



COVID-19 Procurement For North Carolina Local Governments

Frequently Asked Questions

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All units of local government in the state are eligible to apply to the FEMA public assistance program for reimbursement of emergency protective measures expenses incurred in responding to the COVID-19 pandemic. If the expense was incurred under a contract, such as purchasing medical supplies or renting equipment, the contract must comply with Uniform Guidance procurement requirements (2 C.F.R. Part 200, Subpart D). This Frequently Asked Questions document offers guidance on procurement requirements and exceptions to these requirements applicable to the COVID-19 event. Because the FEMA guidance discussed in this FAQ document is specific to the COVID-19 emergency, this guidance should not be relied upon for compliance with Uniform Guidance procurement requirements applicable to other federal grant awards.

For the reader’s convenience, the table of content contains hyperlinks to each section and FAQ. This FAQ document will be updated periodically; the date of the most recent edition is listed in the footer of each page.

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COVID-19 PROCUREMENT FREQUENTLY ASKED QUESTIONS

A. Emergency and Exigent Circumstances Exception (E/E)

FEMA has issued guidance on use of the Emergency and Exigent Circumstances exception to competitive solicitation requirements under the Uniform Guidance (2 C.F.R. Part 200, Subpart D) applicable to FEMA Public Assistance grants. The full text of the FEMA E/E guidance and fact sheet is available at [this link](#).

1. What is the E/E exception?

The E/E exception to Uniform Guidance procurement requirements (2 C.F.R. § 200.320(f)(2)) permits a local government to enter into a contract without complying with Uniform Guidance competitive solicitation requirements under “emergency or exigent” circumstances. These circumstances exist when there is a need to take immediate action during an emergency and taking the time to bid the contract would exacerbate the situation or delay in responding to the threat. The E/E exception is similar to the emergency exception to state bidding requirements (G.S. 143-129(e)(2)).

2. What guidance has FEMA issued on the E/E exception for the COVID-19 event?

Because of the extraordinary circumstances of the current crisis, FEMA has determined that the COVID-19 pandemic automatically qualifies as an emergency or exigent circumstance. Effective January 27, 2020, and for the duration of the current federal Public Health Emergency declaration, local governments may use both new and existing noncompetitively procured contracts in order to protect property and public health and safety, or to lessen or avert the threats created by emergency situations for emergency protective measures under FEMA’s Public Assistance Program to respond to or address COVID-19. FEMA has determined that the ongoing COVID-19 pandemic qualifies per se (meaning, automatically) as an emergency and/or exigent circumstance; as a result, FEMA Public Assistance grant applicants (meaning, local governments seeking FEMA Public Assistance reimbursement) may use non-competitive procurement under the E/E exception.

Under the FEMA determination, contracts used for emergency protective measures in responding to the COVID-19 event qualify under the E/E exception for the duration of this event (the incident period for the COVID-19 emergency is ongoing). This means local governments and non-profits that are responding to COVID-19 may enter into noncompetitive contracts for emergency protective measures or use previously bid contracts even if those contracts do not comply with federal procurement requirements.

The FEMA guidance is retroactive to January 27, 2020. It applies to all new contracts entered into on or after Jan 27. It also applies to costs incurred under contracts entered into prior to January 27 if the expense itself is incurred after January 27. For example, if a local government had a contract already in place for equipment rental prior to January 27, and it needed to rent that equipment now in response to COVID-19, that contract would still qualify under the E/E exception even if it was not originally bid in compliance with federal procurement requirements.

3. What documentation is required if the E/E exception is used?

The local government should document how the contract was related to COVID-19 and why competitive bidding would have delayed or impeded the local government's response. For example, sanitizing equipment was needed urgently to disinfect public facilities to mitigate against the spread of the coronavirus and supplies were limited. This documentation should be saved to the procurement file for each contract.

4. Do any Uniform Guidance requirements still apply under the E/E exception?

Yes. Although the E/E determination for COVID-19 is broad, there are a number of Uniform Guidance Requirements that still apply even to noncompetitive contracts used in response to COVID-19:

- Local governments still must comply with their written local procurement policies (2 C.F.R. § 200.318(a)). Local procurement policies and waiver of those policies is discussed in more detail in these FAQs.
- The contract must include the contract provisions applicable to that type and cost of contract (2 C.F.R. § 200.326 and Appendix II) Federal contract provisions are discussed in more detail in these FAQs.
- Bonding requirements for construction contracts costing \$250,000 or more still apply (2 C.F.R. § 200.325).
- The contractor still must be responsible, meaning he can perform the work required under the contract and is not debarred or suspended under the SAM Exclusion List (2 C.F.R. § 200.318(h)). The SAM Exclusion List is discussed in more detail in these FAQs.
- The contract costs themselves must be reasonable and a cost-price analysis is still required for contracts costing \$250,000 dollars or more (2 C.F.R. § 200.323(a) and (b)). Cost reasonableness requirements are discussed in more details in these FAQs.
- Cost-plus contracts are still prohibited (2 C.F.R. § 200.323(c)).
- Time & Materials contracts can only be used if no other method for contracting is suitable (such as construction work that is short in duration or where immediate action is required to address emergency health and safety threats). Time & Materials contracts must include a not-to-exceed price cap on the total cost of the contract (2 C.F.R. § 200.318(j)).
- The local government must oversee the contractor's performance to make sure he is doing what he is required to do under the contract; the local government must document its oversight of its contractors (2 C.F.R. § 200.318(b)).

- Conflict of interest prohibitions under both federal and state law still apply (2 C.F.R. § 200.318(c); G.S. 14-234; G.S. 133-32).

5. Do MWBE solicitation requirements apply under the E/E exception?

No. Because a contract entered into under the E/E exception is not competitively bid, no solicitation requirements apply, including those for MWBE firms otherwise required under 2 C.F.R. § 200.321. According to FEMA, this waiver is in effect until June 19, 2020 and may possibly be extended.

6. Does the prohibition against local geographic preferences apply under the E/E exception?

No. Because a contract entered into under the E/E exception is not competitively bid, the prohibition against awarding a contract based on a geographic preference otherwise required under 2 C.F.R. § 200.319(b) does not apply. According to FEMA, this waiver is in effect until June 19, 2020 and may possibly be extended.

7. Is piggybacking allowed under the E/E exception?

Yes. Note that FEMA interprets the term “piggyback” in a way different than this term is understood under North Carolina law. Below is an excerpt from the FEMA E/E Fact Sheet:

“Can non-state entities use *piggyback* contracts in an exigency or emergency?

Piggyback contracting occurs when one entity with an existing contract assigns some or all of its contractual rights to another entity that was not previously party to the contract. Generally, FEMA discourages piggyback contracts because the original contract pertains to the needs of the original entity with a specific scope of work for that entity. While there may be circumstances when piggybacking is permissible, in almost all instances, the scope of work would need to be changed to include the needs of a non-state entity, and changes to the scope of work are generally not permitted as there is not likely to be full and open competition for the expanded scope of work. *However, during emergency and exigency circumstances, non-state entities may be able to piggyback another entity’s contract and expand the scope of a contract for the period of the emergency or exigency circumstance.*

Note that a non-state entity may choose to enter into a separate contract with the same contractor as another entity, using the same terms and conditions as in that other entity’s contract, with only a change in the scope of work and the associated costs. However, this is sole-source contracting rather than piggyback contracting, and it must meet the requirements for noncompetitive procurement under exigency or emergency circumstances as described elsewhere in this Fact Sheet.” (emphasis added)

Under FEMA’s definition of “piggybacking,” the unit of government that is “piggybacking” off another unit of government’s contract becomes a party to the original contract; there is no new contract between the “piggybacking” unit of government and the vendor. Under North Carolina law, “piggybacking” is referred to as “Waiver of Bidding for Previously Bid Contracts” (GS 143-129(g)). Unlike FEMA’s definition of piggybacking, under state law the “piggybacking” unit of government enters into a *separate, new contract* with the other local government’s Vendor. The new contract contains the same items at the same or more favorable prices, terms, and conditions as the original contract, but it is still a separate contract only between the “piggybacking” unit of government and the vendor. What under North Carolina law is considered “piggybacking” is defined by FEMA as a “sole source” contract. Under the E/E exception, sole source contracts are permitted (in fact, because bidding is not required under the E/E exception, the

contract is, by definition, a sole source contract). Thus, piggybacking contracts as defined under North Carolina law are permissible under the E/E exception and do not require FEMA review or preapproval.

Remember that North Carolina law requires governing board approval of piggyback contracts. See Connor Crews' [blog post](#) for a discussion of the emergency exception to competitive bidding under state law which may be considered in determining whether board approval is legally required under state law for piggyback contracts used in response to COVID-19 should the urgent need to enter into the contract not permit the delay in obtaining board approval. Should a local government choose to operate under the state emergency exception to competitive bidding requirements, it should document use of the state bidding exception and its justification for doing so.

8. Is sole source contracting allowed under the E/E exception?

Yes. Under the E/E exception, sole source contracts are permitted (in fact, because bidding is not required under the E/E exception, the contract is, by definition, a sole source contract).

Remember that North Carolina law requires governing board approval of sole source contracts (G.S. 143-129(e)(6)). See Connor Crews' [blog post](#) for a discussion of the emergency exception to competitive bidding under state law which may be considered in determining whether board approval is legally required under state law for sole source contracts used in response to COVID-19 should the urgent need to enter into the contract not permit the delay in obtaining board approval. Should a local government choose to operate under the state emergency exception to competitive bidding requirements, it should document use of the state bidding exception and its justification for doing so.

9. Is purchasing from a group purchasing program allowed under the E/E exception?

Yes. Because competitive solicitation is not required, a local government may utilize a group purchasing program (cooperative purchasing program) contract under the E/E exception. North Carolina law also exempts group purchasing program contracts from state competitive bidding requirements (G.S. 143-129(e)(3)).

10. Is purchasing off a state or federal GSA contract allowed under the E/E exception?

Yes. Although normally not permissible under the Uniform Guidance (unless the state complied with all Uniform Guidance procurement requirements applicable to local governments), because competitive solicitation is not required, local governments may purchase directly from vendors under contract with a North Carolina state agency or the federal government. These purchases are also exempt from state competitive bidding requirements (G.S. 143-129(7), (9), and (9a)).

11. Does the FEMA E/E exception apply to other federal grant funds for COVID-19 response?

The FEMA E/E guidance is specific to FEMA Public Assistance grant funds. We do not yet know if other federal agencies awarding COVID-19 disaster relief funds such as the CDC, HHS, and CARES Act funds (including HUD) will render the same E/E determination as FEMA. Local governments should carefully review grant award documents from other federal agencies to determine what procurement requirements apply to those federal funds.

12. Does the E/E exception apply to contracts that aren't related to COVID-19?

The E/E exception is an exception to *federal* Uniform Guidance competitive solicitation requirements. The E/E/ exception guidance issued by FEMA applies only to contracts for COVID-19 event emergency

protective measures responses for which a local government intends to seek FEMA reimbursement. It is *not* an exception to state bidding requirements.

If the purpose of the contract is not related to COVID-19, local governments should continue to follow state law and local policies applicable to the type and cost of the contract. If the non-COVID-19 contract falls into one of the existing exceptions to bidding requirements under state law, a local government may choose to use that exception as it would under normal circumstances.

B. Federal Contract Provisions

13. Are federal contract provisions required under the E/E exception?

Yes. Among the Uniform Guidance requirements that still apply to contracts entered into under the E/E exception are that contracts must include the federal contract provisions required for that type and cost of contract (2 C.F.R. § 200.326 and Appendix II).

14. Is there a list of required federal contract provisions?

Yes. A chart listing all required federal contract provisions, including those recommended by FEMA, is available in Appendix A of these FAQs.

15. Is there sample language for required federal contract provisions?

Yes. The FEMA Procurement Disaster Assistance Team (PDAT) has developed sample language for most of the required federal contract provisions. The PDAT template is available at [this link](#). Local governments should have their attorneys review this language before including these provisions in contracts.

16. Are all federal contract provisions required for all contracts?

No. As indicated in the chart available in Appendix A of these FAQs, federal contract provision requirements vary depending on the type of contract (purchase, service, construction) and cost. And, some of the contract provisions included in Appendix II to 2 CFR Part 200 do not apply to FEMA Public Assistance grants.

17. Can we simply include all federal contract provisions in our standard terms and conditions?

It may be administratively challenging to modify contract templates to add or remove specific provisions for each type of contract depending on the cost. If so, a local government may choose to include all required federal contract provisions applicable to the FEMA Public Assistance program in its contract boilerplate terms and conditions. However, be aware that a provision included in a contract then becomes binding on the parties even if not required under federal law. A recommended best practice is to include the following language at the beginning of the contract terms and conditions that list federal contract provisions: “To the extent required by federal law...” Local governments should consult with their attorneys in developing template contract language.

18. Can we copy and paste the suggested language in the PDAT template into our contracts?

Not entirely. While the FEMA PDAT contract provisions template included both required and suggested language, two of the required provisions (remedies for breach and termination for cause and convenience) must be written by the local government’s attorney. And, be aware that the FEMA PDAT contract template document includes additional information explaining each required contract provision, so do not simply copy and paste the entire document into a contract.

19. Can we use a “short form” of the federal contract provisions?

For some contract provisions, including a simple paragraph that simply lists the various contract requirement and the accompanying federal code citation is sufficient. However, other contract provisions must include specific language mandated by the applicable federal code. FEMA instructs that the full language of each required contract provisions be included in the contract itself. The [FEMA PDAT contract provisions template](#) provides both required and suggested contract provision language.

20. What if a contract doesn’t include the required federal contract provisions?

A contract that does not include the applicable required federal contract provisions can be amended to include them.

21. How do we reference contract provisions in P-Card and electronic purchases?

It is challenging to include contract provisions in electronic transactions, especially P-card purchases. For electronic transactions (such as electronic invoices and purchase orders), a recommended best practice is to program the contract management system or finance software to either include the provisions electronically or to program an automated statement incorporating them by reference. If incorporating the provisions by reference, the local government should post the full text of the required contract provisions on its website or in some other manner to make vendors aware of the provisions and their requirements. More best practices are available on the School of Government’s [COVID-19 Procurement website](#) under “Best Practices.”

For P-card purchases, only two of the required contract provisions apply to contracts costing below \$10,000 (most P-card authorizations are below this threshold). The first is the Equal Employment Opportunity provision required under 41 CFR Part 60-1.4(b) which applies regardless of cost but only to contracts for construction or repair work. Since it is highly unlikely that a local government would pay for a construction contract with a P-card, this requirement would not apply to P-card purchases. The second contract provision that applies to contracts costing less than \$10,000 is the Byrd Anti-Lobbying provision required under 44 C.F.R. Part 18. Because this contract provision is required for all contracts regardless of type or cost, it does apply to P-card transactions (vendor certification of compliance with the Byrd Anti-Lobbying Act is required for all contracts costing \$100,000 or more so the certification requirement would not apply to P-card purchases unless the purchase transaction is in excess of \$100,000). A recommended best practice to ensure compliance with this requirement is to post the full text of the required contract provisions on the local government’s website or in some other manner to make vendors aware of the provisions and their requirements. More best practices are available on the School of Government’s [COVID-19 Procurement website](#) under “Best Practices.”

In addition to the required contract provisions discussed above, FEMA recommends including additional FEMA-specific provisions in all contracts (see Appendix A in these FAQs for a list of the FEMA recommended contract provisions). Although not required under the Uniform Guidance, these recommended FEMA provisions should be included in all contracts. The best practices suggested above are applicable to ensuring compliance with FEMA recommended contract provisions.

C. Cost Reasonableness

22. What is the cost reasonableness requirement?

The Uniform Guidance requires that contract costs be reasonable under the circumstances *prevailing at the time the cost was incurred*. (2 CFR 200.404(a)) This requirement applies to all contracts and is still in effect even under the E/E Exception guidance issued by FEMA.

23. How do we ensure our costs are reasonable in the current COVID-19 market environment?

The current market environment is highly unusual. Supplies are short, some even critically so, and prices are escalating. Nonetheless, it is important to still take steps to ensure that costs are reasonable even in the current COVID-19 emergency. Prices that seem reasonable now might appear exorbitant to an auditor (some audits are conducted over a year after the expenses were incurred).

FEMA has issued guidance on steps that can be taken to satisfy the cost reasonableness requirement. FEMA advises that a key best practice for avoiding future adverse audit findings is to create a detailed record documenting the steps taken (such as market research, online cost comparisons, catalogue pricing comparisons, sharing pricing on the purchasing officers listserv, etc.) to determine whether a particular price offered by a vendor was in fact reasonable. If competitive pricing isn't available at all, as may be the case if a critical supply is available from only one vendor, document the lack of competition and inability to conduct price comparisons. The key is to document the basis for the decision that a particular cost was reasonable at the time the cost was incurred.

FEMA's [Pricing Guide](#) and [Reasonable Cost Evaluation Job Aid](#) provide additional information and suggested strategies for ensuring contract costs are reasonable.

D. Debarred and Suspended Vendors (SAM Exclusions List)

24. What contracts does the debarment and suspension prohibition apply to?

Under federal law, local governments receiving federal grant funds (including FEMA Public Assistance funds) may not contract with a vendor who is listed as a debarred or suspended vendor in the System for Award Management (SAM) Exclusions. The SAM Exclusions is the list maintained by the US General Services Administration and contains the names of parties who have been debarred, suspended, or otherwise excluded from being eligible for federal contracts (2 C.F.R. § 180.530).

The prohibition applies to all purchase contracts costing \$25,000 or more. These contracts also must contain the required federal contract provision. Suggested language for this contract provision is available in the [FEMA PDAT contract provisions template](#). Local governments should check www.sam.gov to determine whether a vendor is on the SAM Exclusions List.

25. Is it permissible to purchase less than \$25,000 from a vendor on the SAM Exclusions List?

Although not specifically prohibited under federal law, it is not a good practice to conduct business with a vendor who has been placed on the SAM Exclusions List. These vendors have been excluded from being eligible to receive federal contracts. An auditor might question why a purchase was made from a federally debarred or suspended vendor.

26. Does a vendor have to be registered in SAM.gov for us to contract with it?

No. To purchase from a vendor, that vendor is not required to be registered in SAM. However, the local government is prohibiting purchase more than \$25,000 from a vendor on the SAM Exclusions List.

E. Other Procurement Questions

27. Our bidders are having difficulty getting bid forms notarized due to COVID-19. Can we waive this requirement?

If state law requires a particular form be notarized, such as a HUB Affidavit of Good Faith Efforts (G.S. 143-128.2(c)), that statutory requirement cannot be waived, even under a declared state of emergency. Because state law requires a notary to perform the notarization in the physical presence of the individual seeking notarization of an affidavit or other document, the notarial act must be performed in person; this requirement cannot be waived either (G.S. 10B-20(c)(1)). If a local purchasing policy or bid specifications requires notarization of bid forms where not mandated by state law, the local government can consider waiving this requirement. For example, some local governments still require an E-Verify affidavit, but this affidavit is not required by state law (since 2015, E-Verify compliance is done through a contract provision; see this [blog post](#)). Where the notarization requirement is mandated by state law, local governments can consider extending bid deadlines to allow bidders more time to get their bid forms notarized.

28. Must bid bonds and performance/payment bonds be notarized?

No. State law does not require any bonds related to public contracting be notarized.

29. Must a Byrd Anti-Lobbying Contractor Certification be notarized?

No. While the Uniform Guidance requires a contractor to submit a certification of compliance with the Byrd Anti-Lobbying Act with its bid for all contracts costing \$100,000 more, the certification is not required to be notarized. See the Federal Contract Provisions section of these FAQs for more discussion of federal contract provisions.

30. How do we waive our local purchasing policies?

The Uniform Guidance requires local governments to have written procurement policies (2 C.F.R. § 200.318(a)). Local governments still must follow their own local purchasing policies, even under the E/E exception. If local purchasing policies still require bidding when the contract otherwise qualifies under the E/E exception for the COVID-19 event, a local government may consider waiving its local policy to expedite obtaining urgently needed supplies and services.

The requirements or process for waiving local policies is not governed by state law. Which procedures to use is depends on the jurisdiction's own local policies and procedures governing its process for waiving local policies. The waiver should be made temporary and apply only to contracts necessary for responding to the COVID-19 event. Local governments should clearly document the policy waiver (for example, a board resolution or memorandum by the manager) and state the reason for the waiver, such as the necessity to obtain critical supplies, equipment, and services necessary for immediate response to the COVID-19 pandemic, the lack of available competition, or other applicable justifications.

Appendix A – Required Federal Contract Provisions

NOTE: Local governments should consult with their attorneys in developing contract provisions.

	<u>Required</u> (2 CFR Part 200 Appendix II)	Type of Contract	Sample Language in FEMA PDAT Contract Template? (Click here for Template)
1.	Legal/contractual/administrative remedies for breach of contract	All contracts costing \$250,000 or more (Simplified Acquisition Threshold)	No. Unit’s attorney must write this provision
2.	Termination for cause or convenience	All contracts costing \$10,000 or more	No. Unit’s attorney must write this provision
3.	Equal Employment Opportunity	All contracts for construction or repair work	Yes. 41 CFR Part 60-1.4(b). See <u>required</u> language in FEMA PDAT Contract Template
4.	Davis Bacon Act <u>Not applicable to FEMA PA</u>	All contracts for construction or repair work	Not applicable to FEMA Public Assistance grants
5.	Copeland Anti-Kickback Act <u>Not applicable to FEMA PA</u>	All contracts for construction or repair work costing \$2,000 or more	Not applicable to FEMA Public Assistance grants
6.	Contract Work Hours and Safety Standards Act	All contracts costing \$100,000 or more for construction or repair work involving employment of mechanics or laborers (does not apply to purchase or service contracts)	Yes. 29 CFR 5.5(b). See <u>required</u> language in FEMA PDAT Contract Template
7.	Rights to inventions made under a contract or agreement <u>Not applicable to FEMA PA</u>	Funding agreement	Not applicable to FEMA Public Assistance grants
8.	Clean Air Act and Federal Water Pollution Control Act	All contracts costing \$150,000 or more	Yes. See suggested language in FEMA PDAT Contract Template
9.	Debarment and Suspension	All purchase contracts costing \$25,000 or more	Yes. See suggested language in FEMA PDAT Contract Template

10.	Byrd Anti-Lobbying Amendment	Contract provision required for all contracts regardless of cost; Certification Statement by contractor required for contracts costing \$100,000 or more	Yes. See <u>required</u> language in FEMA PDAT Contract Template and Certification Statement to be signed by vendor or contractor
11.	Procurement of Recovered Materials	All contracts costing \$10,000 or more where work involves the use of materials	Yes. See suggested language in FEMA PDAT Contract Template

	<u>Recommended</u> (FEMA)	Type of Contract	Sample Language in FEMA PDAT Contract Template? (Click here for Template)
1.	Access to Records	All contracts regardless of cost	Yes. See suggested language in FEMA PDAT Contract Template
2.	Contract Changes or Modifications	All contracts regardless of cost	No. Unit's attorney must write this provision
3.	DHS Seal, Logo, and Flags	All contracts regardless of cost	Yes. See suggested language in FEMA PDAT Contract Template
4.	Compliance with Federal Law, Regulations and Executive Orders	All contracts regardless of cost	Yes. See suggested language in FEMA PDAT Contract Template
5.	No Obligation by Federal Government	All contracts regardless of cost	Yes. See suggested language in FEMA PDAT Contract Template
6.	Program Fraud and False or Fraudulent Statements or Related Acts	All contracts regardless of cost	Yes. See suggested language in FEMA PDAT Contract Template

Source: Modified from FEMA Procurement Disaster Assistance Team [Contract Provisions Template](#)