

PROCUREMENT UNDER FEDERAL GRANTS: HOW TO SPEND AND KEEP YOUR FEDERAL DOLLARS

Florida Association of County Attorneys
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TODAY'S AGENDA

- Importance of Compliance
- Procurement Requirements ***Revised in 2020***
- Documentation Requirements & Tips
- Q&A

PROCUREMENT IS ON THE RADAR

- 2016 OIG Report re FEMA Public Assistance:
 - Goals of proper procurement relate to more than just reasonable cost
 - Better enforcement would “motivate” recipients of federal funds to follow the rules
- 2021 OIG Report re FEMA Public Assistance:
 - “Noncompliance with procurement regulations was among the three findings OIG identified most often.”
 - “FEMA should not allow procurement-related questioned costs based solely on its determination of reasonableness.”
- 2021 OIG Memo re CARES Act Lessons Learned for American Rescue Plan:
 - We recommend that Treasury...apply the requirements of 2 C.F.R. to Federal financial assistance funded through ARP **to the maximum extent authorized by law...**

PROCUREMENT IS ON THE RADAR

CONTINUED

- American Rescue Plan Interim Final Rule:
 - ...payments from the **Fiscal Recovery Funds** as a general matter will be subject to the **provisions of...2 CFR part 200...**including the cost principles and restrictions on general provisions for selected items of cost.
- Treasury Compliance and Reporting Guidance:
 - Recipients are responsible for ensuring that any procurement using SLFRF funds, or payments under procurement contracts using such funds are **consistent with the procurement standards set forth in the Uniform Guidance at 2 CFR 200.317 through 2 CFR 200.327**, as applicable....
- Treasury Award Terms and Conditions:
 - Federal regulations applicable to this award include, without limitation...Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. Part 200...

WHY IT MATTERS

- Under 2 C.F.R. § 200.339, **Remedies for noncompliance**, the Federal awarding agency may...
 - **Impose conditions** on the award, such as:
 - Requiring reimbursement, rather than advance payments;
 - Withholding authority to proceed until agency is satisfied with performance;
 - Requiring additional, more detailed financial reports;
 - Requiring additional project monitoring;
 - Requiring the non-Federal entity to obtain technical or management assistance; or
 - Establishing additional prior approvals.
 - Temporarily **withhold cash payments** pending correction of the deficiency.
 - **Deny/disallow funds** for all or part of the cost of the activity or action not in compliance.
 - Completely or partially **suspend or terminate the Federal award**.
 - Initiate suspension or debarment proceedings.
 - Withhold further Federal awards for the project or program.
 - Take other remedies that may be legally available.

WHY IT MATTERS

- Remedies can happen now or later....OIG audits can lag payment by several years!
- Common reasons for losing funding:
 - Improper procurement;
 - Unreasonable cost;
 - Unsupported costs (i.e., inadequate documentation)
- Success depends on:
 - Understanding the requirements;
 - Implementing policies and procedures that support compliance;
 - Executing those policies and procedures;
 - Documentation, documentation, documentation.

HELPFUL RESOURCES

- 2 C.F.R. Part 200 (available at [ecfr.gov](https://www.ecfr.gov)—can view version by date)
- FEMA Procurement Disaster Assistance Team (PDAT) (www.fema.gov/grants/procurement):
 - 2019 Field Manual contains amplifying guidance
 - Contract provisions guide (updated June 2021)
- Today's handout: Procurement Compliance Toolkit
 - Regulations
 - Compliance worksheets

FEDERAL PROCUREMENT REQUIREMENTS

- Procurement Standards – 2 C.F.R. §§ 200.317-327
 - 200.317 – Procurements by states.
 - 200.318 – General procurement standards.
 - 200.319 – Competition.
 - 200.320 – Methods of procurement to be followed. ***REVISED***
 - 200.321 – Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.
 - 200.322 – Domestic preferences for procurements. ***NEW***
 - 200.323 – Procurement of recovered materials.
 - 200.324 – Contract cost and price.
 - 200.325 – Federal awarding agency or pass-through entity review.
 - 200.326 – Bonding requirements.
 - 200.327 – Contract provisions. ***REVISED***

GENERAL PROCUREMENT STANDARDS (2 C.F.R. § 200.318)

Two foundational documents required:

Procurement Procedures	Standards of Conduct (Conflict of Interest)
<ul style="list-style-type: none">• Must be compliant with federal/state/local rules.• Must be in writing and must be followed.• Must exist pre-disaster.	<ul style="list-style-type: none">• Must govern action of employees/officers/agents engaged in selection, award, and administration of contract.• Must cover personal and organizational conflicts of interest.• Must prohibit employees from soliciting/accepting gifts.• Must provide for disciplinary actions.• Must cover organizational conflicts of interest among contractors.• Must prohibit contractors that develop/draft solicitations from competing for that work.

GENERAL PROCUREMENT STANDARDS (2 C.F.R. § 200.318)

CONTINUED

- Award contracts to only **responsible contractors**
 - Document procedures for checking qualifications
 - Contractors must certify they and subcontractors are not debarred or suspended
 - Check SAM.gov website—no funding for work awarded to debarred or suspended contractor
 - Check state-specific naughty list ([Florida Dept. of Management Vendor Lists](#))
 - Also consider history of past performance

GENERAL PROCUREMENT STANDARDS (2 C.F.R. § 200.318)

CONTINUED

- “The non-Federal entity is encouraged to enter into state and local **intergovernmental agreements** or **inter-entity agreements** where appropriate for procurement or use of common or shared goods and services.”
- Use caution with piggybacking.

GENERAL PROCUREMENT STANDARDS (2 C.F.R. § 200.318)

CONTINUED

- Time and Material/Time and Equipment Contracts permissible only:
 - after a determination that **no other contract is suitable**;
 - if the contract includes a **ceiling price** that the contractor exceeds at its own risk; and
 - the applicant maintains a **high degree of oversight** to ensure efficient methods and cost controls.

FULL AND OPEN COMPETITION (2 C.F.R. § 200.319)

- Full and open competition means **NO**:
 - Unreasonable requirements to qualify
 - Unnecessary experience or excessive bonding requirements
 - Noncompetitive pricing practices
 - Noncompetitive contracts to existing consultants/contractors
 - Specifying brand names
 - Imposing geographic preferences

METHODS OF COMPETITION (2 C.F.R. § 200.320)

- Micro-Purchases (</= \$10,000) ***REVISED***
 - Must be distributed “equitably among qualified suppliers”
 - Entities may annually self-certify up to \$50,000 if they:
 - Document the amount;
 - Document a justification; and
 - Can demonstrate low risk or, for public institutions, if consistent with state law.
 - Higher thresholds are also possible, but only with federal agency approval.
 - Now considered an acceptable “non-competitive” procurement method.
 - P-cards can be used per documented and approved procedures.

METHODS OF COMPETITION (2 C.F.R. § 200.320)

CONTINUED

- Small Purchase Procedures (>\$10,000 and </>\$250,000)
 - Price or rate quotations must be obtained from an adequate number of qualified sources as determined appropriate by the City
 - We recommend no less than three
- Formal Competition (> \$250,000)
 - Sealed Bids – price determines winner
 - Proposals – price and other factors determine winner
- Qualifications-Based Formal Competition (> \$250,000)
 - Requests for Qualifications can be used instead of an RFP process only for architectural or engineering professional services (A/E Services)
 - A/E Services are also the only exception to the prohibition on geographic preferences

METHODS OF COMPETITION (2 C.F.R. § 200.320)

CONTINUED

- Noncompetitive Procurement
 - Micro-Purchases
 - Available only from a single source
 - Public exigency/emergency will not permit delay required for competitive solicitation
 - Federal awarding agency (e.g., FEMA) or pass-through entity (i.e., FDEM) approves in response to written request
 - After solicitation, competition is inadequate

SOCIOECONOMIC CONTRACTING (2 C.F.R. § 200.321)

- Required “Affirmative Steps”
 1. Placing qualified small and minority firms on solicitation lists
 2. Soliciting small/minority/women’s businesses whenever they are potential sources
 3. When economically feasible, dividing total requirements into smaller tasks to permit maximum participation
 4. Establishing delivery schedules which encourage participation
 5. As appropriate, using the SBA and MBDA
 6. Requiring prime contractor to take affirmative steps as to subs

DOMESTIC PREFERENCES (2 C.F.R. § 200.322) ***NEW***

- Requires preference for “purchase, acquisition, or use” of “goods, products, or materials” produced in the U.S.
- Requires preference inserted into all contracts and POs.
- Includes iron, aluminum, steel, cement, and other manufactured products.
- “Produced in the United States” means, for **iron** and **steel** products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
- “Manufactured products” means items and construction materials composed in whole or in part of non-ferrous metals such as **aluminum**; **plastics** and **polymer-based products** such as **polyvinyl chloride pipe**; aggregates such as **concrete**; **glass**, including **optical fiber**; and **lumber**.

CONTRACT COST AND PRICE (2 C.F.R. § 200.324)

- Cost or Price Analysis = *required*
 - For every procurement above the “Simplified Acquisition Threshold” – \$250,000
 - Document the cost analysis in procurement file
 - If you don’t determine that the contract price is fair and reasonable, Federal awarding agency will (**or may not**)
- Cost-plus-a-percentage-of-cost = Federal awarding agency cannot pay
 1. Payment is made at a pre-determined percentage rate;
 2. The pre-determined percentage rate is applied to actual performance costs;
 3. The contractor’s entitlement is uncertain at the time of contracting; and
 4. The contractor’s entitlement increases commensurately with increased performance costs.

BONDING (2 C.F.R. § 200.326)

- Bonding requirements are applicable “when awarding construction or facility improvement contracts” over \$250,000.
 - Bid Bond = 5% of Bid Price
 - 100% Performance Bond
 - 100% Payment Bond
- But what constitutes **construction work** or a **facility improvement** project?

The construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services.

- **Watch out!** FEMA guidance states that “construction work” also includes the supervision, inspection, and other onsite functions incidental to the actual construction.

CONTRACT PROVISIONS (2 C.F.R. § 200.327)

Required by Regulation	Recommended by FEMA
<ul style="list-style-type: none">• Remedies• Termination for Cause• Termination for Convenience• Equal Employment Opportunity• Davis-Bacon Act*• Copeland Anti-Kickback Act*• Contract Work Hours and Safety Standards• Right to Inventions*• Clean Air Act• Federal Water Pollution Control Act• Debarment & Suspension• Byrd Anti-Lobbying Act• Procurement of Recovered Materials• Domestic Preferences *NEW*• Prohibition on Certain Telecom and Video Surveillance Services or Equipment *NEW*• Affirmative Steps for Solicitation of Disadvantaged Firms	<ul style="list-style-type: none">• Changes• Access to Records• Non-Use of DHS Seal, Logo, and Flags• Compliance with Federal Law, Regulations, and Executive Orders• No Obligation by Federal Government• Program Fraud and False or Fraudulent Statements or Related Acts

* Not applicable to FEMA Public Assistance program

EMERGENCY CONTRACTING REQUIREMENTS

- Required **contract clauses** at 2 C.F.R. § 200.327 & Appendix II
- Applicable **bonding requirements** at 2 C.F.R. § 200.326
- **Responsible contractors** only
- **Cost or price analysis** to demonstrate cost is fair and reasonable
- No **cost-plus-percentage-of-cost** contracting
- **T&M** contracts may only be used if:
 - Documented determination that no other contract type is suitable
 - Not-to-exceed amount
 - High degree of contractor oversight
- Applicants must follow **documentation, oversight, and conflict of interest** requirements

Bottom Line: emergency contracting is not a free pass!

10 MOST COMMON PROCUREMENT MISTAKES

1. **Sole-sourcing** without adequate documentation of situation
2. Continuing the **noncompetitive contract** after emergency
3. **Piggybacking**
4. Failing to follow rules for T&M contracts
5. Use of **cost-plus-percentage-of-cost** contracting
6. Awarding contracts without the **required contract clauses**
7. Use of **geographic preferences**
8. Failing to take (or documenting) **affirmative steps** to solicit disadvantaged firms
9. Failing to conduct a **cost or price analysis** where required
10. Lack of **documentation**

DOCUMENTING THE PROCUREMENT

- Regulations require that you “maintain records sufficient to detail the history of each procurement.”
 - Solicitations / Request for Quotes
 - Independent Cost Estimate
 - Advertising
 - Solicitation Lists
 - Written Quotations
 - Affirmative Steps Compliance
 - “Written method for conducting technical evaluations of the proposals received and making selections”
 - Evaluations (we recommend individual score sheets)
 - Cost or Price Analysis
 - Notice of Award
 - Contracts and purchase orders with required contract provisions
 - Responsibility Determination
 - Debarment Certification
 - Anti-Lobbying Certification
 - Protest documentation
 - Evidence of contractor oversight
 - T&M contracting requirements

DOCUMENTING COSTS

- For FEMA, familiarize yourself with the documentation required for:
 - Force Account Labor
 - Force Account Equipment
 - Rented or Purchased Equipment
 - Supplies from Stock
 - Purchased Supplies
 - Contracts
 - Mutual Aid
- Some states (e.g., Florida) do not disburse FEMA-obligated funding until State auditors have validated 100% of project costs.
- FEMA-related documentation handout available [here](#)
- For ARP, consult Interim Final Rule, FAQs, and Compliance & Reporting Guidance

TIPS FOR DOCUMENTING COSTS

CONTINUED

- **READ** (or have someone else read) your contracts
- Only allow costs claimed in accordance with your contracts:
 - Overtime costs claimed according to rates specified;
 - If rates include fuel, do not pay for it or provide it separately;
 - If paying per diem, don't reimburse meals and lodging separately.
- If a not-to-exceed amount is exceeded:
 - Document why
 - Execute an amendment
- Support all necessary change orders using same process as required for contracts (i.e., cost analysis)
- Keep copies of all invoices and proof of payment
- Document any special circumstances or unforeseeable needs that increase costs
- Meetings – keep records of attendees, memorialize conversation with federal awarding agency

ALLOWABLE, REASONABLE COST

§200.403 Factors affecting allowability of costs.

...costs must meet the following general criteria in order to be allowable under Federal awards:

- (a) **Be necessary and reasonable** for the performance of the Federal award and be allocable thereto under these principles....
- (g) **Be adequately documented**....

§ 200.404 Reasonable costs.

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...

DISASTER RECOVERY BRIEFS

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Disaster Recovery Briefs

A timely commentary on developments and decisions affecting federal disaster assistance.

Overview

The availability of federal financial assistance depends on whether an applicant meets statutory, regulatory, and programmatic requirements. These requirements are informed by the interpretations of various entities, including the awarding agency (e.g., FEMA, HUD, Treasury), the Office of Inspector General, and judicial bodies that decide disputes, like Federal Courts and the Civilian Board of Contract Appeals which hears arbitrations of FEMA decisions. Through Disaster Recovery Briefs, Baker Donelson's Disaster Recovery Team provides timely analysis of guidance, reports, and decisions that impact the availability and provision of federal financial assistance, like FEMA Public Assistance, HUD Community Development Block Grants, and funding under the CARES Act Coronavirus Relief Fund, and American Rescue Plan Fiscal Recovery Funds, among others.

June 2021

June 2

- FEMA Applicants and American Rescue Plan Fiscal Recovery Fund Recipients Should Know About Updates to Procurement Requirements**
Entities that enter into contracts funded by federal grants like FEMA's Public Assistance program or the Coronavirus State and Local Fiscal Recovery Funds under the American Rescue Plan, must ensure their procurements and contracts meet the requirements of 2 C.F.R. Part 200, also referred to as the "Uniform Rules." Last fall, the Office of Management and Budget revised 2 C.F.R. Part 200, including the procurement standards. These updates apply to awards made or disasters declared after November 12, 2020, although a few provisions are retroactive to August 13, 2020.
[Read More](#)

June 2

- OIG Reports Lessons Learned from the CARES Act and Advises on American Rescue Plan**
Last year, the CARES Act Authorized the U.S. Department of the Treasury (Treasury) to make \$150 billion payments to state, local, territorial, and tribal governments from the Coronavirus Relief Fund (CRF). Treasury issued guidance on how the funds could be spent, but recipients were not required to sign assistance agreements and funds were not considered by the agency to be "grants" subject to most of the requirements of 2 C.F.R. Part 200, the Uniform Administrative requirements, Cost Principles, and Audit Requirements for Federal Awards. With enactment of the American Rescue Plan Act (ARF), Treasury is now poised to pay \$350 billion to state, local, territorial, and tribal governments from the Coronavirus State and Local Fiscal Recovery Funds (FRF). On May 17, 2021, the Department of the Treasury Office of Inspector General (OIG) issued a Memorandum entitled American Rescue Plan –

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Q&A DISCUSSION

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