Procurement Under Grants

Federal Requirements for Recipients and Subrecipients of Public Assistance Funding

COVID-19 Support

FEMA Procurement Disaster Assistance Team (PDAT)
Game Plan

You will:

• Gain **general knowledge** of the procurement rules
• Increase your awareness of **risk areas**
• Learn about available **tools & resources**

Hot Topics We’ll Discuss:

• Sole-sourcing under E&E
• Additional requirements under E&E
• Use of pre-existing contracts during E&E
# Kickoff: Uniform Rules

2 C.F.R. §§ 200.317 – 326

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**Objectives**

- Reasonable Cost
- Other Policy Goals
Rules that Apply to States

Are You a State Entity?

- Any State of the United States
- District of Columbia
- US Territories:
  - Commonwealth of Puerto Rico
  - U.S. Virgin Islands
  - Guam
  - American Samoa
  - Commonwealth of the Northern Mariana Islands
- State Agency
- State Instrumentality

Applicable Rules

317 Procurements by States
322 Recovered Materials
326 Contract Provisions

Replay

State must:

Follow State procurement policies and procedures

Recovered Materials
Contract Provisions
Rules that Apply to Non-State Entities

Are You a Non-State Entity?

- Local Governments
- **Tribal Governments**
- Institutions of Higher Education
- Hospitals
- Houses of Worship
- Other Private Non-Profit Organizations

Applicable Rules

Must follow **own** procurement policies and procedures

Must follow **state** or **Tribal Law**

Must follow **federal** procurement standards (318-326)

- **318** General Procurement Standards
- **319** Competition
- **320** Procurement Methods
- **321** Socioeconomic Contracting
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- **323** Contract Cost or Price
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- **326** Contract Provisions

FEMA
Full & Open Competition: Fair Playing Field

- **Key principle** of procurement rules
- All qualified and responsible sources are eligible to compete without restrictions
- Cast the net broadly to reach **fair and reasonable pricing from the most qualified contractor**
- Prevents favoritism, fraud, waste, and abuse
Methods of Procurement

- **Micro-Purchase**: Up to $10K
- **Small Purchase**: Up to $250K
- **Sealed Bidding**: Usually Over $250K
- **Competitive Proposals**: Usually Over $250K
- **Sole Sourcing**: No Threshold

**Independent Estimates** are required before receiving bids or proposals.

**Price/Cost Analysis** is required for procurements over $250K.
Sole-Source Procurement Under E&E

Situations that demand immediate aid or action

Emergency
Need to alleviate a threat to life, public health or safety, or improved property

Exigency
Need to avoid, prevent or alleviate serious harm or injury, financial or otherwise

If using sole sourcing due to emergency or exigency, you must:
- Justify with documentation
- Use only during the period of actual exigent or emergency circumstances
- Transition to a competitive method as soon as period ends

FEMA
The exception is applicable to **contracts entered into** or **used** on or after January 27, 2020.

- For the duration of the current federal Public Health Emergency, the ongoing **COVID-19 pandemic qualifies as an E&E circumstance**
- **Non-state entities may sole-source under that exception**
- **State entities have to follow their own state procurement rules**
If sole-sourcing under the E&E exception, non-state entities MUST:

- Use only during the period of actual Public Health Emergency (HHS)
- Document and provide justification for the use of the exception (list of suggested elements for justification provided)
- Conduct a cost or price analysis if applicable
- Follow bonding requirements if applicable
Procurement Under E&E for COVID-19

FEMA Fact Sheet

If sole-sourcing under the E&E exception, non-state entities MUST:

- Include required contract clauses
- Follow T&M contract requirements if applicable
- NOT enter into CPPC contracts. They are prohibited!
- Award contract to a responsible contractor
- Follow documentation, oversight, conflict of interest requirements
Cost or Price Analysis

1. Cost or price analysis is required if your procurement is over $250K

2. **Goal:**
   Determine if the price is fair & reasonable

   **Price Analysis:**
   - Simpler
   - Examination of proposed price as a whole

3. **Cost Analysis:**
   - More complex
   - Evaluation of separate cost elements

4. **Profit must be negotiated**
   - As a separate element of price for contracts with no price competition
   - Always when doing cost analysis

323 Contract Cost or Price
Bonding Requirements

Applicability

• Construction or facility improvement contracts or subcontracts above $250K
• Must not unduly restrict competition

There Must Be:

• A bid guarantee from each bidder equivalent to 5% of the bid price
• A performance bond on the part of the contractor for 100% of the contract price
• A payment bond on the part of the contractor for 100% of the contract price
Contract Language: Provisions Applicable to PA

**Required:**
- Legal/contractual/administrative remedies for breach of contract
- Termination for cause or convenience
- Equal Employment Opportunity
- Contract Work Hours and Safety Standards Act
- Clean Air Act and Federal Water Pollution Control Act
- Debarment and Suspension
- Byrd Anti-Lobbying Amendment
- Procurement of Recovered Materials

**Recommended:**
- Contract Changes
- Access to Records
- DHS Seal, Logo, and Flags
- Compliance with Federal Law, Regulations and Executive Orders
- No Obligation by Federal Government
- Program Fraud and False or Fraudulent Statements or Related Acts

**Online Provisions Template Is Available at:**
www.fema.gov/procurement-disaster-assistance-team
Warning: You Cannot Limit Access to Records!

- Applies to contracts entered into after August 1, 2017
- FEMA **cannot reimburse** applicants for contract expenses **where the contract prohibits** the FEMA Administrator or U.S. Comptroller General from auditing or reviewing all aspects related to the contract.
- **DO NOT** include such a provision in contracts
Rules by Contract Type: Time & Materials

**T&M Contract Cost:**

- Actual cost of materials
- Direct labor hours charged at **fixed hourly rates**

**Applicability:**

- When not possible to initially estimate extent or duration of work
- Use only after determining that **no other contract is suitable**

**Limitations:**

- A **ceiling price**, that the contractor exceeds at own risk, must be established
- Must maintain high degree of **oversight to avoid unneeded cost over-runs**
- Use **only until the scope of work becomes clear**
Cost Plus a Percentage of Cost Contracts Are Prohibited!

How to Spot a CPPC Contract:

- Payment is at a predetermined rate
- This rate is applied to actual performance costs
- Contractor's entitlement is uncertain at the time of contracting
- Rate increases with increased performance costs

Why Using CPPC Contracts Is Prohibited:

- There is no incentive to control costs
- The contractor has a financial interest in increasing the cost of performance

Very Frequent
Must Award Only to Responsible Contractors

1. Able to perform successfully under the procurement’s terms and conditions
2. Evidence of integrity
3. Has been compliant with public policy
4. Has a good record of past performance
5. Has adequate financial and technical resources
6. Must not have been debarred or suspended
7. Must not be listed on exclusions at www.sam.gov
Other Basic Rules of Engagement

**Mandatory Standards**

1. Contractor Oversight
2. Necessity
3. Code of Conduct
4. Conflict of Interest
5. Gifts
6. Responsible Contractors Only
7. Records
8. Settlement of Issues

**Encouraged Standards**

1. Use of Federal Excess and Surplus Property
2. Value Engineering Contracts
3. Intergovernmental Agreements

Must maintain records sufficient to detail the history of the procurement.

- Rationale for the Method of Procurement
- Selection of Contract Type
- Selection of Contractor
- Basis for Contract Price

Sole Sourcing under E&E
Time & Materials Contract Justification
Search at www.SAM.gov
Independent Estimate; Cost or Price Analysis; Quotations

318 General Proc. Standards
Use of Pre-Awarded/Pre-Existing Contracts during E&E

If the pre-awarded/pre-existing contract is not in compliance with the federal procurement requirements, it may still be possible to use the contract for the duration of the E&E.

FEMA recommends that non-state entities:

- Review the requirements applicable during E&E and take actions to modify pre-awarded or pre-existing contracts where applicable.

- Justify the use of a sole-sourced contract with suggested documentation.
Procurement Under E&E for COVID-19

Considerations for State Entities regardless of E&E circumstances:

- Follow **State procurement policies and procedures**
- Follow **procurement of recovered materials requirements**
- Include **required contract clauses**
- While the rules do not prohibit the use of T&M or CPPC contracts, **FEMA discourages states from using them** due to likelihood of unreasonable costs

March 16, 2020
Tools Made Just for You: Long Practice Strategy

Procurement Rules Online
www.ecfr.gov
2 C.F.R. §§ 200.317-326

PDAT Website
www.fema.gov/procurement-disaster-assistance-team
• PDAT Resources
  • Contract Provisions Template
  • COVID-19 Guidance

Docs for Download

www.SAM.gov

Other POCs
• Contact your State Emergency Management Representative
• Work with PA Program Staff
We Will Get There!

Full Community Recovery