



### Using Contract Support for the Development of Hazard Mitigation Assistance (HMA) Grant Applications

#### Purpose

This document presents eight common Hazard Mitigation Assistance (HMA) application development scenarios and provides guidelines to address procurement issues related to non-Federal entity use of contracted support for the development of HMA application elements. The scenarios were developed to address frequently asked questions and ensure compliance with procurement regulations found in the “Uniform Administrative Requirements, Cost Principles and Audit Requirements for Federal Awards” (2 C.F.R. Part 200).

#### Applicability

These guidelines apply to all Pre-Disaster Mitigation (PDM) and Flood Mitigation Assistance (FMA) awards made on or after December 26, 2014, and all Hazard Mitigation Grant Program (HMGP) awards granted under major disaster declarations issued on or after December 26, 2014.

#### Background

All HMA grant program subapplications must address eligibility and feasibility requirements to be approved. HMA Guidance identifies data that must be provided by the subapplicant. The subapplication must include a scope of work that describes the proposed approach, outcomes, and level of effort, including key milestones and schedules and relationship of each activity to the cost estimate. The cost estimate must detail project costs and support the scope of work and document non-Federal cost share. The work schedule should be 3 years or less in length. Other documentation includes verification of cost share, cost effectiveness and feasibility, and compliance with environmental and historic preservation considerations. Some subapplicants use contract support to prepare these elements. The procurement regulations found in 2 C.F.R. Sections 200.317 through 200.326 may impact how contract support is used to prepare subapplications.

FEMA can continue to accept price quotes, design plans, and other documents prepared by contractors to support HMA grant application reviews, under certain situations. Non-Federal entities can use their own historical records including bid proposals received under separate prior projects to guide development of future subapplications. Non-Federal entities can also issue Requests for Information (or use similar mechanisms) to firms to obtain technical suggestions, best practices, or other recommendations, which can then be used by the Non-Federal entity to help inform its own decisions in developing requirements for the project or mitigation planning activity and completing its subapplication without further outside assistance. Under this scenario, the Non-Federal entity is determining what information is pertinent to its project or mitigation plan and whether or not to consider it when preparing a subapplication. The firm/entity plays no further (or active/direct) role in the grant application process. However, when using historical records or information received through the Request for Information process, the Non-Federal entity should be careful not to draft its requirements in such a way that it improperly restrains competition by including language or requirements potentially favoring or steering future contract awards to the firm or entity submitting the information. *See*, 2 C.F.R. Sections 200.319(a)(1)-(7).

In general, a contractor who develops HMA grant application project specifications (e.g., planning, engineering or design firms, or consultants) or is contracted to provide direct assistance with the completion and submission of a grant application is prohibited from competing for the work that it helped to develop (2 C.F.R. Section 200.319(a)). However, the non-Federal entity should consider the following guidelines if interested in preventing contractors from being excluded from future competitive procurements:

- **Review State, tribal, and local requirements:** FEMA encourages non-Federal entities to review State, tribal, and

local procurement policies before preparing subapplications. Besides Federal procurement requirements, there may be additional State, tribal, and local requirements that a non-Federal entity must follow.

- **Develop your own specifications:** The non-Federal entity should develop its own application and bid specifications. If a contractor prepares the specifications, the contractor will not be allowed to bid on the contract.
- **Use public records:** Subapplicants can rely on information in their own records obtained from a contractor's proposal from an old project without precluding the contractor from bidding on a current, related project.

## Non-Competitive Process

Where permitted by 2 C.F.R. Section 200.320(f), subapplicants can use a non-competitive procurement for work funded under a grant. This option is only available when one or more of the following criteria are met:

1. The services are only available from a single source;
2. The public exigency or emergency for requiring the non-competitive proposal will not permit delay resulting from competitive solicitation;
3. The pass-through entity, or FEMA, expressly authorizes the non-competitive procurement before work on the subapplication begins in response to a written request from the non-Federal entity; or
4. The competition is deemed inadequate after solicitation of a number of sources.

Non-Federal entities should be careful when authorizing non-competitive procurements. Even though non-competitive procurements may be permitted under federal procurement standards, any violation either in the application of the non-competitive procurement requirements or reasonable cost determination can result in disallowed costs. Non-Federal entities should maintain adequate records of their non-competitive procurement justifications in order to reduce the risk of having eligible expenses disallowed.

## The Time Period Allowed for A Non-Federal Entity to Update its Procurement Policies and Systems

The regulations at 2 C.F.R. Part 200 became effective on December 26, 2014. However, the Office of Management and Budget (OMB) is providing non-Federal entities additional time, a grace period, to update their procurement policies and systems. If they choose, non-Federal entities may continue to follow the procurement standards in 44 C.F.R. Section 13.36 or other applicable prior OMB procurement guidance (such as 2 C.F.R. Section 215.40 through 215.48) for the duration of the grace period, which extends through the non-Federal entity's first full fiscal year that starts on or after December 26, 2014. For example, if the non-Federal entity's fiscal year runs from January 1, 2015 to December 31, 2015, the grace period would end December 31, 2015. Non-Federal entities who choose to take advantage of the grace period must document that decision in their internal procurement policies.

The grace period only applies to procurements that are initiated during the grace period. For awards with multi-year periods of performance, the grace period will not necessarily apply for the award's full period of performance. Procurements initiated after the grace period must follow 2 C.F.R. Part 200 procurement regulations. For example, a non-Federal entity received a subaward with a period of performance from January 1, 2015 to December 31, 2017. The non-Federal entity's fiscal year runs from January 1, 2015 to December 31, 2015. If there is a long lead time to prepare to start the project, procurements may not be started until the second year of the period of performance or after the first fiscal year has ended (after December 31, 2015). In this case, the procurements started or initiated after December 31, 2015 must follow 2 C.F.R. Part 200.

Eight HMA application development scenarios pertaining to procurement are discussed below with guidelines for issues specific to mitigation planning and projects. These scenarios clarify when a contractor may or may not be excluded from future competitive procurements after the grant is awarded.

## Common HMA Subapplication Development Scenarios

### Mitigation Planning Scenarios

Four mitigation *planning* scenarios are described below to provide guidelines on how to use contract support without excluding contractors from future competitive procurements.

**1. A non-Federal entity obtains a contractor proposal for a prior local mitigation plan and uses it to guide development of a subapplication without assistance from the same contractor**

Non-Federal entities can use a contractor's proposal solicited from a past planning activity or from another community to provide insight on how to establish a current requirement. In this case, the contractor who submitted the old proposal would not be involved in the subapplication development process and remains eligible to bid. The subapplication must be prepared in a manner that does not unnecessarily restrict competition and the award of procurement can only be made to the contractor who submitted the old proposal through a proper, open, competitive bidding process. (2 C.F.R. Section 200.319)

**2. A non-Federal entity obtains one or more proposals from one or more contractors for a local mitigation plan and uses components of one or more of the proposals as a guide to develop a subapplication without further assistance from the contractor(s)**

When past records are unavailable, non-Federal entities sometimes solicit information from firms through the use of a Request for Information (or similar mechanism) to help guide them in the development of a subapplication without further direct assistance from any contractors. Under this scenario, the contractors responding to a Request for Information (or similar mechanism) provide indirect assistance in the form of providing potential ideas to the non-federal entity on how to proceed, but do not provide any direct assistance towards the completion of the subapplication. Non-federal entities must ensure that use of these ideas or any derivatives of these ideas do not improperly restrict competition or favor the contractor providing the information. *See*, 2 C.F.R. Section 200.319(a)(1)-(7)

If a bid or proposal is solicited and a contract awarded for direct assistance to prepare a subapplication, that contractor must be excluded from competing for the associated future contract.

**3. Regional Planning Commissions (RPCs) or Regional Development Commissions (RDCs) working on behalf of non-Federal entities**

These commissions are intended to support local jurisdictions in meeting State and Federal planning requirements. Many planning commissions are established with legislative authorities to encourage communities to support regional planning activities. Commissions usually have a board of directors made up of elected government officials or their appointees. Local governments use the services of commissions to prepare planning grant applications and use planning services. There are two procurement options available when a non-Federal entity wants to use the services of a RPC or RDC.

### Non-Competitive Option for RPCs and RDCs

Where it is unclear whether the RPC or RDC was established in accordance with local, state or tribal procurement standards that conform to the Federal procurement standards (*see*, 2 C.F.R. § 200.317), the non-Federal entity should seek clarification from the State or FEMA. If the establishment of the RPC or RDC does not meet the applicable procurement standards, the Non-federal entity is not necessarily prohibited from using a RPC or RDC, but must first determine whether the non-competitive procurement method is available to obtain the RPC or RDC's services. (*See*, 2 C.F.R. § 200.320(f)) A determination that non-competitive procurement methods are available must be adequately justified and documented in the Non-Federal entity's contract records.

### Shared Services between State and Local Governments for RPCs and RDCs

If State law authorizes the RPC or RDC for use by local governments, RPCs and RDCs must follow local and state procurement standards and ensure that such standards conform to the Federal procurement requirements in 2 C.F.R.

Sections 200.318 through 200.326. This is to allow local governments to use the RPCs and RDCs while maintaining the possibility of requesting reimbursement for eligible expenses. Local governments must also ensure that they follow local and state procurement standards that conform to the Federal procurement standards while awarding contracts to RPCs and RDCs. FEMA recommends that States or other pass-through entities coordinate with FEMA to determine which procurement option (competitive or non-competitive) is available.

#### **4. State institutions of higher education providing application development and mitigation planning services**

In this scenario the State Institutions of Higher Education (IHE) are not seeking to award a contract but are instead providing planning services to other Non-Federal entities. In awarding contracts to IHEs, the State must abide by the same procurement policies and regulations that it would otherwise use. (*See*, 2 C.F.R. Section 200.317) The State should review its State procurement policy to determine requirements for contracting with State higher education institutions. The State must also meet all the requirements outlined in 2 C.F.R. Section 200.317.

Other non-Federal entities must follow local and state (and tribal, if applicable) procurement requirements and ensure that they conform to the procurement standards outlined by 2 C.F.R. Sections 200.318 through 200.326. Non-Federal entities can use IHE services to prepare the subapplication but the educational institutions would generally be excluded from providing the resultant planning services.

Other non-federal entities are not necessarily prohibited from using an IHE for both subapplication development and mitigation plan development, but they must first determine whether the non-competitive procurement method is available to obtain IHE services. (*See*, 2 C.F.R. § 200.320(f)) A determination that non-competitive procurement methods are available must be adequately justified and documented in the Non-Federal entity's contract records.

### **Mitigation Project Scenarios**

Four mitigation *project* scenarios are described below to provide guidelines on how to use contract support without excluding contractors from future competitive procurements.

#### **1. A non-Federal entity using architectural and engineering (A&E) services to prepare a subapplication**

When preparing project subapplications, preliminary design plans may be required. Non-Federal entities may use A&E services to prepare the preliminary design plans. In this scenario, two contracts would be awarded using a competitive process. In the first procurement, a request for proposal is made using the competitive process for A&E services to design the project. In the second procurement, a request for proposal is made for construction services to implement the A&E plan to build the project.

The same firm who was awarded the A&E contract has a construction department and wants to bid to do the construction. Full and open competition is required for both A&E services and construction work.

If the contractor has a direct role in preparing the requirements and/or bid and solicitation documents and prepares the specifications/requirements and bid documents on behalf of the non-Federal entity, the contractor will not be able to bid on the contract. (2 C.F.R. Section 200.319(a))

If the non-Federal entity wants to include the A&E firm in the bidding on construction services, the Non-Federal entity must refrain from awarding the A&E firm a contract to provide the A&E services or justify award of the construction services under non-competitive procurement methods. In documenting the latter, the Non-Federal entity must determine whether the non-competitive procurement method is available through the application of the four exceptions identified at 2 C.F.R. Section 200.320(f)(1)-(4). Failure to adequately justify and document the use of an applicable and available non-competitive procurement exception will result in questioned costs.

#### **2. Competitive selection of a contractor prior to subapplication submittal to prepare the application and complete construction work**

In this scenario, the non-Federal entity would have one bid to select a firm to prepare both the subapplication and construct the project. The procurement process would have to comply with both the State's and the non-Federal entity's

procurement policy. Non-Federal entities are encouraged to review their procurement policies as this option may not be available due to State or local procurement requirements.

This type of procurement practice can become problematic depending on the specific situation, especially when trying to negotiate and document reasonable prices for both A&E and construction services. Contracts for A&E services are completely different from other types of contracts with regards to evaluating qualifications, ranking vendors, and negotiating reasonable prices. In addition, the project type would require a bundling of services. Requiring one vendor to supply all three services could be considered unduly restrictive of competition. For example, construction companies might not be able to participate because they do not offer A&E services, thus violating the competitive procurement requirements.

Depending on the project type, if the non-Federal entity uses a full and open competition process that meets the requirements of 2 C.F.R. Part 200, the same firm can prepare the application, provide A&E services, and complete construction work. The non-Federal entity must determine that the firm is a qualified vendor who provides reasonable prices for both A&E and construction services. If the non-Federal entity cannot reach an agreement over reasonable prices for construction services, it has to select the next most qualified vendor for construction work. The non-Federal entity would have to negotiate with next most qualified vendor on its qualified vendor list until it finds a vendor with whom it can agree on a reasonable price.

### **3. A non-Federal entity obtains two or more preliminary designs to use as a basis of an application, but writes the project application itself**

The guidelines are the same as provided for Planning Scenario 2. The non-Federal entity should be careful when preparing the scope for construction services to ensure that prospective contractors are not excluded from the competition by unnecessarily restrictive specifications that potentially favor the specific contractor or contractors that conducted preliminary design work.

### **4. Determining cost eligibility when an engineering or design consultant on retainer provides preliminary design work and is excluded from subsequent competition per 2 C.F.R. Part 200 regulations**

Many jurisdictions retain contractors, such as engineering firms, to provide services on an as needed basis. Depending on the cost of work involved, a small purchase procurement process can be used to select and hire firms. These firms usually provide A&E work and assist with other tasks, such as preparing bids and grant applications. As such, they are excluded from bidding on the construction contracts.

Many times, design work is completed in phases. A preliminary design is usually developed to help with project planning, application development, and estimating project costs. If an HMA subapplication is approved, a community may need to prepare final plans and specifications to get building permits and construct the project.

The preliminary design costs are considered eligible if the non-Federal entity procures the preliminary design services in accordance with the small purchase method in 2 C.F.R. Part 200. These costs would be eligible as pre-award costs, as long as the small purchase procedures found at 2 C.F.R. Section 200.320(b) are met. These procedures normally require that price or rate quotations be obtained from an adequate number of qualified sources. HMA will not question whether the number of qualified sources was adequate where the non-Federal entity obtains no less than three quotations. However, if the consultant on retainer was selected through full and open competition, the procurement met the procurement standards at 2 C.F.R. Sections 200.318 through 200.326, and the work is within the scope of work of the awarded contract, then the design work can be awarded to the consultant without additional competition.