipients and subrecipients 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 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 recipients and subrecipients to foster greater economy and efficiency by allowing the opportunity for a cost-effective use of shared resources.

Upon contract award, local governments, and nonprofits 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 local government or nonprofit from the requirement to comply with all Federal Procurement Standards applicable to it. In other words, each party acting under a joint procurement should ensure that all applicable Federal Procurement Standards are met 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.”

[260] 2 C.F.R. § 200.318(e).

Example: Joint Procurement between a Local Government or Nonprofit

Scenario: Two neighboring counties have decided to prepare for the upcoming hurricane season. From prior 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 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 contract to carry out debris removal services for the following two weeks. Are the two counties allowed to enter 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. §§ 200.317 – 200.327, this contract could be used by both counties for debris removal services during a major disaster.

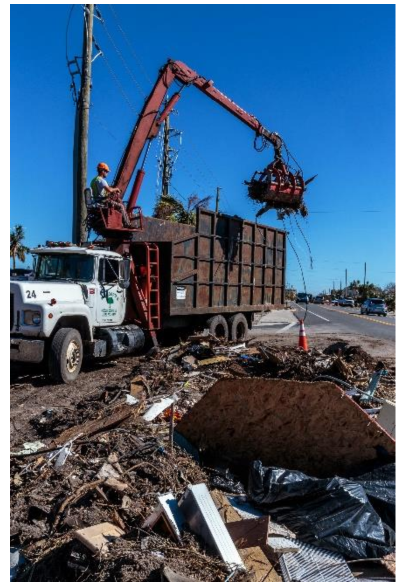
3.2. Joint Procurements between States/Indian Tribes and Local Governments and Nonprofits

A State or Indian Tribe may enter a joint procurement with a local government or nonprofit for goods and services to be used by both parties under a FEMA award.

When a State or Indian Tribe is entering into a procurement with a local government or nonprofit, it is important to remember that the contract must be procured in compliance with both state, tribal and local procurement regulations, as well as the Federal Procurement Standards at 2 C.F.R. §§ 200.318 – 200.327. This is a very important caveat because a State or Indian Tribe 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 a State or Indian Tribe is procuring with a local government or nonprofit, the purchase must comply with the Federal Procurement Standards that are applicable to all entity types participating in the joint procurement.

3.3. Using Another Jurisdiction's Contract (Piggybacking)



There are times when a recipient or subrecipient sets up a contract with a vendor, then a second recipient or subrecipient wants to utilize 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 Standards. Although FEMA generally discourages the use of piggyback contracts, a recipient or subrecipient that obtains contractual rights through assignment[261] may use the contract after first determining that:

- The original contract was procured in compliance with the Federal Procurement Standards 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.

3.4. Local Governments, Nonprofits and Piggybacking

If the above-mentioned criteria are not met, and a local government or nonprofit enters a piggyback contract, FEMA views the contract as noncompetitive. A local government or nonprofit can only sole-source or conduct a noncompetitive procurement when it meets certain exceptions.[262] If a local government or nonprofit enters into a piggyback contract when it does not meet the above-mentioned criteria or the exceptions for noncompetitive procurements, then the local government or nonprofit is noncompliant with the Federal Procurement Standards.

[261] An "assignment" includes the transfer of contract rights from one party to another. *See* Black's Law Dictionary (12th Ed. 2024) (defining "assignment").

[262] 2 C.F.R. § 200.320(c).

3.5. States, Indian Tribes, and Piggybacking

Under the Federal Procurement Standards, a State or Indian Tribe must follow its own rules in determining the appropriateness of piggybacking and whether it can enter 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 Jan. 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 Jan. 23, 2019, storm require City of Z to use all 10 trucks for its debris removal. If 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, so the cumulative need exceeds the scope of the contract. Thus, the City of W's use of the contract would result in an out-of-scope modification to the original contract.

4. Cooperative Purchasing Programs

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. The GSA Multiple Award Schedule (MAS) Purchasing Programs are examples of cooperative purchasing programs. Recipients and subrecipients 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 contracts based on the rates or prices listed in the cooperative purchasing program's agreements or contracts with vendors.

Recipients and subrecipients choosing to procure goods or services from a state supply schedule, cooperative purchasing program, or other similar program, for such procurements to be permissible under federal requirements, the following must be true:

- The procurement of the original contract or purchasing schedule and its use by the recipient or subrecipient complies with state, tribal, and local law, regulations, and written procurement procedures;

- The recipient or subrecipient that originally procured the original contract or purchasing schedule entered the contract or schedule with the express purpose of making it available to the recipient or subrecipient;

- The contract or purchasing schedule specifically allows for such use, and the work to be performed for the recipient or subrecipient falls within the scope of work under the contract as to type, amount, and geography;

- The procurement of the original contract or purchasing schedule complied with all the procurement standards applicable to the recipient or subrecipient at 2 C.F.R. §§ 200.317 – 200.327; and

- With respect to the use of a purchasing schedule, the recipient or subrecipient must follow ordering procedures that adhere to applicable state, tribal, and local laws and regulations and the minimum requirements of full and open competition under 2 C.F.R. Part 200.

If a recipient or subrecipient other than a State or Indian Tribe seeks to use a state supply schedule, cooperative purchasing program, or other similar type of arrangement, FEMA recommends the recipient or subrecipient discuss the procurement plans with its FEMA grants point of contact.

4.1. Use of General Services Administration Schedules

Eligible recipients and subrecipients that may include States, Indian Tribes, local governments, and a limited number of nonprofits, may procure goods and services from many GSA MAS Purchasing Programs, also known as GSA Schedules.[263] Recipients and subrecipients should review the GSA purchasing program guidelines in order to determine whether their entity is eligible to purchase off the GSA Schedule. GSA offers multiple efficient and effective procurement programs for state, tribal, and local government to purchase products and services directly from vetted contractors. The GSA Schedules are long-term government-wide contracts with commercial firms that provide access to millions of commercial products and services at volume discount pricing.

4.1.1. USE OF GSA SCHEDULES BY STATES AND INDIAN TRIBES

If a State or Indian Tribe procures goods or services using a GSA Schedule, the State or Indian Tribe must ensure compliance with its own procurement rules. They must also comply with requirements

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[263] 40 U.S.C. § 502(c); *see* https://www.gsa.gov/policy-regulations/policy/acquisition-policy/eligibility-determinations/nongovernmental-orgs.

for domestic preferences and required contract provisions. States, but not Indian Tribes, are also subject to the procurement of procurement of recovered materials.

4.1.2. USE OF GSA SCHEDULES BY LOCAL GOVERNMENTS AND NONPROFITS

When purchasing from a GSA schedule, eligible local governments and nonprofits will satisfy the federal requirements for full and open competition provided that the GSA ordering procedures are followed. However, the eligible local governments and nonprofits will still need to follow the other Federal Procurement Standards at 2 C.F.R. §§ 200.318 – 200.327, contractor oversight, cost or price analysis, and required contract provisions.

4.2. Other Supply Schedules and Cooperative Purchasing Programs

For recipients and subrecipients that want to procure goods or services from a cooperative purchasing program, or other similar program, for such procurements to be permissible under federal requirements, the following must be true.

4.2.1. COOPERATIVE PURCHASING BY A STATE AND INDIAN TRIBE

If a State or Indian Tribe procures goods or services through cooperative purchasing, the entity must ensure compliance with its own procurement rules. If a State or Indian Tribe procures goods or services through cooperative purchasing, the entity must ensure compliance with its own procurement rules. States and Indian Tribes also must comply with the domestic preferences and required contract provisions. States, but not Indian Tribes, are also subject to the procurement of recovered materials requirement.

4.2.2. COOPERATIVE PURCHASING BY A LOCAL GOVERNMENT AND NONPROFIT

While the Federal Procurement Standards encourage the use of cooperative purchasing where appropriate, local governments and nonprofits 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 – 200.327. For example, if a local government or nonprofit enters into a cooperative purchase with a State or Indian Tribe, the local government and nonprofit must ensure the State's or Indian Tribe's procurement complied with the Federal Procurement Standards for local governments and nonprofits. A local government or nonprofit that decides to use a cooperative purchasing program should document and explain how its use of the program complied with all Federal Procurement Standards and applicable state, tribal, and local procurement rules and policies. Below are additional considerations for local governments and nonprofits when purchasing from a cooperative purchasing program:

- **Micro-Purchases and Simplified Acquisitions:** If a local government and nonprofit wishes to purchase goods and services through a cooperative purchase where the total cost does not exceed the Federal SAT, the local government and nonprofit must ensure that the purchase complies with the Federal Procurement Standards for micro-purchases or simplified acquisitions (depending on the cost of the purchase).[264]

- **Purchases Above the SAT:** If a local government or nonprofit procures goods or services above the Federal SAT through cooperative purchasing, unless there are specific circumstances that allow for a noncompetitive procurement method, such as emergency or exigency circumstance, the local government and nonprofit must ensure compliance with the Federal Procurement Standards for sealed bids or proposals.[265]

- **Methods of Procurement:** Sealed bidding and proposals require that local governments and nonprofits 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 bids) or to the responsive firm whose proposal is most advantageous to the program with price and other factors considered (for proposals).

- **Scope of Work Requirements:** Local governments and nonprofits 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.[266]

- **Compliance with all other Federal Rules:** Local governments and nonprofits must ensure compliance with all applicable Federal Procurement Standards when acquiring goods and services through a cooperative purchasing program. This includes making sure that the purchase order or contract includes all required contract provisions[267] and a cost or price analysis is conducted, including an independent cost estimate pre-solicitation,[268] etc.

Another common issue with cooperative purchasing programs for procurements above the SAT is that while these programs may use the solicitation process, they often do not enter into binding agreements with vendors. This leads to vendors committing to prices and being placed on prequalified lists, leaving the recipient or subrecipient responsible for completing the procurement.

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[264] 2 C.F.R. § 200.320(a).

[265] 2 C.F.R. § 200.320.

[266] 2 C.F.R. § 200.319.

[267] 2 C.F.R. § 200.327.

[268] 2 C.F.R. § 200.324.

To use prequalified lists, local governments and nonprofits must adhere to 2 C.F.R. § 200.319(e), which requires that potential bidders are not precluded from qualifying during the solicitation period. In these circumstances, this would mean that local governments and nonprofits must deviate from the cooperative purchasing program's ordering procedures and instead solicit and advertise their requirements. While they may be able to directly solicit to vendors from the prequalified lists, they must also allow other interested vendors, outside of the prequalified lists, the opportunity to compete if they submit a bid or proposal during the solicitation period.

5. Prepare Before a Disaster

Taking appropriate contracting actions before a disaster strikes, enables recipients and subrecipients to respond quickly in emergency situations, make recovery decisions in a lower-pressure environment, and avoid additional costs associated with last-minute contracts. In addition to reviewing the applicable Federal Procurement Standards, below are contracting actions local governments and nonprofits can take to prepare for a disaster.

5.1. Create Prequalified Lists

Recipients and subrecipients must ensure that all prequalified lists of persons, firms, or products used in procurement transactions are current and include enough qualified sources to ensure maximum open competition.[269] When establishing or amending prequalified lists, the recipient or subrecipient must consider objective factors that evaluate price and cost to maximize competition. The recipient or subrecipient must not preclude potential bidders from qualifying during the solicitation period.[270]

Local governments and nonprofits may use prequalified lists of persons, firms, and products when purchasing under a FEMA award.[271] These prequalified lists, however, are not contracts. They are tools to aid in the procurement of future requirements by allowing recipients and subrecipients to review the qualifications of prospective contractors prior to a contract award. The Federal Procurement Standards set forth two requirements that local governments and nonprofits must meet when using such a list.

- First, they must ensure that all prequalified lists are current and include enough qualified sources to ensure maximum full and open competition.[272]

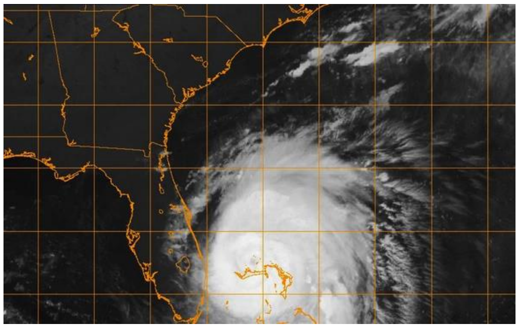
[269] 2 C.F.R. § 200.319(e).

[270] *Id.*

[271] *Id.*

[272] *Id.*

- Second, they must not preclude potential bidders or offerors from qualifying during the solicitation period.[273]



Since prequalified lists are not contracts, local governments and nonprofits must still comply with all the other applicable Federal Procurement Standards when awarding a contract.[274] While a local government or nonprofit 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. §§ 200.317 – 200.327.

Recipients and subrecipients, which include state, local, tribal, and territorial governments, are better positioned to contract in response to an emergency or major disaster when they have written procurement policies and procedures and understand which Federal Procurement Standards apply to their organization. The following outline the federal rules applicable to States, Indian Tribes, local governments, and nonprofits.

- States, the District of Columbia, territories, Indian Tribes and their agencies and instrumentalities, must follow their own documented procurement policies and procedures when purchasing under a FEMA award pursuant to 2 C.F.R. § 200.317. States and Indian Tribes are required to provide a preference for domestic sources to the greatest extent practicable and consistent with law (2 C.F.R. § 200.322). States must also pursue procurement of recovered materials (2 C.F.R. § 200.323). Both States and Indian Tribes are required to ensure that all necessary contract provisions are included in their contracts (2 C.F.R § 200.327). **NOTE:** Indian Tribes are not subject to 2 C.F.R. § 200.323.

- Local governments and nonprofits must have documented procurement policies and procedures, which reflect applicable local, state, or tribal law, and ensure compliance with the federal requirements listed at 2 C.F.R. §§ 200.318 – 200.327.

In the case of noncompliance with the Federal Procurement Standards, FEMA may apply a remedy, as appropriate, in accordance with its authorities found at 2 C.F.R. § 200.339.

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[273] 2 C.F.R. § 200.319(e).

[274] 2 C.F.R. §§ 200.318 – 200.327.

Example: Solicitations Using a Prequalified List

Scenario: The Town of Z, following a public solicitation for a RFQ, 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 Procurement Standards?

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(e). It may be the case, however, that awarding a short-term, noncompetitive debris removal contract to one of the contractors on the prequalified list may be permissible if an exigent or emergency circumstance would make full and open competition infeasible.[275] 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.

5.2. Award Prepositioned Contracts

FEMA encourages recipients and subrecipients to award prepositioned contracts, or advance contracts, before an incident occurs for the potential performance of work under the FEMA award. Use of prepositioned contracts allows entities to conduct a deliberate procurement process outside of the pressure and immediate demands of a disaster. It also helps ensure contractors are readily available to perform work quickly after an incident occurs. When using a prepositioned contract, States, Indian Tribes, local governments and nonprofits must ensure that:

- The contract was procured in compliance with the applicable procurement rules for its entity type (State/Indian Tribe or local government/nonprofit); and

- The contract's scope of work adequately encompasses the type and extent of future work. Failure to do so may result in an out-of-scope modification, also known as a "cardinal change," which FEMA will generally view as a noncompetitive award. (States and Indian Tribes must

[275] 2 C.F.R. § 200.320(c)(3).

ensure out of scope changes are consistent with their own procurement policies and procedures.)

If using a prepositioned contract, entities must ensure the price is considered reasonable in the current market environment. They must also check SAM.gov to verify that the contractor is not suspended or debarred.

FEMA Advance Contracts for goods and services are competed and awarded in advance of major disaster declarations to provide efficient, cost-effective means for rapid delivery of supplies and services for recurring disaster response and recovery requirements. For more information, please see FEMA's Advance Contracts of Goods and Services.

	Prepositioned Contracts	Post-Incident Contracts
What They Are	▪ When an entity solicits and awards a contract before an incident occurs for the potential performance of post-disaster work. Also referred to as "advanced contracts."	▪ When an entity solicits and awards a contract after an incident occurs for the performance of post-disaster work.
Benefits	▪ Respond quickly in emergency situations. ▪ Make recovery decisions in a lower stress environment. ▪ Avoid additional costs associated with last minute contracts.	▪ Scope of work consistent with recovery needs.
Areas of Concern	▪ Scope of work must include future disaster work (State entities should ensure scope changes are consistent with their own procurement policies and procedures).	▪ Impedes the ability to respond quickly in emergency situations. ▪ Negotiated costs may be reflective of a high-demand environment (increased costs due to increase in demand).

5.3. Local Governments, Nonprofits, and Prepositioned Contracts

If the above-mentioned scope considerations are not met when a local government or nonprofit utilizes a prepositioned contract, FEMA will view the contract as a noncompetitive, or sole-sourced, procurement because the new work was not originally subject to full and open competition. A local government or nonprofit is permitted to conduct a noncompetitive procurement under exceptional circumstances.[276] If a local government or nonprofit uses a prepositioned contract, but it is unable to meet the above-mentioned criteria or the exceptions for noncompetitive procurements, then the local government or nonprofit is noncompliant with the Federal Procurement Standards.

5.4. States, Indian Tribes, and Prepositioned Contracts

When determining the appropriateness of utilizing a prepositioned contract, States and Indian Tribes must follow their own documented procurement policies and procedures as well as additional rules pursuant to 2 C.F.R. § 200.317.

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 or 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.

6. Mutual Aid Agreements

Under the PA Program, a recipient or subrecipient may request resources from another agency, organization, or jurisdiction through a "mutual aid" agreement when it does not have enough resources to respond to an incident. FEMA refers to the entity requesting resources as the "Requesting Entity". FEMA refers to the entity providing the requested resource as the "Assisting

[276] 2 C.F.R. § 200.320(c).

Entity"[277]. FEMA provides PA funding to the Requesting Entity as it is legally responsible for the work. FEMA does not provide PA funding directly to the Assisting Entity. For the work to be eligible, the Requesting Entity must have requested the resources provided.

Mutual aid agreement refers to a written or oral agreement between and among agencies, organizations and/or jurisdictions that provides a mechanism to quickly obtain assistance in the form of personnel, equipment, materials, and other associated services. The primary objective is to facilitate the rapid, short-term deployment of support prior to, during, and/or after an incident.

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 Standards apply. However, if the agreement is simply in place to allow for a piggyback of another entity's contract, the recipient and subrecipient must ensure all applicable federal rules regarding piggybacking are followed.

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 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 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?

[277] PAPPG, Chapter 6: Mutual Aid.

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. §§ 200.318-327.

7. Purchasing Agents

A purchasing agent assists a recipient or subrecipient with the procurement of goods and services. The purchasing agent may conduct market research, prepare solicitations, evaluate bids or proposals, negotiate contracts, and screen information about products, among other tasks.

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

7.1. Local Governments, Nonprofits and Purchasing Agents

Local governments and nonprofits are required to follow their own documented procurement procedures provided that they conform with the Federal Procurement Standards.[278] If the local government or nonprofit anticipates using a purchasing agent for its procurements, the local government or nonprofit should ensure that its own procurement procedures allow for the use of a purchasing agent.

When using a purchasing agent, a local government or nonprofit must ensure that it has written standards of conduct covering conflicts of interest.[279] These standards apply to both the local government or nonprofit 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 they have a conflict of interest in the procurement process.

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

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[278] 2 C.F.R. § 200.318(a).

[279] 2 C.F.R. § 200.318(c).

- The local government or nonprofit must maintain oversight over procurements to ensure that contractors perform in accordance with the terms, conditions, and specifications of the contract;[280] and

- The local government or nonprofit must serve as the responsible party regarding the settlement and satisfaction of all contractual and administrative issues arising out of the procurements entered in support of a FEMA award. This includes disputes, claims, protests of award, source evaluation, or other matters of a contractual nature.[281]

7.2. States, Indian Tribes, and Purchasing Agents

Under the Federal Procurement Standards, States and Indian Tribes must follow their own procurement policies and procedures when determining the appropriateness of using purchasing agents along with the federal requirements at 2 C.F.R. § 200.317.

8. Prohibition on Contracting for Covered Telecommunications Equipment or Services

Section 889(b)(1) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (FY 2019 NDAA) and 2 C.F.R. § 200.216 prohibit the obligation or expending of federal award funds on certain telecommunication products or from certain entities for national security reasons. Effective Aug. 13, 2020, FEMA recipients and subrecipients, as well as their contractors and subcontractors, **may not** obligate or expend any FEMA award funds during certain scenarios. *See* required contract provisions regarding the prohibition on contracting for covered telecommunications equipment or services.

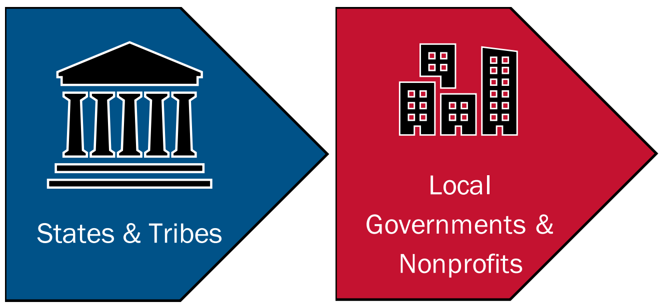
Related Tools and Resources

- ✓ PAPPG
- ✓ Purchasing Goods or Services through Cooperative Programs
- ✓ Preparedness Manual
- ✓ GSA Purchasing Programs

[280] 2 C.F.R. § 200.318(b).

[281] 2 C.F.R. § 200.318(k).

Chapter 13: Remedies for Procurement Noncompliance



When a recipient or subrecipient 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 lists how FEMA staff may administratively implement some of the remedy actions and specific conditions.

1. Remedies for Noncompliance

To address any noncompliance, FEMA may:

- Temporarily withhold cash payments pending correction of the deficiency by placing a hold or stop payment on the grant award in the appropriate award payment system pending the recipient or subrecipient's submission of satisfactory documentation as to correction of the noncompliance;[282]
- Disallow all or part of the cost of the activity or action not in compliance if the recipient or subrecipient has already drawn down money;[283]
- Wholly or partly suspend or terminate the federal award.[284] FEMA may suspend or terminate the federal award if a recipient or subrecipient fails to comply with the terms and conditions of a federal award.[285] 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;[286]

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[282] 2 C.F.R. § 200.339(a).

[283] 2 C.F.R. § 200.339(b).

[284] 2 C.F.R. § 200.339(c).

[285] 2 C.F.R. § 200.340(a)(1).

[286] 2 C.F.R. § 200.340(a)(3).

- Initiate suspension or debarment proceedings;[287]
- Withhold further federal awards for the FEMA grant with respect to the recipient or subrecipient, under one or more programs, and for specified periods of time;[288] or
- 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 or subrecipient.[289]

2. Specific Conditions

Additionally, FEMA may require specific conditions of an award to address noncompliance. FEMA may:

- Require payment on a reimbursement basis rather than advance payment, imposing controlled drawdowns by placing all funds on hold and only releasing funds for drawdown when the recipient or subrecipient provides a request for reimbursement with full-support documentation for the requested payment;[290]
- Withhold authority from the recipient or subrecipient to proceed to later phases of its project until FEMA receives satisfactory evidence of acceptable performance within a given period of performance by placing a hold or stop payment on the grant award in the appropriate Award Payment System pending the recipient's or subrecipient's submission of satisfactory documentation as to acceptable performance;[291]
- Require additional, detailed financial or program progress reports. FEMA may require more frequent reports and/or additional information in the reports on an as needed basis or on a recurring schedule, whichever is appropriate based on the noncompliance and circumstances;[292]
- Require additional project monitoring by requiring technical assistance visits, desk reviews, or site visits to monitor or ensure recipients are taking the appropriate corrective actions to correct noncompliance;[293]
- Require the recipient or subrecipient to get technical assistance or management assistance by requiring the recipient to obtain specialized technical or management assistance, including, but not limited to, webinars targeted at specific issues or concerns, procurement trainings from

[287] 2 C.F.R. § 200.339(d).

[288] 2 C.F.R. § 200.339(e).

[289] 2 C.F.R. § 200.339(f).

[290] 2 C.F.R. § 200.208(c)(1).

[291] 2 C.F.R. § 200.208(c)(2).

[292] 2 C.F.R. § 200.208(c)(3).

[293] 2 C.F.R. § 200.208(c)(4).

FEMA's PDAT, or hiring a contractor to review the recipient's financial systems and make recommendations;[294] or

- Establish additional prior approvals.[295]

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

[294] 2 C.F.R. § 200.208(c)(5).

[295] 2 C.F.R. § 200.208(c)(6).

APPENDIX

ACRONYM REFERENCE

AFG: Assistance to Firefighters Grants Program

A/E: Architecture and Engineering

BABAA: Build America Buy America Act

CCP: Crisis Counseling Assistance & Training Program

CFR: U.S. Code of Federal Regulations

CMAR: Construction Manager at Risk

CPPC: Cost plus a percentage of cost contract

DCM: Disaster Case Management Program

DHS: U.S. Department of Homeland Security

DOL: U.S. Department of Labor

EO: Executive Order

EGS: Office of Enterprise Grant Services

EPA: Environmental Protection Agency

EMPG: Emergency Management Performance Grant

FAR: Federal Acquisition Regulation

FMA: Flood Mitigation Assistance

FEMA: Federal Emergency Management Agency

FMAG: Fire Management Assistance Grant Program

GAAP: Generally Accepted Accounting Principles

GMP: Guaranteed Maximum Price

GPD: Grant Programs Directorate

GSA: General Services Administration

HHPD: High Hazard Potential Dam Grant Program

HMGP: Hazard Mitigation Grant Program

HSGP: Homeland Security Grant Program

IA: Individual Assistance Program

IFB: Invitation for Bids

IHE: Institutions of Higher Education

IHP-ONA: Individuals and Households Program – Other Needs Assistance

IPR: Intercity Passenger Rail Grant Program

ITB: Invitation to Bid

JFO: Joint Field Office

MAS: Multiple Award Schedule

MIAO: Office of Management and Budget, Made in America Office

NFE: Non-Federal Entity

NSGP: Nonprofit Security Grant Program

OIG: DHS Office of the Inspector General

OMB: Office of Management and Budget

PA: Public Assistance Program

PAPPG: Public Assistance Program Policy Guide

PDM: Pre-Disaster Mitigation Grant Program

PDAT: Procurement Disaster Assistance Team

PSGP: Port Security Grant Program

PUG: Procurement Under Grants

RFI: Request for Information

RFP: Request for Proposal

RFQ: Request for Qualifications (used in A/E)

RLF: Revolving Loan Fund (ex: Safeguarding Tomorrow RLF)

SAM: System for Award Management

SASP: State Agency for Surplus Property Program

SAT: Simplified Acquisition Threshold

SBA: Small Business Administration

SDO: Suspension and Debarment Official

SLTT: State, Local, Tribal, and Territorial

S&D: Suspension and Debarment

TSGP: Tribal Security Grant Program

THSGP: Tribal Homeland Security Grant Program

T&M: Time-and-materials contract

U.S.C.: United States Code

DEFINITIONS

- **Acquisition cost:** The (total) cost of the asset including the cost to ready the asset for its intended use. For example, acquisition cost for equipment means the net invoice price of the equipment, including the cost of any modifications, attachments, accessories, or auxiliary apparatus necessary to make it usable for the purpose for which it is acquired. Acquisition costs for software include those development costs capitalized in accordance with GAAP. Ancillary charges, such as taxes, duty, protective in transit insurance, freight, and installation may be included in or excluded from the acquisition cost in accordance with the recipient's or subrecipient's regular accounting practices.[296]

- **Cardinal Change:** 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.

- **Contract:** For the purpose of federal financial assistance, a legal instrument by which a recipient or subrecipient conducts a procurement transaction under a federal award.[297] For additional information on subrecipient and contractor determinations, see 2 C.F.R. § 200.331. *See* also the definition of *subaward* in this section.

- **Contractor:** An entity that receives a contract.[298]

- **Cooperative agreement:** A legal instrument of financial assistance between a federal agency and a recipient or between a pass-through entity and subrecipient, consistent with 31 U.S.C. 6302-6305:

    - Is used to enter into a relationship the principal purpose of which is to transfer anything of value to carry out a public purpose authorized by a law of the United States (*see* 31 U.S.C. 6101(3)); and not to acquire property or services for the Federal Government or pass-through entity's direct benefit or use;

    - Is distinguished from a grant in that it provides for substantial involvement of the federal agency or pass-through entity in carrying out the activity contemplated by the federal award.

    - The term does not include:

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[296] 2 C.F.R. § 200.1 *Acquisition cost.*

[297] 2 C.F.R. § 200.1 *Contract.*

[298] 2 C.F.R. § 200.1 *Contractor.*

- A cooperative research and development agreement as defined in [15 U.S.C. 3710a]; or
- An agreement that provides only:
- Direct United States Government cash assistance to an individual;
- A subsidy;
- A loan;
- A loan guarantee; or
- Insurance.[299]

- **Equipment:** Tangible personal property (including information technology systems) having a useful life of more than one year and a per-unit acquisition cost that equals or exceeds the lesser of the capitalization level established by the recipient or subrecipient for financial statement purposes, or $10,000. *See* also the definitions of *capital assets, computing devices, general purpose equipment, information technology systems, special purpose equipment,* and *supplies* in this section.[300]
- **Federal agency**: An "agency" as defined at 5 U.S.C. 551(1) and further clarified by 5 U.S.C. 552(f). The term generally refers to the agency that provides a federal award directly to a recipient unless the context indicates otherwise. See also definitions of federal award and recipient.[301]
- **Federal award**: In this Guide, the term is used interchangeably with "FEMA Award" and means the federal financial assistance that a recipient receives directly from a federal agency or indirectly from a pass-through entity, as described in 2 C.F.R. § 200.101.[302]
- **Federal award date**: The date when the authorized official of the federal agency signed (physically or digitally) the federal award or when an alternative, consistent with the requirements of [31 U.S.C. 1501], is reached with the recipient.[303]
- **Federal Emergency Management Agency (FEMA):** *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,

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[299] 2 C.F.R. § 200.1 *Cooperative agreement*.

[300] 2 C.F.R. § 200.1 *Equipment*.

[301] 2 C.F.R. § 200.1 *Federal agency*.

[302] See 2 C.F.R. § 200.1 *Federal award*.

[303] 2 C.F.R. § 200.1 *Federal award date*.

comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation.[304] 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 (JFO).

- FEMA administers numerous assistance programs annually or on a regular basis to increase the Nation's preparedness, readiness, and resilience to all hazards. These assistance programs are typically available to recipients and subrecipients including, but not limited to, States, local governments, Indian Tribes, territories, universities, hospitals, and certain PNPs.

- Each program is governed by the applicable federal law, regulations, executive orders, and FEMA program-specific policies. 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 a recipient or subrecipient that receives FEMA financial assistance, consistent with the requirements at 2 C.F.R. Part 200.

- **Federal financial assistance:**

  - Assistance that recipients or subrecipients receive or administer in the form of:

    - Grants;

    - Cooperative agreements;

    - Non-cash contributions or donations of property (including donated surplus property);

    - Direct appropriations;

    - Food commodities; and

    - Other financial assistance (except assistance listed in paragraph (2) of this definition).

  - For 2 C.F.R. § 200.203 and subpart F of 2 C.F.R. Part 200, *federal financial assistance* also includes assistance that recipients or subrecipients receive or administer in the form of:

    - Loans;

    - Loan Guarantees;

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

- Interest subsidies; and
- Insurance.

- For 2 C.F.R. § 200.216, federal financial assistance includes assistance that recipients or subrecipients receive or administer in the form of:
  - Grants;
  - Cooperative agreements;
  - Loans; and
  - Loan Guarantees.
- Federal financial assistance does not include amounts received as reimbursement for services rendered to individuals as described in 2 C.F.R. § 200.502(h) and (i).[305]

- **For-profit organization:** An organization or entity organized for the purpose of earning a profit. The term includes but is not limited to:
  - An "S corporation" incorporated under subchapter S of the Internal Revenue Code;
  - A corporation incorporated under another authority;
  - A partnership;
  - A limited liability company or partnership; and
  - A sole proprietorship.[306]
- **Grant agreement or grant:** A legal instrument of financial assistance between a federal agency and a recipient or between a pass-through entity and a subrecipient, consistent with 31 U.S.C. §§ 6302, 6304: Is used to transfer anything of value from the federal agency or pass-through entity to the recipient or subrecipient 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;

[305] 2 C.F.R. § 200.1 *Federal financial assistance*.

[306] 2 C.F.R. § 200.1 *For-profit organization*.

- A loan;
- A loan guarantee; or
- Insurance.[307]

NOTE: In the PUGPG, *grant agreement is* used interchangeably with "FEMA Award Agreement."

- **Hospital:** Hospital means a facility licensed as a hospital under the law of any State or a facility operated as a hospital by the United States, a State, or a subdivision of a State.[308]

- **Indian Tribe (or "federally recognized Indian Tribe"):** Any Indian Tribe, band, Tribal 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. *See* 25 U.S.C. 5304(e). This includes any Indian Tribe identified in the annually published Bureau of Indian Affairs list of "Indian Entities Recognized and Eligible to Receive Services" and other entities that qualify as an Alaska Native village or regional village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act.[309]

- **Institution of Higher Education (IHE):** Defined at 20 U.S.C. 1001.[310] For the purposes of this Guide, IHEs can be recognized as State or nonprofit (private university or college) depending on funding structure.

- **Inspector General Act of 1978**: Congress enacted this legislation to ensure integrity and efficiency in government. The Act created Offices of Inspector General (OIG) within various departments and agencies across the Federal Government. Following the establishment of DHS in 2002, a new OIG was created in the Department.
  - DHS OIG conducts independent audits, investigations, and inspections of DHS programs and operations and its components and makes recommendations to change policy and practice. DHS OIG has broad authority to audit FEMA programs and activities including the awarding of financial assistance to recipients and subrecipients. DHS OIG focuses on issues of noncompliance. Some of the most common findings resulting from OIG audits involve:
  - Noncompetitive contracting practices;

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[307] 2 C.F.R. § 200.1 *Grant agreement or grant*.

[308] 2 C.F.R. § 200.1 *Hospital*.

[309] 2 C.F.R. § 200.1 *Indian Tribe*.

[310] 2 C.F.R. § 200.1 *Institution of Higher Education (IHE)*.

- Failure to include required contract provisions;
- Failure to conduct cost or price analysis when required.

- **Local government:** *Local government*[311] means any unit of government within a state, including a:
  - County;
  - Borough;
  - Municipality;
  - City;
  - Town;
  - Township;
  - Parish;
  - Special district;
  - School district;
  - Intrastate district;
  - Council of governments, whether incorporated or not as a nonprofit corporation under state law;
  - Local public authority, including any public housing agency under the United States Housing Act of 1937; and
  - Any other agency or instrumentality of a multi-, regional, or intra-state or local government.
- **Micro-purchase***:* An individual procurement transaction for supplies or services, the aggregate amount of which does not exceed the micro-purchase threshold.[312] Micro-purchases comprise a subset of a recipient or subrecipient's small purchases as defined in 2 C.F.R. § 200.320.
- **Non-Federal Entity:** State, Indian Tribe, local government, IHE, or nonprofit that carries out a federal award as a recipient or subrecipient. The term NFE is used to collectively describe recipients and subrecipients of a FEMA award.[313]
- **Non-State Entity:** A *non-state entity* is an eligible FEMA award recipient or subrecipient that does not meet the definition of a "state" under 2 C.F.R. § 200.1. **NOTE:** This was a term used in the FY2021 PDAT Field Manual to describe local governments and nonprofits.
- **Nonprofit organization**[314]**:** Any organization that:
  - Is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest;
  - Is not organized primarily for profit;

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[311] 2 C.F.R. § 200.1 *Local government.*

[312] 2 C.F.R. § 200.1 *Micro purchase.*

[313] 2 C.F.R. § 200.1 *Non-Federal entity (NFE).*

[314] 2 C.F.R. § 200.1 *Nonprofit organization.*

- Uses net proceeds to maintain, improve, or expand the organization's operations; and
- Is not an IHE.

- **Office of Management and Budget:** The Executive Office of the President, Office of Management and Budget.[315]

- **Pass-through entity**: A recipient or subrecipient that provides a subaward to a subrecipient (including lower tier subrecipients) to carry out part of a federal program. The authority of the pass-through entity under this part flows through the subaward agreement between the pass-through entity and subrecipient.[316] Pass-through entities are responsible for processing subawards to subrecipients and ensuring subrecipient compliance with the terms and conditions of the FEMA award agreement.

- **Real Property:** Real property means land, including land improvements, structures, and appurtenances thereto, and legal interests in land such as a fee title, licenses, rights of way, easements, but excludes moveable machinery and equipment.[317]

- **Recipient**: An entity that receives a federal award directly from a Federal agency to carry out an activity under a Federal program. The term recipient does not include subrecipients or individuals that are participants or beneficiaries of the award.[318] A recipient is responsible for administering the federal award in accordance with applicable federal laws. Examples of recipients include state, local, Indian tribal, and territorial governments.

- **Simplified Acquisition Threshold (SAT)***:* The dollar amount below which a recipient or subrecipient may purchase property or services using small purchase methods (*see* 2 C.F.R. § 200.320). Recipients and subrecipients adopt small purchase procedures to expedite the purchase of items at or below the simplified acquisition threshold. The simplified acquisition threshold set in the FAR at 48 C.F.R. part 2, subpart 2.1 is used in this part as the simplified acquisition threshold for secondary procurement activities administered under Federal awards. The recipient or subrecipient is responsible for determining an appropriate simplified acquisition threshold, which is less than or equal to the dollar value established in the FAR, based on internal controls, an evaluation of risk, and its documented procurement procedures. Recipients and subrecipients should also determine if local government purchasing laws apply.[319] This threshold must never

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315 2 C.F.R. § 200.1 Office of Management and Budget (OMB).

316 2 C.F.R. § 200.1 Pass-through entity.

317 2 C.F.R. § 200.1 Real property.

318 2 C.F.R. § 200.1 Recipient.

319 2 C.F.R. § 200.1 Simplified acquisition threshold.

exceed the dollar value established in the FAR. Presently and as of June 2018, the Federal SAT is $250,000,[320] but is periodically adjusted for inflation.

- **State**: *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.[321]

- **Subaward:** An award provided by a pass-through entity to a subrecipient for the subrecipient to contribute to the goals and objectives of the project by carrying out part of a Federal award received by the pass-through entity. It does not include payments to a contractor, beneficiary, or participant. A subaward may be provided through any legal agreement consistent with criteria in § 200.331, including an agreement the pass-through entity considers a contract.[322]

- **Subrecipient:** An entity that receives a subaward from a pass-through entity to carry out part of a federal award. The term subrecipient does not include a beneficiary or participant. A subrecipient may also be a recipient of other federal awards directly from a federal agency.[323]

- **Suspension & Debarment:** Administrative tools used to protect the integrity of federal programs by conducting business only with responsible persons. Suspension is an action taken by an SDO that immediately prohibits a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 C.F.R. chapter 1) for a temporary period, pending completion of an agency investigation and any judicial or administrative proceedings that may ensue. A person so excluded is suspended. Debarment is an action taken by an SDO to exclude a person from participating in covered transactions and transactions covered under the Federal Acquisition Regulation (48 C.F.R. chapter 1). A person so excluded is debarred.[324]

- **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 recipients and subrecipients. The *Uniform Rules* are referred to by several names throughout the PUGPG.

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[320] Section 805 codified at 41 U.S.C. § 134; OMB Memo (M-18-18), see https://www.grants.gov/learn-grants/grant-policies/omb-grant-memoranda.html.

[321] 2 C.F.R. § 200.1 State. Some hospitals and IHEs as defined by 2 C.F.R. § 200.1 Hospital and 2 C.F.R. § 200.1 IHE respectively, may meet the definition of a State.

[322] 2 C.F.R. § 200.1 Subaward.

[323] 2 C.F.R. § 200.1 Subrecipient.

[324] 2 C.F.R. §§ 180.125; 180.1015, and 180.925.