

APPENDIX

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PROCUREMENT **TOOLBOX**



Checklist for Reviewing Procurements Under Grants by Non-Federal Entities (States, local and tribal governments, Institutions of Higher Education, Hospitals, and private non-profit organizations) – 2 CFR pt. 200

This checklist was created to assist FEMA recipients and subrecipients in complying with the federal requirements that procurements must meet in order for FEMA to reimburse eligible expenses. Importantly, this checklist is intended to provide general guidance only and does not provide a detailed explanation of the Federal procurement requirements – it is not intended to serve as legal advice and FEMA makes no guarantee that adherence to this checklist will result in full reimbursement of eligible expenses. To understand the requirements fully, the user should review the provisions of [2 C.F.R. § 200.317 – 326](#), which is the source of these requirements. FEMA’s in – depth guidance on these provisions can be found in its *Supplement to the Public Assistance Field Manual*. In addition, the user may review FEMA’s Field Manual, [Public Assistance Grantee and Subgrantee Procurement Requirements](#), which is available on the internet by searching for “FEMA Procurement Field Manual.” While the Field Manual was drafted to specifically address the Federal procurement standards that were in effect prior to 26 December 2014 ([44 C.F.R. § 13.36\(a\)-\(i\) – States, Local and Tribal Governments](#); and [2 C.F.R. § 215.40-48 – Institutions of Higher Education, Hospitals, and other Non-Profit Organizations](#)), many of the concepts are similar or identical in substance, and thus remains an excellent tool for navigating the current Federal procurement standards. If any questions arise, please contact your servicing attorney or legal counsel for assistance.

2 C.F.R. § 200.317 – 326 became effective on December 26, 2014. For disasters (and their associated projects) declared prior to that date, the relevant procurement standards can continue to be found in 44 C.F.R. § 13.36(a)-(i) (States, local and tribal governments) and 2 C.F.R. § 215.40-48 (Institutions of Higher Education, Hospitals, and Private Non-Profits).¹ As indicated above, while many of the concepts are similar or identical, there are some substantive differences between the old and the new standards. Accordingly, this checklist should not be used for procurements associated

¹ This includes projects associated with declarations issued prior to 26 December 2014, regardless of project start date. For example, if a disaster was declared on 1 November 2014, but contracting for a project under that declaration did not begin until 1 April 2015, then a State (or state agency/instrumentality) would still utilize the old procurement standards found at 44 C.F.R. § 13.36(a); local and tribal governments would follow § 13.36(b)-(i); and Institutions of Higher Education, Hospitals, and Private Non-Profits would use 2 C.F.R. §§ 215.40-48.

with declarations issued prior to 26 December 2014. Instead, see procurement standards Checklists 13.36 and 215.²

Instructions: Each standard below is followed by a block for “Yes”, “No”, or in some cases, “Not applicable”. **Red font** is used to indicate the response which, if checked, indicates that the contract does not comply with federal requirements.

The term “non-Federal entity” (NFE) below refers to the entity that is conducting the procurement action (i.e., the state, local, or tribal government or private-non-profit entity).

1. Does the procurement comply with the State’s own procurement laws, rules, and procedures? §200.317 **Yes** **No**
2. Does the procurement comply with the requirement to make maximum use of recovered/recycled materials? § 200.317, § 200.322. **Yes** **No** **N/A – work does not involve the use of materials (e.g., debris removal or other services)**
3. **Does the contract include the following clauses?**³
 - a. *If the contract amount exceeds \$150,000*⁴, does it address **administrative, contractual, or legal remedies** in instances where contractors violate or breach contract terms, and provide for sanctions and penalties? **Yes** **No**
 N/A
 - b. *If the contract amount exceeds \$10,000*, does it address **termination for cause and for convenience, including the manner by which it will be effected and the basis for settlement?** **Yes** **No** **N/A**
 - c. *If the contract is for construction*, does it include the required **Equal Employment Opportunity clause?**⁵ **Yes** **No** **N/A**
 - d. *For construction contracts exceeding \$2,000 awarded under a Federal grant*, does the contract include a **Davis-Bacon Act clause** and **Copeland “Anti-Kickback” Act clause**⁶ addressing prevailing wage rates? [Note that Public

² 2 C.F.R. §200.110 provides prospective applicants with the option of exercising a “grace period,” which allows the prospective applicant to continue to use the old procurement standards at 13.36 or 215 for an additional two (2) fiscal years beginning on the first fiscal year after 26 December 2014. The fiscal year is based upon the prospective applicant’s own fiscal year. In order to utilize this exception, the prospective applicant is required to affirmatively elect its use through the documentation of this decision in its contract records.

³ See [Appendix II of 2 CFR part 200](#). See also, PDAT Field Manual, section IV.H for a detailed discussion of these clauses. Sample clauses and templates can be found in the [Required Contract Clauses 2 CFR 200.326 and 2 CFR Part 200 Appendix II](#).

⁴ \$150,000 is the current dollar threshold for the simplified acquisition threshold, as authorized by 41 U.S.C. § 1908.

⁵ The EEO clause can be found at [41 C.F.R. § 60-1.4\(b\)](#).

⁶ The clause may read as follows:

Compliance with the Copeland “Anti-Kickback” Act

Assistance and Hazard Mitigation Grant Program contracts do NOT require these clauses.] Yes No N/A

- e. *If the contract amount exceeds \$100,000 and involves the employment of mechanics or laborers, does the contract include a **Contract Work Hours and Safety Standards clause**?⁷* Yes No N/A
- f. Rights to Inventions Made Under a Contract or Agreement.⁸ N/A
- g. *If the contract or subgrant amount exceeds \$150,000, does the contract include clauses addressing the **Clean Air Act and the Federal Water Pollution Control Act**?⁹* Yes No N/A
- h. *Does the contract include a **Suspension and Debarment clause**?¹⁰* Yes No¹¹
- i. *Does the contract include an **Anti-Lobbying clause**?¹²* Yes No

(1) Contractor. The contractor shall comply with 18 U.S.C. § 874, 40 U.S.C. § 3145, and the requirements of 29 C.F.R. pt. 3 as may be applicable, which are incorporated by reference into this contract.

(2) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clause above and such other clauses as the FEMA may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all of these contract clauses.

(3) Breach. A breach of the contract clauses above may be grounds for termination of the contract, and for debarment as a contractor and subcontractor as provided in 29 C.F.R. § 5.12.

⁷ 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.

⁸ As FEMA does not award grants or subgrants associated with research and development projects, this contract clause is inapplicable.

⁹ The clause may read as follows:

Contractor agrees 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), and will report violations to FEMA and the Regional Office of the Environmental Protection Agency (EPA).

¹⁰ See, PDAT Manual, pps. 99-100 for sample text.

¹¹ A prospective contractor that is listed on the government-wide Excluded Parties List System in the System for Award Management (www.SAM.gov) as suspended or debarred, **CANNOT** be awarded a contract funded with Federal assistance.

¹² See PDAT Manual, pgs. 127-129. The clause may read substantially as follows:

- i. For contracts exceeding \$100,000, have bidders submitted an Anti-Lobbying Certification? **Yes** **No** **N/A**
- j. *Does the contract include* a clause requiring the contractor to maximize use of **recovered/recycled materials**? **Yes** **No** **N/A – work does not involve the use of materials (e.g., debris removal or other services)**

If a State agency is awarding the contract, stop here. If the contract is being awarded by a local or tribal government or private nonprofit entity, continue with the checklist.



4. General requirements¹³

- a. *Does the procurement comply with* the NFE's¹⁴ own procurement laws, rules, and procedures? §200.318(a) **Yes** **No**
- b. *Does the NFE maintain* contract oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders? §200.318(b) **Yes** **No**
- c. *Does the NFE have* - §200.318(c)(1):
 - i. Written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts? **Yes** **No**
 - ii. Any employee, officer, or agent participating in the selection, award, or administration of a contract supported by a Federal award that has an actual or apparent conflict of interest?¹⁵ **Yes** **No**

Byrd Anti-Lobbying Amendment, 31 U.S.C. § 1352 (as amended). Contractors who apply or bid for an award of \$100,000 or more shall 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 shall 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 recipient.

¹³ [See, 2 C.F.R. § 200.318](#)

¹⁴ Non-Federal Entity (NFE)

¹⁵ 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.

- iii. Any employee, officer, or agent that has solicited and/or accepted gratuities, favors, or anything of monetary value from contractors or parties to subcontracts?¹⁶ Yes No
- iv. Written standards of conduct that provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity. Yes No
- d. *If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, does the non-Federal entity have written standards of conduct covering organizational conflicts of interest? § 200.318(c)(2)¹⁷* Yes No N/A
- e. The NFE must avoid acquisition of unnecessary or duplicative items. Has the NFE *considered* consolidating or breaking out procurements to obtain a more economical purchase? Where appropriate, has the NFE considered lease versus purchase alternatives? § 200.318(d) Yes No
- f. *Is the contract being awarded to a responsible contractor possessing the ability to perform successfully under the terms and conditions of the proposed procurement, giving consideration to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources? § 200.318(h)* Yes No
- g. *Is the NFE keeping records sufficient to detail the history of the procurement, including, but not limited to, records documenting the rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price? § 200.318(i)* Yes No
- h. *Is the contract a time-and-materials contract?¹⁸ § 200.318(j)* Yes No

¹⁶ However, NFEs may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value.

¹⁷ Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the NFE is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

¹⁸ Time and materials type contract means a contract whose cost to a non-Federal entity is the sum of: (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. Because 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, a time-and-materials 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. **[Note that FEMA previously reimbursed costs under a time-and-materials contract for only the first 70 hours of work performed. See, FEMA PA Guide (2007 ed.), pg. 53. However, FEMA's new Public Assistance Guide, published on 1 January 2016, has eliminated this requirement and replaced it with a reasonable period of time standard. Please engage your FEMA Public Assistance POC for additional information]**

- i. If so, has the NFE documented why no other contract is suitable?
 Yes No
- ii. Does the contract include a ceiling price that the contractor exceeds at its own risk? Yes No
- i. *Is the NFE alone* responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements? §200.318(k) Yes No
- j. *Encouraged*, but not required standards at § 200.318(e), (f), and (g).¹⁹

5. **Competition:**

- a. All procurement transactions must be conducted in a manner providing **full and open competition** consistent with the standards of this section. *Does the procurement involve any of the following*²⁰ § 200.319(a):
 - i. Placing unreasonable requirements on firms in order for them to qualify to do business? Yes No
 - ii. Requiring unnecessary experience and excessive bonding? Yes No
 - iii. Noncompetitive pricing practices between firms or between affiliated companies?²¹ Yes No
 - iv. Noncompetitive contracts to consultants that are on retainer contracts?²² Yes No
 - v. Organizational conflicts of interest?²³ Yes No

¹⁹ §200.318(e) – to foster greater economy and efficiency, the NFE 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 (this section provides the authority for state schedule and mutual aid agreements, for example); §200.318(f) – NFEs are 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; and §200.318(g) – NFEs are encouraged to use value engineering clauses in contracts for construction projects (value engineering is a systematic and creative analysis of each contract item or task to encourage the contractor to develop more cost effective means to produce or procure requirements.).

²⁰ This list is non-exclusive and only serves as an example of some of the types of situations that are considered to be restrictive of competition.

²¹ For example, bid suppression or bid rigging.

²² For example, out-of-scope disaster work added to the consultant's work on retainer.

²³ See, fn 18.

- vi. 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? **Yes** **No**
- vii. Any arbitrary action in the procurement process? **Yes** **No**
- b. Was the contractor that is bidding on the contract also involved with developing or drafting the specifications, requirements, statement of work, invitation for bids or request for proposals? (If so, that contractor must be excluded from competing for such procurements) § 200.319(a) **Yes** **No**
 N/A
- c. *Does the contract include* a state or local geographic preference for local contractors?²⁴ § 200.319(b) **Yes** **No**
- d. Do the NFE’s written procurement procedures ensure that all solicitations comply with the following: § 200.319(c)
 - i. Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured? § 200.319(c)(1) **Yes** **No**
 - ii. Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals? § 200.319(c)(2) **Yes** **No**
- e. If the NFE is using a prequalified list of persons, firms, or products which are used in acquiring goods and services: § 200.319(d) **N/A**
 - i. Is the list current? **Yes** **No**
 - ii. Does the list include enough qualified sources to ensure maximum open and free competition? **Yes** **No**
 - iii. Were any potential bidders precluded from qualifying during the solicitation period?²⁵ **Yes** **No**

6. **Method of Procurement**

²⁴ Geographic preferences are generally not allowed under FEMA grants. The only exception is that 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.

²⁵ Pre-qualified lists are **NOT** contracts. Accordingly, once the decision to solicit and award a contract is made, the NFE may issue the solicitation directly to the contractors on the pre-qualified list, but must also allow any interested contractor (not on the pre-qualified list) to submit its qualifications, and if deemed qualified, allow that contractor to submit a bid or proposal in response to the solicitation. Contract award will then be made to one of the contractors submitting a bid or proposal, IAW the evaluation/award criteria identified in the solicitation.

- a. Is the NFE using one of the following acceptable methods of procurement?
§ 200.320
- i. **Micro-purchase** (i.e., purchases below \$3,500, see, §200.67 Micro-purchases). § 200.320(a) **Yes** **No**
1. [Note: Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.]
 2. To the extent practicable, is the NFE distributing micro-purchases equitably among qualified suppliers? **Yes** **No**
 N/A – not practicable
- ii. **Small purchase procedures** § 200.320(b) **Yes** **No**
1. [Note: 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 **lesser** of either (1) the federal small purchase threshold (i.e., \$150,000), or (2) whatever amount State or local procurement rules set as the small purchase threshold – *if more restrictive than the federal threshold.*]
 2. Did the NFE obtain price or rate quotations from an adequate number of qualified sources?²⁶ **Yes** **No**
- iii. **Sealed bids** § 200.320(c)²⁷ **Yes** **No**
1. [Note: 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. Sealed bidding is the preferred method for procuring construction]
 2. Are *all* of the following conditions to use sealed bidding present?
§ 200.320(c)(1) **Yes** **No**
 - a. A complete, adequate, and realistic specification or purchase description is available **Yes** **No**

²⁶ FEMA has determined that for simplified purchase procedures, an adequate number of qualified sources is considered to be three (3). See, [FEMA Recovery Fact Sheet 9580.212 – Public Assistance Grant Contracting Frequently Asked Questions \(FAQ\)](#), FAC No. 3 and the PDAT Field Manual.

²⁷ Sealed bidding is generally used where price is the most important evaluation factor for the NFE. Accordingly, contract award under the sealed bidding method of procurement is made to the bidder submitting *the lowest priced, responsive and responsible bid*. “Responsive” refers to whether the bidder meets all the material requirements of the Invitation for Bid (IFB), while “Responsibility” is described at § 200.318(h).

- b. Two or more responsible bidders are willing and able to compete effectively for the business **Yes** **No**
 - c. 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 **Yes** **No**
3. *If sealed bids are used*, the following requirements apply: § 200.320(c)(2)
- a. Did the NFE solicit bids from an adequate number²⁸ of known suppliers, providing them sufficient response time prior to the date set for opening the bids? **Yes** **No**
 - b. If the NFE is a local or tribal government, was the invitation for bids publically advertised? **Yes** **No** **N/A**
 - c. Did the invitation for bids include any specifications and pertinent attachments, and define the items or services in order for the bidder to properly respond? **Yes** **No**
 - d. Did the NFE open all bids at the time and place prescribed in the invitation for bids? **Yes** **No**
 - e. For local and tribal governments, were the bids opened publicly? **Yes** **No** **N/A**
 - f. Did the NFE award a firm fixed price contract award in writing to the lowest responsive and responsible bidder? **Yes** **No**
 - g. If any bids were rejected, was there a sound documented reason supporting the rejection? **Yes** **No** **N/A**
- iv. **Procurement by competitive proposals**²⁹ § 200.320(d) **Yes** **No**
- 1. [Note: 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

²⁸ Unlike, for simplified purchase procedures, FEMA has not defined an “adequate number” of known sources under the sealed bidding method. While left undefined, a NFE is likely to meet this requirement through the application of “full and open competition.” (See fn. 27)

²⁹ Whereas contract awards under sealed bidding are focused on selecting the lowest responsive responsible bid, NFEs under the competitive procurement method may prioritize non-price factors, such as technical capability or past performance, over price and therefore award a contract to a contractor whose proposal is more expensive but reflects a better overall value to the NFE (e.g. “best value” contracting).

awarded. It is generally used when conditions are not appropriate for the use of sealed bids.]

2. Did the NFE publicize the Requests For Proposals (RFPs) and identify all evaluation factors and their relative importance? **Yes** **No**
 3. Did the NFE solicit proposals from an adequate number of qualified sources?³⁰ **Yes** **No**
 4. Did the NFE have a written method for conducting technical evaluations of the proposals received and for selecting recipients? **Yes** **No**
 5. Did the NFE award the contract to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered? **Yes** **No**
 6. [Note regarding architectural/engineering (A/E) professional services: The NFE may use competitive proposal procedures for qualifications-based procurement of 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 that are a potential source to perform the proposed effort.]**
- v. **Noncompetitive proposals** § 200.320(f)³¹ **Yes** **No**
1. [Note: Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one (or an improperly limited number of) source(s)]
 2. Do one or more of the following circumstances apply? **Yes** **No**
 - a. The item is available only from a single source **Yes** **No**

³⁰ Unlike, for simplified purchase procedures, FEMA has not defined an “adequate number” of qualified sources under the competitive procurement method. While left undefined, a NFE is likely to meet this requirement through the application of “full and open competition.”

³¹ § 200.320(e) is reserved.

- b. The public exigency or emergency³² for the requirement will not permit a delay resulting from competitive solicitation **Yes** **No**
- c. The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity **Yes** **No**
- d. After solicitation of a number of sources, competition is determined inadequate.³³ **Yes** **No**

7. Contracting with Small and Minority Businesses, Women's Business Enterprises, and Labor Surplus Area Firms

- a. Has the NFE taken the following affirmative steps³⁴ to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible?³⁵ § 200.321 **Yes** **No** **N/A (document)**
 - i. Placing qualified small and minority businesses and women's business enterprises on solicitation lists? **Yes** **No** **N/A (document)**
 - ii. Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources? **Yes** **No** **N/A – no potential sources (document)**
 - iii. 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?³⁶ **Yes** **No** **N/A – not economically feasible (document)**

³² For an explanation of what "emergency" and "exigency" mean, see PDAT Field Manual, pg. 68.

³³ Before utilizing this exception, Applicants should review their solicitation and the publicizing of their solicitation to ensure that it was not inadvertently drafted in a manner to reduce or eliminate competition, which resulted in the receipt of one or no proposals. If this is found to be the case, the Applicant should revise the solicitation and re-publicize the solicitation in order to resolve the competitive concerns.

³⁴ The following affirmative steps are non-exclusive; while these steps must be taken, additional steps, as determined by the NFE, local, state, or tribal government regulations or procedures, may also be taken.

³⁵ Collectively referred to as "socioeconomic contractors" or "socioeconomic contracting," this requirement does not impose an obligation to set aside either the solicitation or award of a contract to these types of firms; this requirement only imposes an obligation to carry out and document the six identified affirmative steps. Failure to do so has been frequently identified as a justification to de-obligate funding by the Department of Homeland Security (DHS), Office of Inspector General (OIG).

³⁶ This is not the same as breaking a single project down into smaller components in order to circumvent the micro-purchase or small purchase thresholds to utilize their streamlined acquisition procedures (e.g. "project splitting.")

- iv. Establishing delivery schedules, *where the requirement permits*, which encourage participation by small and minority businesses, and women's business enterprises? **Yes** **No** **N/A – the requirement does not permit (document)**
- v. 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 **Yes** **No** **N/A – not appropriate (document)**
- vi. Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed above? **Yes** **No** **N/A – no subcontracts will be let (document)**

8. **Contract cost and price**³⁷

- a. *If the contract amount (including contract modifications) exceeds \$150,000*, did the NFE perform a cost or price analysis? § 200.323(a) **Yes** **No** **N/A**
- b. Did the NFE 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*? § 200.323(b) **Yes** **No** **N/A**
- c. Is the contract a “cost plus a percentage of cost” or “percentage of construction cost” contract?³⁸ **[Note: This form of contract is prohibited under the Federal procurement standards and is ineligible for FEMA reimbursement]**
 Yes **No**

9. **Bonding requirements for construction or facility improvement contracts exceeding \$150,000**

- a. **[Note: For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold (i.e, \$150,000), the Federal awarding agency or pass-through entity may accept the bonding policy and**

³⁷ See, [Pricing Guide for Recipients and Subrecipients Under the Uniform Rules](#) for guidance on cost or price analysis.

³⁸ This type of contract is separate and distinct from cost plus fixed fee, cost plus incentive fee, and cost plus award fee type contracts, which are permissible and used to incentivize contractors to perform to a higher standard of quality, lower cost, or faster performance. Cost plus percentage of cost contracts on the other hand provide none of these incentives; instead, there is a reverse incentive for the contractor to increase its costs as the higher its costs go, the more profit it earns, as its potential earnings are uncapped. The following characteristics are suggestive of a prohibited cost plus percentage of cost contract: (1) payment is on a predetermined percentage rate; (2) the predetermined percentage rate is applied to actual performance costs; (3) the contractor's entitlement is uncertain at the time of contracting; and (4) the contractor's entitlement increases commensurately with increased performance costs.

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.]

- b. If such a determination (see above) has not been made, does the procurement include the following? **Yes** **No** **N/A**
- i. A bid guarantee from each bidder equivalent to five percent of the bid price? **Yes** **No** **N/A**
1. 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.
- ii. A performance bond on the part of the contractor for 100 percent of the contract price? **Yes** **No** **N/A**
1. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.
- iii. A payment bond on the part of the contractor for 100 percent of the contract price. **Yes** **No** **N/A**
1. 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.

END OF CHECKLIST³⁹

³⁹ All FEMA PDAT Reference Materials can be found at the following website: www.fema.gov/procurement-disaster-assistance-team

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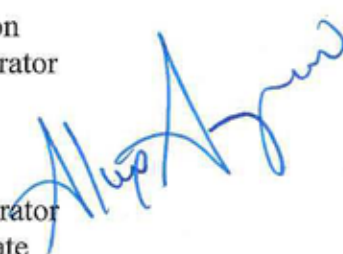


FEMA

MEMORANDUM FOR: Kevin L. Hannes
Federal Coordinating Officer
FEMA-4332-DR-TX

Michael Byrne
Federal Disaster Recovery Coordinator
FEMA-4332-DR-TX

THROUGH: George A. Robinson
Regional Administrator
FEMA Region VI

FROM: Alex Amparo 
Assistant Administrator
Recovery Directorate

SUBJECT: Exigent and Emergency Conditions for FEMA-4332-DR-TX

This memorandum is in response to the State of Texas' request for FEMA to concur that exigent and emergency circumstances exist and allow both state and local governments in declared counties to procure contracts for goods and services that ensure life, safety, and the provision of basic needs for Texans coping with this catastrophic disaster.

The Federal procurement standards allow procurement by noncompetitive proposals (i.e., sole sourcing) under certain circumstances, including when a local government determines that the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation (2 C.F.R. § 200.320(f)(2)). FEMA defines an emergency as an unexpected and unusually dangerous situation that calls for immediate action or an urgent need for assistance or relief. Emergencies typically involve a threat to life, public health or safety, improved property, and/or some other form of dangerous situation. Use of the emergency exception is only permissible during the actual emergency circumstances and a local government must maintain documentation supporting the existence of the emergency circumstances.

Based upon the information presented by the State of Texas and the wide scale destruction in the declared counties, I currently believe exigent and emergency circumstances exist and concur, for debris removal and emergency protective measures, with the use of non-competitively procured contracts through October 10, 2017, in all declared counties. During this period, local governments, eligible private non-profits, and tribal governments in the declared counties may proceed with new and existing non-competitively procured contracts in order to save lives, public health, safety, or improved property.

In addition, applicants need to be aware that during the 30 day period, they must take additional steps, which may be found in the attached *Frequently Asked Questions: Sole Sourcing In Exigency or Emergency Circumstances*. These steps are still required under emergency circumstances and are chiefly designed to ensure costs remain reasonable.

Please also be advised that where applicants use a time and materials contract to accomplish the work, they must: document that no other contracting mechanism was suitable, include a ceiling price within the contract which the contractor exceeds at its own risk, and assert a high degree of oversight to reasonably ensure that the contractor is using efficient methods and effective costs controls.

Because the exception is only available for the duration of the exigent and emergency circumstances, applicants must start the process of competitively procuring goods and services for long term recovery so that they can transition to the new competitively procured contracts when these circumstances cease to exist.

If you have any questions, please contact Chris Logan, Public Assistance Division Director, at (202) 320-2721.

cc: Jeffrey Byard, Associate Administrator, Office of Response and Recovery
Bobby McCane, Chief, Component Procurement Officer
Chris Logan, Director, Public Assistance Division
Christopher B. Smith, Director, Individual Assistance Division
Traci Brasher, Recovery Division Director, Region VI
William Boone, Public Assistance Branch Chief, Region VI

Attachment

(1) *Frequently Asked Questions: Sole Sourcing in Exigency or Emergency Circumstances*

FREQUENTLY ASKED QUESTIONS: SOLE SOURCING IN EXIGENCY OR EMERGENCY CIRCUMSTANCES

What is the exigency or emergency exception?

The Federal procurement standards allow procurement by noncompetitive proposals (commonly known as sole sourcing) under certain circumstances, including when a local or tribal government or private non-profit (non-State applicant) determines that the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation. FEMA defines an “*emergency*” as an unexpected and unusually dangerous situation that calls for immediate action or an urgent need for assistance or relief. FEMA defines an “*exigency*” as something that is necessary in a particular situation that requires or demands immediate aid or action. An emergency will typically involve a threat to life, public health or safety, improved property, and/or some other form of dangerous situation, whereas an exigency is not necessarily so limited.

When can I use the exigency or emergency exception?

Use of the public exigency or emergency exception *is only permissible during the actual exigent or emergency circumstances*. Once the exigent or emergency circumstances cease to exist, the local or tribal government or private non-profit is expected to transition to a more appropriate method of contracting using full and open competition.

How should I document this in my contract file?

In order to justify using the emergency or exigency exception, the non-State applicant must include a justification in its contract file. Attachment A provides a template for justification for a noncompetitive procurement. For a debris removal requirement, the non-State applicant could alternatively obtain and provide documentation from its public health authority explaining any public health threat posed by debris from the disaster, the location of such threat, and include the anticipated duration of such threat.

Do any of the Federal procurement standards still apply if I am sole sourcing my contract under emergency or exigent circumstances?

Yes, for non-State applicants (local or tribal governments or private non-profits), you still must comply with the following requirements:

1. Your contract must include the required contract clauses (2 CFR 200.326 & Appendix II);
2. Your contract must include the Federal bonding requirements, if the contract is for construction or facility improvement (2 CFR 200.325);
3. You must award to a responsible contractor (2CFR 200.318(h));

4. You must complete a cost or price analysis to determine that the cost or price of the contract is fair and reasonable; (2 CFR 200.323(a) and (b))
5. You may not use cost-plus-percentage-of-cost contracting (2 CFR 200.323(c)).

What if I want to use a pre-awarded or pre-existing contract in an exigency or emergency that may not comply with the Federal procurement standards?

If your pre-awarded or pre-existing contract is not in compliance with the Federal procurement standards (e.g. you did not fully and openly compete the requirement or follow the six affirmative socioeconomic contracting steps), you may likely still use your contract for the duration of the exigency or emergency. FEMA recommends that you review the list above and assess whether you can modify your pre-awarded or pre-existing contract or add additional documentation to your contract file to address the pre-awarded or pre-existing contract's non-compliance issues.

What if I have further questions?

Additional questions on this topic may be directed to your State Public Assistance Officer. However, you should consult your attorney throughout this entire process.

ATTACHMENT A

Justification for Non-Competitive Procurement Template

1. Insert a brief description of the product or service you are procuring, including the expected amount of the procurement.
2. Identify which of the four circumstances listed in 2 C.F.R. § 200.320(f) you are relying on for your non-competitive procurement.
3. Explain why it is necessary to contract non-competitively.
 - A justification based on public exigency or emergency should explain the nature of the public exigency or emergency, including why procurement other than through noncompetitive proposals would cause unacceptable delay in addressing the public exigency or emergency. (Failure to plan does not justify noncompetitive procurement based on public exigency or emergency.)
4. State how long you will need to use the non-competitive procurement, and the impact it will have on your community if you are not able use the non-competitive procurement for that amount of time (e.g., how long do you anticipate the exigency or emergency will continue; how long will it take to identify your requirements and award a competed procurement; or how long would it take another contractor to reach the same level of competence).
5. Describe the results of any market survey or research conducted to help you determine whether you could have used full and open competition consistent with applicable law (or, if you did not conduct a market survey or research, explain why not).
6. Describe the results of any conflicts of interest and organizational conflict of interest reviews you conducted (or, if you did not complete a conflict of interest and organizational conflict of interest review, explain why not).
7. Include any other points you think are necessary for the justification.

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FOREWORD

On behalf of the Federal Emergency Management Agency (FEMA), I am pleased to issue the Third Edition of the Public Assistance (PA) Program and Policy Guide, clarifying that private nonprofit houses of worship will not be singled out for disfavored treatment within the community centers subcategory of PA nonprofit applicants. FEMA has archived the First and Second Editions at www.fema.gov/media-library/assets/documents. FEMA applies the First Edition to incidents declared from January 1, 2016 through March 31, 2017. FEMA applies the Second Edition to incidents declared from April 1, 2017 through August 22, 2017. And FEMA applies this Third Edition to incidents declared on or after August 23, 2017 or, with respect to a house of worship, any application for assistance that was pending before FEMA as of August 23, 2017 and has not been finally resolved as of January 1, 2018.

FEMA may provide financial assistance to private nonprofit facilities as defined by Section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5122(11)) (Stafford Act) and 44 C.F.R. § 206.221. The Stafford Act authorizes FEMA to provide assistance to private nonprofit facilities, including community centers. 44 C.F.R. § 206.221(e)(7). This Public Assistance Program and Policy Guide continues to define community centers to include facilities that provide a wide array of services, including but not limited to art classes, gardening, sewing, stamp collecting, community clean-up projects, and activities to pursue items of mutual interest, concern or social engagement.

On June 26, 2017, the United States Supreme Court held in *Trinity Lutheran Church of Columbia v. Comer*, that the Missouri Department of Natural Resources violated the Free Exercise Clause of the First Amendment of the United States Constitution by denying Trinity Lutheran Church an otherwise available public benefit solely because it was a church. In light of the *Trinity Lutheran* decision, FEMA has considered its guidance on private nonprofit facility eligibility and determined that it will revise its interpretation of the aforementioned statutory and regulatory authorities so as not to exclude houses of worship from eligibility for FEMA aid on the basis of the religious character or primarily religious use of the facility.

This Third Edition incorporates the following revisions:

- Deleting “Community centers operated by a religious institution that provides secular activities, such as fundraising activities that help the community at large”;
- Replacing “Social activities to pursue items of mutual interest or concern” with “Activities to pursue items of mutual interest or concern or social engagement” and adding the example “Activities of community centers or houses of worship open to the general public, without regard to their secular or religious nature”;
- Deleting “religious” from the sentence “Facilities established or primarily used for political, athletic, religious, recreational, vocational, or academic training, conferences, or similar activities are not eligible”;
- Deleting language excluding “religious education,” “religious services,” and “religious activities, such as worship, proselytizing, religious instruction, or fundraising activities that benefit a religious institution and not the community at large” as ineligible services;

- Deleting from Appendix B examples of mixed-use facilities that suggest FEMA must deduct from primary-use analysis activities associated with religious worship and instruction.

These changes do not affect or change other general eligibility requirements for nonprofit eligibility. These include the requirement pursuant to 44 C.F.R. § 206.221(f) that private nonprofit facilities must have been granted tax exemption under Sections 501(c), (d), or (e) of the Internal Revenue Code of 1954; and that pursuant to 42 U.S.C. § 5172(a)(3), private nonprofit facilities that do not provide critical services must apply to the Small Business Administration (SBA) for disaster loans and either (1) be determined ineligible for such a loan or (2) have obtained such a loan in the maximum amount for which the SBA determines the facility is eligible.

FEMA will make updates to this guide at <http://www.fema.gov/public-assistance-policy-and-guidance> on an annual basis, as necessary, and will conduct a comprehensive review no less than every three years. We look forward to your feedback to help inform the next version of this guide. Please send policy recommendations to [FEMA-PAP '1](#).



Assistant Administrator
Recovery Directorate



January 2, 2018

MEMORANDUM FOR: Regional Administrators
Federal Coordinating Officers
Regional Recovery Division Directors

FROM: Alex Amparo
Assistant Administrator
Recovery Directorate

A handwritten signature in blue ink, appearing to read "Alex Amparo", is placed over the typed name and title of the sender.

SUBJECT: Eligibility Review Process for Private Nonprofit Houses of Worship

By memorandum dated October 9, 2017, I provided clarification on the Public Assistance Program eligibility review process. Specifically, I instructed you to place on hold the workflow process for private nonprofit (PNP) houses of worship (HOWs) that are found ineligible for Public Assistance because they do not operate eligible facilities.

With this memorandum I am releasing the hold because today I signed the Third Edition of the Public Assistance Program Policy Guide (PAPPG), making PNP HOWs eligible applicants for Public Assistance if they have: 1) damages arising from disasters declared on or after August 23, 2017 or 2) an application for assistance that was pending before FEMA as of August 23, 2017 that FEMA has not finally resolved.

Specifically, the amendments to the PAPPG add as eligible “Activities of community centers or houses of worship open to the general public, without regard to their secular or religious nature.” Further, FEMA has removed from the PAPPG language stating that facilities used primarily for religious activities are not eligible.

To be eligible, a HOW must be owned or operated by a private nonprofit organization and, as a non-critical PNP facility under the Stafford Act, it must apply to the Small Business Administration for a loan.

The hold on pending HOW appeals is also no longer in effect. Any issues in these appeals related to eligibility must now be considered utilizing the Third Edition of the PAPPG.

Should you have any questions on this direction, please consult with the Office of Chief Counsel at the respective Regional Office or Joint Field Office, or Chris Logan, Director of the Public Assistance Division.

cc: Jeffrey Byard, Associate Administrator, Office of Response and Recovery
Adrian Sevier, Chief Counsel
Chris Logan, Director, Public Assistance Division

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PUBLIC ASSISTANCE: CONTRACTING REQUIREMENTS CHECKLIST

The Federal Emergency Management Agency (FEMA) Public Assistance (PA) Program provides supplemental assistance to states, tribes, and local governmental entities, as well as certain private non-profit organizations (hereinafter referred to as applicants). FEMA's *Public Assistance Program and Policy Guide* (<http://www.fema.gov/public-assistance-policy-and-guidance>) provides comprehensive information regarding assistance that FEMA can provide and the requirements that applicants must follow in order to receive the assistance. The purpose of this Fact Sheet is to provide key information that applicants need to consider when utilizing contracted resources.

Avoid the Risk of Not Being Reimbursed for Contract Costs in a Time of Need

Failure to follow federal contracting requirements when procuring and selecting contractors puts applicants at risk of not receiving full reimbursement for associated disaster costs. Both FEMA and the U.S. Department of Homeland Security's Office of Inspector General (OIG) closely review applicant procurement actions and contract selections to evaluate whether Federal requirements were met. Where requirements were not met, funding can be disallowed and, in some cases, taken back even years after the event. Due to the frequency of applicants not following contracting requirements and the millions of dollars subsequently put at risk, FEMA and the OIG are increasing their efforts to ensure applicants understand Federal requirements for contracting resources. In addition to this Fact Sheet, FEMA has extensive procurement and contracting resources for applicants, including the *Procurement Under Grants Field Manual Supplement*, which are available at www.fema.gov/procurement-disaster-assistance-team. Additionally, the OIG in July 2016 issued its *Audit Tips for Managing Disaster-Related Project Costs* (OIG-16-109-D-Jul16).

FEMA reimburses costs incurred using fixed-price or cost-reimbursement contracts. FEMA advises against the use of Time and Materials (T&M) contracts and generally limits the use of these contracts to a reasonable time based on the circumstances during which the applicant could not define a clear scope of work because T&M contracts do not adequately incentivize contractors to control costs or maximize labor efficiency.

AVOIDANCE CHECKLIST

DO NOT:

- "Piggyback" on other jurisdiction's contracts.
- Award cost-plus-a-percentage-of-cost contracts or contracts with a percentage-of-construction-cost method.
- Include local preference.

AVOID:

- Time & Material (T&M) Contracts (FEMA may reimburse costs incurred under a T&M contract **only if all** of the following apply:
 - No other contract was suitable;
 - The contract has a ceiling price that the contractor exceeds at its own risk; and
 - The Applicant provides a high degree of oversight to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.
- Sole-Source Contracts unless you can support their use under the procurement rules.
- Pre-disaster/stand-by contracts with price proposals that increase when awarded post-disaster.

"FEMA's mission is to support our citizens and first responders to ensure that as a nation we work together to build, sustain, and improve our capability to prepare for, protect against, respond to, recover from, and mitigate all hazards."

August 31, 2017

REQUIREMENTS CHECKLIST

- Provide full and open competition;
- Place qualified small and minority businesses and women's business enterprises on solicitation lists;
- Assure that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
- Divide total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;
- Establish delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;
- Use 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;
- Maintain oversight to ensure contractors perform according to the terms, conditions, and specifications of their contracts or purchase orders;
- Maintain written standards of conduct covering conflicts of interest and governing the performance of employees who engage in the selection, award, and administration of contracts;
- 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;
- Perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold, including contract modifications. The Federal threshold is currently \$150,000, if state or local procurement law is more restrictive, then the state or local law must be followed;
- Include required provisions in all contracts awarded; and
- Maintain records sufficient to detail the history of the procurement. These records will include, but are not limited to the rationale for the method of procurement, selection of contract type; contractor selection or rejection; and basis for the contract price.

Noncompetitive procurement may be used under certain circumstances, one of which is when the public exigency or emergency will not permit a delay resulting from competitive solicitation.

Examples Illustrating the Meaning of Exigency and Emergency

Emergency: A tornado impacts the City and causes widespread and catastrophic damage, including loss of life, loss of power, damage to public and private structures, and millions of cubic yards of debris across the City, leaving almost the entire jurisdiction inaccessible. The City needs to begin debris clearance activities immediately to restore access to the community and support search and rescue operations and power restoration.

Exigency: A tornado impacts the City in June and causes widespread and catastrophic damage, including damage to a City school. The City wants to repair the school and have it ready for the beginning of the following school year in September. The City estimates, based on past experience, that the sealed bidding process will take at least 90 days, and the City's engineer estimates that the repair work would take another 60 days. This would bring the project completion to well after the beginning of the school year. Rather than going through sealed bidding, the City—in compliance with State and local law—wants to solicit bids from five contractors that have previously constructed schools in the State and award the contract to the lowest bidder among those five. This would be an example of an "exigency", such that sealed bidding would cause a delay under the circumstances and the use of some other procurement method was necessary based on the particular situation.

Applicants should ensure their attorneys review all procurement actions and contracts. FEMA has a Procurement Disaster Assistance Team that is available to review contracts to ensure they include required provisions. Applicants may contact the State or Territory to request FEMA assist with review.



PUBLIC ASSISTANCE: DEBRIS REMOVAL TIPS

The Federal Emergency Management Agency (FEMA) Public Assistance (PA) Program provides supplemental assistance to states, tribes, and local governmental entities, as well as certain private non-profit organizations (hereinafter referred to as applicants). FEMA's *Public Assistance Program and Policy Guide* (<http://www.fema.gov/public-assistance-policy-and-guidance>) provides comprehensive information regarding assistance that FEMA can provide and the requirements that applicants must follow in order to receive the assistance. The purpose of this Fact Sheet is to provide key information to consider when planning and initiating debris removal operations.

Costs to remove incident-related debris (including, but not limited to, vegetative debris, components of structures, sand, mud, silt, gravel, rocks, boulders, vehicles, and vessels) from improved public property and public rights-of-way (ROWs), including Federal-aid roads, are reimbursable. FEMA also reimburses a limited timeframe for vehicle and vessel storage when necessary to provide applicants time to identify the owner.

If applicants authorize residents to place incident-related debris on the public ROW, including Federal-aid roads, costs to subsequently remove the debris from the ROW are reimbursable. In such cases, local governments should provide guidance to citizens to avoid placing hazardous waste on the ROW and to avoid placing debris near fire hydrants and power poles. Applicants should consider placing large roll-off trash bins on public property and ROW for use by the citizens to minimize significant debris piles on the ROW and establishing debris drop-off sites for household hazardous waste.

Various types of resources are reimbursable, including the applicants' employees, temporary hires, mutual aid, and contractors. Additionally, the value of volunteer hours or donated equipment may be used to offset the non-Federal cost share (usually 25%).

Monitoring Debris Operations

FEMA requires that applicants monitor all contracted debris removal operations. If it does not monitor contracted debris removal operations, it jeopardizes FEMA funding. Applicants may use employees (including temporary hires), contractors, or a combination for monitoring. FEMA will provide debris monitor training to an applicant's employees upon request. It is not necessary, or cost-effective, to have Professional Engineers or other certified professionals perform debris

DOCUMENT THESE ITEMS

Applicants need to document the following information to support debris removal claims:

- Quantity and type of debris:
 - o Hauled to a temporary staging site
 - o Reduced, including reduction method (e.g., chipped, burned)
 - o Hauled to a final disposal site
 - o Recycled
- Pick-up locations
- Disposal locations (temporary staging, recycling, and final disposal)
- Owned ("Force Account") equipment:
 - o Type of equipment and attachments used
 - o Year, make, model, size/capacity
 - o Days and hours used
 - o Operator name
- Contracted equipment
 - o Certifications of truck size/capacity
- Labor:
 - o Name
 - o Days and hours worked
 - o Work performed

monitoring. FEMA considers costs unreasonable when associated with the use of staff that are more qualified than necessary.

SELECTING DISPOSAL SITES

- DO: If burning debris as a reduction method, obtain guidance from applicable State, Territorial, Tribal, or local regulatory agencies to determine if and where burning can be conducted.
- DO: Obtain permits from applicable Federal, State, Territorial, Tribal, and local regulatory agencies.
- AVOID: Areas such as endangered species' critical habitats, archeologically sensitive areas, rare ecosystems, contaminated sites, well fields, or surface waters. If near these areas, establish buffer and/or turbidity barriers.
- AVOID: Areas of close proximity to schools, nursing homes, hospitals, historic buildings, residences, or public water supplies especially in windy areas due to dust and odor.
- DO NOT: Dispose of debris in floodplains or wetlands.

Alternative Procedures Pilot Program for Debris Removal

FEMA is currently conducting the Alternative Procedures Pilot Program for Debris Removal. Under this pilot program, applicants may elect to participate in one or more of the following:

- Reimbursement of straight-time for employees (limited to overtime under standard program)
- Retention of income generated from recycling debris
- 2-percent increased cost-share incentive for applicants with a FEMA-accepted debris management plan with pre-qualified debris removal contractors before the start of the incident period
- Increased Federal cost share based on a sliding scale to accelerate completion of debris removal (This procedure must be authorized in the President's major disaster declaration for declarations requested on or after August 28, 2017):

Debris Removal Conducted (Days from Start of Incident)	Federal Cost Share
1-30	85%
31-90	80%
91-180	75%
FEMA will NOT provide funding for debris activities after 180 days (unless FEMA grants an extension)	

FEMA's *Public Assistance Alternative Procedures Pilot Program Guide for Debris Removal*, <http://www.fema.gov/alternative-procedures> provides detailed guidance on the pilot program.

Additional Fact Sheets are available for debris removal from waterways, removal of animal carcasses, and contract requirements.



GRANTS MANAGER AND GRANTS PORTAL TOOL



A critical component of the new Public Assistance (PA) Program delivery model is standardizing project workflows with improved technology. FEMA focused on developing a new information-technology system to document PA Program projects in formulation with a seamless transition to grant obligation. The result is a two-part platform—the PA Grants Manager and Grants Portal tool—that promotes transparency and accountability for all stakeholders involved in the PA grant process.

The PA Grants Manager is used internally by FEMA specialists to formulate projects, and the PA Grants Portal is the forward-facing platform used by State/Local/Tribal/Territorial governments and eligible non-profit organizations to manage grant applications. EMMIE remains the official system of record for obligation.

The PA Grants Manager and Grants Portal began operation in October 2016, and was piloted on new delivery model disasters in the State of Georgia. The system was built utilizing “agile project management principles”. This method promotes planning, evolutionary development, continuous improvement, and encourages rapid and flexible responses to changes identified by subject matter experts. In Georgia, end users identified issues and submitted ideas through the *Change Control Tool* to improve functionality in the PA Grants Manager and Grants Portal. Over 2,000 enhancements have been made to the system to date. End users working in future delivery operations will also have the opportunity to use the *Change Control Tool*.

Overall, the PA Grants Manager and Grants Portal will establish baseline data to measure performance and make informed adjustments to increase simplicity, accuracy, efficiency, accessibility, and timeliness in the PA Program.

PA GRANTS MANAGER

FEMA uses the PA Grants Manager to track incident-related data after an area receives a federal declaration. FEMA specialists are capable of entering and managing various types of information including, but not limited to, the following:

- Recipient and applicant profiles for the assessment of disaster recovery needs

- Daily status reports to manage progress of PA Program implementation
- *Request for Public Assistance* submission reminders
- Notification messages to applicants on the formulation and progress of their projects
- Updates to *Essential Elements of Information* for applicants' projects
- Exporting comprehensive spreadsheets on the PA Program status and progress
- Recordation of *Exploratory Calls* and *Recovery Scoping Meetings* with applicants

PA GRANTS PORTAL

With the tool, applicants now have the ability to account for all activities associated with their damage claims. Unlike in the past, both recipients and applicants can now register to monitor the project development process in parallel with the assigned FEMA Program Delivery Manager. Applicants will be able to perform actions to include, but not limited to:

- Complete and update profile information
- Submit the *Request for Public Assistance*
- Upload required project documentation
- Obtain daily oversight of project statuses
- Approve workflow items for concurrence/acknowledgement
- Update *Essential Elements of Information* for projects
- Notify the assigned *Program Delivery Manager* of an applicant's actions

ACCESS TO PA GRANTS PORTAL TRAINING

By the end of 2017, each FEMA Region will coordinate a two-day, new delivery model training for State/Local/Tribal/Territorial government stakeholders. An On-Site Refresher Training will also be available to be offered when Joint Field Offices operating under the new delivery model are established.



FOR MORE INFORMATION

Please contact your FEMA Regional Officer or FEMA Program Delivery Manager.

You may also visit us [online at https://www.fema.gov/new-public-assistance-delivery-model](https://www.fema.gov/new-public-assistance-delivery-model)



FEMA

Fact Sheet

Public Assistance: Procurement Conducted Under Exigent or Emergency Circumstances

The Federal Emergency Management Agency (FEMA) Public Assistance (PA) Program provides supplemental assistance to states, territories, tribes, and local governmental entities, as well as certain private non-profit organizations (applicants) following major disasters and emergencies declared by the President. FEMA's *Public Assistance Program and Policy Guide* (<http://www.fema.gov/public-assistance-policy-and-guidance>) provides comprehensive information regarding assistance that FEMA can make available, and the requirements that applicants must follow in order to receive the assistance. This Fact Sheet provides key information that non-state applicants need to consider when utilizing contracted resources under exigent or emergency circumstances.

Federal regulations (2 C.F.R. Part 200 – Uniform Administrative Requirements, Cost Principles, and Audit Requirements For Federal Awards) establish requirements for non-state applicants concerning the exigency or emergency exception that permits the use of noncompetitive procurements, frequently referred to as “sole-source contracting.” These exceptions and associated procurement requirements are discussed further below. The information presented within applies to all categories of work under the PA Program. Emergency work funded under Category A (Debris Removal) and Category B (Emergency Protective Measures) is most often associated with a public exigency or emergency. However, there may be instances where exigent or emergency circumstances necessitate the use of noncompetitive procurements for permanent work (Categories C-G). The answers to the frequently asked questions below provide additional guidance on the acceptable use of noncompetitive proposals under exigent or emergency circumstances, which is described in regulation at 2 C.F.R. § 200.320(f)(2).

It is essential that all applicants understand that both FEMA and the U.S. Department of Homeland Security's Office of Inspector General (OIG) closely review applicant procurement actions and contract selections, with a particular emphasis on noncompetitive procurement actions, to evaluate compliance with Federal requirements. ***Failure to follow federal contracting and procurement requirements puts applicants at risk of not receiving reimbursement for otherwise eligible disaster costs.***

What is the exigency or emergency exception?

Non-state applicants must follow the procurement requirements found at 2 C.F.R. §§ 200.317 – 200.326. However, Federal regulations allow for noncompetitive procurements under certain circumstances, including when a non-state applicant determines that immediate actions required to address the public exigency or emergency cannot be delayed by a competitive solicitation. This represents an exception to requirements for full and open competition. FEMA approval is not required for use of noncompetitive procurements under the emergency or exigency exception, however, the use of noncompetitive procurements does not relieve non-state applicants from complying with other procurement requirements or from ensuring that costs are reasonable.

“FEMA's mission is to support our citizens and first responders to ensure that as a nation we work together to build, sustain, and improve our capability to prepare for, protect against, respond to, recover from, and mitigate all hazards.”

January 19, 2018

When referring to procurement activity, FEMA defines both exigency and emergency as situations that demand immediate aid or action. The difference between the two is that:

- In the case of an **exigency**, there is a need to avoid, prevent or alleviate serious harm or injury, financial or otherwise, to the applicant, and use of competitive procurement proposals would prevent the urgent action required to address the situation. Thus, a noncompetitive procurement may be appropriate.
- In the case of an **emergency**, a threat to life, public health or safety, or improved property requires immediate action to alleviate the threat.

While emergency conditions generally are short-lived, exigent circumstances can exist for a period of weeks or months.

Exigency Example: A tornado impacts a city in June and causes widespread and catastrophic damage, including damage to a city school. The city wants to repair the school and have it ready for use by the beginning of the school year in September. The city estimates, based on past experience, that awarding a contract using a sealed bidding process would require at least 90 days, and the city's engineer estimates that the repair work would last another 60 days. This would extend the project beyond the beginning of the school year. Rather than conducting a sealed bidding process, the city—in compliance with State and local law—wants to sole source with a contractor it has contracted with previously. The City can demonstrate that this constitutes an “exigent circumstance” because use of a sealed bidding process would cause an unacceptable delay and thus procurement by non-competitive methods was necessary based on the particular situation.

Emergency Example: Severe weather impacts a city and causes widespread and catastrophic damage, including loss of life, widespread flooding, loss of power, damage to public and private structures, and millions of cubic yards of debris across the city, leaving almost the entire jurisdiction inaccessible. The city needs to begin debris removal activities immediately to restore access to the community, support search and rescue operations, power restoration, and address health and safety concerns. Under these circumstances, the city may find it necessary to award noncompetitive contracts to address threats to life, property and public health.

When does the exigency or emergency exception apply and for how long?

Use of the public exigency or emergency exception *is only permissible during the actual exigent or emergency circumstances*. Exigency or emergency circumstances will vary for each incident, thus it is difficult to determine in advance or assign a particular time frame when noncompetitive procurements may be warranted. Exigent or emergency circumstances may exist for two days, two weeks, two months or even longer in some cases. Non-state applicants must ensure that work performed under the noncompetitively procured contracts is specifically related to the exigent or emergency circumstance in effect at the time of procurement. Importantly, because the exception to competitive procurement is available only while the exigent or emergency circumstances exist, applicants should, upon awarding a noncompetitive contract, immediately begin the process of competitively procuring similar goods and services in order to transition to the competitively procured contracts as soon as the exigent or emergency circumstances cease to exist.

FEMA may review a non-state applicant's justification that exigent or emergency circumstances warrant an exception to competitive procurement. If the agency determines that exigent or emergency

circumstances did not exist or did not preclude a non-state applicant from adhering to competitive procurement requirements, FEMA may disallow all or part of the non-state applicant's cost related to the contract. (2 C.F.R. 200.338)

What documentation is required to support the use of the exigency or emergency exception?

While FEMA approval is not required to use noncompetitive procurement proposals under the emergency or exigency exception, non-state applicants must document and provide justification for the use of the exigency or emergency exception. A list of elements that applicants may wish to include as part of its written justification can be found at the end of this Fact Sheet. The justification must be included in the non-state applicant's records for each Public Assistance-funded project.

Do any Federal procurement requirements apply if a non-state applicant is sole sourcing a contract under exigent or emergency circumstances?

Yes, non-state applicants must comply with the following requirements, regardless of whether exigent or emergency circumstances exist:

- Contracts must include the required contract clauses (2 C.F.R. 200.326 & Appendix II);
- Contracts must include the Federal bonding requirements if the contract is for construction or facility improvement (2 C.F.R. 200.325);
- Contracts must be awarded to a responsible contractor (2 C.F.R. 200.318(h));
- The non-state applicant must complete a cost or price analysis to determine that the cost or price of the contract is fair and reasonable; (2 C.F.R. 200.323(a) and (b));
- The use of cost-plus-percentage-of-cost contracting is prohibited (2 C.F.R. 200.323(c)).
- Use of time and materials contracts must comply with 2 C.F.R. 200.318(j)

What if the non-state applicant wants to use a pre-awarded or pre-existing contract in an exigency or emergency, and that contract does not comply with the Federal procurement requirements?

If a pre-awarded or pre-existing contract is not in compliance with the Federal procurement requirements (e.g., the contract was not fully and openly competed, or the six affirmative socioeconomic contracting steps were not completed (2 CFR 200.321)), it may still be possible to use the contract for the duration of the exigency or emergency. FEMA recommends that applicants review the list of procurement requirements above and take actions to modify pre-awarded or pre-existing contracts where applicable. In addition, applicants must prepare the appropriate documentation to justify the use of a noncompetitively procured contract.

Can non-state applicants use Time and Materials (T&M) contracts in an exigency or emergency?

Yes, but only under certain circumstances. FEMA advises against the use of T&M contracts and generally limits the use of these contracts to a short time period where the scope or duration of the work is unclear. T&M contracts do not incentivize contractors to control costs or maximize labor efficiency. FEMA may reimburse costs incurred under a T&M contract only if all of the following apply:

- No other contract was suitable;
- The contract has a ceiling price that the contractor exceeds at its own risk; and
- The applicant can demonstrate it provided a high degree of oversight to obtain reasonable assurance that the contractor used efficient methods and effective cost controls.

Can a non-state applicant award cost-plus-a-percentage-of-cost contracts or contracts with a percentage-of construction-cost method in an exigency or emergency?

No. This prohibition applies to all work, regardless of the circumstances (2 C.F.R. § 200.323(d)).

Can non-state applicants use piggyback contracts in an exigency or emergency?

Piggyback contracting occurs when one entity assigns the contractual rights it has in a contract to a non-state applicant. 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 applicant, 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 applicants 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 applicant 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.

If a non-state applicant is contemplating the use of piggyback contracting, they should contact their state or territory liaison to request FEMA assistance with contract review.

Can States use Time and Materials (T&M) or Cost Plus Percentage of Cost contracts in an exigency or emergency?

2 C.F.R. § 200.317 requires state applicants to follow: (1) the same policies and procedures they use for procurements using non-Federal funds; (2) 2 C.F.R. §200.322 (procurement of recovered materials); and (3) 2 C.F.R. §200.326 (required contract provisions). These requirements apply regardless of whether exigency or emergency circumstances exist. For purposes of the federal procurement requirements, states are defined as the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of Northern Mariana Islands, and any agency or instrumentality thereof except for local governments. Tribal governments are not considered to be States when applying federal procurement standards required by 2 C.F.R. Part 200.

States must ensure that they are in compliance with the cost principles in 2 C.F.R. §§200.400 – 200.474, including ensuring that costs are reasonable, as defined in 2 C.F.R. § 200.404. While the federal procurement rules do not prohibit the use of T&M contracts and Cost Plus Percentage of Cost contracts by state entities, FEMA discourages states from using these contracts because they generally lack provisions that control costs and maximize efficiency in performing work. FEMA and the OIG closely scrutinize these types of contracts for cost reasonableness.

Although T&M contracts are discouraged, there may be instances where T&M contracts are appropriate in the short term for activities such as debris removal, emergency power restoration, or other immediate actions required to address emergency health and safety threats. States entering into T&M contracts are encouraged to include language in the contract that specifies a ceiling price and limits the duration of the

contract to a short time period, thus providing the state time to develop a scope of work and transition to the more competitive procurement procedures.

Additional Information and Resources

Non-state applicants should consult as soon as possible after a declared disaster with all appropriate parties, including legal counsel, to review their procurement policies, actions and contracts against federal procurement requirements. Non-state applicants also should contact their State or Territory liaisons to request assistance with any procurement activity concerns.

Detailed procurement and contracting information is available on the FEMA website at www.fema.gov/procurement-disaster-assistance-team. FEMA's *Public Assistance Program and Policy Guide* is available at (<http://www.fema.gov/public-assistance-policy-and-guidance>), and the Code of Federal Regulations referenced in this guidance can be accessed at www.eCFR.gov.

Suggested Elements for Noncompetitive Procurement Justification

1. Identify which of the four circumstances listed in 2 C.F.R. § 200.320(f) justify a non-competitive procurement:
 - (1) The item is available only from a single source;
 - (2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
 - (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
 - (4) After solicitation of a number of sources, competition is determined inadequate.
2. Provide a brief description of the product or service being procured, including the expected amount of the procurement.
3. Explain why a noncompetitive procurement is necessary. The justification should explain the nature of the public exigency or emergency, including specific conditions and circumstances that clearly illustrate why procurement other than through noncompetitive proposals would cause unacceptable delay in addressing the public exigency or emergency. (Failure to plan for transition to competitive procurement cannot be the basis for continued use of noncompetitive procurement based on public exigency or emergency).
4. State how long the non-competitively procured contract will be used for the defined scope of work, and the impact on that scope of work should the the noncompetitively procured contract not be available for that amount of time (e.g., how long do you anticipate the exigency or emergency circumstances will continue; how long will it take to identify your requirements and award a contract that complies with all procurement requirements; or how long would it take another contractor to reach the same level of competence).
5. Describe the specific steps taken to determine that full-and-open competition could not have been used, or was not used, for the scope of work (e.g., research conducted to determine that there were limited qualified resources available that could meet the contract provisions).
6. Describe any known conflicts of interest and any efforts that were made to identify possible conflicts of interest before the noncompetitive procurement occurred. If no efforts were made, explain why.
7. Include any other information justifying the use of noncompetitive procurement in the specific instance.

NOTE: A separate justification is required for each instance of noncompetitive procurement.



I. TITLE: Public Assistance Alternative Procedures for Direct Administrative Costs

II. DATE: October 25, 2017

III. POLICY STATEMENT:

This policy provides guidance for the provision and implementation of Public Assistance (PA) Direct Administrative Costs (DAC).¹ FEMA will allow each Subrecipient to receive a fixed estimate DAC award, calculated as a flat rate percentage of all the Subrecipient's eligible emergency and permanent work, prior to insurance reductions. The policy describes the requirements for participation, and the process for submitting DAC in relation to the submission of individual projects.

IV. PURPOSE:

This policy authorizes DAC to be awarded to the Subrecipient based on a fixed estimate for all of the Subrecipient's eligible emergency and permanent work projects. The fixed estimate DAC award is calculated as a flat rate of 4% of full eligible project costs (i.e., prior to reductions for insurance proceeds, cost share, or any other reductions) with an additional 1% applied to the same eligible project costs as a closeout incentive. Unlike the previous practice for claiming DAC on each eligible project worksheet (PW), all of the Subrecipient's DAC will be documented on one consolidated DAC PW. DAC funds obligated under this fixed estimate may not be allocated for indirect costs.² The Recipient must ensure documentation submitted to support DAC does not duplicate documentation submitted to support State Management Costs award funds made available to a Subrecipient.

This policy includes an incentive for the timely closeout of projects in accordance with section 428(c)(4). The closeout incentive involves the Recipient providing 4% of total eligible costs per project upon request and an additional 1% of total eligible costs per project once the PW is submitted for closeout, for a total of 5% of total eligible pre-award costs as the DAC allowance per project. PWs submitted to the Recipient for closeout within 90 days of the end of the project period of performance will receive the additional 1%. As a remedy for noncompliance with the closeout requirement at 2 CFR §200.343(a), any PW that is submitted to the Recipient for closeout later than 90 days after the end of the project period of performance will not receive the additional 1% which will be deobligated by FEMA at closeout pursuant to 2 CFR §200.338(b).

¹ Direct administrative costs are direct, administrative, or other expenses the Recipient or Subrecipient incurs in administering and managing PA awards that are directly chargeable to a specific project.

² Indirect administrative costs are indirect, administrative, or other expenses the Recipient or Subrecipient incurs in administering and managing PA awards that are not directly chargeable to a specific project. See Section 324 of the Stafford Act and 44 CFR Part 207.



V. SCOPE AND AUDIENCE:

The policy is applicable to eligible Subrecipients in areas declared on or after August 25, 2017, that voluntarily choose to participate. It is intended for FEMA, Recipient, and Subrecipient staff developing and managing projects under the PA Program.

VI. AUTHORITY:

Fixed estimate DAC awards are authorized under Stafford Act section 428(e)(1), Public Assistance Program Alternative Procedures. This policy furthers the goals of the alternative procedures as described in Stafford Act section 428(c).

VII. OBJECTIVES:

- A. To reduce the administrative burden on FEMA, the Recipient, and Subrecipients as it relates to tracking and requesting reimbursement for administrative duties associated with the management and administration of PA awards.
- B. To ensure Subrecipients provide timely and complete information and documentation to FEMA for the purposes of applying for, administering, and closing PA awards, and comply with the federal award administrative requirements described in 2 CFR §200.
- C. To incentivize timely submission of projects for closeout. This is achieved by withholding a portion of the DAC allowance on a per project basis until the emergency or permanent work PW is submitted to the Recipient for closeout.

VIII. POLICY:

A. Participation.

1. Utilization of a fixed estimate DAC award is voluntary. Subrecipients that elect to participate must include all DAC claims under one consolidated PW. The fixed estimate DAC award will be calculated as a flat rate of 4% and a 1% closeout incentive for a total of 5% of eligible project costs prior to reductions for insurance, cost share, or any other reductions. Ineligible and donated resources projects will be excluded from calculation of the fixed DAC award.
2. Subrecipients that elect to participate must sign a written agreement binding them to the provisions of this policy. The agreement is included as Appendix A.

B. PW Processing.

1. Calculating the Fixed Estimate DAC award.



FEMA will award DAC at 5% of the pre-award value for each PW (Version Zero), based on the full eligible dollar value of the PW prior to any applicable reductions for insurance proceeds, cost share, or other reductions. Donated resources PWs and ineligible projects will not be included in this calculation.

2. Formulating the Fixed Estimate DAC PW.

The Subrecipient must agree to consolidate all DAC from each eligible PW into one fixed estimate DAC PW. Doing so will permit the Subrecipient greater flexibility to manage and document direct administrative costs in an aggregate manner, instead of project by project. To effectively calculate the appropriate value for the fixed estimate DAC PW, a spreadsheet has been developed to capture the total eligible costs for each Subrecipient; this spreadsheet is provided in Appendix B.

Subrecipients may request funds be obligated against the fixed estimate DAC award at various milestones of the recovery process. The DAC PW may have up to three versions in addition to the original Version Zero. Note each version provides an opportunity to increase the amount of funding for the fixed estimate DAC award based on newly submitted projects. Upon obligation of the final version, the DAC PW will be locked in based on 5% of pre-award costs for all eligible underlying emergency and permanent work PWs. The Subrecipient cannot submit any additional versions of the fixed estimate DAC PW.

a) DAC PW Version Zero:

Version Zero of the DAC PW is submitted at the discretion of the Subrecipient upon the Subrecipient's request. The Subrecipient determines the appropriate time to make this request. This version will include the aggregate of 5% of the cost of each eligible project submitted into EMMIE for Initial Review at that time. At this time, the fixed estimate DAC award is locked in for all PWs submitted in the first group of projects submitted for inclusion in Version Zero of the fixed estimate DAC PW. Accelerated or Expedited PWs that have been formulated based on a broad damage description and/or scope of work due to lack of information and documentation at the time of PW formulation, and where the estimate will likely fluctuate significantly, will require the Subrecipient to provide appropriate documentation to support the estimate prior to determining the fixed estimate DAC award for that project. Reimbursement of DAC costs are not restricted to PWs submitted for fixed estimate DAC award calculations. However, only eligible projects are allowed to have DAC costs applied against them.

b) DAC PW Versions One, Two, and Three:

If necessary, Versions One, Two, and Three of the DAC PW are submitted at the discretion of the Subrecipient based on each group of projects the Subrecipient chooses to include in the consolidated DAC PW. These versions will include any



additional fixed estimate DAC awards based on the submission of projects that were not submitted in previous versions. Once the fixed estimate DAC PW is recalculated to include the newly submitted projects, the fixed estimate DAC award is once again locked in based on all previously estimated DAC awards from subsequent versions.

The final version (not to exceed Version Three) of the DAC PW can be submitted once all emergency and permanent work PW Version Zeros have been signed and submitted. This milestone must be completed within two years of the declaration date. It will include all DAC based on the aggregate of 5% of the cost of each eligible project submitted into EMMIE for Initial Review. This version will be the final lock-in amount for all DAC for a participating Subrecipient's eligible PA projects. In the event that additional PWs are submitted past this deadline, those PWs will not be eligible for inclusion in the fixed estimate DAC award.

3. All timelines established under Sections 403, 406, 407, and 428 of the Stafford Act apply.

C. Grants Management and Disbursement.

1. Documentation Requirements.

DAC does not need to be tracked on a per project basis. To support a fixed estimate DAC award claimed at 5% of eligible pre-award costs for all eligible underlying emergency and permanent work, the Subrecipient will provide:

- a) The payroll data and an explanation of all Force Account costs incurred for direct administrative activities associated with eligible PA projects; and/or
- b) The contractor invoice(s) for direct administrative activities associated with eligible PA projects.

2. Disbursement of Funds.

FEMA will award 5% of all eligible project costs – prior to any applicable reductions for insurance, cost share, or other reductions – to the Recipient for disbursement to participating Subrecipients.

- a) The Recipient will disburse funds for DAC to Subrecipients upon their request for reimbursement. The amount will not be limited to DAC for projects submitted as part of the fixed estimate DAC awards. However, the final costs must be limited to the total eligible DAC for eligible PA projects. The funds will be disbursed from the consolidated DAC PW, and the total amount of funding disbursed for DAC cannot exceed the total eligible amount included on the DAC PW (either the lock-in allowance for the most recent milestone or the final DAC lock-in allowance).



b) The Recipient must ensure that any funds provided for State Management Costs made available to a Subrecipient do not duplicate any funds provided for DAC pursuant to the provisions of this policy.

3. Closeout Incentive.

To incentivize timely submission of projects for closeout, the Recipient shall withhold a 1% portion of the DAC allowance on a per project basis until the PW is submitted to the Recipient for closeout. If the objective of the closeout incentive has been met by submitting the PW to the Recipient for closeout within 90 days of the end of the project period of performance, as required by 2 CFR §200.343(a), the Recipient may disburse the additional DAC allowance for that project to the Subrecipient. Otherwise, the remaining amount will be deobligated by FEMA at closeout as a non-compliance remedy consistent with 2 CFR §200.338(b).

4. Use of Excess Funds.

The Subrecipient may use DAC excess funds for any costs otherwise eligible pursuant to section 428(e)(1)(D) of the Stafford Act (42 U.S.C. § 5189f). Any excess funds realized on the final DAC PW will need to be identified and a request for the use of those funds presented by the Subrecipient for the Recipient and FEMA approval within 180 days of the latest project period of performance. DAC excess funds can be used for cost effective hazard mitigation activities that will reduce the risk of damage in future disasters. The Subrecipient may use the funds for hazard mitigation on facilities not damaged in the declared disaster. However, the mitigation must be applied to facilities that would otherwise be eligible for PA Program funding. Use of excess funds can also include activities that improve future PA Program operations, such as training and planning for future disaster response and recovery operations.

IX. RESPONSIBLE OFFICE:

Recovery Directorate (Public Assistance Division)


Alex Amparo
Assistant Administrator
Recovery Directorate

10/25/2017
Date



APPENDIX A: Agreement for Participation

This Agreement ("Agreement") is made by and between the Federal Emergency Management Agency ("FEMA"), the State of _____ ("Recipient" or "State"), and participating Subrecipients, collectively "the Parties," as of the date of the executed Agreement. This Agreement is hereby incorporated into and made part of the disaster assistance processing for the Public Assistance Alternative Procedures for Direct Administrative Cost for Subrecipient Administrative Costs for both non-fixed estimate grants provided under sections 403, 406, and 407 of the Stafford Act, as well as fixed estimate, capped grants under section 428 of the Stafford Act. Once a Subrecipient agrees to participate in the pilot, all direct administrative costs for their obligated PWs must be included.

Agreement Stipulations

- A. Each Party acknowledges and agrees that the grant conditions of this Agreement constitute an agreement of FEMA, the Recipient, and the Subrecipient (by signature of the Recipient and Subrecipient) related to FEMA's discretionary eligibility determinations reflected herein and in the administrative cost PW.
- B. The Parties agree that no additional documentation outside of that described in Section VIII.C.1. of the Recovery Policy for Public Assistance Alternative Procedures for Direct Administrative Costs will be required by FEMA to substantiate the fixed estimate DAC award, pursuant to the terms of this Agreement.
- C. The Parties agree that these conditions comport with the statutes, rules, and regulations that relate to and govern awards under FEMA's Public Assistance program and section 428 of the Stafford Act. The parties agree that these conditions do not create any liability on the part of FEMA that would be contrary to 42 U.S.C. § 5148.
- D. FEMA will deobligate funding awarded in compliance with this Agreement and memorialized in the respective PW only (1) as a remedy for non-compliance with the closeout requirement at 2 CFR § 200.343(a) pursuant to Section IV of this policy; or (2) upon a determination of fraud, waste, or abuse. FEMA recognizes that any subsequent determination that deobligates funding associated with the determinations made herein and memorialized in the respective PW could constitute a new dispute subject to appeal under 44 C.F.R. § 206.206.



In consideration of the foregoing covenants, the Parties do hereby set forth their signatures:

[Recipient Representative Name]
[Recipient Representative Title]
[STATE]

Date

[Subrecipient Representative Name]
[Subrecipient Representative Title]
[Name of Subrecipient (County, City, etc.)]

Date

[FEMA Name]
[FEMA Title]
Federal Emergency Management Agency

Date

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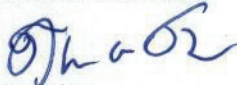


FEMA

JUN 25 2018

MEMORANDUM FOR: FEMA Regional Administrators
Regions I - X

ATTENTION: Recovery Division Directors

FROM: Keith Turi 
Assistant Administrator
Recovery Directorate

SUBJECT: Donated Resources Policy

Currently, the *Public Assistance Program and Policy Guide* (PAPPG) Version 3.1, Chapter 2:V.L. only provides for the application of the value of donated resources (third-party in-kind contributions) toward the non-Federal cost share of eligible Emergency Work projects and Direct Federal Assistance (DFA). The language in the attached policy document authorizes an applicant to apply the value of donated resources used during the performance of an eligible Permanent Work project toward the non-Federal cost share of that specific Permanent Work project. The attached policy is retro-active to disasters declared on or after August 23, 2017 and supersedes the language in Chapter 2:V.L of the PAPPG Version 3.1.

If you have any questions about this policy please contact Jonathan Hoyes, Director, Public Assistance Division, at Jonathan.Hoyes@fema.dhs.gov.

Attachment



I. TITLE: Public Assistance Donated Resources

II. DATE: JUN 25 2018

III. PURPOSE:

Currently, Chapter 2:V.L. of the *Public Assistance Program and Policy Guide*¹ (PAPPG) Version 3.1 only provides for the application of the value of donated resources (third-party in-kind contributions) toward the non-Federal cost share of eligible Emergency Work projects and Direct Federal Assistance (DFA). The language in this policy document supersedes the language in Chapter 2:V.L of the PAPPG Version 3.1. It authorizes Applicants to apply the value of donated resources used during the performance of eligible Permanent Work toward the non-Federal cost share of its eligible Permanent Work projects. This policy is retro-active to disasters declared on or after August 23, 2017.

IV. SCOPE AND AUDIENCE:

The policy is applicable to incidents declared on or after August 23, 2017. It is intended for all personnel involved in the administration of the Public Assistance (PA) Program.

V. AUTHORITY:

Donated resource offsets are authorized under Title 2 Code of Federal Regulations (CFR) §200.306.

VI. POLICY:

Individuals and organizations often donate resources to assist with response and recovery activities. FEMA does not provide PA funding for donated resources. However, FEMA allows Applicants to use the value of donated resources (non-cash contributions of property or services)² related to eligible Emergency Work to offset the non-Federal cost share of its eligible Emergency Work Project Worksheets (PW) and DFA; and to use the value of donated resources related to eligible work on a Permanent Work project to offset the non-Federal cost share of that specific Permanent Work PW. FEMA applies the offsets regardless of the cost share arrangements between the Recipient and the Subrecipients. In addition to overarching Federal PA Program requirements as defined in the PAPPG, the following policy language applies.

The Applicant may apply the offset if all of the following conditions are met:

- The donated resource is from a third-party (a private entity or individual that is not a paid employee of the Applicant or Federal, State, Territorial, or Tribal government);

¹ www.fema.gov/media-library/assets/documents/111781

² Title 2 Code of Federal Regulations (CFR) § 200.96.



FEMA

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- The donated resource is necessary and reasonable for accomplishment of the project;³
- **The Applicant uses the resource in the performance of eligible work** and within the respective project's period of performance;⁴ and
- The Applicant or volunteer organization tracks the resources and work performed, including description, specific locations, and hours.⁵ Donated resources for Permanent Work must be tracked to the specific PW for which it is associated.

FEMA considers unpaid individuals who volunteer their labor to an Applicant to be third-party even if they are officially members or employees of the Applicant organization (e.g. volunteer fire fighters at a private non-profit volunteer fire department performing eligible emergency work).

Resources donated to the Applicant by an organization that would normally provide the same resources under its mission are eligible as an offset provided the organization is not federally funded. Additionally, if a mutual aid agreement provides for assistance at no cost to the Applicant, the Applicant may use the value of that assistance to offset its non-Federal cost share.

The value of a donated resource is not eligible as an offset toward the non-Federal cost share if the resource is:

- Donated by a Federal agency,
- Donated by another federally funded source,
- Funded through a Federal award,⁶
- Used as an offset to any other Federal award,⁷
- Used for ineligible work, or
- Considered a duplication of benefits as described in Chapter 2:V.P of the PAPPG.

Offset Amounts

FEMA applies values to donated resources as follows:

- **Volunteer Labor:** The offset is based on the same straight-time hourly labor rate, and fringe benefits, as a similarly qualified person in the Applicant's organization who normally performs similar work. FEMA does not offset volunteer labor based on overtime or premium rates. If the Applicant does not have employees performing similar work, FEMA credits the non-Federal share based on a rate consistent with those ordinarily performing the work in the same labor market.⁸
- **Equipment:** The offset is based on equipment rates and must not exceed the fair rental value (if loaned) or the fair market value of equipment that is in similar age and condition

³ 2 CFR § 200.306(b)(3).

⁴ 2 CFR § 200.309.

⁵ 2 CFR § 200.434(d) and 306(b)(1).

⁶ 2 CFR § 200.306(b)(5).

⁷ 2 CFR § 200.306(b)(2).

⁸ 2 CFR § 200.306(e) and (f).



at the time of donation (if donated with a transfer of title). See Chapter 2:V.B of the PAPPG for information on equipment rates.⁹

- **Supplies or Materials:** The offset is based on current commercial rates, which FEMA validates based on invoices from previous purchases or information available from vendors in the area. The amount must not exceed the fair market value at the time of donation.¹⁰
- **Buildings or Land:** The offset is based on the fair market value at the time of donation as established by an independent appraisal and certified by the Applicant.
- **Space:** The offset is based on the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.¹¹
- **Logistical Support:** Reasonable logistical support for volunteers doing eligible work, such as donations warehousing and management related to eligible work, may be eligible either for funding (if the Applicant provides the logistical support) or as a donated resource offset (if a third-party provides the logistical support), subject to approval by FEMA.

All projects approved under PA are subject to cost sharing.¹² FEMA applies the Federal cost share to the total value of the project, which includes the value of the donated resources. FEMA does not apply the offset toward other State, Territorial, or Tribal government obligations, or toward another disaster or another Applicant's projects.

For Emergency Work, the donated resource offset is applied against the combined non-Federal cost share of all of the Applicant's Emergency Work PWs (Category A and B). The offset may not exceed the total out-of-pocket costs and is capped at the total non-Federal cost share of these PWs. FEMA prepares the Emergency Work donated resource PW separate from the actual Emergency Work project PWs. FEMA does not obligate the donated resource PW until after it obligates all of that Applicant's Emergency Work PWs.

Although FEMA obligates the donated resource PW as a separate PW, the donated resources are still considered part of the FEMA approved scope of work and not a separate project. As such, administrative costs related to tracking the donations for a project may be claimed as Direct Administrative Costs (DAC) on the related project if tracked to that specific project. DAC may not be claimed on the separate donated resource PW.

For Permanent Work, the donated resource offset is applied against the non-Federal cost share of the specific Permanent Work PW for which the resources were donated. The offset may not exceed the total out-of-pocket costs is capped at the non-Federal cost share of that specific Permanent Work PW. The type and amount of resources donated must directly correlate to, and may not exceed, the type and amount approved in the scope of work of the Permanent Work

⁹ 2 CFR § 200.306(g), (h), and (i).

¹⁰ 2 CFR § 200.306(g).

¹¹ 2 CFR § 200.306(i)(3).

¹² 44 CFR § 206.203(b).



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project (e.g., if the approved scope of work includes replacement of 10 chairs and 15 chairs are donated, the donated resource offset is limited to 10 chairs). The Applicant needs to submit the donated resource information in its closeout package submittal. FEMA will adjust the Permanent Work PW to capture any donated resource offsets related to that PW at closeout.

VII. RESPONSIBLE OFFICE:

Recovery Directorate (Public Assistance Division)

A handwritten signature in blue ink, appearing to read "Keith Turi".

Keith Turi
Assistant Administrator
Recovery Directorate

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OFFICE OF INSPECTOR GENERAL

Audit Tips for Managing Disaster-Related Project Costs



**Homeland
Security**

**September 29, 2017
OIG-17-120-D**

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The Legislative Auditor's Summary of the Louisiana Procurement Code

[R.S. 39:1551-1755](#)

[LAC 34:I.5101-5513 and 34:V.101-3301](#)

[Executive Order JBE 2017-18](#)

Overview

This paper is a summary of the laws related to the [Louisiana Procurement Code \(LPC\)](#). The summary is presented as a series of questions that include references to key statutes, Attorney General Opinions and case law to facilitate understanding of the LPC. The summary provides general principles of state procurement law that serve as a framework for the unique facts and circumstances encountered during an audit.

To facilitate your use of this document, numerous links will direct your attention to document text and to related documents posted on the LLA website and on external websites. For example, under the Table of Contents section, clicking the title of the section that you wish to view will take you directly to that section's text. Within a question, links will point to other areas of the document and to relevant external documents. Placing a mouse pointer over a link will open a box that will explain the use of the link.

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[Introduction](#)

What is the procurement code?

State and local governmental entities must follow specific requirements in order to properly expend public funds for purchases. These requirements are found in statutes, rules, and executive orders issued by the governor. The objective of procurement law is to increase the public's confidence in the government's ability to purchase materials and services for the best price. These laws also help ensure that all persons who are involved with procurement are treated fairly.

This summary identifies the key sources of the Louisiana Procurement Code (LPC or Code) that include: statutes, regulations, case law, Attorney General Opinions and executive orders. It also highlights major topics, such as how goods and services are purchased, and how otherwise exempt political subdivisions may choose to be subject to the Louisiana Procurement Code.

What laws make up the Louisiana Procurement Code?

Statutes and Rules

[R.S. 39:1551-1755](#)
LAC 34:I.5101-5513
and 34:V.101-3301

The Louisiana Procurement Code is a set of laws that govern the purchase of certain services, materials and supplies, and major repairs by most state agencies. For example, the Department of Natural Resources and the Attorney General are state agencies that must follow the LPC. Services contracts typically relate to operations. Examples of services subject to the LPC include janitorial services and maintenance services. Examples of major repairs subject to the LPC include repairs to a pipeline in a plumbing system and repairs to a boardwalk in a nature preserve. Major repairs do not, however, include construction funded through Capital Outlay.

The LPC applies to expenditures of both state and federal monies. In addition to the legal requirements found in statutes (R.S. 39:1551-1755), numerous administrative rules that must be followed are found in Title 34 of the Louisiana Administrative Code (See LAC 34:I.5101-5513 and 34:V.101-3301). These rules may provide definitions and procedures that are not found in the statutes.

Executive Orders

In addition to the LPC statutes and administrative rules, executive orders are also an important source of law. For example, [Executive Order JBE 17-18](#) provides the procedures required when making certain purchases (including small purchases). Executive orders issued by a governor terminate on the date provided in the order or in a later order. If the order does not contain a

termination date, the order terminates 60 days after the legislature's regular session adjourns after the issuing governor leaves office. See R.S. 49:215(C).

[Executive Order JBE 17-18](#)

Which entities must follow the Public Bid Law for public works?

All public entities must follow the Public Bid Law for the construction of public works. Please see the LLA's Public Bid Law FAQ for more information concerning contract requirements for constructions of public works.

Which entities must follow the procurement code?

The answer to this question depends on the type of public entity involved. The LPC generally applies to the executive branch and its agencies. Universities and colleges must also follow the LPC, subject to certain exceptions and exemptions. See R.S. 39:1572B. Further, some agencies within the executive branch and some services are exempt from the requirements of the LPC. For example, construction is exempt from the LPC because it is governed by the Public Bid Law. Likewise, those exempt agencies follow the Public Bid Law.

R.S. 17:3139.5(B) provides that eligible institutions of higher education may participate in the Higher Education Procurement Code established by LSU (See Part XIII of [Title 34 of the Louisiana Administrative Code](#)) in lieu of the State Procurement Code.

Which entities are exempt from the LPC?

The LPC does not apply to the legislative and judicial branches of state government nor to any agency within the legislative branch. However, these two branches of government may choose to subject themselves to the LPC.

Political subdivisions and quasi-public entities are also exempt from the LPC. They also may choose to subject themselves to the LPC.

R.S. 17:3139.5(B) provides that eligible institutions of higher education may participate in the Higher Education Procurement Code established by LSU (See Part XIII of [Title 34 of the Louisiana Administrative Code](#)) instead of the State Procurement Code.

How is "political subdivisions" defined?

Political subdivision is not defined in the LPC. Political subdivisions are, however, defined in Art. VI, §44 to mean a parish, municipality, incorporated city, town, or village, and any other unit of local government, including a school board and a special district, authorized by law to perform governmental functions. Political subdivision also refers to quasi-public entities that are also exempt from the LPC. The only definition of quasi-public entity is found in the audit law

(R.S. 24:511, et seq.)). R.S. 24:513(A)(1)(b). The courts and the Attorney General have generally found that a quasi-public entity is an entity that performs a governmental function.

Political subdivisions are exempt from the LPC. For example, fire protection districts would be exempt from the LPC. See R.S. 39:1554 for exclusions. Though exempt, political subdivisions may choose to make themselves subject to the LPC.

Which laws do exempt entities follow?

Entities that are exempt from the LPC follow the Public Bid Law (R.S. 38:2211-2296). The Public Bid Law governs procurement related to public works (R.S. 38:2212) and to the purchase of certain services, materials and supplies (R.S. 38:2212.1). (For more information see the LLA Summary of the [Public Bid Law FAQ](#).)

Political subdivisions, however, may choose to opt into all or part of the LPC (R.S. 39:1554E). For more information related to public entities that opt into the LPC see **Section III of this Summary**.

Which laws address the construction of public works?

The Public Bid Law addresses the construction of public works. See the LLA's Public Bid Law FAQ for more information.

Which laws address the purchase of certain services, materials and supplies?

The Louisiana Procurement Code addresses the purchase of services, including professional, personal, consulting and social services, material and supplies for most state agencies within the Executive Branch. The Public Bid Law addresses the purchase of materials and supplies for all other public entities. Please see the LLA's Public Bid Law FAQ for additional information.

What is the Office of State Procurement?

Although much procurement occurs at the agency level, the Office of State Procurement (OSP), located within the Division of Administration, is the main hub of purchasing in Louisiana. The OSP supervises the procurement of certain services, materials and supplies. The main page for the OSP is found at <http://www.doa.la.gov/Pages/osp/Index.aspx>.

Act 864 of the 2014 Regular Session combined the Office of State Purchasing and the Office of Contractual Review into the current Office of State Procurement.

Does the law provide for exemptions from the OSP and its regulations?

Yes. Some entities are exempt from OSP and its regulations. For example, the Department of Transportation and Development has authority to procure materials and supplies for component

parts of roads, bridges and highways. Other examples include the New Orleans Food Center Authority and the Louisiana Crawfish Market Development Authority.

Some entities are exempt from OSP but are still subject to state purchasing regulations. For example, the LSU System, Southern University System and the Board of Trustees of State Colleges and Universities System are subject to OSP rules but not to the OSP.

Where may one find more information on OSP?

OSP's web site is a source of much useful purchasing information. There one can find a variety of resources including access to the procurement law, administrative rules, and various vendor lists. Go to <http://www.doa.la.gov/Pages/osp/Index.aspx>. A copy of OSP's Rules and Regulations may be found at <http://www.doa.la.gov/Pages/osp/legal-Index.aspx>

How does an entity make purchases under the LPC?

The answer to this question depends on:

- ❖ the type of public entity involved;
- ❖ the type of materials and supplies being purchased;
- ❖ the amount of materials and supplies to be purchased;
- ❖ the conditions under which the agency is operating (For example, is there an emergency going on? See page 9 for information on emergencies.).

How these questions are answered determines the type of purchasing process that is required by the law, regulation and/or Executive Order. Most purchases will be made from the state contracts list provided by OSP. To view the state contracts list, go to:

<https://wwwcfprd.doa.louisiana.gov/osp/lapac/pubMain.cfm>

What are state contracts?

The OSP provides a state contracts list from which public entities may purchase certain services, materials and supplies. The items that are available for purchase through state contract have been subjected to a competitive process conducted by the OSP. The list saves the public entity time and money that would otherwise be spent on performing the required competitive procedures. Entities that are subject to the LPC are generally required to purchase from state contract. Commodities and entities that are exempt from OSP's control but that are still subject to the LPC are found in R.S. 39:1572.

May an agency purchase outside of the state contract list?

In general, agencies that are subject to the LPC must purchase items from OSP's state contract list. Agencies that want to make a purchase that is not on state contract must first submit a written request to OSP asking permission. An agency must submit a letter that provides a sound business reason for not purchasing an item that is on state contract. OSP will review the request and the agency will be notified if OSP has approved its making a "non-contract" purchase.

R.S. 38:321.1 authorizes State agencies, municipalities, parishes, and other political subdivisions to purchase items through existing (Louisiana) public contracts of other political subdivisions within one year of the opening of bids. State agencies may rely on certificates from the Office of State Procurement that the contract is in compliance with the Procurement Code and has been adopted as a statewide cooperative contract pursuant to R.S. 39:1702, et seq, or from a local political subdivision that the contract was bid in compliance with State law. State agencies should consult with OSP prior to utilizing this new provision.

What happens if an equivalent item appears to be on the state contract list?

Occasionally, public entities want to purchase a specific commodity that it is not on the state contract list although an equivalent item appears to be available for purchase on the list. To issue bids instead of purchasing the commodity from the state contract list, public entities that are subject to the OSP must provide a written valid business case. If OSP approves the entity's bidding out the item, the entity must use open specifications.

What are open specifications?

A public entity must use open specifications when soliciting bids. If doing so is clearly in the public interest, public entities may specify a particular brand, make, or manufacturer in the specifications let for public bid. While the entity may specify a model and catalog number in the bid, the bid documents must clearly state that equivalent products are acceptable.

How does a public entity purchase something that is not on the state contract list?

The type of procurement procedure that a public entity, subject to the provisions of the Procurement Code, must use depends on several factors. One consideration is the cost of the items to be procured, another is the type of contract in question, i.e. purchasing materials and supplies versus contracts for personal, professional, consulting, or social services. The law does not require competitive bidding for purchases that are \$5,000 or less. Purchases that are greater than \$5,000, and up to \$15,000, require quotes from at least three vendors by telephone, fax or other means. Purchases greater than \$15,000, but less than \$25,000, should use OSP's state contract list when feasible. However, if the state contract vendor list cannot be used, then written invitations for bids must be sent to at least five bidders. Contracts that are greater than \$25,000 generally must be awarded through competitive sealed bidding, however there are exceptions. For example, contracts for professional services, as defined under the Procurement Code, are not required to be let through competitive sealed bidding, regardless of the amount of the contract. Additionally, the Procurement Code in R.S. 39:1595 authorizes the Commissioner of Administration to allow a State Agency to use competitive sealed proposals for supplies, services or major repairs when the State Chief Procurement Officer substantiates through written documentation that doing so would be in the best interest of the State.

R.S. 38:321.1 authorizes State agencies, municipalities, parishes, and other political subdivisions to purchase items through existing (Louisiana) public contracts of other political subdivisions within one year of the opening of bids. State agencies may rely on certificates from the Office of State Procurement that the contract is in compliance with the Procurement Code and has been adopted as a statewide cooperative contract pursuant to R.S. 39:1702, et seq, or from a local political subdivision that the contract was bid in compliance with State law. State agencies should consult with OSP prior to utilizing this new provision.

A summary of the required procurement procedures is provided in the table below.

Amount of purchase	Method
\$0-\$5,000 per single transaction	No competitive bidding is required.*
>\$5,000 to \$15,000	Quotes from 3 or vendors by telephone, facsimile, or other means*
>\$15,000 to \$25,000	If possible, use OSP computerized vendor list; otherwise obtain <u>written</u> quotes from at least 5 vendors*
>\$25,000	Advertise according to R.S. 39:1594

Source: *[Executive Order JBE 17-18](#).

What documentation should an entity maintain?

Agencies should maintain documentation of each quote received. Procurement amounts may not be artificially divided in order to circumvent the LPC. Quotes may be taken by telephone, facsimile or other means. The quotes must, however, be in writing if the price exceeds \$5,000. Awards shall be made to the lowest responsive quotation. Subject to some exceptions, the Executive Order provides an extensive list of items that are not subject to competitive bid regardless of price. (See Section 5 of [Executive Order JBE 17-18](#).)

Small Purchases

What does the LPC consider to be small purchases? [R.S. 39:1596](#) LAC 34: V.701

Small purchases are procurements priced below \$25,000 or as defined in the Governor’s Small Purchases Executive Order. The most current executive order addressing small purchase procedures is **JBE 17-18**. (The executive order declares that items covered by an existing state contract and public works contracts that are greater than \$5,000 and which are governed by R.S. 38:2241 are not subject to the procedures in the order.) Small purchases are specifically exempted from the competitive sealed bidding requirements of the LPC. In general, small purchases require a non-sealed bid solicitation. [E.O. JBE 17-18](#)

Competitive Sealed Bidding

What is competitive sealed bidding, and when is it used? [R.S. 39:1594](#) LAC 34:V 301-339
When state contracts are not used and no exceptional circumstances apply (Small Purchase, Sole Source, and Emergency Procurement) and the purchase is greater than \$25,000, competitive sealed bidding should be used. Competitive sealed bidding is a method that uses formal advertising in order to solicit bids from a variety of contractors to capture the best price.

What steps are involved?

Under competitive sealed bidding, public entities issue invitations for bids (IFB). The bid documents must contain a description of the services, materials, and supplies that the entity seeks to procure. The bid documents should also contain all terms and conditions that must be in the final contract. Except for emergency procurements, the time between the date of the IFB and the date set for opening bids may not be less than ten days. For bids greater than \$25,000, the bidding time should typically be no shorter than twenty days.

When may bids be modified?

Bids may not be modified within three working days before the opening of bids. This period excludes Saturdays, Sundays and legal holidays. However, if bids must be modified within the three working day period, the opening of bids is extended by one week without a requirement to re-advertise. The bid modification must be sent to all prospective bidders (LAC 34:I.305).

Does the law provide exceptions to competitive sealed bidding?

Some exceptions to the competitive sealed bidding requirement exist. Some of the exceptions are found in the group purchasing portion of the Other Procurement Methods statute (R.S. 39:1600(B)) that uses a competitive request for proposal process. The preference statutes provide another exception. Public entities are allowed to make selections based on preferences for certain Louisiana goods or services based on specific criteria. (see R.S. 39:1601 – 1604.7)

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For example, in general, Louisiana's Public Bid Law applies to purchases of materials and supplies purchased from Prison Enterprises. Prior to 2017, state agencies were required to purchase from Prison Enterprises those available goods and services if the goods are available and if the prices are less than those of central purchasing. [Act 248 of 2017](#) amended R.S. 15:1157 to provide that state agencies that operate a state prison may purchase goods and services from vendors located in the parish in which the prison facility is located if the prices are less than those of central purchasing or Prison Enterprises, and the vendor meets the requirements of the Hudson Initiative (R.S. 39:2001 et seq.) and the Veteran Initiative (R.S. 39:2171 et seq.).

Contractor certification

[Act 49 of 2017](#) amended R.S. 37:2163 to provide that all architects, engineers, and awarding authorities shall place in their bid specifications the requirement that a contractor shall certify that he holds an active license by displaying his license number on the bid envelope. If the bid does not display the contractor's license number the bid shall be automatically rejected.

Information Technology Procurement

[R.S. 39:196 through R.S. 39:200](#)

- Provides for the procurement of data processing equipment, related services, and software using a request for proposals (RFP) process (R.S. 39:198).
- Applicable to all state agencies in the executive branch, as defined in 36:3(1), except for any agency of a statewide elected official, with respect to the purchase, lease, and rental of all information technology equipment, related services, and software.
- The office of technology services has the sole authority and responsibility for defining the specific information technology systems and information technology services to which the provisions of this law shall apply. Rules and regulations shall be promulgated as necessary to carry out the provisions of the law.
- The office of technology services, through the office of state procurement, may, on behalf of any state agency, enter into contracts under R.S. 39:198.
 - The Office of Telecommunications Management (OTM) is under the Office of Technology Services.
- R.S. 39:199, in order to ensure the lowest price, states:
 - ❖ Any agency seeking to procure a new contract, a contract extension, or any other contract modification for software, software maintenance, and support services must show that the price received or negotiated is the lowest available price by exhibiting prices that may appear in a catalog, price list, schedule, Internet, or other form.

Emergency Procurement

[R.S. 39:1598](#)

LAC 34: V.1101-1111

How does an entity make purchases during an emergency?

In order to expedite purchases so that order may be restored, the ordinary rules of procurement do not apply during a state of emergency.

What is considered an emergency?

LAC 34: V.1103

An emergency is a threat to "...public health, welfare, safety, or public property..." Many types of conditions, including floods, epidemics, and equipment failures, can create an emergency. The agency's chief procurement officer may identify other emergency conditions, which are those that create an immediate need for services, materials or supplies.

Which emergency purchases must the chief procurement officer approve?

Whenever it is practical, the chief procurement officer must approve procurements up to \$5,000. It is mandatory, however, that the chief procurement officer, or the equivalent person, approve all emergency procurements of \$5,000 or more.

What documentation is necessary for an emergency purchase?

The chief procurement officer must document the facts and circumstances of the emergency. Public entities subject to the Procurement Code are required to document and maintain in their contract files that they have followed the following steps for emergency procurements:

- Every effort shall be made to obtain quotations from three or more vendors when supplies, services, or major repairs (except for standard equipment parts for which prices are established) are to be purchased on an emergency basis,;
- Immediate purchasing shall be discouraged to the extent practicable;
- When supplies, services, or major repairs are urgently required and time does not permit obtaining written quotations, a procurement officer may obtain quotations by telephoning or otherwise, but those quotations shall be made on the related purchase requisitions; and
- So far as practicable, quotations shall be secured from institutions of the state as provided by law.

Additional information on emergency procurements is available from the Office of State Procurement: <http://www.doa.la.gov/osp/agencycenter/publications/emergencyprocurement.pdf>
(Rev. August 2016)

Sole Source Procurements

[R.S. 39:1597](#)

LAC 34: V.901-907

What are sole source procurements?

Sole source procurement is used when only one source is available from which to make a particular purchase. Sole source procurement, like emergency procurement, does not require competition. An agency may use sole source when it submits to the OSP in writing that only one source can fill the need. The agency may not make sole source procurement until it receives approval from OSP. For a discussion of Sole Source consideration, see AG Op. No. 13-0078.

Which reporting requirements apply to sole source procurement?

An agency must submit a sole source procurement report to the Legislature annually. The report must include:

- each contractor's name;
- the amount and type of each contract;
- a list of the supplies, services or major repairs procured under each contract; and
- the identification number of each contract file.

Local Political Subdivisions, Quasi-Public Entities and the LPC

[R.S. 39:1554](#)

[R.S. 39:1572](#)

Which entities or branches of government are exempt from the LPC?

The following are exempt from the LPC:

- the legislative branch and its agencies;

- the judicial branch; and
- local political subdivisions and quasi-public entities.

May an exempt entity choose to adopt all or part of the LPC?

Yes. As noted earlier, the LPC does not apply to all public entities. Exempt entities must follow the Public Bid Law (R.S. 38:2211-2296) that governs the purchase of public works and materials and supplies. Local political subdivisions and quasi-public entities, however, may adopt all or any part of the LPC and its regulations for the procurement of supplies, services, or major repairs.

Also, the law exempts some entities from the requirement to make procurements through the OSP and its regulations. Other entities are exempt from OSP but required to follow its regulations.

What procedure should an exempt entity use to adopt all or part of the LPC?

A local political subdivision or quasi-public entity should provide written documentation showing that it has adopted the LPC and its regulations. For example, a police jury, parish council, or board of a local political subdivision or quasi-public entity may pass an ordinance or a resolution confirming adoption of all or part of the LPC.

What happens after an exempt entity adopts the LPC?

Once a local political subdivision or quasi-public entity has formally decided to become subject to all or part of the LPC and its regulations, the entity must follow the rules that apply to state agencies, until the local political subdivision or quasi-public entity formally rescinds such adoption. If a local political subdivision or quasi-public entity formally rescinds its adoption of all or part of the LPC, the political subdivision or quasi-public entity will resume being subject to the provisions of the Public Bid Law.

How else may an otherwise exempt entity become subject to the LPC?

In addition to making itself subject through resolution or ordinance, a public entity that is a “local public procurement unit” that enters into a state procurement contract causes the contract to be subject to the LPC. (LAC 34:V.2705).

For example, R.S. 38:2212.1(F) allows any public entity not subject to the Procurement Code to purchase materials, supplies, and equipment under the cooperative purchasing provisions of the Procurement Code found at R.S. 39:1702 – 1710. The contract thus entered into is subject to the relevant laws of the Procurement Code.

May a local governmental entity purchase an item from a local vendor at the state bid price?

[R.S. 39:1710](#)

Yes, R.S. 39:1710 allows this purchase, but also limits it. The statute provides that:

When a local governing authority purchases an item at the state bid price through a local vendor, the local governing authority may pay to the local vendor the costs for shipping, preparation, and delivery of the item, provided that these costs shall not exceed the state bid price by seven

percent on purchases up to ten thousand dollars, five percent on purchases over ten thousand dollars and up to twenty thousand dollars, and three percent on purchases over twenty thousand dollars.

The Attorney General examined this statute in AG Op. No. 96-44, opining that the following steps would be required for compliance:

In order to facilitate use of these provisions, we would advise that the following steps be taken by a local governing authority:

1. Determine from State Central Purchasing if there is a competitively bid state contract for the needed material or supply and obtain the State Contract Number and the specification for the item on state contract.

2. Contact a local vendor for the item to determine if he/she can provide the item meeting the exact same specification as the state contract item and obtain a written price quote for delivery of the item to the local governing authority. While the statute provides no definition for the word “local”, it is interpreted in this context to mean a vendor situated within the boundaries of the governing authority seeking to make the purchase.

3. If the delivered price offered by the local vendor is within the percentages set forth in the statute for contracts of various values, a purchase order may be issued by the local governing authority to the local vendor, reflecting the state contract number, state contract specification, state contract price and the markup allowed to the local vendor for shipping, preparation and delivery of the item(s).

4. A copy of the local governing authority's purchase order shall be furnished to the State Central Purchasing Office for monitoring compliance with the provisions of [R.S. 39:1710](#).

The statute in question is an exception to the otherwise sweeping requirement of R.S. 38:2212A(1)(a) that all purchases above the contract amount (presently \$10,000) [Now \$30,000] made by a public entity with public funds be made by sealed bid pursuant to advertising. The procedures set forth above are intended to assure compliance with the letter and spirit of both the Public Bid Law ([R.S. 38:2211-2237](#)) and [R.S. 39:1710](#).

Cooperative Purchasing

What is Cooperative Purchasing?

[R.S. 39:1702 -1710](#)

LAC 34: V.2701-2707

Cooperative purchasing allows multiple entities to procure materials and supplies in a joint effort. The entities may be a combination of public units or a mixture of public and private

procurement units. For example, to achieve the best price, a state agency, a local parish government and a university may purchase some equipment via a cooperative purchase contract.

Does Cooperative Purchasing subject an otherwise exempt entity to the LPC?

Yes. Cooperative purchasing is another way by which an otherwise exempt public entity is made subject to the LPC. Although local political subdivisions and quasi-public entities are excluded from the LPC, if an entity that is a “local public procurement unit”¹ enters into a contract governed by the cooperative purchasing laws and regulations, the contract is subject to the LPC. (See LAC .34:V. 2705).

How does an entity that is subject to the LPC make a purchase that is not available on state contract?

If a public entity wants to purchase a specific commodity that it is not on the state contract list, it may solicit bids according to the LPC.

If it appears that an equivalent item is available for purchase on the list, the entity must obtain permission from OSP prior to making the purchase.

R.S. 38:321.1 authorizes State agencies, municipalities, parishes, and other political subdivisions to purchase items through existing (Louisiana) public contracts of other political subdivisions within one year of the opening of bids. State agencies may rely on certificates from the Office of State Procurement that the contract is in compliance with the Procurement Code and has been adopted as a statewide cooperative contract pursuant to R.S. 39:1702, et seq, or from a local political subdivision that the contract was bid in compliance with State law. State agencies should consult with OSP prior to utilizing this new provision.

How does an exempt agency that has opted into the LPC make a purchase that is not available on state contract?

The answer is the same as above. Local political subdivisions and quasi-public entities that opt into the LPC, and therefore make themselves subject to the OSP, must provide a valid business case in writing in order to issue bids instead of purchasing the commodity off the state contract list in the same manner as state agencies. If OSP approves bidding out the item, open specifications must be used.

Can entities otherwise subject to LPC be exempt from its provisions relative to group and cooperative purchasing? [R.S. 39:196\(C\)](#) and [39:1554\(J\)](#)

Yes. Provided that certain conditions are met and that certain oversight limitations of the Legislature are honored, the Procurement Code provisions relative to group purchasing and cooperative purchasing shall not apply to any public postsecondary education institution if:

¹ R.S. 39:1556 (31) defines "local public procurement unit" to mean any parish, city, town, governmental body, and any other subdivision of the state or public agency thereof, public authority, public educational, health, or other institution, and to the extent provided by law, any other entity that expends public funds for the acquisition or leasing of supplies, services, major repairs, and construction, and any nonprofit corporation operating a charitable hospital.

(1) The public postsecondary education institution has requested its own group purchasing and cooperative purchasing procurement provisions and has obtained the approval of its management board and the Board of Regents.

(2) The requesting public postsecondary education institution has adopted its own group purchasing and cooperative purchasing procurement provisions according to rules and regulations adopted in accordance with the APA.

Once these conditions are met, public postsecondary educational institutions may then be exempt from the provisions of Information Technology Procurement, R.S. 39:196 through 39:200.

What are open specifications?

A public entity must use open specifications in its solicitation for bids. If clearly in the public interest, public entities may specify a particular brand, make, or manufacturer in the specifications let out for public bid. The model and catalog number may be specified in the bid. However, the bid documents must clearly state that equivalent products are acceptable.

In addition, even if a local political subdivision or quasi-public entity did not opt into the LPC and instead chose to bid through the Public Bid Law (R.S. 38:2211-2296), open specifications are still required. As the LPC mandates, the bid specifications must clearly state that equivalent products are acceptable even if specifications include a brand or model number.

How does an exempt entity that has not opted into the LPC make a purchase that is not available on state contract?

A public entity that is exempt from the LPC must comply with the provisions of the Public Bid Law.

Right to Prohibit Procurement with Individuals Convicted of Certain Felonies

According to R.S. 38:2212.9, R.S. 39:2191 and 2192, any public entity is authorized to reject the lowest bid from, or not award the contract to, a business in which any individual with an ownership interest of five percent or more has been convicted of, or has entered a plea of guilty or nolo contendere to any state felony crime or equivalent federal felony crime committed in the solicitation or execution of a contract or bid awarded under the laws governing:

- 1) public contracts under the provisions of Chapter 10 of this Title; or
- 2) the Louisiana Procurement Code under the provisions of Chapter 17 of Title 39 of the Louisiana Revised Statutes of 1950 (including contracts for professional, personal, consulting, and social services).

The public entity has no duty to perform criminal background checks on contractors, vendors, or subcontractors.

Any person, company, or entity making an allegation of prior convictions on the part of any individual with an ownership interest of five percent or more in any bidder is responsible for presenting prima facie evidence to the public entity supporting his or her claim.

If evidence is submitted substantiating that an individual with an ownership interest of five percent or more in the lowest bidder has been convicted of, or has entered a plea of guilty or nolo contendere to any state felony crime or equivalent federal felony crime committed in the solicitation or execution of a contract or bid awarded and the public entity rejects the lowest bid, the company whose bid is rejected shall be responsible to the public entity for the costs of rebidding, the increased costs of awarding to the second low bidder, or forfeiture of the bid bond, whichever is higher.

“Public entity” in the case of the procurement code means any agency, board, commission, department, or public corporation of the state, created by the constitution or statute or pursuant thereto, or any political subdivision of the state, including but not limited to any political subdivision as defined by Article VI, Section 44 of the Constitution of Louisiana, and any public housing authority, public school board, or any public officer whether or not an officer of a public corporation or political subdivision.

Reverse Auction

A reverse auction is a competitive online solicitation process on the internet for equipment, supplies, and other materials in which vendors compete against each other online in real time in an open and interactive environment.

More about reverse auctions may be found in the [Public Bid Law FAQ](#) regarding R.S. [38:2271](#) for political subdivisions. For procurement code purposes, R.S. [39:1554\(E\)\(2\)](#), allows any political subdivision not subject to the procurement code to use the reverse auction provisions enacted in [R.S. 39:1600\(D\)](#).

R.S. 39:1600(D) provides for use of a reverse auction method for entities subject to the procurement code. Agencies should review the rules promulgated by the state chief procurement officer relative to reverse auctions, which can be found in Chapter 5 of Part V of Title 34 of the Louisiana Administrative Code.

**NEW
2017**

Act 226 of 2017 amended [R.S. 39:1600\(D\)](#), which provides that a reverse auction may be used for the acquisition of materials, supplies, services, products, or equipment **in any monetary amount, including small purchases, which are currently purchases not exceeding \$25,000. The definition of “reverse auction” means a competitive online solicitation process on the Internet for materials, supplies, services, products, or equipment in which vendors compete against each other online in real time in an open and interactive environment.**

Adequate public notice for the purchase of materials, supplies, services, or equipment using a reverse auction is required **to confirm to the requirements for public notice of sealed bidding or small purchases, as applicable, pursuant to R.S. 39:1594 or 1596, respectively. OPS is required**

to report annually to the legislature, by September 1st, on the use of reverse auctions and any savings achieved.

Change Orders

[R.S. 39:1557.1](#) provides that the governmental body that entered into the contract must record in the office of the recorder of mortgages in the parish where the work is to be done or where the entity is domiciled not later than thirty days after the date of a change order that requires that the recordation take place:

- (1) Each change order to a contract that adds an amount of ten percent or more of the original contract amount if the additional amount is at least ten thousand dollars; or
- (2) All change orders to a contract aggregating to an amount of twenty percent or more of the original contract amount if the additional amount is at least ten thousand dollars.

In addition, the original contract shall be recorded together with the amendments or other revisions if not previously recorded. This provision does not apply to the office of facility planning and control, and the office of state procurement.

Unemployment Compensation

Unemployment Compensation law provides that the collection of contributions, assessments or penalties that are owed by employers but not properly remitted to the La. Workforce Commission are tantamount to a judgment executed by a court.

[R.S. 23:1726\(B\)](#) prohibits any employer against whom an assessment has been levied related to unemployment compensation from submitting a bid or proposal for any public contracts until full payment of the amount due under the assessment is made.

Independent Contractor or Employee Status

[R.S. 23:1711\(G\)\(3\)](#) provides that upon a final determination that an employer knowingly or willfully failed to properly classify an individual as an employee and failed to pay unemployment, then the employer will be prohibited from contracting with any state agency or political subdivision of the state for a period of three years from the date upon which the determination becomes final.

The division of administration will place the employer on a list of such employers, maintain the list, and make the list available to state agencies and political subdivisions of the state.

Exceptions for Procurement of Insurance

[R.S. 39:1540](#)

La. R.S. 39:1540 provides that consulting services for the procurement of insurance may be obtained without the necessity of complying with the La. Procurement Code if the services are ancillary to the contract. The statute authorizes the office of risk management, under the

direction of the commissioner of administration, to contract for consulting services with one or more licensed insurance producers if the commissioner finds that the contract is in the best interest of the state.

Cooperative Purchasing

- ❖ R.S. 38:321.1 authorizes State agencies, municipalities, parishes, and other political subdivisions to purchase items through existing (Louisiana) public contracts of other political subdivisions within one year of the opening of bids. State agencies may rely on certificates from the Office of State Procurement that the contract is in compliance with the Procurement Code and has been adopted as a statewide cooperative contract pursuant to R.S. 39:1702, et seq, or from a local political subdivision that the contract was bid in compliance with State law.

Legislative Review/Approval of Contracts

R. S. 39:1590 requires that professional, personal, and social services contracts that are \$50,000 or more be reported to JLCB and the Contract Services Joint Legislative Task Force for review.

- ❖ Electronic Bids
- ❖ R.S. 39:1594 refers to competitive sealed bids and R.S. 39: 1595 refers to competitive sealed proposals relative to the submission of electronic bids and exceptions.

Recent Attorney General Opinions

NEW
2017

Local governing authorities are not required to purchase goods or services from Prison Enterprises; however, they are eligible to purchase if they so desire. [AG Op. No. 17-0027](#).

**Note, for state agencies see R.S. 15:1157, as amended by [Act 248 of 2017](#).

See [Competitive Sealed Bidding](#)

Discussion of a true sole source situation. [R.S. 39:1597](#) is the “sole source” provision of the Louisiana Procurement Code. The Louisiana Cattleman’s Association can be considered the sole source provider to administer the Program, since it is the only industry organization in Louisiana recognized by the National Cattlemen’s Beef Association [AG Op. No. 13-0078](#).

The exclusion of small business set-asides for construction projects found in R.S. 39:1733(A) is not applicable to political subdivisions of the state [AG Op. No. 12-0059](#).

Based on the jurisprudence and past opinions of his office, the AG continues to be of the opinion that absent statutory authority (such as the exception found in La. R.S. 38:2212.5), the Louisiana Public Bid Law prohibits the prequalification of bidders [AG Op. No. 12-0059](#).

The Procurement Code is intended for the use by state agencies for the buying, purchasing, renting, leasing, or the obtaining of supplies, services, or major repairs. In other words, the Procurement Code is used when state entities expend funds [AG Op. No. 10-0297](#).

Select Definitions

What are some important definitions or terms?

[R.S. 39:1556](#)

Agencies will encounter the terms defined below as they work under the procurement code. These terms are just a few of the words defined in the law. Other definitions appear in other sections of the law.

- **"Contract"** means all types of state agreements, regardless of what they may be called, including orders and documents purporting to represent grants, which are for the purchase or disposal of supplies, services, major repairs, or any other item. It includes awards and notices of award; contracts of a fixed-price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for the issuance of job or task orders; leases; letter contracts; and purchase orders. It also includes supplemental agreements with respect to any of the foregoing.
- **"Governmental body"** means any department, office, division, commission, council, board, bureau, committee, institution, agency, government corporation or other establishment or official of the executive branch of state government. For purposes of procurement of personal, professional, consulting, or social services contracts, governmental shall not include the judicial branch of state government.
- **"Installment-purchase contract"** means a contract which is utilized to procure supplies or equipment from a contractor where payment for the supplies or equipment is made in a set of installment payments over a fixed period of time in accordance with the provisions of the contract, and in which the contractor agrees to deliver title of the property to the governmental body in accordance with the terms and conditions of the contract.
- **"Major repairs"** means those repairs payable with funds appropriated in the general appropriations act, except those funds transferred from the operating budget of one governmental body to supplement and complete a project under contract by the division of administration facility planning and control section.
- **"Procurement"** means the buying, purchasing, renting, leasing, or otherwise obtaining any supplies, services, or major repairs. It also includes all functions that pertain to the obtaining of any public procurement, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.
- **"Services"** means the furnishing of labor, time, or effort by a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply.

Services include but are not limited to the following:

- Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment.
- Routine recurring maintenance of immovable property.
- Housekeeping services.
- Operation of government owned equipment, immovable property, and systems.
- Information technology services..

The term “**services**” shall not include:

- Employment agreements or collective bargaining agreements.
- Personal, professional, consultant, or social services as defined under the Procurement Code.
- Services performed by lawyers as provided by R.S. 42:261 through R.S. 42:264.
- Services performed by an architect, engineer, or landscape architect as provided by R.S. 38:2310 through R.S. 38:2314.

[Executive Orders](#)

Executive orders are issued by the governor to provide guidance to executive agencies in the operation of government. Executive orders have the force and effect of law unless they are contrary to the Constitution or law. (See AG Op. No. 80-281). Two executive orders deal with procurement. Orders JBE 16-55 deals with emergency procedures for conducting state business and [JBE 17-18](#) deals with small purchase procedures.

Executive orders issued by a governor terminate on the date provided in the order or in a later order. If the order does not contain a termination date, the order terminates 60 days after “...adjournment *sine die* of the regular session of the legislature after the issuing governor leaves office.” See R.S. 49:215 (C).

Two relevant executive orders governing purchases under the LPC are listed below:

Click on the links to see the full text.

1. [Executive Order JBE 17-18](#) Small Purchase Procedures
 2. [Executive Order JBE 16-55](#) Emergency Procedures for Conducting State Business
-



Public Bid Law

[R.S. 38:2211, et seq.](#)

Overview

This document discusses the general principles and guidelines concerning [Louisiana's Public Bid Law](#) using a frequently asked questions (FAQ) format. The FAQ also contains Attorney General Opinions and case law to aid understanding of this area of the law. While the document is fairly detailed, remember that every situation is unique and that each situation deserves careful individual review.

Note when working with federal contracts and FEMA reimbursements, the federal government requires a competitive process for procurement of materials and supplies and public works, particularly for FEMA disaster reimbursements. When considering procurement after a disaster, always follow the stricter law to ensure a competitive process and successful reimbursement.

To facilitate your use of this document, numerous links within the summary will direct your attention to related areas within the document and to documents posted on the Louisiana Legislative Auditor's website and on external websites. For example, under the Table of Contents section, you may go directly to any area of the FAQ by clicking the title of the section that you wish to view.

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Frequently Asked Questions

Public Bid Law

[R.S. 38:2211, et seq.](#)

Q.1. What is the Public Bid Law?

- A.1.** The Public Bid Law is the set of laws that governs contracts for public works and the purchase of materials and supplies by public entities that meet certain threshold requirements called the “**contract limit**” (minimum). This limit is \$30,000 for materials and supplies, and **\$152,550** for public works. The purpose of the public bid law is to ensure that public entities receive the best possible price when using public funds for the procurement of materials and supplies or public works.

Procurement rules for state executive branch entities are contained in the Louisiana Procurement Code (LPC). State executive branch entities (the legislative and judicial branches are exempt) are required to use the LPC for the purchase of materials and supplies. They are, however, required to use the Public Bid Law for public works projects.

Local governmental and political subdivisions are required to follow the Public Bid Law for the procurement of materials and supplies and public works projects. They may however, use the LPC for the procurement of materials and supplies when best interest dictates. They may choose by ordinance or resolution to adopt the LPC in part or in its entirety. They may also purchase from vendors that have been pre-approved by the Office of State Procurement (OSP). Purchasing off the state contract allows agencies to purchase items that have been pre-bid by OSP.

Q.2. Does the Public Bid Law apply to procurement by “my” public entity?

- A.2.** “**Public entity**” is defined in R.S. 38:2211(A)(11) as the state of Louisiana, or any agency, board, commission, department, or public corporation of the state, created by the constitution or statute or pursuant thereto, or any political subdivision of the state, including but not limited to any political subdivision as defined in Article VI Section 44 of the Constitution of Louisiana, and any public housing authority, public school board, or any public officer whether or not an officer of a public corporation or political subdivision.

All public entities are required to follow either the Public Bid Law or the Louisiana Procurement Code. Absent a specific exception, all public entities must follow the Public Bid Law for contracts related to public works. Political subdivisions and local governmental entities must use the Public Bid Law for the purchase of materials and supplies, unless they choose to follow the LPC or purchase goods off the state contract. State executive branch entities must use the LPC for the purchase of materials and supplies.

Q.3. What types of contracts are covered by Louisiana’s Public Bid Law?

- A.3.** All contracts for public works (defined in [Q.8](#)) are governed by the Public Bid Law, regardless of whether the contracting entity is a local political subdivision or a state entity.
- Contracts for the purchase of materials and supplies are governed by the Public Bid Law if the entity is a local political subdivision or local governmental entity.
 - State entities must use the LPC for the purchase of materials and supplies.
 - Contracts for professional services procured by political subdivisions and local government entities are not subject to the Public Bid Law.

Louisiana Procurement Code (LPC)

[R.S. 39:1551, et seq.](#)

Q.4. What is the LPC?

- A.4.** The LPC is the set of procurement laws that executive branch agencies of the State are required to follow instead of the Public Bid Law when they are purchasing materials and supplies. The LPC, through the Office of State Procurement, provides a list of vendors and products that have been pre-bid for easy purchase by executive branch agencies. Click [here](#) to go to the Legislative Auditor’s Summary of the LPC.

Q.5. May a public entity that is subject to the Public Bid Law choose to be subject to the LPC? [R.S. 38:2212.1\(F\)](#)

- A.5.** Yes. Political subdivisions are authorized to adopt by ordinance or resolution all or any part of the LPC and its accompanying regulations for the procurement of material and supplies. If the political subdivision adopts the LPC for the procurement of materials and supplies, then the LPC and not the Public Bid Law applies to those purchases. Any public entity may, however, purchase materials, supplies, and equipment from the state contract under the LPC without actually adopting the LPC.

Q.6. May a local governmental entity purchase an item on the state contract? [R.S. 39:1702](#)

- A.6.** Yes, a local entity may purchase an item on the state contract employing the cooperative purchasing provisions of R.S. 39:1701 et seq. The entity is not required to adopt the LPC "all or in part" for this transaction because the purchase is permitted through the Public Bid Law pursuant to R.S. 38:2212.1(F). As a matter of prudent administration, the governing body should, at a minimum, document the details for the purchase through resolution, ordinance, or minutes.
- ❖ AG Op. No. 05-0109 - *R.S. 33:1701-1705 provides political subdivisions the authority to purchase equipment through existing state contracts and precludes the necessity of following the bid requirements set forth in the Public Bid Law (LSA-R.S. 38:2211-2296).*

Q.7. May a local governmental entity purchase an item from a local vendor at the state bid price? [R.S. 39:1710](#)

A.7. Yes, R.S. 39:1710 allows these purchases with certain limitations. The statute provides that:

When a local governing authority purchases an item at the state bid price through a local vendor, the local governing authority may pay to the local vendor the costs for shipping, preparation, and delivery of the item, provided that these costs shall not exceed the state bid price by seven percent on purchases up to ten thousand dollars, five percent on purchases over ten thousand dollars and up to twenty thousand dollars, and three percent on purchases over twenty thousand dollars.

The Attorney General in AG Op. No. 96-44 opined that the following steps would be required to comply with the statute:

In order to facilitate use of these provisions, we would advise that the following steps be taken by a local governing authority:

1. Determine from State Central Purchasing if there is a competitively bid state contract for the needed material or supply and obtain the State Contract Number and the specification for the item on state contract.
2. Contact a local vendor for the item to determine if he/she can provide the item meeting the exact same specification as the state contract item and obtain a written price quote for delivery of the item to the local governing authority. While the statute provides no definition for the word "local", it is interpreted in this context to mean a vendor situated within the boundaries of the governing authority seeking to make the purchase.
3. If the delivered price offered by the local vendor is within the percentages set forth in the statute for contracts of various values, a purchase order may be issued by the local governing authority to the local vendor, reflecting the state contract number, state contract specification, state contract price and the markup allowed to the local vendor for shipping, preparation and delivery of the item(s).
4. A copy of the local governing authority's purchase order shall be furnished to the State Central Purchasing Office for monitoring compliance with the provisions of [R.S. 39:1710](#).

The statute in question is an exception to the otherwise sweeping requirement of [R.S. 38:2212A\(1\)](#) that all purchases above the contract amount (presently \$30,000) made by a public entity with public funds be made by sealed bid pursuant to advertising. The procedures set forth above are intended to assure compliance with the letter and spirit of both the Public Bid Law ([R.S. 38:2211-2237](#)) and [R.S. 39:1710](#).

Public Works

[R.S. 38:2211](#)

Q.8. What are public works?

A.8. Public work, as defined in R.S. 38:2211(A)(12), includes any contract for the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity. These contracts also include labor and materials.

Q.9. Are contracts for demolition considered public works?

A.9. There is not unanimous agreement as to the answer to this question.

The Attorney General (AG) in Opinion 10-0026 opined that a contract for demolition was not a public work as demolition was not included in the definition of a public work (i.e. erection, construction, alteration, improvement or repair), and therefore not subject to the provisions of the Public Bid Law. The AG stated that a contract for demolition should be treated as a contract for services. The AG has not formally withdrawn this opinion.

In 2011, the Fourth Circuit Court of Appeal in *Concrete Busters of Louisiana, Inc. v. The Board of Commissioners of the Port of New Orleans* held that a contract for demolition was a public work, as demolition would result in an alteration of the immovable property of the public entity. Alteration is included within the definition of a public work. The Supreme Court and the other Appellate Courts have not issued a published opinion regarding the status of a contract for demolition being considered a public work. The Fourth Circuit's decision, while persuasive, is not binding on public entities in other Louisiana Appellate Circuits.

The Fourth Circuit's decision in *Concrete Busters* was mentioned by the AG in Opinion 12-0066, but was not fully addressed by the AG. In this opinion, the AG opined that, when a public entity elects to utilize the bid process to execute a contract for demolition, it must comply with the requirements set forth in its bid documents. The AG did not address whether a contract for demolition is a public work in AG Op. No. 12-0066, as the contract for demolition at question was valued below the contract threshold for a public works.

Given these differing determinations, it is possible that another appellate court may ultimately hold that a public entity's contract for demolition is not a public work, or may instead choose to adopt the reasoning of the Fourth Circuit and hold that it is a public work. Public entities should consult with their legal counsel to review these AG opinions and court decision to determine how it should proceed with any contract for demolition.



Q.10. What is the dollar threshold, or contract limit (minimum), for contracts for public works?

A.10. The threshold, or contract limit, is currently set at **\$152,550**. Changes in the 2014 Legislative Session, added an annual Consumer Price Index (CPI) calculation to the threshold. Therefore, beginning February 1, 2015, and annually on February first of each subsequent year, the office of facility planning and control (OFPC) within the division of administration shall adjust the statutory contract limit (\$150,000) by an amount not to exceed the annual percentage increase in the CPI in the preceding year. The OFPC shall publish the new contract limit for public works contracts in the Louisiana Register in January of each year. OFPC has published in the **January 2017** Louisiana Register that the contract limit for public works contracts is now **\$152,550**.

Q.11. What are recent definitions added to the public bid requirements for public works?

A.11. Recent additions to the definitions section in R.S. 38:2211, include:

- **“Alternate”** means an item on the bid form that may either increase or decrease the quantity of work or change the type of work within the scope of the project, material, or equipment specified in the bidding documents, or both.
- **“Change order”** means any contract modification that includes an alteration, deviation, addition, or omission as to a preexisting public work contract, which authorizes an adjustment in the contract price, contract time, or an addition, deletion, or revision of work.
- **“Probable construction costs”** means the estimate for the cost of the project as designed that is determined by the public entity or the designer.

Q.12. Who is a responsive bidder? [R.S. 38:2212\(A\)\(3\)](#)

A.12. R.S. 38:2212 adds the word **“responsive”** to the phrase **“responsible bidder”** to provide as follows:

*All public work exceeding the contract limit as defined in this Section, including labor and materials, to be done by a public entity shall be advertised and let by contract to the lowest **responsible and responsive bidder** who had bid according to the bidding documents as advertised, and no such public work shall be done except as provided in this Part.*

The new law provides that the bidding documents shall not require any bidder, other than the apparent low bidder, to furnish any other information or documentation, including the Attestation Affidavit and the E-Verification Form, any sooner than ten days after the date bids are opened; however, the apparent low bidder may submit such information or documentation at any time prior to the expiration of the ten-day period.

If the apparent low bidder does not submit the proper information or documentation as required by the bidding documents within the ten-day period, such bidder shall be

declared **non-responsive**, and the public entity may award the bid to the next lowest bidder, and afford the next lowest bidder not less than ten days from the date the apparent low bidder is declared non-responsive, to submit the proper information and documentation as required by the bidding documents, and may continue such process until the public entity either determines the low bidder or rejects all bids.

A responsive bidder, therefore, is the apparent low bidder who submits the proper documentation within ten days of the opening of the bids.

Q.13. Does the apparent low bidder who is disqualified as non-responsible have any recourse? [R.S. 38:2212\(X\)](#)

A.13. If the public entity letting the contract proposes to disqualify any bidder, either as a potential bidder or as the low bidder, on grounds that such bidder is not a "**responsible bidder**" such public entity shall do all of the following:

- (a) Give written notice of the proposed action to such bidder and include in the written notice all reasons for the proposed action.
 - (b) Give the bidder who is proposed to be disqualified the opportunity to be heard at an informal hearing at which such bidder is afforded the opportunity to refute the reasons for the proposed action.
- The informal hearing shall be conducted prior to award of the public work.
 - The informal hearing shall be a condition precedent to any action by the bidder adverse to the public entity, its representatives, employees, and designers.
 - The informal hearing shall be conducted by the public entity not later than five business days after the date of the notice of disqualification of such bidder. The public entity shall issue a ruling in writing and deliver it to the affected bidder not later than five business days after the date of the informal hearing.
 - No award of the contract for the public work shall be made by the public entity prior to the expiration of at least five working days following the date of issuance of the decision by the hearing official.
 - The provisions of this Subsection shall not apply to such actions of the Department of Transportation and Development.
 - Although not mentioned in the statute, once a disqualified vendor has exhausted all administrative remedies, a lawsuit remains an option.

Q.14. What preparations must the public entity make before advertising for a public work? [R.S. 38:2212\(H\)](#)

A.14. Every public entity intending to advertise a public work for bids [\[See Q.19\]](#) is required to estimate the probable construction costs of such public work or obtain an estimate from the project designer prior to advertising the public work for bids.

No public entity shall advertise a public work for bids unless the public entity has budgeted funds that meet or exceed the estimate of the probable construction costs for the project.

The estimate of probable construction costs for the project shall be made available at the time of bid opening, either by posting the estimate electronically or announcing aloud the estimate at the bid opening.

Any and all bidders' information shall be available upon request, either no sooner than fourteen days following the bid opening or after the recommendation of award by the public entity or the design professional, whichever occurs first. The requester shall pay reasonable reproduction costs.

These requirements shall not apply to the Department of Transportation and Development.

Q.15. How are bids delivered?

R.S. 38:2212(B)(6)

A.15. Bids may be delivered one of three ways.

- (1) For bids hand delivered by the bidder or his agent, a written receipt shall be handed to the deliverer;
- (2) Alternatively, bids shall be sent by registered or certified mail with a return receipt requested; or
- (3) Shall be submitted electronically.

The new law removes the stipulation that the requirement that all bids be sent by registered or certified mail shall not apply to bids received by municipal and parochial governing authorities. The current presumption is that these alternative requirements do apply to municipal and parochial governing authorities.

No public entity shall accept or take any bids, including receiving any hand delivered bids, on days that are recognized as holidays by the United States Postal Service.

Q.16. May the public entity reject any, or all, bids?

R.S. 38:2214

A.16. R.S. 38:2214(B) provides that the public entity may reject for just cause any and all bids. The statute does not define “**just cause**” for materials and supplies, but does define “**just cause**” for public works, including but not limited to:

- The public entity's unavailability of funds sufficient for the construction of the proposed public work;
- The failure of any bidder to submit a bid within an established threshold of the preconstruction estimates for that public work, as part of the bid specifications;
- A substantial change by the public entity prior to the award in the scope or design of the proposed public work;

- A determination by the public entity not to build the proposed public work within twelve months of the date for the public opening and reading of bids; and
- The disqualification by the public entity of all bidders.

Contract Limits for Public Works

Q.17. Are there changes to the threshold, or contract limit, for Public Works?

R.S. 38:2212(C)

A.17. The Office of Facility Planning and Control (OFPC) adjusts the contract limit for public works by an amount not to exceed the previous year's increase in the Consumer Price Index (CPI). The CPI is commonly used when it is necessary to adjust prices or costs to account for the effect of inflation on the real value of various costs. This adjustment is performed annually on February 1st. The new contract limit for public works contracts is published by OFPC using the rulemaking process in the Louisiana Register in January of each year. Currently, the contract limit for public works contract is **\$152,550**.

R.S. 38:2212 provides that despite provisions in the post-1974 home rule charter to the contrary, the City of Alexandria was not required to bid any public work that is less than the contract limit established in R.S. 38:2212 without an affirmative act of its governing authority to adopt a more restrictive contract limit.

Procedures for Public Works

Q.18. What are the procedures for executing contracts for public works?

R.S. 38:2212(A)

A.18. All contracts for public works exceeding the current contract threshold of **\$152,550** must be advertised for bid and let for contract with the lowest responsible and responsive bidder.

The Legislative Auditor recommends that contracts for public works valued at **\$152,550** or less, be administered through a Request for Proposal (RFP) process and/or solicitation of at least three bids, even though the statute does not require them to be bid.

Public entities through their employees may undertake contracts for public works projects costing less than the contractual limit. All materials and supplies used in the construction must, however, be purchased in accordance with the Public Bid Law pursuant to R.S. 38:2212.1. **R.S. 38:2212(N)**

All contracts for public works by public entities must use the Louisiana Uniform Public Work Bid Form established by the Office of Facility Planning and Control. **R.S. 38:2212(B)(2).**

NEW
2017

Act 399 of 2017 enacted R.S. 38:2211.1 to restrict public entities that fail to comply with audit requirement from letting public contracts. R.S. 38:2211.1 prohibits public entities who have failed to comply with the audit provisions of R.S. 24:513 from letting any public contracts under the Public Bid Law that utilizes any state funds, whether received through direct appropriations or through transfer from another public entity or whose funding relies upon the full faith and credit of the state. For the purposes of this provision, the term "state funds" includes any federal funds, including grants, that pass through the state. Any public entity that has been subject to this restriction, upon coming into compliance with the provisions of R.S. 24:513, shall immediately inform the Legislative Audit Advisory Council (LAAC) in writing of their compliance and, upon confirmation by LAAC, shall be immediately released from the restrictions that were imposed.

The Louisiana Uniform Public Work Bid Form is published in the Louisiana Administrative Code under Title 34, Government Contracts, Procurement and Property Control, Part III. Facility Planning and Control, Chapter 3. [Louisiana Uniform Public Work Bid Form](#).

Under no circumstances shall there be a division or separation of any public work project into smaller projects (splitting) if the division or separation would have the effect of avoiding the requirement that public work be advertised and let by contract to the lowest responsible and responsive bidder. **R.S. 38:2212(V)**

Q.19. What are the requirements regarding the advertisement of bids for public works? [R.S. 38:2212](#)

A.19. All advertisements for contracts for public works exceeding **the contract limit for public works contracts (currently greater than \$152,550)**, unless an exception applies, shall be published once a week for 3 different weeks in a newspaper in the locality; the first advertisement shall appear at least 25 days before the opening of bids and not occur on a Saturday, Sunday, or other legal holiday **R.S. 38:2212(G)**.

- Although the word 'locality' is not defined, the AG has interpreted it to mean the area where the political subdivision is located **AG Op. No. 83-720**.
- Contracts by a public entity for any project to restore or rehabilitate a levee that is not maintained with federal funds nor undertaken by the public entity with its own resources and employees must be advertised for bid if they exceed \$1 million dollars. This exception for a heightened contract limit is slated to expire on December 31, 2018 **R.S. 38:2212(C)(3)**.
- Bidding documents shall be available to bidders on the day of the first advertisement and until 24 hours before the bid opening date **R.S. 38:2212(G)(2)**.



- **Contractor certification Act 49 of 2017** amended R.S. 37:2163 to provide that all architects, engineers, and awarding authorities shall place in their bid specifications the requirement that a contractor shall certify that he holds an active license by displaying his license number on the bid envelope. If the bid does not display the contractor's license number the bid shall be automatically rejected.
- Public entities must include all bid documents as defined in R.S. 38:2211(A)(1), on the electronic website accepting the electronic bids **R.S. 38:2212(E)(7)**.
- When attendance by bidders is mandated at a pre-bid conference, the date, place, and time of the pre-bid conference shall be stated in the first advertisement **R.S. 38:2212(I)**.
- If at the end of the contract document phase, it is determined that the designer's estimate is more than the funds budgeted by the public entity for the project, the project shall not be advertised for bid. The designer's estimate shall be read aloud upon opening bids **R.S. 38:2212(H)**.
- The Construction or Contract Document Phase is the coordination of all technical drawings and designs related to the project, the development of the specifications documents, finalization of details, and an updated statement of probable cost.
- If political subdivisions are required to, allowed to, or elect to allow for electronic submission of bids, the advertisement shall contain the electronic address of the public entity and shall establish the specific times for public access to the electronic interactive environment for purposes of submission of bids **R.S. 38:2212(E)**.

Q.20. May changes be made to the contract after the contract has been executed? **R.S. 38:2212(M)**

A.20. Yes, the contract may be amended through change orders, if they are within the scope of the contract.

- All public work contracts shall contain provisions authorizing the issuance of change orders within the scope of the contract.
- All change orders shall be in writing or in electronic format if the public entity is capable of receiving change orders electronically. All change orders shall be signed by the contractor and the public entity or its design representative.
- The public entity shall pay the contractor for work performed by change order not later than sixty days after the date the public entity approves the application for payment for completion of the work performed in the change order.
- Any change order outside the scope of the contract shall be let out for public bid if it exceeds the contract threshold defined herein.

- Any change order pertaining to public work, not required to be let out for public bid, shall either be negotiated in the best interest of the public entity or let out for public bid. Where the change order is negotiated, the public entity shall require that such change order be fully documented and itemized as to costs, including material quantities, material costs, taxes, insurance, employee benefits, other related costs, profit, and overhead. If certain unit prices are contained in the initial contract, no deviations shall be allowed in computing negotiated change order costs.

Q.21. May a public entity construct a public work using its own employees without bidding? [R.S. 38:2212\(N\)](#)

- A.21.** Public works that are estimated to cost less than the contract limit may be undertaken by the public entity with its own employees. Those contracts let by any public entity for public works estimated to cost more than the contract limit shall be advertised and let by contract to the lowest responsible and responsive bidder.

Q.22. May construction managers or other third party consultants employed by a public entity manage a construction project as the general contractor or act in the role of a general contractor? [R.S. 38:2212\(L\)](#)

- A.22.** No, the practice of using construction managers to oversee, direct, or otherwise perform the role of a general contractor on a public works project is prohibited [AG Op. No. 12-0232](#). This restriction shall not apply to the initial construction of a hospital, medical facility, or a combination of both, constructed by the Orleans Hospital Service District, but shall apply to the construction of any additions or modifications of a hospital, medical facility, or a combination of both, constructed by the Orleans Hospital Service District following the completion of the initial construction.

Q.23. What is the time period for awarding public works contracts? [R.S. 38:2215](#)

- A.23.** R.S. 38:2215 provides that a public entity shall act not later than forty-five calendar days after the date of opening bids to award the public works contract to the lowest responsible and responsive bidder or to reject all bids. If, however, the public entity and the lowest responsible and responsive bidder agree by mutually written consent, the deadline for award may be extended in increments of thirty calendar days.

If the lowest responsible and responsive bidder has timely provided all documents required by R.S. 38:2212, and no injunction or temporary restraining order is in effect, the lowest responsible and responsive bidder and the public entity shall execute the contract not later than sixty calendar days after the date of the public entity's award of the contract to the lowest responsible and responsive bidder.

The public entity shall issue to the contractor a notice to proceed with the project or work order not later than thirty calendar days following the date of the second party's execution of the contract. However, the public entity and the contractor, upon mutual written consent of both parties, may agree to extend the deadline to issue the notice to proceed.

The provisions of this law do not apply to contracts to be financed by bonds that are required to be sold after opening of bids on the contract, or when the contract is to be financed in whole or in part by federal or other funds that will not be readily available at the time bids are opened, or on contracts that require a poll of the Legislature of Louisiana before funds are available to fund the contract. This exception shall be mentioned in the bidding documents for the project and in the official advertisement for bids required in accordance with R.S. 38:2212.

These provisions are not subject to waiver.

Responsible and Responsive Bidder

R.S. 38:2212

Q.24. What is a responsible and responsive bidder?

A.24. A responsible and responsive bidder, according to R.S. 38:2212(A)(1), is one whose bid meets the requirements set out in the advertised bidding documents and who provides the required documentation within ten days of the bid opening. These documents may be required by statute, the Administrative Code, or the bidding documents.

**NEW
2017**

- **Contractor certification Act 49 of 2017 amended R.S. 37:2163 to provide that all architects, engineers, and awarding authorities shall place in their bid specifications the requirement that a contractor shall certify that he holds an active license by displaying his license number on the bid envelope. If the bid does not display the contractor's license number the bid shall be automatically rejected.**

The low bidder is required to furnish any other documentation, including the attestation required under R.S.38:2212.10, within ten days of the bid opening. The governing authority of any publicly owned commercial aviation airport to the Sewerage and Water Board of New Orleans and all agencies of the City of New Orleans including the Regional Transit Authority and the New Orleans Aviation Board are required to have the two lowest bidders furnish any other required documentation and attestations three days after the bid opening.

Q.25. May the requirements of R.S. 38:2212 be waived?

R.S. 38:2212(B)

A.25. Public entities shall not waive the provisions and requirements of R.S. 38:2212, requirements stated in the advertisement for bids, nor those required on the uniform bid form.

- ❖ *“...the public entity should not include any requirements in its advertisement for bids or bid form that it considers insignificant or waivable, because once included, these requirements are non-waivable as a matter of law.” AG Op. No. 09-0304.*

Q.26. What happens if a bidder is not a “responsible bidder”? [R.S. 38:2212\(X\)](#)

A.26. If the public entity letting the contract proposes to disqualify any bidder, either as a potential bidder or as the low bidder, on grounds that such bidder is not a “**responsible bidder**” the public entity shall:

- Give written notice of the proposed action to the bidder and include in the written notice all reasons for the proposed action;
- Give the bidder who is proposed to be disqualified the opportunity to be heard at an informal hearing at which the bidder is afforded the opportunity to refute the reasons for the proposed action.
 - The informal hearing shall be conducted prior to award of the public work.
 - The informal hearing shall be a condition precedent to any action by the bidder adverse to the public entity, its representatives, employees, and designers.
 - The informal hearing shall be conducted by the public entity not later than five business days after the date of the notice of disqualification of the bidder. The public entity shall issue a ruling in writing and deliver it to the affected bidder not later than five business days after the date of the informal hearing.
 - No award of the contract for the public work shall be made by the public entity prior to the expiration of at least five working days following the date of issuance of the decision by the hearing official.

The disqualified vendor has the right to seek redress in a court of law after exhausting administrative remedies.

These provisions do not apply to the Department of Transportation and Development.

Q.27. May the advertisement for bids pre-qualify certain individuals and thereby disqualify others? [R.S. 38:2215](#)

A.27. No, the general rule is that no pre-qualification may occur. For instance, geographic restrictions limiting the distance between the vendor and the public entity are not allowed. However, the entity may specify a time limit for needed repairs if included in the contract.

There are a very few exceptions to the general rule. An example of an exception under R.S. 38:2215 is that contracts for historic restoration for projects other than bridges and roads may be pre-qualified, due to the specific skills needed for the job.

Electronic Bidding Requirements

Q.28. What is electronic bidding? [R.S. 38:2212\(E\) and R.S. 38:2212.1\(B\)\(4\)](#)

A.28. Public entities shall provide, as an additional bidding option, a uniform and secure electronic interactive system for the submittal of bids for public contracts, both public works and materials and supplies, requiring competitive bidding. Any public entity, (including local entities) providing an electronic system shall follow the standards for the receipt of electronic bids adopted by the office of the governor, division of administration, and the office of information technology (See LAC 4:XV.701, providing that any special condition or requirement for the submission shall be specified in the advertisement for bids.)

Q.29. Who is exempt from the electronic bidding requirement under the Public Bid Law?

A.29. The exemptions for **public works** provided by R.S. 38:2212(E) include:

- Public entities that are currently without available high-speed Internet access until high-speed Internet access becomes available;
- Any parish with a police jury form of government and a population of less than twenty thousand; Any city or municipality with a population of less than ten thousand;
- Any other public entity that is unable to comply with the law without securing and expending additional funding;
- Public entities have the option to require that all bids be submitted electronically for any competitive bid let out for public bid.
 - Public entities shall include all bidding documents as defined in R.S. 38:2211(A)(2), on the electronic website accepting the electronic bids.

The exemptions for **materials and supplies** provided by R.S. 38:2212.1(B)(4) include:

- Public entities that are currently without available high-speed Internet access until high-speed Internet access becomes available;
- Any parish with a police jury form of government and a population of less than twenty thousand;
- Any city or municipality with a population of less than ten thousand; and
- Any special service district created by a police jury form of government that is unable to comply without securing and expending additional funding.
 - Public entities shall have the option to require that all bids be submitted electronically for any competitive bid let out for public bid.

Change Orders

[R.S. 38:2211\(A\)\(3\)](#)

[Q.30.](#) What is a change order?

[R.S. 38:2211\(A\)\(3\)](#)

A.30. A change order is any contract modification that includes an alteration, deviation, addition, or omission as to a preexisting public work contract that authorizes an adjustment in the contract price, contract time, or an addition, deletion, or revision of work. Change orders may be either “within the scope of the contract” or “outside the scope of the contract.”

[Q.31.](#) What is a change order that is within the scope of the contract?

[R.S. 38:2211\(A\)\(3\)\(c\)](#)

A.31. A change order is within the scope of the contract when it does not alter the nature of the thing to be constructed and that is an integral part of the project objective.

[Q.32.](#) What is a change order that is outside the scope of the contract?

[R.S. 38:2211\(A\)\(3\)\(b\)](#)

A.32. A change order is outside the scope of the contract when it alters the nature of the thing to be constructed or that is not an integral part of the project objective (See the AG Op. discussed in [\[Q.33\]](#)).

[Q.33.](#) What are the requirements for a change order?

[R.S.38:2212\(M\)](#)

[R.S. 38:2222](#)

A.33. All change orders shall be in writing or in electronic format if the public entity is able to receive change orders electronically. All change orders shall be signed by the contractor and the public entity or its design representative.

The public entity shall pay the contractor for work performed by change order not later than sixty days after the date the public entity approves the application for payment for completion of the work performed in the change order.

- Change orders within the scope of the contract may be negotiated in the public's best interest or let out for bid. Public entities may wish to consider letting out for bid change orders within the scope which are more than the contract limit as a best use of public funds.
- Change orders outside of the scope of the contract that exceed the contract limit must be let for bid.
- R.S. 38:2222 requires that each change order shall be recorded by the public entity which entered into the contract in the office of the recorder of mortgages in the parish where the work is to be done or if not a public work, where the entity is domiciled, not later than 30 days after the date of the change order which requires that the recordation take place. The requirement applies to:

- Change order to a public works contract or to a contract for materials and supplies that adds an amount of 10% or more of the original contract amount, if the additional amount is at least \$10,000 or
 - All change orders to a contract aggregating to an amount of 20% or more of the original contract amount if the additional amount is at least \$10,000.
 - The original contract, if not previously recorded, shall be recorded with the change order.
- This requirement does not apply to the office of facility planning and control and the office of state purchasing.
- ❖ **AG Op. No. 03-0263** *The statute does not place any limit on the size or value of a change order, but does require that any change order be “within the scope of the contract”. A change order “outside the scope of the contract” and in excess of the \$100,000 (now \$152,550) contract limit must be let out for public bid. Change order means an alteration, deviation, addition or omission to a preexisting public work contract and a change order “within the scope of the contract” means a change order which does not alter the nature of the thing to be constructed and which is an integral part of the project objective.*

It is therefore the opinion of this office that the proposed addition to the existing public works contract is outside the scope of the contract and cannot be the subject of a change order. However, because the amount of the additional public work is less than the contract limit the Police Jury may either negotiate the contract with the existing contractor alone, include other contractors in the negotiations, or it may let the contract out for public bids.

Addenda

[R.S. 38:2212\(O\)](#)

Q.34. What are addenda?

A.34. Addenda are used to make changes to the bid documents -- often to extend the bid period. As with change orders, addenda must be within the scope of the project.

Q.35. What are the requirements for addenda?

A.35. The bid period may be extended up to 30 days through the issuance of an addendum without the requirement of re-advertising.

If, however, the addendum is issued within 72 hours of the advertised time of opening bids, the opening of bids is extended for at least 7 but not more than 21 working days without the requirement of re-advertising. The addendum shall state the revised time and date of opening of bids.

If an addendum modifying plans and specifications is issued within 7 days prior to the advertised time for opening bids, the public entity shall transmit -- within 24 hours of the issuance of the addendum -- a copy of the addendum to all prime bidders who have requested bid documents by one of the following methods:

- (1) Facsimile transmission;
- (2) E-mail; or
- (3) Hand-delivery.

Materials and Supplies

[R.S. 38:2212.1](#)

Q.36. What are materials and supplies?

A.36. Materials and supplies are not defined in the statutes; in this context, however, they are commonly understood to be the movable property necessary to conduct public business, from paper and pens to computers and printers.

Q.37. Are all contracts for the purchase of materials and supplies subject to the Public Bid Law?

A.37. Local political subdivisions and local governmental entities are required to use the Public Bid Law for the procurement of materials and supplies if the cost is over the contract limit of \$30,000, unless an exception exists. Examples of exceptions include: group purchasing options for hospitals (R.S. 38:2212.1(G)) and schools (R.S. 38:2212.1(N)); emergency procurements; or buying items off the state contract using the LPC. Transactions between public entities are not subject to the Public Bid Law, as long as a fair price is received for the goods.

State entities are required to use the LPC for the purchase of materials and supplies, and may purchase off the state contract or bid for items over \$25,000 pursuant to R.S. 39:1594. [Executive Order BJ 10-16](#) provides executive branch entities with certain procurement procedures for items under \$25,000.

Contract Limits for Materials and Supplies

Q.38. What is the threshold, or contract limit (minimum), for purchases of materials and supplies by local political subdivisions?

A.38. Contracts by local political subdivisions and local governmental entities for purchases of materials and supplies with a value of more than **\$30,000** must be advertised and let for contract with the lowest responsible bidder. Purchases of \$10,000 or more, but less than \$30,000 dollars, shall be made by obtaining no fewer than three telephone or facsimile quotations. For purchases less than \$10,000, but greater than \$1,000, prudent practice suggests obtaining at least 3 written quotes, though the law does not so require.

Q.39. Does an exception to this threshold exist for purchase by a local governmental unit of a used or new motor vehicle for conversion into a law enforcement vehicle? Please explain the meaning of [R.S. 38:2212.1\(A\)\(2\)\(a\)](#).

A.39. The original purpose of R.S. 38:2212.1(A)(2)(a) was to provide an alternative procedure for use by local governments to purchase law enforcement vehicles valued under the contract limit for the purchase of materials and supplies as provided by R.S. 38:2212.1(A)(1)(a). At the time R.S. 38:2212.1(A)(2)(a) was last amended, the contract limit for the purchase of materials and supplies was \$20,000. The use of sealed competitive bidding was still required if the law enforcement vehicle purchased under R.S. 38:2212.1(A)(2)(a) was valued over the \$20,000 contract limit.

When the general contract limit was raised to \$30,000 by Act 392 of the 2009 Regular Session, the Legislature did not amend the language in R.S. 38:2212.1(A)(2)(a) to match the new higher bid threshold, effectively repealing it. It appears that local governments purchasing used or new motor vehicles for law enforcement that cost more than \$20,000 but that do not otherwise exceed the \$30,000 general contract limit, should obtain three quotes in accordance with R.S. 38:2212.1(A)(1)(b).

Purchases of \$20,000 or less for this purpose appear to remain subject to the exception contained in R. S. 38:2212.1(A)(2)(a) and the purchase, while not requiring a specific amount or type of quotes, should be fully documented in the public entity's contract files. Although the language of R.S. 38:2212.1(A)(2)(a) does not provide for a specific number of quotes to be obtained, it does appear to require that more than one form of documentation be obtained to support the reasonableness of the purchase and be retained in the contract files of the public entity.

Procedures for Procurement of Materials and Supplies

Q.40. What procedures exist for procurement of Materials and Supplies?

A.40. Absent an exception, contracts by local political subdivisions and local governmental entities for the purchase of materials and supplies that exceed the threshold of \$30,000 must be advertised for bid and let for contract to the lowest responsible bidder.

Public entities that have contracts for purchases of materials and supplies for less than **\$30,000** but greater than or equal to **\$10,000** must, pursuant to R.S. 38:2212.1(A)(1)(b):

**Obtain at least 3 telephone or facsimile quotes; and
Obtain written confirmation of the accepted offer.**

If a lower bid than the accepted bid is rejected, the reason for the rejection must be noted.

The attorney general suggests that although not mandatory, public entities seeking contracts for purchases of materials and supplies for less than \$1,000 should, as part of

a good public policy requiring governmental accountability, obtain and document at least 3 verbal quotes, if possible.

The AG further suggests that public entities seeking contracts for purchases of materials and supplies for less than \$10,000, but greater than \$1,000, should, as part of good public policy requiring governmental accountability, obtain at least 3 written quotes.

Q.41. What requirements exist for purchases made by a public safety agency spending federal grant dollars?

A.41. Louisiana law provides that purchases made by a public safety agency following the guidelines and restrictions established pursuant to the expenditure of federal grant dollars shall be made by obtaining not less than three telephone or facsimile quotations. The agency must, however, also comply with the federal grant requirements, which may include competitive bidding. If stricter, federal law must be followed.

Q.42. What requirements exist for the advertisement of bids? [R.S. 38:2212.1\(B\)\(1\)](#) and [R.S. 38:2214](#)

A.42. The advertisement for bids shall be published 2 times in a newspaper in the locality. The word 'locality' is not defined; the AG has interpreted it to mean the area where the political subdivision is located **AG Op. No. 83-720**.

The first publication must appear at least 15 days before the opening of the bids and shall not occur on a Saturday, Sunday or legal holiday.

Plans and specifications shall be available to bidders the day of the first advertisement and until 24 hours before bid opening date.

R.S. 38:2214(A), states that the advertisement for bids shall include the time and place that the bids will be received and shall at that time and place publicly open the bids and read them aloud. No public entity shall accept or take any bids including hand-delivered bids on days that are recognized as holidays by the United States Postal Service.

Q.43. May a public entity specify alternates? [R.S. 38:2212.1\(B\)\(3\)](#)

A.43. The public entity may specify no more than three (3) alternates and must accept them in the order they appear on the bid form. Determination of the low bidder shall be on the basis of the sum of the base bid and any alternates accepted. However, the public entity may accept alternates in any order that does not affect determination of the low bidder.

Q.44. May a public entity specify a particular brand? R.S. 38:2212.1(C)(1) and (2)

A.44. Yes, if in the public interest, a public entity may specify a particular brand, make, or manufacturer in the specifications using the model or catalog number. These specific brand names denote the quality standard of the product desired and does not restrict prospective bidders; equivalent products must be acceptable.

Q.45. What are the rules on the opening of bids?

R.S. 38:2214

A.45. R.S. 38:2212.1(J) provides that the opening of bids is governed by the provisions of R.S. 38:2214. This statute requires the public entity to designate the time and place that the bids will be received in the advertisement for bids. It further requires the public entity at that time and place to publicly open the bids and read them aloud. No public entity shall accept or take any bids, including hand-delivered bids, on days that are recognized as holidays by the United States Postal Service.

Q.46. May the public entity reject any, or all, bids?

R.S. 38:2214

A.46. R.S. 38:2214(B) provides that the public entity may reject any and all bids for just cause. The statute does not define “just cause” for materials and supplies, but does define “just cause” for public works (See [\[Q.16.\]](#))



➤ **Contractor certification [Act 49 of 2017](#)** amended R.S. 37:2163 to provide that all architects, engineers, and awarding authorities shall place in their bid specifications the requirement that a contractor shall certify that he holds an active license by displaying his license number on the bid envelope. If the bid does not display the contractor’s license number the bid shall be automatically rejected.

Electronic Bidding

Q.47. What is electronic bidding?

R.S. 38:2212.1(B)(4)(a)

A.47. Contractors shall be provided the option to submit bids for public contracts through a uniform and secure electronic interactive system. Political subdivisions shall follow the standards for the receipt of electronic bids adopted by the office of the governor, division of administration, and the office of information technology as provided for in LAC 4:XV.701, and shall make the appropriate provisions necessary for the acceptance of electronic bids for all purchases requiring competitive bidding. Any special condition or requirement for the submission shall be specified in the advertisement for bids.

Q.48. Who is exempt from the electronic bidding requirement under the Public Bid Law?

A.48. The exemptions for **public works** provided by R.S. 38:2212(E) include:

- Public entities that are currently without available high-speed Internet access until high-speed Internet access becomes available;
- Any parish with a police jury form of government and a population of fewer than twenty thousand;
- Any city or municipality with a population of fewer than ten thousand;
- Any other public entity that is unable to comply with the law without securing and expending additional funding

- Public entities have the option to require that all bids be submitted electronically for any competitive bid let out for public bid.
- Public entities shall include all bidding documents as defined in R.S. 38:2211(A)(2), on the electronic website accepting the electronic bids.

The exemptions for **materials and supplies** provided by R.S. 38:2212.1(B)(4) include:

- Public entities that are currently without available high-speed Internet access until high-speed Internet access becomes available;
 - Any parish with a police jury form of government and a population of fewer than twenty thousand;
 - Any city or municipality with a population of fewer than ten thousand; and
 - Any special service district created by a police jury form of government that is unable to comply without securing and expending additional funding.
- Public entities shall have the option to require that all bids be submitted electronically for any competitive bid let out for public bid.

Q.49. May electronic bidding be used for “reverse auctions”?

R.S. 38:2271

A.49. Yes, if the procurement officer for the political subdivision determines that electronic bidding is in the best interest of the political subdivision and that electronic online bidding is more advantageous than other methods, reverse bidding may be used.

R.S. 38:2271 provides the detailed procedure. The statute defines "reverse auction" as a competitive online solicitation process on the internet for materials, supplies, services, products, or equipment in which vendors compete against each other online in real time in an open and interactive environment. The Act further provides that in a reverse auction, the political subdivision shall develop policies and may require, among other things, that:

- (1) Vendors register before the opening date and time.
- (2) Vendors be prequalified prior to placing bids.
- (3) The solicitation shall designate an opening date and time and the closing date and time.
- (4) At the opening date and time, the using agency shall begin accepting online bids and continue accepting bids until the bidding is officially closed. Registered bidders shall be allowed to lower the price of their bids below the lowest bid posted on the Internet until the closing date and time.
- (5) Bidders' identities shall not be revealed during the bidding process.
- (6) All bids shall be posted electronically and updated on a real-time basis.

- (7) The using political subdivision shall retain the right to cancel the solicitation if it determines that it is in the political subdivision's best interest.
- (8) The using political subdivision shall retain its existing authority to determine the criteria that will be used as a basis for making awards.

Q.50. What are the notice requirements for a “reverse auction”? [R.S. 38:2271\(C\)](#)

A.50. R.S. 38:2271 requires adequate public notice for purchases of materials, supplies, or equipment by a political subdivision using a reverse auction be given as follows:

- The advertisement or notice shall be published twice in a newspaper in the locality, the first advertisement to appear at least 15 days before the opening date of the reverse auction. The word 'locality' is not defined; the AG has interpreted it to mean the area where the political subdivision is located **AG Op. No. 83-720**.
- In addition to the newspaper advertisement, a political subdivision may also publish an advertisement by electronic media available to the general public.
- The first publication of the advertisement shall not occur on a Saturday, Sunday, or legal holiday.

Exceptions

Q.51. What are the rules for purchases from the federal government related to homeland security? [R.S. 38:2212.6](#)

A.51. R.S. 38:2212.6 provides that any public procurement unit may procure materials, supplies, equipment, and services related to homeland security from federal General Services Administration supply schedules. Such purchases shall:

- Use a Louisiana distributor.
- Use the competitive ordering procedures of the federal General Services Administration.
- Receive prior approval from the director of the Governor's Office of Homeland Security and Emergency Preparedness, or his designee.

Q.52. Does the Public Bid Law apply to a procurement transaction between two public entities? [R.S. 38:2212.1\(D\)](#)

A.52. Generally no, R.S. 38:2212.1(D) provides that the Public Bid Law does not apply to:

- a public entity purchasing surplus materials and supplies from another public entity;
or
- the government of the United States; or

- a transaction governed by the procurement code.

Q.53. What are the exceptions to bidding requirements for contracts for materials and supplies?

A.53. Yes, there are exceptions for certain purchases of materials and supplies. These exceptions include:

- purchases off the State Contract under cooperative purchasing agreements; **R.S. 38:2212.1(F)**
- purchases of surplus materials and supplies from another public entity or the government of the United States or if the particular transaction is governed by the procurement code; **R.S. 38:2212.1(D)**
- purchases off of the Federal General Services Administration Lists, provided that the items are not otherwise available cheaper on State Contract and the public entity utilizes a Louisiana licensed dealer or distributor; R.S. 38:2212.1(E)
- purchases by hospitals service districts under qualified group purchasing organizations; **R.S.38:2212.1(G)**
- purchases of used fire and emergency response vehicles, including associated equipment, with a per unit purchase cost of less than one hundred thousand dollars; **R.S. 38:2238, et seq.**
- lease, rental, or purchases of telecommunications data processing systems, including equipment, and related services, by political subdivisions through a request for proposals; **R.S. 38:2237**
- purchases of materials, equipment and supplies by school districts and schools through a school district purchasing co-op; Act 823 of the 2014 Legislative Session; **R.S. 38:2212.1(N)** and
- purchase of materials, supplies, vehicles or equipment by the State, any levee district, levee drainage district, municipality, parish or other political subdivision of the state through an existing public contract of another political subdivision within one year of the opening of bids; R.S. 38:321.1

Q.54. What is the effect of the R.S. 38:321.1 “piggy backing” provision? R.S. 38:321.1

A.54. R.S. 38:321.1 provides an alternative procurement method as a cost-savings alternative for certain purchases. This method, commonly referred to as “piggy backing,” provides that, in addition to the procurement methods available to all political subdivisions, the State, levee districts, levee drainage districts, municipalities, parishes or other political subdivisions of the state may purchase materials, supplies, vehicles or equipment through an existing public contract of

another political subdivision within one (1) year of the opening of bids, provided that the following conditions are met:

- (1) The contract was bid in compliance with R.S. 38:2211 et seq.*
- (2) The total purchases on the contract do not exceed two times what was purchased by the political subdivision bidding the contract.
- (3) The written consent of the political subdivision which bid the contract is obtained, as well as the contract number, and if applicable, the resolution accepting the contract.
- (4) The vendor agrees to the additional purchase.
- (5) The vendor, product, materials, supplies, vehicles, or equipment are identical to those specified in the existing public contract of the other political subdivision, and the price is the same as the original contract price.

**The State, municipality, parish or other political subdivision of the state may rely on the certificate of the political subdivision that the contract was bid in compliance with state law.*

A state agency or any local government agency may rely on certificates of the office of state procurement that the contract was bid in compliance with Title 39 and was adopted as a statewide cooperative contract pursuant to the cooperative purchase provisions of R.S. 39:1702, et seq.

Emergency Exception

Q.55. Are there exceptions to the Public Bid Law for emergencies? [R.S. 38:2212\(P\)](#)

A.55. Yes, exceptions exist for 2 types of emergency situations: emergency and extreme emergency. The purchase of materials or supplies in the case of an extreme public emergency shall be governed by the provisions of **R.S. 38:2212(D)**, which is now **R.S. 38:2212(P)**. **R.S. 38:2212.1(K)**

Q.56. What is an emergency? [R.S. 38:2211\(A\)\(5\)\(a\)](#)

A.56. An emergency is an unforeseen mischance bringing with it destruction or injury of life or property or the imminent threat of such destruction or injury. An emergency may also result from an order by any judicial body to take any immediate action that requires construction or repairs absent compliance with the formalities of the Public Bid Law, because of insufficient time to follow the advertising requirements as provided in R.S. 38:2212.

For a municipally owned public utility, an emergency shall be deemed to exist and the public entity may negotiate as provided by R.S. 38:2212(P) for the purchase of fuel for

the generation of its electric power if the public entity has first advertised for bids as provided by this Part but has failed to receive more than one bid.

Q.57. **When is the emergency exception applied?** [R.S. 38:2212\(P\)](#)

A.57. After the emergency has been certified by the public entity at a public meeting, the Public Bid Law may be waived provided that notice was given to the public by publishing in the official journal within 10 days of declaring the public emergency.

Q.58. **What special documentation is required for purchases under the emergency exception?** [R.S. 38:2212\(P\)](#)

A.58. Every contract that is negotiated shall be supported by written determination and findings by the public entity justifying the emergency.

If contract action is taken pursuant to telephone or other oral offers, written confirmation of the accepted offer must be included in the file.

The file of the public entity must contain:

- ❖ A minimum of the description of the work to be performed;
- ❖ The name and address of each offeror quoting; and
- ❖ The performance time and terms of each offer.

If quotes lower than the accepted quote are not accepted, reasons for rejection must be in the file. Records must be kept a minimum of 6 years.

Extreme Emergency Exception

Q.59. **What is an extreme emergency?** [R.S. 38:2211\(A\)\(5\)\(b\)](#)

A.59. An extreme emergency is a catastrophic event that causes the loss of ability to obtain a quorum of the members necessary to certify the emergency prior to making the expenditure to acquire materials or supplies or to make repairs necessary for the protection of life, property, or continued function of the public entity.

Q.60. **How is the extreme emergency exception applied?** [R.S. 38:2212\(P\)](#)

A.60. In the event of an emergency or an extreme emergency, the political subdivision may make such purchases to deal with the emergency as may be required immediately. After the events requiring immediate emergency procurement, the president of the police jury, the president of the parish council, the mayor of the municipality, or a person designated to act on behalf of the governing authority of the political subdivision, shall declare that an extreme emergency exists and shall cause such declaration to be published in the official journal within ten days or as soon as practicable thereafter.

Q.61. What documentation is required for purchases under the extreme emergency exception? [R.S. 38:2212\(P\)](#)

A.61. The requirements are the same as for emergencies listed above.

Other Exceptions or Limitations

Q.62. What exceptions or limitations apply to contracts for public works and materials and supplies? [R.S. 38:2212.6](#)

A.62. Exceptions exist for purchases for homeland security from federal General Services Administration supply schedules. These purchases must:

- Use a Louisiana distributor.
- Use the competitive ordering procedures of the federal General Services Administration.
- Receive prior approval from the director of the Governor's Office of Homeland Security and Emergency Preparedness, or designee.

Q.63. What limitations apply to a consultant competing for contracts?

[R.S. 38:2212.7](#)

A.63. R.S. 38:2212.7 provides limitations on consultants competing for contracts. Any person contracting with an agency for the purposes of developing bidding documents, requests for proposals, or any other type of solicitation related to a specific procurement shall be prohibited from bidding, proposing, or otherwise competing for award of that procurement. Such persons shall further be prohibited from participating as subcontractors related to the award of that procurement.

The statute further notes, however, that certain activities are not considered to be **“developing bidding documents, requests for proposals, or any other type of solicitation”** and would therefore not prevent a consultant from competing.

These activities are:

- (1) Architectural and engineering programming.
- (2) Master planning.
- (3) Budgeting.
- (4) Feasibility analysis.
- (5) Constructability review.
- (6) Furnishing specification data or other product information.
- (7) Any other services that do not establish selection qualifications or evaluation criteria for the procurement of an architect or engineer.

Prohibitions

Q.64. What provisions in the Public Bid Law address rejecting bids from convicted felons? [R.S. 38:2212.9](#)

A.64. R.S. 38:2212.9 provides that in awarding contracts, any public entity is authorized to reject the lowest bid from or avoid awarding the contract to, a business in which any individual with an ownership interest of five percent or more has been convicted of, or has entered a plea of guilty or *nolo contendere* to any state felony crime or equivalent federal felony crime committed in the solicitation or execution of a contract or bid awarded under the laws governing public contracts.

The law does not impose a duty, responsibility, or requirement on a public entity to perform criminal background checks on contractors, vendors, or subcontractors. It shall be the responsibility of any person, company, or entity making an allegation of prior convictions on the part of any individual with an ownership interest of five percent or more in any bidder to present prima facie evidence supporting their claim to the public entity. If proved, the company whose bid is rejected shall be responsible to the public entity for the costs of rebidding, the increased costs of awarding to the second low bidder, or forfeiture of the bid bond, whichever is higher.

Q.65. May a commission, fee or other consideration be split or shared?

[R.S. 14:141](#)

A.65. Criminal code article R.S. 14:141 makes it a crime to split fees or commissions derived from the sale of goods and services with a public officer or employee in his official capacity. The penalty upon conviction is a mandatory fine of not more than \$10,000 or imprisonment for not more than 10 years, or both.

Telecommunications and Data Processing Procurement Law

Q.66. How do political subdivisions procure computers and software?

[R.S. 38:2234](#)

A.66. Pursuant to R.S. 38:2234, known as the Political Subdivisions Telecommunications and Data Processing Procurement Law, political subdivisions may lease, rent, or purchase telecommunications or data processing systems, including equipment, and related services, through a Request for Proposal (RFP).

This law is a permissive alternative to the Public Bid Law. Political subdivisions may still use public bid or purchase such items off the state contract.

Procedures for such procurement are contained in [R.S. 38:2237](#).

- Public notice of the RFP shall be given at least thirty days prior to the date scheduled for opening the RFP.

- Written notice of the RFP shall be mailed to persons and corporations who are known to be in a position to furnish the equipment, systems, and related services.
- This public notice may also be given by electronic media available to the general public.
- The RFP will indicate the relative importance of price and other evaluation factors, shall clearly define the tasks to be performed under the contract, the functional specifications, the criteria to be used in evaluating the proposals, and the time frames within which the work must be completed.
- An award shall be made to the responsible offeror whose proposal is determined in writing by the governing authority of the political subdivision to be the most advantageous, considering price and other evaluation factors set forth in the RFP.
- The governing authority of the political subdivision may reject all proposals when the action is deemed in the best interest of the political subdivision.
- If vendors submit written proposals, the proposals of the successful vendor shall be incorporated into the final contract consummated with that vendor.

Political subdivisions may, at their option, procure telecommunications and data processing equipment, systems, or related services in accordance with the Public Bid Law. However, in the event an invitation for bids is used in lieu of a RFP, written notice of that fact shall be given to all bidders, and that notice shall also state that the RFP procedure will not apply.

Cooperative Purchasing

Q.67. May hospitals engage in cooperative purchasing?

R.S. 38:2212.1

A.67. Yes. R.S. 38:2212.1(G) authorizes any hospital owned or operated by a hospital service district, a municipality, the state, or any other public entity to enter into an agreement with one or more qualified group purchasing organizations for the purpose of obtaining bids for the purchase of materials and supplies, with certain requirements.

The term “**qualified group purchasing organization**” means an organization, whether for profit or not for profit, that has contracts for the sale of materials or supplies with at least fifteen hospitals within the United States.

1. The qualified group purchasing organization shall submit a price list for those materials and supplies it offers.
2. Price list must remain in effect for a stated period of time that may not be less than three months.

3. The price list shall thereafter be considered for all purposes to be a valid and binding bid by the qualified group purchasing organization during the effective period of the agreement, and no additional bid by the qualified group purchasing organization shall be necessary.

A hospital owned by the state may purchase equipment from a qualified group purchasing organization if the price is less than that for the same or comparable equipment on the state contract.

R.S. 38:2212.1(H) provides that the commissioners, governing board, or governing authority **of any hospital owned or operated by a hospital service district, a public trust, any municipality, or any other public entity, may authorize by resolution**, the participation in, or the purchasing from, a qualified group purchasing organization for the purchase of supplies and materials, without complying with the Public Bid Law or any other applicable provision of law when it appears to the authority or secretary that participation would positively affect the economic situation or efficiency of operations of the hospital. A positive effect on the economic situation or efficiency of operations shall be presumed when the total price of items to be purchased from the qualified group purchasing organization is less than the total price of those items if purchased from the state bid list.

The secretary of the Department of Health and Hospitals **for any hospital owned or operated by the state**, may also authorize the participation in, or the purchasing from, a qualified group purchasing organization for the purchase of supplies and materials, without complying with the Public Bid Law or any other applicable provision of law when it appears to the authority or the secretary that participation would positively affect the economic situation or efficiency of operations of the hospital.

Q.68. **May school districts and schools engage in cooperative purchasing?**

R.S. 38:2212.1(N)

A.68. R.S. 38:2212.1(N), allows any public school district or public school to enter into an agreement with one or more qualified group purchasing organizations for the purchase of materials, equipment, and supplies, including any installation thereof.

- ❖ Any such agreement requires the qualified group purchasing organization submit a price list for those materials and supplies offered by it and that the prices quoted on the list remain in effect for a stated period of not less than three months.
- ❖ Any such price list shall be considered, for all purposes, to be a valid and binding bid by the qualified group purchasing organizations during the effective period of the agreement, and no additional bid by the qualified group purchasing organization is necessary.
- ❖ Price lists submitted by a qualified group purchasing organization are not public records and shall not be available for inspection; however, the agreement setting forth the existence of the price list and the effective date thereof is a public record.

That portion of the price list setting forth the price of the materials or supplies being purchased shall become a public record at the time of opening bids for those materials and supplies.

A “**qualified purchasing organization**” means an organization, whether for profit or not for profit, of which two or more public school districts are members and that solicits proposals or bids from vendors of services, materials, equipment, or supplies of the type and nature as may be purchased by a public school district or public school.

A school board may purchase equipment from a qualified group purchasing organization if the price for such equipment is less than that for the same or substantially similar equipment on the state bid list.

Professional Services

Q.69. How are professional services for executive branch entities defined?

R.S. 38:2310

A.69. The phrase “**professional services**” has two meanings; one meaning specific to executive branch entities engaging in certain contracts for the procurement of professional services, and one meaning every other type of professional service.

For executive branch entities, the phrase “**professional services**” has a very specific meaning that does not apply to local governmental entities or political subdivisions. In this context, professional services are a specific type of service sought by an executive branch entity that requires a specific kind a professional. These particular professional services are defined in R.S. 38:2310(7) to include contracts by executive branch agencies only for services performed by architects, engineers, or landscape architects. Further, the estimated project costs for these contracts must exceed five hundred thousand dollars (**R.S. 38:2316**). These contracts for services performed by an architect, engineer, or landscape architect must be bid according to R.S. 38:2312. Competence and qualifications of the contractor must be the deciding factors (AG Op. Nos. 07-0061 and 87-31).

Q.70. Are the professional services sought by local political subdivisions and other local entities subject to the Public Bid Law?

A.70. No. Local governments and political subdivisions are not required to advertise, receive bids or engage in competitive negotiations for contracts for professional services. Nevertheless, sound practice dictates seeking the best price available for the service sought to be performed. Sound practices include seeking quotes, using an RFP process, or simply following the Public Bid Law. If an entity does follow the Public Bid Law when it is not required to, it must follow all the rules of Public Bid Law for that purchase.

Q.71. Are other types of contracts for services subject to the Public Bid Law?

A.71. No. The Public Bid Law is relevant to the procurement of materials and supplies and public works, not services.

Q.72. What laws apply to other contracts by executive branch agencies?

R.S. 39:1481-1526

A.72. Other contracts by executive branch agencies for services are addressed in the Professional, Personal, Consulting and Social Services Procurement Code found in R.S. 39:1481-1526 and in the State Procurement Code found at [R.S. 39:1551, et seq.](#) As noted in our Summary on the Procurement Code, these codes were merged in January of 2015.

Additional Legal Sources

Relevant Attorney General Opinions

NEW
2017

AG Op. No. 16-0082 – A contract for routine and preventative maintenance dredging of port's finger pier and docks is not a contract for public works, but a maintenance contract. Such maintenance contracts are specifically exempted from the definition of "public works" and are not required to be publicly bid, provided it has a term of less than two years.

AG Op. No. 16-0153 – A contract whereby an agency negotiates and purchases insurance policies on behalf of a public entity is a contract for professional services and is not subject to the requirements of the Public Bid Law.

AG Op. No. 16-0020 – Absent any legal authority to establish a local hiring preference or otherwise require contractors to hire local workers, the inclusion of such a requirement would be impermissible and against Louisiana Public Bid Law. Similarly, the inclusion and evaluation of a contractor's efforts to hire local workers as part of the Public Bid Law solicitation process would be impermissible and against Louisiana Public Bid Law.

AG Op. No. 15-0139 – Pursuant to La. R.S. 38:2212(B)(2) the City may not require potential bidders to complete either Document A305, or Statement C-451 as part of the pre-bid materials. The City may, however, include such forms as part of their bidding documents and include a requirement and instruction to potential bidders that such forms would be required to be completed and submitted by the apparent low bidder within ten days after the date bids are opened.

**Note: La. R.S. 38:2212(B)(3)(b) provides that all bidders bidding on public works for East Baton Rouge or Jefferson Parish shall submit all bid forms required by statute or by the Louisiana Administrative Code to the governing authority of parish prior to the opening of all bids relative to a contract for public works.

AG Op. No. 15-0080 - The AG discussed the issues whether a Volunteer Fire Department is a public entity and whether it must comply with state laws including, but not limited to, the Open Meetings Law, Public Records Law, Public Bid Law, Local Government Budget Act, Audit Law, etc.

[AG Op. No. 15-0052](#) - The apparent low bidder's failure to comply with the bid documents and instructions to bidders, which required all potential bidders to complete all spaces on the bid form including the space to provide a price for alternate no.1, renders their bid nonresponsive and the Town must reject their bid.

[AG Op. No. 15-0018](#) - Louisiana municipalities may not make a direct purchase from a NJPA contract. A NJPA contract is not a purchasing contract that was competitively bid by another Louisiana local political subdivision. As such, the piggy back direct purchasing alternative is not available to a Louisiana municipality.

[AG Op. No. 14-0217](#) – A contract between a sheriff's office and a private business for the design and preparation of an informational report is a contract for service and is not subject to the provisions of the Public Bid Law. A contract for the printing of the informational report is a printing contract under R.S. 38:2255, which is subject to the provisions of the Public Bid Law in R.S. 38:2212.1.

[AG Op. No. 14-0142](#) - Louisiana's Public Bid Law applies to the proposed dietary management services agreement, as the predominant component of the agreement calls for the purchase of materials and supplies.

[AG Op. No. 14-0005](#) - An exchange of public property between two public entities is authorized under the provisions of the Local Services Law, La. R.S. 33:1324. When property is exchanged between two public entities, those entities are not bound by the advertising and bidding requirements set forth in La. R.S. 33:4712 but the terms of the transfer or exchange must comply with the mandates of La. Const. art. VII, Sec. 14.

[AG Op. No. 12-0165](#) – A public entity may not “piggy-back” off a contract (including those established by a national cooperative purchasing organization) that has not been competitively bid by another Louisiana public entity.

[AG Op. No. 12-0066](#) - The Public Bid Law does not apply to a public works project under \$150,000 (now \$152,550). However, by choosing to bid out the project, the municipality became bound by the requirements set forth in the bid document and should award the contract to the bidder whose bid is responsive and most advantageous to the municipality. Mentions the Fourth Circuit Court of Appeal's holding in Concrete Busters of Louisiana Inc., which determined that a contract for demolition is a public work subject to the Public Bid Law. See [\[Q.9.\]](#) for additional information concerning demolition contracts.

[AG Op. No. 11-0181](#) - A prospective bidder should not be penalized for failing to comply with a bidding requirement or condition that is not allowed or authorized by Louisiana's Public Bid Law.

[AG Op. No. 11-0059](#) – Citing [R.S. 33:4169.1](#) relative to municipal and parish collection and disposal of garbage and trash, the AG opines that contracts for the collection and disposal of solid waste, unless structured as an exclusive franchise, may be negotiated rather than awarded by public bid.

AG Op. No. 10-0134 – If an entity requires attendance at a re-bid conference, a bidder who does not attend the entire conference is disqualified.

AG Op. No. 10-0058 - Debris removal is a contract for services that is not subject to the advertising and bidding requirements of Louisiana's Public Bid Law as long as the municipality does not violate other applicable local statutes or charter provisions.

AG Op. No. 10-0026 – A demolition contract is a contract for services which is not subject to the advertising and bidding requirements of Louisiana's Public Bid Law as long as the municipality does not violate other applicable local statutes or charter provisions. See Q. 9. For additional information concerning demolition contracts.

AG Op. No. 09-0296 - A contract for the purchase of materials and supplies is no longer “viable” once the materials and supplies have been transferred to the public entity and payment has been received by the contract vendor. Further, a contract would no longer be “viable” if it has a specific term of duration and that term has passed.

The AG opines that the following steps are necessary for a local political subdivision to piggy-back off an existing public contract of another local political subdivision pursuant to R.S. 33:1321-1327:

1. Verify that the contract was bid in compliance with state law.
2. Verify that the contract is still active, fresh, or “viable.”
3. Obtain written consent or approval from the other public entity that bid the contract and obtain confirmation as to the contract number and, if necessary, the Council Resolution accepting the contract/bid.
4. Confirm that the vendor and the product, services, materials, supplies or equipment are the same and that the price is same or lower.

AG Op. No. 09-0304 - Under Louisiana's Public Bid Law and beginning August 20, 2009, public entities are required to use the Louisiana Uniform Public Works Bid Form when soliciting bids for public works projects required by R.S. 38:2212.

AG Op. No. 06-0051 - If a public entity uses the bid method for contract, then the entity is bound to follow the rules for Public Bid Law regardless of whether or not the Public Bid Law applied to the contract initially.

Public Works

AG Op. No. 14-0033 - Pursuant R.S. 38:2212 and R.S. 38:2225.2, the AG opines that unless specifically authorized by law, a public entity has no authority to enter into a design-build contract. Instead, the public entity must employ the design-bid-build method, which would require the public entity to first obtain the services of a design professional and then publicly bid the construction of the project pursuant to the Public Bid Law.

[AG Op. No. 05-0445](#) - Absent an escalation clause in a public works contract, a municipality may not amend a public works contract to pay a contractor for increases in material cost required to perform under the contract.

AG Op. No. 04-0197 - Public Bid Law is applicable to public works contracts let by public entities even when only a portion of the funds are public.

[AG Op. No. 04-0079](#) - Public works contracts that do not exceed the contract limit are not subject to the advertising and bidding requirements of the Louisiana Public Bid Law and may be: undertaken by the public entity using its own employees; negotiated with one or more contractors; or let out for public bid.

AG Op. No. 03-0263 – When proposed addition to existing public work contract is outside scope of contract, it must be either negotiated or let by public bid rather than handled by change order to existing contract.

Materials and Supplies

[AG Op. No. 14-0142](#) - If a contract involves the merger of services with the purchase of materials and supplies, the entity must make a factual determination as to whether the predominant or substantial component of the contract is either services, or materials and supplies.

If a contract has a substantial materials and supplies component compared to its services component, the AG has opined that the contract must be bid in accordance with Louisiana's Public Bid Law. On the other hand, if the materials and supplies component of the contract is negligible, then the AG's opinion is that the contract may be characterized as one for services, and, thus, not subject to the advertising and bidding requirements of Louisiana's Public Bid Law.

[AG Op. No. 07-0278](#) - Public Bid Law applies to the proposed food services contract if the predominant component of the proposed food services contract is the purchase of food materials needed to prepare the meals.

[AG Op. No. 05-0314](#) - Louisiana Public Bid Law authorizes a school board purchasing a school bus to specify the type, quality or performance standards of the bus to be purchased, but the specifications must permit a functionally equivalent equal; the board must interpret its bid specifications in a fair and legal manner.

[AG Op. No. 01-0126](#) - When no bids are received in response to a solicitation, public entity should re-advertise and actively solicit bids from potential vendors in the area. Consideration should also be given to state contracts or contracts of other Louisiana public entities that may be accessed without bids. As a last resort, public body should consider whether the emergency provisions of the Public Bid Law may be used.

AG Op. No. 00-0055 - Bidding is not required for sale of equipment and materials between public entities.

Lowest Responsible Bidder

[AG Op. No. 13-0050](#) - It is generally well-settled that the provisions and requirements of Louisiana's Public Bid Law, as well as those provisions and requirements stated in the bid documents, shall not be waived by any public entity. See La. Rev. Stat. 38:2212 (B)(1); Hamp's Construction, LLC. v. City of New Orleans, 2005-0489 (La. 2/22/06), 924 So.2d 104; Beverly Construction Company, L.L.C. v. Parish of Jefferson, 2007-847 (La. App. 5 Cir. 2/6/08), 979 So.2d 551.

Once a requirement is established, that requirement must be uniformly followed by all bidders. A failure to comply with any statutorily imposed requirement would render a bid non-responsive and would warrant a mandatory rejection by the public entity. The same consequences result from failure to comply with any validly imposed requirement stated in the public entity's bid documents. Numerous Louisiana courts have recognized that the statutory requirements, advertisement requirements, and bid form requirements, including those incorporated by reference to other documents, must be completely and accurately observed, and that a bidder's failure to comply with every detail can invalidate the bid. See Hamp's, supra, Beverly, supra.

[AG Op. No. 05-0140](#) - General rule prohibiting prequalification of bidders also prohibits using bidding documents to pre-qualify only Louisiana resident contractors for contract.

Professional Services

[AG Op. No. 13-0135](#) - Louisiana courts have held that contracts for services, professional or otherwise, are not subject to the requirements of the Louisiana Public Bid Law. Numerous Attorney General Opinions have expressed the same conclusion in response to inquiries on a wide variety of service contracts. See generally Attorney General Opinion No. 00-246, 07-0278, 09-0252.

Thus, under applicable Louisiana law, political subdivisions are generally free to contract for professional services without engaging in any sort of competitive bid process. Nevertheless, a political subdivision is not prohibited from implementing or establishing a policy or competitive bid process for procuring professional services. For example, a political subdivision may establish a policy that requires an RFP or Request for Qualifications (RFQ) process when procuring professional services.

[AG Op. No. 06-0183](#) - Legal services constitute a contract for professional services, which are not subject to the Louisiana Public Bid Law. Public Bid Law is not applicable when contracting for services, whether of a professional or other nature.

[AG Op. No. 05-0260](#) - Contract entered into by the Town of Amite for cemetery maintenance is a contract for services, not subject to the Public Bid Law.

Emergencies

[AG Op. No.-06-0067](#) - Due to health and safety concerns at its post-Hurricane Katrina temporary courthouse facility, Plaquemines Parish may invoke the emergency provisions of the Public Bid Law in the construction of new temporary courthouse facilities.

AG Op. No. 02-0413 - Terrebonne Parish Consolidated Waterworks District No. 1 may not declare an emergency under the Louisiana Public Bid Law for the completion of its water plant expansion project. To the extent completion of project equals or exceeds the statutory contract limit, it will be necessary to comply with advertising and bidding requirements of the Louisiana Public Bid Law. "The mere possibility of a problem does not give rise to the emergency exception."

AG Op. No. 01-0289 - "Emergency" provisions of Public Bid Law may be used to repair hail storm damage long after it occurred only where water intrusion has caused health and safety concerns. Other repairs should be bid in compliance with public bid requirements.

Computers and Computer Software

AG Op. No. 13-0224 - In addition to the customary invitation to bid method for purchases of more than \$30,000, Louisiana's Public Bid Law allows political subdivisions to use the request for proposals process when procuring telecommunications or data processing systems, equipment, and related services pursuant to R.S. 38:2234, et seq. Therefore the AG opines that in addition to using the procurement methods set forth in R.S. 38:2212.1 and 38:2234, et seq., a public entity subject to the Public Bid Law is also authorized to purchase computers and other computer related items directly from the state contract vendor pursuant to R.S. 39:1702.

AG Op. No. 04-0264 - A contract to install, provide connectivity to or for, support or maintain software would be a contract for services, not subject to the public bid requirements. A contract for purchase of an existing, commercially available software package (with an accompanying license for its use), the development of a computer software program or the modification, enhancement, or customization of existing computer software would be a purchase of materials and supplies and therefore subject to the Public Bid Law.

Case law

F.H. Myers Construction Co. v. State of Louisiana, Division of Administration, Office of Facility Planning and Control, 2013-2153 (La. App. 1 Cir. 06/18/14); 2014 WL 3702302, Writ Denied, 2014-C-1793 (La. 11/07/14); 2014 WL 6464484.

Summary: The court held that R.S. 38:2216(H) prohibits the inclusion of contractual language which limits a contractor from recovery of delay damages only in circumstances where the delay is wholly attributable to the public entity.

Concrete Busters of Louisiana, Inc. v. The Board of Commissioners of the Port of New Orleans, LA, 69 So.3d 484 (La. App. 4 Cir. 2/2/11)

Summary: The court held that a contract for demolition is a public work and subject to Public Bid Law.

See [\[Q.9\]](#) For additional information concerning demolition contracts.

Beverly Const. Co., L.L.C. v. Parish of Jefferson, 979 So.2d 551, 2008 WL 331185 (La. App. 5 Cir., 2008).

Summary: The court held that the advertised bid requirement that corporate resolution form be returned with the bid package could not be waived by the parish.

Hamp's Const., L.L.C. v. City of New Orleans, 924 So.2d 104 (La., 2006).

Summary: The Supreme Court held that any requirements of the Public Bid Law, any requirements stated in the advertisement for bid, and any requirements required on the bid form cannot be waived by the public entity.

Regency Construction, Inc. v. Lafayette City-Parish Consolidated Government, 2003 WL 2127719, 847 So.2d 796 (La. App. 3 Cir. 6/4/2003)

Summary: Contract for removal of Hurricane Lili debris from property including private property was not a public work and thus was not subject to Louisiana's Public Bid Law.

Broadmoor, L.L.C. v. Ernest N. Morial New Orleans Exhibition Hall Authority, (App. 4 Cir. 2003), 865 So.2d 136, 2003-1996 (La. App. 4 Cir. 12/22/03), writ granted 868 So.2d 702, 2004-0211, 2004-0212 (La. 2/11/04), affirmed 867 So.2d 651, 2004-0211, 2004-0212 (La. 3/18/04), rehearing denied, on subsequent appeal 896 So.2d 251, 2004-1274, 2004-1275, 2004-1276 (La.App., writ denied 896 So.2d 985, 2005-0483 (La. 3/16/05), writ denied 896 So.2d 985, 2005- 0542 (La. 3/16/05).

Summary: Public entity waived certain requirements mandated under Public Bid Law. For example, the bid form required the attachment of an insurance certificate thus making attachment a mandatory and not waivable requirement for bidder. Public board acted impermissibly in waiving the requirement and selecting bidder that did not include the certificate.

State Mach. & Equip. Sales, Inc. v. Livingston Parish Gravity Drainage No. 5, 98-1207 742 So.2d 26 (La. App. 1 Cir. 6/25/99)

Summary: The court found that the evidence established that the bid specifications tracked one manufacturer's product description to such an extent that, although no brand name was specified, the criteria were so limited that the effect was that of a closed specification bid.

Board of Directors of the Industrial Development Board of the City of Gonzalez, LA v. All Taxpayers, Property Owners, Citizens of the City of Gonzalez, LA, et al. (Cabela), 938 So.2d 11 2005-2298 (La. 2006)

Summary: In reviewing application of the TIF Act, the Louisiana Supreme Court overturned its prior decision in *City of Port Allen*, 439 So.2d 399 (La. 1983) regarding Constitutional [Article VII, §14 \(A\)](#) and its prohibition of donations of public funds and public property. The Court held that the TIF Act was constitutional and that Louisiana Constitution [Article VII, §14 \(A\)](#)'s prohibition applied only to gratuitous donations in which there were no reciprocal obligations incurred by the parties. See the LLA's [Cabela Memo](#).



Public Assistance (PA) Grant Program FAQs

Overview

This document is a summary of general principles and guidelines concerning the Public Assistance (PA) Grant Program. This information is presented in a “frequently asked questions” (FAQ) format. While it is fairly detailed, remember that every situation is unique and deserves careful individual review.

To facilitate use of this document, links will direct your attention to text within the document and to related documents posted on the Louisiana Legislative Auditor’s website and on external websites. For example, in the Index, clicking the question you wish to view will take you directly to that question in the text of the FAQ. Within the FAQ, links will direct you to other textual areas of the FAQ and to relevant external documents. Clicking on an individual question number in the text it will return you to the index to allow selection of another question to view.

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PUBLIC ASSISTANCE GRANT PROGRAMS

Q.1. What is the Public Assistance (PA) Grant Program?

- A.1.** The Public Assistance (PA) Grant Program is a Federal assistance program under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), as amended, 42 USC §5121, et seq. The PA Grant Program is designed to provide supplemental Federal assistance to State, Territorial, Indian Tribal, and local governments, and certain types of private nonprofit (PNP) organizations within disaster areas designated under Presidential Declarations. The PA Grant Program is intended to assist governments in returning disaster areas to pre-disaster conditions. Federal assistance under the PA Grant Program is generally provided on a cost-share basis with the Federal Government undertaking 75% of eligible costs and the non-federal entities (State, Territorial, Indian Tribal, and Local Governments, etc) assuming 25% of eligible costs. These amounts may differ in certain circumstances.

The PA Grant Program is managed by the Federal Emergency Management Agency (FEMA) and administered within the State of Louisiana by the Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP).

Q.2. What entities are eligible to apply for Federal Assistance from the Public Assistance (PA) Grant Program?

- A.2.** State, Territorial, Indian Tribal, and local governments, and certain types of private nonprofit (PNP) organizations which are located within disaster areas designated by Presidential Declarations.

Q.3. What State Agencies are available to assist public entities in Louisiana with the Public Assistance (PA) Grant Program?

- A.3.** The Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP) and the Louisiana Legislative Auditor (LLA).

Q.4. What is the time period for applying for Federal assistance under the Public Assistance (PA) Grant Program?

- A.4.** Requests for Public Assistance must be submitted **within 30 days** of the Presidential Declaration. Applications by eligible entities in Louisiana should be submitted through www.LouisianaPA.com.

President Obama issued a disaster declaration for the August 2016 Flooding (DR- 4277) on **August 14, 2016** for the following parishes.

- Acadia
- Ascension
- Avoyelles
- East Baton Rouge
- East Feliciana
- Evangeline
- Iberia
- Iberville
- Jefferson Davis
- Lafayette
- Livingston
- Pointe Coupee
- St Helena
- St Landry
- St Tammany
- Tangipahoa
- Vermillion
- Washington, and
- West Feliciana

Q.5. What categories of work are established under the Public Assistance (PA) Grant Program?

A.5. The Federal Emergency Management Agency (FEMA) provides for two main types of work, Emergency Work (to address immediate threats) and Permanent Work (restoration efforts), under the Public Assistance (PA) Grant Program.

Emergency Work is further separated into the following two categories:

- Debris Removal – Category A
- Emergency Protective Measures – Category B

Emergency work generally must be completed within six months of the from the disaster declaration date.

Permanent Work is separated into the following five categories:

- Roads/Bridges – Category C
- Water Control Facilities – Category D
- Buildings/ Equipment – Category E
- Utilities – Category F
- Parks, Recreational, and other facilities – Category G

Permanent work generally must be completed within eighteen months from the disaster declaration date, but extensions may be granted by FEMA.

Q.6. Where can I find a summary of information on the Public Assistance (PA) Grant Program?

A.6. The Federal Emergency Management Agency (FEMA) has issued a comprehensive guide on the Public Assistance (PA) Grant Program which can be found at the following [link](#) from the LouisianaPA.com website.

Additional information on the PA Grant Program and the August 2016 Floods (DR-4277) can be found at the following:

LouisianaPa.com	http://louisianapa.com/site/paInfo.cfm
FEMA (DR-4277)	https://www.fema.gov/disaster/4277
GOHSEP	http://gohsep.la.gov/GRANTS-INDEX/DISASTER-RELATED-GRANTS/FEMA-PA
Louisiana Legislative Auditor	https://www.la.gov/legalFAQs/

Q.7. What is Force Account Labor?

A.7. Labor performed by the nonfederal entity’s permanent or temporary work force, i.e. employees of the State or local government. Generally only emergency-related overtime work is reimbursable (on a cost-share basis) for permanent, re-assigned, or seasonal employees. Regular time and overtime for emergency-related work by temporary employees may be eligible for reimbursement on a cost-share basis.

Regular time and overtime will generally be eligible for reimbursement on a cost-share basis for eligible permanent work for both permanent and temporary employees.

Under the FEMA Pilot Program, a non-federal entity using their own labor forces for all or part of debris removal operations may be eligible for both straight time and overtime work performed by its employees for this purpose.

Q.8. What constitutes Direct Administrative Costs (DAC)?

A.8. Costs incurred that can be identified separately and assigned to a specific project. Examples of DAC include but are not limited to the following:

- Staff’s time spent to conduct initial inspections, surveying and assessment of damage site(s);
- Time spent preparing, reviewing, and submitting Project Worksheets;

- Time spent preparing correspondence;
- Travel time; and
- Time spent on collection, copying, filing, or submitting documents to support the entity's claims.

Generally, costs may not be charged to a project if similar costs incurred for the same purpose in like circumstances to indirect costs.

FEMA normally considers the salaries of administrative and clerical staff as indirect costs. Direct charging of these costs may be appropriate only if all of the following conditions are met:

- Administrative or clerical services are integral to a project or activity;
- Individuals involved are specifically identified with the project or activity;
- Such costs are explicitly included in the budget for the project or have FEMA's prior written approval; and
- The costs are not also recovered as indirect costs.

Q.9. What are ineligible costs?

- A.9.** The Stafford Act authorizes FEMA to provide Public Assistance (PA) Grant Program funding for specific work performed as a result of a declared disaster-related incident. The PA Grant Program does not; however, provide funding for all losses or costs resulting from the incident.

Examples of ineligible costs, include but are not limited to the following:

- Loss of Revenue;
 - including waiver of tolls and ferry charges to aid in evacuation, utility shutdowns, and cancellation of events.
- Loss of Useful Service Life;
 - i.e. PA funding cannot be provide for the value of the projected loss of useful life of a road due to long-term effects from inundation.
- Tax Assessments; and
 - Costs for post-disaster re-assessment are not covered as FEMA has determined that assessments are not essential to addressing an immediate threat to life or improved property, nor connected with the permanent restoration of eligible facilities.

- Increased Operating Costs
 - Increased costs of operating a facility or providing services are generally not eligible, even when directly related to the declared disaster incident. Short-term increased costs that are directly related to specific emergency health and safety tasks as part of emergency protective measures may however be eligible.

Q.10. What is a FEMA–reviewed Pre-Disaster Debris Management Plan? Why is this important?

A.10. A Debris Management Plan with pre-qualified debris removal contractors accepted by FEMA before the start of the incident period.

FEMA generally encourages State, Territorial, Tribal and local governments to establish written procedures and guidance for managing debris in an expedient, efficient, and environmentally sound manner prior to the occurrence of disaster-related incidents.

State, Territorial, Tribal and local governments which have Pre-disaster FEMA-accepted Debris Management Plans with pre-qualified debris removal contractors may be eligible for a one-time incentive of an additional 2% cost-share adjustment for debris removal work completed within the first 90 days.

Q.11. What constitutes debris which may be eligible as Category A - Emergency Work?

A.11. Debris removal activities, such as clearance, removal, and disposal, are generally eligible as Category A if the removal is in the public interest based on whether the removal activity:

- Eliminates immediate threats to lives, public health, and safety;
- Eliminates immediate threats of significant damage to improved public or private property;
- Ensures economic recovery of the affected community to the benefit of the community at large; or
- Mitigates risk to life and property by removing substantially damaged structures, associated structures, etc.

Debris includes, but is not limited to, vegetative debris, construction and demolition debris, sand, mud, silt, gravel, rocks, boulders, and vehicle and vessel wreckage.

Removal from improved public property and the **public right-of-way** (neutral ground), including Federal-aid roads, is eligible. If State, Territorial, Tribal, or local governments authorize residents to place incident-related debris on public right-of-ways, FEMA provides PA funding to remove the debris from the right-of-ways for a limited period of time.

The following types of debris removal are generally not eligible under the PA Grant Program:

- Removal of debris placed on a right-of-way from commercial properties;
- Removal of materials related to the construction, repair, or renovation of residential or commercial structures;
- Debris removal from Federally maintained navigable channels and waterways (Coast Guard handles this);
- Debris removal from agricultural land; and
- Debris removal from natural, unimproved lands, such as heavily wooded areas and unused areas.

Q.12. What procurement rules apply to disaster-related procurement?

- A.12.** In addition to applicable Federal Law (see [2 C.F.R. Part 200](#)), State and local governments shall comply with the applicable provisions of State Law, i.e. the Public Bid Law and State Procurement Code, when procuring materials and supplies, or contracting for public works and services.

Exceptions from the general procurement rules for emergency procurement are provided for under the Public Bid Law in cases of “Public Emergency” and “Extreme Public Emergency.” For additional information on the emergency procurement requirements of the Public Bid Law, please see the [LLA’s Public Bid Fact Sheet for Disasters](#) on the LLA’s Legal Assistance Page. For additional information on the Public Bid Law, please see the [LLA’s Public Bid FAQ](#).

State Agencies should comply with the provisions of the [State Procurement Code](#) when procuring materials and supplies and contracting for services and review Executive Orders [JBE 2016-55](#) (Emergency Procedures for Conducting State Business) and [JBE 2016-39](#) (Small Purchase Procedures). State Agencies shall comply with the applicable provisions of the Public Bid Law when contracting for public works.

All documentation related to disaster-related procurement contracts (i.e. materials and supplies, public works, and services) should be maintained in the State or local government entity’s files and are considered public records.

Q.13. What documentation should State and local governments maintain?

- A.13.** State and local governments should ensure that they maintain adequate documentation of all expenditures and procurement activities.

Examples of documentation that should be maintained in the public entity's files include, but are not limited to, the following:

- Documentation showing that State and Federal procurement rules were followed:
 - Copies of quotes/bids obtained from vendors (including any documentation why lowest wasn't chosen);
 - Copies of advertisements/solicitations for bids, quotes, proposals, qualifications, etc;
 - Bid Tabs.
- Cost-Analysis information;
- Detailed Time Sheets (including specific project assignments when seeking Direct Administration Cost reimbursement);
- Inspection logs for debris removal;
- Receipts, cancelled checks, or other proofs of payment; and
- Written copies of contracts or other agreements.

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THE LOUISIANA HOMELAND SECURITY AND EMERGENCY ASSISTANCE AND DISASTER ACT: GUIDANCE ON EMERGENCY DECLARATIONS UNDER [R.S. 29:727](#)

This document provides specific guidance for emergency declarations under the Louisiana Homeland Security and Emergency Assistance and Disaster Act (“Act”, Title 29, Chapter 6). The question has arisen as to the level of detail required for the declaration to be considered valid. This guidance will focus on the pertinent statute, certain Attorney General (AG) opinions, and best practices for emergency situations that may arise.

The Louisiana Homeland Security and Emergency Assistance and Disaster Act

The Louisiana Homeland Security and Emergency Assistance and Disaster Act under [R.S.29:727](#) sets forth the applicable law governing emergency situations in the State of Louisiana. In order to deal with a major disaster, the Act confers powers on Parish Presidents that may exceed the powers conferred by the constitution, laws, or a home rule charter or plan of government. Because the powers granted are so broad, it is crucial that the details of the Act be carefully followed.

Requirements

The basic requirements of the Act are as follows:

- The parish president, and only the parish president, may declare a local disaster or emergency;
- The declaration is effective for thirty days only, but may be extended every thirty days until the parish president finds that the threat of danger has been dealt with and the emergency conditions no longer exist; and
- The declaration may be terminated by the parish president, the governor, a petition signed by a majority of the legislature, or a majority of the parish governing authority. In practice, the checks and balances are provided by the parish governing authority. Under the statute, the parish governing authority may terminate the emergency declaration at any time.

These are updated annually by the LLA. Make sure to check out the latest edition at: lla.la.gov/legal-faqs/all-faqs/

The Act provides that the declaration must:

- Indicate the nature of the emergency;
- Indicate the area or areas that are or may be affected;
- Indicate the conditions that brought the emergency about; and
- Be given prompt publicity and filed with the office of emergency preparedness and the office of the clerk of court, whether the declaration be proclaiming the emergency, continuing the proclamation, or terminating the emergency..

Powers

The powers given under the Act at [R.S. 29:727\(F\)](#), are specifically additive to any other powers conferred upon the parish president by the constitution, laws, or by a home rule charter or plan of government.

Specifically, the parish president may:

- (1) Suspend the provisions of any regulatory ordinance prescribing the procedures for conduct of local business, or the orders, rules, or regulations of any local agency, if strict compliance with the provisions of any ordinance, order, rule, or regulation would in any way prevent, hinder, or delay necessary action for coping with the emergency.
- (2) Use all available resources of the local government as reasonably necessary to cope with the local disaster or emergency.
- (3) Transfer the direction, personnel, or functions of local departments and agencies or units thereof for the purpose of performing or facilitating emergency services.
- (4) Subject to any applicable requirements for compensation, commandeer or use any private property that the parish president finds necessary to cope with the local disaster.
- (5) Direct and compel the evacuation of all or part of the population from any stricken or threatened area within the boundaries of the parish if the parish president deems this action necessary for mitigation, response, or recovery measures.
- (6) Prescribe routes, modes of transportation, and destinations within the local government's jurisdiction to facilitate evacuation.
- (7) Control ingress and egress to and from the affected area, the movement of persons within the area, and the occupancy of premises therein.
- (8) Suspend or limit the sale, dispensing, or transporting of alcoholic beverages, firearms, explosives, and combustibles.

Because these powers granted by the Act are so broad, it is crucial that the powers be used only in emergency situations. The statute itself and the AG provide limits on powers and safeguards against abuse.

Limitations in the Statute

The statute itself limits the emergency powers granted by [R.S. 29:727](#). Specific requirements for the declaration of emergency must be followed.

R.S. 29:727(D) specifically states that:

All executive orders or proclamations issued under this Subsection shall indicate the nature of the emergency, the area or areas which are or may be affected, and the conditions which brought it about.

The AG opined in [AG Op. No. 08-0057](#) that the emergency declaration required by R.S. 29:727 is not valid if it fails to contain the three factors listed in R.S. 29:727(D). The AG further determined that the declaration is not valid if it is not an order of the parish president, as required by the Act. It logically follows from the AG's opinion that if any of the Act's requirements related to the declaration are not followed, the declaration may be invalid.

In summary, we see that the AG believes the declaration is not valid if it is not an order of the parish president, and if the three factors specified by R.S. 29:727(D) are not present in the declaration.

Further, [R.S. 29:727\(D\)](#) provides that:

The state of emergency may be terminated by executive order or proclamation, but no state of emergency may continue for longer than thirty days unless extended by the parish president.

Presumably, if the declarations are not extended timely, before the expiration of the thirty day time limit, then any extension of the declaration of emergency is also not valid.

The other clear limitation on the emergency declaration is the power granted to the parish governing authority to terminate it at any time. The parish governing authority concerned about this broad grant of powers to the parish president is empowered to end the emergency declaration at will by majority vote.

Another pertinent question is, how much detail is enough detail?

The Devil is in the Details

The declaration must indicate:

- The nature of the emergency;
- The area or areas that are or may be affected; and
- The conditions that brought the emergency about.

The nature of the emergency apparently requires specific information about the details of the emergency. “**A hurricane made landfall**” does not seem to be sufficient. In fact, comparing this language to the second requirement “**conditions which brought the emergency about**” seems to indicate that the nature of the emergency is the more specific of the two. If not, the nature of the emergency and the conditions that brought it about would both be covered by “**a hurricane made landfall.**”

Conditions of the emergency seems to call for what caused the specific emergency. That is, “**a hurricane made landfall**” or “**a tornado touched down**” would seem to answer the question of what conditions brought the emergency about. The nature of the emergency seems to be asking for the extent of damage inflicted by the hurricane, tornado, ice storm, etc. The other requirement, area or areas that are or may be affected, is self-explanatory. Therefore, “a hurricane made landfall, and there is flooding and debris filling the streets of the parish” would appear to be a correct way to fulfill the requirements of the Act.

Best Practices

Some auditing issues simply are not legal matters, or well reasoned opinions of the Attorney General. They are common sense practices that should be followed to avoid certain unforeseen complications that may arise. One complication is the length of time from the emergency declaration to the formation of a contract to deal with conditions caused by the emergency. The length of time that will be acceptable in making of contracts using the emergency powers granted by the Act will depend upon the specific nature of the emergency. Thus it is important that any emergency declaration provide sufficient information as to the nature and extent of the emergency.

Assuming the declaration has been timely extended every thirty days, it can be valid indefinitely. Should public entities enter contracts using emergency powers after three years, four years or five years? The LLA has encountered public entities entering into such contracts five years after Hurricanes Katrina and Rita. Currently, the Act places no time limit on the emergency declaration, as it may be renewed every thirty days. If the contract entered into under the Act is not specifically related to the declaration, no safeguards remain, except for the ability of the parish governing authority to terminate the contract by majority vote. If, however, the declaration and the subject of the contract have some relation to one another, the object of the contract may be presumed to have a valid purpose related to the emergency. A declaration extended for seventy-two weeks would have a relation back to a contract and the emergency if it states,

“A hurricane made landfall in August 2005. As a result, the streets in the Ninth Ward were flooded, and the streets were damaged.” Assuming the contract entered into five years later was for street repairs in the Ninth Ward, made under the aegis of the Act, the contract would undeniably relate back to the declaration and the emergency.

An excellent example of an emergency declaration is Governor John Bel Edwards’ declaration of emergency in the wake of the 2016 Floods, [Proclamation No. 111 JBE 2016](#), on August 12, 2016. It contains the law on emergency declarations, the Governor’s authority under it, the reasons for the emergency and the potential damage it may cause to the State.

Case Law

Under the Act, a parish president may extend a state of emergency for the parish when the threat of danger continues to exist, even if the governor has not extended the state of emergency statewide, so long as the governor has not issued an order or proclamation terminating the state of emergency and established a period during which no other declaration of emergency or disaster may be issued. *Clement v. Reeves*, App. 3 Cir.2008, 975 So.2d 170, 2007-1154, 2007-1155 (La.App. 3 Cir. 1/3, writ denied 978 So.2d 355, 2008-0482 (La. 4/18/08).

A declaration of emergency is not required for the governmental immunity provisions of the Homeland Security and Emergency Assistance and Disaster Act (R.S. 29:735) to take effect with respect to emergency preparedness activities. *Cooley v. Acadian Ambulance*, 65 So.3d 192, 2010-1229 (La.App. 4 Cir. 5/4/11).

Parish was not immune from suit under the Louisiana Emergency Assistance and Disaster Act for damage to owners' homes related to construction of a canal; canal was constructed for general purposes rather than as part of emergency preparedness activity. *Banks v. Parish of Jefferson*, 990 So.2d 26, 08-27 (La.App. 5 Cir. 6/19/08).

Attorney General Opinions

- ❖ The Act, La. R.S. 29:727 *et seq.*, is constitutional. The Parish President is immune from liability for acts under the Louisiana Homeland Security and Emergency Assistance and Disaster Act, unless the acts constitute willful misconduct. The Parish Council, as the governing authority, may terminate the Declaration of Emergency provided proper procedure is followed. [AG Op. No. 06-0279](#). See also [AG Op. 10-0124](#), which states: While R.S. 29:771(B)(1) might appear to only cover the state with immunity from liability, the express language of R.S. 29:735, imputes this “state immunity” upon all state agencies *and local political subdivisions thereof*. In other words, R.S. 29:771(B)(1) affords the immunity contained in R.S. 29:735 to anyone (state or any political subdivision thereof) engaged in any homeland security and emergency preparedness activity after a public health emergency is made under LHEPA, except in cases of willful misconduct.

- ❖ During a declared disaster or emergency, parish presidents have broad authority to use available local government resources, including unencumbered parish funds, as reasonably necessary to cope with the local disaster or emergency without approval of the parish council, even if those funds are budgeted for other purposes; such authority ends with the termination of the disaster or emergency [AG Op. No. 05-0397](#).

- ❖ FEMA funds are not treated differently from other revenue for budgeting purposes and should be included in a political subdivision's annual budget even if only shown as an estimated amount. If the receipt of FEMA funds after the budget has been adopted results in a political subdivision having a change in operations, the budget must be amended to reflect receipt of the funds [AG Op. No. 10-0232](#).



**FOR MORE INFORMATION OR HELP WITH YOUR PROCUREMENT NEEDS, VISIT
[HTTPS://WWW.FEMA.GOV/PROCUREMENT-DISASTER-ASSISTANCE-TEAM](https://www.fema.gov/procurement-disaster-assistance-team)
OR CONTACT YOUR ORGANIZATION'S PURCHASING OFFICER
OR GOHSEP AT GOHSEPLEGAL@LA.GOV**

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