

Procurements under Grants

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

The Uniform Rules

- Public Assistance applicants will often use contractors to help them carry out work under their Stafford Act awards. These contracts are a commercial transaction between the applicant and their contractor, and FEMA has no contractual relationship between the two. Although FEMA is not a party to the contract, if it is using federal funding to pay for the contract, the applicant must comply with federal laws, including the federal procurement standards.
- The federal procurement standards are found at 2 C.F.R. §§ 200.317-200.326 and they apply to contracts under the Public Assistance program associated with disasters declared on or after December 26, 2014.
- Failure to follow federal contracting requirements when procuring and selecting contractors puts applicants at risk of not receiving full reimbursement for associated disaster costs.

The Basics

- These Replays are intended to provide you with a broad overview of the Federal procurement standards applicable to disaster assistance awards under the Stafford Act.
- The Department of Homeland Security (DHS) Office of Inspector General (OIG), as a responsible steward of public funds, is on the lookout for indications of noncompliance.
 - Failure to comply with Federal procurement standards can result in very serious consequences, including not receiving federal funding. See 2 C.F.R. § 200.338
 - Some of the most common findings resulting from OIG audits involve:
 - Noncompetitive contracting practices
 - Failure to include required contract provisions
 - Failure to perform required procedures to ensure small and minority businesses, women-owned enterprises, and labor surplus area firms are used when possible
 - Cost-plus-percentage-of-cost contracting
- These Replays are not intended to be, nor should it be considered as, legal advice.
 - Please refer to your organization's servicing counsel for resolution of any legal matters.

Key Players

- **Recipient:** Receives and administers the Federal award
Includes: States and Tribal Indian Governments
- **Subrecipient:** The non-Federal entity that receives a subaward from a recipient entity to carry out part of a Federal program, and which is accountable to the recipient for the use of the funds provided.
Includes: Local and Tribal Indian Governments (for declarations of the State), Institutions of Higher Education (IHEs), Hospitals, other Private Nonprofit Organizations (PNPs), Houses of Worship, and State agencies or instrumentalities receiving funds from the pass-through entity.



- **Federal Awarding Agency:** As the Federal awarding agency, FEMA is responsible for ensuring proper performance under the FEMA award, including compliance with the procurement standards.
- **Program Delivery Manager (PDMG):** The primary point of contact for applicants, providing customer service and programmatic guidance throughout the grant process.
- **Infrastructure Branch Director (IBD):** Provides leadership and operational direction for the Public Assistance Program and infrastructure-related Emergency Support Functions (ESFs).
- **Public Assistance Group Supervisor (PAGS):** In operations where ESFs are not activated, the Public Assistance Group Supervisor (PAGS) provides leadership and management direction in the delivery of the Public Assistance (PA) Program.

Applicability of the Federal Procurement Standards

- There are different sets of procurement rules that apply to states and non-state entities, so Public Assistance applicants must determine whether they are a state or a non-state entity to determine which procurement standards will apply in their case. Applicants should consult their legal counsel if they have questions regarding their entity type.
- **State Entity:** 2 C.F.R. § 200.90 defines a state entity as any state or territory of the United States, and any agencies or instrumentalities of that state or territory.
- **Non-State Entity:** Non-state entities are any eligible Public Assistance applicant that does not meet the “state” definition, which includes: Local and Tribal Governments, Institutions of Higher Education (IHEs), Hospitals, other Private Nonprofit Organizations (PNPs), and Houses of Worship.

Rules for State Procurements

- States must follow the procurement procedures found at 2 C.F.R. § 200.317, which include:
 1. Following the same policies and procedures it uses for procurements from its non-federal funds;
 2. Comply with Environmental Protection Agency guidelines found at 2 C.F.R. § 200.322 (procurement of recovered materials); and
 3. Include all necessary contract provisions required by 2 C.F.R. § 200.326 (required contract provisions).

Rules for Non-State Procurements

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- The standards at 2 C.F.R. §§ 200.318-200.326 only address a small portion of rules that can possibly apply to a non-state procurement. If the federal rules do not address a concept, the non-state should seek guidance from their own rules. If, however, there is a difference between the entities’ rules and the federal standards, the **most restrictive** of the two standards applies.
- There are federal procurement standards that apply to the non-states procurement policies, solicitation phase, and contract award phase.
- The rules found at 2 CFR §§ 200.318-200.326 are broken down on the left-hand side.





Competition

- The standard at 2 C.F.R. § 200.319 requires that procurement transactions be conducted in a manner ensuring **full and open competition**. Full and open competition means that all responsible contractors are permitted to submit a sealed bid or proposal on the procurement.
- There are numerous benefits to full and open competition which include:
 - Increasing probability of reasonable pricing from most qualified contractor;
 - Preventing favoritism, collusion, fraud, waste, and abuse; and
 - Allowing the opportunity for small and minority firms, women's business enterprises, and labor surplus area firms to participate in federally-funded work.
- Non-state entities should have written procurement procedures governing their procurement transactions. These procedures must ensure that all solicitation documents incorporate a clear and accurate description of the needs for the goods or services being procured. These descriptions must not unduly restrict competition.
- The federal procurement standards have identified 7 situations at 2 C.F.R. §200.319(a) that are considered to be restrictive of full and open competition, and therefore should be avoided. These include:
 1. Requiring unnecessary experience;
 2. Excessive bonding requirements;
 3. Specifying only a brand name product;
 4. Noncompetitive pricing practices;
 5. Organizational conflicts of interest;
 6. Noncompetitive contracts to contractors on retainer; and
 7. Any arbitrary action in the procurement process.
- There are bonding requirements at 2 C.F.R § 200.325 for construction or facility improvement contracts exceeding the simplified acquisition threshold. Bonding requirements must not unduly restrict competition.
 - Bid Guarantee: Each bidder must provide a bid guarantee equivalent to five percent of the bid price.
 - Performance Bond: There must be a performance bond on the part of the contractor for 100 percent of the contract price.
 - Payment Bond: There must be a payment bond on the part of the contractor for 100 percent of the contract price.
- To preserve full and open competition, the rules require that contractors who help draft the applicant's requirements, statements of work, specifications, and solicitation documents be excluded from competing for such procurement.
- Non-Federal entities are prohibited from using statutorily or administratively imposed geographical preferences in the evaluation of bids or proposals. However, there are limited



exceptions to this rule. Non-Federal entities may use geographical preferences when considering state licensing requirements. Also, the use of geographic location is allowed as one selection criteria when contracting for architectural and engineering (A/E) services, so long as its application leaves an appropriate number of qualified firms for consideration, given the nature and size of the project.





Methods of Procurement

- Non-state applicants must comply with one of the five methods of procurement set forth at 2 C.F.R. § 200.320, which include:
 1. Micro-Purchase Procedures
 2. Small Purchase Procedures
 3. Sealed Bidding
 4. Competitive Proposals
 5. Noncompetitive Proposals

Micro-Purchase Procedures

- A non-state entity may use the micro-purchase procedures for the acquisition of supplies or services where the total dollar amount of the services or supplies does not exceed the micro-purchase threshold. While the micro-purchase threshold is adjusted from time to time, it is currently \$10,000.
- The rules allow for non-state applicants to award micro-purchases without soliciting competitive bids or proposals so long as the price is reasonable.
- To the extent practicable, micro-purchases should be distributed equitably among qualified suppliers.

Small Purchase Procedures

- This relatively simple and informal method of procurement is allowed for purchases where the total dollar amount of the requirement does not exceed the simplified acquisition threshold (SAT). While the SAT is adjusted from time to time, it is currently \$250,000.
- For this method of procurement, price or rate quotations must be obtained from an “adequate number” of qualified sources. What is an adequate number of sources will depend upon the facts and circumstances of the procurement, but in no case should this be less than three. *See page V-8 of the Detailed Resources Supplement for additional guidance.*
- When seeking to use the micro-purchase and small purchase methods, the non-state entity must avoid the intentional “splitting” of purchases or transactions to circumvent the dollar threshold limitations.

Sealed Bidding

- The sealed bidding method of procurement is the preferred method of contracting when the non-state applicant’s requirement is known and specific in detail and the procurement lends itself to a fixed price contract type. Selection of the successful bidder will be made principally based on price.
- The solicitation document used is known as an invitation for bids (IFB). The IFB must describe the specifications for the requirement and include instructions for interested bidders. All bids will be opened at the time and place prescribed in the invitation for bids. For local and tribal governments, the bids must be opened publicly.
- Bids must be solicited from an adequate number of known suppliers, providing them sufficient response time. In this context, what is an adequate number of known suppliers



depends on the facts and circumstances of the procurement. For local and tribal governments, the IFBs must be publicly advertised.

- The award will be made in writing to the lowest priced, responsive, and responsible bidder.

Competitive Proposal

- The competitive proposal method is normally used when the conditions are not appropriate for sealed bidding, including when the requirement is not specific in detail.
- The solicitation document used, known as a request for proposals (RFP), must be solicited from an adequate number of qualified sources. In this context, what is an adequate number of known suppliers depends on the facts and circumstances of the procurement.
- The RFP must be publicized, have instructions for potential contractors, and identify the evaluation factors that will be considered along with their relative importance. The non-state applicant must have a written method for conducting technical evaluations of the proposals received.
- Procurement of A/E professional services is the only instance when price may be excluded as an evaluation factor. Under this qualifications-based procurement of A/E professional services, competitors' qualifications are evaluated, and the most qualified competitor is selected. However, this selection is subject to negotiation of fair and reasonable compensation, and the procurement must be limited to A/E professional services and cannot be used to purchase other types of services even though these A/E firms are potential sources to perform efforts beyond A/E professional services. *See page V-14 of the Detailed Resources Supplement for additional guidance on this limited exception for excluding price as an evaluation factor in competitive proposals.*
- The award will be made to the responsible contractor whose proposal is most advantageous, with price and other factors considered.





Noncompetitive Proposals/Sole-Sourcing

- The federal procurement standards are clear regarding the need to have full and open competition. There are, however, limited situations where noncompetitive proposal methods may be allowed; but only in instances where one or more of the following circumstances apply:
 1. The item is available only from a single source;
 2. Exigency or emergency circumstance;
 3. Awarding agency or pass-through entity approval; or
 4. Inadequate competition
- In any event, it is extremely important for the non-state applicant to document the basis for the justification of the noncompetitive procurement.
- **Single Source:** The use of this exception to full and open competition is allowed when the non-state applicant requires supplies or services that are truly only available from a single source.
- **Exigency or Emergency Circumstance:** The public exigency or emergency will not permit a delay resulting from the full and open competition process.
- The use of this exception to full and open competition is limited and only permissible during the period of actual exigency or emergency. Once this period ends, the non-state applicant must transition to a procurement compliant with the requirements of full and open competition.
- Although the terms are often used interchangeably, “exigency” and “emergency” are not necessarily the same.
- **Emergency:** an unexpected and unusually dangerous situation that calls for immediate action or an urgent need for assistance or relief. E.g. threat to life, public health or safety, improved property, and/or some other form of dangerous situation.
 - Example: A severed power line remains live and is dangling near an apartment building. If not addressed immediately, this live wire poses a risk of igniting the building on fire or causing bodily harm. The emergency would not extend to repair and restoration of the city’s power lines beyond resolution of this limited dangerous situation.
- **Exigency:** something that is necessary in a particular situation that requires or demands immediate aid or action.
 - Example: Augusta, GA using a noncompetitive procurement in advance of The Masters Golf Tournament to remove debris blocking the roadways. If not removed immediately, the debris threatened to force cancellation of this major economic activity for the region. The exigency only existed up until the day that the tournament started. Full and open competition was required for procurements after the commencement of the tournament.



- **Awarding Agency Approval:** The non-state applicant may use this noncompetitive proposal method in the rare instance when the “awarding agency” or “pass-through entity” expressly authorizes the sole source in response to a written request from the non-Federal entity.
- **Inadequate Competition:** This exception can be used when, after solicitation of a number of sources, competition is determined inadequate.
 - The solicitation must have complied with all procurement standards and still only received a single offer or bid, single responsive offer or bid, or no responsive bids or proposal caused by conditions outside of the subrecipient’s control.
 - **NOTE:** Justification for why there is inadequate competition and why the noncompetitive procurement was used without cancelling the solicitation and resoliciting offers or bids must be documented, so evaluating whether the solicitation was sufficiently publicized and speaking with solicited firms to determine why they did not submit offers or bids may be required to ensure the initial solicitation was not overly restrictive. If the award moves forward in light of any restrictive specifications, then documentation should be provided for why the restrictive specification or delivery requirement was necessary and could not be modified so as to enable additional competition.
 - *Page 80 of the Field Manual offers additional guidance on this matter and can be found in the Detailed Resources section of the PDAT website.*





Socioeconomic Affirmative Steps

- In addition to the requirements of full and open competition, the non-state applicant must take the necessary affirmative steps found at 2 C.F.R. § 200.321 to make sure small and minority businesses, women-owned enterprises, and labor surplus area firms are used when possible. Affirmative steps must include at least the following six steps:
 1. Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
 2. Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
 3. Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;
 4. Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;
 5. Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and
 6. Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs 1 through 5 of this section.
- Labor surplus areas are localities that have a civilian average annual unemployment rate during the previous two calendar years of 20% or more above the average annual civil unemployment rate for all states during that same period. *See page V-27 of the Detailed Resources Supplement available on the PDAT website for additional information.*
- This procurement rule does not require subrecipients to avoid the selection of responsive, responsible contractors who do not fall under one of the business categories listed in 2 C.F. R. § 200.321, but instead is a requirement for full and open competition which includes the consideration of these small and minority businesses, women's business enterprises, and labor surplus area firms.
- **Remember:** The OIG frequently cites non-state entities for failure to employ the required procedures to take affirmative steps to ensure small and minority businesses, women-owned enterprises, and labor surplus area firms are considered.

Cost or Price Analysis

- A non-state entity must perform a price or cost analysis in connection with every procurement action above the simplified acquisition threshold, including contract modifications, as required by 2 C.F.R. § 200.323.





- The method and degree of analysis is dependent on the facts and circumstances surrounding the particular procurement, but, as a starting point, the non-state entity must make independent estimates before receiving bids or proposals.
- **Price Analysis:** The examination and evaluation of a proposed price without evaluating its separate cost elements and proposed profit. Techniques may include comparing offers with one another; comparing prior proposed prices and contract prices with current proposed prices for the same or similar goods or services; comparing offers with competitive published price lists, published market prices, or similar indexes; comparing proposed prices with independently developed estimates of the non-state entity; and comparing proposed prices with prices of the same or similar items obtained through market research.
- **Cost Analysis:** The review and evaluation of the separate cost elements (such as labor hours, overhead, materials, etc.) and proposed profit in a proposal to determine a fair and reasonable price for a contract and the application of judgement to determine how well the proposed costs represent what the cost of the contract should be.
- A non-state 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.
- Documentation of cost or price analysis can be useful as evidence that costs are reasonable.





Contract Types

- **Time and Materials (T&M) Contract (2 C.F.R. § 318(j)):** A contract whose cost to a non-state 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.
- A non-state entity may use T&M contracts only after determination that:
 1. No other contract is suitable, AND
 2. the contract includes a ceiling price that the contractor exceeds at its own risk.
- T&M contracts provide no positive profit incentive to the contractor for cost control or labor efficiency, which is why the Uniform Rules require the inclusion of a contract ceiling price.
- The Uniform Rules also require the non-state entity to maintain a high degree of oversight to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.
- Use of T&M contracts are generally limited to a reasonable time based on the circumstances during which the applicant cannot define a clear scope of work. OIG may recommend disallowance of costs based on the inappropriate use of T&M contracts beyond a limited period and where a scope of work can be determined.
- **Cost Plus Percentage of Cost (CPPC) – Prohibited!**
 - A cost plus percentage of cost contract is a cost reimbursement contract containing some element that obligates the subgrantee to pay the contractor an amount (in the form of either profit or cost), undetermined at the time the contract was made and to be incurred in the future, based on a percentage of future costs.
 - The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.
 - Rationale: There is no incentive for a contractor to control costs, and this type of contract incentivizes a contractor to increase its profits by increasing costs of performance.
 - Criteria evidencing this type of contract include:
 1. Payment is on a predetermined percentage rate
 2. The predetermined percentage rate is applied to actual performance costs
 3. The contractor's entitlement is uncertain at the time of contracting
 4. The contractor's entitlement increases commensurately with increased performance costs

Required Contract Provisions

- The required contract provisions apply to both state and non-state entities.
- Under 2 C.F.R. § 200.326, all contracts must contain the applicable provisions described in Appendix II to Part 200—Contract Provisions for non-Federal Entity Contracts Under Federal Awards.





- 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.
- Failure to include the required contract provisions is one of the most common findings under OIG audits of IHEs, hospitals, and PNPs.
- The PDAT website includes a *Contract Provisions Template* that provides additional guidance including required contract provisions, sample language, and insight about which provisions might apply under various circumstances.
 - This template provides information on potentially applicable required contract provisions, which may be determined by the type of entity involved, the project type, or contract price.
- Always consult with your organization's servicing legal counsel for resolution of any questions regarding contract provisions required in your specific circumstances.



Contractor Responsibility

- The non-state entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Matters to be considered: (1) contractor integrity; (2) compliance with public policy; (3) record of past performance; and (4) financial and technical resources. See 2 C.F.R. § 200.318(h)
 - *The Detailed Resources Supplement, available on the PDAT website, provides additional information on page IV-6 regarding assessment of contractor responsibility using these mandatory criteria.*
- **Suspension & Debarment:** Non-Federal entities (including state and non-state entities) are subject to the non-procurement debarment and suspension regulations implementing Executive Orders 12549 and 12689, 2 C.F.R. Part 180. These regulations restrict awards, subawards, and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs or activities. 2 C.F.R. § 200.213
 - Non-Federal entities must not make any award or permit any award at any tier to parties listed on the government-wide exclusions in the System for Award Management ("SAM"), which can be found at www.sam.gov.
 - DHS has adopted debarment and suspension guidelines at 2 C.F.R. Part 3000, which adopt OMB's regulations at 2 C.F.R. Part 180 and provide supplemental policies and procedures.
 - When searching for contractors on SAM.gov, note that a search yielding no results only means that the contractor you are searching for has not registered and is not in and of itself proof that both the contractor and company you are searching for are in good standing.



General Procurement Standards (2 C.F.R. § 200.318)

- Non-state entities must use their own documented procurement procedures which reflect applicable state, local, and tribal laws and regulations, provided the procurement conforms to applicable Federal law and the standards set forth in 2 C.F.R. Part 200.
 - **Note:** NFEs must comply with all other applicable Federal laws, regulations, and executive orders when procuring services or property under a FEMA award. The requirements identified in this Replay only address the Federal procurement standards and not the other requirements established and made applicable through the Uniform Rules.
- For non-state entities, there are eleven general procurement standards; **eight** are mandatory.
 1. **Contractor Oversight:** Must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
 - If non-state entity organizations lack qualified personnel to undertake such oversight, then FEMA expects the non-state entity to acquire the necessary services from sources outside of the entity's organization. Such contracts and services will remain subject to compliance with all procurement standards at 2 CFR Part 200.
 2. **Necessity:** Must have procedures that avoid acquisition of unnecessary or duplicative supplies or services.
 - FEMA expects the non-state entity to limit procurements to current and reasonably expected needs to carry out the scope of work under the FEMA award, and does not allow for the addition of quantities or options to the contract solely for needs unrelated to the scope of work under the FEMA award or for assignment to another party at a later date.
 3. **Standards of Conduct:** Must maintain written standards of conduct covering conflicts of interest and governing the actions of employees engaged in the selection, award, and administration of contracts.
 - These standards of conduct must include "organizational conflicts of interest." Organizational conflicts of interest mean that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.
 - The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.
 4. **Conflict of Interest:** No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real **or** apparent conflict of interest.
 5. **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.





6. **Awards to Responsible Contractors:** Must award contracts only to **responsible** contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement.
 - Matters that must be considered:
 - Contractor integrity
 - Compliance with public policy
 - Record of past performance
 - Financial and technical resources
 - Additional information regarding these mandatory criteria when evaluating whether a contractor is responsible can be found beginning on *Page IV-6 of the Detailed Resources Supplement available on the PDAT website.*
 7. **Records:** 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 or rejection; and the basis for the contract price.
 - Document, document, document!
 8. **Settlement of Issues:** Must alone be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual issues and administrative issues arising out of procurements.
 - Neither FEMA nor the Uniform Rules relieve the NFE of any contractual responsibilities under its contracts.
 - *Additional information regarding NFE responsibility for settlement of issues can be found on page IV-12 of the Detailed Resources Supplement available on the PDAT website.*
- The Uniform Rules also include three encouraged procurement standards.
 - **Use of intergovernmental agreements:** To foster greater efficiency and promote cost-effective use of shared services, state and local intergovernmental agreements or inter-entity agreements are encouraged where appropriate for procurement or use of common or shared goods and services.
 - **Piggybacking:** While piggybacking is not prohibited by the federal procurement regulations, there are strict rules that a non-state entity must follow to be compliant. Non-state entities must ensure that 1) the original procurement complies with federal regulations, 2) the scope of work does not exceed what was contemplated by the original contract, 3) the original contract contains an assignability clause, and 4) the cost is reasonable. *See pages 30-32 of the Field Manual available on the PDAT website for additional considerations.*
 - **Use of federal excess/surplus property:** Encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs. Such equipment/property would be acquired through the Federal Surplus Personal Property Donation Program carried out by the General Services Administration (GSA).
 - **Value engineering:** Encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions.



Records

- 2 C.F.R. § 200.318(i) requires the maintenance of records sufficient to detail the history of a procurement. These records should include, but are not limited to:
 - Rationale for the method of procurement used for each contract (micro-purchase, small purchase procedures, sealed bidding, competitive proposals, and noncompetitive proposals), including a justification for using any procurement by noncompetitive proposal methods;
 - Rationale for selecting the type of contract used (fixed price, cost reimbursement, or time and materials);
 - Rationale for contractor selection or rejection, including written documentation that a prospective contractor qualifies as responsible and set forth the basis for that determination;
 - Basis for the contract price, which will include the cost or price analysis for contracts exceeding the simplified acquisition threshold; and
 - Other appropriate documentation, including the examples listed on *Page IV-9 of the Detailed Resources Supplement* and *page 23 of the Field Manual*; both available on the PDAT website.
- FEMA expects that the non-state entity will maintain reasonable documentation, such that documents included in a procurement history should be in line with the size and complexity of the procurement.
 - Always ensure procurement records are retained for the minimum time frame dictated by local, state, and federal requirements, and at least three years from the date of submission of the final expenditure report for the award. 2 C.F.R. § 200.333
 - Ensure recordkeeping processes for your organization are documented and well known, as this will assist in maintaining knowledge-retention in the absence of any person(s) who might typically handle procurement documentation for the organization.
- The Uniform Rules provide that FEMA, DHS Office of Inspector General, the Comptroller General of the United States, and the pass-through entity, or any of their authorized representatives, must have the right of access to any documents, papers, or other records of the NFE which are pertinent to the FEMA award, to make audits, examinations, excerpts, and transcripts.
- **Pre-Award Procurement Review**
 - **Review of Technical Specifications**
 - A non-state entity must make available the technical specifications for a proposed procurement upon request by FEMA or the pass-through entity.
 - **Review of Other Procurement Documents**
 - A non-state entity must make available upon request, for FEMA or pass-through entity pre-procurement review, other procurement documents such as requests for proposals, invitations for bids, independent cost estimates, etc. in certain circumstances.
 - Exemption: A non-state 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. Part 200.



- **Post-Award Procurement Review**

- This requirement applies to both state and non-state NFEs.
- FEMA may review a NFE's procurement documents after the NFE's contract award as part of FEMA's authority and responsibility to monitor financial assistance execution and ensure proper performance and compliance with the terms and conditions of the FEMA award.
 - Such a review may occur during close-out of a FEMA award, close-out of an individual project under a FEMA award, or through a FEMA audit or monitoring visit.



Things to Do in Advance

• General Requirements

- All non-state entities must have *written* procedures for procurement transactions.
 - These procedures must ensure that all solicitations incorporate clear and accurate descriptions of the technical requirements for the goods or services being procured.
 - Should incorporate clear descriptions, nonrestrictive specifications, qualitative requirements, acknowledgement that FEMA is providing the funds, statement of the contract type, be free of any features that unduly restrict competition, and mention that prospective contractors will need to comply with all applicable Federal laws, regulations, executive orders, and FEMA requirements.
 - Must identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

- **Prequalified Lists:** A prequalified list is a list of vendors that the applicant has vetted possessing the qualifications and technical abilities to satisfy an applicant's potential requirement.

- **THIS IS NOT A CONTRACT**

- Many non-state applicants have prequalified lists that essentially serve as contract research.
- If using, must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition.
- Cannot exclude potential bidders or offerors from qualifying during the solicitation period, even if they were not on the prequalified list.
 - Must still comply with all applicable procurement standards in the award of the contract, including solicitation, evaluation, and subsequent award of a contract.
 - Any additional interested contractors must be permitted to submit their qualifications in response to the solicitation and, if deemed qualified, submit their bids or proposals for consideration.

- **Advanced/Pre-Positioned Contracts:** Advance contracts, also referred to as prepositioned contracts or pre-awarded contracts, may be awarded before an incident occurs for the potential performance of work under the Public Assistance Grant Program under a Stafford Act emergency or major disaster.

- **THIS IS A CONTRACT**

- The contract must have been originally procured in full compliance with the procurement standards under the Uniform Rules.
- The scope of work originally procured must not exceed the reasonably expected needs during a future declaration.
- The scope of work performed must fall within the scope of work of the original contract and there are no cardinal changes.
- The pricing structure must be reasonable.



- May NOT use FEMA assistance to fund projects beyond the original scope of an existing contract.
 - i.e. **cardinal change** (out of scope changes): after-the-fact addition of parties able to use the contract, changes in the type or extent of work to be performed, use of the contract in manner/duration that was not originally anticipated, etc.
 - Non-state entities may utilize modification clauses to bring existing pre-positioned contracts into compliance with the Federal procurement regulations so long as the deviation in the existing contract is possible to cure. *See Page VI-7 of the Detailed Resources Supplement available on the PDAT website.*
 - State entities must follow their own procurement rules and procedures and contract rules on whether cardinal changes are permissible without a separate procurement.
- **Cooperative Purchasing:** A cooperative arrangement for acquiring goods or services that involves combining the demand of two or more entities in an effort to obtain a more economical purchase. Entities typically sign up to use cooperative purchasing programs through a cooperative purchasing agreement. Program membership may provide entities with access to lists of agreements or contracts for goods and services at pre-negotiated rates or prices. Non-state entities:
 - Must ensure the solicitations used by cooperative purchasing programs include a clear and accurate description of the scope of work or goods required.
 - Must comply with the allowable procurement methods, including any requirements to publicly advertise or publicize solicitations, solicit bids from an adequate number of known suppliers, and award contracts to responsible, responsive firms with the lowest price or whose proposal is most advantageous to the program with price and other factors considered.
 - Must ensure cooperative purchasing programs take the applicable affirmative steps required by 2 C.F.R. § 200.321 to encourage participation of small and minority businesses, women's business enterprises, and labor surplus area firms.
 - Must not be restrictive of competition, including any geographic preferences that a cooperative purchasing program uses in evaluating bids or proposals and any additional terms or conditions that favor or give preference to local suppliers.
 - Must still ensure that any contracts contain the applicable required contract provisions under 2 C.F.R. § 200.326.
 - Must conduct an independent cost or price analysis when using cooperative purchasing agreements.
 - NOTE: Cooperative purchasing programs are distinguishable from joint procurements. A "joint procurement" is a method of contracting in which two or more purchasers agree from the outset to use a single solicitation and enter into a single contract with a vendor for the delivery of goods and/or services.



Tools & Resources

- **PDAT Website:** www.fema.gov/procurement-disaster-assistance-team
 - Several extremely helpful resources, including those referenced throughout these Replays, can be found on the PDAT website. These resources will help to provide additional information on the Federal procurement rules governing FEMA Public Assistance grants. These resources include:
 - Contract Provisions Template;
 - Field Manual;
 - Detailed Resources Supplement;
 - Checklists;
 - Online webinars are available as refreshers on the materials covered today; and
 - Much, much more.
- **Procurement Rules Online:** www.ecfr.gov
 - Title 2 → Subtitle A → Chapter II → Part 200 → Subpart D → Procurement Standards
 - 2 C.F.R. 200.317-326 can be viewed in its entirety at this website.
 - Always refer to your organization's servicing legal counsel for resolution of any legal questions.
- **System for Award Management (SAM)-** www.SAM.gov
 - Always check with www.sam.gov to confirm you are not entering into a covered transaction with a party listed on the government-wide exclusions list.
 - System for Award Management Exclusions ("SAM Exclusions") is the list maintained by the General Services Administration that contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulator authority other than Executive Order 12549.
 - The regulations at 2 C.F.R. Part 180 and 2 C.F.R. Part 3000 specifically prohibit a NFE from entering into a "covered transaction" with a party listed on the SAM Exclusions.
- **Other Points of Contact**
 - Always be aware of local and state procurement rules in addition to the Federal requirements discussed today.
 - Please refer to your local procurement staff for any questions related to state and local procurement rules.
 - If you have any questions regarding Federal procurement requirements, contact your dedicated FEMA Public Assistance Staff.



