

Procurements under FEMA Awards

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

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FEMA Procurement Disaster Assistance Team (PDAT)

- PDAT was stood up by the FEMA Office of Chief Counsel in April, 2014 to assist and train FEMA personnel and applicants on the procurement rules that applicants must follow when contracting for work using federal disaster grant funds under the Public Assistance (PA) program.
- A large part of PDAT's mission is giving these presentations to applicants and FEMA personnel. We don't expect you to be experts after this presentation but at least you will get an idea of the basic concepts and issues. We will also provide a copy of the slides after the presentation.



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FEMA Procurement Disaster Assistance Team (PDAT)

- We also assist applicants through FEMA PA personnel. We get issues and questions through them and then answer through them as we are not an applicant's legal advisor. We've advised PA Personnel who are assisting applicants on dozens of contract issues already.
- We sometimes deploy to a JFO to provide support to applicants through their PAC or other FEMA representative.
- Please go to:

<https://www.fema.gov/media-library/assets/documents/96773>



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Why We are All Here

- DHS OIG audits of FEMA disaster grants in Fiscal Year 2014
 - Resulted in 32 recommendations related to recipient (grantee) and subrecipient (subgrantee) failures to adhere to the federal procurement standards
 - OIG recommended up to \$61,654,399 in disallowed costs
- Common findings:
 - Noncompetitive contracting practices
 - Failure to include required contract provisions
 - Failure to employ required procedures to ensure small/minority/women-owned firms are used
 - Cost-plus-percentage-of-cost contracting
- Noncompliance with the federal procurement requirements may comprise a material failure to comply with the terms of the disaster grant award and violate the FEMA-State Agreement



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Purpose and Scope

- This presentation provides an overview of the procurement standards imposed by federal regulations on recipients and subrecipients when procuring services and property with funding from any of the Stafford Act grant programs
- The focus of this presentation is the new procurement standards under the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (“Uniform Rules”), which are codified at 2 C.F.R. §§ 200.317 through 200.326, which supersedes the procurement regulations formerly found at 44 C.F.R. pt. 13 (State, Local, and Tribal Governments), and 2 C.F.R. pt. 215 (Private Nonprofit Organizations)
- This presentation does not address other requirements imposed by federal law, executive orders, and other regulations on non-Federal entity procurements



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Rules of the Road

- Please ask questions as they arise during the presentation—there is no need to wait until the end to ask them
- This presentation (including the slides and any oral information conveyed) provides general information about the procurement requirements applicable to Stafford Act grants and is not intended to be, nor should it be considered as legal advice
 - For example, some slides may omit or only summarize certain requirements set forth in the regulations
 - You should not act or rely on information contained in our presentation (written or oral) without seeking the advice of your own attorney



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Agenda

- Background
- Terminology and Key Players
- Procurement Standards for States
- Procurement Standards for Other Non-Federal Entities
- Differences between the New and Old Procurement Standards



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Stafford Act Grant Programs

- The Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”) authorizes federal financial assistance for states, local and Indian tribal governments, and certain private nonprofit organizations to respond to and recover from emergencies and major disasters
- FEMA administers this financial assistance through various Stafford Act grant programs
- One such grant program is the Public Assistance Grant Program, which provides financial assistance for debris removal and emergency protective measures (known as “emergency work”) and permanent restoration of damaged facilities (known as “permanent work”)



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Uniform Rules Applicability

- DHS adopted the Uniform Rules on December 19, 2014, in an Interim Rule (79 Fed. Reg. 75871)
 - The Uniform Rules apply to all new grant awards under emergencies and major disasters declared on or after December 26, 2014 (79 Fed. Reg. at 75872 and § 200.110)
- The Uniform Rules, where applicable, supersede the procurement standards formerly found at 44 C.F.R. § 13.36 (applicable to states, local, and Indian tribal governments) and 2 C.F.R. pt. 215 (applicable to institutions of higher education, hospitals, and private nonprofit organizations)
- But there is a “grace period” for procurement standards



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“Grace Period” for Procurement

- The Uniform Rules at 2 C.F.R. § 200.110 provide that:

Federal awarding agencies must implement the policies and procedures applicable to Federal awards by promulgating a regulation to be effective by December 26, 2014 unless different provisions are required by statute or approved by OMB. **For the procurement standards in §§ 200.317–200.326, non-Federal entities may continue to comply with the procurement standards in previous OMB guidance (superseded by this part as described in § 200.104) for two additional fiscal years after this part goes into effect.** If a non-Federal entity chooses to use the previous procurement standards during the grace period before adopting the procurement standards in this part, the non-Federal entity must document this decision in its internal procurement policies.



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Contracting in Assistance Projects

- A non-Federal entity will often use contractors to help them carry out their Stafford Act awards or subawards
 - A non-Federal entity may receive a Public Assistance award to restore a damaged building, and will then award a contract to a construction company to do the work
 - The contract is a commercial transaction between the non-Federal entity and its contractor, and FEMA has no privity of contract with the contractor
- Although the federal government is not a party to the contract, the non-Federal entity must comply with the conditions attached to a grant in awarding federally-assisted contracts
 - A non-Federal entity must comply with the procurement requirements imposed by federal law, executive orders, and federal regulations
 - These will control over non-Federal authorities (such as local procurement standards) to the extent they conflict with federal requirements



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Contracting

- The Uniform Rules set forth various procurements standards at 2 C.F.R. §§ 200.317 through 326
- Before the Uniform Rules:
 - State, local, and Indian tribal government procurement standards were set forth at 44 C.F.R. § 13.36
 - Institutions of higher education, hospitals, and other nonprofit organization procurement standards were set forth at 2 C.F.R. §§ 215.40 through 48
 - The procurement standards were similar, but not identical, for different organizations under the old regime
- The purpose of the procurement standards is not just to obtain the cheapest price for the particular service or good, but also includes the furtherance of other objectives



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DHS OIG Audit Results – 2014

- DHS OIG audits of FEMA disaster grants in Fiscal Year 2014
 - Resulted in 32 recommendations related to recipient (grantee) and subrecipient (subgrantee) failures to adhere to the federal procurement standards
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- Common findings:
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Consequences of Noncompliance

- FEMA may take any number of enforcement remedies in the case of a noncompliant procurement under a Stafford Act grant (2 C.F.R. § 200.338)
 - (a) Temporarily withhold cash payments pending correction of the deficiency by the non-Federal entity or more severe enforcement action by the Federal awarding agency or pass-through entity
 - (b) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance
 - (c) Wholly or partly suspend or terminate the Federal award
 - (d) Initiate suspension or debarment proceedings (or in the case of a pass-through entity, recommend such a proceeding be initiated by a Federal awarding agency)
 - (e) Withhold further awards for the program
 - (f) Take other remedies that may be legally available



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Terminology

- “***Non-Federal entity***” means a state, local government, Indian tribe, institution of higher education, or nonprofit organization that carries out a Federal award as a recipient or subrecipient (2 C.F.R. § 200.69)
- “***Federal award***” means, among other things, the Federal financial assistance that a non-Federal entity receives directly from a Federal awarding agency or indirectly through a pass-through entity (2 C.F.R. § 200.38); it also means the instrument setting forth the terms and conditions
- “***Recipient***” means a non-Federal entity that receives a Federal award directly from a Federal awarding agency to carry out an activity under a Federal program (2 C.F.R. § 200.86)



Terminology

- “***Pass-through entity***” means a non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program (2 C.F.R. § 200.74)
- “***Subaward***” means an award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a Federal award received by the pass-through entity; it does not include payments to a contractor (2 C.F.R. § 200.92)
- “***Subrecipient***” means a non-Federal entity that receives a subaward from a pass-through entity to carry out part of a Federal program: but does not include an individual that is a beneficiary of such program (2 C.F.R. § 200.93)



The Key Players – Recipient

- The recipient is the Federal award administrator for all funds provided under the Public Assistance Program and responsible for ensuring compliance with all applicable federal laws, regulations, executive orders, FEMA policies, the FEMA-State Agreement, and other terms and conditions
- The recipient must comply with the applicable procurement standards for all recipient procurements
- The recipient, as a pass-through entity, is responsible for:
 - Processing subawards to subrecipients
 - Adhering to the federal procurement standards for recipient procurements, which is 2 C.F.R. § 200.317 for a state
 - Ensuring subrecipient awareness of, and compliance with Federal procurement standards for subrecipient procurements
 - Ensuring compliance with the FEMA-State Agreement



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The Key Players – Subrecipient

- The subrecipient means the non-Federal entity that receives a subaward from a pass-through entity to carry out part of a Federal program, and which is accountable to the recipient or pass-through entity for the use of the funds provided (2 C.F.R. § 200.93). Includes:
 - Local and Tribal Indian Governments; and
 - IHE, Hospitals, and other Nonprofit Organizations
- The subrecipient must adhere to the federal procurement standards, which are found at 2 C.F.R. § § 200.318-326.
- Formerly used the term “subgrantee.”
- Indian Tribal governments follow the procedures at 2 C.F.R. § § 200.318-326, irrespective of whether they are a recipient or subrecipient.



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The Key Players – FEMA and OIG

- FEMA is the federal awarding agency
 - Has an affirmative duty to manage and administer the Federal award in a manner to ensure that Federal funding is expended for authorized purposes and in accordance with all federal laws, regulations, and executive orders and the terms of the grant award
 - Educate and inform grantees about various grant requirements
 - Recovers funding for improper expenditures under a grant
- DHS Office of Inspector General (“OIG”)
 - Conducts independent audits, investigations, and inspections of the programs and operations of DHS and makes recommendations
 - The DHS OIG has broad authority to audit FEMA programs and activities



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Summary of Procurement Standards

State	Other Non-Federal Entities (local governments, tribal governments, IHE, hospitals, and other nonprofit organizations)
2 C.F.R. § 200.317	2 C.F.R. §§ 200.318 through 326
<p><u>Synopsis:</u></p> <p>Must follow same policies and procedures it uses for procurements from its non-Federal funds, comply with 200.322 (procurement of recovered materials), and ensure that every purchase order or other contract includes any clauses required by 200.326 (contract provisions)</p>	<p><u>Synopsis:</u></p> <p>Must follow its own documented procurement procedures which reflect applicable state, local, and tribal laws and regulations, provided that the procurements conform to applicable federal law and the standards identified in 2 C.F.R. §§ 200.318 through 326</p>
<p><u>Note:</u> The recipient and subrecipient must comply with all applicable federal laws, regulations, and executive orders</p>	



Procurement Standard for States

- The regulation at 2 C.F.R. § 200.317 sets forth the procurement standard applicable to a state:
 - Must follow the same policies and procedures it uses for procurements from its non-Federal funds
 - Will comply with 2 C.F.R. § 200.322 (Procurement of Recovered Materials)
 - Must ensure that every purchase order or other contract includes any clauses required by 2 C.F.R. § 200.326 (Contract Provisions)
- The Uniform Rules do not define an Indian tribe as a state, such that an Indian tribe must follow the procurement standards at 2 C.F.R. §§ 200.318-326 irrespective of whether it is a recipient or subrecipient



Hypothetical

The federal procurement standard at 2 C.F.R. § 200.320(b) allows small purchase procedures for the acquisition of supplies or services below the simplified acquisition threshold (which is currently \$150,000). The State of X has a threshold of \$175,000 in its own version of small purchase procedures, and uses its own threshold and small purchase procedures to procure \$170,000 in supplies.

Is there an issue with the State's procurement?



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<p><u>Note:</u> The recipient and subrecipient must comply with all applicable federal laws, regulations, and executive orders</p>	



Other Non-Federal Entities

- All other non-Federal entities, to include Indian tribes (whether a recipient or subrecipient), follow their own documented procurement procedures which reflect applicable state, local, and tribal laws and regulations, provided that the procurements conform to applicable federal law and the standards identified in 2 C.F.R. §§ 200.318 through 326
- A non-Federal entity's procurement may meet the requirements of applicable state, local, and tribal procurement laws and regulations, but not meet the Federal procurement standards set forth in 2 C.F.R. §§ 200.318 through 326—such a procurement would not be compliant with the Uniform Rules
- This means that institutions of higher education, hospitals, and other private nonprofit organizations now follow the same procurement standards as local and tribal governments



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Hypothetical

The federal procurement standard at 2 C.F.R. § 200.320(b) allows small purchase procedures for the acquisition of supplies or services below the simplified acquisition threshold (which is currently \$150,000). The State of X has a threshold of \$175,000 in its own version of small purchase procedures. The City of Y uses the State's threshold and uses small purchase procedures to procure \$170,000 in supplies.

Is there an issue with the City's procurement?



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Overview of Standards

- The procurement standards can be broken down into the following categories:
 - General procurement standards (2 C.F.R. § 200.318)
 - Competition (2 C.F.R. § 200.319)
 - Methods of procurement (2 C.F.R. § 200.320)
 - Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms (2 C.F.R. § 200.321)
 - Procurement of recovered materials (2 C.F.R. § 200.322)
 - Contract cost and price (2 C.F.R. § 200.323)
 - Awarding agency and pass-through entity review (2 C.F.R. § 200.324)
 - Bonding requirements (2 C.F.R. § 200.325)
 - Contract provisions (2 C.F.R. § 200.326 and Appendix II)



General Procurement Standards

- The regulation at 2 C.F.R. § 200.318 identifies eleven general procurement standards, some of which are mandatory and others encouraged
- Contractor Oversight – A non-Federal entity must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders (2 C.F.R. § 200.318(b))
- Necessity – A non-Federal entity must have procedures that avoid acquisition of unnecessary or duplicative supplies or services, and consideration should be given to breaking out procurements to obtain a more economical purchase (2 C.F.R. § 200.318(d))



General Procurement Standards

- Standards of Conduct: Must maintain written standards of conduct covering conflicts of interest and governing the performance of employees engaged in the selection, award, and administration of contracts (2 C.F.R. § 200.318(c))
 - These standards must provide for disciplinary actions
 - Must cover “organizational conflicts of interest” if the non-Federal entity has a non-governmental parent, subsidiary, or affiliate (**new**)
- Conflict of Interest – No employee, officer, or agent must participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real **or** apparent conflict of interest
- Gifts – The officers, employees, and agents of the non-Federal entity must neither solicit nor accept gratuities, favors, or anything else of monetary value from contractors/subcontractors



Hypothetical

A local government is procuring construction services for the repair of its town hall damaged in a major disaster. Using procurement through sealed bids, the local government receives twelve bids. The head of the contracting board, who makes the final award decision, is the brother of the President of the company that submitted the lowest bid.

Should the head of the contracting board participate in the award decision?



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General Procurement Standards

- Awards to Responsible Contractors: A non-Federal entity must award contracts only to **responsible** contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement, and will give consideration to such matters as: (2 C.F.R. § 200.318(h))
 - Contractor integrity
 - Compliance with public policy
 - Record of past performance
 - Financial and technical resources
- Records: A non-Federal entity must maintain records sufficient to detail the history of the procurement, which must include, but are not limited to, rationale for the method of procurement; selection of contract type; contractor selection; and the basis for the contract price (2 C.F.R. § 200.318(i))



General Procurement Standards

- Time and Materials Contract (2 C.F.R. § 200.318(j))
 - A non-Federal entity may use time and materials (T&M) contracts only after a determination that no other contract is suitable and the contract includes a ceiling price that the contractor exceeds at its own risk
 - A time and materials type contract means a contract whose cost to a non-Federal entity is the sum of: (1) the actual cost of materials; and (2) direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit
- Settlement of Issues – A non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual issues (2 C.F.R. § 200.318(k)) (**change**)
- The Uniform Rules also “encourages” various standards (use of federal excess property, intergovernmental agreements, and value engineering) (2 C.F.R. § 200.318(e), (f), and (g))



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Competition

- A non-Federal entity must conduct procurement transactions in a manner providing “full and open competition” consistent with the standards of 2 C.F.R. § 200.319
- Contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from participating for such procurements (**new**)
- A non-Federal entity must conduct procurements in a manner that **prohibits** the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except where federal law expressly mandates or encourages geographic preference
- A non-Federal entity may use pre-qualified lists of persons, firms, or products, subject to certain conditions



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Competition

- The regulation identifies seven situations considered to be restrictive of competition (2 C.F.R. § 200.319(a)(1)-(7))
 - Noncompetitive pricing practices
 - Noncompetitive contracts to consultants on retainer
 - Organizational conflicts of interest
- A non-Federal entity must have written procedures for procurement transactions, which must ensure the solicitations provide for at least the following (2 C.F.R. § 200.319(c))
 - Incorporate a clear and accurate description of the technical requirements for the material product, or service procured
 - Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals



Hypothetical

Pre-Qualified Lists – City, after publicly advertising a request for qualifications, pre-qualifies three debris removal contractors for potential use during a future event. Later that same year, a category 5 hurricane impacts the State of Z, causing widespread damage and debris. Knowing debris removal will continue for approximately six months, the City uses the procurement by sealed bids method among the three contractors to meet the debris removal requirement. Contractor, who is not among the list of three, contacts the City during the solicitation period and wants to submit a request for qualifications and subsequent bid. The City denies this request during the solicitation period.

Does such a denial comport with 2 C.F.R. § 200.319(d)?



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Procurement Methods

- Micro-Purchase Procedures (2 C.F.R. § 200.320(a)) (new)
 - The acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold - \$ 3500
 - To the extent practicable, must distribute micro-purchases equitably among qualified suppliers
 - May be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable
- Small Purchase Procedures (2 C.F.R. § 200.320(b))
 - Are those relatively simple and informal procurement methods for securing services, supplies, or other property that does not cost more than the simplified acquisition threshold - \$ 150,000
 - Price or rate quotations are to be obtained from an “adequate number” of qualified sources



Procurement Methods

- Sealed Bidding (2 C.F.R. § 200.320(c))
 - 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 (IFB), is the lowest in price
 - Bids must be solicited from an “adequate number of known suppliers,” providing them sufficient response time before date for the opening of bids
 - Local and tribal governments must publicly advertise the invitation for bids (change)
 - All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly (change)
 - This method is “preferred” for construction when sealed bidding is “feasible,” which is when certain conditions are present
 - Other procedural requirements at 2 C.F.R. § 200.320(c)(2)



Procurement Methods

- Competitive Proposals (2 C.F.R. § 200.320(d))
 - Competitive proposals are generally used when conditions are not appropriate for the use of sealed bids
 - The appropriate method when more than one source is expected to submit an offer and either a fixed-price or cost-reimbursement type contract is awarded
 - Requests for proposals **must be publicized** and identify all evaluation factors and their relative importance
 - Proposals must be solicited from an adequate number of qualified sources
 - Must have written method for conducting technical evaluations of the proposals received and for selection of the contractor
 - Awards will be made to the responsible firm whose proposal is most advantageous to the program, with **price** and other factors considered



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Procurement Methods

- Noncompetitive Proposals (2 C.F.R. § 200.320(f)) (**change**)
 - Procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply
 - **One Source:** The item is available only from a single source
 - **Exigency/Emergency:** An exigency or emergency will not permit a delay resulting from competitive solicitation
 - **Awarding Agency Approval:** The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity
 - **Inadequate Competition:** After the solicitation of a number of sources, competition is determined inadequate
- The award of a contract no longer has to be “infeasible” under one of the competitive methods of procurement (which was another condition precedent under 44 C.F.R. § 13.36(d)(4))



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Procurement Methods – Case Study

- Severe storms, flooding, and landslides impact the State of Z during the period February 20 through April 2. The impacts of the storm necessitated road repairs.
- City X Agency invited four specific contractors—with whom they were familiar—to bid on the roadwork repairs, and awarded a contract for \$4.2 million to the lowest bidder among the four
- City X issued a notice to proceed with the work on January 8 (nine months after the disaster), and the contractor completed the project in December
- City X asserts that the City Procurement Manager approved the contract under emergency procurement procedures



Procurement Methods – Case Study

- OIG recommended a disallowance of the contract costs of \$4.2 million based, in part, on the following findings:
 - The applicant circumvented full and open competition by inviting only the four contractors to bid on roadwork repairs
 - The work commenced nine months after the declaration, and the work itself was more long term in nature and not emergency-oriented
- OIG stated that it did not believe it was prudent to waive federal procurement standards unless lives and property are at risk
 - The goals of proper contracting relate to more than just reasonable costs
 - Once the roads are clear, power is restored, and the danger is over, cities, counties, and other entities should follow federal regulations or risk losing federal funding



Socioeconomic Contracting

- A non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible (2 C.F.R. § 200.321)
- The affirmative steps must include at least the following:
 - Placing qualified small and minority businesses and women's business enterprises on solicitation lists
 - Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources
 - 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
 - Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises



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Socioeconomic Contracting

- The affirmative steps must include at least the following (cont.):
 - 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
 - Requiring the prime contractor, if subcontracts are to be let, to take the five previous, affirmative steps
- Failure to comply with the former, equivalent procurement standard has been a very common finding in Office of Inspector General audits



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Socioeconomic – Case Study

- A severe winter storm impacts the State of Z and coats power lines and trees with ice, and the added weight of the ice damages or destroys roughly 8000 utility poles through the Utility Cooperative's service area. This caused power outages to approximately 25,000 of the Cooperative's customers.
- After the Cooperative restored power to its customers, it used full and open competition in awarding \$5.6 million in contracts for longer term work.
- However, the Cooperative did not take the required steps to assure that it used small businesses, minority-owned firms, and women's business enterprises when possible, and did not include federally required provisions in its contracts



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Socioeconomic – Case Study

- OIG recommended a disallowance of \$5.6 million in contract costs based, in part, on the Cooperative's failure to take specific steps to ensure the use of small businesses, minority-owned firms, and women's business enterprises whenever possible
- The Cooperative stated that it was unaware of this requirement and that all businesses had an opportunity to bid, and that it was concerned about contract cost and contractor experience rather than a contractor's business affiliation



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Cost and Price

- A non-Federal entity must perform a price or cost analysis in connection with every procurement action above the simplified acquisition threshold, including contract modifications (2 C.F.R. § 200.323) (**change**)
- The method and degree of analysis is dependent on the facts and circumstances surrounding the particular procurement but, as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals (**change**)
- A non-Federal entity **shall** 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



Hypothetical

The City conducts a procurement through competitive proposals for consulting services, resulting in a cost reimbursement contract with anticipated costs of \$100,000 at the time of the contract. The City has made an independent estimate of the contract cost during acquisition planning of \$110,000.

Is the City required to conduct a price or cost analysis?



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Cost Plus Percentage of Cost

- A non-Federal entity must not use a cost-plus-percentage-of-cost or cost-plus-percentage-of-construction-cost method of contracting (2 C.F.R. § 200.323(d))
- Criteria evidencing this type of contract
 - Payment is on a predetermined percentage rate
 - The predetermined percentage rate is applied to actual performance costs
 - The contractor's entitlement is uncertain at the time of contracting
 - The contractor's entitlement increases commensurately with increased performance costs
- Rationale: There is no incentive to control costs, and the contractor has a financial interest in *increasing* the cost of performance



Case Study

- Hurricane Katie impacts the State of Z in August 2005 and causes significant damage to School District facilities
- The School District noncompetitively awards a prime contractor a cost-plus-percentage-of-cost contract for work totaling \$17.3 million for 13 projects
 - Contract largely included work necessary to open schools for the 2005-2006 school year (mold remediation; replacement of canopies; exterior windows, doors, and frames; repairs to roofing and flooring; and other various repair items)
 - Under the contract, the primary contractor added markups of 10 percent each for overhead and profit on time-and-materials billings for its own employees and on pass-through costs of its subcontractors
 - School District does not conduct price or cost analysis



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Case Study – OIG 14-44-D (2014)

- The OIG stated that the “emergency” requirement to get schools opened as quickly as possible after the disaster justified the use of a noncompetitive contract
- Because the contract work expedited the opening of the schools, OIG did not question the entire contract amount, but did recommend disallowing \$2.9 million because:
 - Federal regulations prohibit a cost-plus-percentage-of-cost contract
 - FEMA has no assurance that the District paid a fair and reasonable price for the contract work.
- There were other problems with the contract, such as:
 - Applicant did not solicit competitive bids for A/E services for long term repair work for 16 projects
 - Applicant did not take affirmative steps to ensure the use of minority firms,



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women's business enterprises, and labor surplus firms when possible



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Cost and Price – Case Study

- Hurricane Kathleen impacts the State of Z and causes significant damage to University in August
- As part of the restoration of the facility, University awards a \$205 million contract to its primary contractor using a noncompetitive, prohibited cost-plus-percentage-of-cost contract; work mainly performed from September to June

Description	Amounts Billed Before Markups	Markup Amounts	Mark up %	Amounts Billed After Markups	% of Total Billings
Time & Materials Billings	\$ 45,124,626	\$ 8,703,232	19.3%	\$ 53,827,858	26.2%
Subcontractors & Vendors	<u>125,239,350</u>	<u>26,300,261</u>	21.0%	<u>151,539,611</u>	<u>73.8%</u>
Totals	<u>\$170,363,976</u>	<u>\$35,003,493</u>	20.5%	<u>\$205,367,469</u>	<u>100.0%</u>



Cost and Price – Case Study

- OIG recommended, in part, the disallowance of \$35 million as excessive and prohibited mark-up costs
 - Federal regulations prohibit cost-plus-percentage-of-cost because they provide no incentive for contractors to control costs—the more contractors charge, the more profit they make
 - Normally, the OIG would recommend total disallowance of the entire \$205.4 million; however, it did not in this case because exigent circumstances existed at the time of the award
- University did not perform a cost or price analysis, did not take sufficient steps to ensure the use of small businesses, minority firms, and women’s business enterprises, and did not include required contract provisions



Pre-Procurement Document Review

- Review of Specifications: A non-Federal entity must make available the technical specifications for a proposed procurement upon request by FEMA or the pass-through entity where FEMA or the pass-through entity believes such review is necessary to ensure that the item or service specified is the one being proposed for acquisition (2 C.F.R. § 200.324(a))
- Pre-Procurement Review of Other Procurement Documents
 - A non-Federal entity must make available upon request for FEMA or pass-through entity **pre-procurement review** of other procurement documents (such as requests for proposals, invitations for bid, independent cost estimates) in certain circumstances (2 C.F.R. § 200.324(b))
 - A non-Federal entity is exempt from the pre-procurement review if FEMA or the pass-through entity determines that its procurement systems comply with the standards under 2 C.F.R. pt. 200



FEMA

Bonding Requirements

- A non-Federal entity must follow its own bonding requirements for construction or facility improvement projects beneath the simplified acquisition threshold (2 C.F.R. § 200.325)
- A non-Federal entity must meet certain bonding requirements for construction or facility improvement projects above the simplified acquisition threshold (2 C.F.R. § 200.325(a)-(c))
 - A non-Federal entity may use its own bonding policy and requirements provided that FEMA or the pass-through entity has made a determination that the Federal interest is adequately protected
 - If no such determination has been made, the bonding requirements are:
 - A bid guarantee from each bidder equivalent to 5% of the bid price
 - A performance and payment bond on the part of the contractor for 100% of the contract price



FEMA

Hypothetical

City conducts a procurement through sealed bidding for debris removal services, awarding the contract on a unit price basis with estimated total costs of \$400,000. Neither FEMA nor the State has certified the bonding policy and requirements of the City.

Is the procurement subject to the bonding requirements of 2 C.F.R. § 200.325?



FEMA

Required Contract Provisions

- A non-Federal entity's contracts are required to contain certain provisions – some are based on sound contracting practices and others are required by federal law, executive order, and regulations (2 C.F.R. § 200.326)
- These required provisions are provided in Appendix II to Part 200—Contract Provisions for Non-Federal Contracts Under Federal Awards



FEMA

Procurement of Recovered Materials

- A non-Federal entity that is a **state agency or agency of a political subdivision of a state and its contractors** must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (2 C.F.R. § 200.322)
- The requirements of Section 6002 include:
 - Procuring only items designated in guidelines of the EPA at 40 C.F.R. pt. 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000
 - Procuring solid waste management services in a manner that maximizes energy and resource recovery
 - Establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines



FEMA

Suspension and Debarment

- Non-federal entities and contractors are subject to the non-procurement debarment and suspension regulations implementing Executive Orders 12549 and 12689, 2 C.F.R. pt. 180 (2 C.F.R. § 200.212)
- Non-Federal entities must not make any award or permit any award at any tier to parties listed on the governmentwide exclusions in the System for Award Management (“SAM”), which can be found at www.sam.gov.
- The rules for assistance exclusion are also governed by DHS implementing regulations at 2 C.F.R. pt. 3000



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Agenda

- Background
- Terminology and Key Players
- Procurement Standards for States
- Procurement Standards for Other Non-Federal Entities
- Differences between the New and Old Procurement Standards



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States

- The former standard at 44 C.F.R. § 13.36(a) is substantively the same as 2 C.F.R. § 200.317 – a state must follow the same policies and procedures it uses for procurements from its nonfederal funds
- There is a slight difference in the case of contract clauses
 - The previous standard required that the “state will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations
 - The new regulation is more prescriptive, making the state include the clauses required by 2 C.F.R. § 200.326
- The new standard also makes clear a state needs to comply with 2 C.F.R. § 200.322 (procurement of recovered materials)



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IHEs, Hospitals, and Other PNPs

- The former procurement standards applicable to institutions of higher education, hospitals, and other nonprofit organizations were set forth at 2 C.F.R. §§ 215.40 through 48
- These former procurement standards were similar, but not the same, as the new standards
 - The new procurement standards devote great attention to the methods of procurement that must be followed
 - Geographic preferences are expressly prohibited
 - There are different affirmative steps related to small and minority businesses, women's business enterprises, and labor area surplus firms
 - Written standards of conduct must include provisions for organizational conflict of interest in the case of parents, subsidiaries, and affiliates
 - There are some additional documentation requirements concerning the choice of the method of procurement and contract type
 - Conditions precedent for time and materials contracts



Government Entities (not States)

- There are some important distinctions between the former standards at 44 C.F.R. § 13.36 and the new standards
- The methods of procurement have changed
 - There is now a micro-purchase method of procurement
 - Clarifies that the small purchase procedures apply to simplified acquisitions of \$150,000
 - Removal of the “infeasibility” condition precedent for a procurement through noncompetitive proposals
 - Requirement for sealed bids to be advertised and opened publicly is limited to local and tribal governments
- The regulation expressly prohibits contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or proposals from competing for such requirements



FEMA

Government Entities (not States)

- The cost or price analysis regulation has changed
 - Cost or price analysis only required for procurements exceeding the simplified acquisition threshold (used to be required for all procurements)
 - No longer a requirement to conduct a cost analysis when adequate price competition is lacking; and for sole source procurements, including contract modifications or change orders
 - All non-Federal entities required to perform independent estimate
- There is new content required in a non-Federal entity's written standards of conduct for organizational conflicts of interest arising due to related organizations
- Removal of content requiring non-Federal entities to have protest procedures to handle and resolve disputes related to procurements and also content explaining when the Federal awarding agency will review protests



Questions?

- Additional Resources can be found at the following link:

<https://www.fema.gov/media-library/assets/documents/96773>



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Home and Security