Procurement Under Grants

Federal Requirements for Recipients and Subrecipients of Public Assistance Funding

COVID-19 Support

FEMA Procurement Disaster Assistance Team (PDAT)

FEMA

Game Plan

You will:

- Gain **general knowledge** of the procurement rules
- Increase your awareness of **risk areas**
- Learn about available **tools & resources**

Hot Topics We'll Discuss:

- Sole-sourcing under E&E
- Additional requirements under E&E
- Use of pre-existing contracts during E&E

Kickoff: Uniform Rules

2 C.F.R. §§ 200.317 – 326

317	Procurements by States
318	General Procurement Standards
319	Competition
320	Procurement Methods
321	Socioeconomic Contracting
322	Recovered Materials
323	Contract Cost or Price
324	Review of Procurements
325	Bonding Requirements
326	Contract Provisions

Objectives

- Reasonable Cost
- Other Policy Goals

Rules that Apply to States

Are You a State Entity?

- Any State of the United States
- District of Columbia
- US Territories:
  - Commonwealth of Puerto Rico
  - U.S. Virgin Islands
  - Guam
  - American Samoa
  - Commonwealth of the Northern Mariana Islands
- State Agency
- State Instrumentality

Applicable Rules

317	Procurements by States
322	Recovered Materials
326	Contract Provisions

Replay

State **must**:

Follow **State procurement policies** and procedures

+

Recovered Materials

Contract Provisions

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Rules that Apply to Non-State Entities

Are You a Non-State Entity?

- Local Governments
- **Tribal Governments**
- Institutions of Higher Education
- Hospitals
- Houses of Worship
- Other Private Non-Profit Organizations

Applicable Rules

Must follow **own** procurement policies and procedures

+

Must follow **state** or **Tribal Law**

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Must follow **federal** procurement standards (318-326)

318	General Procurement Standards
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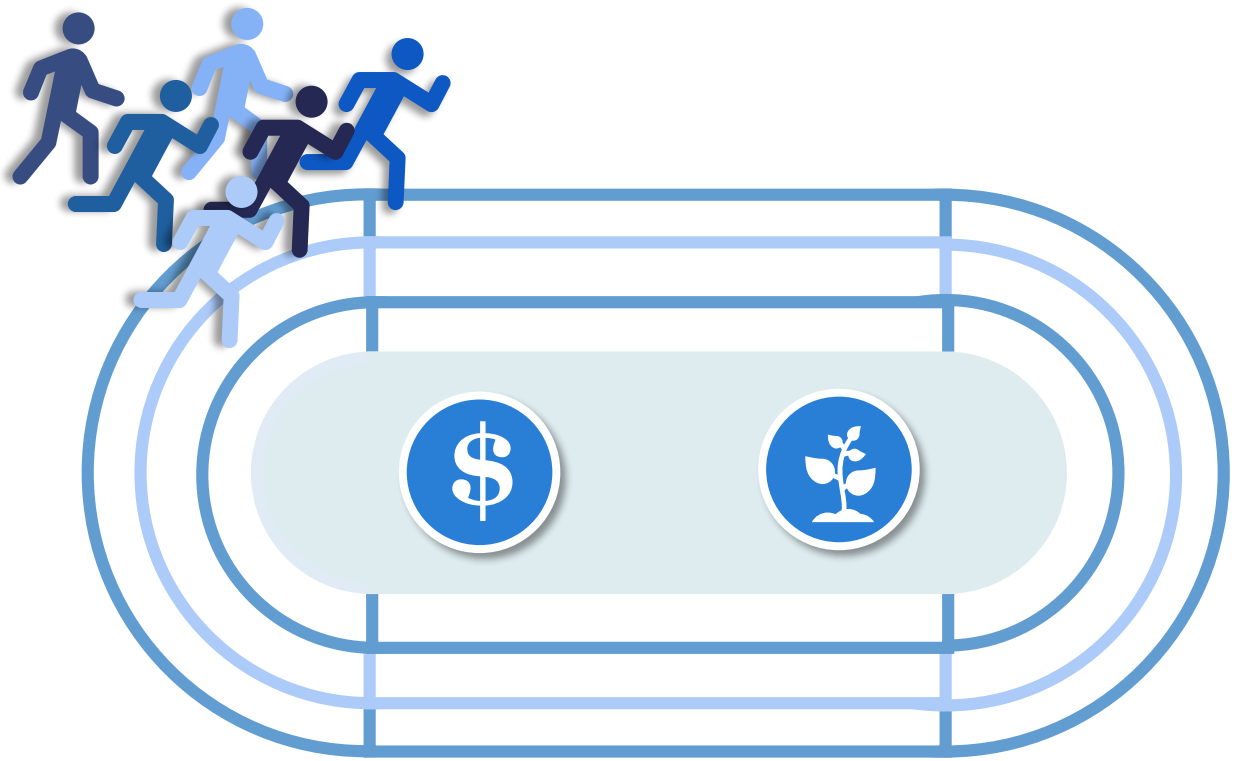
Full & Open Competition: Fair Playing Field

- **Key principle** of procurement rules
- All qualified and responsible sources are eligible to compete without restrictions
- Cast the net broadly to reach **fair and reasonable pricing from the most qualified contractor**
- Prevents favoritism, fraud, waste, and abuse



Methods of Procurement

Micro-Purchase	Small Purchase	Sealed Bidding	Competitive Proposals	Sole Sourcing
Up to $10K	Up to $250K	Usually Over $250K	Usually Over $250K	No Threshold

Independent Estimates are required before receiving bids or proposals

Price/Cost Analysis is required for procurements over $250K

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320 Procurement Methods

Sole-Source Procurement Under E&E

Situations that demand **immediate aid or action**

Emergency

Need to alleviate a threat to life, public health or safety, or improved property

Exigency

Need to avoid, prevent or alleviate serious harm or injury, financial or otherwise

If using sole sourcing due to emergency or exigency, you **must**:

- Justify with **documentation**
- Use only during the **period of actual** exigent or emergency circumstances
- Transition to a competitive method **as soon as period ends**

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Sole-Sourcing Under E&E for COVID-19

The exception is applicable to **contracts entered into** or **used** on or after January 27, 2020

Jan. 27, 2020

March 13

March 17

- For the duration of the current federal Public Health Emergency, the ongoing **COVID-19 pandemic qualifies as an E&E circumstance**
- **Non-sate entities may sole-source under that exception**
- Sate entities have to follow their own state procurement rules

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Procurement Under E&E for COVID-19

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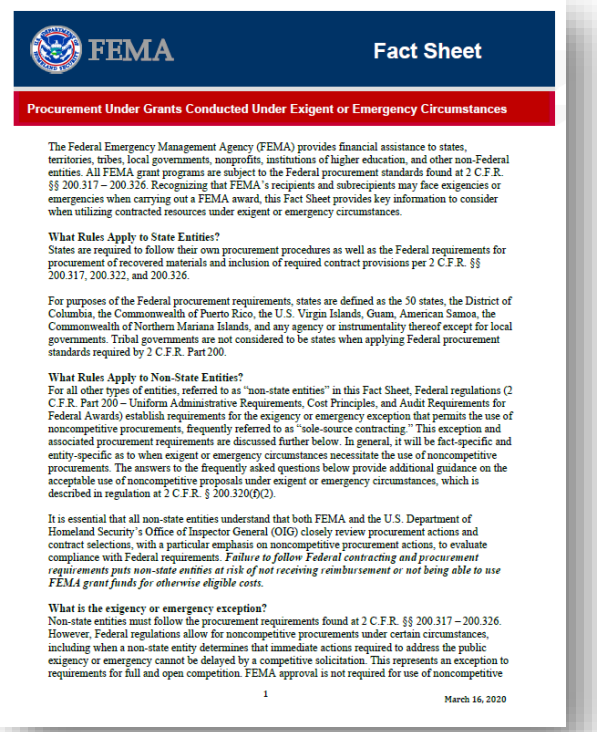

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Procurement Under Grants Conducted Under Exigent or Emergency Circumstances

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What Rules Apply to Non-State Entities?
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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

1 March 16, 2020

March 16, 2020

If sole-sourcing under the E&E exception,

non-state entities MUST:

- Use only during the **period of actual** Public Health Emergency (HHS)
- Document and provide **justification** for the use of the exception (list of suggested elements for justification provided)
- Conduct a **cost or price analysis** if applicable
- Follow **bonding requirements** if applicable

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Procurement Under E&E for COVID-19

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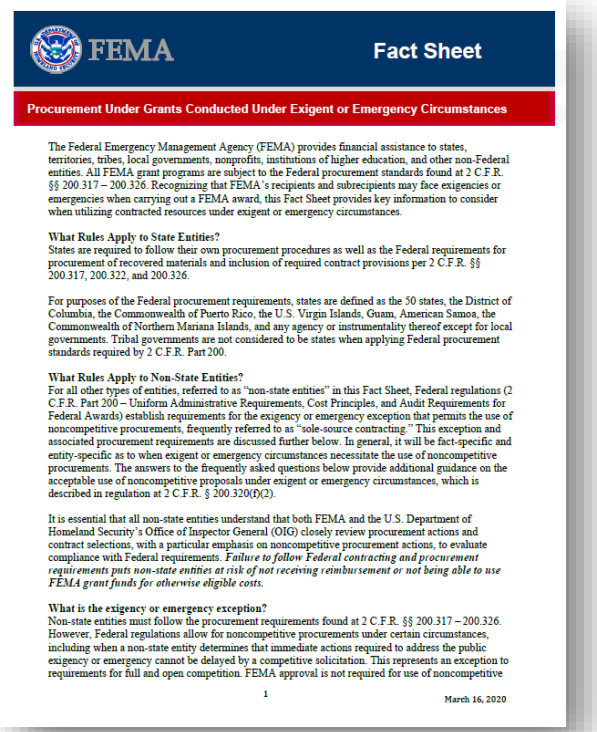

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1 March 16, 2020

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If sole-sourcing under the E&E exception,

non-state entities MUST:

- Include required **contract clauses**
- Follow **T&M contract requirements** if applicable
- **NOT enter into CPPC contracts.** They are prohibited!
- Award contract to a **responsible contractor**
- Follow **documentation, oversight, conflict of interest requirements**

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Cost or Price Analysis

1

Cost or price analysis is required if your procurement is over **$250K**

Goal:

Determine if the price is fair & reasonable

2

Price Analysis:

- Simpler
- Examination of proposed price as **a whole**

Cost Analysis:

- More complex
- Evaluation of **separate cost elements**

3

Profit must be negotiated

- As a separate element of price for contracts with no price competition
- Always when doing cost analysis

Bonding Requirements

Applicability

- **Construction or facility improvement** contracts or subcontracts above **$250K**
- Must not unduly restrict competition

There Must Be:

- **A bid guarantee** from each bidder equivalent to 5% of the bid price
- **A performance bond** on the part of the contractor for 100% of the contract price
- **A payment bond** on the part of the contractor for 100% of the contract price

Contract Language: Provisions Applicable to PA

Required:

- Legal/contractual/administrative remedies for breach of contract
- Termination for cause or convenience
- Equal Employment Opportunity
- Contract Work Hours and Safety Standards Act
- Clean Air Act and Federal Water Pollution Control Act
- Debarment and Suspension
- Byrd Anti-Lobbying Amendment
- Procurement of Recovered Materials

Recommended:

- Contract Changes
- Access to Records
- 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

Very Frequent

Online Provisions Template Is Available at:
www.fema.gov/procurement-disaster-assistance-team

326 contract Provisions

Warning: You Cannot Limit Access to Records!

- Applies to contracts entered into after August 1, 2017
- FEMA **cannot reimburse** applicants for contract expenses **where the contract prohibits** the FEMA Administrator or U.S. Comptroller General from auditing or reviewing all aspects related to the contract.
- **DO NOT** include such a provision in contracts

Rules by Contract Type: Time & Materials

T&M Contract Cost:

Actual cost of materials

+

Direct labor hours charged at **fixed hourly rates**

Applicability:

- When not possible to initially estimate extent or duration of work
- Use only after determining that **no other contract is suitable**

Limitations:

- A **ceiling price**, that the contractor exceeds at own risk, must be established
- Must maintain high degree of **oversight to avoid unneeded cost over-runs**
- Use **only until the scope of work becomes clear**

Cost Plus a Percentage of Cost Contracts Are Prohibited!

How to Spot a CPPC Contract:

- Payment is at a predetermined rate
- This rate is applied to actual performance costs
- Contractor's entitlement is uncertain at the time of contracting
- Rate increases with increased performance costs

Why Using CPPC Contracts Is Prohibited:

- There is no incentive to control costs
- The contractor has a financial interest in increasing the cost of performance

Must Award Only to Responsible Contractors

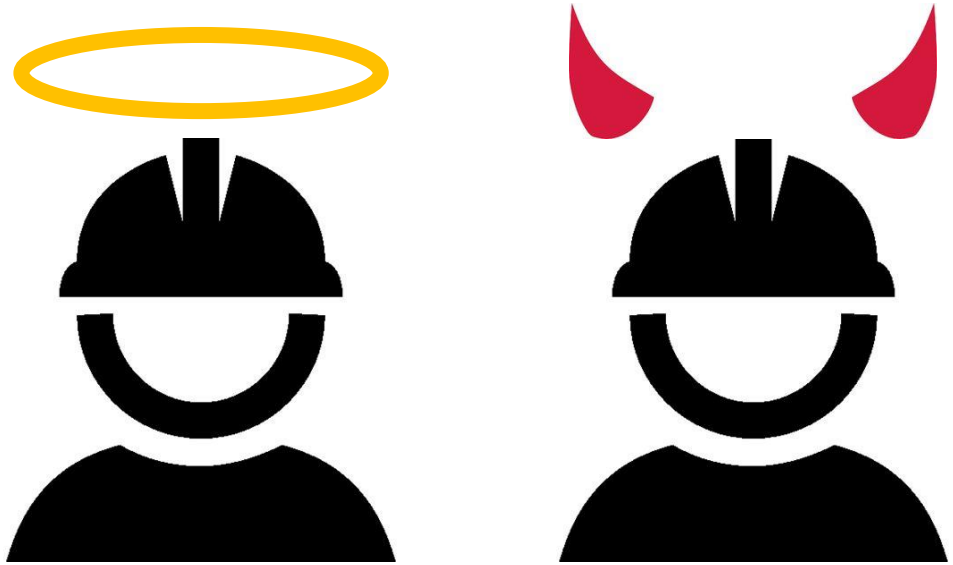
Able to perform successfully under the procurement's terms and conditions

Evidence of integrity

Has been compliant with public policy

Has a good record of past performance

Has adequate financial and technical resources



Must not have been debarred or suspended

Must not be listed on exclusions at www.sam.gov

Other Basic Rules of Engagement

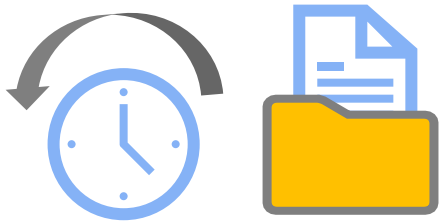
Mandatory Standards

1. **Contractor Oversight**
2. Necessity
3. Code of Conduct
4. **Conflict of Interest**
5. Gifts
6. Responsible Contractors Only
7. **Records**
8. Settlement of Issues

Encouraged Standards

1. Use of Federal Excess and Surplus Property
2. Value Engineering Contracts
3. Intergovernmental Agreements

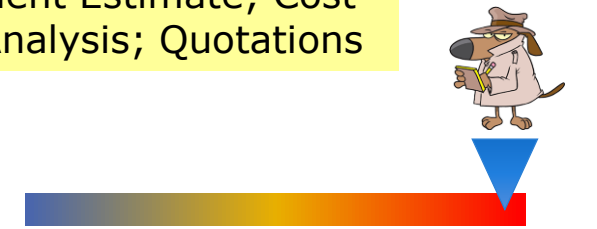
Records: Document, Document, Document!



Must maintain records sufficient to detail the history of the procurement

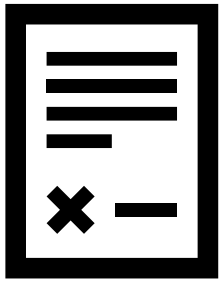
- Rationale for the Method of Procurement
- Selection of Contract Type
- Selection of Contractor
- Basis for Contract Price

- Sole Sourcing under E&E
- Time & Materials Contract Justification
- Search at www.SAM.gov
- Independent Estimate; Cost or Price Analysis; Quotations



318 General Proc. Standards

Use of Pre-Awarded/Pre-Existing Contracts during E&E

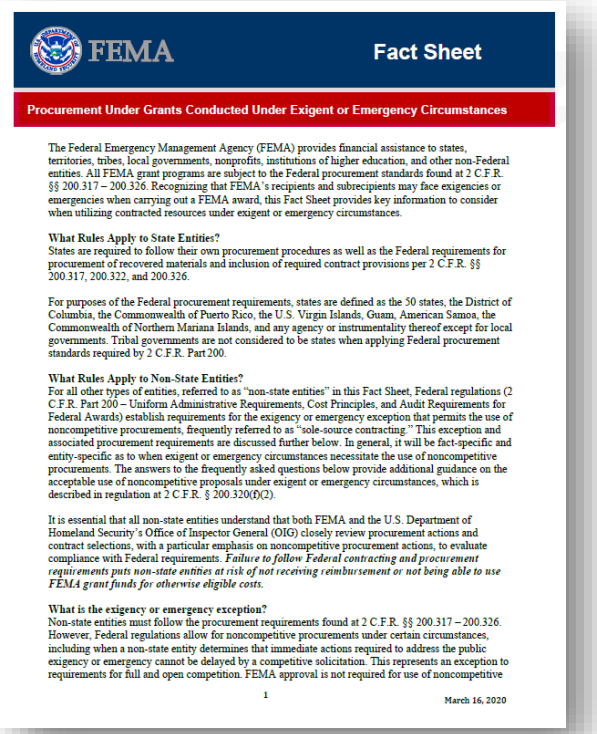


If the pre-awarded/pre-existing contract is **not in compliance** with the federal procurement requirements, it may still be possible to use the contract for the duration of the E&E

FEMA recommends that **non-state entities**:

- Review the requirements applicable during E&E and **take actions to modify pre-awarded or pre-existing** contracts where applicable
- **Justify the use of a sole-sourced contract** with suggested documentation

Procurement Under E&E for COVID-19



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Considerations for State Entities regardless of E&E circumstances:

- Follow **State procurement policies and procedures**
- Follow **procurement of recovered materials** requirements
- Include **required contract clauses**
- While the rules do not prohibit the use of T&M or CPPC contracts, **FEMA discourages states from using them** due to likelihood of unreasonable costs

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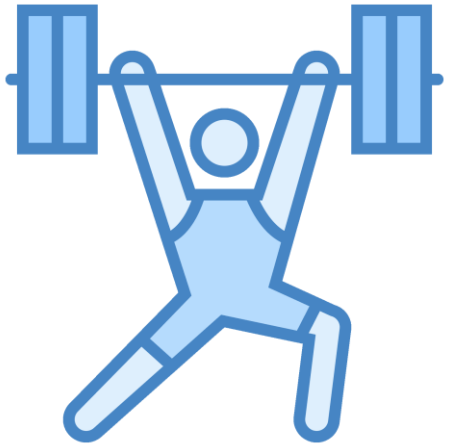
Tools Made Just for You: Long Practice Strategy

Procurement Rules Online
www.ecfr.gov
2 C.F.R. §§ 200.317-326



PDAT Website
www.fema.gov/procurement-disaster-assistance-team

- PDAT Resources
  - Contract Provisions Template
  - COVID-19 Guidance

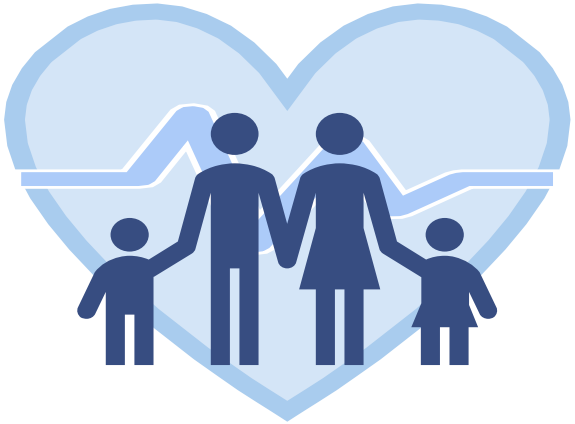
Docs for Download

Other POCs

- Contact your State Emergency Management Representative
- **Work with PA Program Staff**

www.SAM.gov

We Will Get There!



Full Community Recovery