

# Public Procurement Practice

## PROCUREMENT'S ROLE IN FEDERAL EMERGENCY MANAGEMENT COMPLIANCE

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*Caveat: This practice does not constitute legal advice, but is designed as a resource. Much of the content is taken directly from the referenced documents and serves as an overview. Procurement professionals are advised to reference the documents directly and seek expert advice.*

### STANDARD

To obtain and keep federal funding, an entity must comply with federal emergency management requirements under 2 C.F.R., Part 200. Three primary resources that should be referenced include:

- 2 CFR 200 - UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS 200.317 to 200.326
- FIELD MANUAL PUBLIC ASSISTANCE GRANTEE AND SUBGRANTEE PROCUREMENT REQUIREMENTS UNDER 44 C.F.R. PT. 13 AND 2 C.F.R. PT. 215 FEMA Office of Chief Counsel Procurement Disaster Assistance Team (December 2014)
- PROCUREMENT GUIDANCE FOR RECIPIENTS AND SUBRECIPIENTS UNDER 2 C.F.R PART 200 (UNIFORM RULES) SUPPLEMENT TO THE PUBLIC ASSISTANCE PROCUREMENT DISASTER ASSISTANCE TEAM (PDAT) FIELD MANUAL (June 2016)

In general, if there is a conflict, entities will be required to comply with whichever requirement is more stringent, including the entity's own statutes, ordinances, rules, and regulations; which may be more stringent than the Federal standards. To ensure compliance, it is important to use the most current version of government regulations, manuals, and publications. The entity is strongly advised to engage an emergency management expert to ensure compliance.

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### Definition

**Emergency Management:** Emergency management is a managerial function that includes the creation of the framework within which communities reduce vulnerability to hazards and cope with disasters. (FEMA Principles of Emergency Management Supplement. September 11, 2007.)

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Procurement professionals should be familiar with the following terms:

- Non-Federal entity, or "Applicant"
- Federal award (formerly "grant")
- Subaward (formerly "subgrant")
- Recipient (formerly "grantee")
- Subrecipient (formerly "subgrantee")
- Pass-through entity
- Exigency vs. Emergency



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#### **Element 1: Procurement professionals should be fully engaged with Emergency Management Teams in advanced planning for emergencies.**

Emergencies are local events, which usually depend on local procurement professionals as well as local responders. Examples of advanced planning include:

- Contracting to harden infrastructure.
- Developing advanced contingency contracts to facilitate and lessen response costs.
- Assuring continuity of operations.
- Use of national systems for planning and funds, e.g., The National Incident Management System (NIMS) released by FEMA, the Government of Canada's Disaster Financial Assistance Arrangements (DFAA).

To increase available resources, the procurement professional is advised to develop partnerships. Partner needs as well as those of the local government should be addressed in mutual aid agreements and logistical preparedness such as partnerships formally managed by local and state agreements, e.g., Emergency Management Assistance Compact (EMAC).

#### **Element 2: Access to an emergency management expert, whether internal or external, is strongly recommended.**

Many agencies have emergency management staff either in a designated department or may have operations housed within a larger unit such as public safety. This department or unit would coordinate response before, during, and after an emergency event. The Chief Procurement Officer (CPO) should be a member of the agency's Emergency Management Team. If an entity does not have an emergency department or unit of some kind, an expert should be identified who can:

- Train staff regarding emergency management principles.
- Coordinate emergency response.
- Allocate resources, such as staff, equipment, goods, and services.
- Manage the operation of an emergency event response.
- Develop a disaster purchasing policy and procedures.

Some organizations are integrating the concept of resiliency, the ability to prepare and plan for, absorb, recover from, and more successfully adapt to adverse events, into emergency management. Resilience efforts may include the hiring of a Chief Resilience Officer (CRO).

#### **Element 3: When contracting for emergency goods, services, and construction, procurement professionals must refer to 2 C.F.R. Part 200 as the primary resource for complying with requirements.**

Requirements may differ depending on the entity type, e.g., federal or non-federal entity (NFE). Whereas federal agencies must comply with the Federal Acquisition Regulation (FAR), state and local governments typically need to comply with their individual statutes, codes, ordinances, policies, and procedures relating to emergency management. When differing requirements result in conflicting guidance:

- In general, comply with the most stringent requirements. When using competitive solicitations, applicants must comply with applicable state and local procurement requirements, which may be more stringent than Federal requirements. See 2 C.F.R. Part 200.
- Ensure that contracts by non-federal entities contain the applicable Uniform Rules contract clauses (Contract Provisions for non-Federal Entity Contracts Under Federal Awards). See 2 C.F.R. Part 200.326 and Appendix II to the Uniform Rules.

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Note that this concept of direct conflicts and more or less restrictive standards only applies to NFEs other than states. States will always follow the procurement standards found at 2 C.F.R. Part 200.317, which direct them to utilize their own procurement standards, comply with 2 C.F.R. Part 200.322 (procurement of recovered materials), and refer to 2 C.F.R. Part 200.326, which requires NFE contracts to contain the applicable provisions described in Appendix II to Part 200.



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### Requirements under the Uniform Rules

A primary reason an agency may not be reimbursed by FEMA for emergency expenditures is the failure of that agency to include the required contract provisions in their solicitation and/or contract documents. Contracts of a non-Federal entity must contain the applicable contract clauses described in Appendix II to the Uniform Rules (Contract Provisions for non-Federal Entity Contracts Under Federal Awards), which may include:

- Remedies
- Termination for Cause and Convenience
- Equal Employment Opportunity
- Davis Bacon Act and Copeland Anti-Kickback Act
- Contract Work Hours and Safety Standards Act
- Rights to Inventions Made Under a Contract or Agreement
- Clean Air Act and the Federal Water Pollution Control Act
- Debarment and Suspension
- Byrd Anti-Lobbying Amendment
- Procurement of Recovered Materials
- Additional FEMA Requirements

### Element 4: Public procurement professionals must comply with mandatory requirements for Public Assistance recipients and subrecipients when using Public Assistance funding to finance their procurements.

The Field Manual Public Assistance Grantee and Subgrantee Procurement Requirements under 44 C.F.R. PT. 13 AND 2 C.F.R. PT. 215 FEMA Office of Chief Counsel Procurement Disaster Assistance Team (December 2014) and PROCUREMENT GUIDANCE FOR RECIPIENTS AND SUBRECIPIENTS UNDER 2 C.F.R PART 200 (UNIFORM RULES) SUPPLEMENT TO THE PUBLIC ASSISTANCE PROCUREMENT DISASTER ASSISTANCE TEAM (PDAT) FIELD MANUAL (June 2016):

- Support FEMA employees in assisting recipients and subrecipients to comply with the procurement requirements and to increase consistency in the FEMA's application of these standards across the agency.
- Provide a description and explanation of the procurement requirements to applicable recipients and subrecipients when procuring property and services for debris removal (Category A), emergency protective measures (Category B), and restoration of damaged facilities (Categories C-G) under the Public Assistance Grant Program.
  - This includes, among other things, the procurement of property and services for the construction, repair, and alteration of buildings, structures, or appurtenances.
- Apply to any alterations or repairs to buildings or structures existing on that land when that land was acquired or made available for the Public Assistance project.
- Describe and explain the procurement requirements for recipients and subrecipients under 2 C.F.R. Part 215.40-48.

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#### **Emergency Work Categories**

The Disaster Assistance Fact Sheet 9580.4 identifies acceptable contracting procedures in the Public Assistance Program, following an emergency or major disaster declaration, when contracting for emergency work categories, including Category A Debris Removal and Category B Emergency Protective Measures.

Requirements include:

- Competitive solicitation process
  - A federal disaster declaration may allow local governments to use all GSA schedules
- Applicable Federal, State, and local laws and regulations; provided that the procurement conforms to the Federal law and standards set forth in 2 C.F.R. Part 200 that non-competitive contracting may be acceptable only in rare circumstances where specific criteria are met.

To be reimbursed for work performed under a contract that was not competitively solicited, the procurement of that work must not have been feasible under small purchase procedures, sealed bids, or competitive proposals, and one of the following circumstances may apply:

- The item is available only from a single source;
- There is a public exigency or emergency for the requirement that will not permit delay from competitive solicitation;
- The awarding agency authorizes noncompetitive proposals; or
- Solicitation from a number of sources has been attempted, and competition is determined to be inadequate.

**Whether utilizing competitive or non-competitive procurement procedures, all costs must be determined reasonable by FEMA to be eligible for reimbursement.**

In cases where non-competitive procurement procedures are used, the applicant may be required to submit the proposed procurement to the awarding agency (FEMA) for review. See 2 C.F.R. Part 200.

#### **Eligibility determinations are made solely by FEMA.**

No contractor has the authority to make eligibility determinations, determinations of acceptable emergency contracting procedures, or definitions of emergency work.

#### Emergency Work - Debris Removal

- Reimbursable costs include removal of incident-related debris from improved public property and public rights-of-way, including Federal-aid roads
- All contracted debris removal operations must be monitored
- Debris removal claims must provide supporting documentation

Permanent Work includes:

- Roads and bridges
- Water control facilities
- Public buildings and contents
- Public utilities
- Parks, recreational, and other facilities

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### **NFE (Non-Federal Entity) recipients and subrecipients**

NFE (Non-Federal Entity) recipients and subrecipients of FEMA financial assistance under the financial assistance programs may use contractors to assist them in carrying out the scope of work under their Federal financial assistance awards.

The NFE must make available upon request, for FEMA or a pass-through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when any of the following conditions are present:

- The NFE's procurement procedures or operations fail to comply with the procurement standards in 2 C.F.R. Part 200.
- The procurement is expected to exceed the Simplified Acquisition Threshold, the dollar amount below which an NFE may purchase property or services using small purchase methods, and is to be awarded without competition or only one bid or proposal is received in response to a solicitation.
- The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a "brand name" product.
- The proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement.
- A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.

FEMA may review an NFE's procurement documents subsequent to the NFE's contract award, even years after the emergency, 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.

### **Element 5: By documenting and accounting for disaster-related costs, entities can minimize the loss of FEMA disaster assistance funds, maximize financial recovery, and prevent fraud, waste, and abuse of disaster funds.**

Data should be collected during the disaster prior and recorded on FEMA Forms, which may include a(n):

- Incident Command System Form: Activity Log (ICS-214).
- Employee Log, e.g., number of employees, names, and hours for disaster preparedness.
- Material Summary Sheet, e.g., purchased materials, rental equipment.
- Equipment Log.
- Rented Equipment Record.
- FEMA's Contractual Work Summary Record.

Prior to the emergency, pictures should be taken to document the condition of the office or area of work, as much as possible.

The Office of Inspector General (OIG) in the Department of Homeland Security considers several factors to determine which activities to audit. These factors include:

- The risk of fraud, waste, and abuse of Federal funds.
- Statutory and regulatory requirements.
- Current or potential dollar magnitude.
- Requests from congressional, FEMA, or state officials.
- Reports/allegations of impropriety or problems in implementing FEMA programs.



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Frequent audit findings include:

- Improper Procurement Practices (2 C.F.R. Parts 200.318 to .326).
- Failure to provide full and open competition (2 C.F.R. Part 200.319(a)).
- Failure to take all affirmative steps to assure the use of disadvantaged businesses when possible (2 C.F.R. Part 200.321).
- Failure to include all required contract provisions (2 C.F.R. Part 200.326).
- Failure to verify whether contractors were suspended, debarred, or otherwise excluded or ineligible (2 C.F.R. Part 200.213).
- Unsupported Costs (2 C.F.R. Part 200.403(g)).
- Poor Project Accounting (2 C.F.R. Part 200.302).
- Duplication of Benefits (Section 312 of the Stafford Act ).
- Excessive Equipment Charges.
- Excessive Labor and Fringe Benefit Charges (2 C.F.R. Part 200.403(c)).
- Unrelated Project Charges (2 C.F.R. Part 200.403(a)).
- Unapplied Credits (2 C.F.R. Part 200.406).
- Ineligible or insufficient tracking of Direct Administrative Costs (FEMA's PAPPG (Public Assistance and Policy Guide)).
- Failure to Obtain and Maintain Insurance (Section 311 of the Stafford Act).

When administering FEMA grants:

- Designate a person to coordinate the accumulation of records.
- Establish a separate and distinct account for recording revenue and expenditures, and a separate identifier for each distinct FEMA project.
- Ensure that the final claim for each project is supported by amounts recorded in the accounting system.
- Ensure each expenditure is recorded in the accounting books and is referenced to supporting source documentation (checks, invoices, etc.) that can be readily retrieved.
- Research insurance coverage and seek reimbursement for the maximum amount. Credit the appropriate FEMA project with that amount.
- Check with the entity's Federal Grant Program Coordinator about the availability of funding under other Federal programs (Federal Highway, Housing and Urban Development, etc.) and ensure that the final project claim does not include costs that another Federal agency funded or should have funded.
- Ensure that materials taken from existing inventories for use under FEMA projects are documented by inventory withdrawal and usage records.
- Ensure that expenditures claimed under the FEMA project are reasonable and necessary, are authorized under the scope of work, and directly benefit the project.
- Ensure proper grant administration is established and enforced throughout the duration of the grant.
- Ensure that records of FEMA conversations and communications, e.g., emails are maintained.

#### **Element 6: Procurement can take steps to establish pre-approved contracts that avoid the need to open a contract to market forces.**

In the midst of an emergency, when goods and services of a contract are needed, contractors may leverage low supply and urgent demand to default on or renegotiate contracts. The following steps may be taken to avoid such a situation:

- Establish an emergency binder and revisit it with other stakeholders annually, and well before, a cyclical emergency, e.g., hurricane.
- Speak with the manufacturer and supplier about the contract.
- Strategize for large scheduled events to mitigate potential emergencies.

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- Include in the RFP a request for contractor emergency plan(s) if an emergency is declared, e.g., provide and transport water; in general, what other value-added services could the contractor offer in a declared emergency in addition to their core services.
- Receive assurances from suppliers and manufacturers, for example:
  - Require bonding/irrevocable letter of credit
  - Pay retainer to ensure that equipment shows up within 48 hours
  - Remove force majeure language from the contract

In extreme circumstances, entities may reach out to media and to government officials, e.g., attorney general or law enforcement to make them aware of a disaster or emergency situation and the contractors who are trying to take advantage of the situation.

### Background

Natural and manmade disasters are now expected occurrences for which we must plan. Toward that end, Congress passed the Robert T. Stafford Disaster Relief and Emergency Assistance Act Public Law 100-707 (November 23, 1988) to:

- Encourage states and localities to develop comprehensive disaster preparedness plans,
- Prepare for better intergovernmental coordination in the face of a disaster,
- Encourage the use of insurance coverage, and
- Provide federal assistance programs for losses due to a disaster.

The Stafford Act: Emergency Declarations and Major Disaster Declarations provide for two types of disaster declarations. Both declaration types authorize the United States President to provide supplemental federal disaster assistance. However, the event related to the disaster declaration and type and amount of assistance differ.

- An Emergency Declaration is authorized to provide emergency services, such as the protection of lives, property, public health, and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.
- A Major Declaration is authorized to provide a wide range of federal assistance programs for individuals and public infrastructure, including funds for both emergency and permanent work.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) authorizes Federal financial assistance for state, local, and Indian tribal governments, and certain private nonprofit organizations to respond to and recover from emergencies and major disasters. FEMA administers this financial assistance through various Stafford Act grant programs, including:

- Public Assistance Program
  - Emergency work: debris removal and emergency protective measures
  - Permanent work: permanent restoration of damaged facilities
- Hazard Mitigation Grant Program
- Pre-Disaster Mitigation

Procurement professionals who are not familiar with the requirements referenced in this practice may pose the greatest risk in the public assistance cost recovery process. This practice addresses how Procurement can obtain and keep Federal funds and how Procurement can establish pre-approved contracts that mitigate the need for a contract open to market forces.



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