

THE NEW PROCUREMENT GUIDE: Getting and KEEPING your FEMA grant dollars!

PURPOSE OF THIS PUBLICATION

To assist Subrecipients (Applicants) in **identifying** and **applying** the required Federal regulations for the **procurement** of **materials, supplies, services** and **construction projects** when using Federal Emergency Management Agency (FEMA) funds.

INTENDED AUDIENCE

Louisiana **local governing authorities, eligible private nonprofit (PNP) organizations** and Federally recognized Tribal governing authorities who receive funding from the **FEMA Public Assistance (PA), FEMA Hazard Mitigation (HM) and Preparedness** Grant Programs.



Governing regulations for procurement are dependent upon the **type** of grant you receive. For *disaster-related grants*, the effective date is dependent on the **issuance** of the **Presidential Declaration (PD)**. For *nondisaster grants*, the effective date is dependent on the date the **grant award** is **issued**.

| ENTITY | GRANT AWARDS OR PD BEFORE 12/26/2014 | | GRANT AWARDS OR PD ON OR AFTER 12/26/2014 | |
|---------------------------|--------------------------------------|----------------|---|----------------------|
| | REGULATION | COST PRINCIPLE | REGULATION | COST PRINCIPLE |
| State/local governments | 44 CFR 13.36 | 2 CFR 225 | 2 CFR 200.317 – .342 | 2 CFR 200.400 – .475 |
| Tribal | 44 CFR 13.36 | 2 CFR 225 | | |
| Private nonprofits (PNPs) | 2 CFR 215.40 – .48 | 2 CFR 230 | | |
| Hospitals | 2 CFR 215.40 – .48 | 2 CFR 230 | | |
| Educational institutions | 2 CFR 215.40 – .48 | 2 CFR 220 | | |

METHODS of procurement

There are **several** methods for procuring goods and services. The **chart** below identifies methods of procurement and describes when to use **each**.

| METHOD OF PROCUREMENT | WHEN TO USE |
|--------------------------|--|
| Micro-purchases | <ul style="list-style-type: none"> Does not apply to grant awards OR Presidential Declarations (PDs) prior to 12/26/2014. Applies to purchases less than OR equal to \$3,000 (increased to \$3,500 on 10/1/2015). No solicitation required. Subrecipient (Applicant) determines reasonableness. |
| Small purchases | <ul style="list-style-type: none"> Applies to purchases less than OR equal to the Simplified Acquisition Threshold (SAT).¹ Only quotes required (a minimum of three [3] written or telephone quotes from qualified sources). Purchases of commercial products sold in substantial quantities to the general public. <ul style="list-style-type: none"> Limited by State law to contracts for supplies and materials less than \$10,000. Item must meet the definition of commercial product. |
| Sealed bids | <ul style="list-style-type: none"> Preferred for construction. Fixed price. Publicly advertised and publicly opened. Two (2) or more responsive bidders. (Rejected bidders are not considered responsive.) Awarded to lowest, responsive, responsible bidder. Any OR all bids may be rejected for a sound, documented reason. |
| Competitive proposals | <p>General</p> <ul style="list-style-type: none"> Must have more than one (1) responsible bidder. Must be publicized to maximum extent practical. Must have written procedure for conducting evaluations and award (See <i>REQUIRED Written Procedures</i>). <p>Request for Proposals (RFP)</p> <ul style="list-style-type: none"> Price a criteria for selection. Contract awarded to firm offering best value. <p>Request for Qualifications (RFQ)</p> <ul style="list-style-type: none"> Limited to Architecture and Engineering (A/E) services. Qualifications only criteria selection. Price negotiated after selection based on cost analysis. |
| Noncompetitive proposals | <ul style="list-style-type: none"> Available only from a single source. Used when insufficient number of responses received. Used in emergency or exigent circumstances. Always requires a cost analysis. |

¹ The threshold is dependent upon the **date of issuance** of the **grant** or the **Presidential Declaration (PD)**. For grants awarded **before 12/26/2014**, the SAT is **\$100,000**. For grants awarded **after 12/26/2014**, the threshold is **\$150,000**. Adjusted annually for inflation according to the Consumer Price Index (CPI).

Procurement REQUIREMENTS by category of purchase + size of contract

Category of purchase and size of the contract both determine the requirements for procurement.

- The most restrictive rules apply; those are circled below.
- Responses ONLY count if they are responsive and responsible.
- FEMA requires a minimum of two (2) responses for contracts in excess of the SAT and a minimum of three (3) responses for contracts equal to or less than the SAT.
- PNPs must, at a minimum, follow Federal regulations.

| CATEGORY OF PURCHASE | FEDERAL REGULATIONS: [44 CFR 13.36] | SIZE OF CONTRACT | REQUIREMENTS FOR STATE + LOCAL + FEDERALLY RECOGNIZED TRIBAL GOVERNMENT ENTITIES (LA RS 38:2211-2296) | LOCAL |
|----------------------------------|--|---|--|---|
| Materials + supplies | Quotes required | Less than \$1,000 and \$1,000 - \$9,999 | No competitive procedure or cost analysis for commercial items. Louisiana Legislative Auditor (LLA) recommends three (3) written quotes. | Check with local authorities for local procurement rules. |
| | | \$10,000 - \$30,000 | Three (3) telephone or FAX quotes. | |
| | | Greater than \$30,000 | | |
| | | Greater than \$100,000/\$150,000 | Bid required. | |
| Public works | Quotes required | Less than OR equal to \$150,000 | No competitive requirement. LLA recommends RFP process and/or three (3) solicited bids. | |
| | Bid required | Greater than \$150,000 | Bid required – no minimum number of responses. | |
| Services (Except for A/E) | Quotes required | Less than OR equal to \$150,000 | No competitive requirement. LLA recommends RFP process and/or three (3) solicited bids. | |
| | Bid required | Greater than \$150,000 | | |
| A/E services | Bid required | ANY size | No competitive requirement. | |
| State Cooperative Purchase (SCP) | Authorized under 44 CFR 13.36(b)(5) and 2 CFR 200.318(e) | ANY size | <ul style="list-style-type: none"> • Authorized under Louisiana Revised Statute (LA RS) Title 38:2212.1(F) (Louisiana bid law). • Limited to public entities as defined by LA RS 38:2211. • ONLY Office of State Procurement (OSP) SCP contracts. • Can be used for materials, supplies and equipment. | |

Equal OPPORTUNITY requirements

Contracting with small and minority firms, women-owned business enterprises and labor-surplus area firms [44 CFR 13.36(i); 2 CFR 215.44(b); 2 CFR 200.32]

- Must take affirmative steps to assure these firms are used when possible.
- Affirmative steps emphasize assurance that firms receive solicitation if they are potential sources.
- Appears to require that potential Subrecipients (Applicants) maintain a list of such firms.
 - Subrecipients (Applicants) allowed to divide total requirements to permit participation by such firms.
- Use the Louisiana Economic Development (LED) Agency, Small Business Administration (SBA) and Minority Business Development Agency (MBDA) of the U.S. Department of Commerce (DOC) for assistance in complying.

Required WRITTEN PROCEDURES for PROCUREMENT

Federal regulations **require** the Subrecipient (Applicant) to follow general procurement standards and have "documented procurement procedures" which are:

| WRITTEN PROCEDURES | GRANT AWARDS OR PD BEFORE 12/26/2014 | | GRANT AWARDS OR PD ON OR AFTER 12/26/2014 |
|---|---|-------------------|--|
| | 44 CFR 13.36 | 2 CFR | 2 CFR 200 |
| Contract Administration/Oversight | (b)(2) | 215.47 | 200.318 |
| • Employee + organizational conflicts of interest standards | (b)(3) | 215.42 | 200.318(c) |
| • Avoiding acquisition of unnecessary or duplicative items | (b)(4) | 215.44(a)(1) | 200.318(d) |
| • Granting awards to responsible contractors | (b)(8) | 215.45(d) | 200.318(h) |
| • Maintaining records to detail history of the procurement | (b)(9) | 215.46 | 200.318(i) |
| • Use of time and material (T + M) contracts | (b)(10) | – | 200.318(j) |
| • Protest procedures | (b)(11)-(12) | 215.41 | 200.318(k) |
| • Selection procedures for procurement transactions | (c)(3) | 215.44(a) | 200.319(c) |
| • Methods for conducting technical evaluations | (d)(3)(ii) | 215.44(a)(3)(iii) | 200.320(d)(3) |
| Utilizing small businesses, minority owned firms and women business enterprises | (e) | 215.44(b) | 200.321 |
| Procurement of recovered materials | (i)(12) | 215.16 | 200.322 |

Types of CONTRACTS

CONTRACTS TO USE

| | |
|------------------------------|--|
| Lump sum | Contract for work within a prescribed boundary with a <i>clearly</i> defined scope and a total price . |
| Unit price | Work done on an item-by-item basis, with cost determined per unit (e.g., box, cubic yard, etc.). |
| Cost plus fixed fee | Total known cost with a defined fixed fee <i>added</i> to the price. |
| T + M | Must make determination that no other type of contract is suitable ; must contain a <i>not-to-exceed</i> (ceiling) clause. Payment based on hourly rate schedule and cost of materials . <ul style="list-style-type: none"> Maintain <i>high</i> degree of oversight. Contracts used for emergency protective measures and debris operations can not exceed 70 hours continuous of actual work immediately following the emergency or disaster incident. |
| Intergovernmental agreements | Subrecipients (Applicants) are <i>encouraged</i> to enter into State and local intergovernmental agreements for procurement or use of common goods and services. |

CONTRACTS TO AVOID

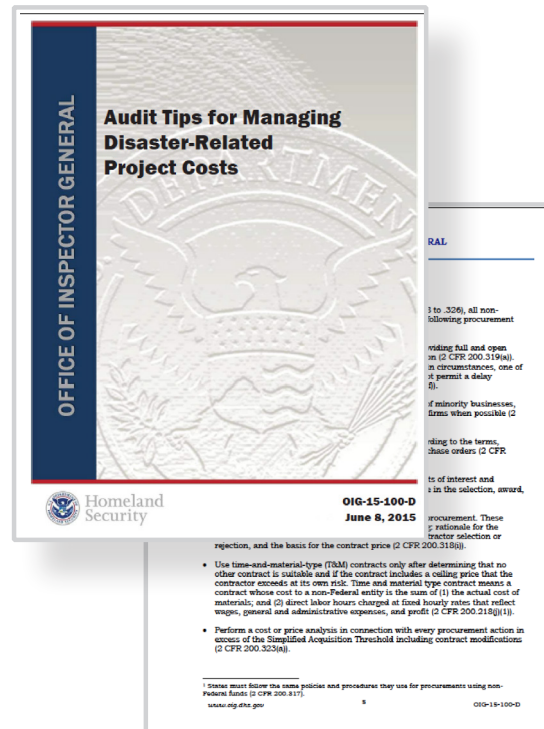
| | |
|---------------------------------|---|
| Piggyback | Piggybacks are generally ineligible . However, work done using another Subrecipient's (Applicant's) <i>pre-existing</i> properly procured contract must meet strict criteria to be eligible. The existing contract must be viable, same item must be purchased, price and vendor must also be the same; include written mutual consent of the original contracting parties. |
| Cost-plus-percentage-of-costs | Strictly prohibited. |
| Percentage-of-construction-cost | Strictly prohibited. |
| Cost plus | Not allowed under State bid law (LA RS Title 38). |

BEST PRACTICES for procurement: U.S. Department of Homeland Security - Office of Inspector General (DHS-OIG)

According to Federal regulations (2 CFR 200.318 - 326), **all non-Federal entities** (other than States) must comply with the following procurement standards:²

- Conduct all procurement transactions in a manner providing **full and open competition** with the standards of this section (2 CFR 200.319(a)). **Noncompetitive** procurement may be used under *certain circumstances*, one of which is when the public exigency or emergency will not permit a delay resulting from competitive solicitation (2 CFR 200.320(f)).
- Take all necessary **affirmative steps** to assure the use of **minority businesses, women-owned business enterprises** and **labor-surplus area firms** when possible (2 CFR 200.321).
- Maintain **oversight** to ensure contractors perform according to the **terms, conditions** and **specifications** of their contracts or purchase orders (2 CFR 200.318(b)).
- Maintain **written standards of conduct** covering conflicts of interest and governing the performance of its employees who engage in the selection, award and administration of contracts (2 CFR 200.318(c)(1)).
- Maintain **records** sufficient to detail the history of the procurement. These records will include, but are not limited to the following: rationale for the **method of procurement**, selection of **contract type**, **contractor selection** or **rejection** and the basis for the **contract price** (2 CFR 200.318(i)).
- Use **time and material (T + M) type** contracts *only* after determining that no other contract is **suitable** and if the contract includes a **ceiling price** that the contractor *exceeds* at its own risk. T + M type contract means a contract whose cost to a non-Federal entity is the **sum** of (1) the actual cost of materials; and (2) direct labor hours charged at **fixed** hourly rates that reflect wages, general and administrative expenses and profit (2 CFR 200.318(j)(1)).
- Perform a **cost or price analysis** in connection with **every procurement** action in excess of the Simplified Acquisition Threshold (SAT) *including* contract modifications (2 CFR 200.323(a)).
- Negotiate **profit** as a **separate element** of the price for *each* contract in which there is no price competition and in all cases where cost analysis is performed (2 CFR 200.323(b)).
- Do **not** use **cost plus a percentage of cost** and **percentage-of-construction-cost methods** of contracting (2 CFR 200.323(d)).
- Include **required provisions** in all contracts awarded (2 CFR 200.326).

² States must follow the same policies and procedures they use for procurements using non-Federal funds (2 CFR 200.317).



DHS-OIG AUDIT TIPS FOR MANAGING DISASTER-RELATED PROJECT COSTS – OIG-15-100-D – JUNE 8, 2015 CAN BE DOWNLOADED AT oig.dhs.gov/assets/GrantReports/2015/OIG_15-100-D_Jun15.pdf

To the extent possible, GOHSEP will work with Subrecipients (Applicants) to resolve any procurement issues. Possible penalties for improper procurement may include:

- Withholding payment
- Deobligation of funds
- Suspending grant
- Withholding future grants
- Applying penalties
- And MORE!

REFERENCES

2 CFR 200.318

gpo.gov/fdsys/pkg/CFR-2014-title2-vol1/pdf/CFR-2014-title2-vol1-sec200-318.pdf

2 CFR 215.48

gpo.gov/fdsys/granule/CFR-2005-title2-vol1/CFR-2005-title2-vol1-sec215-48

44 CFR 13.36

gpo.gov/fdsys/pkg/CFR-2014-title44-vol1/content-detail.html

Disaster Operations Legal Reference (DOLR) version 2.0

fas.org/irp/agency/dhs/fema/dolr.pdf

FEMA 322 – *Public Assistance Guide*
– June 2007

fema.gov/media-library/assets/documents/25651

Department of Commerce's Minority Business Development Agency
mbda.gov

LA Department of Transportation and Development (DOTD) –
Disadvantaged Business Enterprise (DBE) Certified Contractors
[wwwsp.dotd.la.gov/Inside_LaDOTD/Divisions/
Administration/Compliance/Pages/DBE_Certification.aspx](http://wwwsp.dotd.la.gov/Inside_LaDOTD/Divisions/Administration/Compliance/Pages/DBE_Certification.aspx)

Louisiana Department of Economic Development (LED)
opportunitylouisiana.com

Louisiana Economic Development: Small Businesses
opportunitylouisiana.com/index/small-business

Louisiana Legislative Auditor (LLA)
lla.la.gov/legalFAQs

Louisiana Procurement Technical Assistance Center (PTAC)
la-ptac.org/homePage.do

Louisiana Revised Statutes
legis.la.gov/Legis/Laws_Toc.aspx?folder=75&level=Parent

Robert T. Stafford Disaster Relief and Emergency Assistance Act
(Public Law 93-288) as amended
fema.gov/media-library/assets/documents/15271

Small Business Administration Assistance Resources (SBA)
sba.gov/tools/local-assistance/LA/local-resources

Women's Business Centers
sba.gov/tools/local-assistance/wbc

Women's Business Council Gulf Coast
wbcsouth.org/

What else do I
need to know?

It is YOUR responsibility to have a working knowledge of AND to comply with local, State, Federal – and your own – procurement guidelines in order to get and keep all funds you were approved to receive. You must ensure that your contractors also follow all applicable procurement guidelines.

For more information or help with your procurement needs, visit <http://www.fema.gov> (search for procurement guidelines 44 CFR 13.36 and 2 CFR 215.44-.48 for grants awarded or PDs before 12/26/2014 and 2 CFR 200 for grants awarded or PDs after 12/26/2014) OR contact your organization's purchasing officer OR GOHSEP, 225.925.7500.

Required contract PROVISIONS

Governing regulations for procurement are dependent upon the **type** of grant you receive. For *disaster-related grants*, the effective date is dependent on the **issuance** of the **Presidential Declaration** (PD). For *nondisaster grants*, the effective date is dependent on the date the **grant award** is **issued**.

When applicable, contracts are **required** to include certain provisions as stated **below**:

| CONTRACT PROVISION | CFR | | | APPLICATION |
|--|--------------------------------------|-------------------|---|--|
| | GRANT AWARDS OR PD BEFORE 12/26/2014 | | GRANT AWARDS OR PD ON OR AFTER 12/26/2014 | |
| | 44 CFR | 2 CFR | 2 CFR 200 | |
| Bonding requirements | 13.36(h) | 215.48(c) | 200.325 | Contracts for construction or facilities improvement in excess of the simplified acquisition threshold (SAT). The bonding requirements include: bid guarantee, performance bond and payment bond . |
| Administrative and legal remedies for violation or breach of contract | 13.36(i)(1) | 215.48(a) | Appendix II(A) | All contracts <i>greater than</i> the SAT. |
| Termination for cause and convenience | 13.36(i)(2) | 215.48(b) | Appendix II(B) | Applies to all contracts in excess of \$10,000 . |
| <i>Executive Orders (EOs) 11246 and 11375 "Equal Employment Opportunity (EEO)"</i> | 13.36(i)(3) | - | - | All construction contracts awarded in excess \$10,000 . |
| | - | 215 Appendix A(1) | - | All contracts . |
| | - | - | Appendix II(I) | All construction contracts. |
| <i>Copeland Anti-Kickback Act</i> | 13.36(i)(4) | - | Appendix II(E) | All construction or repair contracts. |
| | - | 215 Appendix A(2) | Appendix II(D) | All construction or repair contracts in excess of \$2,000 . |
| <i>Davis-Bacon Act</i> | 13.36(i)(5) | 215 Appendix A(3) | Appendix II(D) | Although listed as a required contract provision in all of the CFRs, the <i>Robert T. Stafford Disaster Relief and Emergency Assistance Act</i> (Stafford Act) DOES NOT require compliance with this Act and therefore no clause is required (Office of Chief Council [OCC] <i>Public Assistance (PA) Field Manual</i> , page 90; <i>Public Assistance Guide</i> , FEMA 322/July 2007, page 44). May be required by Other FEMA grants. |
| <i>Contract Work Hours and Safety Standards Act</i> | 13.36(i)(6) | 215 Appendix A(4) | - | Construction contracts <i>greater than</i> \$2,000 and for other contracts <i>greater than</i> \$2,500 where mechanics and laborers are employed. |
| | - | - | Appendix II(E) | All construction contracts <i>greater than</i> \$100,000 where mechanics and laborers are employed. |
| Compliance with reporting requirements | 13.36(i)(7) | 215.50 | 200.327 – .329 | Contracts/grants must include the Subrecipient (Applicant) responsibility to provide the required reports , i.e. program performance, financial and progress reports. |



| CONTRACT PROVISION | CFR | | | APPLICATION |
|---|--------------------------------------|----------------------|---|---|
| | GRANT AWARDS OR PD BEFORE 12/26/2014 | | GRANT AWARDS OR PD ON OR AFTER 12/26/2014 | |
| | 44 CFR | 2 CFR | 2 CFR 200 | |
| Compliance with regulations pertaining to patent rights (inventions), copyrights and rights in data | 13.36(i)(8)(9) | 215.36 Appendix A(5) | Appendix II(F) | The FEMA Public Assistance (PA) Program does not authorize any experimental, developmental or research work that would give rise to patents, inventions, copyrights or data. Therefore, there is NO REQUIREMENT for such clauses (OCC PA Field Manual page 94). |
| Clean Air Act and Federal Water Pollution Act | 13.36(i)(12) | 215 Appendix A(6) | - | Applies to all contracts greater than or equal to \$100,000. |
| | - | - | Appendix II(G) | Applies to all contracts greater than or equal to \$150,000. |
| Byrd Anti-Lobbying Amendment | - | 215 Appendix A(7) | Appendix II(J) | Contractors that apply or bid for a contract must certify that it will not and has not used any Federal funds to influence an employee or member of Congress in obtaining any Federal award. |
| Access to records | 13.36(i)(10) | 215.53 | DHS Grant Alert 15-05 paragraph XXXIII(2) | Allows the Federal government, the Recipient (Grantee) or Subrecipient (Applicant) access to a contractor's records . Subrecipient (Applicant) must include provision in contract stating this requirement by the contractor. |
| Retention of records | 13.36(i)(11) | 215.53 | 200.333 | Where applicable, contract clause requiring the Subrecipient (Applicant) to retain all records for three (3) years from the date of final expenditure report and a contractor to retain records for three (3) years after the termination date of the contract (OCC PA Field Manual page 95 referring to responsibility of contractor). |
| Energy efficiency | 13.36(i)(13) | 215.44(1)(3)(vi) | Appendix II(H) | Contractor agrees to comply with mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan (LA RS 40:1730.49). |
| Awards to debarred and suspended parties | 13.35 | 215 Appendix A(8) | Appendix II(I) | Subrecipient (Applicant) must require and contractor must make a declaration that the contractor, its principles or affiliates (subcontractors), are currently not disqualified as a result of debarment or suspension. |
| Procurement of recovered materials | 13.36(i)(12) | 215.16 | Appendix II(J) See 200.322 | Applies to State and local government entities and their contractors . |

DISCLAIMER: This document provides guidance on Federal procurement regulations as stated in **44 CFR 13.36 and 2 CFR 215.44-48**. It does not and is not designed to address all procurement issues which a Subrecipient (Applicant) may face. **It is the Subrecipient's (Applicant's) responsibility to assure that Federal regulations are followed in all circumstances involving Federal funding.**