



Procurement Disaster Assistance Team (PDAT): Construction Manager at Risk (CMAR) Contracting

Attention!

- Non-state applicants should exercise caution when considering the CMAR delivery method and ensure compliance with the federal procurement under grant rules.
- Although numerous states authorize the use of CMAR, certain CMAR procedures may violate federal procurement under grant rules and place FEMA Public Assistance applicants' disaster funding at risk.

Construction Manager at Risk (CMAR) is one approach to completing a construction project. The procurement processes for using the CMAR approach can be complicated, vary by state, and must comply with the federal procurement under grants rules if an entity is using FEMA funding. The federal procurement under grants rules are set forth in 2 C.F.R. Part 200. **State entities** must follow 2 C.F.R. § 200.317 and **non-state entities** must follow 2 C.F.R. §§ 200.318 to 200.326. Failure to follow federal procurement rules may jeopardize FEMA funding for Public Assistance applicants. This Fact Sheet provides guidance regarding the general use of CMAR and highlights frequent procurement compliance concerns for non-state entities.

What is CMAR?

There are three primary delivery methods for construction projects: (1) design-bid-build, (2) design-build, and (3) CMAR (sometimes referred to as "CM/GC").

- **Design-bid-build**, the traditional approach, is a linear process where an entity contracts separately with an architectural/engineering (A/E) firm for design services and then with a construction firm based on a completed design.
- The **design-build** approach entails an entity contracting with one firm to provide both design and construction services.
- Under a typical **CMAR** approach, an entity procures the construction firm, or the CMAR contract, separately from the design firm. Unlike the design-build approach, there is no contractual relationship between the design and construction firms. The entity selects the construction firm (or construction manager) before or early in the design process. The construction manager advises the design firm during the design and planning phases and then often acts as the equivalent of a general contractor during the construction phase. At a designated point later in the design phase, the entity and construction manager negotiate a guaranteed maximum price (GMP) based on the as-yet-completed design. The GMP includes the construction manager's estimate of the remaining design features and hard cost of construction work.

While CMAR is a complex process, if done properly, it can yield time and cost efficiencies. Such efficiencies can be accomplished when an entity obtains construction manager input during the design phase and begins aspects of a construction project before the full design is complete.

CMAR Considerations

The federal procurement under grants rules do not specifically address the use of CMAR. States may authorize the use of CMAR, but a state allowance does not waive the federal procurement under grants requirements for non-state entities. Certain CMAR procedures may be inconsistent with these federal requirements and, in turn, place FEMA grant sub-recipients' disaster funding at risk. Non-state entities should consider the complexities posed by CMAR before selecting it as a project delivery method. Frequent procurement compliance issues to be on the lookout for are detailed on the next pages.

FREQUENT PROCUREMENT COMPLIANCE ISSUES WITH CMAR CONTRACTING

- **Price as a selection factor for competitive proposals (2 C.F.R. § 200.320(d)):**

When procuring a construction manager, non-state entities should review anticipated project costs and determine if a majority of the costs are for actual construction costs or for A/E professional services. If a majority of the costs are for the actual cost of construction, then non-state entities must consider price for the entire project (design, planning, and construction phases) such that no part of the construction manager selection (including the initial selection of qualified contractors) is done without consideration of cost competition. Because the majority of costs when using CMAR are often for actual construction costs, not A/E services, using a qualifications-based procurement for the CMAR approach may not comply with the federal procurement rules.
- **Cost or price analysis for all project costs (2 C.F.R. § 200.323):**

Use of CMAR may not comply with 2 C.F.R. § 200.323 if the most significant construction cost is excluded from an entity's cost or price analysis. Cost or price analysis is a potential risk area under CMAR if the construction manager is selected without consideration of the actual cost of construction. Since hard construction cost estimates are not typically provided under CMAR until the construction manager submits the GMP proposal, non-state entities should include price considerations during the initial CMAR procurement through such means as general conditions costs and anticipated costs.
- **Independent estimates are required for projects over \$250,000 (2 C.F.R. § 200.323):**

Non-state entities must make independent estimates before receiving bids or proposals for procurements over \$250,000. If the design is not yet complete at the time of the CMAR solicitation, entities may be unable to conduct a complete independent estimate before receiving bids. In the absence of a completed design, non-state entities must take steps to make accurate and meaningful independent estimates for all project phases. A comprehensive understanding of the costs of labor, materials, equipment, and the means and methods of both design and construction required to complete the project will assist non-state entities in forecasting costs.
- **Socioeconomic affirmative steps (2 C.F.R. § 200.321):**

Solicitations for either contractors or subcontractors under the CMAR delivery method must still follow the six socioeconomic affirmative steps found at 2 C.F.R. § 200.321. Some CMAR processes may require entities to follow socioeconomic affirmative steps when procuring the construction manager but fail to require the construction manager (acting as a general contractor) to follow the applicable affirmative steps. Non-state entities must require construction managers to comply with these same six socioeconomic affirmative steps when soliciting subcontractors under CMAR.
- **Responsible contractors (2 C.F.R. § 200.318(h)):**

Non-state entities must only award contracts to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Similarly, construction managers procured under CMAR and operating as general contractors must ensure subcontractors in covered lower tier transactions are responsible. Construction managers must take into account contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. Entities and construction managers must check the exclusions list for suspended or debarred parties on www.SAM.gov during their responsibility assessments.

- **Full and open competition requirements (2 C.F.R. § 200.319):**

All full and open competition requirements established in the federal procurement rules apply when an entity uses the CMAR delivery method. These rules state that contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some CMAR processes allow entities to solicit bids or proposals for the construction phase if they do not accept the construction manager's GMP proposal. If this occurs, the originally-selected construction manager, which likely assisted in drafting one of the above-mentioned documents, must be prohibited from competing for the separate construction phase procurement.

- **Applicable requirements for procurement method being used under 2 C.F.R. § 200.320:**

Any procurement method used by a non-state entity must align with one of the procurement methods set forth at 2 C.F.R. § 200.320. CMAR procurements often resemble the competitive proposal procurement method. In addition to considering price as a selection factor (discussed above), non-state entities must also publicly advertise RFPs and solicit proposals from an adequate number of qualified sources when procuring a construction manager.

Note: This is not an exhaustive list of CMAR considerations and is meant only to highlight frequent CMAR procurement compliance issues. All Federal procurement rules, including those not discussed herein, remain applicable regardless of the construction project delivery method used by a Public Assistance applicant.