

Purchasing Under a FEMA Award: Exigency or Emergency Circumstances

When disaster strikes, communities must often act quickly to protect life, public health or safety, and property. In such instances, conducting a competitive procurement may be impractical and could delay critical response and recovery activities. This Fact Sheet provides key information to consider when using contracted resources during exigency or emergency circumstances under FEMA grant awards or declarations issued on or after November 12, 2020. For additional information, please also refer to [Procurement Disaster Assistance Team \(PDAT\) Field Manual](#).

Federal Procurement Standards

Recipients and subrecipients are subject to the federal procurement rules at [2 C.F.R. §§ 200.317- 200.327](#) when purchasing under a FEMA award. To determine which federal procurement rules to follow, recipients and subrecipients must first determine whether they are a state or a non-state entity. Below are the federal procurement rules applicable to state and non-state entities with FEMA grant awards or declarations issued on or after November 12, 2020:

Federal Procurement Standards Applicable to State and Non-State Entities

- States, the District of Columbia, territories and their agencies and instrumentalities, must follow their own documented procurement policies and procedures when purchasing under a FEMA award pursuant to [2 C.F.R. § 200.317](#). These entities must also comply with socioeconomic affirmative steps ([2 C.F.R. § 200.321](#)), requirement for domestic preferences ([2 C.F.R. § 200.322](#)), the requirements for procurement of recovered materials ([2 C.F.R. § 200.323](#)), and ensure that all necessary contract provisions are included in their contracts ([2 C.F.R. § 200.327](#)).
- Non-federal entities (NFE) other than states, collectively referred to as non-state entities, include local governments, tribes and eligible nonprofit organizations. They must have documented procurement policies and procedures, which reflect applicable local, state, or tribal law, and must ensure compliance with the federal requirements listed at [2 C.F.R. §§ 200.318 - 200.327](#).

NOTE: In the case of noncompliance with the federal procurement rules, FEMA may apply a remedy, as appropriate, in accordance with its authorities found at [2 C.F.R. § 200.339](#). Additionally, state and non-state entities must ensure compliance with the Cost Principles at [2 C.F.R. Part 200 Subpart E](#) ensuring that costs are reasonable, as defined in [2 C.F.R. § 200.404](#).



FEMA

Rules for State Entities

State entities must follow the same policies and procedures as they would from their own source of funding, which include any emergency procurement procedures, as well as the additional requirements listed in the section above. However, FEMA will find that taking the affirmative steps in [2 C.F.R. § 200.321](#) to maximize participation by small businesses and minority- and women-owned firms will generally not be feasible while using their emergency procurement procedures. See Chapter 6: Socioeconomic Contracting of the [PDAT Field Manual](#).

Even if a state entity complies with its own policies and procedures used for non-federal procurement when it procures property or services under a FEMA award, FEMA will still evaluate the procurement to determine whether the costs conform to the Cost Principles at [2 C.F.R. Part 200 Subpart E](#). Additionally, although more prescriptive conflict of interest rules apply to non-state entities, FEMA requires that all NFEs, including state entities, maintain written conflict of interest rules, including organizational conflicts of interest rules, governing the actions of their procurement professionals and disclose any potential conflict of interest to FEMA in writing. See Chapter 2: Applicability of the Federal Procurement Under Grant Standards of the [PDAT Field Manual](#).

Public Exigency or Emergency Exception for Non-State Entities

Exigency or Emergency (E&E) Circumstances

When referring to procurement activity for non-state entities, FEMA defines both exigency and emergency as situations that demand immediate aid or action. The differences between the two situations are outlined below.

Defining Exigency and Emergency

FEMA defines both exigency and emergency as situations that demand immediate aid or action. While emergency conditions generally are short term, exigencies can exist for a period of weeks or months. See Chapter 5: Methods of Procurement of the [PDAT Field Manual](#).

- In the case of an **exigency**, there is a need to avoid, prevent, or alleviate serious harm or injury, financial or otherwise, to the recipient or subrecipient, and use of competitive procurement proposals would prevent the urgent action required to address the situation. Thus, a noncompetitive procurement may be appropriate.
 - In the case of an **emergency**, there is a threat to life, public health or safety, or improved property, or some other form of dangerous situation that requires immediate action to alleviate the threat. Emergency conditions are generally more short-lived than exigency circumstances.
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- **Exigency Example:** A tornado impacts a city in June and causes widespread and catastrophic damage, including damage to a city school. The city wants to repair the school and have it ready for use by the beginning of the school year in September. The city estimates, based on experience, that awarding a contract using a sealed bidding process would require at least 90 days, and the city's engineer estimates that the repair work would last another 60 days. This would extend the project beyond the beginning of the school year. Rather than conducting a sealed bidding process, the city, in compliance with state and local law, wants to sole source with a contractor it has contracted with previously. The city can demonstrate that this constitutes an exigent circumstance

because use of a sealed bidding process would cause an unacceptable delay and thus procurement by noncompetitive methods is necessary based on the specific situation.

- **Emergency Example #1 (Disaster Grants):** Severe weather impacts a county and causes widespread and catastrophic damage, including loss of life, widespread flooding, loss of power, damage to public and private structures, and millions of cubic yards of debris across the county, leaving almost the entire jurisdiction inaccessible. The county needs to begin debris removal activities immediately to restore access to the community, support search and rescue operations, power restoration, and address health and safety concerns. Under these circumstances, the county may find it necessary to award noncompetitive contracts to address threats to life, property, and public health.
- **Emergency Example #2 (Non-Disaster Grants):** The weather in a township has been below freezing for the past 2 weeks, causing a pipe in its emergency operations center to burst and flood the first floor. This flood destroyed half of the township's radios that its emergency workers use to communicate with police and fire personnel. The township documented and demonstrated that it needed to replace these radios right away to avert an immediate threat to life, safety, or property as the township needed a full supply of radios to respond to emergencies. Under these circumstances, the township may find it necessary to award noncompetitive contracts to address threats to life, property and public health.

FEMA reserves the right to review all procurements conducted under the exigency or emergency exception. If the agency determines that exigency or emergency circumstances did not exist or did not preclude a non-state entity from adhering to competitive procurement requirements, FEMA may disallow all or part of the non-state entity's cost related to the contract or take other actions permitted by statute and regulation. See [2 C.F.R. § 200.339](#).

Non-State Entity Rules During E&E Circumstances

As noted, federal procurement regulations require that all non-state entities conduct procurement transactions in a manner allowing for full and open competition unless certain allowable noncompetitive procurement ("sole source") circumstances apply. One of the allowable sole source circumstances is the exigency or emergency exception, which can be used if the non-state entity determines that a public exigency or emergency will not permit a delay resulting from competitive solicitation. See [2 C.F.R. § 200.320\(c\)](#).

The non-state entity may use its own judgment in determining whether this condition has been met. FEMA approval is not required however, the non-state entity must document its justification for using noncompetitive procurements and must still comply with other procurement requirements and ensure that costs are reasonable.

Allowability

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 time frame when noncompetitive procurements may be warranted. Exigency or emergency circumstances may exist for days, weeks, months, or longer in some cases. Non-state entities must ensure that work performed under the noncompetitively procured contracts is specifically related to the exigency or emergency circumstance in effect at the time of procurement. Because the exception to competitive procurement is

available only while the exigency or emergency circumstances exist, non-state entities should, upon awarding a noncompetitive contract, immediately begin the process of competitively procuring similar goods and services to transition to competitively procured contracts as soon as the exigency or emergency ceases to exist.

Documentation Requirements

Although FEMA approval is not required for a non-state entity to use noncompetitive procurements under the exigency or emergency exception, the non-state entity must document and provide justification for the use of the exigent or emergency exception as well as complying with all applicable federal procurement standards to ensure that costs are reasonable. A list of elements that non-state entities may wish to include as part of their written justifications can be found at the end of this Fact Sheet. The justification must be included in the non-state entity's records for each FEMA award, subaward or project.

Additional Federal Procurement Rules

Even during exigency or emergency circumstances, non-state entities must comply with the following rules:

- Contracts must include the required contract clauses. See [2 C.F.R. § 200.327](#) & [Appendix II to Part 200 – Contract Provisions for Non-Federal Entity Contracts Under Federal Awards](#) (also applicable to states).
- Contracts exceeding the federal simplified acquisition threshold must include the federal bonding requirements if the contract is for construction or facility improvement. See [2 C.F.R. § 200.326](#).
- Contracts must be awarded to a responsible contractor. See [2 C.F.R. § 200.318\(h\)](#).
- The non-state entity must negotiate profit as a separate element of price for each contract in which there is no price competition, and in all cases when cost analysis is used. See [2 C.F.R. § 200.324\(a\)](#) and [\(b\)](#).
- The use of cost-plus-percentage-of-cost contracting is prohibited. See [2 C.F.R. § 200.324\(d\)](#).
- Use of time-and-materials contracts must comply with [2 C.F.R. § 200.318\(j\)](#).
- To the greatest extent practicable, provide a preference for purchase, acquisition or use of goods products or materials produced in the United States. See [2 C.F.R. § 200.322](#).
- The non-state entity must follow documentation, oversight and conflict of interest requirements among other general procurement requirements in [2 C.F.R. § 200.318](#). If a conflict of interest is unavoidable due to the exigent/emergency circumstances, the non-state entity must explain that in the procurement documentation.
- The non-state entity must comply with the procurement of recovered materials requirement at [2 C.F.R. § 200.323](#).
- Effective August 13, 2020, state and non-state entities are prohibited from expending FEMA award funds for certain telecommunications equipment or services as required by [2 C.F.R. § 200.216](#). See [FEMA Policy 405-143-1, Prohibitions on Expending FEMA Award Funds for Covered Telecommunications Equipment or Services](#).

SOCIOECONOMIC AFFIRMATIVE STEPS

Where there is sufficient justification warranting a non-state entity to use procurement through noncompetitive procurements, FEMA generally finds that taking the affirmative steps in [2 C.F.R. § 200.321](#) to maximize participation by small and minority businesses, women’s business enterprises, and Labor Surplus Area Firms is feasible. See Chapter 6: Socioeconomic Contracting of the [PDAT Field Manual](#).

TIME-AND-MATERIALS (T&M) CONTRACTING

In some cases, a T&M contract may be appropriate in the immediate response to an incident to protect lives or public health and safety, as it may be impossible to accurately estimate the extent or duration of the required scope of work or to anticipate costs with any reasonable degree of confidence. FEMA may reimburse costs incurred under a T&M contract for non-state entities only if all the following apply:

- No other contract was suitable;
- The contract has a ceiling price that the contractor exceeds at its own risk; and
- The non-state entity can demonstrate it provided a high degree of oversight to obtain reasonable assurance that the contractor used efficient methods and effective cost controls. See [2 C.F.R. § 200.318\(j\)](#).

COST PLUS A PERCENTAGE OF COST (CPPC) CONTRACTING

Non-state entities are prohibited from awarding CPPC and cost-plus-percentage-of-construction-cost contracts, regardless of the circumstances. See [2 C.F.R. § 200.324\(d\)](#).

PRE-AWARD OR PRE-EXISTING CONTRACTING

If a pre-awarded or pre-existing contract is not in compliance with the federal procurement requirements [e.g., the contract was not fully and openly competed ([2 C.F.R. §§ 200.319 – 200.320](#)), or the six affirmative socioeconomic contracting steps were not completed ([2 C.F.R. § 200.321](#))], it may still be possible to use the contract for the duration of the exigency or emergency. FEMA recommends that non-state entities review the procurement requirements outlined in this fact sheet and take actions to modify pre-awarded or pre-existing contracts where applicable. In addition, non-state entities must prepare the appropriate documentation to justify the use of a noncompetitively procured contract. For information on contract actions you can take before a disaster strikes please see the [Prepare Before a Disaster Fact Sheet](#).

PIGGYBACKING

Piggyback contracting occurs when one entity with an existing contract assigns some or all its contractual rights to another entity that was not previously party to the contract. Generally, FEMA discourages [piggyback contracts](#) because the original contract pertains to the needs of the original entity with a specific scope of work for that entity. There may be circumstances when piggybacking is permissible, but in almost all instances the scope of work would need to be changed to include the needs of a non-state entity. Changes to the scope of work are generally not permitted as there is not likely to be full and open competition for the expanded scope of work. However, during

exigency and emergency circumstances, non-state entities may be able to piggyback off another NFE's contract and expand the scope of a contract for the period of the exigency and emergency circumstance.

A non-state entity may choose to enter a separate contract with the same contractor as another entity, using the same terms and conditions as found in that entity's contract, with only a change in the scope of work and the associated costs. However, this is sole source contracting rather than piggyback contracting, and it must meet the requirements for noncompetitive procurement under exigency or emergency circumstances set forth at [2 C.F.R. § 200.320\(c\)](#).

Suggested Elements for Noncompetitive Procurement Justification

1. Identify which of the four circumstances listed in [2 C.F.R. § 200.320\(c\)](#) justify a noncompetitive procurement:
 - a. The item is available only from a single source;
 - b. The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
 - c. The federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-state entity; or
 - d. After solicitation of an adequate number of sources, competition is determined inadequate.
2. Provide a brief description of the product or service being procured, including the expected dollar amount.
3. Explain why a noncompetitive procurement is necessary. If the noncompetitive procurement is based on exigent or emergency circumstances, then the justification should explain the nature of the public exigency or emergency. This would include specific conditions and circumstances that clearly illustrate why procurement other than through noncompetitive proposals would cause unacceptable delay in addressing the public exigency or emergency. Failure to plan for transition to competitive procurement cannot be the basis for continued use of noncompetitive procurement based on public exigency or emergency.
4. State how long the noncompetitively procured contract will be used for the defined scope of work, and the impact on that scope of work should the noncompetitively procured contract not be available for that amount of time. Examples of questions to ask include:
 - a. How long do you anticipate the exigency or emergency circumstances will continue?
 - b. How long will it take to identify your requirements and award a contract that complies with all procurement requirements?
 - c. How long would it take another contractor to reach the same level of competence?
5. Describe the specific steps taken to determine that full and open competition could not have been met, or was not used, for the scope of work (e.g., research conducted to determine that the good or service required is only available from one source).
6. Describe any known conflicts of interest and any efforts that were made to identify possible conflicts of interest before the noncompetitive procurement occurred. If no efforts were made, explain why.
7. Include any other information justifying the use of noncompetitive procurement in the specific instance.

NOTE: A separate justification is required for each instance of noncompetitive procurement. See Chapter 5, Section 3.6: Suggested Elements for Noncompetitive Procurement Justification of the [PDAT Field Manual](#).

Additional Information and Resources

Non-federal entities should consult as soon as possible with all appropriate parties, including their own legal counsel, to review their procurement policies, actions and contracts, comparing them to the federal procurement requirements. Non-state entities also should contact their state or territory liaisons, or applicable FEMA Program Office to request assistance with any procurement activity concerns. For assistance with FEMA contact information, the entity should contact the Centralized Scheduling and Information Desk (CSID) help line at (800) 368-6498 or askcsid@fema.dhs.gov. CSID hours of operation are from 9 a.m. to 5 p.m. ET, Monday through Friday, except federal holidays.

Detailed procurement and contracting information are available on the FEMA website at www.fema.gov/grants/procurement. The current Code of Federal Regulations referenced in this guidance can be accessed at www.eCFR.gov. The annual Code of Federal Regulations is available at <https://www.govinfo.gov/app/collection/cfr>, and the applicable regulations will be the ones in place at the time FEMA issued the declaration or made the award.