

# **PUBLIC ASSISTANCE COVID-19 EMERGENCY PROTECTIVE MEASURES PROCUREMENT BULLETIN #5 REVISED – 4/3/20**

## **State of Nevada Division of Emergency Management**

### **COVID-19 Emergency Protective Measures**

Procurement Under Grants Conducted Under Exigent or Emergency Circumstances

#### **Key Points**

**The President’s Nationwide Emergency Declaration for Coronavirus Disease 2019 (COVID-19) Public Health Emergency was declared on March 13, 2020.**

“For the duration of the Public Health Emergency, which began January 27, 2020 as determined by the U.S. Health and Human Services, local governments, tribal governments, nonprofits, and other non-state entities may proceed with new and existing noncompetitively procured contracts in order to protect property and public health and safety, or to lessen or avert the threats created by emergency situations for

- 1) Emergency Protective Measures under FEMA’s Public Assistance Program and
- 2) Use of FEMA non-disaster grant funds by non-state recipients to respond to or address COVID-19.”

“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.”

(FEMA Memorandum from Acting Administrator Office of Response and Recovery, David Bibo, March 17, 2020)

#### **Local Procurement (including Tribal governments):**

- 1) All contracts must be in writing.
- 2) Your local jurisdiction procurement policy must still be followed, which may include formal notifications, price or rate quotations and competitive formal bid requirements.
- 3) Any emergency procurement must follow the State NRS 332.112 (Emergency Contracts), including:
  - a. These contracts must be reported to the governing body at its next regularly scheduled meeting.
  - b. The governing body (i.e. Board of Commissioners) minutes is required documentation.
- 4) Contracts must include the required Federal contract clauses (2 C.F.R. § 200.326 & Appendix II) (refer to the FEMA – Contract Provisions Template, September 30, 2019 for guidance)
- 5) Follow Federal 2 CFR 200 Requirements for procuring under Exigent or Emergency Circumstances:
  - a. Allows jurisdictions to proceed with new and existing noncompetitively procured contracts in order to protect property and public health and safety, or to lessen or avert the threats created by emergency situations for
    - i. Emergency protective measures under FEMA's Public Assistance Program and
    - ii. Use of FEMA non-disaster grant funds by non-state recipients and sub-recipients to respond to or address COVID-19.
  - b. Use of the emergency/exigency exception is only permissible during the actual emergency or exigent circumstances.

- c. To procure contracts/items non-competitively if the amount exceeds or is expected to exceed the simplified purchase threshold (currently \$250,000).  
(2 C.F.R. § 200.323(a) and (b))  
The jurisdiction must still comply with the other Federal 2CFR 200 requirements, including:
- (1) the contract must include the required contract clauses;
  - (2) the contract must include the Federal bonding requirements, if the contract is for construction or facility improvement;
  - (3) the non-state entity must award to a “responsible contractor;”
  - (4) the non-state entity must complete a cost or price analysis (FEMA requires 3 quotes, keep the documentation to provide when submitting for reimbursement); and
  - (5) the local jurisdictions cannot use a “cost-plus-percentage-of-cost contract” (refer to Section #7 on T&M and cost-plus-percentage-of-cost contract section)
- d. The allowance to sole source contracts in emergency/exigent circumstances:
- i. When it comes to reimbursement, the documentation that we will be asking for will include, but is not limited to:
    - a brief description of the product or service you procured,
    - an explanation of why was necessary to contract non-competitively, and
    - the impact to your community if you had not been able to use the non-competitively procured contract.

**Procurement Thresholds Guidance – Nevada Local Government Purchasing NRS 332 vs. Federal 2 CFR 200 Requirements**

Procurement Amount Thresholds	NRS 332 Requirements	Federal 2 CFR 200 Requirements
< \$10,000		Micro-Purchase Threshold: May be awarded without soliciting competitive quotations if the local jurisdiction considers the price to be reasonable.
Annual amounts > \$50,000 - \$100,000	2 Price or Rate Quotations and formal advertising is required unless deemed an "Emergency Contract"	
Annual amounts >\$100,000	Competitive Solicitation - Formal Bid and advertising required unless deemed an "Emergency Contract"	
\$10,000 - <\$250,000		Small Purchase Procedures: Price or rate quotations must be obtained from 3 qualified sources (FEMA determined the adequate number is 3)
\$250,000 and greater		See next page...

Procurement Amount Thresholds	NRS 332 Requirements	Federal 2 CFR 200 Requirements	Additional Federal 2 CFR 200 Requirements \$250,000 and greater
\$250,000 and greater		<p><u>ALL Procurements \$250,000 and greater:</u> Applicants must submit additional documentation for procurements in excess of the "Simplified Acquisition Threshold" including a "Cost Price Analysis."</p> <p style="text-align: center;">➔</p> <p><b>AND</b></p>	
			<p>1) <b>Procurement by Sealed Bids</b> (Formal Advertising):</p> <ul style="list-style-type: none"> <li>- Bids are publicly solicited, and a firm fixed price contract is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price</li> </ul> <p><b>OR</b></p>
			<p>2) <b>Competitive Proposal:</b></p> <ul style="list-style-type: none"> <li>- Conducted with more than one source submitting an offer and generally used when conditions are not appropriate for the use of sealed bids.</li> <li>- Refer to 2 CFR § 200.320 for guidance.</li> <li>- Documentation should include records of the sources who bid, what they bid, and the process to select the awardee</li> </ul> <p><b>OR</b></p>
			<p>3) <b>Noncompetitive Procurement Exemptions:</b></p> <p>This type of procurement may only be used when:</p> <ul style="list-style-type: none"> <li>(a) Full and open competition is infeasible because: <ul style="list-style-type: none"> <li>(i) The item is only available from a single source;</li> <li>(ii) It is a case of public exigency or emergency;</li> <li>(iii) Authorization is provided by the awarding agency; or</li> <li>(iiii) Competition is determined inadequate after solicitation of a number of sources; as well as</li> </ul> </li> <li>(b) A Cost Analysis is performed to determine cost reasonableness</li> </ul>

**\*\* Effective June 20, 2018: Federal "Micro-Purchase Threshold" increased to \$10,000 & the "Simplified Acquisition Threshold" increased to \$250,000**

## Note of Caution:

- 1) Failure to follow Federal contracting and procurement requirements puts local jurisdictions at risk of not receiving reimbursement or not being able to use FEMA grant funds for otherwise eligible costs.
- 2) Use of the public exigency or emergency exception is only permissible during the actual exigent or emergency circumstances.
- 3) Non-state entities should, upon awarding a noncompetitive contract, immediately begin the process of competitively procuring similar goods and services in order to transition to the competitively procured contracts as soon as the exigent or emergency circumstances cease to exist.
  - a. An exigency or emergency period will last often for a short time.
  - b. Once the emergency or exigency period ends, the contract must be re-solicited under full and open competition.
- 4) Engineering or Professional Services Contracts –
  - a. the Nevada Revised Statutes and Nevada Administrative Code has outlined exemptions for “Professional Services” (i.e. engineers, attorneys, etc.) in the procurement requirements.
  - b. Federal procurement requirements do not exempt Professional Services (i.e. engineering, accounting contracts) from following 2 CFR 200.
  - c. A contractor who fulfilled the requirement under emergency or exigent circumstances cannot compete for the new contract if that contractor helped the local jurisdiction develop or draft specifications, requirements, statements of work, or solicitation documents in support of the competitive procurement.
- 5) A contractor who fulfilled the requirement under emergency or exigent circumstances cannot compete for the new contract if that contractor helped the local jurisdiction develop or draft specifications, requirements, statements of work, or solicitation documents in support of the competitive procurement. This includes engineering contracts referred to as “professional services” in the Nevada Revised Statutes.
- 6) Piggyback Contracts

Piggyback contracting occurs when one entity with an existing contract assigns some or all its contractual rights to another entity that was not previously party to the contract.

  - Generally, FEMA discourages piggyback contracts because the original contract pertains to the needs of the original entity with a specific scope of work for that entity.
  - Recommend requesting assistance with contract review from the DEM Grants/Recovery Team before utilizing a “piggyback” type of contract,
- 7) Time and Materials (T&M) or Cost-Plus-Percentage-of-Cost (CPPC) Contracts.
  - a. Federal procurement rules do not prohibit the use of T&M contracts and CPPC contracts by states, FEMA discourages states from using these contracts because they generally lack provisions that control costs and maximize efficiency in performing work. FEMA and the Office of the Inspector General closely scrutinize these types of contracts for cost reasonableness.
  - b. Although T&M contracts are discouraged, there may be instances where T&M contracts are appropriate in the short term for activities such as debris removal, emergency power restoration, or other immediate actions required to address emergency health and safety threats under a Public Assistance award.
- 8) Local jurisdictions should contact the DEM Recovery/Grants Team or FEMA Region IX Program Office to request assistance with any procurement activity concerns.

## References

### Nevada Revised Statute

#### [NRS 332.112](#) Emergency contracts

1. For the purposes of this section, an “emergency” is one which:
  - (a) Results from the occurrence of a disaster, including, but not limited to, fire, flood, hurricane, riot, power outage or disease; or
  - (b) May lead to impairment of the health, safety or welfare of the public if not immediately attended to.
2. If the authorized representative, chief administrative officer or governing body of the local government determines that an emergency exists affecting the public health, safety or welfare, a contract or contracts necessary to contend with the emergency may be let without complying with the requirements of this chapter. If such emergency action was taken by the authorized representative or chief administrative officer, he or she shall **report it to the governing body at its next regularly scheduled meeting.**

### Federal References:

FEMA – COVID-19 Memo: [Procurement Under Grants Conducted Under Emergency or Exigent Circumstances](#)

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

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

FEMA – [Contract Provisions Template](#), September 30, 2019

FEMA - [Procurement Guidance for Recipients and Subrecipients under 2 CFR Part 200 \(Uniform Rules\) Supplement to the Public Assistance Procurement Disaster Assistance Team \(PDAT\) Field Manual](#)

## State Procurement (excluding Tribal governments)

- 1) Must follow NRS [333.130](#), [333.180](#) and NAC 333.114 State Purchasing policies.
- 2) The Administrator for NV Department of Administration must approve all emergency purchases.
  - a. It must be a threat to "the health, safety or welfare of the persons in this state occurs."
  - b. Obtain written authorization for an emergency purchase by sending an email to Administrator Kevin D. Doty at [kddoty@admin.nv.gov](mailto:kddoty@admin.nv.gov).
  - c. If your agency makes a purchase to protect life without receiving prior authorization from the Administrator for the Department of Administration, send an email to Administration Doty at [kddoty@admin.nv.gov](mailto:kddoty@admin.nv.gov) on the next working day so he can give after-the-fact approval.
- 3) Must follow Federal 2 CFR § 200 requirements for procurement, regardless of emergency or exigency:
  - a. Must include Federally required contract provisions (refer to the FEMA PDAT Contract Provisions Template for guidance);
  - b. Procuring Recovered Materials –  
Procure only items designated in guidelines of the Environmental Protection Agency (EPA) that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000. (40 CFR § 24 ).
  - c. Must ensure the agency is following the cost principles in 2 CFR §§ 200.400 – 200.474, ensuring that costs are reasonable (2 CFR § 200.404).

### Note of Caution:

#### 4) Piggyback Contracts

Piggyback contracting occurs when one entity with an existing contract assigns some or all its contractual rights to another entity that was not previously party to the contract.

- Generally, FEMA discourages piggyback contracts because the original contract pertains to the needs of the original entity with a specific scope of work for that entity.
- Recommend consulting with DEM Grants/Recovery Team before you procure a "piggyback" type of contract.

#### 5) Time and Materials (T&M) or Cost-Plus-Percentage-of-Cost (CPPC) Contracts.

- a. Federal procurement rules do not prohibit the use of T&M contracts and CPPC contracts by states, FEMA discourages states from using these contracts because they generally lack provisions that control costs and maximize efficiency in performing work. FEMA and the OIG closely scrutinize these types of contracts for cost reasonableness.
- b. Although T&M contracts are discouraged, there may be instances where T&M contracts are appropriate in the short term for activities such as debris removal, emergency power restoration, or other immediate actions required to address emergency health and safety threats under a Public Assistance award.
- c. States entering into T&M contracts are encouraged to include language in the contract that specifies a ceiling price and limits the duration of the contract to a short time period, thus providing the state time to develop a scope of work and transition to the more competitive procurement procedures.

- 6) Professional Services Contracts –
  - a. the Nevada Administrative Code has outlined competitive selection exemptions for “Professional Services” (engineers, architect, accountant, attorneys, expert witness) in the procurement requirements (NAC 333.150)
  - b. Federal procurement requirements do not exempt Professional Services (i.e. engineering contracts) from following 2 CFR 200.
  - c. A contractor who fulfilled the requirement under emergency or exigent circumstances cannot compete for the new contract if that contractor helped the local jurisdiction develop or draft specifications, requirements, statements of work, or solicitation documents in support of the competitive procurement.

**References**

**Nevada Administrative Code Reference**

**NAC 333.114 Authorization for emergency purchases. (NRS 333.130, 333.180)**

1. The Administrator will authorize an emergency purchase if an emergency, as that term is defined in [NRS 414.0345](#), or any other situation that the Administrator identifies as a threat to the health, safety or welfare of the persons in this state occurs and he or she determines that the emergency purchase is in the best interests of the State.
2. The Administrator may authorize an emergency purchase for any amount.
3. If the Administrator authorizes an emergency purchase, he or she will provide the using agency with written authorization for the emergency purchase, including, without limitation, a description of the justification for authorizing the emergency purchase. The Administrator will provide a separate written authorization for each order relating to the emergency purchase.

**Federal References:**

FEMA – [Procurement Standards for States under FEMA Public Assistance Awards FAQ](#)

FEMA – COVID-19 Memo: [Procurement Under Grants Conducted Under Emergency or Exigent Circumstances](#)

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

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

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**FOR QUESTIONS, PLEASE CONTACT:**

*Thank you!*