FEMA RECOVERY

FACT SHEET 9580.212

PUBLIC ASSISTANCE GRANT CONTRACTING FREQUENTLY ASKED QUESTIONS (FAQ)

Overview

The Federal Emergency Management Agency (FEMA) provides State, local and Tribal governments, as well as certain private non-profit organizations (collectively referred to as "applicants"), grant assistance for the cost of responding to and recovering from major disasters. This assistance includes reimbursement for the cost of eligible work completed through contracts procured by the applicant. In order to be reimbursed for these costs, contracts must be in compliance with the procurement requirements in 44 Code of Federal Regulations (CFR) part 13, 2 CFR parts 215, 220, 225, and 230, and applicable state and local procurement laws (collectively referred to as the "procurement rules"). Compliance with the procurement rules is a condition of receiving grant funding. ***Non-compliance with Federal contracting requirements puts an applicant's grant funding at risk.***

These FAQs identify and clarify the procurement rules, alert applicants to pitfalls, and highlight best practices.

Frequently Asked Questions

1. What are the procurement requirements that must be followed by grantees and subgrantees?

Applicants must use their own procurement procedures which reflect applicable State and local laws and regulations. They must also, however, meet the minimum Federal procurement standards[1] where those standards are more onerous (including but not limited to those discussed in this Fact Sheet), or the contract will be deemed in violation of the procurement rules, and the request for reimbursement could be subject to the enforcement provisions discussed later in this Fact Sheet.

2. What are the procurement actions required for reimbursement by FEMA?

Full and Open Competition. The procurement rules require full and open competition, with limited exceptions.

[1] *See e.g.* 44 CFR §§13.36(a) and (b).

Cost or price analysis. The specific facts of the procurement will dictate the method and degree of analysis, but at a minimum, applicants must always make an independent estimate before receiving bids or proposals. A price analysis will be used to determine the reasonableness of the proposed contract price. Further, a cost or price analysis should be completed to evaluate the bids or proposals received.

Contractor ownership preferences.[2] Full and open competition also involves the adherence to procurement rules covering contractor ownership preferences. The applicant must take positive actions to involve and use "small and minority firms, women's business enterprise and labor surplus area firms."[3] The applicant's process should give potential contractors in these categories a full and open opportunity to compete.[4] FEMA will reimburse the applicant if, after a full and open competition, the applicant selects a contractor who provides the lowest price but does not meet one of these categories. When the applicant hires a prime contractor, the applicant must also require the prime contractor to utilize the same approach towards these categories when hiring sub-contractors.

System for managing procurement. Applicants must employ a system that governs contracts and purchase orders. This system must include a means of enforcing agreements, written procedures governing procurement actions, and a written code of standards for contract and purchase order administration. This code of standards must provide ethical rules and the penalties for violating these rules.[5] The system must also include a process to handle protests involving contracts and purchase order awards.[6]

Required provisions in procurement actions. The applicant must include certain provisions in its procurement actions. These provisions vary depending on the type and dollar amount of the contract, and are provided in 44 CFR part 13 or 2 CFR part 215, 220, 225, or 230, as applicable. Note that the Uniform Administrative Requirements For Federal Grant Assistance require applicant contracts to contain a provision requiring compliance with the Davis-Bacon Act when required by grant program legislation. The Stafford Act requires preparedness grantees to comply with Davis-Bacon provisions.[7] The Stafford Act does not require compliance with Davis-Bacon for any other grants. Therefore, applicant contracts to execute eligible work under the Public Assistance program are not required to contain a Davis-Bacon provision.

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[2] Applicants should not establish mandatory set-aside programs, which have been found to violate the 14th Amendment of the U.S. Constitution unless they are used as narrowly tailored remedies for identified discrimination. *See* City of Richmond v. J.A. Croson Co. 488 U.S. 469 (1989).

[3] Title VI of the Civil Right Act of 1964, 42 U.S.C. §2000d, et seq. and 44 CFR Part 7.

[4] This includes putting these contractors on solicitation lists; dividing the task into smaller pieces if economically feasible; working with the Small Business Administration (SBA) and the appropriate Department of Commerce/Minority Business Development Agency.

[5] The penalties must adhere to State and local laws and regulations. *See e.g.* 44 CFR §13.36(b)(3).

[6] FEMA will generally not get involved in these protests. *See e.g.* 44 CFR §13.36(b)(12) (limiting Federal agency protest reviews to violations "of Federal law or regulations and the standards of this section" and "of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest.").

[7] Stafford Act §611(j)(9), 42 U.S.C. §5196(j)(9).

Guarantees and bonds. For construction contracts and facility improvements above the simplified acquisition threshold[8], the applicant must require a bid guarantee from each bidder equivalent to 5% of the bid price, a performance bond on the part of the contractor for 100% of the contract price, and a payment bond on the part of the contractor for 100% of the contract. In lieu of these requirements, if FEMA (with respect to a grant) or the state (with respect to a subgrant), has made a determination that FEMA or the state's interest is adequately protected through other means, they may accept the bonding policy and requirements of the applicant.

3. What do applicants have to do to provide full and open competition?

Full and open competition means a contract action in which responsible sources are permitted to compete. Fair and open competition occurs when a complete, adequate and realistic specification or purchase description is publicly solicited and multiple responsible bidders are allowed to compete effectively for the business.[9]

When procuring goods or services at or below the simplified acquisition amount, the applicant must consider an adequate number of qualified sources. FEMA considers three to be the minimum adequate number of qualified sources.

This Fact Sheet as well as 44 CFR 13.36, 2 CFR Parts 215, 220, 225, and 230, as appropriate, provide the necessary requirements and processes to follow in order to ensure that an applicant satisfies the full and open competition requirements.

4. Is there a time when full and open competition is not required?

A procurement action that does not meet the requirement for full and open competition, such as a sole source contracts, constitutes a violation of regulation and is unauthorized unless the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals AND one of the following circumstances applies:

1. The item is available only from a single source;
2. The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
3. FEMA authorizes noncompetitive proposals; or
4. After solicitation of a number of sources, competition is determined inadequate.

If an applicant takes a noncompetitive procurement action, the applicant must complete a cost analysis and may be required to submit the proposed procurement to FEMA for pre-award review.[10]

[8] The simplified acquisition threshold is managed by the Federal Acquisition Council and is subject to change. As of October 1, 2010, the rate is $150,000. 75 FR 53129.
[9] See FAR Subpart 6.1. *See e.g.* 44 CFR §§13.36(d)(2) and (d)(3).
[10] *See e.g.* 44 CFR §13.36(d)(4).

5. Are there any other recommendations FEMA has for procurement actions?

Use sealed bids. For construction contracts, FEMA prefers sealed bids. After a public invitation and solicitation to bid, the applicant should award a firm-fixed-price contract, in writing, to the lowest responsible offeror. Applicants may also use the sealed bid method for non-construction contracts if appropriate.

When the sealed bid method is not appropriate, the applicant may use competitive proposals to award a fixed-price contract or a cost-reimbursement contract. With competitive proposals, awards are made in accordance with evaluation and award criteria set forth in the solicitation. The solicitation must set out all evaluation factors and their relative importance; solicit proposals from an adequate number of qualified sources; and have a method to conduct technical evaluations and select awardees. The competitive proposals method allows applicants to make their decision on more factors than price alone. When an applicant procures professional architecture or engineering services, this method permits eliminating price as a selection factor entirely.[11]

Keep detailed records. Keep detailed records of any decision points in the procurement process, and document the rationale for the decision. A contemporary accounting of the decision will help the applicant in the event of an appeal or challenge at a later time.

Team up. To foster greater economy and efficiency, applicants are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

Lease versus purchase. Applicants should compare the costs associated with leasing and those associated with purchasing over an applicable time frame to determine which option provides the greatest cost savings.

Use value engineering. Put value engineering clauses in sizeable construction contracts. Value engineering systematically reviews contract items and tasks to ensure that the "essential function is provided at the overall lower cost."[12]

6. Are there any procurement actions that are discouraged by FEMA?

Time and materials contracts. Applicants should avoid using time and materials contracts in their procurement actions. This contract type creates the risk that costs could go beyond what the parties

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[11] *See e.g.* 44 CFR §13.36(d)(3)(v). Note that the compensation must be "fair and reasonable." *Id.* This exception strictly limits applicants to eliminate price as a factor for the professional architecture or engineering services themselves and not for other services performed by those firms. *Id.*

[12] *See e.g.* 44 CFR §13.36(b)(7).

anticipated, so applicants should only use it when no other contract type is suitable. In light of this risk, time and materials contracts must include a ceiling amount on the price of the contract.[13] Including a ceiling shifts the risk to the contractor for any overages. For Public Assistance, such contracts should be limited for work that is necessary immediately after a disaster and should not exceed 70 hours.[14]

"Piggyback" contracts. "Piggybacking" occurs when an applicant has disaster-related work performed by another jurisdiction's contractor.[15] Because the competitive process for the existing contract could not have included the full scope of the new work, the new work has not been competitively bid. The resulting costs may therefore be higher than if the work had been bid out separately. FEMA therefore discourages such contracts and will use the reasonableness of eligible work as a basis to determine reimbursable costs.[16]

7. Are there any procurement actions that are prohibited by FEMA?

Noncompetitive contracts. Given the Federal contracting requirements for full and open competition, applicants must avoid awarding noncompetitive contracts unless the exceptions in FAQ #4 above apply.

Cost plus percentage of cost contracts. Cost plus percentage of cost contracts are strictly prohibited. Such contracts have four elements:

1. Payment is based on a pre-determined percentage rate;
2. Percentage rate is applied to actual performance costs;
3. Contractor entitlement is uncertain at the time of contracting, and;
4. Contractor entitlement increases commensurately with increased performance costs.[17]

Debarred or suspended contractors. Applicants must not employ disbarred or suspended contractors. In addition, applicants must report contractors who demonstrate a lack of integrity, ethical lapses, or perform inadequately. Applicants should check against the General Services Administration list of debarred and suspended contractors at: https://www.epls.gov/

Conflicts of interest. The procurement regulations forbid awarding contracts "if a conflict of interest, real or apparent, would be involved."[18] Conflicts of interest arise when an applicant's employee,

[13] *See e.g. Id.* at §13.36(d)(10)(ii).
[14] *See* FEMA 321, Public Assistance Policy Digest (January 2008), p. 23.
[15] *See* FEMA 325, Public Assistance Debris Management Guide (July 2007), p. 19.
[16] *Id.*
[17] U.S. GAO Opinion B-252378 (September 21, 1993). (In this case, the GAO determined that a 54 percent overhead rate applied to a cost reimbursement (no fee) contract constituted a prohibited cost plus percentage of cost method of contracting. No ceiling was applied to indirect cost reimbursements. GAO further opined that "…the use of a predetermined overhead rate to be applied to some element of direct cost which is undetermined at the time the rate is set, with no provision for retroactive adjustment to the actual cost, violates the express statutory prohibition against cost-plus-percentage-of-cost system of contracting….")

[18] *See e.g.* 44 CFR § 13.36(b)(3).

officer, or agent (or their immediate families or partners) has a financial or other interest in who receives the contract award. FEMA will also find a conflict of interest when an organization that employs (or is about to employ) any of the above parties has a financial or other interest in the award.

Duplicative costs. The Stafford Act and its implementing regulations forbid FEMA from reimbursing duplicative costs.

Contingency clauses. When procuring property and services under a grant, an applicant must follow the same policies and procedures it uses for procurements from its non-Federal funds. Therefore, while it is acceptable if the contract scope of work indicates that activities will be carried out consistent with FEMA laws, regulations, and eligibility guidelines, *contracts may not be contingent upon the issuance of a Presidential declaration or FEMA's approval or obligation of funds*.

Excessive Costs. To be eligible for reimbursement, costs incurred must be *reasonable*, allocable, and allowable.[19] Further, applicants must perform a cost or price analysis in connection with every procurement action including contract modifications.

Grantee or subgrantee profit. It is acceptable for applicants to pay reasonable fees or profit to cost-type contractors. However, no applicant can ever be in a position to receive a profit or fee itself for work procured pursuant to a Federal grant. FEMA will not fund any fee or profit to the applicant.

8. What happens when an applicant has hired a debris contractor without full and open competition because of the emergency circumstances from a declared disaster?

There are circumstances where public health and safety demand that initial debris clearance and removal be commenced before a standard competitive process can be completed. Generally, however, such circumstances do not exist for more than 70 hours following a disaster event. If an applicant has hired a debris removal contractor without competition, the applicant should immediately solicit a new contract for the remaining work using a competitive process. The work already completed should provide helpful information on the scope of work necessary to complete debris collection and disposal, and a basis for estimating a reasonable cost for the remaining work to effectively solicit a reasonable lump sum or unit price (cubic yard or ton) contract.

In addition, for the work completed with a contract not competitively bid, the applicant should complete and document a cost analysis to demonstrate price reasonableness, and complete and document why the public exigency or emergency did not permit full and open competition.

[19] 2 CFR pt. 225, Appendix A, § C. Note: OMB Circular A-87 is codified as 2 CFR pt. 225.

9. Is it appropriate for an applicant to use a pre-qualified list of debris contractors from another jurisdiction?

Applicants are encouraged, but not required, to develop their own lists of pre-qualified contractors. This allows the applicant to have more control over the qualifications of its pool of potential bidders. In addition, State and local governments may use the GSA schedule of contractors to compete their work. These contractors are pre-qualified and their costs have been vetted as reasonable.[20]

For more information on Debris Removal Contract Provisions, see Recovery Fact Sheet 9580.201 *Debris Contracting Guidance*.

10. Will FEMA review my solicitation and/or contract to guarantee it will be eligible for reimbursement?

While FEMA may elect to review a contract or solicitation, this does not equate to FEMA's approval of the solicitation/contract.

11. Will FEMA testify for me or help me enforce a contract?

FEMA will not get involved in contract disputes between an applicant and its contractors. A protestor must exhaust all administrative remedies with the applicant before pursuing a protest with FEMA. Further, the testimony of FEMA employees, or the disclosure of information in private litigation, is generally prohibited.[21]

12. What happens if an applicant doesn't follow the procurement rules?

If an applicant fails to comply with any term of an award (including the contracting requirements discussed in this Fact Sheet), whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, FEMA may:

1. Temporarily withhold payment, or take more severe enforcement action;
2. Disallow all or part of the cost of the activity or action not in compliance;
3. Wholly or partly suspend or terminate the applicant's current award;
4. Withhold further awards; or
5. Take other remedies that may be legally available.

[20] For more information, see FEMA Fact Sheet 9580.103, GSA Disaster Recovery Purchasing Program.
[21] 44 CFR 5.87 and 6 CFR 5.44

Authority

- Sections 102, 403, 406, 407 and 502 of the Stafford Act.[22]
- Title 44 Code of Federal Regulations (CFR) Part 206 ("Federal Disaster Assistance"), Subparts G ("Public Assistance Project Administration") and H ("Public Assistance Eligibility")
- 44 CFR Part 13 ("Uniform Administrative Requirements for Grant and Cooperative Agreements to State and Local Governments")
- Office of Management and Budget (OMB) Circulars and Guidance, 2 CFR Parts 215 ("Uniform administrative requirements for grants and agreements with institutions of higher education, hospitals, and other non-profit organizations"), 220 ("Cost principles for educational institutions"), 225 ("Cost principles for state, local, and Indian tribal governments"), and 230 ("Cost principles for non-profit organizations").
- 5 CFR Part 2635 "Standards of Ethical Conduct for Employees of the Executive Branch" (providing the ethical framework for Federal employees).

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Date

[22] 42 U.S.C. §§5122, 5170, 5172, 5173, and 5192