

Non-State Subrecipients

For Presidentially Declared Disasters on/after December 26, 2014

Purpose

This publication is not intended to serve as legal advice and does not reflect all of the federal procurement requirements. Cal OES makes no guarantee that adherence to this guide will result in the full reimbursement of costs and recommends reviewing the procurement requirements applicable to the disaster period.

This publication is intended to be an overview of contracting requirements applicable to Non-State Subrecipients (non-Federal entities other than states) of FEMA Public Assistance funds.

Reference Materials Appearing in this Publication

2 CFR §200	Refers to the OMB's	<i>Title 2, Chapter II, Part 200 of the Code of Federal Regulations</i>
PGFMS	Refers to FEMA's	<i>Procurement Under Grants Field Manual Supplement</i>

Summary

- Following **Federal procurement standards (Title 2 CFR 200.318-200.326)** and **FEMA's Program Policy** is a condition of receiving Public Assistance funding for the cost of eligible goods and services.
- Non-State Subrecipients must follow their own documented procurement standards (reflecting applicable State, Tribal, and local government laws and regulations) **AND** Federal procurement standards.
- When the two standards conflict the more **restrictive** standard applies.
- State, local, and tribal law cannot waive Federal procurement requirements, even during an emergency.

Overview (*Not Comprehensive*)

Non-State Subrecipients of Public Assistance Funds Must

- Maintain adequate oversight of their contractors and document the steps taken to ensure their contractors perform to the terms, conditions, and specifications of their contracts. ^{2CFR §200.318(b)}
- Maintain and enforce a written standard of conduct covering conflicts of interest and the performance of employees engaged in the selection, award, and administration of contracts. ^{2CFR §200.318(c)(1)}
- Not enter into any contracts that are conditional on the approval of federal funding.
- Only award contracts to responsible contractors possessing the ability to execute the contract. ^{2CFR §200.318(h)}
- Take responsibility for the settlement of all contractual and administrative issues. ^{2CFR §200.318(k)}
- Facilitate full and open competition and exclude contractors that assist in development of materials used to create the IFB, RFP, or RFQ from competing for the resulting contract. ^{2CFR §200.319(a)}
- Procure contracts in an approved method and advertise the intent to contract when required. ^{2CFR §200.320}
- Follow the affirmative steps to ensure that small businesses, minority owned businesses, women's business enterprises, and labor area surplus firms are used when possible. ^{2CFR §200.321}
- Document a price/cost analysis for contracts over the Simplified Acquisition Threshold (currently \$150,000), including contract modifications. ^{2CFR §200.323}
- Ensure contracts contain all of the required clauses and provisions. ^{2CFR §200.326, PGFMS Ch. IV ¶12}
- Comply with the National Environmental Policy and Historic Preservation Acts. ^{PGFMS Ch. C ¶6}
- Maintain detailed and accurate records including: ^{2CFR §200.318(i)}
 - Rationale for the method of procurement
 - Selection of contract type
 - Contractor selection or rejection
 - The basis for the contract's price
 - Pre-solicitation documents
 - List of contractors solicited
 - Notices of proposed contract action
 - Solicitations, addenda, and amendments
 - Determination of contractor's responsiveness
 - Notice of award
 - Notice to unsuccessful bidders
 - Record of protests, disputes, and claims
 - Bid, performance, payment, and bond documents
 - Independent cost estimates

Public Assistance Contracting Guidance, Non-State Subrecipients



Special Rules Apply During Emergencies and Exigencies But Expire Quickly

Public Emergency PGFMS Ch. V ¶2.h.i.(2)b

An unexpected and dangerous situation that threatens life, public health or safety, or improved property.

- Competitive solicitation requirements are waived during emergency and exigency situations that require an immediate response. 2 CFR § 200.320(f)(2)
- The public exigency or emergency exception is only allowable during the actual exigent or emergency situation. It cannot be used after the immediate crisis is averted. PGFMS Ch. V ¶2.h.i.(2)(c)
- Contracts entered into during emergencies and exigencies that did not result from competition must be canceled and replaced immediately following the end of the emergency/exigency period. PGFMS Ch. V ¶2.h.i.(2)c
- While not required by regulation, it is advisable to document an account of the situation that justified the necessity of an immediate response in case the contract is called into question at a later date.

Public Exigency PGFMS Ch. V ¶2.h.i.(2)a

Something necessary in a particular situation requiring immediate aid or action.

Keeping Records and Maintaining Adequate Technical Capacity

- All documents related to the history of the contract's procurement must be recorded with a sufficient level of detail and maintained for three years following the State's closure of the grant, or until any litigation, claim, or audit started before the end of the three year period has been resolved. 2CFR 200§318(i), 2CFR §200.333

Ensuring Compliance with the Environmental and Historical Protection Laws

- Compliance with environmental and historic preservation laws including the **National Environmental Policy Act (NEPA)** and the **National Historic Preservation Act (NHPA)** are required. PGFMS Ch. C ¶6
Contact the Cal OES Environmental/Historical Officer to determine if a NEPA/NHPA review is required before a project begins.

Including Disadvantaged Business Enterprises (DBE) and Labor Surplus Area Firms

The following affirmative steps are required to ensure small businesses, minority and women's owned businesses (DBEs), and labor surplus area firms (LSAs) are used when possible: 2CFR §200.321

- Place DBEs/LSAs on solicitation lists and solicit to them when they are a potential source.
- Use the services of organizations such as the Small Business Administration and the Minority Business Development Agency.
- When economically feasible, divide total requirements into smaller tasks or quantities and establish delivery schedules.
- Require contractors who use subcontractors to follow the affirmative steps.

Ensuring Full and Open Competition

Contracts must be procured in a manner providing full and open competition. 2CFR §200.319

- Do not place unreasonable requirements on potential contractors, e.g. unnecessary experience or bonding.
- Do not specify a brand name of the product that must be used (“brand name or equal” is allowable).
- Do not make noncompetitive awards to consultants on a retainer contract.
- Undertake reasonable efforts to ensure the contract procurement process is free from conflicts of interest and that prospective contractors do not engage in bid rigging.
- Do not apply different treatment to contractors based on their geographical location except when evaluating architectural and engineering services or when requiring compliance with state licensing laws.
- Ensure that prequalified lists (if used) include a sufficient number of sources.
- Allow contractors to qualify to be added to prequalified lists during the solicitation period.
- Provide adequate information and time to respond to the advertisement.

Public Assistance Contracting Guidance, Non-State Subrecipients



Eligible Methods of Procurement Per Federal Regulations (*Local rules may be more strict*)

Methods	When to Use
Micro Purchases	<p>Contract aggregate amount ≤ \$3,500*</p> <ul style="list-style-type: none"> Do not require bids/solicitation. Price must be reasonable and awarded to a responsible contractor. <p>See 2 CFR §200.67 and FEMA PGFMS Ch. V ¶ 2.b - 2.d</p>
Small Purchases	<p>Contracts ≤ \$150,000*</p> <ul style="list-style-type: none"> Only qualified responsibly contractors should be solicited for quotes. Must receive an adequate number of quotes from qualified sources. If the lowest quote was not accepted, document the reason. <p>See 2 CFR §200.320(b) and FEMA PGFMS Ch. V ¶ 2.e</p>
Sealed Bids	<p>Contracts > \$150,000*</p> <p><i>Used when price is the primary consideration used to select the contractor.</i></p> <ul style="list-style-type: none"> Advertised for bidding using an Invitation for Bids and solicited to known contractors. Advertisement period must provide sufficient time for contractors to respond. Minimum of 2 (preferably more) responsive/responsible bidders required. Awarded to lowest responsive and responsible bidder. Any and all bids may be rejected if there is a sound documented reason. <p>See 2 CFR §200.320(c) and FEMA PGFMS Ch. V ¶ 2.f</p>
Competitive Proposal	<p>Contracts > \$150,000*</p> <p><i>Used when other factors are at least equal to price when selecting the contractor.</i></p> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <p>Price is a Selection Criteria</p> <ul style="list-style-type: none"> Advertised using a Request for Proposals (RFP). </div> <div style="border: 1px solid black; padding: 5px; margin-bottom: 5px;"> <p>Price is not a Selection Criteria (Limited to Architect and Engineering Services)</p> <ul style="list-style-type: none"> Advertised using a Request for Qualification (RFQ). Price is negotiated after the contractor is selected. </div> <ul style="list-style-type: none"> Must be advertised, and the bid period must provide sufficient time for contractors to respond. Evaluation factors and their importance must be listed in the advertisement. Procedure for conducting evaluations must be documented beforehand. Proposals must be solicited from adequate number of qualified sources. Minimum of 2 (preferably more) responsive/responsible contractors required. <p>See 2 CFR §200.320(d) and FEMA PGFMS Ch. V ¶ 2.g</p>
Non-Competitive Proposal	<p>Acceptable when 1 or more of the following apply:</p> <ul style="list-style-type: none"> The item is available only from a single source. Noncompetitive proposal was given express authorization from FEMA or Cal OES. Work must start immediately due to a public emergency or exigency. Competition was determined inadequate following competitive solicitation procedures. <p>Contracts awarded without price competition must also:</p> <ul style="list-style-type: none"> Have a documented cost analysis justifying the contract's price. Page 14 of FEMA's Pricing Guide Include the contractor's profit as a separately negotiated cost element. 2 CFR § 200.323(b) <p>See 2 CFR §200.320(f) and FEMA PGFMS Ch. V ¶ 2.h</p>

* The \$3,500 Micro Purchase and \$150,000 Simplified Acquisition Thresholds are periodically adjusted and defined in FAR 2.1

Contracts

Eligible Contracts	Description
Time and Materials	Provides for payment of the actual cost of materials and direct labor charged at fixed hourly rate reflecting wages, general/administrative expenses, and profit.
	<p>Time and Materials contracts are only allowable after making a determination that no other contract type is a viable option.</p> <p>FEMA will review the rationale used to support the use of time and materials contracts to determine if the procurement violated federal regulations or FEMA policies.</p> <p>When the scope of work becomes clear, these contracts must be canceled and replaced.</p> <p>Time and Materials Contracts Require:</p> <ul style="list-style-type: none"> ▪ The right to terminate for convenience; ▪ A ceiling price the contractor will exceed at their own risk; ▪ Documentation explaining why no other contract was suitable; ▪ A higher degree of oversight to ensure the contractor is controlling the costs. <p>See 2 CFR § 200.318(j) and FEMA PGFMS Ch. IV ¶ 8</p>
Fixed Price (Lump Sum)	Provides for the payment of a fixed price with or without economic adjustment or incentives.
	<ul style="list-style-type: none"> ▪ Firm Fixed Price Not subject to any adjustments. ▪ Economic Adjustment Revision for specified contingencies. ▪ Incentive Adjustment Based on actual to target cost of completion. ▪ Unit Price A fixed price that is itemized by a unit of measure. <p>See FEMA PGFMS Ch. IV ¶ 10.b.vi.(1)</p>
Cost-Plus-Fee (Reimbursement)	Provides for the payment of actual costs and a fee that reflects the contractor's profit.
	<ul style="list-style-type: none"> ▪ Used when uncertainties prevent the use of a Fixed Price contract; ▪ A ceiling cost should be established that cannot be exceeded without pre-approval. ▪ Incentives can be used to encourage higher quality, lower costs, or faster completion. <p>See FEMA PGFMS Ch. IV ¶ 10.b.vi.(2)</p>
Ineligible Contracts	Description
Cost-Plus % of Cost	Provides for the payment of actual costs and a fee reflecting the contractor's profit that is calculated as percent of the actual costs.
	<ul style="list-style-type: none"> ▪ No economic incentive for the contractor to control the cost; ▪ Not eligible for Public Assistance funding. <p>See 2 CFR § 200.323(d) and FEMA PGFMS Ch. V ¶ 4.c for additional guidance</p>
Existing Contracts	Description
Advanced Contracts (Prepositioned)	Awarded before an incident occurs for the potential performance of work.
	<p>Advanced (pre-awarded) contracts can only be used when:</p> <ul style="list-style-type: none"> ▪ Awarded in compliance with all federal procurement standards. ▪ The scope of work does not exceed what could be expected during a future declaration. ▪ The work performed falls within the scope of the contract. <p>See page 2 of FEMA's Key Points Regarding Contracting Practices</p>
Piggy Back Contracts	Solicited and awarded by another entity.
	<p>Not recommended by FEMA because the original underlying contract often does not meet all of the federal procurement standards having often been issued under different circumstances and for a different scope of work.</p> <p>See page 4 of FEMA's Key Points Regarding Contracting Practices</p>

Required Contract Provisions

- Contracts cannot use the DHS seal/logo without preapproval. ^{PGFMS Ch. IV ¶12.b.iii}
- Contracts cannot include contingencies stating the contract is conditional on a federal declaration or public assistance funding.

Contracts must include provisions addressing the following ^{2CFR §200.326, PGFMS Ch. IV ¶12}

- Suspension and debarment of contractors. ^{2CFR 200 Appx II (H)}
- FEMA and Cal OES are not parties to the contract, and not subject to obligations or liabilities. ^{PGFMS Ch. IV ¶12.b.v}
- The contractor acknowledges that 31 U.S.C. Chap. 38 applies to its actions. ^{PGFMS Ch. IV ¶12.b.vi}
- FEMA will fund the contract, and that FEMA and Cal OES have the right to review the contractor's records. ^{PGFMS Ch. IV ¶12.b.ii, PGFMS Ch. IV ¶12.b.iv}
- The contractor will comply with federal law, regulation, executive orders, and FEMA policies, procedures, and directives. ^{PGFMS Ch. IV ¶12.b.iv}

Other Required Contract Provisions and Clauses

- Construction Contracts Must include an **Equal Employment Opportunity Clause** ^{2CFR 200 Appx II (C)}
- Contracts > \$10,000 Must address **Termination for Cause and for Convenience** including the manner by which it will be effected and the basis for settlement. ^{2CFR 200 Appx II (B)}
- Contracts ≥ \$100,000 Must include a **Byrd Anti-Lobbying Clause**. ^{2CFR 200 Appx II (I)}
- Contracts > \$100,000 Involving the employment of mechanics/laborers must include a **Work Hours and Safety Standards Act Clause**. ^{2CFR 200 Appx II (E)}
- Contracts > \$150,000 Must Address **administrative, contractual, or legal remedies** in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate. ^{2CFR 200 Appx II (A)}
- Contracts > \$150,000 Provision requiring the contractor to comply with the **Clean Air Act and Water Pollution Control Act** ^{2CFR 200 Appx II (G)}

Sample language for contract clauses <https://www.fema.gov/media-library/assets/documents/96773>

Price and Costs Analysis Requirements

Price Analysis

Awards made with price competition > \$150,000 require a relatively simple price analysis that compares the bids/proposal received and rational for selecting the awarded contractor.

Cost Analysis

Awards made without price competition require a more detailed cost analysis regardless of the value of the contract. This includes situations where competition was determined to be inadequate.

See the *FEMA Pricing Guide* for information about completing a Price or Cost Analysis.

Determination of Contractor's Eligibility

The System for Award Management (sam.gov) should be used to verify contractors are not suspended or debarred before making an award. Documentation should be retained demonstrating that the verification was performed. ^{2CFR §200.212}

Only responsible contractors that can successfully execute the contract should be considered for an award. ^{2CFR §200.318(h), PGFMS Ch. IV ¶6.a}

A responsibility determination must be documented and should include criteria such as:

- Integrity
- Performance record
- Possessing necessary resources
- Compliance with public policy

Inadequate Competition

- Competition is said to be inadequate when all of the competition requirements were followed and either only one or no contractors submitted a bid. ^{2CFR §200.320(f)(4)}
- If the contract was not sufficiently publicized, only solicited to a few sources, or included an overly restrictive requirement that dissuaded competition, FEMA will not consider competition inadequate. ^{PGFMS Ch. V ¶2.h.i.(4)b-c}
- If the decision is made to move forward with a noncompetitive award without revising or cancelling the solicitation and re-soliciting offers or bids, it is important to document why there was inadequate competition. This may include evaluating whether or not the contract was sufficiently publicized or solicited, and speaking with unresponsive contractors to determine their reasons for not responding. ^{PGFMS Ch. V ¶2.h.i.(4)c.i}

Negotiating Profit for Contracts Awarded without Price Competition

When a contract is awarded without price competition, the contractor's profit must be negotiated. ^{2CFR §200.323(b), PGFMS Ch. V ¶4.b}

When negotiating profit the following factors should be considered:

- Complexity of the work to be performed;
- Risk borne by contractor;
- Contractor's investment;
- Amount of subcontracting that will be required;
- Contractor's record of past performance.
- Industry profit rates for similar work in the area.

Bid Guarantees and Bonding Requirements

Construction and facility improvement contracts or subcontracts > \$150,000 must be bonded and if a bonding policy has not been pre-approved by FEMA and Cal OES, the following is required: ^{PGFMS Ch. V ¶5}

- Bidders must guarantee 5% of the bid price as assurance that, if awarded, they will execute the contract.
- Awarded contracts must provide a performance bond and a payment bond for the amount of the contract.

Office of Inspector General (OIG) Audits

The DHS OIG has the right to audit any Disaster Assistance grant for three years following its closure.

If an audit reveals that federal regulations were not followed, the OIG will recommend that FEMA de-obligate the portion of the project's funding related to the non-compliance.

Common OIG Audit Findings related to Contracting:

- Failing to procure contracts using full and open competition
- Failing to follow the affirmative steps
- Not maintaining sufficient contractor oversight;
- Not having written standards of conduct
- Not maintaining adequate records
- Not including all required contract provisions
- Using T&M (time-and-material) contracts before determining that no other contract was suitable
- Not document a price or cost analysis for contracts when required
- Not negotiating profit as a separate cost element when required
- Using cost-plus-a-percentage-of-cost contracts

See the OIG's [*Audit Tips for Managing Disaster-Related Project Costs*](#) for information.

Additional Resources

[FEMA Procurement Guidance](#)

A guide published by FEMA to assist with the procurements of property and services.



[FEMA PA Program/Policy Guide](#)

An overview of the PA Program implementation process with links to additional details.



[FEMA Pricing Guide](#)

A guide published by FEMA to assist with performing price and cost analyses.



[FEMA Procurement Checklist](#)

A checklist published by FEMA to assist applicants complying with the federal procurement regulations.



[Required Contract Clauses](#)

A list of the required contract clauses with sample language.



[Key Points Regarding Contracting](#)

A guide published by FEMA to detailing some of the most important aspects of contracting.



[Code of Federal Regulations Title 2, Subtitle A, Chapter II, Part 200](#)

Uniform Administrative Requirements, Cost Principles, And Audit Requirements For Federal Awards.



[Federal Acquisition Regulation \(FAR\)](#)

The principal set of rules in the Federal Acquisition Regulations System.



[FEMA's Procurement Under Grants Webinar Series](#)

A series of webinar modules covering the procurement standards for Federal Awards.



[Disaster Recovery Audits Reports](#)

Audit reports published by the Office of Inspector General for FEMA disaster recovery grants.

