Disaster Recovery Construction Contracting Procurement Requirements and Public Assistance

FEMA Procurement Disaster Assistance Team
North Carolina Division of Emergency Management
UNC School of Government

January 30, 2019

FEMA

UNC SCHOOL OF GOVERNMENT

Welcome!

FEMA Procurement Requirements

Keri Borzilleri

Lynda Cortes-Avellaneda

State "Most Restrictive Rule" Requirements

Norma Houston

Public Assistance Tips and Pitfalls

Mary Glasscock

Procurement Under Grants

Federal Requirements for Recipients and Subrecipients of Public Assistance Funding

DR-4393-NC

Keri Borzilleri & Lynda Cortes-Avellaneda

FEMA Procurement Disaster Assistance Team (PDAT)

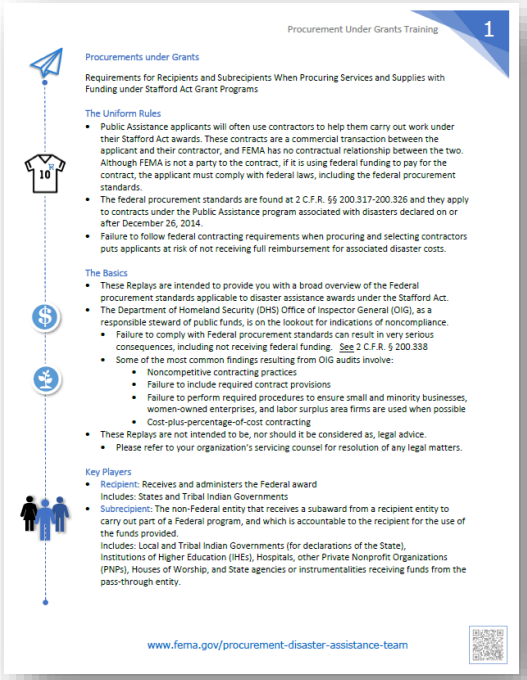
01/30/2019

FEMA

Follow Along with FEMA PDAT Handouts

Available on SOG Hurricane Florence Information Website: www.sog.unc.edu/ncem

https://www.sog.unc.edu/sites/www.sog.unc.edu/files/general_media/PuG%20Updated%20Presentation%20Replays_0.pdf



Procurement Under Grants Training 1

Procurements under Grants

Requirements for Recipients and Subrecipients When Procuring Services and Supplies with Funding under Stafford Act Grant Programs

The Uniform Rules

- Public Assistance applicants will often use contractors to help them carry out work under their Stafford Act awards. These contracts are a commercial transaction between the applicant and their contractor, and FEMA has no contractual relationship between the two. Although FEMA is not a party to the contract, if it is using federal funding to pay for the contract, the applicant must comply with federal laws, including the federal procurement standards.
- The federal procurement standards are found at 2 C.F.R. §§ 200.317-200.326 and they apply to contracts under the Public Assistance program associated with disasters declared on or after December 26, 2014.
- Failure to follow federal contracting requirements when procuring and selecting contractors puts applicants at risk of not receiving full reimbursement for associated disaster costs.

The Basics

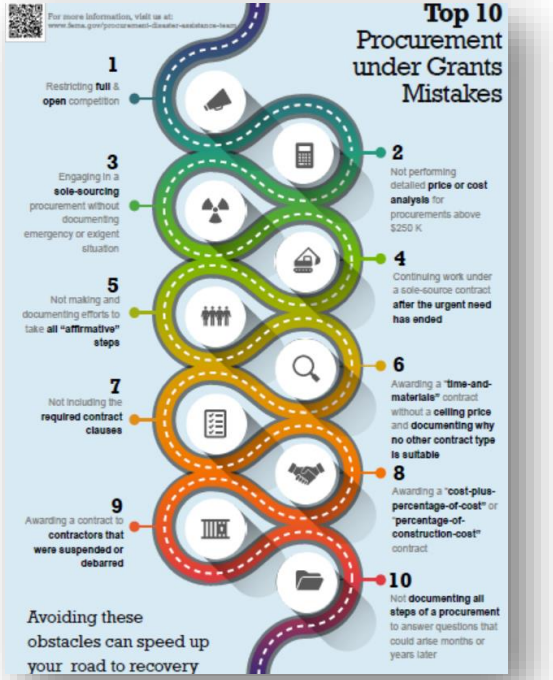
- These Replays are intended to provide you with a broad overview of the Federal procurement standards applicable to disaster assistance awards under the Stafford Act.
- The Department of Homeland Security (DHS) Office of Inspector General (OIG), as a responsible steward of public funds, is on the lookout for indications of noncompliance.
  - Failure to comply with Federal procurement standards can result in very serious consequences, including not receiving federal funding. See 2 C.F.R. § 200.338
  - Some of the most common findings resulting from OIG audits involve:
    - Noncompetitive contracting practices
    - Failure to include required contract provisions
    - Failure to perform required procedures to ensure small and minority businesses, women-owned enterprises, and labor surplus area firms are used when possible
    - Cost-plus-percentage-of-cost contracting
- These Replays are not intended to be, nor should it be considered as, legal advice.
  - Please refer to your organization's servicing counsel for resolution of any legal matters.

Key Players

- Recipient: Receives and administers the Federal award
  Includes: States and Tribal Indian Governments
- Subrecipient: The non-Federal entity that receives a subaward from a recipient entity to carry out part of a Federal program, and which is accountable to the recipient for the use of the funds provided.
  Includes: Local and Tribal Indian Governments (for declarations of the State), Institutions of Higher Education (IHEs), Hospitals, other Private Nonprofit Organizations (PNPs), Houses of Worship, and State agencies or instrumentalities receiving funds from the pass-through entity.

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

https://www.sog.unc.edu/sites/www.sog.unc.edu/files/general_media/Top%2010%20PuG%20Mistakes_Flyer.pdf



For more information, visit us at: www.fema.gov/procurement-disaster-assistance-team

Top 10 Procurement under Grants Mistakes

1 Restricting **full** & **open** competition

2 Not performing detailed **price or cost analysis** for procurements above $250 K

3 Engaging in a **sole-sourcing** procurement without documenting emergency or exigent situation

4 Continuing work under a sole-source contract **after the urgent need has ended**

5 Not making and documenting efforts to take **all "affirmative" steps**

6 Awarding a **"time-and-materials"** contract without a **ceiling price** and **documenting why no other contract type is suitable**

7 Not including the **required contract clauses**

8 Awarding a **"cost-plus-percentage-of-cost"** or **"percentage-of-construction-cost"** contract

9 Awarding a contract to **contractors that were suspended or debarred**

10 Not **documenting all steps of a procurement** to answer questions that could arise months or years later

Avoiding these obstacles can speed up your road to recovery

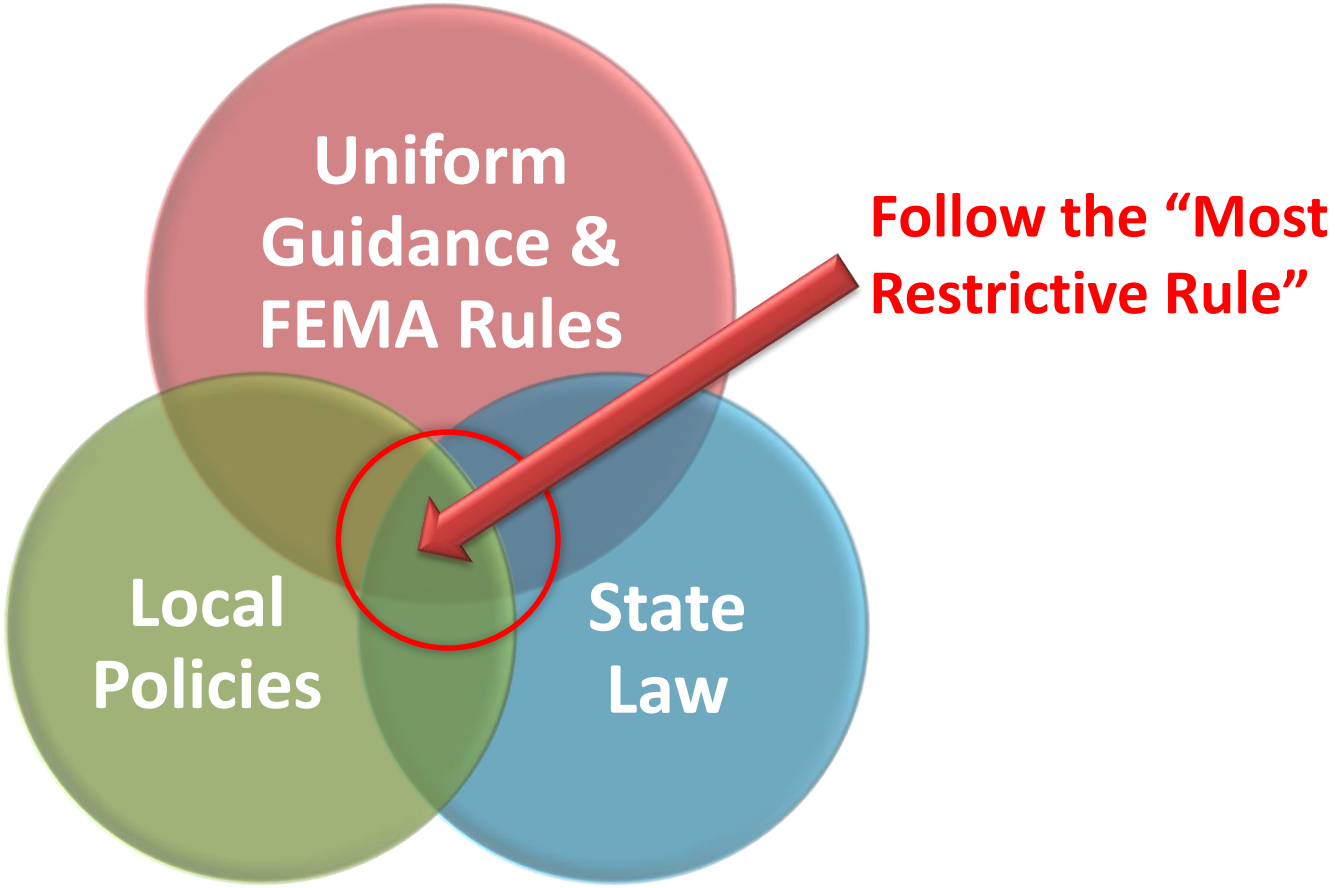
FEMA

UNIFORM GUIDANCE (UG) AND STATE LAW CONSTRUCTION CONTRACTING REQUIREMENTS

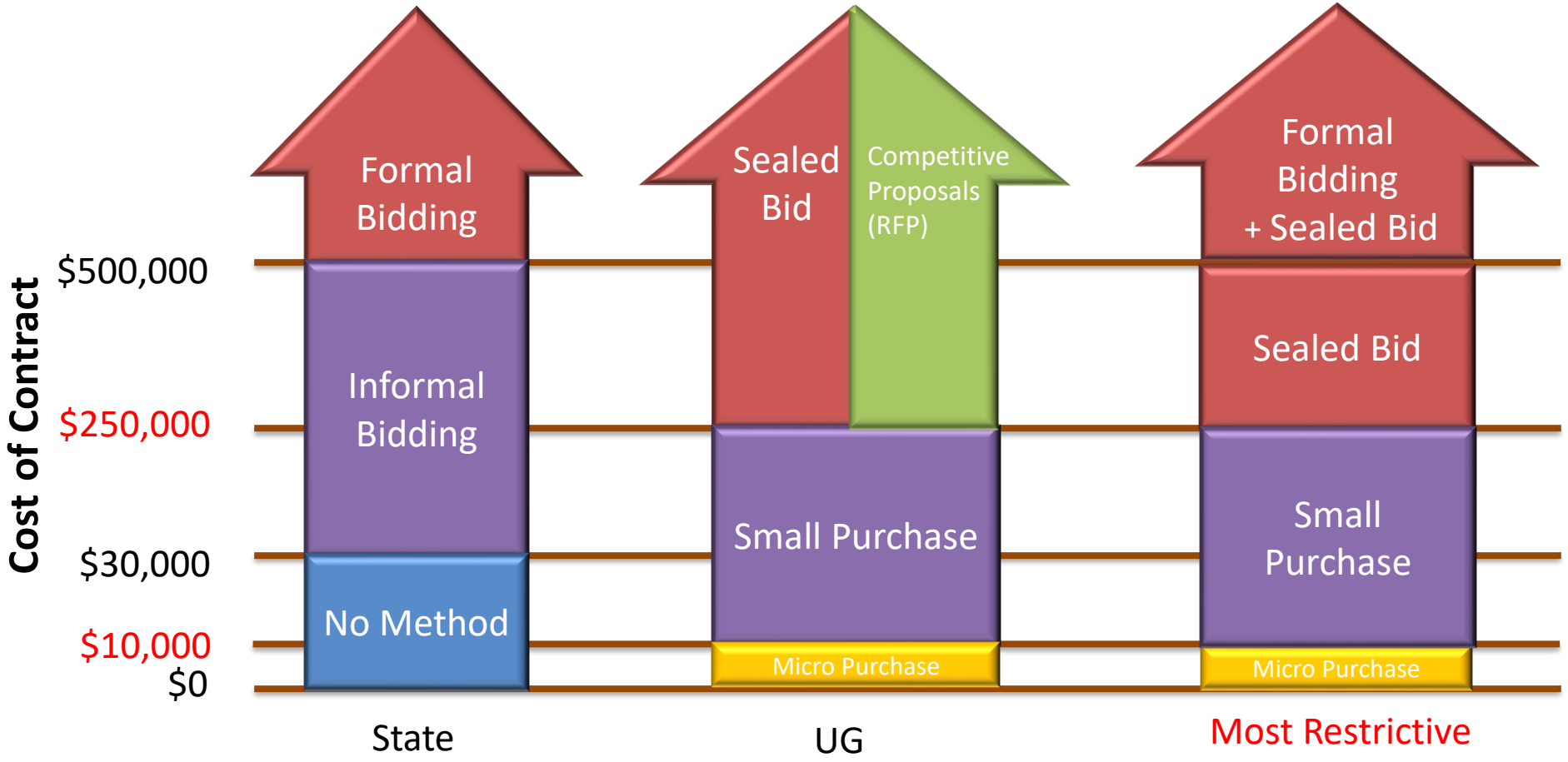
"MOST RESTRICTIVE RULE"

Procurement Requirements

Requirements apply to ALL categories of PA permanent work (Cat C–G Projects)



Construction and Repair Contracts



Even when generally following federal rules, some specific state requirements may still apply and vice versa.

“Most Restrictive Rule” Construction and Repair Contracts

Contract Cost: $10,000-$250,000

UG Small Purchase Procedure

More restrictive state bidding requirements in red

Procedures:

- Quotes from “adequate number” of bidders *(FEMA requires 3-bid minimum)*
- MWBE solicitation *(recommend state HUB Office website)*
- If project involves a building: informal HUB requirements at $30,000
- Award to Lowest Responsive Responsible Bidder (LRRB)
- Award on fixed-price or lump sum basis
- Contract in writing with UG & FEMA provisions
- Document procedures

“Most Restrictive Rule” Construction and Repair Contracts

Contract Cost: $250,000 to $500,000

UG Sealed Bid Procedure

More restrictive state bidding requirements in red

Procedures:

- Cost/Price analysis before bidding
- Specs available to bidders
- Public advertising *(recommend 7-day minimum)*
- MWBE solicitation *(recommend state HUB Office website)*
- If project involves a building: informal HUB requirements up to $300,000; formal HUB requirements above $300,000
- Sealed bids
- Public bid opening
- 2-bid minimum
- 5% bid bond / 100% P&P bonds
- Award to LRRB
- Award on fixed-price or lump sum basis
- Contract in writing with UG & FEMA provisions
- Document procedures

“Most Restrictive Rule” Construction and Repair Contracts

Contract Cost: $500,000 and above

State formal bidding + UG Sealed Bid

More restrictive state bidding requirements in red

Procedures:

- Cost/Price analysis before bidding
- Specs available to bidders
- Formal advertising 7-day minimum
- MWBE solicitation *(recommend state HUB Office website)*
- If project involves a building: formal HUB requirements
- Sealed bids in paper form
- Public bid opening
- 3-bid minimum
- 5% bid bond / 100% P&P bonds
- Award to LRRB
- Award on fixed-price or lump sum basis
- Contract in writing with UG & FEMA provisions
- Document procedures

“Most Restrictive Rule” Construction and Repair Contracts

Contract Cost:
$300,000 and above

Involving a building

Additional state requirements for large building projects

Additional State Requirements:

- State formal HUB, including bidders’ good faith efforts
- Separate specs for main trades
- Use authorized bidding method (single-prime most common method)
- Dispute resolution procedures (required for all building projects)

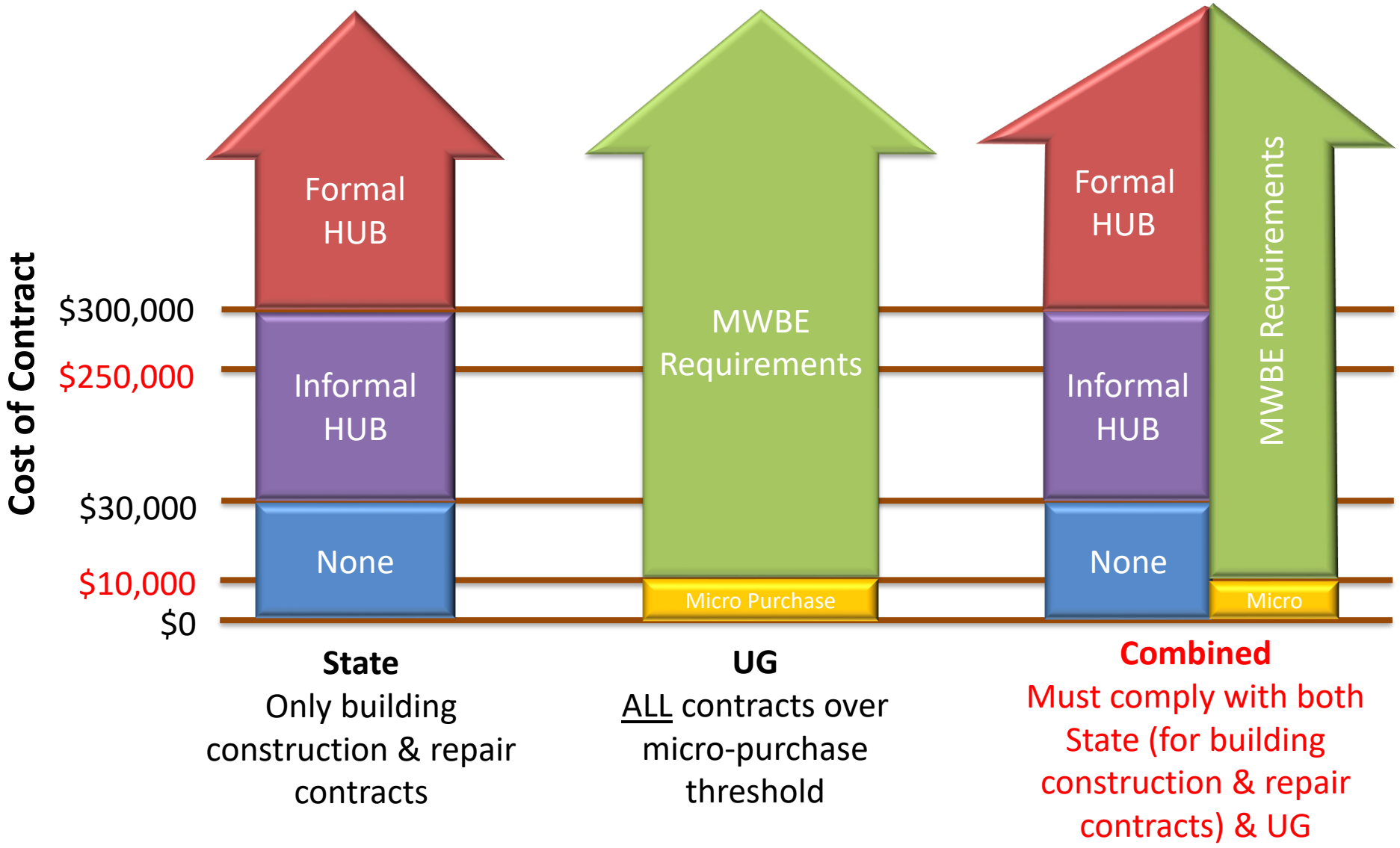
“Most Restrictive Rule” Construction and Repair Contracts

Federal procurement methods not permissible under state law for construction and repair contracts:

- Competitive Proposal Method
- Sole Source
- Cooperative (group) purchasing (*purchase of materials permissible if compliant with federal law; construction must be bid)*
- Piggybacking

UG MWBE AND STATE HUB SOLICITATION REQUIREMENTS

HUB and MWBE Requirements



Requirements

UG (MWBE)

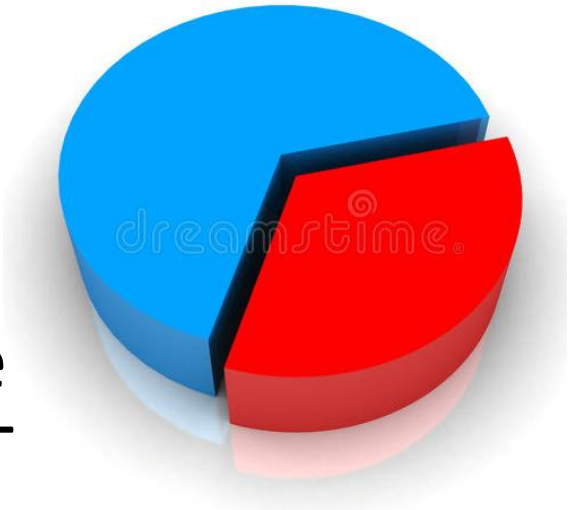
- ✓ Applies to **All** Contracts regardless of type above micro-purchase threshold ($10,000)
- ✓ Requires 6 specific solicitation steps

State (HUB)

- ✓ Local government engages in outreach efforts for all building construction contracts costing $30,000 and above
- ✓ Require bidders to engage in good faith efforts for all building construction contracts costing $300,000 and above

Goals

- UG does not require MWBE goals
- State law requires goals for building construction projects:
  - $300,000 with local funds
  - $100,000 with state funds
- Some federal programs require goals (ex: DBE goals for US DOT projects)



Documentation and Reporting

UG

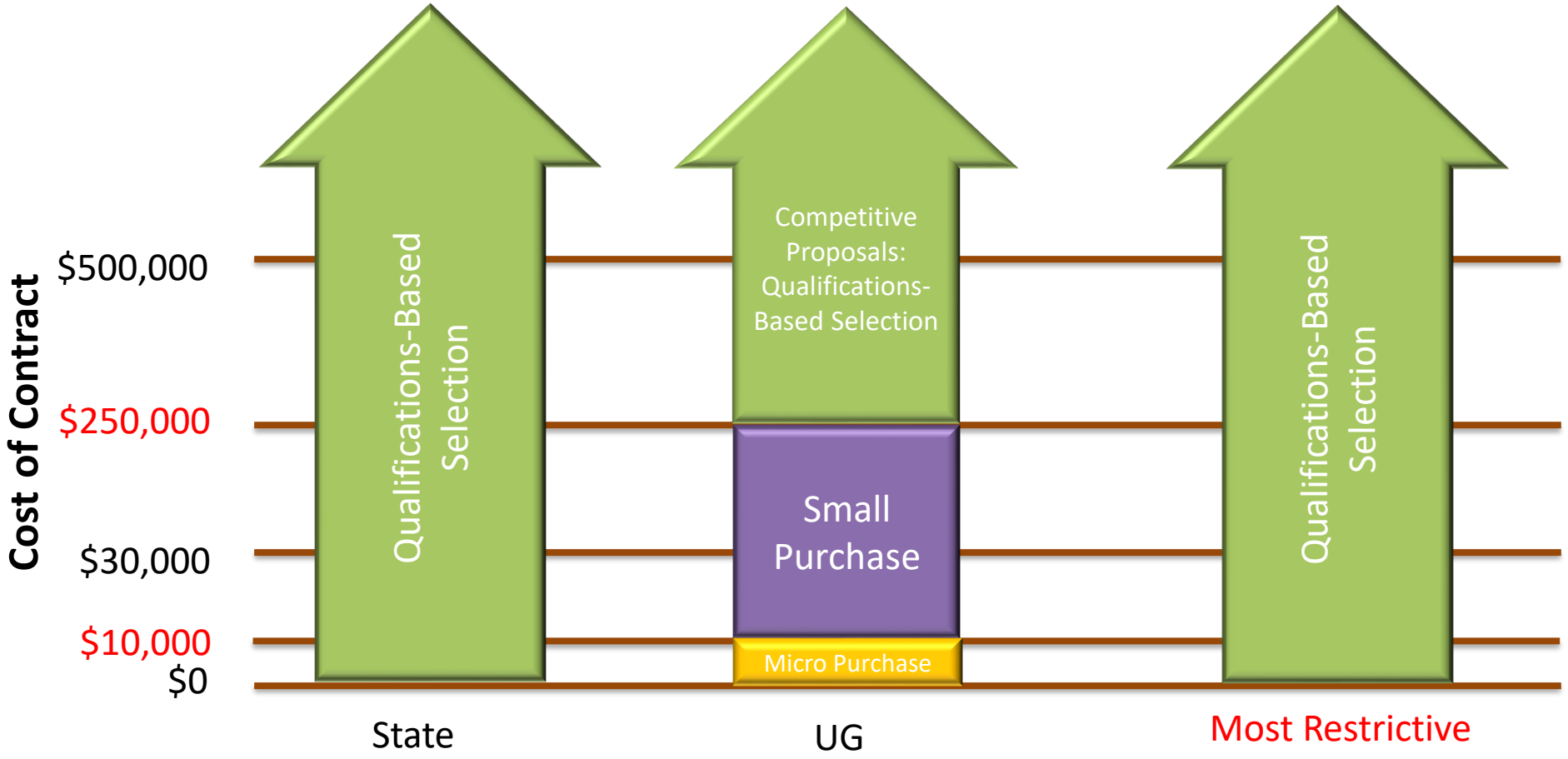
- Local government must document compliance with MWBE solicitation requirements (along with all other procurement requirements)
- Recommend requiring contractors to document their compliance
- HUB certification of firms not required for compliance

State

- Formal HUB – bidder's good faith efforts affidavits
- Local government must report to NC HUB office
- HUB certification required for credit toward local government participation goals

UG AND STATE LAW A/E CONTRACT REQUIREMENTS

A/E Contracts



Even when generally following federal rules, some specific state requirements may still apply and vice versa.

A/E Contracting Requirements

RFQ Requirements

- "Announce" requirements for A/E services – solicit broadly!
- Comply with UG MWBE solicitation requirements (*minority outreach also required under state law – recommend using state HUB Office website*)
- Evaluate all firms based on qualifications
- Negotiate price with "best qualified" firm

Prohibitions

- Cannot solicit price (other than unit cost)
- Cannot solicit prior work product
- In-state preference allowed, but local preference prohibited
- State exemption for contracts under $50,000 only allowed for contracts under $10,000 (micropurchase threshold)

PUBLIC ASSISTANCE PITFALLS AND TIPS

Other Florence-Related PA Items

⑩ Time Extensions

Permanent Work = 18 months with up to 30 more, then FEMA

Debris and EPM = 6 months with up to 6 more, then FEMA

- **Debris Operations**

6 month mark soon. Take "legal" Florence debris to the ROW, and let state know it's out there. Disaster permitting critical from start to finish.

⑩ Payments

Speed of payments generally in line with speed documentation provided. EEI's are critical to the timeline. Applicants are paid by the State.

Hazard Mitigation

FEMA's Hazard Mitigation ("406 Mitigation")

- Must be cost effective
- Must not exceed 15% of damage on facility
- Must be in Appendix J of the PAPPG at https://bit.ly/2tfyjYT

Do you have ideas for your Florence-damaged facility that will help avoid repeat damages in future disasters?

The State's Required SAA and DAA Forms – Get Paid!

The SAA – State Applicant Disaster Assistance Agreement

- Represents the contract between the State and the applicant (subgrantee)
- Must complete all seven (7) pages
- Include Federal Tax I.D.

The DAA – Designation of Applicant's Agent

- The persons designated as agents will be the primary and secondary contacts for the applicant
- Resolution must be certified by applicant's governing body

NCEM PA Contacts

NCEM Public Assistance Supervisor
Mary Glasscock 919-306-8188 or mary.glasscock@ncdps.gov

Public Assistance Hazard Mitigation ("406 Mitigation"):
Derek Winstead - 984-297-5661 or derek.winstead@ncdps.gov

Debris Operations
Andy Innis – 919-218-3191 or andy.innis@ncdps.gov

Get Paid! Send your SAA/DAA forms to public.assistance@ncdps.gov

RESOURCES

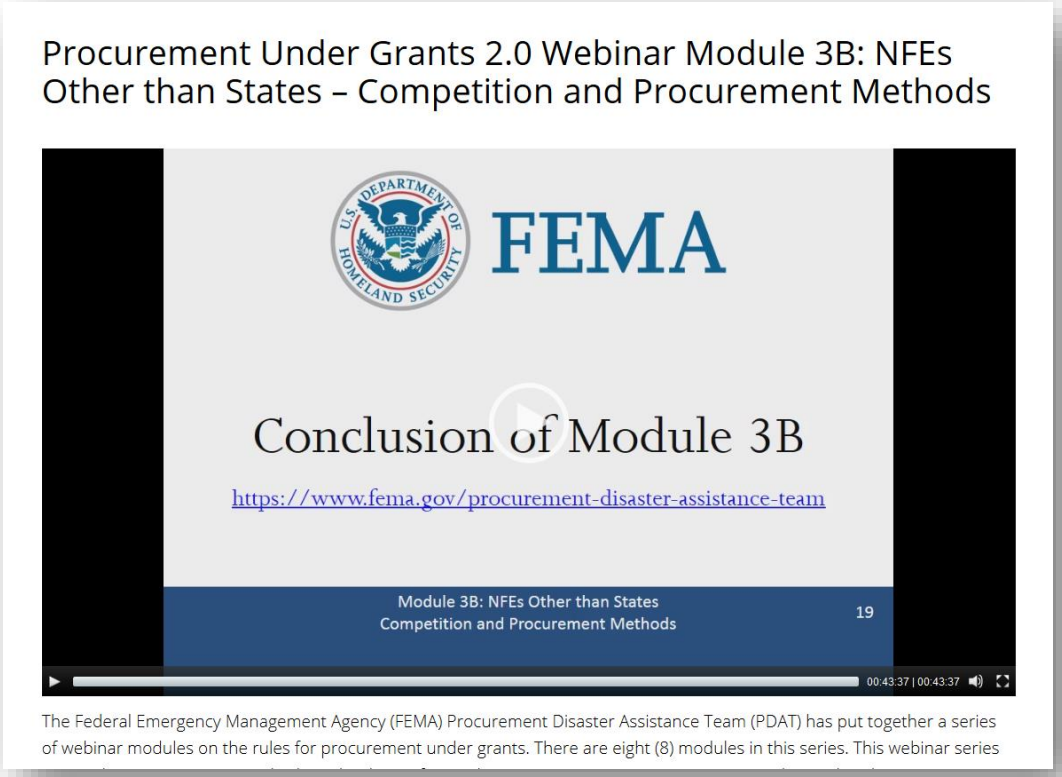
CFR Website

https://www.ecfr.gov/cgi-bin/text-idx?SID=6214841a79953f26c5c230d72d6b70a1&tpl=/ecfrbrowse/Title02/2cfr200_main_02.tpl

FEMA PDAT

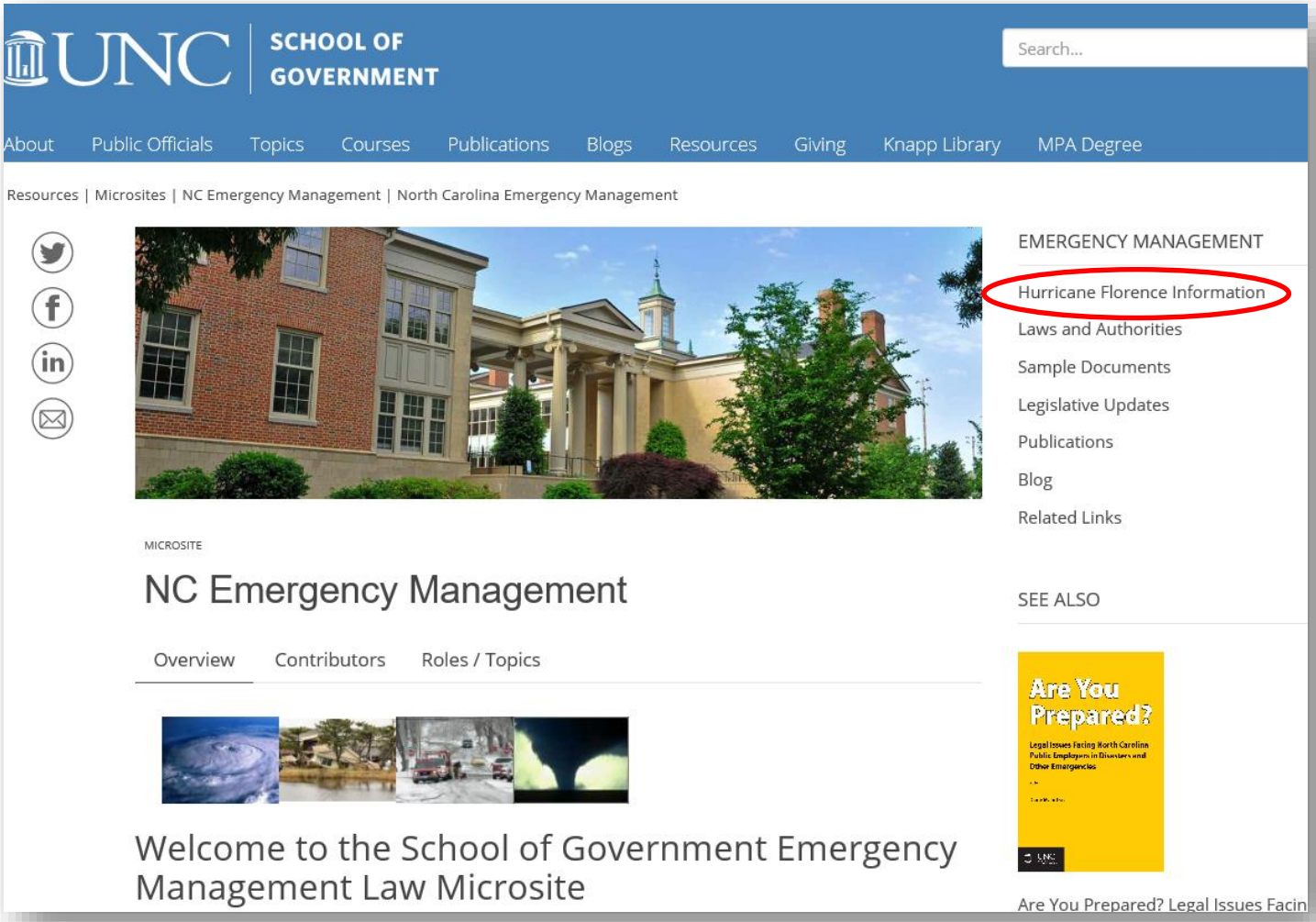
FEMA Procurement Disaster Assistance Team

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



SOG Hurricane Florence Info Site

www.sog.unc.edu/resources/microsites/nc-emergency-management



Good Luck!

Norma Houston
UNC School of Government
nhouston@sog.unc.edu

Mary Glasscock
NC Division of Emergency Management
Mary.Glasscock@ncdps.gov

FEMA

UNC SCHOOL OF GOVERNMENT