

6 Frequent Sources of Non-Compliance Issues

- 1. Time & Materials Contracts.** T&M contracts can be used for a reasonable amount of time when (1) no other contract type is suitable; and (2) the contract includes a ceiling that the contractor exceeds at its own risk. Non-federal entities must also maintain a high degree of oversight (§ 200.318(j)).
- 2. Cost-Plus-Percentage-of-Cost Contracts.** These are contracts where the contractor's profit is based on a percentage of the underlying project costs actually incurred. Such contracts are explicitly prohibited by the Federal procurement standards and ineligible for FEMA grant funding (§ 200.323(d)).
- 3. Piggybacking.** Adopting a pre-existing contract solicited and awarded by another entity is referred to as "piggybacking." Non-state applicants considering piggybacking should closely examine whether use of another jurisdiction's contract would violate the federal procurement standards, as often these contracts do not contain required assignability clauses, are improper in scope, or were not procured in compliance with the federal procurement standards (§ 200.319).
- 4. Geographic Preferences.** Non-state applicants must conduct procurements in a manner that *prohibits* the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals (§ 200.323(b)).
- 5. Awarding to Contractors that Drafted Solicitation Documents.** Non-state applicants must prohibit contractors that develop or draft specifications, requirements, statements of work, invitations for bid or requests for proposal from competing for and being awarded the subsequent contract for that work (§ 200.323(a)).
- 6. Suspended or Debarred Contractors.** Non-state applicants may not award a contract to a suspended or debarred contractor, nor may any prime contractor award to a suspended or debarred subcontractor. Check the database at www.sam.gov prior to awarding the contract (§§ 200.213, 200.318(h)).

What do non-state applicants need to document in the contract file?

Maintaining contemporaneous records to detail the history of a procurement action is both required under the federal procurement standards (§ 200.318(i)) and the best defense in the event of an audit. FEMA requires non-state applicants to keep at least the following documentation:

- **Why you chose the procurement method** (e.g., documentation explaining that the contract was for construction so sealed bidding was the preferred procurement type pursuant to the federal procurement standards).
- **Why you chose the type of contract** (e.g., documentation explaining that the debris removal contract is a time and materials contract because no other contract type is suitable due to the uncertain amount of debris; that a firm ceiling price is included in the contract; and that this contract will be monitored to ensure the efficiency and avoid abuse by the contractor).
- **Why you chose or rejected a contractor** (e.g., documentation explaining that Contractor X was rejected because it failed to submit the required bid bond, whereas Contractor A was selected because it was deemed responsive, responsible, and had the lowest bid price).
- **The basis for the contract price** (e.g., documentation showing an independent cost estimate was performed prior to procurement; that although the contract price is slightly higher than the cost estimate, this contractor had a superior technical solution and was selected as the most advantageous; and that cost was further negotiated with the contractor to bring it closer to the cost estimate).



Procurement Under Public Assistance Awards

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FEMA

Intended Audience. This publication is primarily intended for local governments, tribal governments, institutions of higher education, hospitals, and other nonprofit organizations (non-state applicants) who receive funding through FEMA's Public Assistance Program. While this publication does not address the federal procurement standards that apply to state entities, states must follow the rule set forth in 2 C.F.R. § 200.317. States are defined as any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, or any agency or instrumentality of a state except for local governments.

Purpose of this Publication. The purpose of this publication is to assist eligible Public Assistance applicants in identifying and applying the federal procurement standards. Public Assistance applicants must follow these standards when using FEMA funds to procure disaster materials, supplies, public works projects, and services. Non-compliance with the federal procurement standards may result in the denial or de-obligation of Public Assistance funding. This document only provides a snapshot of the federal procurement standards; it does not address all Public Assistance requirements. The information provided is not legal advice. Public Assistance applicants should always consult with their legal counsel regarding any legal questions.

Federal Procurement Standards. The federal procurement standards applicable to federal awards can be found at Title 2 of the Code of Federal Regulations, Part 200, Sections 200.317 through 200.326 (2 C.F.R. §§ 200.317-200.326).

FEMA Resources. The Procurement Disaster Assistance Team (PDAT) provides resources to help Public Assistance applicants comply with the federal procurement standards at their website: www.fema.gov/procurement-disaster-assistance-team. PDAT's resources include:

- Field Manual and Supplement on the Federal procurement standards;
- Compliance checklists;
- Required contract clauses template;
- Cost and price analysis guide; and
- Webinar series.

What federal procurement standards apply to non-state applicants (i.e., local governments, tribal governments, institutions of higher education, hospitals, and other nonprofit organizations)?

Non-state applicants must:

- Follow their own documented procurement procedures which reflect applicable state, local, and tribal laws and regulations; and
- Conform their procurements to applicable Federal law and the regulations identified in 2 C.F.R. §§ 200.318 through 200.326.

What procurement methods can non-state applicants use?

Micro-Purchase Procedures (§ 200.320(a))

- ≤\$3,500 or comparable state/local/tribal threshold, whichever is lower
- Requires only ONE quote if price is reasonable
- MUST distribute equitably among vendors

Small Purchase Procedures (§ 200.320(b))

- ≤\$150,000 or comparable state/local/tribal threshold, whichever is lower
- Requires quotes from three (3) suppliers

Sealed Bidding (§ 200.320(c))

- Preferred method for construction contracts
- Firm-fixed-price contract is awarded to the lowest priced, responsive, responsible bidder
- Non-state applicants must solicit bids from an adequate number of suppliers
- Local and tribal governments must publicly advertise the invitation for bids and open bids publicly

Competitive Proposals (§ 200.320(d))

- Method generally used when conditions are not appropriate for sealed bidding
- Fixed price or cost reimbursement contract is awarded to the responsible firm whose proposal is most advantageous to the non-state applicant
- Non-state applicants must publicize requests for proposals (RFPs), and solicit proposals from an adequate number of qualified sources
- RFPs must identify all evaluation factors and their relative importance

Do non-state applicants have to award to small, minority owned, women's business enterprises, or labor surplus area firms?

Non-state applicants must engage these categories of socioeconomic firms in the procurement process, but are not required to set aside awards for them. To engage them in the procurement process, non-state applicants MUST take the following affirmative steps (§ 200.321):

1. Place qualified socioeconomic firms on their solicitation lists;
2. Assure that socioeconomic firms are solicited whenever they are potential sources;
3. Divide total requirements, when economically feasible, into smaller tasks or quantities;
4. Establish delivery schedules, where the requirement permits, which encourage participation by socioeconomic firms;
5. Use 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. Require prime contractors to take steps (1) through (5) if they use subcontractors.

Is it ever permissible for non-state applicants to sole source a contract?

Yes, the federal procurement standards identify four situations in which a non-state applicant may sole source a contract (§ 200.320(f)):

1. The item is available from only one source;
2. A public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
3. FEMA or the State authorizes a written request to sole source; or
4. After solicitation of a number of sources, competition is determined inadequate.

When sole sourcing, the non-state applicant must provide a written justification in the contract file.