
PROCUREMENT STANDARDS FOR STATE AGENCIES UNDER FEMA PUBLIC ASSISTANCE AWARDS

AS RELATED TO PURCHASES MADE BY STATE AGENCIES FOR THE FIGHT AGAINST COVID-19

PRESENTED BY: IAN BRADSHAW, CAL OES
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WHY ARE WE DISCUSSING THE PROCUREMENT STANDARDS FOR FOR STATE AGENCIES UNDER FEMA PUBLIC ASSISTANCE?

- On March 13, 2020, the President declared the ongoing Coronavirus Disease 2019 (COVID-19) pandemic of sufficient severity and magnitude to warrant an emergency declaration for all states, tribes, territories, and the District of Columbia pursuant to section 501 (b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5207 (the “Stafford Act”). State, Territorial, Tribal, local government entities and certain private non-profit (PNP) organizations are eligible to apply for Public Assistance.
- As of March 20, 2020, all 50 states, the District of Columbia, five territories and one tribe are working directly with FEMA under the Nationwide Emergency Declaration for COVID-19.

WHY ARE WE DISCUSSING THE PROCUREMENT STANDARDS FOR FOR STATE AGENCIES UNDER FEMA PUBLIC ASSISTANCE?

- The assistance FEMA provides through the public assistance is usually 75 percent of the eligible costs. If Federal obligations, excluding administrative costs, meet or exceed a qualifying threshold, FEMA may recommend an increase up to 90 percent.
- Additionally, the Federal cost share for **Emergency Work** may be increased in limited circumstances if warranted.
- In order to receive a federal cost share reimbursement of the eligible costs of goods and services before, during and after a disaster, you must follow the federal procurement under grant regulations.
- Failure to follow the applicable rules may place your FEMA grant funding at risk.

WHAT IS THE PURPOSE OF THIS PRESENTATION AND WHO IS THE INTENDED AUDIENCE

- This presentation is intended to be an overview of the federal procurement standards applicable to **State agencies or instrumentalities of State Government.**
- *There are additional requirements for local governments that will not be covered in this presentation.*
- This presentation is not intended to serve as legal advice and does not reflect all of the federal procurement requirements.
- Cal OES can not guarantee that adherence to this training will result in full reimbursement of costs, and recommends reviewing the complete requirements in Title 2 CFR 200, and FEMA's Procurement Field Manual.

THE FEDERAL PROCUREMENT STANDARDS ARE DIFFERENT FOR STATE ENTITIES AND NON-STATE ENTITIES.


A Local government is defined as any unit of government within a state, including:

- a. County;
- b. Borough;
- c. Municipality;
- d. City;
- e. Town;
- f. Township;
- g. Parish;
- h. Local public authority, including any public housing agency under United States Housing Act of 1937;
- i. Special district;
- j. School district;
- k. Intrastate district;
- l. Council of governments, whether or not incorporated as a nonprofit corporation under state law; and
- m. Any other agency or instrumentality of a multi-, regional, or intra-state or local government.

**If any of these describe the organization you work for.
This presentation is not relevant for you.**

FEMA'S PROCUREMENT UNDER DISASTER ASSISTANCE TEAM AND THE PROCUREMENT FIELD MANUAL

<https://www.fema.gov/procurement-disaster-assistance-team>



FEMA

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- Office of Response and Recovery
- Office of National Capital Region Coordination
- Office of the Senior Law Enforcement Advisor
- Office of Chief Counsel
- Resilience

PDAT Resources when Procuring with Federal Grant Funds

Some communities may not always have the resources on hand to properly prepare for, respond to, or recover from a disaster.

When using [FEMA Public Assistance](#) funds to procure goods and services before, during and after a disaster, you must follow the [federal procurement under grant regulations](#).

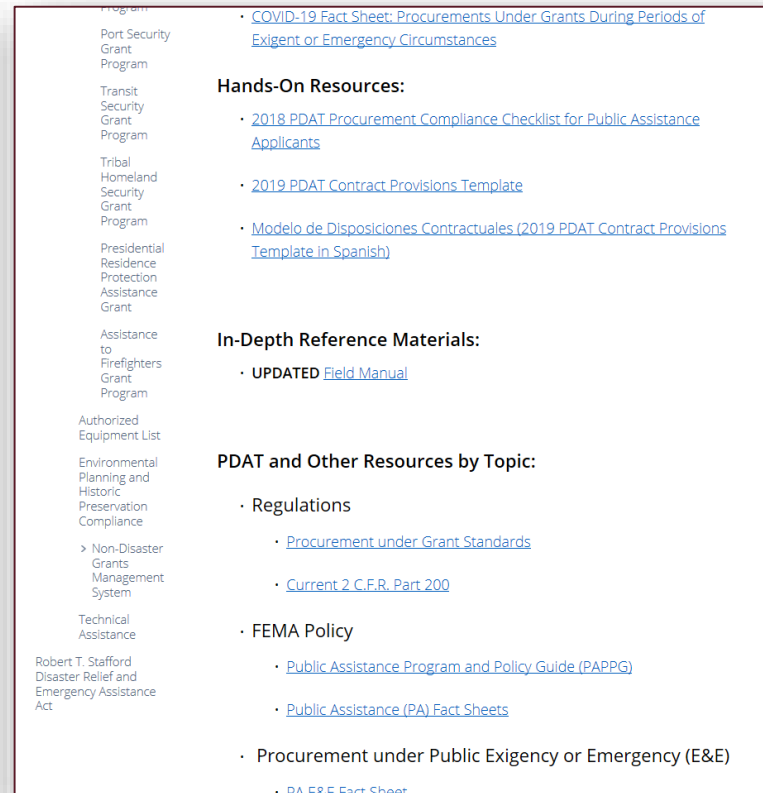
Failure to follow the applicable rules may place your FEMA grant funding at risk.

In addition to providing training and technical assistance on the procurement under grant rules, the Procurement Disaster Assistance Team (PDAT) has created and compiled the resources below to help you avoid common mistakes when procuring with federal disaster grant funds.

[Expand All Sections](#)

- [Know The Rules](#)
- [Explore Procurement Under Grant Tools And Resources](#)
- [Take A Training Now](#)
- [Request A PDAT Training](#)

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Port Security Grant Program

Transit Security Grant Program

Tribal Homeland Security Grant Program

Presidential Residence Protection Assistance Grant

Assistance to Firefighters Grant Program

Authorized Equipment List

Environmental Planning and Historic Preservation Compliance

> Non-Disaster Grants Management System

Technical Assistance

Robert T. Stafford Disaster Relief and Emergency Assistance Act

- [COVID-19 Fact Sheet: Procurements Under Grants During Periods of Exigent or Emergency Circumstances](#)

Hands-On Resources:

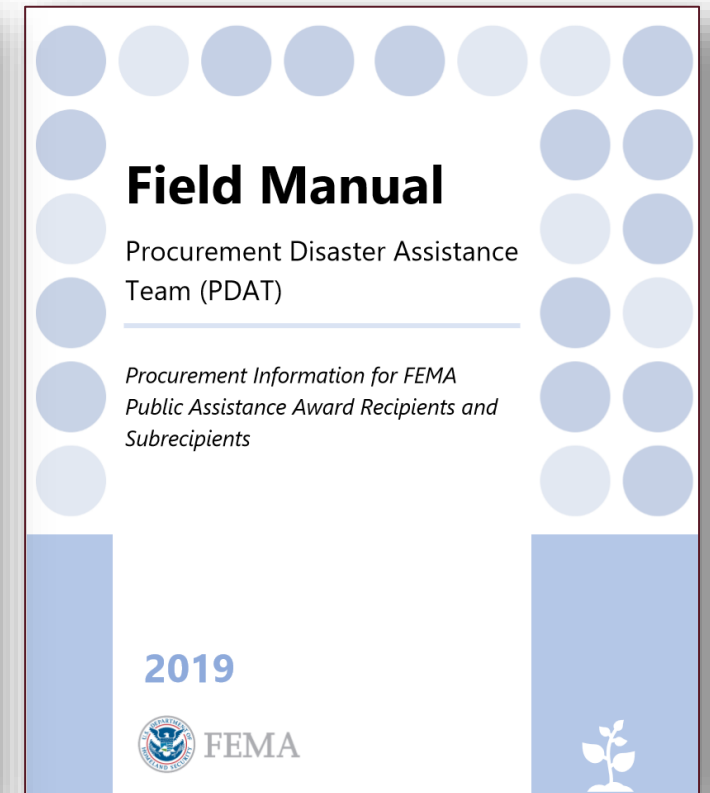
- [2018 PDAT Procurement Compliance Checklist for Public Assistance Applicants](#)
- [2019 PDAT Contract Provisions Template](#)
- [Modelo de Disposiciones Contractuales \(2019 PDAT Contract Provisions Template in Spanish\)](#)

In-Depth Reference Materials:

- [UPDATED Field Manual](#)

PDAT and Other Resources by Topic:

- Regulations
 - [Procurement under Grant Standards](#)
 - [Current 2 C.F.R. Part 200](#)
- FEMA Policy
 - [Public Assistance Program and Policy Guide \(PAPPG\)](#)
 - [Public Assistance \(PA\) Fact Sheets](#)
- Procurement under Public Exigency or Emergency (E&E)
 - [PA E&E Fact Sheet](#)





Field Manual

Procurement Disaster Assistance Team (PDAT)

Procurement Information for FEMA Public Assistance Award Recipients and Subrecipients

2019



WHAT RULES ARE STATE AGENCIES REQUIRED TO FOLLOW UNDER THE FEDERAL PROCUREMENT STANDARDS?

- ✓ Comply with all applicable federal and state laws, regulations, statutes, and policies.
- ✓ Use the same policies and procedures used for procurements with non-Federal funds.
- ✓ Comply with the Uniform Cost Principals outlined in 2 C.F.R. Part 200 Subpart, including ensuring that costs are allowable and reasonable.
- ✓ Include the contract clauses required by 2 C.F.R. § 200.326, and FEMA's recommended contract provisions, in every contract and purchase order.
- ✓ Do not award contracts to contractors, or purchase through vendors, that are suspended or debarred from participating in federal awards (2 C.F.R. § 200.213).
- ✓ Comply with the rules outlined 2 C.F.R. § 200.322, for the procurement of recovered materials.

<https://www.epa.gov/smm/comprehensive-procurement-guideline-cpg-program>

USE THE SAME POLICIES AND PROCEDURES USED FOR PROCUREMENTS WITH NON-FEDERAL FUNDS.

- The federal procurement under grant standards require that state agencies follow their own procurement policies and procedures.
- A state agency, following its legal requirement to waive normal procurement procedures during a declared disaster, is compliant with this requirement.
- This means that unlike local government, there is no federal requirement to justify the use of non-competitive purchases made by state agencies during a declared state of emergency, if when doing so, they are following their documented procurement policies and procedures.
- FEMA will still; however, evaluate these purchases to determine whether they conform to the cost principles (2 C.F.R. Part 200, Subpart E). So while a State Agency may not be required to justify the use of a non-competitive purchase, it will still need to justify the allowability and reasonableness of the cost paid under the **circumstances prevailing at the time**.


HOW TO ENSURE THAT COSTS ARE ALLOWABLE AND REASONABLE HOW IS THIS RELATED TO THE MARKET FOR PPE, MEDICAL SUPPLIES, AND SUCH.

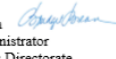
U.S. Department of Homeland Security
Washington, DC 20472



March 17, 2020

MEMORANDUM FOR: All States, Territories, Tribal Governments, Local Governments, and All Other Non-Federal Entities Receiving FEMA Financial Assistance

FROM: David Bibo 
Acting Associate Administrator
Office of Response and Recovery

Bridget E. Bean 
Assistant Administrator
Grant Programs Directorate

SUBJECT: Procurement Under Grants Conducted Under Emergency or Exigent Circumstances for COVID-19

Subsequent to the President's March 13, 2020 Nationwide Emergency Declaration for Coronavirus Disease 2019 (COVID-19), the Department of Homeland Security's Federal Emergency Management Agency (FEMA) is issuing the attached Fact Sheet addressing procurements made during periods of exigent or emergency circumstances. FEMA recognizes that noncompetitive procurements may be necessary to save lives, to protect property and public health, and to ensure public safety, as well as to lessen or avert the threat of a catastrophe. The attached Fact Sheet provides answers and guidance surrounding the need for such measures.

Current Federal procurement standards (found at 2 C.F.R. § 200.320(f)(2)) allow non-state entities to noncompetitively procure contracts (i.e., sole-sourcing) under certain emergency or exigent circumstances. FEMA defines an emergency or exigent circumstances as unexpected and unusually dangerous situations requiring immediate action or an urgent need for assistance or relief. Emergencies typically involve a threat to life, public health or safety, improved property, or some other form of dangerous situation. Exigencies, on the other hand, typically involve an urgent need to avoid, prevent, or alleviate serious harm or injury, financial or otherwise. Under both an emergency and exigency, using a competitive procurement process would prevent a non-state entity from taking immediate action required to address the situation. However, use of the emergency/exigency exception is only permissible during the actual emergency or exigent circumstances.

The President's unprecedented Nationwide Emergency Declaration, and the Secretary of Health and Human Services' (HHS) declaration of a Public Health Emergency for COVID-19 establish that exigent and emergency circumstances currently exist.

www.fema.gov

As of January 27, 2020, FEMA is treating any procurement related to the fight against COVID-19 as an emergency purchase action.

The memorandum validates the use of non-competitive purchases necessary to save lives as a result of COVID-19.

FEMA issued a memorandum on March 17 2020 discussing the exception.

"FEMA recognizes that noncompetitive procurements may be necessary to save lives, to protect property and public health, and to ensure public safety, as well as to lessen or avert the threat of a catastrophe."

ENSURING THAT
COSTS ARE
ALLOWABLE
AND
REASONABLE
AS RELATED TO
CURRENT
MARKET FORCES

- **How to determine if costs are allowable.**

“Cost are generally allowable if they are necessary and reasonable to accomplish the work properly and efficiently.”

- **How to determine if costs are reasonable.**

2 C.F.R. §200.404 states, “[a] cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person ***under the circumstances prevailing at the time the decision was made to incur the cost.***”

- **Attorney-Advisor FEMA Office of Chief Counsel
*Not An Official Response from FEMA***

“We understand that prices are fluctuating right now. I think it is important for applicants to do their market research, and do a price or cost analysis as required by 2 C.F.R. §200.323(a). If applicants do their best and properly document all the steps they took to ensure that the price was reasonable based off of today’s conditions, there shouldn’t be any future issues.”

ENSURING THAT
COSTS ARE
ALLOWABLE
AND
REASONABLE
*AS RELATED TO
CURRENT
MARKET FORCES*

- **If the supplies or equipment are excess of what prudent person would pay under **normal** conditions.**

Document the necessity of purchasing the supplies or equipment, at the current price, given the circumstances prevailing **right now**.

Do you best to explain the need, who the supplies or equipment will be used to protect, and the potential outcome of waiting for more favorable market conditions.

If the supplies or equipment are only available through single supplier. Document what other suppliers you tried to obtain them from, at more reasonable price.

If the supplies or equipment are available through multiple suppliers, and every supplier is charging in excess of what prudent person would pay under normal conditions. Document that you purchased the supplies or equipment through most cost effective supplier.

DO NOT AWARD CONTRACTS TO CONTRACTORS, OR PURCHASE THROUGH VENDORS THAT ARE SUSPENDED OR DEBARRED

- **What does it mean that a company is *suspended or debarred*?**

If a company is suspended or debarred, then it may not bid on or receive any federally funded contracts. It may also not receive any federal grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, or insurance.

Any contracts entered into with suspended or debarred contractor are ineligible for FEMA public assistance.

(or any federal reimbursement program)

- **How to determine if an entity is suspended or debarred**

The names and addresses of all entities suspended or debarred are entered in the System for Award Management (SAM), an electronic database.

SAM Exclusions may be accessed at <https://www.sam.gov>

DO NOT AWARD
CONTRACTS TO
CONTRACTORS,
OR PURCHASE
THROUGH
VENDORS THAT
ARE SUSPENDED
OR DEBARRED



A NEW WAY TO SIGN IN - If you already have a SAM account, use your **SAM email** for login.gov.

Log In

Login.gov FAQs

HOME SEARCH RECORDS DATA ACCESS CHECK STATUS ABOUT HELP

ALERT: SAM.gov will be down for scheduled maintenance Saturday, 03/28/2020 from 8:00 AM to 10:00 PM

The System for Award Management (SAM) is an official website of the U.S. government. There is no cost to use SAM. You can use this site for FREE to:

- Register to do business with the U.S. government
- Update or renew your entity registration
- Check status of an entity registration
- Search for entity registration and exclusion records

Getting Started

Create A User Account



Start by creating a SAM user account.

Register Entity



After creating your SAM user account, log in to register to do business with the U.S. government.

Search Records



Do a public search for existing entity registration records or exclusion records.

Federal users can log in to see additional information.

GSA

IBM-P-20200214-1547
WWW1

Search Records Disclaimers FAPIIS.gov
Data Access Accessibility GSA.gov/IAE
Check Status Privacy Policy GSA.gov
About USA.gov
Help

This is a U.S. General Services Administration Federal Government computer system that is "FOR OFFICIAL USE ONLY." This system is subject to monitoring. Individuals found performing unauthorized activities are subject to disciplinary action including criminal prosecution.

DETERMINING WHAT CONTACT CLAUSES ARE REQUIRED AND SAMPLE LANGUAGE

FEMA PROVIDED RESOURCES

PROCUREMENT COMPLIANCE CHECKLIST

Public Assistance Applicant Procurement Compliance Checklist

Purpose:

Checklist for Reviewing Procurements under Grants by States, local and tribal governments, Institutions of Higher Education, Hospitals, and private non-profit organizations - 2 C.F.R. pt. 200. Revised on 11/21/18.

Complementary Resources:

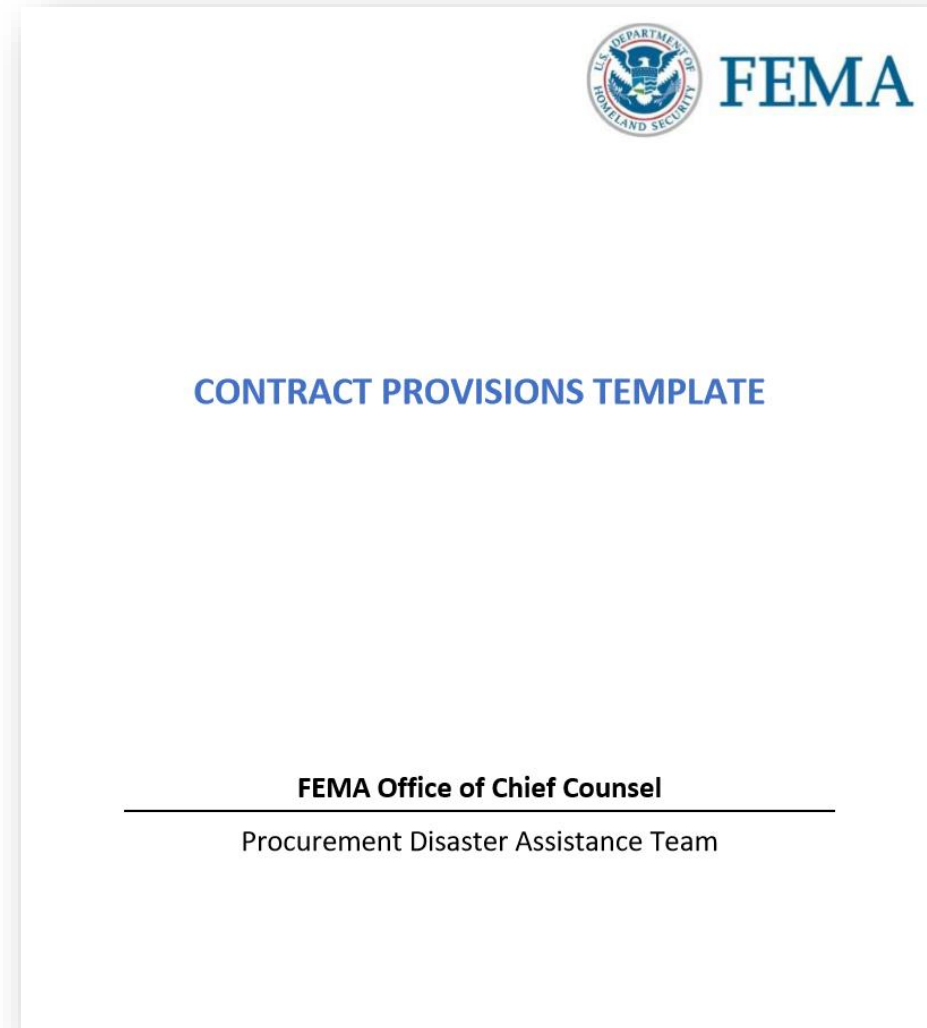
- Procurement Rules Online: www.ecfr.gov
2 C.F.R. 200.317-326 can be viewed in its entirety at this website.
Title 2 → Subtitle A → Chapter II → Part 200 → Subpart D → Procurement Standards
- [Field Manual](#) and [Supplement](#) available at www.fema.gov/procurement-disaster-assistance-team

Applicant Name:			
Reviewer Name:		Date Reviewed:	
Type of Entity Conducting the Procurement			
The term "non-Federal entity" (NFE) below refers to the entity that is conducting the procurement action (i.e., the state, local, territorial or tribal government, or private-non-profit entity).			
Type of Entity	1	Is the NFE a State as defined by 2 C.F.R. § 200.90?	Yes <input type="checkbox"/> → The NFE must comply with 2 C.F.R. 200.317, 200.322, and 200.326 No <input type="checkbox"/> → The NFE must comply with 2 C.F.R. 200.318 through 200.326
	2	Does the procurement comply with the State's own procurement laws, rules, and procedures? §200.317	Yes <input type="checkbox"/> No <input type="checkbox"/> → The procurement does not comply with federal requirements
	3	Does the procurement comply with the requirement to make maximum use of recovered/recycled materials? § 200.317, § 200.322	Yes <input type="checkbox"/> No <input type="checkbox"/> → The procurement does not comply with federal requirements N/A <input type="checkbox"/> → Work does not involve the use of materials (e.g., debris removal or otherservices) or the NFE is not a political subdivision of a State

DETERMINING
WHAT
CONTACT
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FEMA PROVIDED RESOURCES

CONTRACT PROVISION TEMPLATE



ENSURE EVERY PURCHASE ORDER OR OTHER CONTRACT INCLUDES ANY CONTRACT CLAUSES REQUIRED UNDER 2 C.F.R. § 200.326

The federal rules require that NFE (state and non-state) contracts contain the applicable provisions described in Appendix II to the Uniform Rules (Contract Provisions for Non-Federal Entity Contracts Under Federal Awards).

Contract provisions required for federal awards.

- 1. Contract Remedies for contracts in excess of the simplified acquisition threshold, which is currently \$250,000.**
- 2. Termination for Cause and Convenience for contracts in excess of \$10,000.**
- 3. Equal Employment Opportunity for federally assisted construction contracts.**
- 4. Contract Work Hours and Safety Standards Act for contracts in excess of \$100,000 that involve the employment of mechanics or laborers**

ENSURE EVERY PURCHASE ORDER OR OTHER CONTRACT INCLUDES ANY CONTRACT CLAUSES REQUIRED UNDER 2 C.F.R. § 200.326

Contract provisions required for federal awards. *Continued*

5. Clean Air Act and the Federal Water Pollution Control Act for contracts in excess of \$150,000 .
6. NFE and Contractors are subject to Suspension and Debarment. All Contacts
7. Byrd Anti-Lobbying Amendment for contracts over \$100,000.
8. Procurement of Recovered Materials

Additional information about each of the required provision can be found in the procurement field manual and in the contract provision template.

INCLUDE THE ADDITIONAL FEMA RECOMMENDED PROVISIONS AND CLAUSES

FEMA Recommended Provisions

1. Access to Records

FEMA recommends that NFEs include an Access to Records clause in contracts that acknowledges the legal requirements above which grant DHS and FEMA access to financial and procurement documents to ensure compliance with federal regulations.

2. Changes/Modifications

FEMA recommends that an NFE include a changes clause in its contract that describes how, if at all, changes can be made by either party to alter the method, price, or schedule of the work without breaching the contract. The language of the clause may differ depending on the nature of the contract and the end-item procured.

ENSURE EVERY PURCHASE ORDER OR OTHER CONTRACT INCLUDES ANY CONTRACT CLAUSES REQUIRED BY 2 C.F.R. § 200.326

3. DHS Seal, Logo, and Flags

FEMA recommends that all NFEs place in their contracts a provision that a contractor shall not use the DHS seal(s), logos, crests, or reproductions of flags or likenesses of DHS agency officials without specific FEMA pre-approval.

4. Compliance with Federal Law, Regulations, and Executive Orders

FEMA recommends that all NFEs place into their contracts an acknowledgement that FEMA financial assistance will be used to fund the contract along with the requirement that the contractor will comply with all applicable federal law, regulations, executive orders, and FEMA policies, procedures, and directives.

ENSURE EVERY PURCHASE ORDER OR OTHER CONTRACT INCLUDES ANY CONTRACT CLAUSES REQUIRED BY 2 C.F.R. § 200.326

5. No Obligation by the Federal Government

FEMA recommends that the NFE include a provision in its contract that states that the Federal Government is not a party to the contract and is not subject to any obligations or liabilities to the NFE, contractor, or any other party pertaining to any matter resulting from the contract.

6. Program Fraud and False or Fraudulent Statements or Related Acts

FEMA recommends that the NFE include a provision in its contract that the contractor acknowledges that 31 U.S.C. Chap. 38 (Administrative Remedies for False Claims and Statements) applies to its actions pertaining to the contract.

CONSIDERATIONS FOR STATE ENTITIES USING COST PLUS PERCENT OF COSTS CONTRACTS

“Although the federal procurement regulations do not expressly prohibit state entities from using cost plus a percentage of cost contracts when otherwise permissible under state law, state entities should exercise caution before entering into this contract type.

All entities, state and non-state, must abide by the Cost Principles found in 2 C.F.R. Part 200, Subpart E to ensure that all costs are reasonable.

FEMA scrutinizes CPPC contracts because they often lead to unreasonable costs.”

from page 94 of the FEMA Procurement under Disaster Field Manual

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