

Checklist for Reviewing Procurements Under Grants by Institutions of Higher Education, Hospitals, and Other Private Non-Profit Organizations – 2 CFR pt. 215

This checklist was created to assist FEMA grantees and subgrantees in complying with the federal requirements that procurements must meet in order for FEMA to reimburse eligible expenses. Importantly, this checklist is intended to provide general guidance only and does not provide a detailed explanation of the Federal procurement requirements – it is NOT intended to serve as legal advice and FEMA makes no guarantee that adherence to this checklist will result in full reimbursement of eligible expenses. To understand the requirements fully, the user should review the provisions of [2 C.F.R. §§ 215.40-48](#), which is the source of these requirements as they apply to Institutions of Higher Education (IHE), Hospitals, and Other Non-Profit Organizations.¹ In addition, the user may review FEMA's [Field Manual, Public Assistance Grantee and Subgrantee Procurement Requirements](#), which is available on the internet by searching for "FEMA Procurement Field Manual." If any questions arise, please contact your servicing attorney or legal counsel for assistance.

For disasters and emergencies declared prior to 26 December 2014, the relevant procurement standards are found in 44 C.F.R. § 13.36(a)-(i) (States, local and tribal governments) and 2 C.F.R. §§ 215.40-48 (Institutions of Higher Education, Hospitals, and Private Non-Profits). This checklist specifically addresses the procurement standards found in 2 C.F.R. §§ 215.40-48. For guidance related to the procurement standards applicable to States, Local and Tribal governments, please refer to PUG Checklist 13.36. For disasters and emergencies declared after 26 December 2014, please refer to PUG Checklist pt. 200 for the applicable procurement standards for all recipients and subrecipients.

Instructions: Each standard below is followed by a block for "Yes", "No", or in some cases, "Not Applicable" or "N/A." **Red font** is used to indicate the response which, if checked, indicates that the contract does not comply with federal procurement standards.

1. Recipient Responsibilities

- a. Is the recipient the responsible authority, without recourse to the Federal awarding agency, regarding the settlement and satisfaction of all contractual

¹ This includes projects associated with declarations issued prior to 26 December 2014, regardless of project start date. For example, if a disaster was declared on 1 November 2014, but contracting for a project under that declaration did not begin until 1 April 2015, then an Institution of Higher Education, Hospital, or Private Non-Profits would use 2 C.F.R. §§ 215.40-48.

and administrative issues arising out of procurements entered into in support of an award or other agreement?² § 215.41 Yes No

2. **Codes of Conduct**

a. *Does the Recipient have:*

- i. Written standards of conduct governing the performance of its employees engaged in the award and administration of contracts? § 215.42 Yes No
- ii. Any employee, officer, or agent participating in the selection, award, or administration of a contract supported by Federal funds that has a real or apparent conflict of interest?³ § 215.42 Yes No
- iii. Any employee, officer, or agent that has solicited and/or accepted gratuities, favors, or anything of monetary value from contractors or parties to subcontracts?⁴ § 215.42 Yes No
- iv. Written standards of conduct that provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient? § 215.42 Yes No

3. **Competition**

- a. Have all procurement transactions been conducted in a manner to provide, to the maximum extent practical, open and free competition? § 215.43 Yes No
- b. Is the recipient alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade? § 215.43 Yes No

² This includes disputes, claims, protests of award, source evaluation or other matters of a contractual nature. Matters concerning violation of statute are to be referred to such Federal, State or local authority as may have proper jurisdiction.

³ Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award.

⁴ However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value.

- c. Have contractors that developed or drafted specifications, requirements, statements of work, invitations for bids and/or requests for proposals been excluded from competing for such procurements? § 215.43 Yes No
- d. Does the solicitation clearly set forth all requirements that the bidder or offeror must fulfill in order for the bid or offer to be evaluated by the recipient? § 215.43 Yes No
- e. Was award made to the bidder or offeror whose bid or offer was responsive to the solicitation and most advantageous to the recipient, price, quality and other factors considered? § 215.43 Yes No
- f. Were any bids or offerors rejected because it was in the recipient's interest to do so – and is this determination documented in the contract file? § 215.43 Yes No N/A

4. Procurement Procedures

- a. Does the recipient have written procurement procedures? § 215.44(a) Yes No
- b. Do these written procedures, at a minimum, address the following:
 - i. Recipients avoided purchasing unnecessary items. § 215.44(a)(1) Yes No
 - ii. Where appropriate, the recipient made an analysis of lease and purchase alternatives to determine which would be the most economical and practical procurement for the Federal Government? § 215.44(a)(2) Yes No
 - iii. Did the solicitations for goods and services provide for all the following?
 - 1. A clear and accurate description of the technical requirements for the material, product or service to be procured? § 215.44(a)(3)(i) Yes No
 - 2. Requirements which the bidder/offeror must fulfill and all other factors to be used in evaluating bids or proposals? § 215.44(a)(3)(ii) Yes No

3. A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards. § 215.44(a)(3)(iii) Yes No
 4. The specific features of “brand name or equal” descriptions that bidders are required to meet when such items are included in the solicitation? §215.44(a)(3)(iv) Yes No N/A
 5. The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement? § 215.44(a)(3)(v) Yes No N/A– **Not practicable or economically feasible**
 6. Preference, to the extent practicable and economically feasible, for products and services that conserve natural resources and protect the environment and are energy efficient? § 215.44(a)(3)(vi) Yes No N/A– **Not practicable or economically feasible**
- c. Has the recipient taken positive efforts to utilize small businesses, minority-owned firms, and women’s business enterprises, whenever possible? § 215.44(b) Yes No N/A– **Not possible (document)**
- i. Ensure that small businesses, minority-owned firms, and women’s business enterprises are used to the fullest extent practicable? § 215.44(b)(1) Yes No N/A(**document**)
 - ii. Make information on forthcoming opportunities available and arrange time frames for purchases and contracts to encourage and facilitate participation by small businesses, minority-owned firms, and women’s business enterprises? § 215.44(b)(2) Yes No N/A (**document**)
 - iii. Consider in the contract process whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women’s business enterprises? § 215.44(b)(3) Yes No N/A (document)

- iv. Encourage contracting with consortiums of small businesses, minority-owned firms and women's business enterprises when a contract is too large for one of these firms to handle individually? §215.44(b)(4)
 Yes No N/A (document)

- v. Use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Department of Commerce's Minority Business Development Agency in the solicitation and utilization of small businesses, minority-owned firms and women's business enterprises? § 215.44(b)(5) Yes No N/A
(document)

- d. Is the type of procuring instrument used appropriate for the particular procurement and for promoting the best interest of the program or project involved?⁵ § 215.44(c) Yes No
 - i. Involves a cost-plus-percentage-of-cost contract?⁶ [Note: This form of contract is prohibited under the Federal procurement standards and is ineligible for FEMA reimbursement] § 215.44(c) Yes No

- e. Has the contract been awarded to a responsible contractor who possesses the potential ability to perform successfully under the terms and conditions of the proposed procurement?⁷ § 215.44(d) Yes No

5. Cost and Price Analysis

- a. Has the recipient conducted and documented some form of cost⁸ or price analysis⁹ in connection with the procurement? § 215.45 Yes No

⁵ E.g. fixed price contracts, cost reimbursable contracts, purchase orders and incentive contracts.

⁶ This type of contract is separate and distinct from cost plus fixed fee, cost plus incentive fee, and cost plus award fee type contracts, which are permissible and used to incentivize contractors to perform to a higher standard of quality, lower cost, or faster performance. Cost plus percentage of cost contracts on the other hand provide none of these incentives; instead, there is a reverse incentive for the contractor to increase its costs as the higher its costs go, the more profit it earns, as its potential earnings are uncapped. The following characteristics are suggestive of a prohibited cost plus percentage of cost contract: (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; and (4) the contractor's entitlement increases commensurately with increased performance costs.

⁷ Consideration shall be given to such matters as contractor integrity, record of past performance, financial and technical resources or accessibility to other necessary resources. Contractors who are debarred or suspended are de facto non-responsible and are therefore ineligible for contract award.

⁸ Cost analysis is the review and evaluation of each element of cost to determine reasonableness, allocability, and allowability.

6. Procurement Records

- a. If in excess of \$150,000, do the procurement records and files for purchases, include at a minimum:
- i. A basis for contractor selection? § 215.46(a) Yes No
 - ii. Justification for lack of competition when competitive bids or offers are not obtained? And... § 215.46(b) Yes No
 - iii. Basis for award cost or price? § 215.46(c) Yes No

7. Contract Administration

- a. Does the recipient have a system for contract administration that is maintained to ensure contractor conformance with the terms, conditions, and specifications of the contract and to ensure adequate and timely follow up of all purchases? § 215.47 Yes No

8. Contract Provisions

- a. If a contract exceeds the small purchase threshold (\$150,000), does it address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms? § 215.48(a) Yes No N/A
- b. If a contract exceeds the small purchase threshold (\$150,000), does it address termination by the recipient, including the manner by which termination shall be effected and the basis for settlement? Additionally, does it describe conditions under which the contract may be terminated for default or under conditions beyond the contractor's control? § 215.48(b) Yes No N/A
- c. Bonding:
- i. If a contract (or subcontract) for construction or facility improvements does not exceed \$100,000, does it require the recipient to follow its own requirements relating to bid guarantees, performance bonds, and payment bonds? § 215.48(c) Yes No N/A

⁹ Price analysis may be accomplished in various ways, including the comparison of price quotations submitted, market prices and similar indicia, together with discounts.

- ii. If a contract (or subcontract) for construction or facility improvements exceeds \$100,000, does it include a:
1. Bid Guarantee – equivalent to Five (5) percent of the bid price? § 215.48(c)(1) Yes No N/A
 2. Performance Bond – equivalent to One hundred (100) percent of the contract price? § 215.48(c)(2) And... Yes No N/A
 3. Payment Bond – equivalent to One hundred (100) percent of the contract price? § 215.48(c)(3) Yes No N/A
- d. If a negotiated contract exceeds the small purchase threshold (\$150,000), does it include a provision granting the recipient, FEMA, the Comptroller General of the United States, or any of their duly authorized representatives, access to any books, documents, papers and records of the contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions? § 215.48(d) Yes No N/A
- e. Does the contract include the required Equal Employment Opportunity clause? § 215.48(e), citing to Appendix A to Part 215—Contract Provisions, para. 1. Yes No
- f. If a contract for construction or repair work exceeds \$2000, does it include the required *Copeland “Anti-Kickback” Act* clause? § 215.458(e), citing to Appendix A to Part 215 – Contract Provisions, para. 2. Yes No N/A
- g. If a contract for construction exceeds \$2000, does it include a Davis-Bacon Act clause? [Note that Public Assistance and Hazard Mitigation Grant Program contracts do not require these clauses.] § 215.48(e), citing to Appendix A to Part 215—Contract Provisions, para. 3. N/A
- h. If a contract for construction exceeds \$2000, or any other contract that involves the employment of mechanics or laborers in excess of \$2500, does it include a Contract Work Hours and Safety Standards Act clause? § 215.48(e), citing to Appendix A to Part 215—Contract Provisions, para. 4. Yes No N/A

- i. Rights to Inventions Made Under a Contract or Agreement.¹⁰ § 215.48(e), citing to Appendix A to Part 215—Contract Provisions, para. 5. N/A

- j. If the contract or subgrant amount exceeds \$100,000, does the contract include clauses addressing the Clean Air Act and the Federal Water Pollution Control Act? § 215.48(e), citing to Appendix A to Part 215—Contract Provisions, para. 6. Yes No N/A

- k. Contractors who apply or bid for an award of \$100,000 or more shall file the required certification, in accordance with the Byrd Anti-Lobbying Amendment?¹¹ Yes No N/A

END OF CHECKLIST

¹⁰ Public Assistance work does not generally involve the development or use of intellectual property. Accordingly, an Applicant need not use this specific clause.

¹¹ See PDAT Manual, pgs. 127-129. The clause may read substantially as follows:

Byrd Anti-Lobbying Amendment, 31 U.S.C. § 1352 (as amended). Contractors who apply or bid for an award of \$100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant, or any other award covered by 31 U.S.C. § 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.