

# Procurement Desk Reference

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

getting it right!



## PURPOSE

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

## DISCLAIMER

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

### Introduction to the Procurement Desk Reference

When disasters occur, they generally have severe impacts on communities ranging from damages to homes and public facilities, loss of life, closed businesses and population displacement. When the magnitude of the disaster overwhelms the resources of a State and its local entities, the President can declare a disaster and provide Federal assistance to the affected areas.

Federal assistance is channeled to Louisiana through the Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP). Funding for recovery is provided to the State and local entities, in part, in the form of **FEMA Public Assistance (PA)** and **Hazard Mitigation (HM) grants**. **Federal assistance comes with regulatory requirements that must be met.** As the *Grantee*, it is the responsibility of GOHSEP to ensure that the recipient of the FEMA grant, the *subgrantee*, complies with all Federal regulations and FEMA policy regarding FEMA grants management.

As a step to assure that subgrantees retain their Federal grant funding, GOHSEP conducts **annual education outreach programs** and **produces job aids** to assist subgrantees in maintaining **regulatory compliance** throughout the grants management cycle.

Sometimes our response partners lose sight of the fact that every action taken for response and recovery efforts are governed by **Federal law, regulation** and **FEMA policy**. Failure to follow those governing rules may have significant financial consequences for the subgrantee.


Since 2011, GOHSEP has placed considerable emphasis on procurement both in the presentations of education outreach programs and in the preparation of job aids. The reason for this is obvious: **Improper procurement is a significant reason** why the U.S. Department of Homeland Security - Office of Inspector General (DHS-OIG) recommends **de-obligation of FEMA funding**.

The amounts are considerable. For fiscal years 2009 – 2012, DHS-OIG conducted 51 audits in Louisiana of grants issued for the FEMA PA program. After accounting adjustments, the audits recommended that **\$502,367,246 be de-obligated**. Thirteen (13) of those audits addressed **improper procurement practices** by subgrantees resulting in recommendations that **\$100,328,174 be de-obligated**. DHS-OIG does not audit all subgrantees nor does it audit **all** project worksheets (PWs) of the subgrantees. It is expected that similar issues will be discovered at closeout of the FEMA PA program currently supporting Louisiana open disasters.

These audits mainly address projects initiated during 2005 – 2008 and highlight both GOHSEP's and the subgrantee's need to address the issue of procurement compliance. While FEMA has liberally exercised its discretionary powers to mitigate improper procurement by applying a **reasonable cost analysis**, FEMA continues to be challenged by DHS-OIG in its blanket application of its discretionary powers.

While most emphasis is placed on the FEMA PA program due to the large amount of funding, FEMA HM, Homeland Security (HLS) and Emergency Management Performance Grants (EMPGs) are also subject to the same procurement rules. FEMA funding in **any form** and **for any reason** brings with it the requirement for the subgrantee to be **regulatory compliant**.



This job aid — the **Procurement Desk Reference: DHS-OIG Audit Findings + FEMA Policy + Comments + Tips + MORE!** (**Procurement Desk Reference**) — is a companion piece to the *PROCUREMENT GUIDE: Getting and KEEPING your FEMA grant dollars!* and **Procurement Checklist**. The suite of materials represents continuing efforts by GOHSEP to both simplify and provide the subgrantee with the necessary information to understand the procurement requirements for Federal grants. The specific purpose of the **Procurement Desk Reference** is to break down the procurement regulation (44 CFR 13.36) to its simplest form and provide information to assist the subgrantee in understanding how a specific provision of the regulation is interpreted. The **Procurement Desk Reference** contains both formal and informal information. The formal information is represented by FEMA responses to DHS-OIG audits and stated FEMA policies which address procurement. (Complete FEMA documents cited in the **Procurement Desk Reference** can be viewed and downloaded at [www.gohsep.la.gov/publications.aspx](http://www.gohsep.la.gov/publications.aspx)). Informal information  contains **tips**, **ideas** and **advice** based upon the daily interactions of the GOHSEP staff with FEMA and DHS-OIG. In both instances, GOHSEP is providing the user with its interpretation of the FEMA responses and the informal information it receives. The information is open to

individual interpretations and is meant to provide the subgrantee with source references to better manage its Federal grants.

While it has been recognized that procurement regulations governing **FEMA PA, HM, HLS** and **EMPG** grant programs are unique to our State and local laws and can be confusing, compliance is required — as it should be. Competition should be open. Costs should be competitive and reasonable whenever possible. As exhibited above, large sums of funding are at stake. It makes little sense to receive funding for a project only to be notified after the project is started, or even completed, that the funds have to be returned (de-obligated) as a result of **non-compliance**. It is with great expectation that this **Procurement Desk Reference** will assist our subgrantees in retaining all of their Federal funding.

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# table of contents

## Procurement: AVOIDING DHS-OIG Audit Findings!

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ACRONYMS	1
44 CFR § 13.36 PROCUREMENT	3
(a) STATES	3
(b) PROCUREMENT STANDARDS	3
(c) COMPETITION	11
(d) METHODS OF PROCUREMENT TO BE FOLLOWED	15
(e) CONTRACTING WITH SMALL AND MINORITY FIRMS, WOMEN'S BUSINESS ENTERPRISE AND LABOR SURPLUS AREA FIRMS	21
(f) CONTRACT COST AND PRICE	23
(g) AWARDING AGENCY REVIEW	27
(h) BONDING REQUIREMENTS	31
(i) CONTRACT PROVISIONS	33
APPENDIX	39
GOHSEP CONTACTS	41

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### Acronyms

**A/E** – Architectural/Engineering

**AG** – Attorney General

**CFR** – Code of Federal Regulations

**DAP** – Disaster Assistance Policy

**DHS-OIG** – U.S. Department of Homeland Security – Office of Inspector General

**DOLR** – Disaster Operations Legal Reference

**DRS** – Disaster Recovery Specialist

**FAQ** – Frequently Asked Questions

**FAR** – Federal Acquisition Regulation

**FEMA** – Federal Emergency Management Agency

**FMA** – Flood Mitigation Assistance

**GOHSEP** – Governor’s Office of Homeland Security and Emergency Preparedness

**HLS** – Homeland Security

**HM** – Hazard Mitigation

**LAC** – Louisiana Administrative Code

**LRS** – Louisiana Revised Statute

**OIG** – Office of Inspector General

**OMB** – Office of Management and Budget

**PA** – Public Assistance

**PNP** – private nonprofits

**RFC** – Repetitive Flood Claims

**RFP** – Request for Proposal

**RP** – Recovery Policy

**RFQ** – Requests for Qualifications

**SOW** – Statement of Work or Scope of Work

**SRL** – Severe Repetitive Loss

**Stafford Act** – *Robert T. Stafford Disaster Relief and Emergency Assistance Act*


**T & M** – Time and Materials

**U.S.C.** – United States Code

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## AVOIDING DHS-OIG AUDIT FINDINGS: PROCUREMENT

Provision 44 CFR § 13.36 Procurement	Remarks
<b>(a) States.</b>	
<p>When procuring <b>property</b> and <b>services</b> under a grant, a State will follow the <b>same</b> policies and procedures it uses for procurement from its non-Federal funds. 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. <b>Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.</b></p>	<ul style="list-style-type: none"> <li>• <b>State</b> is defined as “any agency or instrumentality of a State, exclusive of local governments” (44 CFR 13.3 and 2 CFR 225 (B) (16) and (18)).</li> <li>• Louisiana law defines <b>local governmental subdivision</b> as “any Parish or municipality (Louisiana Constitution of 1974, Section 44 (1)). Any political subdivision not a Parish or municipality may be a “State”.</li> <li>• There appear to be some <b>qualifiers</b>. “Instrumentality of a State” is defined as a State university or a State department of transportation (<i>Black’s Law Dictionary</i>, 9th ed, 2009: “arm of the State”).</li> <li>• <b>Agency</b> is defined under Louisiana law as “each State board, commission, department, agency, officer or other entity which makes rules, regulations, or policy or formulates or issues decisions or orders (Louisiana Revised Statute [LRS] 49:951(2)).</li> </ul> <p style="text-align: center;"> <i>Opportunity for a subgrantee to take a position most beneficial to it. Caution: Exercise most <b>conservative</b> position if unsure.</i></p>
The following provisions apply to <b>non-State grantees</b> and <b>subgrantees</b> .	
<b>(b) Procurement standards.</b>	
<p>(1) Grantees and subgrantees will use their <b>own procurement procedures</b> which reflect applicable State and local laws and regulations, provided that the procurements <b>conform to applicable Federal law</b> and the standards identified in this section.</p>	<ul style="list-style-type: none"> <li>• <b>Disaster Assistance Policy (DAP) 9580.212</b> contains relevant Frequently Asked Questions (FAQs) on grant contracting</li> <li>• <b>Plaquemines Parish DD-09-03</b>, states that Federal Acquisition Regulation (FAR) Section 2.101 requires contracts and amendments to be in writing; <b>Archdiocese of New Orleans DD-10-18</b>, <b>City of Abita Springs DD-11-04</b>, and <b>Orleans Parish Criminal Sheriff DD-10-08</b>, FEMA noted the OIG finding that the contract was unsigned and <b>required GOHSEP to notify subgrantee of requirement that contract be in writing.</b></li> <li>• <b>New Orleans City Park DD-09-15</b>, FEMA <b>will not recognize executive orders relaxing State procurement requirements</b> as they do not change Federal regulations that must be complied with.</li> <li>• <b>City of Abita Springs DD-11-04</b>, while State law (LRS 39:1581 and Louisiana Administrative Code [LAC] 34:1101) <b>may allow a subgrantee to avoid normal procurement procedures under emergency conditions</b>, that procedure must conform to this regulation.</li> </ul>

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## AVOIDING DHS-OIG AUDIT FINDINGS: PROCUREMENT

<p>(2) Grantees and subgrantees <b>will maintain a contract administration system</b> which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.</p>	<ul style="list-style-type: none"> <li>• <b>Plaquemines Parish DD-09-03 questioned the subgrantee's exercise of its responsibility under this regulation</b> resulting in the performance of <b>ineligible work</b> by subgrantee's contractor.</li> </ul> <p> <i>It is the responsibility of the subgrantee to assure that all contract provisions are followed. Suggest that subgrantees have a contract monitoring policy much like the monitoring requirement for Grantees found at 44 CFR 13.40.</i></p>	<p>1 2 3 4 5 6 7 8</p>
<p>(3) Grantees and subgrantees <b>will maintain a written code of standards of conduct governing the performance of their employees</b> engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee <b>shall participate in selection</b>, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. <b>Such a conflict would arise when:</b></p> <ul style="list-style-type: none"> <li>(i) The employee, officer or agent,</li> <li>(ii) Any member of his immediate family,</li> <li>(iii) His or her partner, or</li> <li>(iv) An organization which employs, or is about to employ, any of the above, has a <b>financial or other interest</b> in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent or potential conflicts of interest.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Recovery Policy (RP) 9580.212</b>, page 5, paragraph 7 which addresses conflicts of interest.</li> </ul> <p> <i>If one always applies the "apparent" standard, should never have an issue.</i></p>	<p>9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32</p>
<p>(4) Grantee and subgrantee procedures <b>will provide for a review of proposed procurements</b> to avoid purchase of <b>unnecessary or duplicative</b> items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, <b>an analysis will be made</b> of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.</p>	<ul style="list-style-type: none"> <li>• <b>DAP 9525.12</b>, paragraph VII,D for policy on <b>leasing</b>.</li> </ul> <p> <i>Appears to suggest that this is an exception to the rule of separating larger projects into smaller projects if one can justify "a more economic purchase". Suggest this be avoided.</i></p>	<p>33 34 35 36</p>



## AVOIDING DHS-OIG AUDIT FINDINGS: PROCUREMENT

<p>(5) To foster greater economy and efficiency, grantees and subgrantees are <b>encouraged to enter into State and local intergovernmental agreements</b> for procurement or use of common goods and services.</p>	<ul style="list-style-type: none"> <li>• <b>RP 9580.212, page 8, paragraph 6</b> describes <b>piggyback contracts</b>. These agreements do not meet the definition of piggyback contracts.</li> </ul> <p> <i>Subgrantee should use these agreements whenever they are available and fit its needs. It allows the subgrantee to avoid the procurement process.</i></p>
<p>(6) Grantees and subgrantees are encouraged to <b>use Federal excess and surplus property in lieu of purchasing new equipment</b> and <b>property</b> whenever such use is feasible and <b>reduces</b> project costs.</p>	
<p>(7) Grantees and subgrantees <b>are encouraged to use value engineering clauses in contracts for construction projects of sufficient size</b> to offer reasonable opportunities for <b>cost reductions</b>. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.</p>	<p> <i>Operative word is “encouraged” and not required. Probably why it has never been an issue. GOHSEP has not been presented with this issue.</i></p>
<p>(8) Grantees and subgrantees <b>will make awards only to responsible contractors</b> possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration <b>will be given to such matters</b> as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.</p>	<ul style="list-style-type: none"> <li>• <b>Jesuit High School DD-11-21</b>, responsible contractor is judged by <b>integrity</b> and <b>past performance</b>.</li> </ul> <p> <i>Past performance of contractors is frequently an issue with some Applicants. It can be addressed in the grading process.</i></p> <p> <i>A response deemed to be non-responsive (usually addressed in the Request for Proposal [RFP]) and/or not responsible will not count as a response to the solicitation.</i></p>
<p>(9) Grantees and subgrantees <b>will maintain records sufficient to detail</b> the significant history of a procurement. These records will include, but are not necessarily limited to the <b>following</b>: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.</p>	<p> <i>On first request for reimbursement by subgrantee, GOHSEP Disaster Recovery Specialist (DRS) will request that subgrantee produce the RFP, number of responses, selection methodology and contract. Non-compliance will result in termination of future payments and cost analysis by subgrantee to justify payment of current services.</i></p>

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## AVOIDING DHS-OIG AUDIT FINDINGS: PROCUREMENT

(10) Grantees and subgrantees **will use time and materials type contracts only** —

- (i) After a determination that **no other contract is suitable**, and
- (ii) If the contract includes a ceiling price that the **contractor exceeds** at its own risk.

- See **RP 9580.212, page 4, paragraph 6** for a discussion on time and materials (T & M) contracts.
- **Debris Guide 9580.201**, T & M contracts typically occur with debris.



*Other than debris contracts, consulting services contracts are T & M contracts and have not been questioned by FEMA or OIG.*

- **Archdiocese of New Orleans DD-10-18, Town of Abita DD-11-0, Calcasieu School Board DD-11-20**, when a T & M contract is improperly used, FEMA will pay **reasonable cost** in accordance with its discretionary enforcement policy (see 44 CFR 13.43); T & M contracts must contain a not-to-exceed clause, and subgrantee must show justification for the use of T&M contract and reasonable cost, and that rates are fully loaded.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the **settlement of all contractual and administrative issues** arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies **will not substitute their judgment for that of the grantee or subgrantee** unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

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## AVOIDING DHS-OIG AUDIT FINDINGS: PROCUREMENT

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes **relating to their procurements** and shall in all instances **disclose information regarding the protest** to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. **Reviews of protests by the Federal agency will be limited to:**

- (i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the **jurisdiction** of State or local authorities) and
- (ii) Violations of the grantee’s or subgrantee’s protest procedures for failure to review a complaint or protest. **Protests** received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

### (c) Competition.

(1) All procurement transactions will be conducted in a manner providing **full and open competition consistent with the standards of section 13.36**. Some of the situations considered to be restrictive of competition **include but are not limited to:**

- (i) Placing **unreasonable requirements** on firms in order for them to qualify to do business,
- (ii) Requiring **unnecessary experience** and excessive bonding,
- (iii) **Noncompetitive** pricing practices between firms or between affiliated companies,
- (iv) **Noncompetitive** awards to consultants that are on retainer contracts,
- (v) Organizational **conflicts** of interest,
- (vi) Specifying only a **“brand name”** product instead of allowing “an equal” product to be offered and describing the performance of other relevant requirements of the procurement, and
- (vii) Any **arbitrary action** in the procurement process.

- **Plaquemines Parish DD-09-03**, full and open competition required.
- **Orleans Parish Criminal Sheriff DD-10-08**, FEMA will allow a noncompetitive contract, but when **exigent circumstances** no longer exist, it must be competitively bid.
- **Xavier University DD-11-12**, subgrantee solicited sufficient proposals but only received **one response**. FEMA stated the good faith effort and found the lack of response based upon inadequacy of local competition. FEMA found subgrantee to be prudent and its action allowable.



*Publicizing verses advertising is required; no limited lists of vendors no matter how large or capable.*

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## AVOIDING DHS-OIG AUDIT FINDINGS: PROCUREMENT

(2) Grantees and subgrantees **will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals**, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for **architectural and engineering (A/E)** services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

- **Section 307 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act)** encourages geographic preference.
- **LRS 38:2225.1** addresses **preferences** under State law for residences.
- **LRS 39:2171** gives a **preference** to Louisiana Veterans (Veteran Initiative) and LRS 39:2001 allows a preference to Louisiana Small Enterprises (Hudson Initiative).

(3) Grantees **will have written selection procedures for procurement transactions**. These procedures will ensure that all solicitations:

- (i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the **qualitative** nature of the material, product or service to be procured, and when necessary, shall set forth those **minimum essential characteristics** and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a **“brand name or equal”** description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and
- (ii) Identify **all requirements** which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

-  *A good statement of work (SOW) is needed to properly evaluate the responses and will prevent problems such as “out of scope” work after the contract is signed and the work begins.*
-  *RFP usually contains administrative instructions which, if not followed, makes the response “unresponsive” and is rejected. RFP should include grading and scoring criteria.*

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## AVOIDING DHS-OIG AUDIT FINDINGS: PROCUREMENT

(4) Grantees and subgrantees **will ensure that all pre-qualified lists of persons, firms, or products which are used in acquiring goods and services are current** and include enough **qualified sources** to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.



*Seems to suggest that a pre-qualified list which is broad enough to provide for a competitive process is sufficient. Second sentence states that it cannot preclude other bidders. When read together, appears to indicate that despite having a sufficient pre-qualified list, unless you advertise/publicize, you are precluding others from bidding. However, see Jesuit DD-11-21 reported at (d)(3)(i).*

### (d) Methods of procurement to be followed.

(1) *Procurement by small purchase procedures.* Small purchase procedures are those **relatively simple** and **informal procurement methods** for securing services, supplies or other property that **do not cost more than the simplified acquisition threshold** fixed at 41 United States Code (U.S.C.) 403(11) (**currently set at \$150,000**). If small purchase procedures are used, price or rate quotations shall be obtained from an **adequate number** of qualified sources.

- **Disaster Operations Legal Reference (DOLR) Version 2.0, page 5-117**, threshold is currently \$150,000 for the simplified acquisition.
- **FEMA Recovery Fact Sheet 9580.212** states that THREE (3) is the minimum number of sources.
- **Jesuit School DD-11-21** discusses a small purchase.

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## AVOIDING DHS-OIG AUDIT FINDINGS: PROCUREMENT

(2) Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the **responsible bidder whose bid, conforming to all the material terms and conditions of the invitation for bids, is the lowest in price**. The sealed bid method is the **preferred method** for procuring construction, if the conditions in § 13.36(d)(2)(i) apply.

- (i) In order for sealed bidding to be **feasible**, the following conditions should be present:
  - (A) A complete, adequate, and realistic **specification** or purchase description is available;
  - (B) Two or more **responsible bidders** are willing and able to compete effectively and for the business; and
  - (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.
- (ii) If sealed bids are used, the following **requirements** apply:
  - (A) The invitation for bids will be **publicly advertised** and bids shall be solicited from an **adequate number** of known suppliers, providing them sufficient time prior to the date set for opening the bids;
  - (B) The invitation for bids, which will include any **specifications** and pertinent attachments, shall define the items or services in order for the bidder to properly respond;
  - (C) All bids will be **publicly opened** at the time and place prescribed in the invitation for bids;
  - (D) A firm-fixed-price contract award will be made **in writing** to the **lowest responsive** and **responsible** bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and
  - (E) Any or all bids **may be rejected** if there is a sound documented reason.



*Bidder criteria usually limited to construction contracts; lowest bidder must be responsible, i.e. ability to perform the contract, not just the lowest bidder.*



*Section (i)(B): seems to define adequate number as two (2).*



*Interpret (A) as meaning that the Grantee or subgrantee should assure that an adequate number of suppliers have knowledge of the bid.*



*Responsive, responsible, debarred contractor.*

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## AVOIDING DHS-OIG AUDIT FINDINGS: PROCUREMENT

(3) Procurement by *competitive proposals*. The technique of competitive proposals is normally conducted with **more than one source submitting an offer**, and **either a fixed-price or cost-reimbursement type contract is awarded**. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following **requirements** apply:

- (i) Requests for proposals will be **publicized** and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;
- (ii) Proposals will be solicited from **an adequate number** of qualified sources;
- (iii) Grantees and subgrantees will have a method for conducting **technical evaluations** of the proposals received and for selecting awardees;
- (iv) Awards will be made to the **responsible** firm whose proposal is most advantageous to the program, with price and other factors considered; and
- (v) Grantees and subgrantees may use competitive-proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby **competitors' qualifications** are evaluated and the most qualified competitor is selected, subject to negotiation of **fair and reasonable compensation**. The method, where price is not used as a selection factor, can **only be used** in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.



*"More than one source" indicates that the minimum number of responses is TWO (2).*

- **City of Abita Springs, DD-11-04**, piggyback contracts, although not ineligible are to be **avoided**, *Debris Management Guide* FEMA 325, July 2007, page 19, DOLR Version 2.0, page 5-128.
- **Jesuit High School DD-11-21**, formal advertising is not required. Subgrantee took no steps to limit competition and under the circumstances sought the **broadest possible** number of bidders.



*Subgrantees are required to publicize. Advertising is a part of publicizing. The requirement to publicize means that the subgrantee must not take any steps to limit competition and seek the broadest possible number of bidders under the circumstances.*

- **Xavier University DD-11-12** where subgrantee was found to solicit from an **adequate number** of sources but received only one response.

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## AVOIDING DHS-OIG AUDIT FINDINGS: PROCUREMENT

- (4) Procurement by *noncompetitive proposals* is procurement through **solicitation of a proposal from only one source**, or after solicitation of a number of sources, competition is determined inadequate.
- (i) Procurement by noncompetitive proposals may be used **only** when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:
    - (A) The item is available only from a **single source**;
    - (B) The public exigency or emergency for the requirement will **not permit a delay** resulting from competitive solicitation;
    - (C) The awarding agency **authorizes** noncompetitive proposals; or
    - (D) After solicitation of a number of sources, competition is determined **inadequate**.
  - (ii) **Cost analysis**, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits, is required.
  - (iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for **pre-award** review in accordance with paragraph (g) of this section.

- **Xavier University DD-11-12, id**
- **Jefferson Davis and Beauregard Electrical Cooperatives DD-09-08**, FEMA recognized the emergency period to restore power to the area following Hurricane Rita. FEMA will not recognize emergency periods that are **arbitrarily** set.
- **St. Mary’s Academy DD-11-15**, FEMA found a noncompetitive awarded contract eligible recognizing the need to open the school as soon as possible, the **good faith effort** of the subgrantee to obtain bids and the lack of contractors to do the work.
- **Jesuit High School DD-11-21**, noncompetitive contract properly procured based upon the exigent circumstances to clean and stabilize the facility and stop further deterioration. Also noted by FEMA was the subgrantees longtime **relationship** with the contractor.
- **St. Charles Parish School Board DD-13-07**, FEMA recognized exigent circumstances to open the schools as soon as possible. FEMA also commented on cost and **previous relationship** with contractor.
- **Orleans Parish Sheriff’s Office DD-10-08**, once the exigent conditions and emergency circumstances no longer exist, **contract must be competitively bid**; any expenses after this period are limited to reasonable and necessary cost.



*Everything is limited to necessary cost, even if properly procured?*

- **St. Charles Parish School Board DD-13-07, Jesuit High School DD-11-12**, under (B), FEMA appears to determine “public exigency or emergency” on a case-by-case basis.

### (e) Contracting with small and minority firms, women’s business enterprise and labor surplus area firms.

- (1) Grantees and subgrantees **will take all necessary affirmative steps to assure that minority firms, women’s business enterprises and labor area firms are used when possible**.

- **Cameron Parish School Board DD-12-04 and St. Charles Parish DD-12-20** reiterates that subgrantees will take the necessary steps to use these firms.



*The term “when possible” was interpreted by the OIG as “. . . to the extent consistent with quality, price, risk and other lawful and relevant considerations . . .” Source: OIG Audit, St. Charles Parish (Finding D, page 7).*

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## AVOIDING DHS-OIG AUDIT FINDINGS: PROCUREMENT

(2) **Affirmative steps** shall include:

- (i) Placing **qualified** small and minority businesses, and women’s business enterprises on solicitation lists;
- (ii) Assuring that small and minority businesses, and women’s business enterprises are **solicited** whenever they are potential sources;
- (iii) Dividing total requirements, when economically feasible, into **smaller tasks** or **quantities** to permit maximum participation by small and minority business, and women’s business enterprises;
- (iv) Establishing delivery schedules, where the requirement permits, which **encourage participation** by small and minority business, and women’s business enterprises;
- (v) Using the services and assistance of the **Small Business Administration**, and the **Minority Business Development Agency** of the **Department of Commerce**; and
- (vi) Requiring the prime contractor, if subcontracts are to be let, to take the **affirmative steps** listed in paragraphs (e)(2) (i) through (v) of this section.

- **FEMA P-323 / March 2010**, examples of affirmative; steps include, but are not limited to:
  - Ensuring that the group of contractors considered for awards reflects **appropriate** demographics,
  - Placing qualified minority and women-owned businesses on **solicitation lists**, soliciting these businesses when possible, and requiring prime contractors to take these steps as well.



*Suggest that solicitation means that these firms are identified and sent copies of the RFP/requests for qualifications (RFQs).*



*Appears to contradict the requirement that you cannot breakdown a large project into small projects. If a subgrantee decided to do this, suggest there be documented reasons.*

**(f) Contract cost and price.**

- (1) Grantees and subgrantees **must perform a cost or price analysis in connection with every procurement action including contract modifications.** The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A **cost analysis must be performed when the offeror is required to submit the elements of his estimated cost**, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a **catalog** or **market price** of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis **will be used in all other instances to determine the reasonableness of the proposed contract price.**

- **Jefferson Davis and Beauregard Electrical Cooperatives DD-09-08**; shortages of materials, labor and equipment will affect reasonable cost; reasonable costs must be based upon **similar** contracts under **similar** circumstances.
- **Archdiocese of New Orleans DD-10-18**, where there is an inadequate number of responses, must do a **cost analysis**.



*Not currently a requirement by FEMA to perform a cost analysis where there is a competitive process.*

- Noncompetitive proposal and sole source are many times used **interchangeably**.
- Cost analysis **not required** for commercially available commodities such as food products (not mass feeding), general supplies, attorney’s fees set by Attorney General (AG), items on State contract.

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## AVOIDING DHS-OIG AUDIT FINDINGS: PROCUREMENT

(2) Grantees and subgrantees **will negotiate profit as a separate element of the price for each contract** in which there is no price competition and in all cases where coanalysis is performed. To establish a fair and reasonable profit, **consideration** will be given to the **complexity** of the work to be performed, the **risk** borne by the contractor, the contractor's investment, the **amount** of subcontracting, the **quality** of its record of past performance and industry **profit rates** in the surrounding geographical area for similar work.



*This provision is contradictory to the performance of a cost analysis. The audits never address profit as a separate element but look to the reasonableness of the overall cost.*

(3) Costs or prices based on estimated costs for contracts under grants **will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent** with Federal cost principles (see § 13.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

- **City of Slidell DD-11-08**, costs which exceed the contract cost are **ineligible** for reimbursement and all contract costs must be supported by proper documentation.



*Allowable cost principles are stated in 2 CFR 220 (OMB Circular A-21 [Educational Institutions]), 2 CFR 225 (OMB Circular A-87 [State, local and Indian Tribal Governments]), 2 CFR 230 (OMB Circular A-122 Private Nonprofits [PNPs]).*

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## AVOIDING DHS-OIG AUDIT FINDINGS: PROCUREMENT

(4) The **cost plus** a percentage of cost and percentage of construction cost methods of contracting **shall not** be used.

- **Plaquemines Parish DD-09-03, Roman Catholic Church of the ANO DD-10-18, Chennault International Airport Authority DD-11-07, Xavier University DD-11-12 and Jesuit High School DD-11-21**, use of such contracts will **limit** FEMA to paying for reasonable cost.
- **Xavier University DD-10-19**, FEMA suggested that ongoing work under a prohibited contract be terminated immediately.
- **City of Slidell DD-11-08**, FEMA allows A/E services to be paid on a **cost curve** relative to total estimated project costs.



*The City of Slidell audit evidences payment for A/E based upon a percentage but expressed as a lump sum. Appears to be an exception to the percentage of cost prohibition.*

- **New Orleans City Park DD-09-15**, states that contingency contracts are **ineligible**, citing 2001 *PA Digest FEMA 321*, January 2008 Digest (page 23) states that contingency contracts are not advisable.



*Best practice to not use contingency contracts as defined in OMB Circular 122 (now 2 CFR 225 Appendix B [9]), Jesuit High School DD-11-21.*

### (g) Awarding agency review.

(1) Grantees and subgrantees **must make available**, upon request of the awarding agency, **technical specifications on proposed procurements where the awarding agency believes such review is needed** to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place **prior** to the time the specification is incorporated into a solicitation document. However, if the grantee or subgrantee desires to have the review accomplished after a solicitation has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.



*At this time, it is not the practice of GOHSEP to request review of procurement documents prior to the award. However, a subgrantee may request and GOHSEP will provide technical assistance and conduct a pre-solicitation/pre-award review.*

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## AVOIDING DHS-OIG AUDIT FINDINGS: PROCUREMENT

- (2) Grantees and subgrantees **must on request make available for awarding agency pre-award review procurement documents**, such as request for proposals or invitations for bids, independent cost estimates, etc. when:
- (i) A grantee's or subgrantee's procurement procedures or operation **fails to comply** with the procurement standards in this section; or
  - (ii) The procurement is expected to exceed the **simplified acquisition threshold** and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or
  - (iii) The procurement, which is expected to exceed the simplified acquisition threshold, specifies a "**brand name**" product; or
  - (iv) The proposed award is more than the simplified acquisition threshold and is to be awarded to **other than** the apparent low bidder under a sealed bid procurement; or
  - (v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the simplified acquisition threshold.



*On first request for reimbursement by subgrantee, GOHSEP DRS will request that subgrantee produce the RFP, number of responses, selection methodology and contract. Non-compliance will result in termination of future payments and cost analysis by subgrantee to justify payment of current services.*

- **City of Abita DD-11-04** and **City of Kenner DD-09-04**, FEMA must approve modifications to a contract.
- **City of Kenner DD-09-04**, modifications that significantly **change the type and magnitude** of the scope of work (SOW) on original contracts must be competitively bid. However, changes are permitted when necessary if the SOW does not change and price adjustments are allowed (FEMA letter 4/8/10).
- **City of Slidell DD-11-08**, where subgrantee's solicitation was broad enough to cover amended SOW.



*Modifications which significantly change the scope of the original contract creates a new contract.*

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## AVOIDING DHS-OIG AUDIT FINDINGS: PROCUREMENT

<p>(3) A grantee or subgrantee <b>will be exempt from the pre-award review in paragraph (g)(2) of this section</b> if the awarding agency determines that its procurement systems comply with the standards of this section.</p> <p>(i) A grantee or subgrantee may request that its procurement system be <b>reviewed</b> by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding and third-party contracts are awarded on a regular basis.</p> <p>(ii) A grantee or subgrantee may <b>self-certify</b> its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.</p>	
<p><b>(h) Bonding requirements.</b></p>	
<p>For construction or facility improvement contracts or subcontracts exceeding the simplified acquisition threshold, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:</p>	<p> <i>Bonding company requirements under Louisiana law can be found at LRS 38:2218 and 38:2219.</i></p>
<p>(1) A <b>bid guarantee</b> from each bidder equivalent to five (5) percent of the bid price. The "bid guarantee" <b>shall consist of a firm commitment such as a bid bond, certified check or other negotiable instrument</b> accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.</p>	
<p>(2) A <b>performance bond</b> on the part of the contractor for 100 percent of the contract price. A "performance bond" is one <b>executed in connection with a contract to secure fulfillment of all the contractor's obligations</b> under such contract.</p>	

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## AVOIDING DHS-OIG AUDIT FINDINGS: PROCUREMENT

(3) A <b>payment bond</b> on the part of the contractor for 100 percent of the contract price. A “payment bond” is one <b>executed in connection with a contract to assure payment as required by law</b> of all persons supplying labor and material in the execution of the work provided for in the contract.		1 2 3 4
<b>(i) Contract provisions.</b>		5
A grantee’s and subgrantee’s contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work and other clauses approved by the Office of Federal Procurement Policy.	<ul style="list-style-type: none"> <li>• <b>Cameron Parish School Board DD-12-04</b>, contracts shall include all required contract provisions.</li> </ul>  <i>Not all of the provisions apply to all contracts.</i>	6 7 8 9 10
(1) Administrative, contractual or legal remedies in instances <b>where contractors violate or breach contract terms</b> , and provide for such sanctions and penalties as may be appropriate. (Contracts more than the simplified acquisition threshold.)		11 12 13 14
(2) <b>Termination for cause and for convenience by the grantee or subgrantee</b> including the manner by which it will be effected and the basis for settlement. (All contracts in excess of \$10,000.)	<ul style="list-style-type: none"> <li>• <b>44 CFR 13.44 termination</b> for convenience.</li> <li>• <b>Xavier University DD-10-19</b>, FEMA required subgrantee to immediately terminate all <b>noncompetitively bid</b> contracts and contracts with prohibited clauses.</li> </ul>  <i>Upon first request for reimbursement, GOHSEP DRS will request all supporting documentation for contract. If contract is improperly procured, subgrantee will be notified that no further payment will be made on the contract and the subgrantee must terminate the contract. If improper contract is discovered by GOHSEP and project is not substantially complete, GOHSEP will demand termination of the contract.</i>	15 16 17 18 19 20 21 22 23 24 25 26 27
(3) Compliance with Executive Order 11246 of September 24, 1965, <b>entitled “Equal Employment Opportunity,” as amended by Executive Order 11375 of October 13, 1967</b> , and as supplemented in Department of Labor regulations (41 CFR chapter 60). (All construction contracts awarded in <b>excess of \$10,000</b> by grantees and their contractors or subgrantees.)	<ul style="list-style-type: none"> <li>• <b>Xavier University DD-11-12</b>, educational institutions must contain a contract provision that it will <b>comply</b> with the <i>Equal Employment Opportunity Act</i> (citing 2 CFR 215, OMB Circular A-110).</li> </ul>	28 29 30 31 32
(4) <b>Compliance with the Copeland “Anti-Kickback” Act (18 U.S.C. 874)</b> as supplemented in Department of Labor regulations (29 CFR Part 3). (All contracts and subgrants for <b>construction or repair</b> .)		33 34 35 36





## AVOIDING DHS-OIG AUDIT FINDINGS: PROCUREMENT

<p>(5) <b>Compliance with the Davis-Bacon Act (40 U.S.C. 276a to 276a-7)</b> as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts <b>in excess of \$2000</b> awarded by grantees and subgrantees when required by Federal grant program legislation.)</p>	<ul style="list-style-type: none"> <li>• <i>Public Assistance Guide</i>, FEMA 322/June 2007, page 44, the provisions of Davis-Bacon <b>do not</b> apply to State or local contracts for work completed using PA funds under the Stafford Act.</li> </ul> <p> <i>FEMA has notified GOHSEP that the provisions of Davis-Bacon <b>do not</b> apply to HM funds under the Stafford Act as well as the Pre-Disaster Mitigation Programs. Note that the Flood Mitigation Assistance (FMA), Repetitive Flood Claims (RFC) and Severe Repetitive Loss (SRL) programs are authorized by the National Flood Insurance Act of 1968 and <b>appear to be</b> subject to the Davis-Bacon Act.</i></p>
<p>(6) <b>Compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330)</b> as supplemented by Department of Labor regulations (29 CFR Part 5). (Construction contracts awarded by grantees and subgrantees in <b>excess of \$2000</b>, and in <b>excess of \$2500</b> for other contracts which involve the employment of mechanics or laborers.)</p>	
<p>(7) Notice of awarding agency requirements and regulations <b>pertaining to reporting.</b></p>	
<p>(8) Notice of awarding agency requirements and regulations <b>pertaining to patent rights with respect to any discovery or invention</b> which arises or is developed in the course of or under such contract.</p>	
<p>(9) Awarding agency requirements and regulations <b>pertaining to copyrights and rights in data.</b></p>	
<p>(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are <b>directly pertinent to that specific contract for the purpose of making audit, examination, excerpts and transcriptions.</b></p>	
<p>(11) <b>Retention of all required records for three (3) years</b> after grantees or subgrantees make final payments and all other pending matters are closed.</p>	<ul style="list-style-type: none"> <li>• <b>44 CFR 13.42</b> means three (3) years after complete <b>closeout</b>.</li> </ul> <p> <i>Be Aware! Banks may keep records for only four (4) years.</i></p>
<p>(12) <b>Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15).</b> (Contracts, subcontracts and subgrants of amounts in <b>excess of \$100,000</b>.)</p>	



## AVOIDING DHS-OIG AUDIT FINDINGS: PROCUREMENT

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(13) Mandatory standards and policies **relating to energy efficiency which are contained in the State energy conservation plan** issued in compliance with the Energy Policy and Conservation Act (Pub.L. 94-163, 89 Stat. 871).

- **LRS 40:1730.21-1730.48**, State law on this.



# appendix

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If you have questions regarding this [Procurement Desk Reference: DHS-OIG Audit Findings + FEMA Policy + Comments + Tips + MORE!](#), please contact any of the following:

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# Procurement: AVOIDING DHS-OIG Audit Findings!

getting it right!

