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Key Points Regarding Contracting Practices for Local and Tribal Governments, Institutions of Higher Education, Hospitals, and other Non-Profits Receiving FEMA Public Assistance Grant Funds

In the aftermath of a disaster resulting in a disaster declaration by the President of the United States, FEMA provides grant funding to local and tribal governments and non-profit (“PNP”) entities to assist them with recovering from the event. Local governments and non-profit entities are generally referred to as “Subrecipients” because they receive grant funds through the state; tribal governments also are Subrecipients when not receiving grant funds directly from FEMA.¹ **Subrecipients must comply with the federal procurement standards to ensure their procurements are eligible for federal grant funding.** These standards are found in Title 2 of the Code of Federal Regulations (“CFR”), sections 200.318 through 200.326 and became effective for declarations issued on or after December 26, 2014.² While this document is intended to provide a summary of general guidance on FEMA’s standards for procurement, it is not intended to be comprehensive, serve as legal advice, or replace the advice of your servicing legal counsel.

The standards Subrecipients must comply with include, but are not limited to:

- Having written standards of conduct covering conflicts of interest and governing the performance of its employees engaged in contract award and administration.
- Maintaining records to detail the significant history of the procurement action.
- Performing a cost or price analysis for procurement actions exceeding the small purchase threshold of \$150,000 – or the equivalent local or state threshold (whichever is less).
- Taking the required six affirmative steps to encourage small and women/minority-owned businesses to participate in the contracting process.³

¹ Irrespective of whether a tribal government is designated as a Recipient or a Subrecipient, they will always follow the procurement standards discussed in this document (2 CFR §§ 200.318 – 200.326)

² The rules governing Subrecipient procurements were formerly published at 44 CFR § 13.36 (for state, local and tribal governments) and at 2 CFR part 215 (for Institutions of Higher Education, Hospitals, and PNPs). These earlier published rules still apply to projects associated with declarations issued before December 26, 2014. While the CFR citations have changed, the rules for state, local and tribal governments are substantially the same, with some exceptions. The rules for Institutions of Higher Education, Hospitals and PNPs have changed significantly.

With the exception of two provisions described just below, the detailed standards in 2 CFR §§ 200.318 – 200.326 for the most part do not apply to State agencies procuring property and services with FEMA grant funds. A State agency or instrumentality of a state (as defined by the state but excluding local governments) must simply follow its normal procurement policies and procedures it must also comply with 2 CFR § 200.322 regarding the procurement of recovered materials and ensure that every purchase order or other contract includes any clauses required by 2 CFR § 200.326. (See, 2 CFR § 200.317 for the federal procurement standards applicable to States)

³ See, 2 CFR § 200.320. This is not a set-aside requirement or a requirement to prioritize award to these types of firms – it is only a requirement to take and document that you took the six affirmative steps to encourage these types of firms to participate in the procurement.



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- Prohibiting contractors that develop a requirement or its solicitation from competing for and being awarded the subsequent contract for that work.
- Prohibiting the use of state, local, or tribal geographical preferences in the evaluation of bids or proposals.
- Including certain specific provisions in the contract.⁴

Acceptable methods of Procurement:

- Micro purchase procedures (for purchases under \$3,500 – or the equivalent local or state threshold, whichever is less);
- Small purchase procedures (for purchases under \$150,000 – or the equivalent local or state threshold, whichever is less);
- Sealed Bids (award to the lowest priced, responsive, responsible bidder);
- Competitive Proposals (award need not be made to the lowest priced offeror if award criteria establish award is to be based on some other non-price-related factor; however, while price is not a factor in awarding a contract for architectural/engineering services—it is separately negotiated after the proposal has been selected); and
- Noncompetitive Proposals.

Procurement by noncompetitive proposals may be used only under one of the following circumstances:

- The item is available from only a single source (not the most convenient source);
- After solicitation of a number of sources, competition is determined to be inadequate; or
- A Public emergency (threats to health, life or safety) or exigency (threats requiring an immediate response) exists that will not permit a delay resulting from competitive solicitation. An exigency or emergency period will last often for a short time—generally until roads are cleared and power is back on; this exception can only be used until the emergency or exigency period ends, at which time, the contract must be re-solicited under full and open competition.

Things to watch out for:

- **Pre-awarded (also known as pre-positioned or standby) contracts.** A contract that was awarded prior to the issuance of the current federal procurement standards may still be used if certain conditions are met:

⁴ The contract provisions can be found in Appendix II of 2 C.F.R. Part 200.



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- The existing contract must have been in compliance with the federal procurement standards that were applicable at the time the contract was solicited and awarded;
 - The Subrecipient must re-examine the contract to ensure that it complies with the current federal procurement standards – some of which have been revised, but most of which have become more permissive;
 - Where there has been a change in the new procurement standards and the existing contract is non-compliant, the Subrecipient must determine under local, state, or tribal procurement law, whether a contract modification is legally permissible to bring the contract into compliance;⁵
 - The Subrecipient would have to determine that the existing contract’s scope of work was broad enough to cover the type and extent of work now contemplated – out of scope work cannot be included in an existing contract; and
 - The Subrecipient would have to reassess whether the age of the existing contract is a problem as it relates to whether the associated prices/costs remain fair and reasonable due to the passage of time, e.g. a 4-5 year old contract should probably be re-competed.
- **Time-and Materials (T&M) contracts.** T&M contracts can be used for a reasonable period of time only when:
 - No other contract is suitable; and
 - The contract includes a ceiling price that the contractor exceeds at its own risk.

This type of contract is often used where the scope of work or the duration of the work is unclear. Because this type of contract requires significant oversight to ensure costs are reasonable, the Subrecipient should start thinking about switching to a different type of contract as soon as it awards a T&M contract. Once the scope of work becomes clear, the Subrecipient should switch to a different type of contract, like a cost reimbursement or fixed price contract.

- **Cost-Plus-Percentage-of-Cost contracts.** These are contracts where the contractor’s profit is based on a percentage of the underlying project costs actually incurred. Such contracts are explicitly prohibited by the federal procurement standards and ineligible for FEMA grant funding because they incentivize the contractor to increase their actual

⁵ For example, it’s possible that contract provisions could potentially be added, or standards of conduct updated, etc. via modification.; it is doubtful that more substantial non-compliance issues with the new federal procurement standards could be cured so easily, such as the prohibition against a contractor developing the solicitation requirements and/ or specifications and later on competing for and being awarded a contract involving that same work – this is now specifically prohibited under the new federal procurement standards at 2 CFR § 200.319.



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costs in order to increase the associated profit. Subrecipients should read contracts carefully to ensure these types of provisions are not included in a contract, as they can be difficult to identify.

- **Piggyback contracts.** Adopting a pre-existing contract solicited and awarded by another entity is referred to as “piggybacking.” FEMA closely reviews piggyback contracts because the original underlying contract often does not meet all of the federal procurement standards as they pertain to the Subrecipient attempting to utilize them, having often been issued under different circumstances and for a different scope of work.

Additional information about Subrecipient requirements under the federal procurement standards can be found in FEMA’s *Public Assistance Procurement Field Manual (dated December 2014 - addresses the procurement based rules applicable before Dec. 26, 2014), Supplement to the Field Manual (dated 2016 -addresses the procurement based rules applicable on or after Dec. 26, 2014), Procurement checklists; Contract provisions template, Cost or price guide; and all other FEMA Procurement Disaster Assistance Team (“PDAT”) developed reference materials. These materials can be found at the following webpage: www.fema.gov/procurement-disaster-assistance-team.*