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 requirement 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
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/ssm/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.

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 COVID19.

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

The Federal Emergency Management Agency (FEMA) Public Assistance Program Guide (http://www.fema.gov/public-assistance) contains comprehensive information regarding assistance that FEMA can provide. Applicants must follow in order to receive assistance. This guide focuses on providing guidance to applicants regarding the eligibility of costs for Federal funds provided under the Public Assistance Program. The guide is intended to provide clear and consistent guidance to ensure that applicants receive assistance in a timely and equitable manner.

Applicability:
This guidance applies to all applicants who receive assistance under the Public Assistance Program. It provides clear guidance on how to ensure that costs are allowable and reasonable.

Costs are a critical component of any grant project. Applicants must ensure that costs are reasonable and necessary to the project. The guide provides a comprehensive list of factors to consider when evaluating cost reasonableness.

Table:

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<tr>
<th>Factor</th>
<th>Example</th>
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<tr>
<td>Whether the cost is in accordance with applicable Federal, State, or local laws and regulations</td>
<td>Whether the cost is reasonable and necessary to the project</td>
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<tr>
<td>Cost reimbursement is consistent with the applicant's cost allocation system</td>
<td>Whether the applicant's system for cost reimbursement is consistent with applicable Federal, State, or local laws and regulations</td>
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1 2014 CFR 200.483

FEMA also considers project-specific complexities that may affect costs, such as environmental or historic issues, remote access or location, provision of a unique service with few providers, and elements requiring an extraordinary level of effort.
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
DETERMINING WHAT CONTACT CLAUSES ARE REQUIRED AND SAMPLE LANGUAGE

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**FEMA PROVIDED RESOURCES**

**PROCUREMENT COMPLIANCE CHECKLIST**

Public Assistance Applicant Procurement Compliance Checklist

**Purpose:**

**Complementary Resources:**
- Procurement Rules Online: www.ncfr.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

<table>
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<tr>
<th>Type of Entity Conducting the Procurement</th>
<th>Date Reviewed:</th>
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<tr>
<td>Applicant Name:</td>
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<td>Reviewer Name:</td>
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**Type of Entity**

- **1.** Is the NFE a State as defined by 2 C.F.R. § 200.90?
  - Yes ☐☐ The NFE must comply with 2 C.F.R. 200.317, 200.322, and 200.326
  - No ☐☐ The NFE must comply with 2 C.F.R. 200.318 through 200.316

- **2.** Does the procurement comply with the State’s own procurement laws, rules, and procedures? § 200.317?
  - Yes ☐☐ The procurement complies with federal requirements
  - No ☐☐ 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 ☐☐ The procurement complies with federal requirements
  - No ☐☐ The procurement does not comply with federal requirements
  - N/A ☐☐ Work does not involve the use of materials (e.g., debris removal or other similar) or the NFE is not a political subdivision of a State
DETERMINING WHAT CONTACT CLAUSES ARE REQUIRED AND SAMPLE LANGUAGE
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.
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.
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.
“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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