

# Purchasing Under a FEMA Award: Common Mistakes to Avoid by Non-State Entities

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This fact sheet identifies the most common mistakes non-state entities make when awarding a contract under a FEMA award, and provides steps to take to help minimize noncompliance risks with the federal procurement standards under [2 C.F.R. §§ 200.318 – 200.327](#).

## Common Mistakes by Non-State Entities

Below is a list of the common procurement mistakes non-state entities, which include but are not limited to local governments, tribes, and nonprofit organizations, make when awarding contracts under a FEMA award.

### Restricting Full and Open Competition

Federal procurement standards require non-state entities to conduct all procurement transactions in a manner that provides full and open competition unless certain allowable noncompetitive procurement circumstances described in [2 C.F.R. § 200.320\(c\)](#) exist. This means that a complete requirement with a scope of work is publicly solicited, and all responsible sources that are interested are permitted to compete. See “Chapter 4: Competition” of the [Procurement Disaster Assistance Team \(PDAT\) Field Manual](#). The following are procurement actions to avoid:

- Placing unreasonable requirements on firms; requiring unnecessary experience; specifying only a “brand name” product; or engaging in any arbitrary action that could show prejudice or discrimination;
- Using state, local, or tribal geographic preferences in the evaluation of bids or proposals unless permitted by federal law;
- Allowing contractors that develop or draft specifications, requirements, statements of work, invitations for bid, or requests for proposals to compete for and be awarded the subsequent contract for that work;
- Awarding noncompetitive contracts to consultants that are on retainer contracts;
- Allowing for noncompetitive pricing practices between firms or affiliated companies; and
- Not maintaining written standards of conduct covering conflicts of interest, including organizational conflicts of interest.



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## Omission of Price or Cost Analysis for Procurements Above \$250,000

A non-state entity must conduct a price or cost analysis for each procurement action, including modifications, above the federal Simplified Acquisition Threshold, which is currently \$250,000. See “Chapter 9: Cost or Price Analysis” of the [PDAT Field Manual](#).

- A **price analysis** is the review and evaluation of the total amount of a proposed price without evaluating its separate cost elements and proposed profit. Price analysis is typically used when acquiring commercial items, where such items generally maintain similar standards or quality and differ only in price or when using the procurement through a sealed bidding method.
- A **cost analysis** is the review and evaluation of the separate cost elements such as labor hours, overhead, materials and proposed profit in a proposal to determine how well the proposed costs represent what the contract cost should be. Cost analysis is typically used to establish the basis for negotiating contract prices when:
  - Situations where price analysis by itself does not ensure price reasonableness; or
  - Procuring professional, consulting, or architectural engineering services contracts.

## Improper Use of Noncompetitive Procurements

One of the foundations of the federal procurement rules is full and open competition. However, if certain circumstances described in [2 C.F.R. § 200.320\(c\)](#) exist, a non-state entity may award a noncompetitive procurement, also known as “sole source.” These circumstances include:

- Micro-purchases;
- Single source;
- Public exigency or emergency;
- Federal awarding agency approval; and
- Inadequate competition.

Excluding micro-purchases, a non-state entity must include a written justification in its procurement file for each noncompetitive procurement. For more information on sole sourcing, including suggested elements for justifying a noncompetitive procurement, see Chapter 5: Methods of Procurement of the [PDAT Field Manual](#).

## Continuing Work Under a Sole-source Contract after the Urgent Need has Ended

Use of the public exigency or emergency exception is only permissible during the actual exigency or emergency circumstances. Exigency or emergency circumstances will vary for each incident, making it difficult to determine in advance or assign a particular timeframe in which a noncompetitive procurement may be warranted. Exigency or emergency circumstances may exist for days, weeks, months or even longer in some cases. Non-state entities must

ensure that work performed under the noncompetitively procured contract is specifically related to the exigency or emergency circumstance in effect at the time of procurement. Importantly, because the exception to competitive procurement is available only while the exigency or emergency circumstances exist, non-state entities should consider starting the competitive procurement process for any work that will be needed past the period of exigency or emergency circumstances. See FEMA Fact Sheet: Emergency and Exigency Circumstances.

## Missing Socioeconomic Process Documentation

Non-state entities must take the six affirmative steps below to involve small and minority businesses, women's business enterprises, and [labor surplus area firms](#), collectively referred to as target firms, in the procurement process:

1. Place qualified target firms on solicitation lists;
2. Assure that target 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 target 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 (above) if they use subcontractors.

A recurring issue within the context of the socioeconomic affirmative steps is whether a non-state entity may set-aside a certain percentage of its contracting for target firms. Non-state entities must conduct all procurements in a manner providing full and open competition and set asides for target firms are not permitted. See "Chapter 6: Socioeconomic Contracting" of the [PDAT Field Manual](#).

## Improperly Awarding a Time-and-Materials Contract

A Time-and-Materials (T&M) contract cost to a non-state entity includes the actual cost of materials, direct labor hours charged at fixed hourly rates reflecting wages, general and administrative expenses, and profit. T&M contracts can be used by non-state entities when:

1. There is a determination made that no other contract is suitable;
2. The contract includes a ceiling price that the contractor exceeds at its own risk; and
3. The recipient and subrecipient maintain a high degree of contractor oversight.

T&M contracts are often used where the scope of work or the duration of the work is unclear, and as a result, require significant oversight to ensure costs are reasonable. Consequently, the non-state entity should plan contract transitioning as soon as a T&M contract is awarded. Once the scope of work becomes clear, the non-state entity must switch to a different type of contract, like a cost reimbursement or fixed price contract. See Chapter 3: General Procurement Under Grant Standards of the [PDAT Field Manual](#).

## Missing Required Contract Clauses

Non-state entity contracts must contain the applicable contract clauses required by [2 C.F.R. § 200.327](#) and [Appendix II to Part 200](#). For a detailed list of the contract clauses, including when they are applicable, please see the [PDAT Contract Provisions Guide](#).

## Awarding a Prohibited “Cost-Plus-Percentage-of-Cost” Contract

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 for non-state entities by the federal procurement standards because they incentivize the contractor to increase their actual cost to increase the associated profit. Non-state entities should work closely with their attorneys and procurement staff to read contracts carefully to ensure these types of provisions are not included in a contract, as they can be difficult to identify. See Chapter 9: Cost or Price Analysis of the [PDAT Field Manual](#).

## Awarding a Contract to Suspended or Debarred Contractors

Any contractors that are suspended or debarred by a federal agency are ineligible to receive a federal award or contract. [See 2 C.F.R. 2 C.F.R. pt. 3000](#). Prior to entering into a contract, non-state entities should go to the System for Award Management (SAM) database at the [SAM website](#) to check whether a contractor is suspended or debarred. See Chapter 3: General Procurement Under Grant Standards of the [PDAT Field Manual](#).

## Missing or Incomplete Documentation of Procurement Actions

A non-state entity must maintain sufficiently detailed records that document the procurement history. These records must include but are not limited to the following:

- Rationale for the method of procurement;
- Selection of contract type;
- Contractor selection or rejection; and
- Basis for the contract price.

Additionally, the non-state entity’s records must also include the contract documentation and any contract modifications. Contract documents pertinent to a federal award must be retained for three years from the date of submission of the final expenditure report pursuant to [2 C.F.R. § 200.334](#). A complete list of the procurement documentation file can be found in Chapter 3 of the [PDAT Field Manual](#),