

# PROCUREMENT STANDARDS FOR LOCAL GOVERNMENT UNDER FEMA PUBLIC ASSISTANCE AWARDS

AS RELATED TO EMERGENCY PROCUREMENT ACTIONS TAKEN BY LOCAL  
GOVERNMENTS FOR THE FIGHT AGAINST COVID19 (4482DR-CA)

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# WHAT IS THE PURPOSE OF THIS PRESENTATION?

This presentation is an overview of the federal procurement standards applicable to Local Government, that exist during an emergency or exigent situation. The intent is to provide you with information about these regulations so you can administer your public assistance projects appropriately.

I am not an attorney, and this presentation is not intended to serve as legal advice. This presentation will not cover all of the procurement standards, only the issues that are applicable to the purchase of good and services in response to an active emergency or exigent situation.

Cal OES can not guarantee that adherence to this training will result in full reimbursement of project costs, and recommends reviewing the complete requirements in Title 2 CFR Part 200, and in FEMA's Procurement Field Manual.

# INTENDED AUDIENCE

A LOCAL GOVERNMENT IS DEFINED AS ANY UNIT OF GOVERNMENT WITHIN A STATE, INCLUDING:

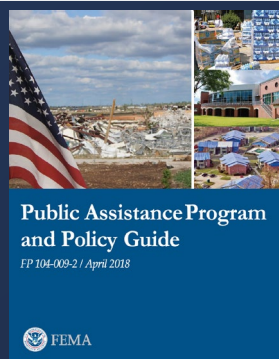
There are additional requirements for local governments that do not apply to State Government Entities, and some of the topics described in this presentation may not apply to Private-Not-For-Profits (PNP) or Native American Tribal Governments. Private-Not-For-Profits have other eligibility considerations that have to be taken into account.

- Counties
- Boroughs
- Municipalities
- Cities
- Towns
- Townships
- Parishes
- Local public authorities
- Special districts
- School districts
- Intrastate districts

Only Emergency Protective Measures related to COVID19 are eligible for Public Assistance.

## EMERGENCY PROTECTIVE MEASURES – CATEGORY B

A list of typical Emergency Protective Measures can be found in the FEMA Public Assistance Program and Policy Guide (starting on page 57).



Work done to:

- Eliminate or lessen immediate threats to lives, public health, or safety;
- Eliminate or lessen immediate threats of significant additional damage to improved public or private property in a cost-effective manner.

If your procurement was not conducted for either of these reasons, it is likely ineligible for FEMA Public Assistance even if was the result of COVID19 – but ultimately that decision is made by FEMA.

## IS MY PROCUREMENT ELIGIBLE?

Whether or not a procurement is eligible will be based on the situation that led to the procurement action, and potentially how well you justify the need in the context of saving lives, or protecting public health and safety, or protecting improved property (*if it is not immediately apparent*).

IT related expenses are not eligible as emergency protective measures unless the additional cost is specifically related to work done to save lives, or protect public health and safety, or protect improved property.

If a procurement you are considering is contingent on a guarantee that FEMA is going to cost-share with you. Don't Proceed. This program is setup to reimburse disaster related expenses that would have been incurred regardless of reimbursement (equal treatment of federal and non-federal funds).

# IS MY PROCUREMENT ELIGIBLE?

## Next Steps

Please review the General Work Eligibility section of the FEMA Public Assistance Program and Policy Guide – starting on page 19, and the description and examples provided for Emergency Protective Measures – starting on page 57.

**Determining cost eligibility is not the intended purpose of this presentation.**

If you still have questions regarding whether your procurement is eligible – please contact [Peter.Crase@caloes.ca.gov](mailto:Peter.Crase@caloes.ca.gov) to discuss your concerns.



## Public Assistance Program and Policy Guide

*FP 104-009-2 / April 2018*



# WHAT TOPICS WON'T BE COVERED IN THIS PRESENTATION?

The advice provided in this presentation is for emergency procurement only. It is contingent on an active emergency or exigent situation. It does not reflect the procurement standards that apply during a non-emergency situation.

Rules Specific to Purchases Made Under Non-Emergency / Not-Exigent Circumstances

Procurement of Recovered Materials

Bonding Requirements for Construction Projects

Design-Bid-Build and Design-Build Contracts

*for information regarding these topics*

[www.fema.gov/procurement-disaster-assistance-team](http://www.fema.gov/procurement-disaster-assistance-team)

# RESOURCES I RECOMMEND YOU DOWNLOAD AND HAVE AVAILABLE TO REFERENCE

- Public Assistance Program and Policy Guide
- Procurement Field Manual
- Reasonable Cost Evaluation Job Aid
- Procurement Under Grants Conducted Under Exigent or Emergency Circumstances Fact Sheet
- Contract Provision Template

[WWW.FEMA.GOV/MEDIALIBRARY/ASSETS/DOCUMENTS/111781](http://WWW.FEMA.GOV/MEDIALIBRARY/ASSETS/DOCUMENTS/111781)

## FEMA'S PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE

An overview of the PA Program implementation process with links to other publications and documents that provide additional process details.

**Resource for Non-Procurement Information**

**Topics Including**

Applicant Eligibility

Facility Eligibility

Cost Eligibility

Examples of Emergency Protective Measures starting on page 57.



## Public Assistance Program and Policy Guide

*FP 104-009-2 / April 2018*

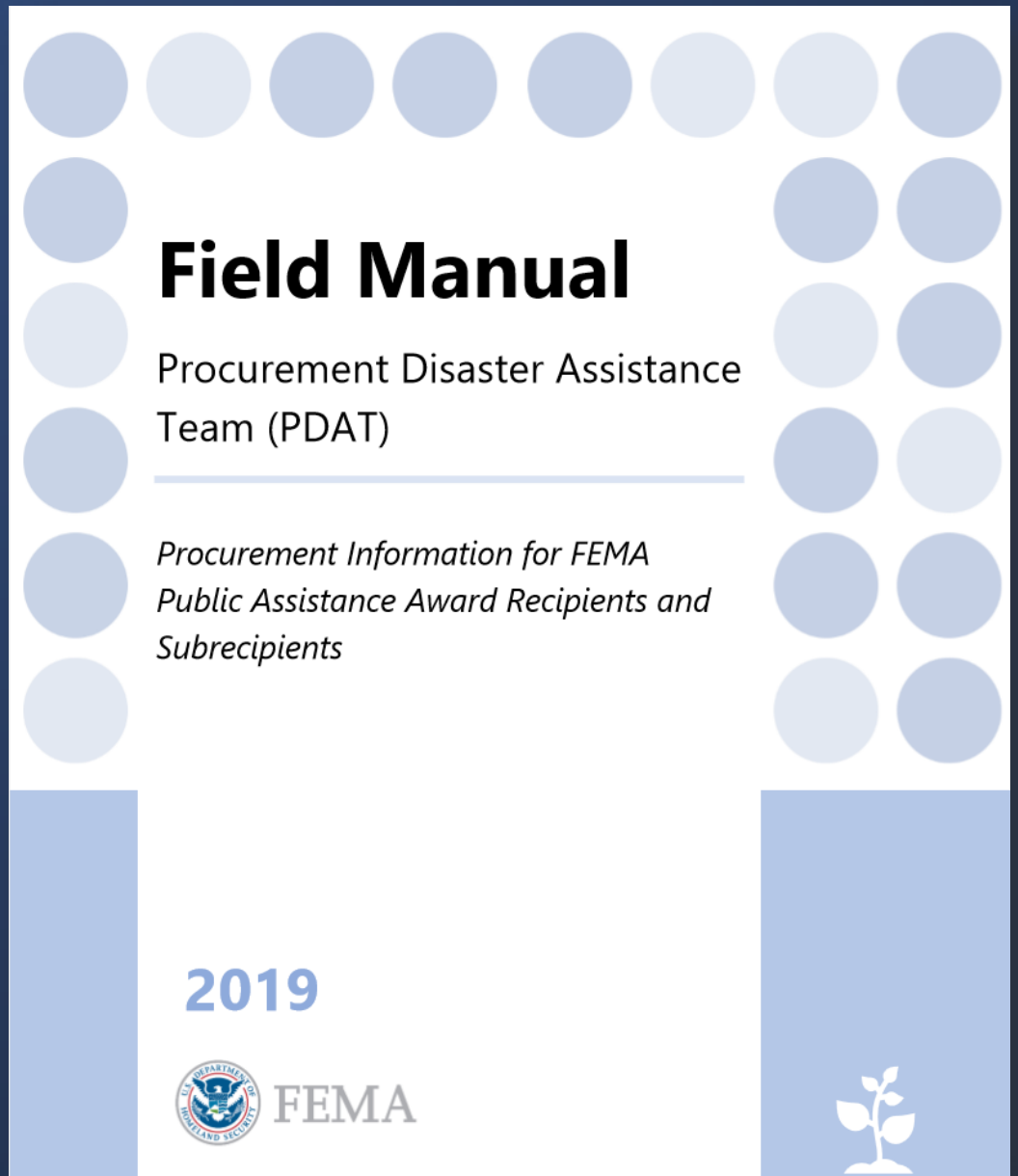


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PROCUREMENT-DISASTER-ASSISTANCE-TEAM

## THE PROCUREMENT FIELD MANUAL

This Field Manual lists, describes, and exemplifies the mandatory requirements for the procurement of property and services under the FEMA Public Assistance program.

The Procurement Disaster Assistance Team (PDAT) developed this Manual primarily to support FEMA staff in providing accurate and consistent information to PA applicants on how to comply with these federal procurement requirements.



## REASONABLE COST EVALUATION

This job aid was created for use by FEMA personnel when evaluating whether costs are reasonable, but it is available for everyone who needs to document how they determined the cost they paid for goods or services was reasonable based on the situation at hand.

This guide will be especially useful for anyone engaged in the purchase of goods that are being sold at premium due to current market conditions – such as PPE and Sanitizer.



FEMA

Job Aid

### PUBLIC ASSISTANCE: REASONABLE COST EVALUATION

The Federal Emergency Management Agency (FEMA) Public Assistance (PA) Program provides supplemental assistance to States, Territories, Tribes, and local governmental entities, as well as certain private nonprofit (PNP) organizations (hereinafter referred to as Applicants). FEMA's *Public Assistance Program and Policy Guide* (<http://www.fema.gov/public-assistance-policy-and-guidance>) provides comprehensive information regarding assistance that FEMA can provide and the requirements that Applicants must follow in order to receive the assistance. This Job Aid supersedes FEMA's *Public Assistance Alternative Procedures Pilot Program Validation of Subgrantee-Provided Cost Estimates Job Aid*, dated May 20, 2013. It provides uniform guidance to FEMA personnel on evaluating cost reasonableness for Federal funds expended by non-Federal entities, also referred to as Applicants in this guidance, under the PA Program in accordance with Title 2 Code of Federal Regulations (CFR) § 200.404, and for disasters declared prior to December 26, 2014, in accordance with 44 CFR part 13 and the Office of Management and Budget (OMB) Circular A-87. This Job Aid includes a checklist in Appendix A: *Validation of Applicant-Provided Cost Estimates*, which FEMA staff must use to review and validate cost estimates submitted to FEMA for Permanent Work.

#### Applicability

This guidance applies to any assessment of cost reasonableness undertaken by FEMA for relevant work completed under a PA grant award or subaward. It provides general information to guide FEMA personnel in evaluating whether costs are reasonable including when necessary as the result of a financial review such as closeout or administrative appeals, Department of Homeland Security Office of the Inspector General (DHS OIG) audits, single audits under 2 CFR part 200, and Improper Payments Elimination and Recovery Act audits.

Cost eligibility is a basic component of PA Program eligibility, and in order for a cost to be considered allowable, it must be necessary and reasonable to accomplish the work properly and efficiently.<sup>1</sup> FEMA evaluates cost reasonableness for all projects. In addition, the determination of cost reasonableness is also instructive with regard to grant non-compliance enforcement remedies. Generally, FEMA considers an Applicant's force account labor, equipment, and materials costs as reasonable provided the costs are consistent with the entity's policies including, but not limited to, pay rates, labor policies, and cost schedules utilized during its normal operations. Contract costs are generally considered reasonable when the Applicant adheres to full and open competition under applicable Federal procurement under grant requirements, and the scope of services or work in the contract and level of effort is consistent with respect to the eligible scope of work. For these situations, FEMA staff are not required to perform a detailed cost reasonableness analysis.

<sup>1</sup> 2 CFR § 200.403

# PROCUREMENT UNDER GRANTS CONDUCTED UNDER EXIGENT OR EMERGENCY CIRCUMSTANCES FACT SHEET

This fact sheet provides key information to consider when procuring goods or services in response to an active exigency or emergency. This fact sheet is especially relevant for the current disaster, as emergency protective measures are the only approved category of work for COVID19.



FEMA

Fact Sheet

## Procurement Under Grants Conducted Under Exigent or Emergency Circumstances

The Federal Emergency Management Agency (FEMA) provides financial assistance to states, territories, tribes, local governments, nonprofits, institutions of higher education, and other non-Federal entities. All FEMA grant programs are subject to the Federal procurement standards found at 2 C.F.R. §§ 200.317 – 200.326. Recognizing that FEMA’s recipients and subrecipients may face exigencies or emergencies when carrying out a FEMA award, this Fact Sheet provides key information to consider when utilizing contracted resources under exigent or emergency circumstances.

### What Rules Apply to State Entities?

States are required to follow their own procurement procedures as well as the Federal requirements for procurement of recovered materials and inclusion of required contract provisions per 2 C.F.R. §§ 200.317, 200.322, and 200.326.

For purposes of the Federal procurement requirements, states are defined as the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of Northern Mariana Islands, and any agency or instrumentality thereof except for local governments. Tribal governments are not considered to be states when applying Federal procurement standards required by 2 C.F.R. Part 200.

### What Rules Apply to Non-State Entities?

For all other types of entities, referred to as “non-state entities” in this Fact Sheet, Federal regulations (2 C.F.R. Part 200 – Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards) establish requirements for the exigency or emergency exception that permits the use of noncompetitive procurements, frequently referred to as “sole-source contracting.” This exception and associated procurement requirements are discussed further below. In general, it will be fact-specific and entity-specific as to when exigent or emergency circumstances necessitate the use of noncompetitive procurements. The answers to the frequently asked questions below provide additional guidance on the acceptable use of noncompetitive proposals under exigent or emergency circumstances, which is described in regulation at 2 C.F.R. § 200.320(f)(2).

It is essential that all non-state entities understand that both FEMA and the U.S. Department of Homeland Security’s Office of Inspector General (OIG) closely review procurement actions and contract selections, with a particular emphasis on noncompetitive procurement actions, to evaluate compliance with Federal requirements. *Failure to follow Federal contracting and procurement requirements puts non-state entities at risk of not receiving reimbursement or not being able to use FEMA grant funds for otherwise eligible costs.*

### What is the exigency or emergency exception?

Non-state entities must follow the procurement requirements found at 2 C.F.R. §§ 200.317 – 200.326. However, Federal regulations allow for noncompetitive procurements under certain circumstances, including when a non-state entity determines that immediate actions required to address the public exigency or emergency cannot be delayed by a competitive solicitation. This represents an exception to requirements for full and open competition. FEMA approval is not required for use of noncompetitive

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## CONTRACT PROVISIONS TEMPLATE

Sample language, definitions, and references for each of the required and recommended contract clauses and provisions are available in FEMA's Contract Provisions Template.



### CONTRACT PROVISIONS TEMPLATE

**FEMA Office of Chief Counsel**

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Procurement Disaster Assistance Team



**RULES APPLICABLE TO PROCUREMENT ACTIONS TAKEN BY  
LOCAL GOVERNMENTS TO MITIGATE AN ACTIVE  
EMERGENCY OR EXIGENT SITUATION**

**JUSTIFY THE USE OF THE EMERGENCY OR EXIGENT EXCEPTION  
WHEN BYPASSING THE NORMAL COMPETITIVE PROCUREMENT  
REQUIREMENTS.**



## JUSTIFY THE USE OF THE EMERGENCY OR EXIGENT EXCEPTION WHEN BYPASSING NORMAL COMPETITIVE PROCUREMENT.

Local, state, and even federal emergency proclamations/declarations **do not** automatically waive the federal procurement requirement for full and open competition.

However, a local proclamation may be necessary to waive your organization's own requirements for competitive procurement.

The federal procurement requirement for full and open competition is only waived during a public exigency or emergency when the situation at hand will not permit the delay that would result from competitive solicitation.

In these situations, where there is a threat to lives, public health and safety, or improved property, there is no pre-approval necessary; however, -

you must document the justification for bypassing the normal requirements for full and competition for **each** non-competitive procurement.

## Suggested Elements for Noncompetitive Procurement Justification Procurement Under Grants Conducted Under Exigent or Emergency Circumstances Fact Sheet

1. Identify which of the four circumstances listed in 2 C.F.R. § 200.320(f) justify a noncompetitive procurement:
  - 1) single source;
  - 2) **The public exigency or emergency resulting from competitive solicitation;**
  - 3) The Federal awarding agency or pass-through entity preapproval; or
  - 4) After solicitation of a number of sources, competition is determined inadequate.
2. Provide a brief description of the product or service being procured, including the expected amount of the procurement.
3. Explain why a noncompetitive procurement is necessary. If utilizing the exigency/emergency exception, the justification should explain the nature of the public exigency or emergency, including 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.
5. Describe the specific steps taken to determine that full and open competition could not have been used, or was not used, for the scope of work (e.g., research conducted to determine that there were limited qualified resources available that could meet the contract provisions).
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. If a conflict of interest is unavoidable, such as due to exigent/emergency circumstances, explain how it was unavoidable and any steps taken to address the impact of that conflict of interest.
7. Include any other information justifying the use of noncompetitive procurement in the specific instance.

# THE EMERGENCY PERIOD ENDS WHEN THE IMMEDIATE THREAT HAS BEEN MITIGATED

After the immediate threat to lives, public health and safety, or improved property has been mitigated – you can no longer bypass the rules for full and open competition using the emergency or exigency exception.

Any ongoing contracts that were non-competitively awarded when responding to the emergency or exigency must be canceled, and any future procurement actions will need to abide by the rules for full and open competition.

In an effort to make this presentation as relevant to the current situation as possible – I am not discuss the rules for full and open competition.

I suggest that you familiarize yourself with these rules before we reach that point.

The FEMA PDAT Procurement Field Manual is the best resource for this information.

MARCH 17, 2020  
MEMORANDUM FOR:  
ALL STATES, TERRITORIES, TRIBAL  
GOVERNMENTS, LOCAL GOVERNMENTS, AND  
ALL OTHER NON-FEDERAL ENTITIES  
RECEIVING FEMA FINANCIAL ASSISTANCE


*"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."*




FEMA

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.

APPLY THE MORE STRINGENT THE ORGANIZATION'S OWN POLICIES AND PROCEDURES USED FOR PROCUREMENTS WITH NON-FEDERAL FUNDS, AND THE FEDERAL PROCUREMENT STANDARDS.



## APPLY THE MORE STRINGENT OF LOCAL AND FEDERAL PROCUREMENT PROCEDURES

Local governments must follow their own documented procurement procedures (which should already reflect applicable local and state, laws and regulations).

As a condition of receiving a public assistance cost share, Local governments are also expected to abide by the federal procurement under grant standards.

When there is a difference between these standards, the local government must apply the rule that allow for compliance with all applicable layers.

This is generally the more stringent rule.

*Compliance with this requirement is considerably easier during an active emergency or exigent situation when the normal rules for full and open competition can be bypassed; however, please understand that once the emergency period ends - the application of this requirement will become more complicated.*

**COMPLY WITH THE UNIFORM COST PRINCIPALS OUTLINED  
IN TITLE 2 C.F.R. PART 200 SUBPART E, INCLUDING  
ENSURING THAT COSTS ARE REASONABLE.**



PER THE COST PRINCIPALS,  
FOR SOMETHING TO BE  
ALLOWABLE  
THE COST MUST BE REASONABLE  
**BUT WHAT IS REASONABLE?**

*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***

§200.404

The determination of whether a cost is reasonable - is not a comparison of what something cost 6 months ago. It is an evaluation of the current situation to determine whether it make sense to incur the cost.

- Is it necessary based on the situation at hand?
- Does it conform to the current market price?
- Are there emergency circumstances?
- Did you follow your own procurement procedures?

## FOR PURCHASING GOODS AND SERVICES AND AT A MARKET PREMIUM AND DOCUMENTING REASONABLENESS

If the supplies or equipment will be purchased at a premium.

- 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 conditions.
- If the supplies or equipment are only available through a single supplier. Document what other suppliers you tried to obtain them from at a more favorable price.
- If the supplies or equipment are available through multiple suppliers, and every supplier is charging a premium. Document that you purchased the supplies or equipment through most cost effective supplier.

**AVOID THE ACQUISITION OF UNNECESSARY OR  
DUPLICATIVE ITEMS.**



## FACTORS AFFECTING THE ELIGIBILITY OF SUPPLIES PURCHASED FOR RESPONSE OR RECOVERY

Unnecessary and duplicative items are not eligible for FEMA Public Assistance, only the cost of supplies necessary to carry out the scope of work. Items that are purchased specifically to be stockpiled for future use are not eligible.

If at the end of the event, if you have residual supplies that are no longer needed; if they can be repurposed for other federally funded programs this is the best option and it is allowable provided the you inform FEMA first.

Otherwise, the current market value of any unused residual supplies will be calculated. If the total of unused residual supplies is greater than \$5,000, FEMA will reduce eligible funding by this amount.

**For the cost of supplies to be allocable to the disaster, their usage must be tracked with inventory, withdrawal, and usage records.**

**PERFORM/DOCUMENT A COST OR PRICE ANALYSIS FOR EVERY PROCUREMENT ACTION ABOVE THE SIMPLIFIED ACQUISITION THRESHOLD.**



# A COST OR PRICE ANALYSIS IS REQUIRED FOR EVERY PROCUREMENT GREATER THAN THE SIMPLIFIED ACQUISITION THRESHOLD

Every procurement action above the simplified acquisition threshold (currently \$250,000), including contract modifications, requires a cost or price analysis.

The method for completing this analysis will vary based on the situation; however, the goal is always the same – a documented analysis of the procurement action that shows how you concluded that the price was fair and “reasonable”.

## **Price Analysis**

An evaluation of the total proposed price. This analysis is used when you have multiple offers to compare prices against, and for the procurement of commercially available items.

## **Cost Analysis**

An evaluation of the separate cost elements or line items in a single proposal as compared to independent estimates and/or historical costs.

**VERIFY CONTRACTOR AND VENDOR PARTICIPATION  
ELIGIBILITY AND DOCUMENT SEARCH RESULTS AS  
EVIDENCE OF COMPLIANCE.**



# SUSPENDED AND DEBARRED COMPANIES CANNOT PARTICIPATE IN FEDERAL FUNDED PROJECTS SUCH AS FEMA PUBLIC ASSISTANCE

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

Suspended and debarred companies cannot receive funding from any federal funded grants project. This includes FEMA Public Assistance.

What are the causes for Suspension and Debarment?

- Commission of fraud, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal laws, receiving stolen property, an unfair trade practice
- Violation of antitrust statutes
- Willful, or a history of, failure to perform
- Violation of the Drug-Free Workplace Act
- Delinquent Federal taxes > \$3,000
- Knowing failure to disclose violation of criminal law
- Any other cause that affects present responsibility

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

Public Assistance is reimbursement grant program; therefore, it is your organization's responsibility to verify contractor and vendor eligibility.

Contracts entered into with suspended or debarred contractors, and purchases made through suspended or debarred vendors are not eligible for a public assistance cost share. There is no minimum amount this does not apply to.

## How to determine if a company is suspended or debarred

The names and addresses of every suspended and debarred company are entered into the System for Award Management (SAM), an electronic database.

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

Save a copy of your search results as documented evidence of compliance.

**INCLUDE THE APPLICABLE CONTRACT CLAUSES DESCRIBED  
IN TITLE 2 C.F.R. PART 200, AND OF THE FEMA  
RECOMMENDED CONTRACT PROVISIONS, IN EVERY  
CONTRACT AND PURCHASE ORDER.**



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## CONTRACT PROVISIONS TEMPLATE

Sample language, definitions, and references for each of the required and recommended contract clauses and provisions are available in FEMA's Contract Provisions Template.



### CONTRACT PROVISIONS TEMPLATE

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**FEMA Office of Chief Counsel**

Procurement Disaster Assistance Team

# FEMA RECOMMENDED CONTRACT PROVISIONS

FEMA recommends the following provisions.

## Contractor Acknowledgements:

- DHS has the legal right to access and review the contractor's records.
- Permission is required to use the DHS's Seal, Logo, or Flag.
- They will comply with all federal laws, regulations, and executive orders.
- The contract is not an obligation of the federal government.
- Title 31 of the U.S. Code Chap. 38 - Administrative Remedies for False Claims and Statements - applies to the contractor's actions regarding this contract.

## How the Contract Can Be Modified

Language stating how and if the contract can be modified at a later date.

# CONTRACT PROVISIONS REQUIRED FOR ALL FEDERAL AWARDS

1. Contracts in excess of the simplified acquisition threshold (currently \$250,000) must include provisions addressing administrative, contractual, or legal “remedies” in instances where contractor violates or breach terms, and provide for sanctions and penalties when appropriate.
2. Contracts in excess of \$10,000 must address termination for cause and convenience.
3. Construction contracts must include the Equal Employment Opportunity clause.
4. Contract in excess of \$100,000, that involve the employment of mechanics or laborers, must include a provision for compliance with the “Contract Work Hours and Safety Standards Act”.
5. Contracts in excess of \$150,000 must contain a provision that requires the contractor to agree to comply with the Clean Air and Federal Water Pollution Control Acts.
6. All contracts must include language stating the contract is a covered transaction, and that the contractor is subject to Suspension and Debarment.
7. Contracts in excess of \$100,000 must include a provision addressing the Byrd Anti-Lobbying Amendment.
8. All contracts must include language addressing the Procurement of Recovered Materials.

Sample language is available for provisions 2 through 8.

**ONLY AWARD TIME AND MATERIALS CONTRACTS AFTER DOCUMENTING WHY NO OTHER CONTRACT TYPE IS SUITABLE, AND INCLUDE A CEILING PRICE THAT THE CONTRACTOR WILL EXCEED AT THEIR OWN RISK.**



# TIME AND MATERIALS CONTRACTS

## WHAT IS A TIME AND MATERIALS CONTRACT?

A time and materials contract is a contract where the cost is composed of the actual cost of materials + a fee for labor, which is charged at fixed hourly rates that includes wages, general and administrative expenses, and profit.

$$\begin{array}{l} \text{Admin} \\ + \text{Wages} \\ + \text{Profit} \\ \hline \text{Rate} \end{array} \quad \text{Cost} = \text{Materials} + \left( \text{Labor Hours} \times \text{Rate} \right)$$

Contractors generally prefer time and materials contracts over firm fixed price agreements because they don't bear the risk of cost overruns. Consequently, they provides no incentive for the contractor to control costs or find labor efficiencies, because the contractor's profit increases as the labor hours increase.

For this reason, Time and Material contracts are more strictly regulated and reviewed.

# TIME AND MATERIALS CONTRACTS

## WHAT ARE THE ADDITIONAL REQUIREMENTS?

Time and materials contract are appropriate when used to immediately respond to protect lives or public health and safety, or improved property, and in situations where it is impossible accurately estimate the extent or duration of the required scope of work or to anticipate costs with a reasonable degree of confidence.

You must **document a determination** that no other contract is suitable; preferably beforehand or shortly afterwards if it a life or death scenario.

These contracts **must be canceled and transitioned** to a different type of contract as soon as it is feasible to do so.

Time and materials contracts **must includes a ceiling price** that the contractor will exceed at it's own risk. The ceiling price must not be so high as to render it meaningless as a cost control measure.

**AVOID AWARDING COST PLUS PERCENT OF COST  
CONTRACTS.  
THESE ARE SPECIFICALLY PROHIBITED.**



## COST PLUS PERCENT OF COST CONTRACTS

### WHAT IS A COST PLUS PERCENT OF COST CONTRACT?

A cost plus a percentage of cost contract is a contract where the contractor's profit (or fee) is calculated as a percentage of unknown future costs.

**Fee = Predetermined Rate × Unknown-Actual Future Costs**

Contractors generally prefer this pricing structure over firm fixed price agreements because they don't bear the risk of cost overruns.

This pricing structure incentivizes the contractor to increase profit by increasing performance costs. For this reason, Cost Plus Percent of Cost Contracts are prohibited in Title 2 CFR Part 200.

FEMA will not cost share with any contracts that meets this description.

## COST PLUS FIXED FEE CONTRACTS ARE ALLOWABLE

Cost plus fixed fee contracts have a pre-negotiated fee that does not change based on the actual cost to complete the project.

### **Contract Cost = Fixed Fee + Unknown-Actual Future Costs**

These contracts do not incentivize the contractor to inflate project costs, and are useful when you can only estimate the extent or duration of the required scope of work or the total project costs with a moderate amount of accuracy.

Contractors like Cost Plus Fixed Fee Contracts because they are guaranteed to make the negotiated fee – even in the event of cost overruns.

These contracts can also include reasonable incentives to lower the project's cost. These contracts are a good alternative to Cost Plus Percent of Cost Contracts.

**MAINTAIN OVERSIGHT TO ENSURE THAT CONTRACTORS  
PERFORM IN ACCORDANCE WITH THE TERMS,  
CONDITIONS, AND SPECIFICATIONS OF THEIR CONTRACTS  
OR PURCHASE ORDERS.**



# CONTRACTOR AND VENDOR OVERSIGHT IS REQUIRED

Local governments are required to maintain oversight of their contractors and vendors to ensure they perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders; and efforts taken to maintain oversight should be documented as evidence of compliance.

Examples of this oversight include making sure contractors comply with contract terms and conditions, invoices are correct, and goods and services are received.

By necessity, Time and Materials contracts require a higher degree of oversight than firm fixed price contracts to ensure labor hours are not being inflated.

If your organization lacks qualified personnel to undertake such oversight as required; FEMA expects your organization to acquire the necessary personnel to provide these services. If you use this excuse, it will be rejected.

CONDUCT TRANSACTIONS IN A MANNER BEYOND REPROACH,  
AT ARM'S LENGTH, WITH IMPARTIALITY, AND WITHOUT  
PREFERENTIAL TREATMENT.

ADOPT A WRITTEN STANDARDS OF CONDUCT COVERING  
CONFLICTS OF INTERESTS AND GOVERNING THE ACTIONS OF  
EMPLOYEES ENGAGED IN THE SELECTION, AWARD, AND  
ADMINISTRATION OF CONTRACTS. THESE STANDARDS MUST  
INCLUDE DISCIPLINARY ACTIONS



## CONDUCT TRANSACTIONS IN A MANNER BEYOND REPROACH A WRITTEN STANDARDS OF CONDUCT IS REQUIRED

Local governments are required to conduct procurement transactions in a manner beyond reproach, at arm's length, with impartiality, and without preferential treatment.

Local governments are also required to have a written standards of conduct covering conflicts of interests and governing the actions of employees engaged in the selection, award, and administration of contracts.

These standards must include disciplinary actions in the event of violations of the standards of conduct.



# GIFTS ARE GENERALLY NOT PERMISSIBLE THIS SHOULD BE OUTLINED IN YOUR CODE OF CONDUCT

The officers, employees, and agents of local governments may neither solicit nor accept gifts or gratuities, favors, or anything of monetary value from contractors or parties to subcontracts.

This includes entertainment, hospitality, loans and forbearance, services, and gifts of training, transportation, local travel, lodgings, and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred.

## De Minimus Exception

Local governments may set standards for accepting gratuities in situations in which the financial interest is not substantial, or the gift is an unsolicited item of nominal value.



# BOTH REAL AND APPARENT CONFLICTS OF INTERESTS MUST BE AVOIDED

No employee, officer, or agent may participate in the selection, award or administration of a contract supported by a federal award if he or she has a real or apparent conflict of interest.

## Real Conflict of Interest

A real conflict of interest arises when an employee, officer, agent any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of these individuals, has a financial or other interest or a tangible personal benefit from a firm considered for a contract.

## Apparent Conflict of Interest

An apparent conflict of interest is an existing situation or relationship that creates the **appearance** of a real conflict of interest.

# RECUSALS IS AN OPTION TO AVOID A CONFLICT OF INTEREST

If permitted by your organizations own rules and regulation, a recusal may be appropriate when an employee, officer, or agent that is involved in awarding a contract has a real or apparent conflict of interest.

By disclosing the real or apparent conflict of interest and removing that individual from the contractor selection process, your organization may be able to resolve the conflict.

When used, document the recusal in writing and include it in the procurement file.



# DISCIPLINARY ACTIONS

The standards of conduct must include disciplinary actions for violations of the standards of conduct by officers, employees, or agents.

One example of the disciplinary action that is provided is dismissal.

Any disciplinary actions outlined in your code of conduct must be enforced.



**MAINTAIN RECORDS SUFFICIENT TO DETAIL THE HISTORY OF THE PROCUREMENT.**



# DOCUMENTATION AND RECORD KEEPING

Local governments are required to maintain records sufficient to detail the history of a procurement.

## **Rationale for Method of Procurement**

This is especially important for when bypassing the normal requirement for full and competition during an active emergency or exigent situation. The Emergency/Exigency justification previously described must be documented.

## **Rationale for the Contract Type**

This is especially important for when awarding a time and materials contract as a determination why no other contract type was suitable must be documented.

## **The Basis for the Contract / Purchase Order Price**

This is especially important when supplies and equipment are being purchased at a premium due to market conditions, and in situations where the procurement exceeds the simplified acquisition threshold and requires a price or cost analysis.

# DOCUMENTATION AND RECORD KEEPING

Documents should be retained somewhere safe, where multiple people know how to access them, and not subject to normal confidential destruction cycles.

When your application is closed and you received final payment, Cal OES will provide you with an audit waiver date.

Do not destroy these records before that date as they could be requested for review by the Department of Homeland Security's Office of Inspector General.



# PROCUREMENT STANDARDS FOR LOCAL GOVERNMENT UNDER FEMA PUBLIC ASSISTANCE AWARDS

AS RELATED TO EMERGENCY PROCUREMENT ACTIONS TAKEN BY LOCAL  
GOVERNMENTS FOR THE FIGHT AGAINST COVID19 (4482DR-CA)

**PRESENTED BY: IAN BRADSHAW, CAL OES**  
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**Cal OES Public Assistance COVID19 Webpage**  
**<https://www.caloes.ca.gov/cal-oes-divisions/recovery/covid-19>**

**FEMA Public Assistance Procurement Disaster Assistance Team**  
**<https://www.fema.gov/procurement-disaster-assistance-team>**

**SPOTTED SOMETHING THAT LOOKS WRONG? FEEDBACK IS APPRECIATED.**