

Procurement Desk Reference

DHS-OIG Audit Findings + FEMA Policy +
Comments + Tips + MORE!

getting it right!



PURPOSE

This Procurement **Desk Reference: DHS-OIG Audit Findings + FEMA Policy + Comments + Tips + MORE!** is a companion job aid to the **PROCUREMENT TOOLBOX: Comprehensive guide to getting and KEEPING your FEMA grant dollars!**, **THE NEW PROCUREMENT GUIDE: Getting and KEEPING your FEMA grant dollars!** and the **Procurement Checklist**. It is designed as a resource for attorneys, procurement officers, purchasing agents and grants management professionals who contract using FEMA grant funds.

DISCLAIMER

This document provides guidance on Federal procurement regulations. It does not and is not designed to address all procurement issues that a subgrantee may experience and may be subject to other interpretation. It is the subgrantee's responsibility to assure all Federal regulations are followed in all circumstances involving Federal funding.

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getting it right!



LEGEND


Blue = Institutions of higher education, hospitals and other private nonprofit (PNP) organizations

Red = State, local and Indian tribal governments for grants awards or Presidential Declarations (PD) before 12/26/2014



Information containing tools, tips, ideas and advice based upon the daily interactions of the GOHSEP staff with FEMA and DHS-OIG.


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GRANT AWARDS OR PRESIDENTIAL DECLARATION (PD) BEFORE 12/26/2014	GRANT AWARDS OR PD ON OR AFTER 12/26/2014	REMARKS
<p>44 Code of Federal Regulations (CFR) 13.36(a)</p> <p>2 CFR 215.40</p>	<p>§200.317 Procurements by states.</p> <p>When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with §200.322 Procurement of recovered materials and ensure that every purchase order or other contract includes any clauses required by section §200.326 Contract provisions. All other non-Federal entities, including subrecipients of a state, will follow §200.318 General procurement standards through §200.326 Contract provisions.</p>	<ul style="list-style-type: none"> • State is defined as “any State of the United States ... any agency or instrumentality of a State, exclusive of local governments” [44 CFR 13.3 and 2 CFR 225 (B)(16) and (18)]. • Louisiana law defines local governmental subdivision as “any Parish or municipality” [Louisiana Constitution of 1974, Section 44 (1)]. Any political subdivision not a Parish or municipality may be a “State”. • There appear to be some qualifiers. “Instrumentality of a State” is defined as a State university or a State department of transportation (<i>Black’s Law Dictionary</i>, 9th ed, 2009: “arm of the State”). • Agency is defined under Louisiana law as “each State board, commission, department, agency, officer or other entity which makes rules, regulations, or policy or formulates or issues decisions or orders [Louisiana Revised Statute (LA RS) 49:951(2)]. <p> <i>Opportunity for a Subrecipient (Applicant) to take a position most beneficial to it. Caution: exercise most conservative position if unsure.</i></p>


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GRANT AWARDS OR PRESIDENTIAL DECLARATION (PD) BEFORE 12/26/2014	GRANT AWARDS OR PD ON OR AFTER 12/26/2014	REMARKS
<p>44 CFR 13.36(b)(1)</p> <p>2 CFR 215.44(a)</p>	<p>§200.318 General procurement standards.</p> <p>(a) The non-Federal entity must use its own documented procurement procedures which reflect applicable State, local, and tribal laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this part.</p>	<ul style="list-style-type: none"> • Disaster Assistance Policy (DAP) 9580.212 contains relevant Frequently Asked Questions (FAQs) on grant contracting. • Plaquemines Parish DD-09-03 states that Federal Acquisition Regulation (FAR) Section 2.101 requires contracts and amendments to be in writing; • Archdiocese of New Orleans DD-10-18, City of Abita Springs DD-11-04 and Orleans Parish Criminal Sheriff DD-10-08, FEMA noted the DHS-OIG Audit finding that the contract was unsigned and required GOHSEP to notify Subrecipient (Applicant) of requirement that contract be in writing. • New Orleans City Park DD-09-15, FEMA will not recognize executive orders (EOs) relaxing State procurement requirements as they do not change Federal regulations that must be complied with. • City of Abita Springs DD-11-04, while State law (LA RS 39:1581 and Louisiana Administrative Code [LAC] 34:1101) may allow a Subrecipient (Applicant) to avoid normal procurement procedures under emergency conditions, that procedure must conform to this regulation.




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GRANT AWARDS OR PRESIDENTIAL DECLARATION (PD) BEFORE 12/26/2014	GRANT AWARDS OR PD ON OR AFTER 12/26/2014	REMARKS
<p>44 CFR 13.36(b)(2)</p> <p>2 CFR 215.47</p>	<p>(b) Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.</p>	<ul style="list-style-type: none"> • Plaquemines Parish DD-09-03 questioned the Subrecipient's (Applicant's) exercise of its responsibility under this regulation, resulting in the performance of ineligible work by Subrecipient's (Applicant's) contractor. <p> <i>It is the responsibility of the Subrecipient (Applicant) to assure that all contract provisions are followed. Suggest that Subrecipients (Applicants) have a contract monitoring policy much like the monitoring requirement for Recipients (Grantees) found at 44 CFR 13.40.</i></p>




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<p>44 CFR 13.36(b)(3)</p> <p>2 CFR 215.42</p>	<p>(c)(1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her 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. The officers, employees, and agents of the non-Federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.</p> <p>(2) If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.</p>	<ul style="list-style-type: none"> • Recovery Policy (RP) 9580.212, page 5, FAQ 7, addresses Conflicts of Interest. <p> <i>If one always applies the “apparent” standard, should never have an issue.</i></p>

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<p>44 CFR 13.36(b)(4)</p> <p>2 CFR 215.44(a)(1) – (2)</p>	<p>(d) The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.</p>	<ul style="list-style-type: none"> • Disaster Assistance Policy (DAP) 9525.12, pages 2-3, VII, (D) for policy on equipment leasing. <p> <i>Appears to suggest that this is an exception to the rule of separating larger projects into smaller projects if one can justify "a more economic purchase." Suggest this be avoided.</i></p>
<p>44 CFR 13.36(b)(5)</p>	<p>(e) To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal Government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.</p>	<ul style="list-style-type: none"> • RP 9580.212, page 5, FAQ 6 describes "piggyback". These agreements do not meet the definition of "piggyback." <p> Subrecipient (Applicant) should use these agreements whenever they are available and fit its needs. It allows the Subrecipient (Applicant) to avoid the procurement process.</p>
<p>44 CFR 13.36(b)(6)</p>	<p>(f) The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.</p>	
<p>44 CFR 13.36(b)(7)</p>	<p>(g) The non-Federal entity is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.</p>	<p> <i>Operative word is "encouraged" and not required. Probably why it has never been an issue.</i></p>

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<p>44 CFR 13.36(b)(8)</p> <p>2 CFR 215.44(d)</p>	<p>(h) The non-Federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. See also Appendix II to Part 200 (H) Debarment and Suspension.</p>	<ul style="list-style-type: none"> • Jesuit High School DD-11-21, responsible contractor is judged by integrity and past performance. <p> <i>Past performance of contractors is frequently an issue with some Subrecipients (Applicants). It can be addressed in the grading process.</i></p> <p> <i>A response deemed to be nonresponsive (usually addressed in the Request for Proposal [RFP]) and/or not responsible will not count as a response to the solicitation.</i></p>
<p>44 CFR 13.36(b)(9)</p> <p>2 CFR 215.46</p>	<p>(i) The non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.</p>	<ul style="list-style-type: none"> • East Jefferson General Hospital OIG-15-48-D, must maintain records documenting contractor selection and establishing cost. <p> <i>On first request for reimbursement by Subrecipient (Applicant), GOHSEP Disaster Recovery Specialist (DRS) will request that Subrecipient (Applicant) produce the RFP, number of responses, selection methodology and contract. Noncompliance will result in termination of future payments and cost analysis by Subrecipients (Applicants) to justify payment of current service</i></p>


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44 CFR 13.36(b)(10)	<p>(j)(1) The non-Federal entity may use a time and materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and materials type contract means a contract whose cost to a non-Federal entity is the sum of:</p> <ul style="list-style-type: none"> (i) The actual cost of materials; and (ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit. <p>(2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.</p>	<ul style="list-style-type: none"> • See RP 9580.212, page 4, FAQ 6 for a discussion on time and materials (T + M) contracts. • Debris Guide 9580.201, T + M contracts typically occur with debris. <p> <i>Other than debris contracts, consulting services contracts are T + M contracts and have not been questioned by FEMA or OIG.</i></p> <ul style="list-style-type: none"> • Archdiocese of New Orleans DD-10-18, Town of Abita DD-11-0, Calcasieu School Board DD-11-20, when a T + M contract is improperly used, FEMA will pay reasonable cost in accordance with its discretionary enforcement policy (see 44 CFR 13.43); T + M contracts must contain a not-to-exceed clause, and Subrecipient (Applicant) must show justification for the use of T + M contract and reasonable cost, and that rates are fully loaded.
44 CFR 13.36(b)(11) 2 CFR 215.41	<p>(k) The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction.</p>	

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<p>44 CFR 13.36(c)(1)</p> <p>2 CFR 215.43</p>	<p>§200.319 Competition.</p> <p>(a) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:</p> <ol style="list-style-type: none"> (1) Placing unreasonable requirements on firms in order for them to qualify to do business; (2) Requiring unnecessary experience and excessive bonding; (3) Noncompetitive pricing practices between firms or between affiliated companies; (4) Noncompetitive contracts to consultants that are on retainer contracts; (5) Organizational conflicts of interest; (6) Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement; and (7) Any arbitrary action in the procurement process. 	<ul style="list-style-type: none"> • Plaquemines Parish DD-09-03, full and open competition required. • Orleans Parish Criminal Sheriff DD-10-08, FEMA will allow a noncompetitive contract, but when exigent circumstances no longer exist, it must be competitively bid. • Xavier University DD-11-12, Subrecipient (Applicant) solicited sufficient proposals but only received one response. FEMA stated the good faith effort and found the lack of response based upon inadequacy of local competition. FEMA found Subrecipient (Applicant) to be prudent and its action allowable. <p> <i>Publicizing verses advertising is required; no limited lists of vendors no matter how large or capable. Lists cannot exclude qualified vendors or otherwise limit competition.</i></p>

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44 CFR 13.36(c)(2)	(b) The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.	<ul style="list-style-type: none"> • Section 307 of the <i>Robert T. Stafford Disaster Relief and Emergency Assistance Act</i> (Stafford Act) encourages geographic preference. • LA RS 38:2225.1 addresses preferences under State law for residences. • LA RS 39:2171 gives a preference to Louisiana Veterans (Veteran Initiative) and LA RS 39:2001 allows a preference to Louisiana Small Enterprises (Hudson Initiative).

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<p>44 CFR 13.36(c)(3)</p> <p>2 CFR 215.44(a)</p>	<p>(c) The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations:</p> <p>(1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equivalent” description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and</p> <p>(2) Identify all requirements which the offers must fulfill and all other factors to be used in evaluating bids or proposals.</p>	<p> A good scope of work (SOW) is needed to properly evaluate the responses and will prevent problems such as “out of scope” work after the contract is signed and the work begins.</p> <p> RFP usually contains administrative instructions which, if not followed, makes the response “unresponsive” and is rejected. RFP should include grading and scoring criteria.</p>

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44 CFR 13.36(c)(4)	(d) The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.	<ul style="list-style-type: none"> • Administrators of the Tulane Educational Fund DD-13-11, states that using a pre-selected list of contractors may be deemed open and free competition if the following circumstances are met: <ol style="list-style-type: none"> 1. The list is current 2. The list includes enough qualified sources to ensure open and free competition 3. The applicant will not preclude potential bidders from qualifying during the solicitation period. <p> <i>Seems to suggest that a pre-qualified list which is broad enough to provide for a competitive process is sufficient. Second sentence states that it cannot preclude other bidders. When read together, appears to indicate that despite having a sufficient pre-qualified list, unless you advertise/publicize, you are precluding others from bidding. However, see Jesuit DD-11-21 reported at (d)(3)(i).</i></p>

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44 CFR 13.36(d)(1)	<p>§200.320 Methods of procurement to be followed.</p> <p>The non-Federal entity must use one of the following methods of procurement.</p> <p>(a) Procurement by micro-purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (§200.67 Micro-purchase). To the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.</p> <p>(b) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.</p>	<ul style="list-style-type: none"> • Disaster Operations Legal Reference (DOLR) Version 2.0, page 5-117, threshold is currently \$150,000 for the simplified acquisition. • FEMA Recovery Fact Sheet 9580.212 states that THREE (3) is the minimum number of sources. • Jesuit School DD-11-21 discusses a small purchase.

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44 CFR 13.36(d)(2)	<p>(c) Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (c)(1) of this section apply.</p> <p>(1) In order for sealed bidding to be feasible, the following conditions should be present:</p> <ul style="list-style-type: none"> (i) A complete, adequate and realistic specification or purchase description is available; (ii) Two or more responsible bidders are willing and able to compete effectively for the business; and (iii) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price. 	<p> Bidder criteria usually limited to construction contracts; lowest bidder must be responsible, (i.e. ability to perform the contract, not just the lowest bidder.)</p> <p> Section (1)(ii): seems to define adequate number as two (2).</p> <p> Interpret (i) as meaning that the Recipient (Grantee) or Subrecipient (Applicant) should assure that an adequate number of suppliers have knowledge of the bid.</p> <p> Responsive, responsible, debarred contractor.</p>

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<p>(Continued . . .)</p> <p>44 CFR 13.36(d)(2)</p>	<p>(2) If sealed bids are used, the following requirements apply:</p> <ul style="list-style-type: none"> (i) Bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids, for state, local, and tribal governments, the invitation for bids must be publically advertised; (ii) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond; (iii) All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly; (iv) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and (v) Any or all bids may be rejected if there is a sound documented reason. 	

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44 CFR 13.36(d)(3)	<p>(d) Procurement by competitive proposals. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:</p> <ol style="list-style-type: none"> (1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical; (2) Proposals must be solicited from an adequate number of qualified sources; (3) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients; (4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and (5) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort. 	<p> <i>"More than one source" indicates that the minimum number of responses is TWO (2).</i></p> <ul style="list-style-type: none"> • City of Abita Springs, DD-11-04, piggyback contracts, although not ineligible are to be avoided, <i>Debris Management Guide FEMA 325, July 2007, page 19, DOLR Version 2.0, page 5-128.</i> • Jesuit High School DD-11-21, formal advertising is not required. Subrecipient (Applicant) took no steps to limit competition and under the circumstances sought the broadest possible number of bidders. <p> <i>Subrecipient (Applicant) are required to publicize. Advertising is a part of publicizing. The requirement to publicize means that the Subrecipient (Applicant) must not take any steps to limit competition and seek the broadest possible number of bidders under the circumstances.</i></p> <ul style="list-style-type: none"> • Xavier University DD-11-12 where Subrecipient (Applicant) was found to solicit from an adequate number of sources but received only one response.

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44 CFR 13.36(d)(4)	<p>(f) Procurement by noncompetitive proposals. Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:</p> <p>(1) The item is available only from a single source;</p> <p>(2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;</p> <p>(3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or</p> <p>(4) After solicitation of a number of sources, competition is determined inadequate.</p>	<ul style="list-style-type: none"> • Xavier University DD-11-12, Jefferson Davis and Beauregard Electrical Cooperatives DD-09-08, FEMA recognized the emergency period to restore power to the area following Hurricane Rita. FEMA will not recognize emergency periods that are arbitrarily set. • St. Mary's Academy DD-11-15, FEMA found a noncompetitive awarded contract eligible recognizing the need to open the school as soon as possible, the good-faith effort of the Subrecipient (Applicant) to obtain bids and the lack of contractors to do the work. • Jesuit High School DD-11-21, noncompetitive contract properly procured based upon the exigent circumstances to clean and stabilize the facility and stop further deterioration. Also noted by FEMA was the Subrecipient's (Applicant's) longtime relationship with the contractor. • St. Charles Parish School Board DD-13-07, FEMA recognized exigent circumstances to open the schools as soon as possible. FEMA also commented on cost and previous relationship with contractor.

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(Continued . . .) 44 CFR 13.36(d)(4)	(Continued . . .)	(Continued . . .) <ul style="list-style-type: none"> • Orleans Parish Sheriff’s Office DD-10-08, once the exigent conditions and emergency circumstances no longer exist, contracts must be competitively bid; any expenses after this period are limited to reasonable and necessary cost. • St. Charles Parish School Board DD-13-07, Jesuit High School DD-11-12, under (B), FEMA appears to determine “public exigency or emergency” on a case-by-case basis. <p> <i>FEMA literature always refers to the most cost- effective option. A scenario which suggests that a noncompetitively bid contract may continue after the exigent period may be when the continuation of that contract is more cost effective than rebidding it.</i></p>
44 CFR 13.36(e)(1) 2 CFR 215.44(b)	<p>§200.321 Contracting with small and minority businesses, women’s business enterprises, and labor surplus area firms.</p> <p>(a) The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women’s business enterprises, and labor surplus area firms are used when possible.</p>	<ul style="list-style-type: none"> • Cameron Parish School Board DD-12-04, St. Charles Parish DD-12-20, and University of New Orleans Research and Technology Foundation OIG-14-148-D, East Jefferson General Hospital OIG-15-48-D reiterate that Subrecipients (Applicants) must take the necessary steps to use these firms. <p> <i>The term “when possible” was interpreted by the OIG as “. . . to the extent consistent with quality, price, risk and other lawful and relevant considerations . . .” Source: OIG Audit, St. Charles Parish (Finding D, page 7).</i></p>

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<p>44 CFR 13.36(e)(2)</p> <p>2 CFR 215.44(b)(1-6)</p>	<p>(b) Affirmative steps <i>must include</i>:</p> <p>(1) Placing qualified small and minority businesses and women’s business enterprises on solicitation lists;</p> <p>(2) Assuring that small and minority businesses, and women’s business enterprises are solicited whenever they are potential sources;</p> <p>(3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women’s business enterprises;</p> <p>(4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women’s business enterprises;</p> <p>(5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and</p> <p>(6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.</p>	<ul style="list-style-type: none"> • FEMA P-323 / March 2010, examples of affirmative steps include, but are not limited to: <ul style="list-style-type: none"> – Ensuring that the group of contractors considered for awards reflects appropriate demographics, – Placing qualified minority and women-owned businesses on solicitation lists, soliciting these businesses when possible, and requiring prime contractors to take these steps as well. <p> <i>Suggest that solicitation means that these firms are identified and sent copies of the RFP/requests for qualifications (RFQs).</i></p> <p> <i>Appears to contradict the requirement that you cannot breakdown a large project into small projects. If a Subrecipient (Applicant) decided to do this, suggest there be documented reasons.</i></p>

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(Continued . . .) 44 CFR 13.36(e)(2) 2 CFR 215.44(b)(1-6)	(Continued . . .) §200.322 Procurement of recovered materials. A non-Federal entity 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, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR 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 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.	(Continued . . .)

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<p>44 CFR 13.36(f)(1)</p> <p>2 CFR 215.45</p>	<p>200.323 Contract cost and price.</p> <p>(a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.</p>	<ul style="list-style-type: none"> • Jefferson Davis and Beauregard Electrical Cooperatives DD-09-08; shortages of materials, labor and equipment will affect reasonable cost; reasonable costs must be based upon similar contracts under similar circumstances. • Archdiocese of New Orleans DD-10-18, where there is an inadequate number of responses, must do a cost analysis. <p> <i>Not currently a requirement by FEMA to perform a cost analysis where there is a competitive process.</i></p> <ul style="list-style-type: none"> • Noncompetitive proposal and sole source are many times used interchangeably. • Cost analysis not required for commercially available commodities such as food products (not mass feeding), general supplies, attorney's fees set by Attorney General (AG), items on State contract. • Administrators of the Tulane Educational Fund DD-13-11, states that damaged equipment and furnishings can be replaced with comparably priced items, even new items. <p> <i>Not currently a requirement by FEMA to perform a cost analysis where there is a competitive process. See 48 CFR 15.404-1(b)(2)(i). However, costs analyses are performed by public entities as the starting point of a project.</i></p>

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44 CFR 13.36(f)(2)	(b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance and industry profit rates in the surrounding geographical area for similar work.	 <p><i>This provision is contradictory to the performance of a cost analysis. The audits never address profit as a separate element but look to the reasonableness of the overall cost.</i></p>
44 CFR 13.36(f)(3)	(c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under Subpart E—Cost Principles of this part . The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.	<ul style="list-style-type: none"> • City of Slidell DD-11-08, costs which exceed the contract cost are ineligible for reimbursement and all contract costs must be supported by proper documentation.  <p><i>Allowable cost principles are stated in 2 CFR 200 Subpart E.</i></p>

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<p>44 CFR 13.36(f)(4)</p> <p>2 CFR 215.44(c)</p>	<p>(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.</p>	<ul style="list-style-type: none"> • Plaquemines Parish DD-09-03, Roman Catholic Church of the ANO DD-10-18, Chennault International Airport Authority DD-11-07, Xavier University DD-11-12 and Jesuit High School DD-11-21, use of such contracts will limit FEMA to paying for reasonable cost. • Xavier University DD-10-19, FEMA suggested that ongoing work under a prohibited contract be terminated immediately. • City of Slidell DD-11-08, FEMA allows A/E services to be paid on a cost curve relative to total estimated project costs. <p> <i>The City of Slidell audit evidences payment for A/E based upon a percentage but expressed as a lump sum. Appears to be an exception to the percentage of cost prohibition.</i></p>

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GRANT AWARDS OR PRESIDENTIAL DECLARATION (PD) BEFORE 12/26/2014	GRANT AWARDS OR PD ON OR AFTER 12/26/2014	REMARKS
(Continued . . .)	(Continued . . .)	<ul style="list-style-type: none"> • New Orleans City Park DD-09-15, states that contingency contracts are ineligible, citing <i>PA Digest FEMA 321</i>, January 2008 (page 23) states that contingency contracts are not advisable. • East Jefferson General Hospital OIG-15-48-D (second FEMA response dated 8/28/15), FEMA discusses the factors which make a contract a cost-plus contract. Appears to redefine our understanding of what constitutes a cost-plus contract. <p> <i>Best practice to not use contingency contracts as defined in Office of Management and Budget (OMB) Circular 122 (now 2 CFR 225 Appendix B [9]), Jesuit High School DD-11-21.</i></p>



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GRANT AWARDS OR PRESIDENTIAL DECLARATION (PD) BEFORE 12/26/2014	GRANT AWARDS OR PD ON OR AFTER 12/26/2014	REMARKS
<ul style="list-style-type: none"> Awarding agency review. 		
<p>44 CFR 13.36(g)(1)</p> <p>2 CFR 215.44(e)</p>	<p>§200.324 Federal awarding agency or pass-through entity review.</p> <p>(a) The non-Federal entity must make available, upon request of the Federal awarding agency or pass-through entity, technical specifications on proposed procurements where the Federal awarding agency or 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 generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the non-Federal entity desires to have the review accomplished after a solicitation has been developed, the Federal awarding agency or pass-through entity may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.</p> <p>(b) The non-Federal entity must make available upon request, for the Federal awarding agency or pass-through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when:</p>	<p> At this time, it is not the practice of GOHSEP to request review of procurement documents prior to the award. However, a Subrecipient (Applicant) may request and GOHSEP will provide technical assistance and conduct a presolicitation/preaward review.</p>

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<p>44 CFR 13.36(g)(2)(i-v)</p> <p>2 CFR 215.44(e)(1-5)</p>	<p>(1) The non-Federal entity's procurement procedures or operation fails to comply with the procurement standards in this part;</p> <p>(2) The procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;</p> <p>(3) The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a "brand name" product;</p> <p>(4) The proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or</p> <p>(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.</p>	<p> <i>On first request for reimbursement by Subrecipient (Applicant), GOHSEP DRS will request that Subrecipient (Applicant) produce the RFP, number of responses, selection methodology and contract. Non-compliance will result in termination of future payments and cost analysis by Subrecipient (Applicant) to justify payment of current services.</i></p> <ul style="list-style-type: none"> • City of Abita DD-11-04 and City of Kenner DD-09-04, FEMA must approve modifications to a contract. • City of Kenner DD-09-04, modifications that SOW the type and magnitude of the SOW on original contracts must be competitively bid. However, changes are permitted when necessary if the SOW does not change and price adjustments are allowed (FEMA letter 4/8/10). • City of Slidell DD-11-08, where Subrecipient's (Applicant's) solicitation was broad enough to cover amended SOW. <p> <i>Modifications which significantly change the scope of the original contract creates a new contract.</i></p>

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44 CFR 13.36(g)(3)(i-ii)	<p>(c) The non-Federal entity is exempt from the pre-procurement review in paragraph (b) of this section if the Federal awarding agency or pass-through entity determines that its procurement systems comply with the standards of this part.</p> <p>(1) The non-Federal entity may request that its procurement system be reviewed by the Federal awarding agency or pass-through entity to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews must occur where there is continuous high-dollar funding and third party contracts are awarded on a regular basis;</p> <p>(2) The non-Federal entity may self-certify its procurement system. Such self-certification must not limit the Federal awarding agency's right to survey the system. Under a self-certification procedure, the Federal awarding agency may rely on written assurances from the non-Federal entity that it is complying with these standards. The non-Federal entity must cite specific policies, procedures, regulations or standards as being in compliance with these requirements and have its system available for review.</p>	


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GRANT AWARDS OR PRESIDENTIAL DECLARATION (PD) BEFORE 12/26/2014	GRANT AWARDS OR PD ON OR AFTER 12/26/2014	REMARKS
Bonding requirements.		
<p>44 CFR 13.36(h)</p> <p>2 CFR 215.48(c)</p>	<p>§200.325 Bonding requirements.</p> <p>For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the non-Federal entity provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:</p>	 <p><i>Bonding company requirements under Louisiana law can be found at LA RS 38:2218 and 38:2219.</i></p>
<p>44 CFR 13.36(h)(1)</p> <p>2 CFR 215.48(c)(1)</p>	<p>(a) A bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.</p>	
<p>44 CFR 13.36(h)(2)</p> <p>2 CFR 215.48(c)(2)</p>	<p>(b) A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor’s obligations under such contract.</p>	
<p>44 CFR 13.36(h)(3)</p> <p>2 CFR 215.48(c)(3)</p>	<p>(c) A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.</p>	

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GRANT AWARDS OR PRESIDENTIAL DECLARATION (PD) BEFORE 12/26/2014	GRANT AWARDS OR PD ON OR AFTER 12/26/2014	REMARKS
Contract provisions.		
<p>44 CFR 13.36(i)</p> <p>2 CFR 215.48 and 2 CFR 215.48(e)</p>	<p>§200.326 Contract provisions.</p> <p>The non-Federal entity's contracts must contain the applicable provisions described in Appendix II to Part 200—Contract Provisions for non-Federal Entity Contracts Under Federal Awards.</p> <p>Appendix II to Part 200—Contract Provisions for Non-Federal Entity Contracts Under Federal Awards</p> <p>In addition to other provisions required by the Federal agency or non-Federal entity, all contracts made by the non-Federal entity under the Federal award must contain provisions covering the following, as applicable.</p>	<ul style="list-style-type: none"> • Cameron Parish School Board DD-12-04 and Holy Cross School OIG-15-65-D, contracts shall include all required contract provisions. <p> <i>Not all of the provisions apply to all contracts.</i></p>
<p>44 CFR 13.36(i)(1)</p> <p>2 CFR 215.48(a)</p>	<p>(A) Contracts for more than the simplified acquisition threshold currently set at \$150,000, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, 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.</p>	

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<p>44 CFR 13.36(i)(2)</p> <p>2 CFR 215.48(b)</p>	<p>(B) All contracts in excess of \$10,000 must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement.</p>	<ul style="list-style-type: none"> • 44 CFR 13.44 termination for convenience. • Xavier University DD-10-19, FEMA required Subrecipient (Applicant) to immediately terminate all noncompetitively bid contracts and contracts with prohibited clauses. <p> Upon first request for reimbursement, GOHSEP DRS will request all supporting documentation for contract. If contract is improperly procured, subrecipient will be notified that no further payment will be made on the contract and the subrecipient must terminate the contract. If improper contract is discovered by GOHSEP and project is not substantially complete, GOHSEP will demand termination of the contract.</p>
<p>44 CFR 13.36(i)(3)</p> <p>2 CFR 215 Appendix A(1)</p>	<p>(C) Equal Employment Opportunity. Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of “federally assisted construction contract” in 41 CFR Part 60-1.3 must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, “Equal Employment Opportunity” (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, “Amending Executive Order 11246 Relating to Equal Employment Opportunity,” and implementing regulations at 41 CFR part 60, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.”</p>	<ul style="list-style-type: none"> • Xavier University DD-11-12, educational institutions must contain a contract provision that it will comply with the Equal Employment Opportunity Act (citing 2 CFR 215, OMB Circular A-110).

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<p>44 CFR 13.36(i)(5)</p> <p>2 CFR 215 Appendix A(3)</p> <p>44 CFR 13.36(i)(4)</p> <p>2 CFR 215 Appendix A(2)</p>	<p>(D) Davis-Bacon Act, as amended (40 U.S.C. 3141-3148). When required by Federal program legislation, all prime construction contracts in excess of \$2,000 awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction"). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The non-Federal entity must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland "Anti-Kickback" Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR 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"). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency.</p>	<ul style="list-style-type: none"> • Public Assistance Guide, FEMA 322/June 2007, page 44, the provisions of <i>Davis-Bacon</i> do not apply to State or local contracts for work completed using PA funds under the Stafford Act. <p> <i>FEMA has notified GOHSEP that the provisions of Davis-Bacon do not apply to HM funds under the Stafford Act as well as the Predisaster Mitigation Programs. Note that the Flood Mitigation Assistance (FMA), Repetitive Flood Claims (RFC) and Severe Repetitive Loss (SRL) programs are authorized by the National Flood Insurance Act of 1968 and appear to be subject to the Davis-Bacon Act.</i></p>

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<p>44 CFR 13.36(i)(6)</p> <p>2 CFR 215 Appendix A(4)</p>	<p>(E) Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708). Where applicable, all contracts awarded by the non-Federal entity in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.</p>	
<p>44 CFR 13.36(i)(8-9)</p> <p>2 CFR 215 Appendix A(5)</p>	<p>(F) Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of “funding agreement” under 37 CFR §401.2 (a) 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 CFR 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 the awarding agency.</p>	



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GRANT AWARDS OR PRESIDENTIAL DECLARATION (PD) BEFORE 12/26/2014	GRANT AWARDS OR PD ON OR AFTER 12/26/2014	REMARKS
<p>44 CFR 13.36(i)(12)</p> <p>2 CFR 215 Appendix A(6)</p>	<p>(G) Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended—Contracts and subgrants of amounts in excess of \$150,000 must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).</p>	
<p>44 CFR 13.35</p> <p>2 CFR 215 Appendix A(8)</p>	<p>(H) Debarment and Suspension (Executive Orders 12549 and 12689)—A contract award (see 2 CFR 180.220) must not be made to parties listed on the government wide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), “Debarment and Suspension.” SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.</p>	

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GRANT AWARDS OR PRESIDENTIAL DECLARATION (PD) BEFORE 12/26/2014	GRANT AWARDS OR PD ON OR AFTER 12/26/2014	REMARKS
2 CFR 215 Appendix A(7)	(J) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352) —Contractors that apply or bid for an award exceeding \$100,000 must file the required certification. 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 officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.	
44 CFR 13.36(i)(11) 2 CFR 215.53		<ul style="list-style-type: none"> • 2 CFR 200.333 establishes records retention requirements for disasters on or after December 26, 2014.  <i>Be aware! Banks may keep records for only four (4) years.</i>
44 CFR 13.36(i)(10) 2 CFR 215.48(d)		 <i>Requires oversight access to any books, documents, papers, and records of a contractor which are directly related to a federal grant program.</i>
44 CFR 13.36(i)(13)		LA RS 40:1730.41-1730.49, states same.

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