

June 21, 2016



**FEMA**

**PROCUREMENT GUIDANCE FOR RECIPIENTS AND SUBRECIPIENTS UNDER  
2 C.F.R PART 200 (UNIFORM RULES)  
SUPPLEMENT TO THE PUBLIC ASSISTANCE  
PROCUREMENT DISASTER ASSISTANCE TEAM (PDAT) FIELD MANUAL**

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1. **PURPOSE.** This document provides guidance for Non-Federal Entity (“NFE”) recipients and subrecipients of Federal financial assistance awarded by the Federal Emergency Management Agency (“FEMA”) when using that assistance to finance procurements of property and services. The guidance provided by this document only applies to Federal financial assistance (e.g., grants and cooperative agreements) subject to the procurement standards of the government-wide *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*, at 2 C.F.R. §§ 200.317 to 200.326, which were adopted by the Department of Homeland Security (“DHS”). See 2 C.F.R. Part 3002.
2. **AUTHORITY.** FEMA provides Federal assistance through various financial assistance programs under the authority of various Federal laws. NFEs that are recipients and subrecipients of Federal financial assistance provided by FEMA under these programs are generally required to comply with the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (“Uniform Rules”) at 2 C.F.R. Part 200, as adopted by DHS at 2 C.F.R. Part 3002. Chapter I, ¶ 3 of this document contains a detailed list of these programs and authorizing statutes.
3. **WAIVER.** FEMA may waive any provisions of this document to the extent permitted by Federal law or regulation.
4. **DATES OF APPLICABILITY**
  - a. With one exception identified in Sec. 4.b., below, financial assistance associated with emergencies or major disasters declared under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”), the procurement standards at 2 C.F.R. §§ 200.317 to 200.326 are the default standards that apply to those grants associated with emergencies or major disasters declared on or after December 26, 2014. See 79 Fed. Reg. 75871, 75872 (Dec. 19, 2014). For awards made by FEMA, or for emergency or major disasters declared, prior to December 26, 2014 (this includes awards associated with prior emergencies or disasters, but not started until after this date), Federal financial assistance awards are governed by the Uniform Administrative Requirements at either 44 C.F.R. Part 13 (for state, local, and Indian tribal governments) or 2 C.F.R. Part 215 (for institutions of higher education, hospitals, and other nonprofit organizations), depending upon the type of entity.

- b. Grace Period. A Non-Federal Entity (also known as a “NFE”), however, may continue to comply with the former procurement standards applicable to FEMA awards at 44 C.F.R. Part 13 (for states, local, and Indian tribal governments) or 2 C.F.R. Part 215 (for institutions of higher education, hospitals, and other nonprofit organizations) until the completion of two additional fiscal years after December 26, 2014. This is an elective grace period. If a NFE elects to use the previous procurement standards, it must affirmatively document this decision in its internal procurement policies, including the date upon which its grace period (based upon the two additional fiscal years) will end and it will accordingly transition to the new procurement standards. 2 C.F.R. § 200.110(a). *See also*, Ch. 1, par. 2.e., below for additional amplifying guidance.
5. AMENDMENTS TO THIS DOCUMENT. FEMA may periodically update this document due to changes in other revised or new guidance or regulations.
6. SUPPLEMENT. This document is intended to supplement the *FEMA Field Manual, Public Assistance Grantee and Subgrantee Procurement Requirements Under 44 C.F.R. Pt. 13 and 2 C.F.R. pt. 215*, dated, December 2014 (“PDAT<sup>1</sup> Field Manual” or “Field Manual”) by providing up-to-date identification, analysis and discussion of the current Federal procurement standards found at 2 C.F.R. pt. 215, which went into effect on December 26, 2014. The Field Manual can be found online at the following web link: <https://www.fema.gov/media-library/assets/documents/96773>, and provides in-depth discussion of the previous Federal procurement standards, to include analysis of Department of Homeland Security (“DHS”) Office of Inspector General (“OIG”) audits related to various procurement violations and real-world procurement scenarios. Together, both documents provide a comprehensive analysis of the Federal procurement standards that apply to procurements associated with disaster financial assistance provided both after and prior to December 26, 2014.
7. DISCLAIMER. This document and the guidance provided therein is not intended to, nor does it provide or constitute legal advice. This document is only intended to serve as a general guide as to the Federal procurement standards identified in the Uniform Rules. Adherence to, application of, or use of this document and the information herein to a procurement subject to Federal grant money, does NOT guarantee the legal sufficiency of any procurement, nor ensure that an award or subaward will NOT be audited or investigated, and subsequently determined to be non-compliant with the procurement standards. All legal questions concerning the sufficiency or insufficiency of a procurement in regards to the Federal procurement standards should be referred to servicing legal counsel.

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**PROCUREMENT GUIDANCE FOR RECIPIENTS AND SUBRECIPIENTS**

**TABLE OF CONTENTS**

<b><u>CHAPTER</u></b>	<b><u>PAGE</u></b>
<b>I. INTRODUCTION.....</b>	<b>I-1</b>
1. THE FEDERAL EMERGENCY MANAGEMENT AGENCY .....	I-1
2. BACKGROUND .....	I-1
3. AUTHORIZING LEGISLATION AND GRANT PROGRAMS .....	I-3
4. DEFINITIONS.....	I-3
5. FEMA’S ROLE .....	I-3
<b>II. APPLICABILITY.....</b>	<b>II-1</b>
1. LEGAL EFFECT .....	II-1
2. APPLICABILITY.....	II-1
3. FEDERAL LAWS, REGULATIONS, EXECUTIVE ORDERS, AND OTHER FEMA REQUIREMENTS .....	II-3
4. STATE, LOCAL, AND TRIBAL LAWS AND REGULATIONS.....	II-5
<b>III. PROCUREMENT BY A STATE .....</b>	<b>III-1</b>
1. GENERAL STANDARD .....	III-1
2. COST ALLOWABILITY.....	III-1
3. LAW, REGULATIONS, AND EXECUTIVE ORDERS.....	III-2
4. PROCUREMENT BY NFEs OTHER THAN STATES.....	III-2
<b>IV. GENERAL PROCUREMENT STANDARDS.....</b>	<b>IV-1</b>
1. GENERAL.....	IV-1
2. CONTRACTING CAPACITY AND OVERSIGHT .....	IV-1
3. STANDARDS OF CONDUCT .....	IV-1
4. DETERMINING NFE’S NEEDS.....	IV-3
5. VALUE ENGINEERING.....	IV-5
6. CONTRACTOR QUALIFICATIONS .....	IV-5
7. RECORD KEEPING .....	IV-8
8. TIME AND MATERIALS CONTRACTS .....	IV-100

9.	SETTLEMENT OF CONTRACTUAL AND ADMINISTRATIVE ISSUES	IV-111
10.	WRITTEN PROCEDURES FOR PROCUREMENT TRANSACTIONS.....	IV-122
11.	STATE AND LOCAL INTERGOVERNMENTAL AGREEMENTS .....	IV-166
12.	CONTRACT PROVISIONS .....	IV-16
<b>V.</b>	<b>PROCEDURES AND GUIDANCE FOR OPEN MARKET PROCUREMENTS.</b>	<b>V-1</b>
1.	COMPETITION .....	V-1
2.	METHODS OF PROCUREMENT .....	V-7
3.	METHODS OF PROCUREMENT – ADDITIONAL TOPICS.....	V-199
4.	CONTRACT COST OR PRICE.....	V-20
5.	BONDING REQUIREMENTS .....	V-242
6.	CONTRACTING WITH SMALL AND MINORITY BUSINESSES, WOMEN’S BUSINESS ENTERPRISES, AND LABOR AREA SURPLUS FIRMS .....	V-253
7.	PROCUREMENT OF RECOVERED MATERIALS.....	V-285
8.	CHANGES.....	V-297
<b>VI.</b>	<b>OTHER PROCUREMENT METHODS AND ADDITIONAL TOPICS .....</b>	<b>VI-1</b>
1.	FEDERAL SUPPLY SCHEDULES.....	VI-1
2.	USE OF EXISTING CONTRACTS.....	VI-4
3.	JOINT PROCUREMENTS .....	VI-8
4.	PURCHASING SCHEDULES.....	VI-8
5.	OBTAINING GOODS AND SERVICES THROUGH MUTUAL AID.....	VI-9
6.	ASSIGNMENT OF CONTRACT RIGHTS.....	VI-10
7.	USE OF PURCHASING AGENTS.....	VI-11
8.	FEDERAL EXCESS PROPERTY .....	VI-132
<b>APPENDIX A.</b>	<b>AUTHORIZING LEGISLATION AND GRANT PROGRAMS.....</b>	<b>A-1</b>
<b>APPENDIX B.</b>	<b>DEFINITIONS.....</b>	<b>B-1</b>
<b>APPENDIX C.</b>	<b>APPLICABLE FEDERAL LAWS, REGULATIONS, AND EXECUTIVE ORDERS.....</b>	<b>C-1</b>

## **CHAPTER I**

### **INTRODUCTION**

#### **1. THE FEDERAL EMERGENCY MANAGEMENT AGENCY**

- a. The Federal Emergency Management Agency (“FEMA”) is a Federal agency within the Department of Homeland Security (“DHS”). FEMA is headed by an Administrator. FEMA’s primary mission is to reduce the loss of life and property and protect the Nation from all hazards, including natural disasters, acts of terrorism, and other man-made disasters, by leading and supporting the Nation in a risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 503 (2002) (codified as amended at 6 U.S.C. § 313).
- b. FEMA administers its programs and carries out its activities through its headquarters offices in Washington, D.C.; ten Regional Offices; Area Offices for the Pacific, Caribbean, and Alaska; various Recovery Offices; and temporary Joint Field Offices.
- c. FEMA provides Federal financial assistance through various assistance programs. Each program is not only governed by the enabling laws, implementing regulations, and FEMA policies for those programs, but also a wide range of cross-cutting laws, executive orders, and other regulations. As the Federal awarding agency for these programs, FEMA is responsible for the proper management and administration of these programs as otherwise required by law and enforcing the terms of the agreements it enters into with Non-Federal Entities (NFEs) that receive FEMA financial assistance, consistent with the requirements at 2 C.F.R. Part 200.

#### **2. BACKGROUND**

- a. NFE recipients and subrecipients of FEMA financial assistance under the financial assistance programs may use contractors to assist them in carrying out the scope of work under their Federal financial assistance awards.
- b. As a condition of receiving FEMA financial assistance for these contractor costs, a NFE must comply with applicable Federal laws, regulations, executive orders, and other requirements. Each NFE is responsible for managing and administering its Federal awards in compliance with the applicable requirements.
- c. One such Federal requirement is the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* codified at 2 C.F.R. Part 200 (“Uniform Rules”), which DHS has adopted at 2 C.F.R. § 3002.10. 79 Fed. Reg. 75871 (Dec. 19, 2014). Of particular note, the regulations at 2 C.F.R. §§ 200.317 to 326 set forth various procurement standards that NFEs must follow when using FEMA financial assistance to finance procurements of property and

services.

- d. The regulation at 2 C.F.R. § 200.110 provides that the procurement standards set forth at 2 C.F.R. §§ 200.317 to 200.326 apply to all FEMA awards issued on or after December 26, 2014. For grants and cooperative agreements under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, these procurement standards apply to those grants and cooperative agreements associated with emergencies or major disasters declared on or after December 26, 2014. *See* 79 Fed. Reg. 75871, 75872 (Dec. 19, 2014).
- e. A NFE, however, may continue to comply with the former procurement standards applicable to FEMA awards at 44 C.F.R. Part 13 (for states, local, and Indian tribal governments) or 2 C.F.R. Part 215 (for institutions of higher education, hospitals, and other nonprofit organizations) under two scenarios:
  - i. Until the completion of two additional fiscal years after December 26, 2014. “Two additional fiscal years” is interpreted to refer to the NFE’s fiscal year. Accordingly, if the NFE’s fiscal year is the equivalent of a calendar year (January 1 – December 31), the two additional fiscal year periods will begin on January 1, 2015 and end on December 31, 2016. If another NFE’s fiscal year runs from 1 July – 30 June, its two additional fiscal year periods will begin on July 1, 2015 and end on June 30, 2017. During the period of the two additional fiscal years, the NFE may continue to follow the procurement standards found at 44 C.F.R. Part 13 or 2 C.F.R. Part 215 (depending upon the type of entity). Once the two additional fiscal years are complete, the NFE must transition to the new procurement standards found in 2 C.F.R. Part 200. As the grace period is voluntary, if a NFE elects to utilize the grace period, it must affirmatively document this decision in its internal procurement policies, including the date upon which it will transition to the new procurement standards. 2 C.F.R. § 200.110(a). There is no template or one way to do this.
  - ii. The previous procurement standards must continue to be used in situations involving declarations that were issued prior to December 26, 2014, to include all projects associated with such a declaration, regardless of project start date. For example, if a disaster declaration was issued on November 1, 2014, the previous procurement standards would apply. If a project associated with this declaration did not begin until June 1, 2015, the previous procurement standards would remain applicable because the project is associated with a disaster declaration that was issued prior to the effective date of the procurement standards found in the Uniform Rules.<sup>2</sup>

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<sup>2</sup> FEMA Office of Chief Counsel Procurement Disaster Assistance Team, Field Manual – Public Assistance Grantee and Subgrantee Procurement Requirements under 44 C.F.R. pt. 13 and 2 C.F.R. pt. 215, § V.C.2 (Dec. 2014), available at <http://www.fema.gov/media-library-data/1419360792322->

- f. The purpose of this document is to describe how a recipient or subrecipient of FEMA financial assistance can comply with the procurement standards of 2 C.F.R. §§ 200.317 to 200.326.

### 3. AUTHORIZING LEGISLATION AND GRANT AND COOPERATIVE AGREEMENT PROGRAMS

- a. This circular applies to all of the grant and cooperative agreement programs listed in Appendix A.
- b. Appendix A also identifies the programs' authorizing statutes and implementing regulations.

### 4. DEFINITIONS

- a. Appendix B provides the definitions used in this document, which are consistent with the definitions set forth in 2 C.F.R. Part 200, subpart A, except where otherwise noted.

### 5. FEMA'S ROLE

- a. General. As the Federal awarding agency, FEMA is responsible for monitoring financial assistance execution, and ensuring proper performance under the FEMA award, including compliance with the procurement standards. FEMA may, in exercising this responsibility, conduct both pre- and post-procurement reviews of a NFE's procurements consistent with the terms of 2 C.F.R. §§ 200.317-200.326.
- b. Pre-Award Procurement Review.
  - i. Technical Specifications. A NFE must make available, upon request by FEMA or a pass-through entity, technical specifications of proposed procurements by the NFE where FEMA or the pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review will generally take place before the time the specification is incorporated into a solicitation document. However, if the NFE requests a procurement review after a solicitation has been developed, FEMA or a pass-through entity, may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase. 2 C.F.R. § 200.324(a).
  - ii. Procurement Documents. The NFE must make available upon request, for FEMA or a pass-through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when any of the following conditions are

present. 2 C.F.R. § 200.324(b).

- (1) The NFE's procurement procedures or operation fails to comply with the procurement standards in 2 C.F.R. Part 200;
- (2) The procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;
- (3) The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a "brand name" product;
- (4) The proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or
- (5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold. 2 C.F.R. § 200.324(b).

iii. Exemption. The NFE is exempt from pre-procurement review if FEMA or the pass-through entity determines that the NFE's procurement systems comply with the standards of 2 C.F.R. Part 200. There are two possible methods for a NFE to avail itself of this exemption.

- (1) FEMA or Pass-Through Entity Review. The NFE may request that its procurement system be reviewed by FEMA or a pass-through entity to determine whether its system meets the standards under 2 C.F.R. Part 200 in order for its system to be certified. 2 C.F.R. § 200.324(c)(1). Generally, these reviews must occur where there is continuous high-dollar funding and third party contracts are awarded on a regular basis. In all cases where a recipient reviews a subrecipient's procurement system, it must provide the results of that review to FEMA.
- (2) Self-Certification. The NFE may self-certify its procurement system. Such self-certification must not limit FEMA's right to survey the system. Under a self-certification procedure, FEMA may rely on written assurances from the NFE that it is complying with the procurement standards at 2 C.F.R. §§ 200.317 to 200.326. The NFE must cite specific policies, procedures, regulations, or standards as being in compliance with these requirements and have its system available for review. 2 C.F.R. § 200.324(c)(2). Even if a NFE self-certifies, this does not prevent the NFE from requesting review by FEMA or a pass-through entity.

c. Post-Award Procurement Review. FEMA may review a NFE's procurement documents subsequent to the NFE's contract award as part of FEMA's authority



and responsibility to monitor financial assistance execution, and ensure proper performance and compliance with the terms and conditions of the FEMA award. Such a review may occur during close-out of a FEMA award, close-out of an individual project under a FEMA award, or through a FEMA audit or monitoring visit. *See* 2 C.F.R. § 200.336.

- d. Standard of Review. A “standard of review” is the criterion or level of deference by which FEMA will measure the propriety of a decision or action made by a NFE when conducting pre- and post-award review.
  - i. Mandatory Provisions. The regulations at 2 C.F.R. §§ 200.317 to 326 will, in some cases, set forth a mandatory procurement standard. For example, 2 C.F.R. § 200.323 requires NFEs that are not states to perform a price or cost analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold, including contract modifications. FEMA affords no deference to a NFE when making the determination of whether it complied with the mandatory regulation.
  - ii. Discretionary Provisions. The regulations at 2 C.F.R. §§ 200.317 to 326 will, in other cases, allow the NFE to take an action that involves the exercise of discretion or judgment. For example, the regulation at 2 C.F.R. § 200.318(j) provides that a NFE may use a time and materials contract only after, among other things, it makes a determination that no other contract is suitable. FEMA will review such discretionary procurement decisions by a NFE to determine whether: (1) the NFE’s decision lacked a rational basis; and/or (2) the procurement procedure involved a violation of Federal law, regulation, or FEMA policy. In reviewing whether a decision lacked a rational basis, FEMA does not substitute its judgment for that of a NFE, but may impose any one of the remedies for non-compliance available to it, for example, by identifying and substituting reasonable costs for actually incurred costs (that are determined to be unreasonable). 2 C.F.R. § 200.338
- e. Access to Records. The Federal awarding agency, Inspectors General, the Comptroller General of the United States, and the pass-through entity (e.g. the recipient), or any of their authorized representatives, must have the right of access to any documents, papers, or other records of the NFE which are pertinent to the Federal award, in order to make audits, examinations, excerpts, and transcripts. The right also includes timely and reasonable access to the NFE’s personnel for the purpose of interview and discussion related to such documents. 2 C.F.R. § 200.336.
- f. Audits. FEMA may perform or contract for audits of Federal awards or monitoring visits, which could include a review of a NFE’s procurements. 2 C.F.R. §§ 200.336 and 200.503.
- g. Training and Technical Assistance. FEMA provides procurement training and

technical assistance to NFEs at both the regional and national levels. For assistance, please contact your FEMA Regional Office.

## CHAPTER II

### APPLICABILITY

#### 1. LEGAL EFFECT

- a. FEMA has developed this document to assist NFEs in complying with the Federal procurement standards at 2 C.F.R. Part 200 and considers this document, in its entirety, to be a guidance document and not a legislative regulation. Although this guidance document does not have the force and effect of law or regulation, it does contain information about the regulations at 2 C.F.R. Part 200 that are mandatory.
- b. This document describes how a NFE can comply with a particular procurement standard. Unless stated otherwise, such examples should not be treated as the exclusive manner in which a NFE can comply with a particular procurement standard. If a NFE identifies an alternate method to comply with a particular regulation, it may contact FEMA for comment before pursuing that alternate method.

#### 2. APPLICABILITY

- a. General.
  - i. The regulation at 2 C.F.R. § 200.110 provides that the procurement standards set forth at 2 C.F.R. §§ 200.317 to 326 apply to all FEMA awards issued on or after December 26, 2014. For financial assistance under the Stafford Act, these procurement standards apply to those financial assistance awards associated with emergencies or major disasters declared on or after December 26, 2014. *See* 79 Fed. Reg. 75871, 75872 (Dec. 19, 2014).
  - ii. A NFE, however, may continue to comply with the former procurement standards applicable to FEMA awards at 44 C.F.R. Part 13 (for states, local, and Indian tribal governments) or 2 C.F.R. Part 215 (for institutions of higher education, hospitals, and other nonprofit organizations) until the completion of two additional fiscal years after December 26, 2014. This is an elective grace period and, if a NFE affirmatively elects to use the previous procurement standards, it must document this decision in its internal procurement policies, including the date upon which it will transition to the new procurement standards. 2 C.F.R. § 200.110(a). *See* Ch. I, ¶ e.
  - iii. This document only applies to those financial assistance awards that are awarded on or after the date of this circular's issuance or the end of the NFE's grace period, whichever is later. For financial assistance authorized under major disaster and emergency declarations pursuant to

the Stafford Act, this document only applies to financial assistance awarded under declarations occurring after December 26, 2014 or the end of the NFE's grace period (where affirmatively elected), whichever is later.

- b. States. When procuring property and services under a grant or cooperative agreement, a state (to include state agencies and instrumentalities of the state<sup>3</sup>) must use the same policies and procedures that it uses for procurements from its non-Federal funds. 2 C.F.R. § 200.317. A state must comply with 2 C.F.R. § 200.322 (Procurement of Recovered Materials), must ensure that every purchase order or other contract included any clauses required by 2 C.F.R. § 200.326 (Contract Provisions), and must follow all applicable Federal laws, executive orders, implementing regulations, and policies. As such, Chapter I (*Introduction*), Chapter II, ¶ 1 (*Legal Effect*), Chapter II, ¶¶ 3 (*Federal Laws, Regulations, and Executive Orders*) and 4 (*State, Local, and Indian Tribal Laws and Regulations*), Chapter III (*Procurement by a State*), Chapter IV, ¶ 12 (Contract Provisions), and Chapter V, ¶ 7 (Procurement of Recovered Materials) of this Supplement apply to the procurement of services or property by a state.
- c. Non-States. When procuring property and services under a grant or cooperative agreement, all other NFEs, must follow the regulations at 2 C.F.R. § 200.318 (General Procurement Standards) through 2 C.F.R. § 200.326 (Contract Provisions). 2 C.F.R. § 200.318. This includes local governments, institutions of higher education, hospitals, and other non-profit organizations, as well as Indian tribes (irrespective of whether they are serving as a recipient or subrecipient), institutions of higher education (that do not meet the definition of "state" instrumentality at 2 C.F.R. § 200.90), hospitals (that do not meet the definition of "state" instrumentality at 2 C.F.R. § 200.90), and other non-profit organizations. As such, Chapter I (*Introduction*), Chapter II, ¶ 1 (*Legal Effect of This Circular*), Chapter II, ¶¶ 3 (*Federal Laws, Regulations, and Executive Orders*) and 4 (*State, Local, and Indian Tribal Laws and Regulations*<sup>4</sup>), Chapter IV (*General Procurement Standards*), Chapter V (*Procedures and Guidance for Open Market Procurements*), and Chapter VI (*Other Procurement Methods and Additional Topics*) of this Supplement apply to the procurement of services or property by the NFEs that are not a state.
- d. Recipients of Federal Financial Assistance from FEMA and other Federal Agencies. A NFE that uses funding provided by another Federal agency or agencies for a third party procurement also supported by FEMA financial assistance must comply with the procurement requirements of both FEMA and the other Federal agencies providing Federal financial assistance. These

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<sup>3</sup> 2 C.F.R. § 200.90. "State" is defined as "any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any agency or instrumentality thereof exclusive of local governments.

<sup>4</sup> Id.

requirements may sometimes differ, with the result that FEMA expects the NFE to comply with both sets of requirements. If compliance with all applicable Federal requirements is impossible, the NFE should notify FEMA or its pass-through entity, as appropriate, for resolution by FEMA.

3. FEDERAL LAWS, REGULATIONS, EXECUTIVE ORDERS, AND OTHER FEMA REQUIREMENTS

- a. Enabling Laws, Implementing Regulations, and FEMA Policies. The property or services acquired by a NFE must be eligible for support and otherwise comply with the relevant enabling laws, regulations, and FEMA policies for the specific financial assistance programs set forth in Chapter I, ¶ 3.
- b. Scope of the Grant or Cooperative Agreement. The property or services acquired must be within the scope of work of the underlying grant or cooperative agreement.
- c. Period of Performance. FEMA expects the NFE to use sound business judgment in establishing and extending a contract's period of performance, with such period generally not exceeding the time necessary to accomplish the purpose of the contract. Furthermore, FEMA will not reimburse a NFE for contract work performed outside of the period of performance of the financial assistance award. 2 C.F.R. § 200.309; Standard Form 424D, ¶ 6.
- d. Contract Costs Incurred Prior to the FEMA Federal Assistance Award.
  - i. Pre-Award Costs. Pre-award costs are those costs incurred before the effective date of the FEMA award directly pursuant to negotiation and in anticipation of the FEMA award where such costs are necessary for efficient and timely performance of the scope of work. 2 C.F.R. § 200.458. Such costs are allowable only to the extent that they would have been allowable if incurred after the date of the FEMA award and only with the written approval of FEMA. For example, FEMA may fund pre-award planning or project costs directly related to the development of a Hazard Mitigation Grant Program project or planning proposal. *See* 44 C.F.R. § 206.439.
  - ii. Project Implementation Before Award.
    - (1) Contract costs associated with project implementation but incurred before FEMA has awarded a grant or cooperative agreement (or project under a grant or cooperative agreement) are generally unallowable for reimbursement. *See also* Appendix C, ¶ 6 (concerning environmental and historic preservation implications). For example, contract costs associated with the commencement of actual implementation of a project under the Hazard Mitigation Grant Program before FEMA has awarded that project are ineligible for reimbursement. *See* 44 C.F.R. § 206.439.

- (2) There are limited exceptions to this prohibition, and recipients should engage the appropriate Regional or FEMA Headquarters staff with specific questions. Furthermore, even where contract costs are incurred before the effective date of award, if those costs are ultimately deemed otherwise allowable, the NFE must still comply with the procurement standards of 2 C.F.R. Part 200 when procuring property or services.
- e. Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.
- i. General. The procurement standards set forth in the Uniform Rules at 2 C.F.R. §§ 200.317 to 200.326 apply to all awards as detailed in Chapter II, ¶ 2.a.
  - ii. Waivers. FEMA may, subject to certain limitations, approve exceptions to the procurement standards on a case-by-case basis for individual NFEs pursuant to 2 C.F.R. § 200.102(b). Recipients should contact their respective Regional Office for information about submitting waiver requests.
  - iii. More Restrictive Procurement Standards. FEMA may apply more restrictive procurement standards, to a class of FEMA awards or NFEs when approved by OMB or required by Federal statutes or regulations. 2 C.F.R. § 200.102(c). As of the date of this document, FEMA has not sought approval from OMB for any more restrictive requirements for any FEMA grant or cooperative agreement program or class of NFEs.
  - iv. Less Restrictive Procurement Standards. FEMA may also apply less restrictive procurement standards when making fixed amount awards, except for those requirements imposed by statute. 2 C.F.R. § 200.102(c).
  - v. Cost Principles. The costs under a FEMA grant or cooperative agreement must conform to the cost principles set forth under the Uniform Rules at 2 C.F.R. Part 200, subpart E. In general, costs must be necessary and reasonable; allocable to the FEMA award; conform to any limitations or exclusions set forth in the Cost Principles or in the FEMA award as to types or amount of cost items; be consistent with policies and procedures that apply uniformly to both Federally-financed and other activities of the NFE; be accorded consistent treatment; not be included as a cost or used to meet cost sharing or matching requirements of any other Federally-financed program in either the current or a prior period and authorized by Federal law or regulation; be adequately documented; and be determined in accordance with generally accepted accounting principles (“GAAP”), except, for state and local governments and Indian tribes only, as otherwise provided for in 2 C.F.R. Part 200, subpart E. 2 C.F.R. § 200.403.

- f. Other Federal Laws, Regulations, and Executive Orders.
  - i. In addition to complying with the Uniform Rules and the enabling laws, implementing regulations, and FEMA policies for a financial assistance program, each NFE must also comply with all other applicable Federal laws, regulations, and executive orders.
  - ii. Many of these laws, regulations, and executive orders will need to be included in third party contracts to the lowest tier necessary, and others, although not expressly referenced in a contract, will have a direct and indirect effect on a NFE's third party contracts.
  - iii. DHS issues, on an annual basis, Standard Terms and Conditions that apply to recipients of Federal awards from all DHS Components, including FEMA. In addition, a recipient executes a Standard Form ("SF") 424B or 424D with its financial assistance application to FEMA that contains standard assurances. The DHS Standard Terms and Conditions and SF 424B and D contain references to many cross-cutting Federal laws and regulations that may apply to a FEMA award.
  - iv. Appendix C provides a non-exhaustive list and description of some of the cross-cutting laws, regulations, and executive orders that may affect a NFE's procurement.
- g. Federal Acquisition Regulation. The Federal Acquisition Regulation ("FAR"), 48 C.F.R. Chapter 1, does not apply to FEMA-assisted procurements, absent Federal laws or regulations to the contrary. Nevertheless, in the case where the regulations at 2 C.F.R. §§ 200.317 to 200.326 need amplification as they relate to a particular procurement or a NFE's procurement laws, regulations, or policies do not provide guidance on a particular issue, then the FAR may prove helpful if the NFE's circumstances are suitable for application of the specific FAR provision under consideration.

#### 4. STATE, LOCAL, AND TRIBAL LAWS AND REGULATIONS AND STANDARDS

- a. General. The Uniform Rules provide that a state must, among other things, follow the same policies and procedures it uses for procurements from its non-Federal funds. 2 C.F.R. § 200.317. They also provide that all other NFEs must use their own documented procurement procedures which reflect applicable state, local, and tribal laws and regulations, provided that the procurement conform to applicable Federal law and the procurement standards set forth at 2 C.F.R. §§ 200.317 to 200.326. 2 C.F.R. § 200.318.
- b. Waivers of Local, State, and/or Tribal Procurement Standards. Under certain circumstances, NFE authorities may, pursuant to their own legal requirements, waive local, state, or tribal procurement standards or regulations as a result of, or in anticipation of a disaster or emergency. However, even though the appropriate NFE may have waived local, state or tribal procurement standards or regulations,

the NFE cannot waive the applicable Federal procurement standards, which would continue to apply to the NFE, even where local, state, or tribal procurement standards or regulations have been waived.

- c. Direct Conflicts Between the Federal Procurement Standards and the Procurement Standards Applicable to NFEs Other Than States. The Federal procurement standards are relatively brief. They only address certain, limited procurement concepts and do not address all possible procurement issues. Where the Federal procurement standards do not address a particular area of procurement, FEMA expects the NFE to apply local, state, and/or tribal procurement standards or regulations – whichever applies to the particular NFE. However, where a *direct conflict* exists between a Federal procurement standard and a local, state and/or tribal procurement standard or regulation, FEMA expects the NFE to apply the more restrictive procurement standard.

NFE procurement standards may, in some cases, be more restrictive than the Federal procurement standards at 2 C.F.R. §§ 200.318 to 200.326. For example, the regulation at 2 C.F.R. § 200.320(b) allows a NFE to use procurement by small purchase procedures when the services, property, or other property acquired do not cost more than the simplified acquisition threshold (which is currently \$150,000). It may be the case that the applicable state, local, and/or Indian tribal procurement laws and regulations do not permit small purchase procedures for acquisitions over \$50,000. In such a circumstance where there is a direct conflict between local, state (and/or tribal) procurement standards and these Federal procurement standards, the NFE is required to follow the more restrictive applicable state, local, or tribal laws and regulations. A more permissive procurement standard of the Uniform Rules would not, in other words, control over more restrictive state, local, or tribal standards. Note that this concept of direct conflicts and more or less restrictive standards *only applies to NFEs other than states*. States will always follow the procurement standards found at 2 C.F.R. § 200.317, which directs them to utilize their own procurement standards, comply with 2 C.F.R. § 200.322 (procurement of recovered materials), and 2 C.F.R. § 200.326 (contract provisions).



## CHAPTER III

### PROCUREMENT BY A STATE

#### 1. GENERAL STANDARD

- a. When procuring property and services under a grant or cooperative agreement, a state must follow the same policies and procedures that it uses for acquisitions from its non-Federal funds. 2 C.F.R. § 200.317. A state must comply with 2 C.F.R. § 200.322 (Procurement of Recovered Materials) and ensure that every purchase order or other contract includes any clauses required by 2 C.F.R. § 200.326 (Contract Provisions). As such, Chapter IV, ¶ 12 (Contract Provisions) and Chapter V, ¶ 7 (Procurement of Recovered Materials), which discuss the regulations at 2 C.F.R. §§ 200.322 and 326, apply to a state. A state must also follow all other applicable Federal law, executive orders, and implementing regulations.
- b. A “state” means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any agency or instrumentality thereof exclusive of local governments. As such, the procurement standard at 2 C.F.R. § 200.317 and described in Chapter III, ¶ 1.a apply to a state agency irrespective of whether that agency is acting as recipient or subrecipient under a FEMA award.
- c. Under the Stafford Act and other FEMA financial assistance programs, an Indian tribe may potentially serve as a recipient. An Indian tribe is not defined as a “state” at 2 C.F.R. § 200.90, however, meaning that the procurement standards applicable to an Indian tribe will always be 2 C.F.R. §§ 200.318 through 200.326 and not 2 C.F.R. § 200.317, unless the definition is subsequently revised by the Office of Management and Budget, which is responsible for the Uniform Rules.

#### 2. COST ALLOWABILITY

- a. The Uniform Rules require financial costs to conform to the Cost Principles at 2 C.F.R. Part 200, subpart E, for allowable costs. In general, costs must be necessary and reasonable; allocable to the FEMA award; conform to any limitations or exclusions set forth in the Cost Principles or in the FEMA award as to types or amount of cost items; be consistent with policies and procedures that apply uniformly to both Federally-financed and other activities of the NFE; be accorded consistent treatment; not be included as a cost or used to meet cost sharing or matching requirements of any other Federally-financed program in either the current or a prior period and authorized by Federal law or regulation; be adequately documented; and be determined in accordance with generally accepted accounting principles (“GAAP”), except, for state and local governments and Indian tribes only, as otherwise provided for in 2 C.F.R. Part 200, subpart E. *See* 2 C.F.R. § 200.403.

- b. Even if a state complies with its own policies and procedures when procuring services or property under a FEMA award, FEMA will not provide full reimbursement of a state's third party contract costs if FEMA determines the costs do not conform to the cost principles. For example, FEMA will not provide full reimbursement in the case of cost plus percentage of cost or cost plus percentage of construction cost contracts, as FEMA considers the percentage of cost portion of the contract to be unreasonable.
  - c. A state must use the cost principles at 2 C.F.R. Part 200, subpart E as a guide in the pricing of fixed-price contracts and subcontracts where costs are used in determining the appropriate price. 2 C.F.R. § 200.401.
3. LAW, REGULATIONS, AND EXECUTIVE ORDERS
- a. A state must comply with all applicable Federal laws, regulations, and executive orders when procuring services or property under a FEMA award.
  - b. This document provides a list of some of the applicable Federal laws, executive orders, and regulations at Appendices A and C.
4. PROCUREMENTS BY NFEs OTHER THAN STATES
- a. The remaining chapters of this circular discuss the procurement standards that apply to Institutions of Higher Education (both public and private), Hospitals, and other Private Non-Profit Organizations. Unlike the procurement standards for states, found in 2 C.F.R. § 200.317, the procurement standards for Institutions of Higher Education, Hospitals, and other Private Non-Profit Organizations are found at 2 C.F.R. §§ 200.318-326. With the exception of the requirements for Recovered Materials (2 C.F.R. § 200.322) and contract provisions (2 C.F.R. § 200.326), there is no other overlap of the procurement standards between States and NFEs other than States.
  - b. Accordingly, NFEs must be cognizant of the fact that the Federal procurement standards are differentiated by the type of entity receiving Federal disaster assistance from FEMA. In other words, the Federal procurement standards are divided into those that apply to States (as defined above and by the Uniform Rules) and those that apply to NFEs other than States – in other words, everyone else.
  - c. With the exception of the following discussion on the standards associated with 2 C.F.R. § 200.322 (Procurement of Recovered Materials) and 2 C.F.R. § 200.326 (contract provisions), the remaining sections and chapters of this document refer to the procurement standards applicable to NFEs other than States (local and tribal governments, institutions of higher education, hospitals, and other non-profit organizations). 2 C.F.R. § 200.318 – 200.326.

## CHAPTER IV

### **GENERAL PROCUREMENT STANDARDS FOR NFEs OTHER THAN STATES**

#### 1. GENERAL

- a. A NFE that is NOT a state, must use its own documented procurement procedures which reflect applicable state, local, and tribal laws and regulations, provided the procurement conforms to applicable Federal law and the standards set forth in 2 C.F.R. Part 200.
- b. The regulations at 2 C.F.R. §§ 200.318, 319, and 326 set forth various general procurement standards for NFEs, some of which are mandatory and some of which are encouraged. These standards are discussed in this chapter.
- c. A NFE must comply with all other applicable Federal laws, regulations, and executive orders when procuring services or property under a FEMA award. The requirements identified in this supplement only address the Federal procurement standards and not the other requirements established and made applicable through the Uniform Rules. This supplement provides a (non-exclusive) list of some of the applicable Federal laws, executive orders, and regulations at Appendices A and C.

#### 2. CONTRACTING CAPACITY AND OVERSIGHT

- a. NFEs must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders. 2 C.F.R. § 200.318(b).
- b. A NFE should maintain adequate technical capacity to comply with the procurement standards at 2 C.F.R. §§ 200.318 to 326. If a NFE lacks qualified personnel (force account labor) within its organization to undertake the various tasks (such as evaluating contractors, drafting specifications, overseeing contract performance), then FEMA expects the NFE to acquire the necessary services from sources outside the NFE's organization. If the NFE obtains such services, those services are eligible under a particular FEMA grant or cooperative agreement, and the NFE seeks to fund those services using FEMA award funding, then the procurement standards at 2 C.F.R. Part 200 and this circular will apply to those contracts and to those contractors selected to perform procurement functions on behalf of the NFE.

#### 3. STANDARDS OF CONDUCT

- a. Written Standards. The NFE must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award, and administration of contracts. 2 C.F.R. § 200.318(c)(1).

- b. Personal Conflicts of Interest. No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a FEMA award if he or she has a real or apparent conflict of interest. Such a conflict would arise when the employee, officer, or 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 parties, has a financial or other interest in or a tangible personal benefit from a firm considered for award. 2 C.F.R. § 200.318(c)(1); *See also* Standard Form 424D, ¶ 7; Standard Form 424B, ¶ 3.
  - i. FEMA considers a “financial interest” to be the potential for gain or loss to the employee, officer, or 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 parties as a result of the particular procurement. The prohibited financial interest may arise from ownership of certain financial instruments or investments such as stock, bonds, or real estate, or from a salary, indebtedness, job offer, or similar interest that might be affected by the particular procurement.
  - ii. FEMA considers an “apparent” conflict of interest to exist where an actual conflict does not exist, but where a reasonable person with knowledge of the relevant facts would question the impartiality of the employee, officer, or agent participating in the procurement.
- c. Gifts. The officers, employees, and agents of the NFE must neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, NFEs may set standards for situations in which the financial interest is *de minimus*, not substantial, or the gift is an unsolicited item of nominal value. 2 C.F.R. § 200.318(c)(1).
- d. Violations. The NFE’s written standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the NFE. 2 C.F.R. § 200.318(c)(1). For example, the penalty for a NFE’s employee may be dismissal, and the penalty for a contractor might be the termination of the contract.
- e. Organizational Conflicts of Interest.
  - i. Parent, Subsidiaries, and or Affiliates. If a NFE has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the NFE must maintain written standards of conduct governing organizational conflicts of interest. Organizational conflicts of interest within this context means that because of relationships with a parent company, affiliate, or subsidiary organization, the NFE is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization. 2 C.F.R. § 200.318(c)(2).
  - ii. Other Contractors. An organizational conflict of interest can also arise

within the context of contractors that are not related organizations. An organizational conflict of interest arises in these cases where a person, because of other activities or relationships with other persons, is unable or potentially unable to render impartial assistance of advice to the NFE, the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage. Chapter V, ¶ 1.b provides more information about such organizational conflicts of interest.

- iii. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such requirements. 2 C.F.R. § 200.319(a).

#### 4. DETERMINING NFE NEEDS

- a. Eligibility. The property and services to be acquired must be eligible under the Federal financial assistance award, including the Federal law authorizing the FEMA award and any implementing regulations and policies. Furthermore, if FEMA assistance will finance the cost of property or services, the property or services must be within the scope of work of the specific FEMA grant or cooperative agreement (or project within that grant or cooperative agreement). *See* Chapter II, ¶ 3.a.
- b. Necessity. The Uniform Rules require the NFE to establish procedures to avoid the purchase of unnecessary or duplicative items. 2 C.F.R. § 200.318(d). In monitoring whether a NFE has complied with its procedures to avoid the purchase of unnecessary or duplicative items, FEMA bases its determination on what would have been the NFE's reasonable expectations at the time it entered into the contract.
  - i. General Prohibition. FEMA expects the NFE to limit an acquisition to its current and reasonably expected needs to carry out the scope of work under the FEMA award, and may not add quantities or options to the contract solely for needs unrelated to the scope of work under the FEMA award or for the purpose of assignment to another party at a later date. The prohibition does not apply, however, to joint procurements or state or local government purchasing schedules or contracts.
  - ii. Advance Contracts for Future Work. A NFE may award advance contracts before an incident occurs for the potential performance of work under a Stafford Act emergency or major disaster. These are also known as pre-positioned or pre-awarded contracts. These types of contracts are eligible for reimbursement when used to support response and recovery efforts pursuant to a financial assistance award; however, NFEs must ensure that these contracts are awarded in accordance with the Federal

procurement standards found at 2 C.F.R. §§ 200.318 – 200.326 and that the scope of work adequately encompasses the type and extent of work anticipated for its use in response to and recovery from the disaster.

- c. Procurement Size. The NFE should consider whether to consolidate or break out the procurement to obtain a more economical purchase. 2 C.F.R. § 200.318(d).
  - i. Joint Procurements. It may be economically advantageous for a NFE to enter into a joint procurement with others that have similar needs. A joint procurement will enable the two or more NFE's to obtain advantages unavailable for smaller procurements.
  - ii. Smaller Procurements. The regulations require a NFE to take the affirmative step, when possible, to divide total requirements by breaking out procurements when economically feasible into smaller tasks or quantities to permit maximum participation of small and minority businesses and women's business enterprises. 2 C.F.R. § 200.321(b)(3). Absent efforts to permit maximum participation of small and minority businesses and women's business enterprises, a NFE should not break out a larger procurement merely to bring it under the micro-purchase or simplified acquisition thresholds. In other words, NFEs should not perform what is commonly referred to as "project splitting," by which a single requirement is broken up into smaller components simply to defeat an established dollar threshold in order to take advantage of streamlined procurement procedures under the micro-purchase and small purchase procedures, methods of contracting.
- d. Options. The NFE's contracts may include options to ensure the future availability of property or services as long as the NFE justifies them as needed for the purpose of the FEMA grant or cooperative agreement.
- e. Lease vs. Purchase. A NFE must, where appropriate, make an analysis of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach. 2 C.F.R. § 200.318(d). FEMA will review any costs used in the comparison for reasonableness, realistic current market conditions, and based on the expected useful service life of the asset. The following provide examples of where the lease vs. purchase analysis is required under FEMA financial assistance programs.
  - i. Temporary Facilities under the Public Assistance Grant Program. Eligible Public Assistance applicants may request FEMA financial assistance for temporary facilities following a Stafford Act declaration to continue the essential community services<sup>5</sup> previously performed at a damaged facility.

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<sup>5</sup> "Essential community services" are those services of a governmental nature that are necessary to save lives, protect property and the public, and preserve the proper function and health of the

Applicants may decide to lease, purchase, or construct eligible temporary facilities; whichever option is selected, it must be reasonable, cost-effective, and temporary in nature. FEMA does not mandate that the applicant pursue a specific option, but will fund only the most cost-effective option. Before FEMA will provide financial assistance for temporary facilities under the Public Assistance Grant Program, FEMA requires the applicant to perform a cost comparison of the options and provide that to FEMA. Id.

- ii. Equipment to Perform Emergency Work under the Public Assistance Grant Program. FEMA may provide FEMA financial assistance to a NFE to acquire equipment to perform emergency work following an emergency or major disaster declaration under the Stafford Act. In those circumstances, the NFE must analyze its options to either lease or purchase equipment. FEMA, in most cases, does not mandate that the NFE either purchase or lease equipment but will fund only the most cost-effective option, and will review the applicant's analysis of comparative costs and other factors. *See* Public Assistance Program and Policy Guide, Ch. 2, Section V (C). The following provides several factors that FEMA will consider: estimated length of the period the equipment is to be used and the extent of use within that period; cumulative rental payments for the estimated period of use; net purchase price; transportation and installation costs; maintenance and other service costs; availability of purchase options; and trade-in or salvage value.

## 5. VALUE ENGINEERING

- a. A NFE is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lowest cost. 2 C.F.R. § 200.318(g).
- b. Under value engineering clauses, contractors are incentivized to submit change proposals which reduce the cost of contract performance by promising the contractor a share of the savings.
- c. Part 48 of the FAR is dedicated to the subject of value engineering and may provide a useful reference for a NFE.

## 6. CONTRACTOR QUALIFICATIONS

- a. Responsibility.

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community at large. Stafford Act § 102(11)(B), 42 U.S.C. 5122. *See also*, Public Assistance Program and Policy Guide, Ch. 2, Section VI (B) (17).

- i. Requirement. A NFE must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed requirement. 2 C.F.R. § 200.318(h). The Uniform Rules require a NFE to give consideration to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. The following provide amplifying information in regard to these mandatory criteria.

- (1) Integrity. A contractor must have a satisfactory record of integrity and business ethics. Contractors that are debarred or suspended as described in Chapter III, ¶ 6.d must be rejected and cannot receive contract awards at any level. A NFE, for those contractors that are not debarred or suspended, may also analyze whether the contractor has:

- a. Committed fraud or a criminal offense in connection with obtaining or attempting to obtain a contract;
- b. Violated Federal or state antitrust statutes;
- c. Committed embezzlement, theft, forgery, bribery, falsification or destruction of records, or tax evasion;
- d. Made false statements;
- e. Violated Federal criminal tax laws;
- f. Received stolen property;
- g. Committed any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of the contractor;
- h. Been indicted for any of the offenses described in ¶ 6.a.(1)(a)-(g); or
- i. Has delinquent Federal or state taxes

- (2) Public Policy. A contractor must have complied with the public policies of the Federal Government and state, local government, or tribal government. This includes, among other things, past and current compliance with the:

- a. Equal opportunity and nondiscrimination laws described in Appendix C, ¶ 5;
- b. Five affirmative steps described at 2 C.F.R. § 200.321(b) for all subcontracting under contracts supported by FEMA financial assistance; and



- c. Applicable prevailing wage laws, regulations, and executive orders

(3) Record of Past Performance. A contractor must be able to provide a satisfactory past performance record, which could include:

- a. Sufficient Resources. The contractor has key personnel with adequate experience and subcontractors with adequate experience that will be performing work under the prospective contract.

- b. Adequate Past Experience. A contractor has successful past experience in carrying out similar work, including a record of:

- i. Having the necessary organization, accounting, and operational controls;
- ii. Conforming to requirements and standards of good workmanship;
- iii. Forecasting and controlling costs and showing appropriate budgetary controls;
- iv. Adherence to schedules, including the administrative aspects of performance;
- v. Reasonable and cooperative behavior and commitment to customer satisfaction;
- vi. Business-like concern for the interest of the customer; and
- vii. Meeting quality requirements

(4) Financial Resources. A contractor must have adequate financial resources to perform the contract or the ability to obtain such resources. A NFE could analyze the existing cash flow of the contractor, account receivables, and other financial data as well as existing business prospects in making this evaluation.

(5) Technical Resources. A contractor must have or be able to acquire the required construction, production, and/or technical facilities, equipment, employees, and other resources to perform the work under the contract.

- ii. While the NFE is afforded great discretion in its Responsibility determination, FEMA requires a NFE exercising this discretion to make a documented determination that a prospective contractor qualifies as responsible and set forth the basis for that determination. 2 C.F.R. §

200.318(h).

- b. Organizational Conflict of Interest. The Uniform Rules require a NFE to exclude contractors that developed or drafted specifications, requirements, statements of work, or invitations for bids or requests for proposals from competing for such procurements in order to ensure objective contractor performance and eliminate unfair competitive advantage. *See* ¶ 3.e; 2 C.F.R. § 200.319(a).
- c. Lobbying Certification. The NFE must obtain a lobbying certification and, if applicable, a lobbying disclosure from a prospective contractor if the contract will exceed \$100,000 before awarding the contract. *See* 2 C.F.R. § 200.450; Chapter IV, ¶ 12.ix and Appendix C, ¶ 4; 44 C.F.R. Part 18 (New Restrictions on Lobbying).
- d. Debarment and Suspension. A NFE's contractor or subcontractor must not be debarred nor suspended from Federal programs. *See* 2 C.F.R. § 200.213.
  - i. OMB Guidelines. The rules of assistance exclusion are governed by the OMB guidelines to agencies on government-wide debarment and suspension set forth at 2 C.F.R. Part 180. These guidelines prohibit a NFE from entering into a "covered transaction" with a party listed on the System for Award Management ("SAM) Exclusions list. *See* 2 C.F.R. Part 200, Appendix II, ¶ I; Appendix C, ¶ 2.
  - ii. Department Guidelines. The Department has adopted debarment and suspension guidelines at 2 C.F.R. Part 3000, which adopt OMB's regulations at 2 C.F.R. Part 180 and provide supplemental policies and procedures.
  - iii. Covered Transactions. As detailed in 2 C.F.R. Part 180 and 2 C.F.R. Part 3000, the following comprise "covered transactions" of a NFE under a FEMA award:
    - (1) Contract awarded by a NFE in the amount of at least \$25,000 or more;
    - (2) Contract awarded by NFE that requires approval of FEMA (irrespective of contract amount);
    - (3) Contract awarded by a NFE for a Federally required audit (irrespective of the contract amount);
    - (4) A subcontract awarded by a NFE's contractor or subcontractor that requires the approval of FEMA (irrespective of amount) or is in the amount of at least \$25,000. 2 C.F.R. § 3000.220; 2 C.F.R. § 180.220.
  - iv. State Debarment and Suspension Lists. A NFE may treat, consistent with applicable state, local, and/or Indian tribal laws and regulations, any

prospective contractor or subcontractor listed on a centralized government debarment and suspension list as non-responsible and ineligible for contract award, pursuant to applicable state, local or tribal law. This would not fall within the Federal Suspension and Debarment classification, but would instead fall within the NFE's requirement to determine and award contracts only to contractors determined to be responsible.

## 7. RECORD KEEPING

- a. Procurement History. The Uniform Rules require a NFE to maintain records sufficient to detail the history of a procurement. These records include, but are not limited to, the following: rationale for method of procurement, selection of contract type, contractor selection or rejection, and the basis for contract price. 2 C.F.R. § 200.318(i).
  - i. Procurement Method. A NFE must document its rationale for the method of procurement used for each contract (micro-purchases, small purchase procedures, sealed bidding, competitive proposals, and noncompetitive proposals), including a justification for using the procurement by noncompetitive proposals method.
  - ii. Contract Type. A NFE must document its rationale for selecting the contract type it used (fixed price, cost reimbursement, or time and materials). In addition, time and materials contracts have additional requirements described at 2 C.F.R. § 200.318(j). *See* Chapter IV, ¶ 8.
  - iii. Contractor Selection. A NFE must document its rationale for contractor selection or rejection, including a written responsibility determination for the successful contractor.
  - iv. Price. A NFE must document the basis for the contract price, which will include the cost or price analysis for contracts exceeding the simplified acquisition threshold. *See* 2 C.F.R. § 200.323; Chapter V, ¶ 4.
  - v. Other Documentation. A procurement file should also include the following documentation as appropriate:
    - (1) Acquisition planning information and other pre-solicitation documents;
    - (2) List of sources solicited;
    - (3) Copies of published notices of proposed contract action;
    - (4) Independent cost estimate;
    - (5) Copy of the solicitation, all addenda, and all amendments;
    - (6) Determination of contractor's responsiveness;

- (7) Notice of award;
  - (8) Notice to unsuccessful bidders or offerors and record of any debriefing;
  - (9) Record of protests, disputes, and claims;
  - (10) Bid, performance, payment, and other bond documents;
  - (11) Notice to proceed
- b. Extent of Documentation. FEMA expects that the NFE will maintain reasonable documentation, such that documents included in a procurement history should be commensurate with the size and complexity of the procurement.
- c. Access to Records.
- i. The Uniform Rules provide that FEMA, DHS Office of Inspector General, the Comptroller General of the United States, and the pass-through entity, or any of their authorized representatives, must have the right of access to any documents, papers, or other records of the NFE which are pertinent to the FEMA award, in order to make audits, examinations, excerpts, and transcripts. 2 C.F.R. § 200.336; DHS Standard Terms and Conditions, v 3.0, ¶ XXVI (Dec. 4, 2013).
  - ii. A NFE must acknowledge and agree—and require any contractors, successors, transferees, and assignees acknowledge and agree—to comply with applicable provisions governing DHS access to records, accounts, documents, information, facilities, and staff. DHS Standard Terms and Conditions, v 3.0, ¶ XXVI (Dec. 4, 2013).

## 8. TIME AND MATERIALS CONTRACTS

- a. Definition. A time and materials type contract means a contract whose cost to a NFE is the sum of the actual cost of materials and direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit. 2 C.F.R. § 200.318(j)(1)(i) and (ii).
- b. Conditions Precedent. A NFE may use a time and materials type contract only after a determination that (1) no other contract is suitable; and (2) if the contract includes a ceiling price that the contractor exceeds at its own risk. 2 C.F.R. § 200.318(j).
- c. Oversight. Time and materials type contracts provide no positive profit incentive to the contractor for cost control or labor efficiency, which is why the Uniform Rule requires the inclusions of a contract ceiling price. The Uniform Rules also require the NFE to assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls. 2 C.F.R. § 200.318(j)(2).

- d. Differentiating Time and Materials and Cost Plus Percentage of Cost Contracts.
  - i. As described above, a time and materials (T&M) contracts provides for the payment of labor costs on the basis of fixed hourly billing rates which are specified in the contract. These hourly billing rates would include wages, indirect costs, general and administrative expense, and profit. No fee or profit is allowed except as part of the fixed billing rate for direct labor hours, such that materials are billed at cost.
  - ii. To include for the payment of labor costs on the basis of fixed hourly billing rates and allow the contractor to bill for actual costs other than labor (such as materials or travel) plus a percentage rate of those actual costs would constitute a prohibited cost-plus-percentage-of-cost contract. A contractor, however, is allowed to recover overhead costs on its direct costs, such as materials or travel, if the contractor's accounting system clearly separates the overhead costs associated with those direct costs and those overhead costs are not included in the overhead pool that is applied to direct labor costs. In other words, there must be no duplicate billing for material handling overhead costs in the rates applied to labor hours.
- e. FEMA Review.
  - i. FEMA will review a NFE's determination to use a time and materials contract under a reasonable basis standard.
  - ii. FEMA generally discourages a NFE from using time and materials type contracts; however, where their use is unavoidable, FEMA generally limits the use of these contracts to a reasonable time based on the circumstances during which the Applicant could not define a clear scope of work. FEMA also encourages a NFE to ensure that it has a unilateral right to terminate the contract for convenience that will enable the NFE to award a follow-on fixed price or cost reimbursement contract type.

## 9. SETTLEMENT OF ALL CONTRACTUAL AND ADMINISTRATIVE ISSUES

- a. General. A NFE alone is responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. 2 C.F.R. § 200.318(k). While not specifically defined in the Uniform Rules, these terms generally have the following meaning:
  - i. A "protest" is a disagreement before or over the award of a contract. Such disagreements can arise from, among other things, content in a solicitation, an award or proposed award of a contract, or termination or cancellation of an award of the contract.
  - ii. A "dispute" is a disagreement between the NFE and its contractor

regarding the rights of the parties after a contract has been awarded that do not concern award of the contract itself.

- iii. A “claim” is a written demand or assertion by the NFE or its contractor seeking payment of a specific sum of money, an adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.
  - iv. A “source evaluation” generally refers to the evaluation by a NFE of a prospective contractor’s proposal when using the procurement by competitive proposal method.
- b. Contractual Responsibilities. Neither FEMA nor the Uniform Rules relieve the NFE of any contractual responsibilities under its contracts. 2 C.F.R. § 200.318(k).
  - c. Violations of Law. FEMA and NFEs must refer violations of law to the local, state, or Federal authority having proper jurisdiction. 2 C.F.R. § 200.318(k).
  - d. FEMA Review. FEMA will not substitute its judgment for that of the NFE in resolving contractual and administrative issues unless the matter is primarily a Federal concern. 2 C.F.R. § 200.318(k). An example of a matter that is “primarily a Federal concern” includes, but is not limited to, a violation of Federal law, violation of any of the procurement standards at 2 C.F.R. §§ 200.318 to 326, and violation of other Federal regulations or executive orders, impropriety, waste, fraud, or abuse.
  - e. Liquidated Damages. If a NFE’s contract includes a liquidated damages provision, FEMA requires the NFE to credit any liquidated damages recovered to the FEMA award unless FEMA approves other uses for the liquidated damages.

## 10. WRITTEN PROCEDURES FOR PROCUREMENT TRANSACTIONS

- a. General. The Uniform Rules require that a NFE must have written procedures for procurement transactions. 2 C.F.R. § 200.319(c). FEMA expects these written procedures to address the following items.
- b. Solicitations. The NFE’s written procedures must ensure that all solicitations meet the following requirements. 2 C.F.R. § 200.319(c).
  - i. Clear Description. The solicitation must incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. 2 C.F.R. § 200.319(c)(1).
  - ii. Nonrestrictive Specification. The description of the technical requirements must not contain features that unduly restrict competition. 2 C.F.R. § 200.319(c)(1).

- iii. Qualitative Requirements. The description of the technical requirements may include a statement of the qualitative nature of the material, product, or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. 2 C.F.R. § 200.319(c)(1). The NFE should avoid detailed product specifications if at all possible.
  - (1) Brand Name or Equal. When it is impractical or uneconomical to write a clear and accurate description of the technical requirements of the property or services to be acquired, a NFE may use a “brand name or equal” description as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offerors must be clearly stated.
  - (2) Preference for Performance Specifications. FEMA interprets the Uniform Rules, in setting the requirements for solicitations, as expressing a preference for performance or functional specifications, although they do not prohibit the use of detailed technical specifications when appropriate. A performance specification describes an end result, an objective, or standard to be achieved, and leaves the determination of how to reach the result to the contractor. Using performance specifications, a NFE should describe what the product should be able to do or the services to accomplish without imposing unnecessarily detailed requirements on how to accomplish the tasks.
- iv. Requirements. The solicitation must identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals. 2 C.F.R. § 200.319(c)(2). If using the procurement through competitive proposals method, the NFE should state if it is reserving its right to award the contract to other than the lowest priced offeror.
- v. FEMA Funding. The solicitation must acknowledge the NFE’s use of FEMA funding for the contract, in compliance with the terms of its financial assistance award from FEMA. Specifically, the document should indicate that FEMA is providing the funds, the Catalog of Federal Domestic Assistance Number, as applicable, and the amount provided. *See* Financial Services and General Government Appropriations Act, 2015, Pub. L. No. 113-83, Division E, § 724 (2015); DHS Standard Terms and Conditions, v 3.0, ¶ II (Dec. 4, 2013); Appendix C, ¶ 3.
- vi. Contract Type. The solicitation should state the type of contract that will be awarded.
  - (1) Fixed Price. A fixed price contract provides for a firm price that remains irrespective of the contractor’s actual cost of performing

the scope of work under the contract. The risk of performing the work, at the fixed price, is borne by the contractor. Fixed price contracts may include an economic price adjustment, incentives, or both.

- (2) Cost Reimbursement. Cost-reimbursement type contracts provide for payment of certain incurred costs to the extent provided in the contract. They normally provide for the reimbursement of the contractor for its reasonable, allocable, actual, and allowable costs, with an agreed-upon fee. There is a limit to the costs that a contractor may incur at the time of contract award, and the contractor may not exceed those costs without the NFE's approval or does so at its own risk. In a cost-reimbursement contract, the NFE bears more risk than in a fixed price contract. There are many varieties of cost-reimbursement contracts, such as cost-plus-fixed-fee, cost-plus-incentive-fee, and cost-plus-award-fee.
  - (3) Time and Materials Contracts. A time and materials type contract is a contract whose cost to a NFE is the sum of the actual cost of materials and direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit. 2 C.F.R. § 200.318(j)(1)(i) and (ii). The Uniform Rules prohibit the use of this type of contract unless certain conditions precedent are met. *See* ¶ 8.b.
  - (4) Cost Plus Percentage of Cost. The use of cost plus percentage of cost and cost plus a percentage of construction cost methods of contracting are prohibited. *See* Chapter V, ¶ 4.c; 2 C.F.R. § 200.323(d).
- vii. Prohibitions. The Uniform Rules prohibit a NFE from using a solicitation that contains features that unduly restrict competition. 2 C.F.R. § 200.319(a). Some of the situations considered restrictive of competition include the following. *See also* Chapter V, ¶ 1.b.
- (1) Excessive Qualifications. Placing unreasonable requirements on firms in order for them to qualify to do business. 2 C.F.R. § 200.319(a)(1).
  - (2) Unnecessary Experience. Requiring unnecessary experience. 2 C.F.R. § 200.319(a)(2).
  - (3) Unnecessary Bonding. Requiring excessive bonding. 2 C.F.R. § 200.319(a)(2).
  - (4) Improper Qualification. Using improper prequalification procedures that conflict with 2 C.F.R. § 200.319(d).
  - (5) Retainer Contract. Making a noncompetitive solicitation only to a



person or firm on retainer contract where that award is not for property or services specified for delivery under the scope of work of the retainer contract. 2 C.F.R. § 200.319(a)(4).

(6) In-State, Local, or Tribal Geographic Preferences. Imposing prohibited in-state, local, or tribal geographic preferences that conflict with 2 C.F.R. 200.319(b).

(7) Organizational Conflicts of Interest. Allowing entities to submit bids or proposals in response to the solicitation where there would be a prohibited organizational conflict of interest. 2 C.F.R. § 200.319(a)(5).

viii. Federal Laws, Regulations, Executive Orders, and FEMA Requirements Affecting the Procurement. The solicitation should inform prospective contractors that they will need to comply with all applicable Federal laws, regulations, executive orders, and FEMA requirements.

- c. Necessity. The Uniform Rules require a NFE's written procedures to avoid acquisition of unnecessary or duplicative items. 2 C.F.R. § 200.318(d); Chapter IV, ¶ 4.b
- d. Records. The procurement procedures must ensure the generation of records sufficient to detail the history of the procurement. 2 C.F.R. § 200.318(i); Chapter IV, ¶ 7.
- e. Lease vs. Purchase. The procurement procedures must ensure that, where appropriate, the NFE makes an analysis of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach. 2 C.F.R. § 200.318(d); Chapter IV, ¶ 4.e.
- f. Procurement Methods. The NFE's procurement procedures must address what procurement methods will be used, including a description of those methods and the circumstances when used. These methods should ensure that a procurement complies with at least the minimum standards at 2 C.F.R. § 200.320 (Methods of Procurement to Be Followed) when using FEMA financial assistance for that procurement. These methods should also include a description of how and when the NFE will use joint procurements, purchasing agents, and Federal and state supply schedules.
- g. Additional Content. FEMA also recommends that a NFE's written procurement procedures address the following:
  - i. Legal Restrictions. The NFE's procurement procedures should include a description of any Federal, state, local, and tribal restrictions on the NFE's acquisitions.
  - ii. Third Party Contract Provisions. The NFE's procurement procedures

should address the required third party contract provisions required for third party contracts under Federal law, regulation, and executive order, including requirements for each third-party contractor to extend applicable requirements subcontractors. *See* 2 C.F.R. § 200.326; Chapter IV, ¶ 12.

- iii. Resolution of Procurement Issues. The NFE's procurement procedures should provide procedures for settling contractual and administrative issues arising out of procurements, including source evaluation, protests, disputes, and claims, in order to meet the requirements of 2 C.F.R. § 200.318(k).

## 11. STATE AND LOCAL INTERGOVERNMENTAL AGREEMENTS

- a. Use Encouraged. The Uniform Rules, to foster greater economy and efficiency, encourage a NFE 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. 2 C.F.R. § 200.318(e).
- b. Joint Procurements. FEMA interprets the regulation at 2 C.F.R. § 200.318(e) as encouraging NFEs to enter into intergovernmental agreements to conduct joint procurements. FEMA uses the term "joint procurement" to mean a method of contracting in which two or more NFEs agree to use a single solicitation document and enter into a single contract with a vendor for delivery of property or services in a fixed quantity, even if expressed as a total minimum or total maximum. *See* Chapter VI, ¶ 3.
- c. Purchasing Schedules or Purchasing Contracts. FEMA has interpreted the regulation at 2 C.F.R. § 200.318(e) as encouraging NFEs to enter into intergovernmental agreements for procurements and use of property and services through government purchasing schedules and contracts. FEMA uses the term "government purchasing schedule and contract" to mean an arrangement that a state, local, or Indian tribal government has established with several or many vendors in which those vendors agree to provide the option to the state, local, or Indian tribal government, their subordinate government entities, and others it might include in their programs to acquire specific property or services in the future at established prices. In establishing this arrangement, the NFE may also seek the agreement of a vendor to provide the listed property and services to others with access to the schedules. *See* Chapter VI, ¶ 4.

## 12. CONTRACT PROVISIONS

- a. Requirement under the Uniform Rules. A NFE's contracts must contain the applicable provisions described in Appendix II to the Uniform Rules (Contract Provisions for NFE Contracts Under Federal Awards), which are set forth below. 2 C.F.R. § 200.326. FEMA has provided model language for these required contract clauses at: <https://www.fema.gov/media-library/assets/documents/96773>.
  - i. Remedies.

- (1) Standard. Contracts for more than the simplified acquisition threshold must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate. *See 2 C.F.R. Part 200, Appendix II, ¶ A.*
  - (2) Applicability. This requirement applies to all FEMA financial assistance programs in excess of \$150,000, which is the current simplified acquisition threshold.
- ii. Termination for Cause and Convenience.
- (1) All contracts in excess of \$10,000 must address termination for cause and for convenience by the NFE including the manner by which it will be effected and the basis for settlement. *See 2 C.F.R. Part 200, Appendix II, ¶ B.*
  - (2) Applicability. This requirement applies to all FEMA grant and cooperative agreement programs, in excess of \$10,000.
- iii. Equal Employment Opportunity.
- (1) Standard. Except as otherwise provided under 41 C.F.R. Part 60, all contracts that meet the definition of “Federally assisted construction contract” in 41 C.F.R. § 60-1.3 must include the equal opportunity clause provided under 41 C.F.R. § 60-1.4(b), in accordance with Executive Order 11246, *Equal Employment Opportunity* (30 Fed. Reg. 12319, 12935, 3 C.F.R. Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, *Amending Executive Order 11246 Relating to Equal Employment Opportunity*, and implementing regulations at 41 C.F.R. Part 60 (Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor). *See 2 C.F.R. Part 200, Appendix II, ¶ C.*
  - (2) Key Definitions.
    - a. Federally Assisted Construction Contract. The regulation at 41 C.F.R. § 60-1.3 defines a “Federally assisted construction contract” as any agreement or modification thereof between any applicant and a person for construction work which is paid for in whole or in part with funds obtained from the Government or borrowed on the credit of the Government pursuant to any Federal program involving a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the

Government for a grant, contract, loan, insurance, or guarantee under which the applicant itself participates in the construction work.

- b. Construction Work. The regulation at 41 C.F.R. § 60-1.3 defines “construction work” as 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. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.

- (3) Applicability. This requirement applies to all FEMA financial assistance programs.

iv. Davis Bacon Act and Copeland Anti-Kickback Act.

- (1) Applicability of Davis-Bacon Act and Copeland-Anti-Kickback Act. The Davis-Bacon and Copeland-Anti-Kickback Acts only apply to the Emergency Management Preparedness Grant Program, Homeland Security Grant Program, Nonprofit Security Grant Program, Tribal Homeland Security Grant Program, Port Security Grant Program, and Transit Security Grant Program. These Acts do not apply to other FEMA grant and cooperative agreement programs, such as FEMA’s Public Assistance Grant Program. However, if the NFE’s own procurement standards include equivalents to, or adopt the Davis-Bacon and Copeland-Anti-Kickback Acts, under those circumstances, they should be applied by the NFE.
- (2) All prime construction contracts in excess of \$2,000 awarded by NFEs must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. §§ 3141-3144 and 3146-3148) as supplemented by Department of Labor regulations at 29 C.F.R. Part 5 (Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction)). *See* 2 C.F.R. Part 200, Appendix II, ¶ D.
- (3) In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week.
- (4) The NFE must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must

be conditioned upon the acceptance of the wage determination. The NFE must report all suspected or reported violations to the Federal awarding agency.

- (5) In contracts subject to the Davis-Bacon Act, the contracts must also include a provision for compliance with the Copeland “Anti-Kickback” Act (40 U.S.C. § 3145), as supplemented by Department of Labor regulations at 29 C.F.R. Part 3 (Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States). The Copeland Anti-Kickback Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The NFE must report all suspected or reported violations to FEMA.

v. Contract Work Hours and Safety Standards Act.

- (1) Where applicable (*see* 40 U.S.C. § 3701), all contracts awarded by the NFE in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. §§ 3702 and 3704, as supplemented by Department of Labor regulations at 29 C.F.R. Part 5. *See* 2 C.F.R. Part 200, Appendix II, ¶ E.
- (2) Under 40 U.S.C. § 3702, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week.
- (3) The requirements of 40 U.S.C. § 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of property or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.
- (4) Applicability. This requirement applies to all FEMA grant and cooperative agreement programs.

vi. Rights to Inventions Made Under a Contract or Agreement.

- (1) If the FEMA award meets the definition of a “funding agreement” under 37 C.F.R. § 401.2(a) and the NFE wishes to enter into a

contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the NFE must comply with the requirements of 37 C.F.R. Part 401 (Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements), and any implementing regulations issued by FEMA. *See* 2 C.F.R. Part 200, Appendix II, ¶ F.

- (2) The regulation at 37 C.F.R. § 401.2(a) currently defines “funding agreement” as any contract, grant, or cooperative agreement entered into between any Federal agency, other than the Tennessee Valley Authority, and any contractor for the *performance of experimental, developmental, or research work* funded in whole or in part by the Federal government. (emphasis added) This term also includes any assignment, substitution of parties, or subcontract of any type entered into for the performance of experimental, developmental, or research work under a funding agreement as defined in the first sentence of this paragraph.
- (3) Applicability. This requirement does not apply to the Public Assistance, Hazard Mitigation Grant Program, Fire Management Assistance Grant Program, Crisis Counseling Assistance and Training Grant Program, Disaster Case Management Grant Program, and Federal Assistance to Individuals and Households – Other Needs Assistance Grant Program, as FEMA awards under these programs do not meet the definition of “funding agreement.”

vii. Clean Air Act and the Federal Water Pollution Control Act.

- (1) Contracts for amounts in excess of \$150,000 must contain a provision that requires the contractor to agree to comply with all applicable standards, orders, or regulations issued pursuant to the Clean Air Act (42 U.S.C. §§ 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. §§ 1251-1387). Violations must be reported to FEMA and the Regional Office of the Environmental Protection Agency. *See* 2 C.F.R. Part 200, Appendix II, ¶ G.
- (2) Applicability. This requirement applies to all FEMA financial assistance programs, in excess of \$150,000.

viii. Debarment and Suspension.

- (1) NFEs and contractors are subject to the debarment and suspension regulations implementing Executive Order 12549, *Debarment and Suspension* (1986) and Executive Order 12689, *Debarment and*

*Suspension* (1989) at 2 C.F.R. Part 180 and the Department of Homeland Security's regulations at 2 C.F.R. Part 3000 (Non-procurement Debarment and Suspension). These regulations restrict awards, subawards, and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs and activities. See 2 C.F.R. Part 200, Appendix II, ¶ I; and Chapter IV, ¶ 6.d and Appendix C, ¶ 2.

- (2) A contract award must not be made to parties listed on the SAM Exclusions list. SAM Exclusions is the list maintained by the General Services Administration that contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549. SAM exclusions can be accessed at [www.sam.gov](http://www.sam.gov). See 2 C.F.R. § 180.530; Chapter IV, ¶ 6.d and Appendix C, ¶ 2.
- (3) Applicability. This requirement applies to all FEMA financial assistance programs.

ix. Byrd Anti-Lobbying Amendment.

- (1) Contractors that apply or bid for an award of \$100,000 or more must file the required certification. See 2 C.F.R. Part 200, Appendix II, ¶ J; 44 C.F.R. Part 18; Chapter IV, ¶ 6.c; Appendix C, ¶ 4.
- (2) Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. § 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award. See Chapter IV, ¶ 6.c and Appendix C, ¶ 4.
- (3) Applicability. This requirement applies to all FEMA financial assistance programs where contractors apply or bid for an award of \$100,000 or more.

x. Procurement of Recovered Materials.

- (1) A NFE that is a state agency or agency of a political subdivision of a state and its contractors must comply with Section 6002 of the

Solid Waste Disposal Act, Pub. L. No. 89-272 (1965) (codified as amended by the Resource Conservation and Recovery Act at 42 U.S.C. § 6962). *See* 2 C.F.R. Part 200, Appendix II, ¶ K; 2 C.F.R. § 200.322; Chapter V, ¶ 7.

(2) The requirements of Section 6002 include procuring only items designated in guidelines of the EPA at 40 C.F.R. Part 247 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 by the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

(3) Applicability. This requirement applies to all FEMA financial assistance programs, consistent with the guidance found in ¶ (2) above.

b. Additional FEMA Requirements. The Uniform Rules authorize FEMA to require additional provisions for NFE contracts. FEMA, pursuant to this authority, requires or recommends the following:

- i. Changes. To be eligible for FEMA assistance under the NFE's FEMA grant or cooperative agreement, the cost of the change, modification, change order, or constructive change must be allowable, allocable, within the scope of its grant or cooperative agreement, and reasonable for the completion of project scope. *See* Chapter V, ¶ 8. FEMA recommends, therefore, that a 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.
- ii. Access to Records. All NFEs must place into their contracts a provision that all contractors and their successors, transferees, assignees, and subcontractors acknowledge and agree to comply with applicable provisions governing Department and FEMA access to records, accounts, documents, information, facilities, and staff. *See* DHS Standard Terms and Conditions, v 3.0, ¶ XXVI (Dec. 4, 2013).
- iii. DHS Deal, Logo, and Flags. All NFEs must 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. *See* DHS Standard Terms and Conditions, v 3.0, ¶ XXVI (Dec. 4, 2013).



- iv. Compliance with Federal Law, Regulations, and Executive Orders. All NFEs must 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. *See* Standard Form 424D, ¶ 19; Chapter IV, ¶ 10.b.v; Appendix C, ¶ 3.
- v. No Obligation by Federal Government. The NFE should 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.
- vi. Program Fraud and False or Fraudulent Statements or Related Acts. The NFE must include a provision in its contract that the contractor acknowledges that 31 U.S.C. Chapter 38 (Administrative Remedies for False Claims and Statements) applies to its actions pertaining to the contract.

## CHAPTER V

### PROCEDURES AND GUIDANCE FOR OPEN MARKET PROCUREMENTS

#### 1. COMPETITION

- a. Competition Required. The Uniform Rules require a NFE to conduct all procurement transactions in a manner providing full and open competition consistent with the standards of 2 C.F.R. § 200.319. FEMA considers “full and open” competition to mean that a complete requirement is publicly solicited (except if specifically not required) and all responsible sources that are interested in doing so, are permitted to compete.
  - i. There are numerous benefits to full and open competition, such as increasing the probability of reasonable pricing from the most qualified contractors and helping discourage and prevent favoritism, collusion, fraud, waste, and abuse.
  - ii. FEMA will scrutinize procurements not providing for full and open competition, even if they result in the same or lower contract price than if conducted through full and open competition.
- b. Prohibited Situations Restrictive of Competition. The Uniform Rules identify seven situations considered to be restrictive of competition. 2 C.F.R. § 200.319(a)(1)-(7). **This is an illustrative and non-exclusive list, such that FEMA may consider other situations as restrictive of competition, even though they are not specifically listed.**
  - i. Unreasonable Requirements. A NFE must not place unreasonable requirements on firms in order for them to qualify to do business. 2 C.F.R. § 200.319(a)(1). This means that the NFE should include only those requirements that are the least restrictive to establish the contractor’s necessary qualifications.
  - ii. Unnecessary Experience and Excessive Bonding. A NFE must not require unnecessary experience and excessive bonding. 2 C.F.R. § 200.319(a)(2).
    - (1) Unnecessary experience could include unnecessary levels or years of experience for contractors as organizations, the contractors’ workforce, or for the contractors’ key personnel on a project.
    - (2) Excessive bonding increases the cost associated with the contract and restricts competition by reducing a prospective bidder’s or offeror’s capability to bid or offer a proposal on bonded work. FEMA does not require any additional bonding requirements other than construction or facility improvement contracts or subcontracts set forth at 2 C.F.R. § 200.325. Notwithstanding, a NFE might

find it desirable to exceed the bid, performance, or payment bond requirements at 2 C.F.R. § 200.325 for construction or facility improvements, or might find bonds desirable for work other than construction or facility improvements. In these cases, FEMA expects the NFE's bonding requirements to be reasonable, not unduly restrictive, and in accordance with any applicable local, state or tribal government standards.

iii. Noncompetitive Pricing Practices. A NFE should undertake reasonable efforts to ensure that prospective contractors have not engaged in noncompetitive pricing practices in responding to a solicitation. 2 C.F.R. § 200.319(a)(3). The most prominent form of noncompetitive pricing is referred to as "bid rigging," which is when conspiring competitors effectively raise prices under a process where a purchaser acquires goods or services by soliciting competing bids. Essentially, competitors agree in advance who will submit the winning bid on a contract being awarded through the competitive bidding process. Bid rigging takes many forms, but bid-rigging conspiracies usually fall into one or more of the following categories: bid suppression, complementary bidding, and bid rotation.

- (1) In bid suppression schemes, one or more competitors, who otherwise would be expected to bid or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.
- (2) Complementary bidding (also known as "cover" or "courtesy" bidding) occurs when some competitors agree to submit bids that are either too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine competitive bidding. Complementary bidding schemes are the most frequently occurring forms of bid rigging, and they defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.
- (3) In bid rotation schemes, all conspirators submit bids but take turns being the low bidder. The terms of the rotation may vary. For example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator company.

iv. Noncompetitive Contracts to Consultants.

- (1) A NFE must not make a noncompetitive award to a consultant on a retainer contract. 2 C.F.R. § 200.319(a)(4).

- (2) Although the Uniform Rules do not define the term “retainer contract,” FEMA considers a retainer contract to be a form of agreement for general, unspecified services entered into in advance of work to be done. Under such an agreement, the consultant remains available when the client needs services during a specific period or on a specified matter. As such, it would be restrictive of competition if a NFE simply made a noncompetitive contract award for work to be done under a FEMA award to a consultant that was already on retainer, specifically where the noncompetitive contract award was for property or services not specified for delivery under the retainer contract or where the retainer contract was not originally procured in a manner that met all of the requirements of 2 C.F.R. §§ 200.318 to 200.326.
- v. Organizational Conflicts of Interest. A NFE must ensure that its procurements are free from organizational conflicts of interest. 2 C.F.R. § 200.319(a)(5).
- (1) Meaning of Organizational Conflict of Interest. The Uniform Rules provide that an organizational conflict of interest can arise where, because of relationships with a parent company, affiliate, or subsidiary organization, a NFE is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization. 2 C.F.R. § 200.318(c)(2). In addition, an organizational conflict of interest may also occur in circumstances of impaired objectivity, unequal access to information, and biased ground rules, irrespective of whether the contractor is a related organization (parent, affiliate, or subsidiary) or not.
    - a. Impaired objectivity arises where a contractor is unable, or potentially unable, to provide impartial and objective assistance or advice to the NFE due to other relationships, contracts, or circumstances. This would comprise circumstances where a contractor’s work under one contract could entail it evaluating itself through an assessment of performance under another contract or an evaluation of proposals.
    - b. Unequal access to information occurs when a contractor has access to nonpublic information as part of its performance under another contract with the NFE and where that information may provide the contractor with a competitive advantage in a later competition for a NFE contract.
    - c. Biased ground rules issues arise where a contractor, as part of its performance of work under a contract with the NFE, has in some sense set the ground rules for another NFE

contract. An example of such a situation would be where a NFE prepares a statement of work or specifications for a contract and later competes for that contract. Notably, the Uniform Rules require that, in order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, and invitations for bids or requests for proposals must be excluded from competing for such procurements. 2 C.F.R. § 200.319(a).

- (2) Advance Acquisition Analysis. FEMA expects a NFE to analyze each planned acquisition in order to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible and avoid or mitigate potential conflicts.
  - vi. Specifying Only a Brand Name. A NFE shall not specify only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement. When it is impractical or uneconomical to write a clear and accurate description of the technical requirements of the property or services to be acquired, a NFE may use a “brand name or equal” description as a means to define the performance or other salient requirements of procurement. Should a NFE determine that only a brand name product is acceptable to fulfill a requirement, that determination must be documented and justified in the same manner as a noncompetitive procurement. The specific features or salient characteristics of the named brand which must be met by offers must be clearly stated. 2 C.F.R. § 200.319(a)(6) and (c)(1).
  - vii. Any Arbitrary Action. A NFE must not engage in any other arbitrary action in the procurement process that would restrict competition. 2 C.F.R. § 200.319(a)(7). The term “arbitrary” generally refers to an action or decision founded on prejudice or preference rather than on reason or fact or something that is otherwise unreasonable or unsupported. Accordingly, FEMA considers an “arbitrary action” within the procurement context to include, among other things, a discretionary action that showed preference or prejudice to certain contractors in a manner not consistent with full and open competition.
- c. Prohibited Geographical Preferences.
- i. Prohibition. A NFE must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. 2 C.F.R. § 200.319(b). Prohibited geographic preferences may come in a variety of forms, such as the

following:

- (1) Exclusion of Contractors from Outside a Geographic Area. A NFE could exclude from consideration for a procurement all contractors incorporated or primarily doing business outside the state, local, or tribal geographical area in which the NFE is located. In other words, the NFE simply sets aside the contract for an in-state or local contractor.
  - (2) Price Matching. Price matching is where a NFE will give an opportunity for a local vendor—within a certain percentage of the lowest bid to a solicitation—to match the lowest bid. If the local vendor does not match the bid, then the NFE awards the contract to the next lowest bidder.
  - (3) Reducing Bids. A NFE may reduce by a percentage a bid submitted by a local vendor during the evaluation of bids submitted during sealed bidding. For example, a preference may deem a bid submitted by a resident business to be five percent lower than the bid actually submitted.
  - (4) Adding Weight to Evaluation Factors. A NFE may add weight on evaluation factors to an in-state or local business as part of a procurement by competitive proposals.
- ii. Exception – Architectural and Engineering Contracts. When contracting for architectural and engineering services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract. 2 C.F.R. § 200.319(b).
  - iii. Exception – State Licensing Laws. Nothing in the Uniform Rules or this document preempts state licensing laws. 2 C.F.R. § 200.319(b).
  - iv. Exception – Federal Law.
    - (1) General. A NFE may use a state, local, or tribal geographical preference in the evaluation of bids or proposals where applicable Federal statutes expressly mandate or encourage geographic preference.
    - (2) Federal Laws Establishing FEMA Grant and Cooperative Agreement Programs. None of the Federal laws establishing or governing FEMA grant and cooperative agreement programs mandate or encourage geographic preferences by NFEs. Of particular note, NFEs frequently have questions concerning Section 307 of the Stafford Act, which appears to direct local preferences in the award of response and recovery contracts;

however, Section 307 only applies to procurements conducted by FEMA or other Federal agencies, not NFEs.

- (3) Tribal Self-Determination and Education Act. Tribal preferences may be permissible if certain requirements are met under the Indian Self - Determination and Education Assistance Act.<sup>6</sup> Pursuant to this Act, an Indian tribal government acting as either a recipient or subrecipient may give a preference in the award of contracts funded in whole or in part with Public Assistance funding to businesses falling within the meaning of “Indian organizations” or “Indian-owned economic enterprises,” as further defined by section 3 of the Indian Financing Act of 1974.<sup>7</sup> This determination would generally be issued and documented by the tribal government claiming such an exception.

d. Prequalified Lists.

- i. General. A NFE may use prequalified lists of persons, firms, and products among which to compete property and services under a FEMA award. 2 C.F.R. § 200.319(d). Prequalified lists, however, are not contracts. They are tools to aid in the procurement of future requirements by allowing NFEs to review the qualifications of prospective contractors prior to contract award of an anticipated future need. The Uniform Rules set forth two requirements that must be met in using such a list.
  - (1) Sources. A NFE must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum full and open competition.
  - (2) Qualification Period. A NFE must not exclude potential bidders or offerors from qualifying during the solicitation period. When using FEMA award funding, a NFE must allow vendors an opportunity to qualify during the solicitation period for the service or property, although FEMA does not expect a NFE to delay a proposed award (extend the solicitation period) in order to afford a vendor the opportunity to demonstrate that its product or services meet the pre-qualification requirements (*e.g.*, technical capability, management capability, prior experience, and past performance).
- ii. Other Requirements. As pre-qualified lists are not contracts, but merely tools to assist NFEs with the solicitation and award of a future requirement, even after such a list is created, a NFE must still comply with

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<sup>6</sup> Indian Self Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2205 (1975) (codified as amended at 25 U.S.C. § 5150(a)(3))

<sup>7</sup> Indian Financing Act of 1974, Pub. L. No. 93-262, § 2(e), 88 Stat 77 (codified as amended at 25 U.S.C. § 1452(e) and (f)).

all other applicable procurement standards identified in 2 C.F.R. §§ 200.318-326 in the award of a contract. While a NFE may submit a solicitation directly to those contractors identified on a pre-qualified list, NFEs must still publicly solicit the requirement pursuant to the applicable standards contained in the Uniform Rules, and allow any additional interested contractors to submit their qualifications and, if deemed qualified, submit their bids or proposals in response to the solicitation. The solicitation, evaluation, and subsequent award of a contract or contracts must also conform to the standards identified in this Supplement.

## 2. METHODS OF PROCUREMENT

- a. General. The NFE must use one of the following five methods of procurement: procurement by micro-purchases; procurement by small purchase procedures; procurement by sealed bids; procurement by competitive proposals; and procurement by noncompetitive proposals.
- b. Procurement by Micro-Purchases. The Uniform Rules authorize a NFE to use simplified acquisition procedures to purchase property and services where the aggregate dollar amount of the property or services does not exceed the micro-purchase threshold. While the Micro-Purchase threshold is adjusted from time to time, as of October 2015, the Micro-Purchase threshold was adjusted to \$3,500. Micro-purchase procedures comprise a subset of a NFE's small purchase procedures, and a NFE uses such procedures in order to expedite the completion of its lowest-dollar small purchase transactions and minimize the associated administrative burden and cost. 2 C.F.R. §§ 200.67 and 320(a).
- c. When Appropriate. A NFE may use the micro-purchases procurement method for the acquisition of property or services when the aggregate dollar amount of the services or property does not exceed the micro-purchase threshold.
- d. Procedures. The following procedures apply to micro-purchases.
  - i. Competition. A NFE may award micro-purchases without soliciting competitive quotations if the NFE considers the price to be fair and reasonable. To the extent practicable, a NFE must distribute micro-purchases equitably among qualified suppliers. 2 C.F.R. § 200.320(a).
  - ii. Prohibited Divisions. A NFE must not split a larger procurement merely to lower the cost of a procurement to less than the micro-purchase threshold in order to take advantage of the streamlined procurement process associated with this method.
  - iii. Documentation. A NFE must document its determination that the price is fair and reasonable, and the basis for that determination, but does not need to document its rationale for the procurement method used or selection of contract type. It also does not need to document its reasons for contractor selection or rejection if it did not utilize competitive quotations. If the



NFE solicited competitive quotations and made an award to other than the lowest bidder, it must document its explanation for the award decision.

- iv. Responsibility. A NFE must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the solicitation and contract. 2 C.F.R. § 200.318(h). This is a “go/no-go” determination. A NFE must give consideration to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. The NFE must document its responsibility determination for the winning bidder, and must (if applicable) also document its determination that the otherwise lowest bidder is not responsible. *See* Chapter IV, ¶ 6.
- e. Procurement by Small Purchase Procedures. A NFE may use relatively simple and informal small purchase procedures when securing services, property, or other property where the aggregate dollar amount of the services, property, or other property does not exceed the simplified acquisition threshold, which is currently \$150,000. NFEs adopt small purchase procedures in order to expedite the purchase of items costing less than the simplified acquisition threshold. 2 C.F.R. §§ 200.88 and 320(b).
  - i. When Appropriate.
    - (1) Small purchase procedures may be used to acquire services and property where the aggregate dollar amount of the acquisition does not exceed the simplified acquisition threshold.
    - (2) The contracts should be fixed price or not to exceed cost-reimbursement contracts with assurances that the scope of work can be completed for less than the simplified acquisition threshold.
  - ii. Procedures. The following procedures apply to small purchases.
    - (1) Competition. The NFE must obtain price or rate quotations from an adequate number of qualified sources. What is an adequate number of sources will depend upon the facts and circumstances of the procurement, but in no case should this be less than three. 2 C.F.R. § 320(b).
    - (2) Prohibited Divisions. A NFE must not split a larger procurement merely to bring the cost of a procurement under the simplified acquisition threshold. Similarly, a NFE may not intentionally limit the size of a procurement to only a portion of a known requirement in order to lower the cost of a procurement to under the simplified acquisition threshold and then, to fulfill the entire requirement, issue a follow-on change order that brings the procurement above the simplified acquisition threshold.

- (3) Documentation. The NFE must document the procurement history as detailed in 2 C.F.R. § 200.318(i). *See* Chapter IV, ¶ 7. This should include an independent NFE estimate of the costs of the procurement that indicates the total estimated cost to fall below the simplified acquisition threshold.
- (4) Responsibility. A NFE must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the solicitation and contract. 2 C.F.R. § 200.318(h). This a “go/no-go” determination. A NFE must give consideration to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. The NFE must document its responsibility determination for the winning bidder, and must (if applicable) also document its determination that the otherwise lowest bidder is not responsible. *See* Chapter IV, ¶ 6.

iii. Future Changes that Cause the Contract to Exceed the Simplified Acquisition Threshold.

- (1) It may be the case that a NFE properly used small purchase procedures to acquire services or property below the simplified acquisition threshold, but later needs to modify the contract to an amount above the threshold to cover unforeseen circumstances or an unexpected overrun in the quantity of work.
- (2) Such a change may be permissible under certain facts and circumstances, particularly where such a change falls within the scope of the original contract. The NFE should document its justification. FEMA will utilize this justification along with the independent NFE’s estimate completed before the procurement in reviewing whether or not the NFE’s decision to use small purchase procedures was permissible.

f. Procurement by Sealed Bids. Sealed bidding is a permissible method of procurement, where bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming to all the material terms and conditions of the invitation for bids, is the lowest in price. 2 C.F.R. § 200.320(c).

i. When Appropriate. Sealed bidding is the preferred method for procuring construction if the following conditions apply. 2 C.F.R. § 200.320(c)(1).

- (1) Specification. A complete, adequate, and realistic specification or purchase description is available.
- (2) Adequate Price Competition. Two or more responsible bidders are willing and able to compete effectively for the business.

- (3) Fixed Price Contract. The procurement lends itself to a firm fixed price contract.
  - (4) Price Determinative. The NFE selects the successful bidder principally on the basis of price, which includes the price-related factors included within the solicitation. *See* Chapter V, ¶ 2.d.ii.(5). Other than the responsibility determination, the NFE may not select a contractor on the basis of non-price related factors.
- ii. Procedures. The following procedures apply to procurement by sealed bids. 2 C.F.R. § 200.320(c)(2).
- (1) Public Advertisement. A local or tribal government must publicly advertise the invitation for bids. *Public advertisement is not a requirement for other NFEs.* 2 C.F.R. § 200.320(c)(2)(i).
  - (2) Solicitation from Adequate Sources. The NFE must solicit bids from an adequate number of known suppliers, providing them with sufficient response time before the date set for opening the bids. 2 C.F.R. § 200.320(c)(2)(ii). What is an adequate number of sources will depend upon the facts and circumstances of the procurement. Unlike small purchase procedures, FEMA has not defined an “adequate number” of qualified sources here, as obtaining at least three quotes.
  - (3) Invitation for Bids. The invitation for bids must define the items or services in order for the bidder to properly respond and must include any specifications and pertinent attachments. 2 C.F.R. § 200.320(c)(2)(ii).
  - (4) Bid Opening. The NFE must open the bids at the time and place prescribed in the invitation for bids. For local and Indian tribal governments, the bids must be publicly opened. Other NFEs are not required to open bids publicly. 2 C.F.R. § 200.320(c)(2)(iii).
  - (5) Firm Fixed Price Contract. The NFE will make a firm fixed price contract in writing to the lowest responsive and responsible bidder. 2 C.F.R. § 200.320(c)(2)(iv).
    - a. Price-Related Factors. Where specified in the bidding documents, the NFE may consider discounts, transportation costs, and life cycle costs in determining which bid is lowest. The NFE will only use payment discounts to determine the low bid when prior experience indicates such discounts are usually taken advantage of.
    - b. Incentives and Economic Adjustments. FEMA considers a fixed price incentive contract or inclusion of an economic price adjustment provision in a fixed price contract as

permissible if the NFE documents a rational basis for using those forms of fixed price contracts.

- (6) Rejection of Bids. The NFE may reject any or all bids if it documents a sound reason for the rejection. 2 C.F.R. § 200.320(c)(2)(5).
  - (7) Documentation. The NFE must document the procurement history as detailed in 2 C.F.R. § 200.318(i). *See* Chapter IV, ¶ 7.
  - (8) Affirmative Steps. The NFE must take all necessary affirmative steps to assure that minority businesses, women’s business enterprises, and labor area surplus firms are used when possible. The affirmative steps must include those set forth at 2 C.F.R. § 200.321(b). *See* Chapter V, ¶ 6.
  - (9) Responsibility. A NFE must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the solicitation and contract. 2 C.F.R. § 200.318(h). This is a “go/no-go” determination. A NFE to give consideration to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. The NFE must document its responsibility determination for the winning bidder, and must (if applicable) also document its determination that the otherwise lowest bidder is not responsible. *See* Chapter IV, ¶ 6.
- g. Procurement by Competitive Proposals. Procurement by the competitive proposal method is an acceptable form of procurement, which is where more than one vendor submits an offer and the NFE awards either a fixed price or cost-reimbursement type contract. 2 C.F.R. § 200.320(d).
- i. When Appropriate. A NFE will generally use this method when conditions are not appropriate for the use of sealed bids. FEMA considers the following as some of the possible factors that a NFE could use to justify procurement by competitive proposals.
    - (1) Types of Specifications and Other than Price-Related Factors. The procurement by competitive proposals method is used when the NFE cannot base the contract award exclusively on price or price-related factors due to the nature of the service or property to be acquired. When the NFE’s material requirements are clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection and weighs against the need to use this procurement method. On the other hand, the less definitive the requirements, the more development work required, or the greater the performance risk, the more that technical capability, past performance, and prior

experience considerations may play a dominant role in source selection and weigh in favor of this procurement method.

- ii. Procedures. The following procedures apply to procurement by competitive proposals. 2 C.F.R. § 200.319(d).
  - (1) Public Advertisement. The NFE must publicize the request for proposals. 2 C.F.R. § 200.319(d)(1).
  - (2) Solicitation from Adequate Sources. In addition to publicizing the request for proposals, the NFE must solicit proposals from an adequate number of qualified sources, providing them with sufficient response time before the date set for the receipt of proposals. 2 C.F.R. § 200.319(d). What is an adequate number of sources will depend upon the facts and circumstances of the procurement. Unlike small purchase procedures, FEMA has not defined an “adequate number” of qualified sources here, as meaning obtaining no less than three quotes. 2 C.F.R. § 200.320(c)(ii).
  - (3) Responsibility. A NFE must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the solicitation and contract. 2 C.F.R. § 200.318(h). A NFE must give consideration to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. The NFE must document its responsibility determination for the winning contractor, and must (if applicable) also document its determination that the otherwise lowest bidder is not responsible. *See Chapter IV, ¶ 6.*
  - (4) Evaluation Factors. The request for proposals must identify all evaluation factors and their relative importance. 2 C.F.R. § 200.319(d). The following provides several considerations for NFEs when developing evaluation factors:
    - a. The evaluation factors for a specific procurement should reflect the subject matter and elements that are most important to the NFE.
    - b. The evaluation factors may include such things as technical design, technical approach, length of delivery schedules, past performance, and quality of proposed personnel.
    - c. A NFE may use any one or a combination of source selection approaches as permitted under state, local, and tribal laws, regulations, and procedures, and these approaches will often differ based on the relative

importance of price or cost for the procurement.

- d. If permitted by the NFE's written procurement procedures and applicable non-Federal laws and regulations, a NFE may award a contract to the offeror whose proposal offers the "best value" to the NFE. The solicitation must, in addition to the items described above, inform potential offerors that the award will be made on a "best value" basis, which should include a statement that the NFE reserves the right to award the contract to other than the lowest priced offeror.
  - e. Two examples of source selection approaches are "tradeoff" and "lowest price technically acceptable" ("LPTA") methods. Under the "tradeoff" process, a NFE may consider award to other than the lowest-priced offeror or other than the highest technically rated offeror. The process allows trade-offs among cost or price and non-cost factors and allows the NFE to accept other than the lowest priced proposal (meaning that the benefits of the higher priced proposal merit the additional cost). The LPTA process is similar to sealed bidding with the award going to the lowest priced offer that is technically acceptable. A cost-technical tradeoff is not used under the LPTA process—the award goes to the lowest price which meets the minimum technical standards. The technical factors, in other words, are go/no-go and rated only for acceptability (and not ranked or scored).
  - f. The request for proposals must identify evaluation factors and their relative importance, but need not disclose numerical or percentage ratings or weights.
  - g. FEMA does not require any specific evaluation factors or analytic process. Notwithstanding, the evaluation factors must support the purposes of the grant or cooperative agreement.
- (5) Consideration. The NFE must consider any response to publicized requests for proposals to the maximum extent practical. 2 C.F.R. § 200.319(d)(1).
- (6) Affirmative Steps. The NFE must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor area surplus firms are used when possible. The affirmative steps must include those set forth at 2 C.F.R. § 200.321(b). *See* Chapter V, ¶ 6.

- (7) Evaluation Method. The NFE must have a written method for conducting technical evaluations of the proposals received and for selecting offerors. 2 C.F.R. § 200.319(d)(4).
    - a. When evaluating proposals, FEMA expects the NFE to consider all evaluation factors specified in its solicitation documents and evaluate offers only on the evaluation factors included in the solicitation documents.
    - b. The NFE may not modify its evaluation factors after proposals have been submitted without re-opening the solicitation.
    - c. In awarding a contract that will include options, FEMA expects the NFE to evaluate proposals for any option quantities or periods contained in the solicitation if it intends to exercise those options after the contract is awarded.
  - (8) Award. The NFE must make the award to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered. Price must be a factor evaluated by the NFE, unless the procurement is for architectural/engineering professional services. 2 C.F.R. § 200.319(d)(4).
  - (9) Documentation. The NFE must document the procurement history as detailed in 2 C.F.R. § 200.318(i). *See* Chapter IV, ¶ 7.
- iii. Architectural and Engineering Services. A NFE may use competitive proposal procedures for qualifications-based procurement of architectural/engineering professional services.
- (1) Price Not Used as an Evaluation Factor. Under this qualifications-based procurement, a NFE evaluates competitors' qualifications and selects the most qualified competitor for award, subject to negotiation of fair and reasonable compensation. 2 C.F.R. § 200.319(d)(5). The following provides amplifying guidance in the case of failed negotiations for compensation:
    - a. If failing to agree on a fair and reasonable price, the NFE may conduct negotiations with the next most qualified offeror.
    - b. Then, if necessary, the NFE will conduct negotiations with successive offerors in descending order until contract award can be made to the offeror whose price the NFE believes is fair and reasonable.
  - (2) Limitation. This method, where price is not used as an evaluation

factor, may only be used in procurement of architectural/engineering professional services. It cannot be used to purchase other types of services though architectural/engineering firms are a potential source to perform the proposed effort.

(3) Meaning of Architectural/Engineering Professional Services.

FEMA considers the following to fall within the scope of architectural/engineering professional services:

- a. Professional services of an architectural or engineering nature, as defined by applicable state law, and which the state law requires to be performed or approved by a registered architect or engineer.
  - b. Professional services of an architectural or engineering nature associated with design or construction of real property.
  - c. Other professional services of an architectural or engineering nature or services incidental thereto (including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals and other related services) that logically or justifiably require performance by registered architects or engineers or their employees.
  - d. Professional surveying and mapping services of an architectural or engineering nature.
- h. Procurement by Noncompetitive Proposals. Procurement by noncompetitive proposals is an acceptable method of procurement under certain circumstances, where solicitation of a proposal occurs from only one source or a limited number of sources. 2 C.F.R. § 200.320(f).
- i. When Appropriate. A NFE may use procurement by noncompetitive proposals only when one or more of the following circumstances apply.
    - (1) One Source. The item is only available from one source. An item or service is available from only one source when no other property or services will satisfy the NFE's requirements. 2 C.F.R. § 200.320(f)(1).
      - a. Examples. The following provide examples of some circumstances under which a NFE could consider property or services as available from only one source.





and an “exigency” is that an emergency will typically involve a threat to life, public health or safety, improved property, and/or some other form of dangerous situation, whereas an exigency is not necessarily so limited.

- c. Duration. Use of the public exigency or emergency exception **is only permissible during the actual exigent or emergency circumstances**. Once the exigent or emergency circumstances cease to exist, the NFE is expected to transition to a more appropriate method of contracting using full and open competition. Failure to properly transition to a more appropriate method of contracting at the cessation of the exigent or emergency circumstance has frequently been identified by the Department of Homeland Security (“DHS”), Office of Inspector General (“OIG”) as problematic, resulting in frequent recommendations to de-obligate or disallow all or a portion of incurred costs.
- d. Applicability to Categories of Work. The Federal procurement standards are not limited to the Public Assistance emergency work period under Category A or B. The Federal procurement standards apply to all categories of work.

(3) FEMA or Pass-Through Entity Approval. FEMA or the pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the NFE. While identified as a potential exception to full and open competition under the noncompetitive procurement process, approval for this exception has been exceptionally rare at both the FEMA and pass-through entity levels. NFEs that are considering the use and application of this exception, should first consult with their servicing FEMA Public Assistance Coordinator to ascertain whether this option is available and what steps are necessary to undertake its use. 2 C.F.R. § 200.320(f)(3).

(4) Competition Inadequate. The NFE determines that, after solicitation of a number of sources, competition is inadequate. 2 C.F.R. § 200.320(f)(4).

- a. FEMA considers competition “inadequate” when a NFE has complied with all of the procurement standards and receipt of a single offer or bid, single responsive offer or bid, or no responsive bids or proposals is caused by conditions outside of the NFE’s control.
- b. FEMA will not, on the other hand, consider competition

inadequate where a NFE did not sufficiently publicize the requirement, solicited only a few sources that chose not to submit a proposal, set unduly restrictive specifications, and/or took arbitrary actions or failed to take other actions that resulted in the inadequate competition. In those cases, adequate competition may be attainable; however, the NFE failed to take the proper steps and actions to ensure such competition.

- c. It is important for a NFE to document its justification for why there is inadequate competition and why it moved forward with a noncompetitive award without revising or cancelling the solicitation and re-soliciting offers or bids.
  - i. In making this justification, it may be necessary for the NFE to evaluate whether or not it sufficiently publicized the invitation for bids or requests for proposals and/or solicited an adequate number of firms.
  - ii. It may also be necessary to speak to those firms solicited to find out why they did not submit offers or bids. If the reason is an overly restrictive specification or delivery requirement, then the NFE would need to evaluate whether it should cancel the solicitation, change that specification to allow for more bids or offers, and re-solicit bids or offers. If the NFE chooses to move forward with the award in light of the restrictive specification, then the NFE should document in the procurement file why the restrictive specification or delivery requirement was necessary and could not be modified so as to enable additional competition.

(5) When Inappropriate. Procurement by noncompetitive proposals is not justified based on the NFE's failure to adequately plan its procurement, concerns about the amount of FEMA financial assistance available to support a procurement, or ability to save money.

(6) Procedures. The following procedures apply to a procurement through noncompetitive proposal:

- a. Justification and Documentation. The NFE must document the procurement history as detailed in 2 C.F.R. § 200.318(i). *See* Chapter IV, ¶ 8. Of particular note, the NFE must adequately document its justification for the sole source contract in light of the requirement for full and open

competition.

- b. Negotiation of Profit. The NFE must negotiate profit as a separate element of the price. 2 C.F.R. § 200.323(b).
- c. Preaward Review. The NFE must submit proposed procurement documents to either FEMA or the pass-through entity as directed. *See* 2 C.F.R. § 200.324(b); Chapter I, ¶ 5.

(7) Affirmative Steps. Where there is sufficient justification for the NFE to use procurement through noncompetitive proposals, FEMA will generally consider it not possible for the NFE to take affirmative steps to assure that minority businesses, women's business enterprises, and labor area surplus firms are used under those circumstances.

### 3. METHODS OF PROCUREMENT – ADDITIONAL TOPICS

- a. Design-Bid-Build. Constitutes the traditional system of construction in the United States. Involves the selection of an architect who completes a fully detailed design, solicitation of construction bids based on the 100 percent complete design, and the selection of the lowest eligible and responsible bidder to complete construction. In this process, the three phases of planning, design, and construction run sequentially and the construction contractor has no involvement until the construction stage.
  - i. Use Permitted. FEMA allows a NFE to use design-bid-build procurement procedures under FEMA awards if permitted by state, local, and/or Indian tribal laws and regulations.
  - ii. Procurement Process. Involves two (2) separate and distinct solicitations and contract awards. The first solicitation and contract award is for the complete building designs, drawings, and/or specifications. This is followed by a second solicitation and contract award for construction associated with the complete building designs, drawings, and/or specifications. Both procurements must comply with all of the procurement standards of the Uniform Rules.
  - iii. Prohibition. 2 C.F.R. § 200.319 prohibits a contractor that is awarded a contract to develop designs, drawings, and/or specifications from competing for and receiving award for the associated construction portion of the work.
- b. Two-Step Procurement Procedures. A two-step procurement procedure is a selection method used during either procurement by competitive proposals or sealed bidding in which the NFE selects a limited number of contractors during step 1 to submit detailed proposals or bids for step 2.

- i. Use Permitted. FEMA allows a NFE to use two-step procurement procedures under FEMA awards if permitted by state, local, and/or Indian tribal laws and regulations.
- ii. Procurement Process. The procurement must comply with all of the procurement standards of the Uniform Rules. In addition, FEMA expects that the NFE's procurement will, at a minimum, meet the following requirements.
  - (1) Review of Technical Qualifications and Approach. The first step consists of a review of the prospective contractors' technical approaches to the NFE's request and technical qualifications to carry out that approach. The NFE may then narrow the competitive range to prospective contractors that demonstrate a technically satisfactory approach and have satisfactory qualifications.
  - (2) Review of Bids and Proposals Submitted by Qualified Prospective Contractors. The second step consists of soliciting and reviewing complete proposals (including price) or bids submitted by each prospective contractor that the NFE has determined to be qualified during step 1. The NFE should attempt to obtain bids or quotations from as many qualified sources as possible, but should solicit bids or proposals from at least three qualified sources. In the case where the NFE conducts a qualifications based procurement during step 2, the NFE must evaluate contractors on price as well as any non-price evaluation factors.
- c. Design-Build Contracts. The design-build procurement method consists of contracting for design and construction simultaneously with a contract award to a single contractor or contractor team that will be responsible for both the project's design and construction.
  - i. Use Permitted. FEMA allows the use of "design-build" contracts, if permitted by state, local, or tribal laws and regulations, under FEMA awards involving construction and design. The use of such a method must meet the following minimum requirements.
  - ii. Procurement Method Determined by Value. The NFE must separate the various contract activities to be undertaken and classify them as either design or construction, and then calculate the estimated total value of each. FEMA expects the NFE to use the procurement method appropriate for the services having the greatest cost.
    - (1) The construction costs normally comprise a greater estimated total value than design costs. If so, then FEMA expects the NFE to use procurement by competitive proposals or sealed bidding for the entire procurement rather than a qualifications-based procurement

by competitive proposals.

(2) If architectural and engineering services are predominant (which is usually not the case), then the NFE may use sealed bidding, procurement by competitive proposals, or a qualifications-based procurement by competitive proposals.

iii. Selection Processes. A NFE may use a one-step or two-step procurement process when conducting a design-build procurement.

- d. Construction Manager at Risk (CMAR) Delivery Method. Under a CMAR delivery method, a project owner conducts a procurement of a construction manager firm early in or before the design process that will later serve as the project's general contractor. The construction manager, during the design and planning process, is the equivalent of an agent or consultant of the project owner and conducts early coordination with the architect, project cost, estimating, value engineering, construction scheduling, and constructability reviews. After the project owner selects a design, the construction manager and the NFE negotiate a Guaranteed Maximum Price (GMP).<sup>8</sup> If a GMP is agreed upon, the CM then acts as the equivalent of a general contractor during the construction phase to select, schedule, and sequence subcontractors to complete the required construction work. (However, jurisdictions differ as to the purpose and extent of performance required during the construction phase, which provides an added layer of complexity in defining a uniform rule pertaining to the CMAR delivery method.)<sup>9</sup>
- i. Use Permitted. The Federal procurement standards do not expressly prohibit the potential use of the CMAR delivery process by a NFE. However, because there is no uniform CMAR standard across the different NFEs, particularly in regards to the construction phase and the evaluation thereof, FEMA will review the use of the CMAR delivery method on a case-by-case basis to ensure that the method utilized conforms to the requirements outlined by the Federal procurement standards for the solicitation and award of contracts using federal disaster assistance funds – even where use of the CMAR delivery method is otherwise permitted by state, local, and/or Indian tribal laws and regulations.
- ii. Procurement Process. NFEs will generally issue a Request for

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<sup>8</sup> The GMP includes hard (estimated) costs of construction, associated fees, and contingencies applicable to the construction phase of the project. If agreed upon by the CM and the NFE, any cost overruns over the GMP (that are not due to change orders from the NFE) will be borne by the CM, hence, the CM “at risk.” Conversely, any savings under the GMP will be attributed to the NFE and not to the CM, unlike traditional fixed price/lump sum contracts.

<sup>9</sup> In other words, some CMAR processes provide for the CM to directly perform the work once a GMP is agreed upon, while other CMAR processes prohibit the CM from performing such work itself, and require the CM to either subcontract out the work or conduct solicitations, evaluations and awards for construction work on the behalf of the NFE.

Qualifications (RFQ)/Request for Proposals (RFP) for construction management at risk preconstruction and construction management services and require prospective offerors to submit both a price and non-price related proposal – the extent and thoroughness of which differs between jurisdictions.

- (1) Preconstruction Phase. This phase includes the performance of tasks such as developing professional construction cost estimates and schedules, developing value-added concepts and value engineering reviews, providing advice relative to the overall project budget and constructability reviews; collaborating with project architects on design, and preparing detailed estimates of the schematic design.
- (2) Construction Phase. There is no uniformity between NFE jurisdictions concerning this phase of the CMAR delivery method. Some jurisdictions prohibit the Construction Manager (CM) from performing the construction work itself – instead requiring the CM to use its construction and management expertise to procure and manage subcontractors and trade subcontractors to construct the project more efficiently – while other jurisdictions have no such prohibition. Accordingly, in situations such as these, questions are appropriately raised as to the propriety of the solicitation, evaluation, and award of CMAR contracts, particularly when it comes to the construction phase of work.

#### 4. CONTRACT COST OR PRICE

- a. Cost or Price Analysis. A NFE must perform a cost or price analysis in connection with every procurement action in excess of the simplified acquisition threshold, including contract modifications. 2 C.F.R. § 200.323(a).
  - i. Method and Degree of Analysis and Independent Estimate. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the NFE must make independent estimates before receiving bids or proposals. 2 C.F.R. § 200.323(a).
  - ii. Amplifying Guidance. FEMA provides the following guidance as to the meaning and use of cost and price analysis.
    - (1) Price Analysis. A price analysis is the examination and evaluation of a proposed price without evaluating its separate cost elements and proposed profit.
      - a. This is the form of analysis typically used when acquiring commercial items or when using the procurement through sealed bidding method.

- b. The NFE is responsible for selecting and using whatever price analysis techniques will ensure a fair and reasonable price. Some of the ways in which a price analysis could be performed include comparing offers with one another; comparing prior proposed prices and contract prices with current proposed prices for the same or similar goods or services; comparing offers with competitive published price lists, published market prices, or similar indexes; comparing proposed prices with independently developed estimates of the NFE; and comparing proposed prices with prices of the same or similar items obtained through market research.

(2) Cost Analysis. A cost analysis is the review and evaluation of the separate cost elements (such as labor hours, overhead, materials, etc.) and proposed profit in a proposal in order to determine a fair and reasonable price for a contract and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency.

- a. This is the form of analysis typically used to establish the basis for negotiating contract prices when using the procurement through competitive proposals method; using procurement through sealed bidding where price competition was not sufficient; making contract modifications; and any other case when a price analysis, by itself, does not ensure price reasonableness.
- b. The NFE is responsible for selecting and using whatever cost analysis techniques will ensure a fair and reasonable price. Some of the ways in which a cost analysis could be performed include verification of the cost or pricing data and evaluation of cost elements and comparison of costs proposed for individual cost elements with previously incurred actual costs and independently developed estimates by the NFE.

b. Negotiation of Profit. A NFE must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where a cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work. 2 C.F.R. § 200.323(b).

c. Cost Plus Percentage of Cost. A NFE is prohibited from using the cost plus



percentage of cost and percentage of construction cost methods of contracting. 2 C.F.R. § 200.323(d).

- i. FEMA considers a cost plus a percentage of cost or percentage of construction cost contract to be a contract containing some element that obligates the NFE to pay the contractor an amount (in the form of either profit or cost), undetermined at the time the contract was made and to be incurred in the future, based on a percentage of future costs. The inclusion of a ceiling price does not make these forms of contracts acceptable.
- ii. FEMA will use the following four-part analysis to determine if a certain contract is a prohibited cost plus percentage of cost or percentage of construction cost contract:
  - (1) Payment is made on 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.
- iii. The prohibition against a cost plus percentage of cost and percentage of construction cost applies to subcontracts of the contractor in the case where the prime contract is a cost-reimbursement type contract or subject to price redetermination.
- d. Estimated Costs. Costs or prices based on estimated costs for contracts under the FEMA award are allowable only to the extent that costs incurred or cost estimates included in the negotiated prices would be allowable for the NFE under the Federal cost principles at 2 C.F.R. Part 200, subpart E. The NFE may reference its own cost principles that comply with the Federal cost principles.

## 5. BONDING REQUIREMENTS

- a. General. There are bonding requirements for ***construction or facility improvement contracts*** exceeding the simplified acquisition threshold. 2 C.F.R. § 200.325.
  - i. A bond is a written instrument executed by a contractor (the "principal"), and a second party ("the surety" or "sureties") to assure fulfillment of the principal's obligations to a third party (the "obligee"), identified in the bond. If the principal's obligations are not met, the bond assures payment, to the extent stipulated, of any loss sustained by the obligation.

- ii. FEMA or the pass-through entity may accept the bonding policy and requirements of the NFE provided that FEMA or pass-through entity has made a determination that the Federal interest is adequately protected. This means that FEMA will approve the bonding policy and requirements of a recipient, and that the recipient will approve the bonding policy and requirements of its subrecipients.
  - iii. If FEMA or the pass-through entity has not made such a determination, then the NFE must meet the bid guarantee, performance bond, and payment bond requirements described in ¶ 5.b through 5.d.
- b. Bid Guarantee. Each bidder must provide a bid guarantee equivalent to five percent of the bid price. The bid guarantee must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid by the NFE, execute such contractual documents as may be required within the time specified. 2 C.F.R. § 200.325(a).
  - c. Performance Bond. There must be a performance bond on the part of the contractor for 100% of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor’s obligations under such contract. 2 C.F.R. § 200.325(b).
  - d. Payment Bond. There must be a payment bond on the part of the contractor for 100 percent of the contract price. A payment bond is one executed in connection with a contract to assure payment as required by law for all persons supplying labor and material in the execution of work provided for in the contract. 2 C.F.R. § 200.325(c).
  - e. Not Construction or Facility Improvement. If the NFE is procuring neither construction nor facility improvement services, then there are no bonding requirements imposed by the Uniform Rules or this document.

## 6. CONTRACTING WITH SMALL AND MINORITY BUSINESSES, WOMEN’S BUSINESS ENTERPRISES, AND LABOR AREA SURPLUS FIRMS

- a. Requirement. A NFE must take all necessary, affirmative steps to assure that small and minority businesses, women’s business enterprises, and labor area surplus firms are used when possible. 2 C.F.R. § 200.321(a). *These steps are in addition to full and open competition* and must include, at a minimum, the following six affirmative steps.

- i. Solicitation Lists. The NFE must place small and minority businesses and women's business enterprises on solicitation lists. 2 C.F.R. § 200.321(b)(1).
- ii. Solicitations. The NFE must assure that it solicits small and minority businesses and women's business enterprises whenever they are potential sources. 2 C.F.R. § 200.321(b)(2).
- iii. Dividing Requirements. The NFE must divide total requirements, *when economically feasible*, into smaller tasks or quantities to permit maximum participation by small and minority businesses and women's business enterprises. 2 C.F.R. § 200.321(b)(3).
- iv. Delivery Schedules. The NFE must establish delivery schedules, *where the requirement permits*, which encourage participation by small and minority businesses and women's business enterprises. 2 C.F.R. § 200.321(b)(4).
- v. Obtaining Assistance. The NFE must use the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce. 2 C.F.R. § 200.321(b)(5).
- vi. Prime Contractor Requirements. The NFE must require the prime contractor, if subcontracts are anticipated or let, to take the five affirmative steps described in ¶ 6.a.i through 6.a.v above. 2 C.F.R. § 200.321(b)(6).

b. Additional Guidance.

- i. Meaning of Terms. The Uniform Rules do not define the terms small business, minority business, women's business enterprises, and labor area surplus firms. FEMA will use the following meaning of the terms when evaluating compliance with the requirements of the Uniform Rules. If state, local, or tribal law and procedures provide different meanings of small business, women's business enterprise, and minority business, then FEMA may accept those meanings.
  - (1) Small Business. A business that is independently owned and operated, not dominant in the field of operation in which it is bidding on NFE contracts, and qualified as a small business under the Small Business Administration criteria and size standards at 13 C.F.R. Part 121.
  - (2) Women's Business Enterprise. A business enterprise that is: (a) at least 51 percent owned by one or more women or, in the case of a publicly owned business, at least 51 percent of the stock is owned by one or more women; and (b) whose management and daily

operations are controlled by one or more women.

- (3) Minority Business. A business that is (a) at least 51 percent owned by one or more minority group members or, in the case of a publicly owned business, at least 51 percent of the stock is owned by one or more minority group members; and (b) whose management and daily operations are controlled by one or more minority group members.
  - (4) Labor Area Surplus Firm. A labor surplus area firm is one that, together with its first tier subcontractors, will perform substantially in labor surplus areas. The Department of Labor's Employment and Training Administration has defined labor surplus areas (LSA) as localities that have a "civilian average annual unemployment rate during the previous two calendar years of 20 percent or more above the average annual civil unemployment rate for all states" during that same period. 20 C.F.R. §§ 654.4-654.5. More information about LSAs is available at 20 C.F.R. pt. 654, subchapter A as well as on this website: <https://www.doleta.gov/programs/laborsurplus02.cfm>. The Department of Labor has also issued a list for FY 2016 of all the LSAs: <https://www.doleta.gov/programs/lssa.cfm>.
- ii. Documentation of Compliance. A NFE must document its compliance with the six affirmative steps. As it relates to the prime contractor requirements, FEMA recommends the inclusion of the requirement in the solicitation and also in the contract.
  - iii. Set-Asides.
    - (1) A set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to small businesses, minority business, women's business enterprises, and/or labor area surplus firms. FEMA considers set-asides or percentages as impermissible (unless otherwise authorized by Federal law).
    - (2) Noticeably, the Federal procurement standards do NOT mandate a set aside of a solicitation or reservation of an award to any socioeconomic contractor, but merely that they are used, when possible, e.g. in other words, given the opportunity to compete for such awards.
    - (3) Indian tribes may use preferences pursuant to the requirements and conditions set forth in the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2205 (1975) (codified as amended at 25 U.S.C. § 450 *et seq.*).

## 7. PROCUREMENT OF RECOVERED MATERIALS

- a. Requirement. A NFE that is a state agency or agency of a political subdivision of a state and its contractors must comply with Section 6002 of the Solid Waste Disposal Act, Pub. L. No. 89-272 (1965) (codified as amended by the Resource Conservation and Recovery Act at 42 U.S.C. § 6962). The requirements of Section 6002 include procuring only items designated in guidelines of the EPA at 40 C.F.R. Part 247 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; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines. 2 C.F.R. § 200.322.
- b. Additional Background.
  - i. Inapplicability to Indian Tribes and Private Parties. The requirements of Section 6002 and its implementing regulations at 40 C.F.R. Part 247 do not apply to procurements by Indian tribes or private party NFEs (such as hospitals, institutions of higher education, and non-profit organizations).
  - ii. Product Designation and Associated Procurement Requirement. EPA is required to designate products that are or can be made with recycled materials, and to recommend best practices for buying these products. EPA has currently designated 61 products across eight categories, which are construction products, landscaping products, non-paper office products, paper products, park and recreation products, transportation products, vehicular products, and miscellaneous products. *See* 40 C.F.R. Part 247, subpart B.
    - (1) Once EPA designates a product, Section 6002(c)(1) of the Solid Waste Disposal Act (codified as amended at 42 U.S.C. § 6962(c)(1)) requires a NFE to procure that designated item composed of the highest recovered material content level practicable, consistent with maintaining a satisfactory level of competition, considering such guidelines. *See also* 40 C.F.R. § 247.2(d).
    - (2) A NFE may decide not to procure such items if they are not reasonably available in a reasonable period of time; fail to meet reasonable performance standards; or are only available at an unreasonable price. *See* Section 6002(c) of the Solid Waste Disposal Act (codified as amended at 42 U.S.C. § 6962(c)); 40 C.F.R. § 247.2(d).

- iii. Affirmative Procurement Program. Section 6002(i) of the Solid Waste Disposal Act (codified as amended at 42 U.S.C. § 6962(i)) provides that each NFE that purchases items designated by EPA must establish an affirmative procurement program, containing four specific elements, for procuring such items containing recovered materials to the maximum extent practicable. *See also* 40 C.F.R. § 247.6. The four required elements of the affirmative procurement program are:
  - (1) Preference program for purchasing the designated items;
  - (2) Promotion program;
  - (3) Procedures for obtaining estimates and certifications of recovered materials content and for verifying the estimates and certifications; and
  - (4) Annual review and monitoring of the effectiveness of the program
- iv. Solid Waste Disposal Services. Section 6002(f) of the Solid Waste Disposal Act (codified as amended at 42 U.S.C. § 6962(f)) requires a NFE, to the maximum extent practicable, manage or arrange for the procurement of solid waste management services in a manner which maximizes energy and resource recovery.
- v. Certifications. Section 6002(c)(3) of the Solid Waste Disposal Act (codified as amended at 42 U.S.C. § 6962(c)(3)) and 40 C.F.R. § 247.4 provide that a NFE must require that its vendors:
  - (1) Certify that the percentage of recovered materials to be used in the performance of the contract will be at least the amount required by applicable specifications or other contractual requirements; and
  - (2) Estimate the percentage of the total material utilized for the performance of the contract which is recovered materials (for contracts greater than \$100,000).

## 8. CHANGES

- a. General. There are many reasons why a NFE may wish to make changes to an existing contract. For example, during performance, changes may be required in order to fix inaccurate or defective specifications, react to unforeseen circumstances, or otherwise modify the work to ensure the contract meets NFE requirements.
- b. NFE Responsibilities. The NFE is responsible for issuing, evaluating, and making necessary decisions involved any change to its third party contracts and any change orders it may issue. The NFE is also responsible for evaluating and making the necessary decisions involving any claim of a constructive change.

- c. Cardinal Change.
  - i. A cardinal change is a significant change in contract work (property or services) that causes a major deviation from the original purpose of the work or the intended method of achievement, or causes a revision of contract work so extensive, significant, or cumulative that, in effect, the contractor is required to perform very different work from that described in the original contract.
  - ii. FEMA considers a cardinal change to a contract to be a noncompetitive award and will evaluate whether the NFE meets the necessary conditions precedent for using the procurement through noncompetitive proposal method.
  - iii. A change within the scope of the contract (sometimes referred to as an “in-scope” change) is not a cardinal change. Nothing restricts a NFE from exercising reasonable freedom to make minor adjustments contemplated fairly and reasonably by the parties when they entered into the contract.
- d. Evaluation of Changes. FEMA will, in determining whether the NFE has made a prohibited cardinal change, evaluate whether the change is “within the general scope of the contract” and “within the scope of competition.”
  - i. Scope of the Contract. FEMA will, in determining whether changes are beyond the scope of the contract, usually compare the total work performed by the contractor to the work called for by the original contract. This includes evaluating the nature of the work being performed and also the amount of effort the contractor is required to perform in order to evaluate the cumulative impact on the contract’s quantity, quality, costs, and delivery terms.
  - ii. Scope of Competition. FEMA will, in determining whether changes are beyond the scope of competition, usually evaluate whether there is a material difference between the modified and original contract that was originally competed, to include considering whether the solicitation for the original contract adequately advised offerors of the potential for the type of changes at issue or whether the changes are of a nature that potential offerors would have reasonably anticipated them.
  - iii. In both evaluations, FEMA has not adopted a specific detailed list of acceptable contract changes, as cardinal changes cannot be easily established by setting specific objective and measurable threshold criteria that would apply in all cases. Such evaluations will be conducted on a case-by-case basis.
- e. Changes Clause. FEMA recommends that NFEs incorporate a “changes clause” in their contracts. A changes clause is one that permits the NFE contracting officer to make unilateral changes, in designated areas, within the general scope

of the contract, to be followed by such equitable adjustments in the price and delivery schedule as the changes make necessary.



## CHAPTER VI

### **OTHER PROCUREMENT METHODS AND ADDITIONAL TOPICS**

#### 1. **FEDERAL SUPPLY SCHEDULES**

- a. **Background.** GSA establishes long-term government-wide multiple award schedule (“MAS”) contracts with commercial firms to provide access to millions of commercial products and services at volume discount pricing. The MAS contracts, also referred to as GSA Schedule and Federal Supply Schedule contracts, are indefinite delivery, indefinite quantity contracts.
- b. **Permissible Use of Federal Supply Schedules – Disaster Purchasing.**
  - i. Federal law authorizes “state and local governments” access to buy goods and services from GSA Federal Supply Schedules to facilitate recovery from a major disaster declared by the President under the Stafford Act; facilitate disaster preparedness or response; or facilitate recovery from terrorism or nuclear, biological, chemical, or radiological attack. 40 U.S.C. § 502(d)(1).
  - ii. The Department of Homeland Security has determined that all of the products and services available under GSA Federal Supply Schedules qualify as those that could be used in preparation or response to all disasters, as well as recovery from major disasters declared by the President, or recovery from terrorism or nuclear, biological, chemical, or radiological attack. 40 U.S.C. § 502(d)(2).
  - iii. Participation by a firm that sells to the Federal Government through the schedule is voluntary with respect to a sale to the state or local government through such supply schedule. 40 U.S.C. § 502(d)(1).
  - iv. **Key Definitions.**
    - (1) **State and Local Governments.** Only states or local governments may access and buy goods and services from GSA Federal Supply Schedules. A NFE falling outside the definition of a state or local government is not authorized to use GSA Federal Supply Schedules pursuant to 40 U.S.C. § 502(c) or (d).
      - a. The term “state or local government” includes any state, local, regional, or tribal government, or any instrumentality thereof (including any local educational agency or institution of higher education). 40 U.S.C. § 502(c)(3)(A).
      - b. The term “tribal government” means: (1) the governing body of any Indian tribe, band, nation, or other organized

group or community located in the continental United States (excluding the State of Alaska) that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, and (2) any Alaska Native regional or village corporation established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. § 1601 *et seq.*). 40 U.S.C. § 502(c)(3)(B).

- c. The term “local educational agency” has the meaning given that term in section 8013 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 7713). 40 U.S.C. § 502(c)(3)(C).
- d. The term “institution of higher education” has the meaning given that term in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. § 1001(a)). 40 U.S.C. § 502(c)(3)(D).

(2) Preparedness, Response, and Recovery. State and local governments may buy goods and services from GSA Federal Supply Schedules in preparation or response to all disasters, facilitate *recovery* from a major disaster declared by the President under the Stafford Act; or facilitate *recovery* from terrorism or nuclear, biological, chemical, or radiological attack.

- a. “Preparedness” means actions that involve a combination of planning, resources, training, exercising, and organizing to build, sustain, and improve operational capabilities. Preparedness is the process of identifying the personnel, training, and equipment needed for a wide range of potential incidents, and developing jurisdiction – specific plans for delivering capabilities when needed for an incident. U.S. General Services Administration, [Disaster Purchasing FAQs](#).
- b. “Response” means immediate actions to save lives, protect property and the environment, and meet basic human needs. Response also includes the execution of emergency plans and actions to support short-term recovery. U.S. General Services Administration, [Disaster Purchasing FAQs](#).
- c. “Recovery” means the development, coordination, and execution of service- and site-restoration plans; the reconstitution of government operations and services; individual, private-sector, nongovernmental, and public-assistance programs to provide housing and to promote

restoration; long-term care and treatment of affected persons; additional measures for social, political, environmental, and economic restoration; evaluation of the incident to identify lessons learned; post incident reporting; and development of initiatives to mitigate the effects of future incidents. U.S. General Services Administration, [Disaster Purchasing FAQs](#).

c. Permissible Use of Federal Supply Schedules – Information Technology, Law Enforcement, Security, and Certain Other Related Items.

- i. Federal law authorizes state and local governments access to buy information technology (“IT”) through GSA’s Federal Supply Schedule, which includes automated data processing equipment (including firmware), software, property, support equipment, and services (as contained in Federal supply classification code group 70). 40 U.S.C. § 502(c)(1)(A).
- ii. Federal law also authorizes state and local governments access to buy alarm and signal systems, facility management systems, firefighting and rescue equipment, law enforcement and security equipment, marine craft and related equipment, special purpose clothing, and related services (as contained in Federal supply classification code group 84 or any amended or subsequent version of that Federal supply classification group). 40 U.S.C. § 502(c)(1)(B).
- iii. Participation by a firm that sells to the Federal Government through the supply schedule shall be voluntary with respect to a sale to the state or local government through such supply schedule. 40 U.S.C. § 502(c)
- iv. Key Definitions. The definitions of state and local government, tribal government, local educational agency, and institution of higher education are set forth in Chapter VI, ¶ 1.b.iv(1).

d. Ordering Procedures and Additional Information.

- i. Federal law requires that all users of Federal supply schedules, including non-Federal users, shall use the schedules in accordance with the ordering guidance provided by the GSA Administrator. 40 U.S.C. § 502(f).
- ii. GSA has provided guidance that a NFE must follow its own procurement procedures when ordering goods and services from the GSA Federal Supply Schedules. In addition to ensuring compliance with its own procurement procedures, a NFE is encouraged—but not required—to use GSA’s Schedule Ordering Procedures to ensure competition and to receive best value from GSA Federal Supply Schedule contractors. See U.S. General Services Administration, [Disaster Purchasing FAQs](#) and [Cooperative Purchasing FAQs](#). These ordering procedures can be found

at 48 C.F.R. § 8.405-1 (Ordering Procedures for Property and Services Not Requiring a Statement of Work) and § 8-405-2 (Ordering Procedures for Services Requiring a Statement of Work).

- iii. Orders placed under the Disaster Purchasing program must include the following statement: “This order is placed under GSA Schedule number \_\_\_\_\_ under the authority of the GSA Disaster Purchasing program. The products and services purchased will be used in preparation or response to disasters or recovery from major disaster declared by the President, or recovery from terrorism or nuclear, biological, chemical, or radiological attack.”
- iv. If a NFE uses the GSA ordering procedures, *it will have fulfilled the requirements for full and open competition*. The NFE must also ensure that all required clauses in 2 C.F.R. § 200.326 are included in the contract and determine whether the GSA price is reasonable. The NFE may seek a lower price than that published on the schedules.
- v. If a NFE does not follow the GSA ordering procedures, it must at least follow ordering procedures that meet the minimum requirements for full and open competition.

## 2. USE OF EXISTING CONTRACTS

- a. Background. A NFE may wish to use an existing contract in order to perform work under a FEMA award. FEMA considers an “existing contract” as a contract that, when formed, was intended to be limited to the parties, and does not include state, local, or tribal purchasing schedules or purchasing contracts.
- b. Permissible Use of Existing Contracts. FEMA permits a NFE to use an existing contract in the following circumstances:
  - i. The NFE originally procured the contract in full compliance with the procurement standards under the Uniform Rules.
  - ii. The scope of work to be performed falls within the scope of work of the original contract and there are no cardinal changes.
  - iii. The scope of work of the contract as originally procured did not exceed the amount of property and services required to meet the NFE’s original, reasonably expected needs.
    - (1) The Uniform Rules require the NFE to establish procedures to avoid the purchase of unnecessary or duplicative items. 2 C.F.R. § 200.318(d).
    - (2) The NFE should only contract for its current and reasonably expected needs under the FEMA award, and may not add

quantities or options to contract for solely for the purpose of a potential use at a later date. Therefore, an existing contract could have an improper, original scope if the NFE added excess capacity in the original procurement primarily for its future use. Moreover, an existing contract with an overbroad scope of work may lead to unreasonable pricing and should not be used.

- (3) The quantity of property or services a NFE reasonably believes it may need at the time of contract award could decrease due to changed circumstances or other reasons. In those situations, the NFE may use the excess contract authority to perform work under the FEMA award.
- c. Advance Contracts. A NFE may award advance contracts, also referred to as prepositioned contracts or pre-awarded contracts, before an incident occurs for the potential performance of work under the Public Assistance Grant Program under a Stafford Act emergency or major disaster.
- i. This approach enables a NFE to conduct a deliberate procurement process outside of the pressure and immediate demands of an incident and also helps to ensure that the NFE has a contractor(s) ready to perform work very quickly after an incident occurs when needed most.
  - ii. The use of such contracts is permissible so long as the circumstances below are met:
    - (1) The NFE originally procured the contract in full compliance with the procurement standards under the Uniform Rules.
    - (2) The scope of work originally procured must not exceed the reasonably expected needs during a future declaration.
    - (3) The scope of work performed must fall within the scope of work of the original contract and there are no cardinal changes.
    - (4) The pricing structure must be reasonable.
      - a. The contract price may come at a premium based on the need for the contractor to be able to perform services with little or no notice. Such a pricing structure is not, per se, unreasonable, although FEMA will scrutinize premium prices for work. For example, FEMA will scrutinize such work at premium prices extending beyond the period of time in which the NFE could have completed a competitive procurement following the declaration and the winning contractor begun work at non-premium prices.
      - b. The contract price may have built-in contingencies that result in unreasonable pricing for the work to be performed.

For example, a state could procure a statewide debris removal contract that is available for use by all state agencies and also all local governments in the state. Even assuming the procurement was conducted in full compliance with the Uniform Rules for non-state recipients and subrecipients and consistent with Chapter VI, ¶ 2.c.ii.(1)-(3), the contract would presumably have unit pricing that builds in a contractor's costs for potential debris removal anywhere in the state and on a large-scale basis. This means that the application of such a rate to a particular jurisdiction—where the scope of work is very narrow and the market rate for such services are less—may result in unreasonable pricing as applied to that particular jurisdiction. While this may be the case, per 2 C.F.R. § 200.404, costs are not unreasonable simply because there may have been a method whereby the recipient could have received a better price. A finding of “unreasonable costs” must be based on a determination that the costs incurred appear to be unreasonable because they do not reflect the actions a prudent person would take in the circumstances.

iii. Permissibility of Use of Contracts Awarded Under the Old Procurement Standards After the Implementation of the Uniform Rules.

- (1) If a prepositioned (advanced/pre-awarded) contract was properly awarded in accordance with the old Federal procurement standards found at 44 C.F.R. pt. 13 – and to a lesser extent, 2 C.F.R. pt. 215 – on a general basis, the NFE would not likely be required to necessarily re-solicit or re-award the existing contract for use during a disaster or emergency declaration issued after December 26, 2014. If the existing contracts were properly solicited and awarded under the old procurement standards at 44 C.F.R. § 13.36(a)-(i), they'll likely be in compliance when it comes to using these existing contracts today and maintaining the potential for maximum reimbursement of eligible expenses – at least from a purely procurement-related perspective. The final determination of course will need to be made on a case-by-case basis.
- (2) The old procurement standards found at 44 C.F.R. § 13.36(a)-(i) served as the basis for the new procurement standards identified at 2 C.F.R. §§ 200.317-200.326. However, with few exceptions, the new procurement standards are much more lenient than the older standards. If for example, the competition requirements, socioeconomic requirements and non-competitive proposal requirements were met under the prior rules, they would most likely survive any scrutiny under the current rules. Many of the requirements under the Uniform Rules were carried over from the old standards found at 44 C.F.R. § 13.36(b)-(i). For example, the

competition requirement (with the exception of the prohibition on award to contractors that assist in the development of a specification or requirement, Invitations for Bid or Requests for Proposals from competing for and receiving that very same contract award) and the socioeconomic standards are identical. Few requirements are more onerous such as the prohibition on award mentioned immediately above, while most changes are in fact more lenient, such as the elimination of the two-step process of analysis under non-competitive proposals, involving a preliminary determination as to whether any other contract method is infeasible for use under the four contemplated circumstances (only one source, exigent/emergency circumstances, FEMA or pass through entity pre-approval, or inadequate competition), or requirement to conduct cost or price analysis only where procurements are in excess of the simplified acquisition threshold.

- (3) As indicated above, contracts that are found to have been properly solicited and awarded IAW the old procurement standards will most likely meet the current standards, with two noticeable potential exceptions:
  - a. 2 C.F.R. § 200.319 – prohibiting a contractor from developing the specifications and requirements; Invitation for Bids or Request for Proposals; and competing for and receiving the subsequent award. This prohibition wasn't specifically addressed in the old regulations. If this situation exists in the existing contract, it would be difficult to impossible to cure this deviation in order to ensure that the existing contract meets the requirements of the current procurement standards.
  - b. 2 C.F.R. § 200.326 – requiring each purchase order or contract to include certain contract provisions. The contract provisions required by the new procurement standards have been revised in subtle ways. It would be a matter of local, state, and tribal analysis to determine whether the current contract provisions could be added through a contract modification to the existing contract and still remain within scope.
- (4) As the differences between the new standards and the old procurement standards for Institutions of Higher Education, Hospitals, and certain Private Non-profits has changed more drastically with the conversion to the Uniform Rules, use of existing contracts for these types of entities that were awarded under the old procurement standards would necessarily require a more intensive analysis by these entities to ensure that the existing contracts were solicited and awarded in a manner that would have

met the new procurement standards.

- (5) Additionally, while states have fewer requirements under the Federal procurement standards than other entities, existing contracts awarded by a state would need to be analyzed on a case-by-case basis in order to determine whether they meet the new procurement standards at 2 C.F.R. § 200.317, requiring compliance with the new contract provisions found at 2 C.F.R. § 200.326.
  - (6) However, in the absence of such confirmations, the grace period available at 2 C.F.R. § 200.110 could be exercised by a NFE, in accordance with the Uniform Rules' requirements for doing so, with the existing contracts (compliant with the old procurement standards but not the new) continuing to be used during the two additional fiscal years associated with the grace period, while follow on contracts were solicited and awarded pursuant to the new procurement standards. Under this scenario, the NFE would have an additional two fiscal years after the Uniform Rules went into effect on December 26, 2014 to get its procurement systems and contracts in line with the new standards.
- iv. Impermissible Use of Existing Contracts. A NFE may not use FEMA assistance to finance cardinal changes (e.g. out of scope changes – after-the-fact addition of parties able to use the contract, changes in the type or extent of work to be performed, use of the contract in manner and/or duration that was not originally anticipated, etc.) of an existing contract for its use under a subsequent FEMA award.

### 3. JOINT PROCUREMENTS

- a. Background. The Uniform Rules provide that—to foster greater economy and efficiency and in accordance with efforts to promote cost-effective use of shared services across of the Federal government—a NFE 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. 2 C.F.R. § 200.318(e). FEMA has interpreted this regulation as encouraging NFEs to collaborate in joint procurements.
- b. Meaning of Joint Procurement. FEMA uses the term “joint procurement” to mean a method of contracting in which two or more NFEs agree from the outset to use a single solicitation document and enter into a single contract with a vendor for delivery of property or services in a fixed quantity, even if expressed as a total minimum or total maximum. This is typically done to obtain advantages unavailable for smaller procurements, and a joint procurement is separate and distinct from a purchasing schedule.
- c. Compliance with Uniform Rules. When procuring goods or services using a joint procurement, the NFEs must comply with all applicable procurement standards



set forth in the Uniform Rules and detailed in this document.

- d. Responsibilities under the Joint Procurement. The NFE responsible for undertaking the joint procurement may, upon contract award, assign to the other participants responsibilities for administering those parts of the contract affecting their property or services. Participation in a joint procurement, however, does not relieve any participating NFE from the requirements and responsibilities it would have if it were procuring the property or services itself, and does not relinquish responsibility for the actions of other participants merely because the primary administrative responsibility for a particular action resides in another NFE other than in itself. In other words, each party taking action under a joint procurement, must ensure that all applicable Federal procurement standards are met in order to maximize the potential for reimbursement for all eligible expenses incurred under the procurement.
- e. Joint Procurements: Statewide Debris Removal Contracts. A state may establish a statewide debris removal contract that could permissibly be used by a local government under a Public Assistance award through a joint procurement. Under such an approach, the state would procure a single contractor to provide debris removal services statewide for state agencies and, at their election, for the local government.
- f. Compliance with State Law and Regulation. The state's procurement of the original contract and its use by local governments must comply with state and local law, regulations, and written procurement procedures. Importantly, the state must procure the contract with the express purpose of making it available to local governments and the contract must specifically allow for such use.
- g. Scope of Work. The scope of the work to be performed for the local government must fall within the scope of work under the statewide contract as to type, amount, haul distance, and geography.
- h. Definitive Requirements. FEMA expects the state to limit the acquisition of Federally-assisted debris removal services to the amount it needs to support its and other NFE's Public Assistance project(s).
- i. Compliance with the Uniform Rules. The state's procurement of the contract must comply with all of the procurement standards *applicable to a local government* at 2 C.F.R. §§ 200.318 to 326. This is a very important caveat, as the state would otherwise not be required to comport with the regulations when procuring services or property for its own use, but only with the regulation at 2 C.F.R. § 200.317. However, because local governments are subject to the requirements of 2 C.F.R. §§ 200.318 to 326, the state must comply with those procurement standards in order for the local governments to permissibly use the statewide contract.
- j. Pricing. It is possible that a joint procurement may not have pricing that accounts

for variables in geographic and market conditions unique to the local government availing itself of the contract. This may or may not lead to a local government paying more than it otherwise may have paid had the local government procured its own contract. While this may be the case, per 2 C.F.R. § 200.404, costs are not unreasonable simply because there may have been a method whereby the recipient could have received a better price. A finding of “unreasonable costs” must be based on a determination that the costs incurred appear to be unreasonable because they do not reflect the actions a prudent person would take in the circumstances.

#### 4. PURCHASING SCHEDULES

- a. Background. FEMA uses the term “state, local, or tribal purchasing schedule” to mean an arrangement that a state, local, or tribal government has established with several or many vendors in which those vendors agree to provide essentially an option to the state, local, or tribal government (and their subordinate government entities) to acquire specific property or services in the future at established, binding prices. If permitted by state, local, or tribal laws and regulations, a non-governmental NFE may also use the state, local, or Indian tribal purchasing schedule.
- b. Use Permitted. The Uniform Rules encourage state, local, and tribal governments to enter into intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services. As such, FEMA allows a NFE to use a state, local, or tribal purchasing schedule to procure services and property under a FEMA award if the schedule was established in a manner that complies with 2 C.F.R. §§ 200.318 to 326.
- c. Ordering Procedures.
  - i. A NFE must follow its own procurement procedures which reflect applicable state, local, or tribal laws and regulations when ordering property and services. These procedures must at least meet the minimum requirements of full and open competition and the source selection requirements under the Uniform Rules. FEMA may, in reviewing such a procurement, request not only the procurement records for originally establishing the supply schedule, but also records concerning the ordering solicitation prepared by the ordering NFE, documentation demonstrating that an adequate number of sources were solicited, documentation showing the evaluation of bids or offers received, rationale for source selection (including the cost or price analysis), and other documentation as required.
  - ii. Any property ordered must be an end item from the supply schedule, such as office property, computers, other commercial off the shelf items, and construction materials. Minor modifications or modifications customarily available in the marketplace may be permissible so long as the

modifications do not comprise a cardinal change.

- iii. Any services ordered must be for the specific tasks and/or specific outcomes to be achieved as detailed in the supply schedule, and not for tasks and/or specific outcomes falling outside the scope of the supply schedule. The acquisition of new construction services or non-routine alterations and repair services will rarely, if ever, be appropriate to order from a supply schedule, as a purchasing schedule or contract for new construction or non-routine alterations and repairs will lack the specificity for critical circumstances common to such efforts, such as the technical approach for completion of the work, innumerable combinations of site requirements (weather, physical conditions, etc.), and tailored pricing.

## 5. OBTAINING GOODS AND SERVICES THROUGH MUTUAL AID AGREEMENTS

- a. FEMA, pursuant to Subchapter H of Ch. V of the Public Assistance Program and Policy Guide, FP 104-009-2, January 2016, allows a subrecipient to use Public Assistance funding to pay for work performed by another entity through a mutual aid agreement.
- b. FEMA does not treat a mutual aid agreement as a procurement for the purposes of 2 C.F.R. pt. 200 so long as the work provided under the agreement falls within certain categories of work. Rather, FEMA treats the mutual aid assistance performed by a providing entity's employees as akin to temporary hires of the requesting entity.
- c. This applies to all forms of mutual aid assistance, including agreements between a requesting and providing entity, statewide mutual aid agreements, and mutual aid services provided under the Emergency Management Assistance Compact ("EMAC").
- d. There are three types of mutual aid work eligible for FEMA assistance:
  - i. ***Emergency Work (Public Assistance Categories A and B)*** – Mutual aid work provided in the performance of emergency work necessary to meet immediate threats to life, public safety, and improved property.
  - ii. ***Emergency Utility Restoration (Regardless of whether it is deemed Category B or F)*** – Work that is of a permanent nature but is necessary for emergency restoration of utilities. For example, work performed to restore electrical and other power.
  - iii. ***Grant Management Work*** – Work associated with the performance of the grantee's responsibilities as grant administrator. EMAC provided assistance to perform these tasks is eligible mutual aid work.
- e. If mutual aid work falls within the scope described above, then FEMA will next look to see if the providing entity performed the work using force account labor or

contract resources. A subrecipient (the requesting entity) may use Public Assistance funding to pay for the costs of *the force account labor or use of equipment* of the entity providing assistance (the providing entity) consistent with Subchapter H of Ch. V of the Public Assistance Program and Policy Guide, FP 104-009-2.

- f. If, however, the providing entity performs mutual aid work through contract, then FEMA will perform the following analysis:
  - i. Contract Services or Supplies are Incidental to the Work Performed by the Providing Entity. In those cases where contract services or supplies are incidental to the work performed by the providing entity, then FEMA will generally not treat the mutual aid agreement as a procurement and evaluate it according to the criteria at 2 C.F.R. Part 200.
  - ii. The Providing Entity Predominantly or Exclusively Performs Mutual Aid Work Through Contract. In other cases, however, a providing entity may perform the work under the mutual aid agreement predominantly or exclusively through contract. FEMA will, in these cases, treat the mutual aid agreement as a procurement and evaluate it against the criteria of 2 C.F.R. §§ 200.318-200.326.

## 6. ASSIGNMENT OF CONTRACT RIGHTS

- a. Background. A NFE may find it advantageous to use existing contract rights of another NFE. An “existing contract” does not include, for the purposes of this section, a state, local, or tribal supply schedule or the GSA Federal Supply Schedule.
- b. Exercise of Assignment Rights. Although FEMA generally discourages a NFE from obtaining contract rights from another NFE, a NFE may exercise contractual rights obtained through assignment subject to the following limitations.
  - i. Original Procurement. The original contract must have been procured in full compliance with the procurement standards under the Uniform Rules.
  - ii. Original Scope. The scope of the contract originally procured by the assigning party does not exceed the amount of property and services required to meet the assigning party’s original, reasonably expected needs. The regulation at 2 C.F.R. § 200.318(d) requires a NFE to have procurement procedures that preclude it from acquiring property or services it does not need. Therefore, a contract would have an improper original scope if the original party added excess capacity in the original procurement primarily to permit assignment of those contract rights to another entity. Moreover, an assignable contract with an overbroad scope of work may lead to unreasonable pricing and thus should not be used.
  - iii. Assignability Provisions. The original contract must contain appropriate

assignability provisions that permit the assignment of all or a portion of the specified deliverables under the terms originally advertised, competed, evaluated, and awarded, or contains other appropriate assignment provisions.

- iv. No Cardinal Changes. The scope of work, terms, and conditions of the assigned contract rights that the NFE seeks to exercise must be the same or substantially similar to those in the original contract and there are no cardinal changes.
  - v. Quantities. The quantities the assigning party acquired, coupled with the quantities the acquiring recipient or subrecipient seeks, do not exceed the amounts available under the assigning entity's contract
  - vi. Price. The NFE may not exercise assigned contract rights unless it has determined that the price is fair and reasonable.
- c. Noncompetitive Procurement. FEMA will treat an assignment of contract rights that does not meet the limitations described in Chapter VI, ¶ 5.b as a sole source procurement, such that a NFE may only use such a method if it meets the requirements for procurement through noncompetitive proposals.

## 7. USE OF PURCHASING AGENTS

- a. General. FEMA uses the term “purchasing agent” to generally refer to a contracted agent of the NFE that assists in the procurement of goods and services. The purchasing agent may assist the NFE in, among other things, conducting market research, preparing solicitations, evaluating bids or proposals, and negotiating contracts, and screening information about products on the behalf of the recipient or subrecipient.
- b. Use Permitted. If the NFE lacks qualified personnel within its organization to undertake the various tasks required to comply with the procurement standards, FEMA expects the NFE to acquire the necessary services from sources outside the NFE's organization, such as a purchasing agent. The use of a purchasing agent should be specified in the NFE's written procurement procedures.
- c. Conflicts of Interest. A purchasing agent shall not participate in the selection, award, or administration of a contract supported by a FEMA award if he or she has a real or apparent conflict of interest. *See* 2 C.F.R. § 200.318(c)(1); Chapter IV, ¶ 3. In addition, the NFE must take appropriate steps to prevent or mitigate organizational conflicts of interest that would result in conflicting roles that might bias a contractor's judgment or would result in unfair competitive advantage.

## 8. FEDERAL EXCESS PROPERTY

- a. The Uniform Rules encourage NFEs to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and

reduces project costs. 2 C.F.R. § 200.318(f). A NFE would acquire such equipment and property through the Federal Surplus Personal Property Donation Program.

- b. The General Services Administration (“GSA”) carries out the Federal Surplus Personal Property Donation Program under which GSA will donate “surplus” Federal property—through a state agency for surplus property—to eligible public agencies and eligible nonprofit educational or public health institutions. *See* 40 U.S.C. § 549; 41 C.F.R. Part 102-37. Surplus personal property (surplus property) means excess personal property not required for the needs of any Federal agency, as determined by GSA.
- c. A NFE interested in obtaining Federal surplus personal property should contact its servicing FEMA Regional Administrator for additional information.

## APPENDIX A

### AUTHORIZING LEGISLATION AND GRANT PROGRAMS

1. A number of Federal laws provide the authority for FEMA to carry out its grant and cooperative agreement programs.
2. Public Assistance Grant Program. The Public Assistance (“PA”) Grant Program is authorized by the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, §§ 402, 403, 406, 407, and 502 (1974) (codified as amended at 42 U.S.C. §§ 5170a, 5170b, 5172, 5173, and 5192) (“Stafford Act”). The implementing regulations for this program are set forth at 44 C.F.R. Part 206, subparts C, G, H, I, and M. FEMA has also issued the *Public Assistance Program and Policy Guide* (“PAPPG”), which includes most of the Public Assistance policy. Additional documents not yet superseded by the PAPPG are available online.
3. Hazard Mitigation Grant Program. The Hazard Mitigation Grant Program (“HMGP”) is authorized by the Stafford Act, § 404 (codified as amended at 42 U.S.C. § 5170c) under a major disaster declaration. The implementing regulations are set forth at 44 C.F.R. Part 206, subpart N. FEMA has also issued the [Hazard Mitigation Assistance Unified Guidance](#) to provide additional guidance.
4. Fire Management Assistance Grant Program. The Fire Management Assistance Grant (“FMAG”) Program is authorized by the Stafford Act, § 420 (codified as amended at 42 U.S.C. § 5187) under a fire declaration. The implementing regulations are set forth at 44 C.F.R. Part 204. FEMA has also issued a number of [policy documents](#) and issued the [FMAG Guide](#) to describe the basic provisions, processes, and procedures of the program.
5. Crisis Counseling Assistance and Training Grant Program. The Crisis Counseling Assistance and Training Grant Program is authorized by the Stafford Act, § 416 (codified as amended at 42 U.S.C. § 5183) under a major disaster declaration. The implementing regulations are set forth at 44 C.F.R. § 206.171.
6. Disaster Case Management Grant Program. The Disaster Case Management Service Grant Program is authorized by the Stafford Act, § 426 (codified as amended at 42 U.S.C. § 5189d) under a major disaster declaration. FEMA has adopted [Disaster Case Management Program Guidance](#) to provide implementing guidance for this grant program.
7. Federal Assistance to Individual and Households – Other Needs Assistance (State Option). The Other Needs Assistance (“ONA”) program is authorized by the Stafford Act, § 408 (codified as amended at 42 U.S.C. § 5174) under either an emergency or major disaster declaration. The implementing regulations are set forth at 44 C.F.R. Part 206, subpart D.
8. Flood Mitigation Assistance Grant Program. The Flood Mitigation Assistance (“FMA”) Program is authorized by the National Flood Insurance Act of 1968, Pub. L. No. 90-448, § 1366 (1968) (codified as amended at 42 U.S.C. § 4104c) (“NFIA”). The implementing

regulations are set forth at 44 C.F.R. Parts 78 and 79. FEMA has also issued the [Hazard Mitigation Assistance Unified Guidance](#)

9. Pre-Disaster Mitigation Grant Program. The Pre-Disaster Mitigation (“PDM”) Program is authorized by Stafford Act, § 203 (codified as amended at 42 U.S.C. § 5133). FEMA has issued the [Hazard Mitigation Assistance Unified Guidance](#) to provide additional guidance.
10. Cooperating Technical Partners Cooperative Agreement Program. The Cooperating Technical Partners Program (“CTPP”) is authorized by the NFIA, § 1360 (codified as amended at 42 U.S.C. § 4101).
11. National Dam Safety Grant Program. The National Dam Safety Program is authorized by the National Dam Safety Program Act, Pub. L. No. 93-367, § 8 (1972) (codified as amended at 33 U.S.C. § 467f).
12. Earthquake Hazards Reduction Cooperative Agreement Program. The Earthquake Hazard Reduction Program is authorized by the Earthquake Hazard Reduction Act (“EHRA”) of 1977, Pub. L. No. 95-124, § 5 (1977) (codified as amended at 42 U.S.C. § 7704). The implementing regulations are set forth at 44 C.F.R. Part 361.
13. Emergency Management Preparedness Grant. The Emergency Management Preparedness Grant (“EMPG”) is authorized by the Stafford Act, §§ 611 and 613 (codified as amended at 42 U.S.C. §§ 5196 and 5196b); Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, § 662 (2006) (codified as amended at 6 U.S.C. § 762); NFIA; and EHRA. FEMA publishes each year the *Emergency Management Performance Grant Program Funding Opportunity Announcement* that provides detailed information about this program. This announcement is posted on the Preparedness (Non-Disaster) Grants [webpage](#).
14. Homeland Security Grant Program. The Homeland Security Grant Program is authorized by the Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 2002 and 2003 (2002) (codified as amended at 6 U.S.C. §§ 603 and 604) (“Homeland Security Act”). The Homeland Security Grant Program is comprised of three interconnected grant programs: State Homeland Security Program, Urban Areas Security Initiative, and Operation Stonegarden. FEMA publishes each year the *Homeland Security Grant Program Funding Opportunity Announcement* that provides detailed information about this program. This announcement is posted on the Preparedness (Non-Disaster) Grants [webpage](#).
15. Nonprofit Security Grant Program. The Non-Profit Security Grant Program is authorized by the Homeland Security Act, § 2003 (codified as amended at 6 U.S.C. § 604). FEMA publishes each year the *Nonprofit Security Grant Program Funding Opportunity Announcement* that provides detailed information about this program. This announcement is posted on the Preparedness (Non-Disaster) Grants [webpage](#).
16. Tribal Homeland Security Grant Program. The Tribal Homeland Security Grant Program is authorized by the Homeland Security Act, § 2005 (codified as amended at 6 U.S.C. § 606). FEMA publishes each year the *Tribal Homeland Security Grant Program Funding*



*Opportunity Announcement* that provides detailed information about this program. This announcement is posted on the Preparedness (Non-Disaster) Grants [webpage](#).

17. Transit Security Grant Program. The Transit Security Grant Program is authorized by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1406 (2007) (codified as amended at 6 U.S.C. § 1135). FEMA publishes each year the *Transit Security Grant Program Funding Opportunity Announcement* that provides detailed information about this program. This announcement is posted on the Preparedness (Non-Disaster) Grants [webpage](#).
18. Port Security Grant Program. The Port Security Grant Program is authorized by the Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, § 102 (2002) (codified as amended at 46 U.S.C. § 70107). FEMA publishes each year the *Port Security Grant Program Funding Opportunity Announcement* that provides detailed information about this program. This announcement is posted on the Preparedness (Non-Disaster) Grants [webpage](#).
19. Fire Prevention and Safety Grant Program. The Fire Prevention and Safety Grant Program is authorized by the Federal Fire Prevention and Control Act of 1974, Pub. L. No. 93-498, § 33 (1974) (codified as amended at 15 U.S.C. § 2229) (“Federal Fire Prevention and Control Act”). The implementing regulations are set forth at 44 C.F.R. Chapter I, Subchapter C. FEMA also publishes each year the *Fire Prevention and Safety Grant Program Funding Opportunity Announcement* that provides detailed information about this program. This announcement is posted at the Assistance to Firefighters Grant Program [webpage](#).
20. Staffing for Adequate Fire and Emergency Response. The Staffing for Adequate Fire and Emergency Response Program is authorized by the Federal Fire Prevention and Control Act, § 34 (codified as amended at 15 U.S.C. § 2229a). The implementing regulations are set forth at 44 C.F.R. Chapter I, Subchapter C. FEMA also publishes each year the *Staffing for Adequate Fire and Emergency Response Funding Opportunity Announcement* that provides detailed information about this program. This announcement is posted at the Assistance to Firefighters Grant Program [webpage](#).
21. Continuing Training Grants. The Continuing Training Grant Program is authorized by the annual DHS Appropriations Acts.

## **APPENDIX B**

### **DEFINITIONS**

1. All definitions at 2 C.F.R. Part 200, subpart A apply to this circular, and the definitions marked by an “\*” below are restatements of several of those definitions. In addition, there are additional definitions provided below that apply to this Supplement.
2. Approval means a written statement transmitted in written hard copy or in electronic format or medium of a FEMA official authorized to permit the NFE to take or omit an action required by the grant agreement, cooperative agreement, Uniform Rules, or this circular, which action may not be taken or omitted without such permission. An oral permission or interpretation has no legal effect, force, or authority.
3. Best value means a procurement by competitive proposal process in which the NFE reserves the right to select the most advantageous offer by evaluating and comparing factors in addition to cost or price, consistent with the stated evaluation criteria. Under such a process, the NFE may award a contract to the offeror whose offer is the most technically superior but is higher in price than the lowest priced, technically acceptable proposal.
4. Cardinal change means a significant change in contract work (property or services) that causes a major deviation from the original purpose of the work or the intended method of achievement, or causes a revision of contract work so extensive, significant, or cumulative that, in effect, the contractor is required to perform very different work from that described in the original contract.
5. Change order means an order authorized by the recipient or subrecipient to make changes, pursuant to contract provisions for such changes; may be issued with or without consent of the contractor, depending upon the language of the provision.
6. Constructive change means an act or omission by the NFE that, although not identified as a “change order,” does in fact cause a change in the contract work.
7. \*Contract means a legal instrument by which a NFE purchases property or services needed to carry out the project or program under a Federal award. The term does not include legal instrument, even if the NFE considers it a contract, when the substance of the transaction meets the definition of a Federal award or subaward. 2 C.F.R. § 200.22.
8. \*Cooperative agreement means a legal instrument of financial assistance between a Federal awarding agency or pass-through entity and a NFE that, consistent with 31 U.S.C. §§ 6302-6305:
  - a. Is used to enter into a relationship the principal purpose of which is to transfer anything of value from the Federal awarding agency or pass-through entity to the NFE to carry out a public purpose authorized by a law of the United States (*see* 31 U.S.C. § 6101(3));

- and not to acquire property or services for the Federal government or pass-through entity's direct benefit or use;
- b. Is distinguished from a grant in that a cooperative agreement provides for substantial involvement between the Federal awarding agency or pass-through entity and the NFE in carrying out the activity contemplated by the Federal award.
  - c. The term does not include:
    - i. A cooperative research and development agreement as defined in 15 U.S.C. § 3710a;
    - ii. An agreement that provides only: (a) Direct United States Government cash assistance to an individual; (b) A subsidy; (c) A loan; (d) A loan guarantee; or (e) Insurance. 2 C.F.R. § 200.24.
9. Department or DHS means the Department of Homeland Security.
  10. Design-build means a procurement method consisting of contracting for design and construction simultaneously with a contract award to a single contractor or contractor team that will be responsible for both the project's design and construction.
  11. \*Federal awarding agency means the Federal agency that provides a Federal award directly to the NFE. 2 C.F.R. § 200.37. In this circular, the Federal awarding agency is FEMA.
  12. FEMA financial assistance means the assistance that NFEs receive or administer in the form of grants and cooperative agreements under the programs set forth in Chapter I, ¶ 3.
  13. FEMA means the Federal Emergency Management Agency.
  14. FEMA Award or "Award" has the meaning, depending on the context, of:
    - a. The FEMA financial assistance that a NFE receives directly from FEMA or indirectly from a pass-through entity under one of the grant and cooperative agreement programs set forth in Chapter I, ¶ 3; or
    - b. The instrument setting forth the terms and conditions associated with FEMA financial assistance.
  15. \*Fixed amount award means a type of grant agreement under which the Federal awarding agency or pass-through entity provides a specific level of support without regard to actual costs incurred under the Federal award. This type of Federal award reduces some of the administrative burden and recordkeeping requirements for both the NFE and Federal awarding agency or pass-through entity. Accountability is based primarily on performance and results. 2 C.F.R. § 200.45.
  16. Full and open competition generally means that a complete requirement is publicly solicited and all responsible sources are permitted to compete.

17. \*Grant agreement means a legal instrument of financial assistance between a Federal awarding agency or pass-through entity and a NFE that, consistent with 31 U.S.C. §§ 6302, 6304:
  - a. Is used to enter into a relationship the principal purpose of which is to transfer anything of value from the Federal awarding agency or pass-through entity to the NFE to carry out a public purpose authorized by a law of the United States (*see* 31 U.S.C. § 6101(3)); and not to acquire property or services for the Federal awarding agency or pass-through entity's direct benefit or use;
  - b. Is distinguished from a cooperative agreement in that it does not provide for substantial involvement between the Federal awarding agency or pass-through entity and the NFE in carrying out the activity contemplated by the Federal award.
  - c. Does not include an agreement that provides only: (1) Direct United States Government cash assistance to an individual; (2) A subsidy; (3) A loan; (4) A loan guarantee; or (5) Insurance. 2 C.F.R. § 200.51.
18. \*Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. Chapter 33), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. § 450b(e)). *See* annually published Bureau of Indian Affairs list of Indian Entities Recognized and Eligible to Receive Services. 2 C.F.R. § 200.54.
19. \*Institution of higher education is defined at 20 U.S.C. § 1001. 2 C.F.R. § 200.55.
20. \*Local government means any unit of government within a state, including a: (a) County; (b) Borough; (c) Municipality; (d) City; (e) Town; (f) Township; (g) Parish; (h) Local public authority, including any public housing agency under the 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 organization under state law; and (m) any other agency or instrumentality of a multi-, regional, or intra-state or local government. 2 C.F.R. § 200.64.
21. Joint procurement means a method of contracting in which two or more purchasers agree to use a single solicitation document and enter into a single contract with a vendor for delivery of property or services for a fixed quantity. The fixed quantity may be expressed as a total minimum and total maximum. Unlike a State, local, or Indian tribal purchasing schedule, a joint procurement is not drafted for the purpose of accommodating the needs of other parties that may later choose to participate in the benefits of that contract.
22. \*Micro-purchase means a purchase of property or services using simplified acquisition procedures, the aggregate amount of which does not exceed the micro-purchase threshold. Micro-purchase procedures comprise a subset of a NFE's small purchase procedures. The NFE uses such procedures in order to expedite the completion of its lowest-dollar small purchase transactions and minimize the associated administrative burdens and costs. The

micro-purchase threshold is set by the Federal Acquisition Regulation at 48 C.F.R. Part 2 (Definitions of Words and Terms), subpart 2.1 (Definitions). The regulations state that it is \$ 3,000 *except as otherwise discussed in subpart 2.1 of that regulation*, but this threshold is periodically adjusted for inflation. 2 C.F.R. § 200.67. As of 1 October 2015, the current micro-purchase threshold, after adjustment for inflation, is \$ 3,500.

23. \*NFE means a state, local government, Indian tribe, institution of higher education, hospital, or nonprofit organization that carries out a Federal award as a recipient or subrecipient. 2 C.F.R. § 200.69.
24. \*Nonprofit organization means any corporation, trust, association, cooperative, or other organization, not including IHEs, that:
  - a. Is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest;
  - b. Is not organized primarily for profit; and
  - c. Uses net proceeds to maintain, improve, or expand the operations of the organization. 2 C.F.R. § 200.69.
25. Option means a unilateral right in a contract by which, for a specified time, a NFE may elect to purchase additional equipment, property, or services called for by the contract, or may elect to extend the term of the contract for a set period of time.
26. Office of Inspector General or “OIG” means the independent auditing organization within the Department of Homeland Security.
27. \*Pass-through entity means a NFE that provides a subaward to a subrecipient to carry out part of a Federal program. 2 C.F.R. § 200.74.
28. \*Personal property means property other than real property. It may be tangible, having physical existence, or intangible. 2 C.F.R. § 200.78.
29. \*Property means real property or personal property. 2 C.F.R. § 200.81.
30. Purchasing agent means an agent of the NFE that assists in the procurement of goods and services. The purchasing agent may assist the NFE in, among other things, conducting market research, preparing solicitations, evaluating bids or proposals, and negotiating contracts, and screening information about products.
31. \*Real property means land, including land improvements, structures or appurtenances thereto, but excludes machinery and equipment. 2 C.F.R. § 200.85.
32. \*Recipient (formerly “Grantee) means a NFE that receives a Federal award directly from a Federal awarding agency to carry out an activity under a Federal program. The term recipient does not include subrecipients. 2 C.F.R. § 200.86.

33. \*Simplified acquisition threshold means the dollar amount below which a NFE may purchase property or services using small purchase methods. NFEs adopt small purchase procedures in order to expedite the purchase of items costing less than the simplified acquisition threshold. The simplified acquisition threshold is set by the Federal Acquisition Regulation at 48 C.F.R. Subpart 2.1 (Definitions) and in accordance with 41 U.S.C. § 1908. As of the publication of this circular, the simplified acquisition threshold is \$150,000, but this threshold is periodically adjusted for inflation. 2 C.F.R. § 200.88.
34. \*State means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any agency or instrumentality thereof exclusive of local governments. 2 C.F.R. § 200.90. A State does not include an Indian tribe.
35. State, local government, or Indian tribe purchasing schedule or purchasing contract means an arrangement that a State, local government, or Indian tribe has established with multiple vendors in which those vendors agree to provide essentially an option to the State, local government, or Indian tribe and their subordinate government entities and others it might include in their programs, to acquire specific property or services in the future at established prices and consistent with the terms established in the schedule or purchasing contract.
36. \*Subaward (formerly “Subgrant”) means an award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a Federal award received by the pass-through entity. It does not include payments to a contractor or payments to an individual that is a beneficiary of a Federal program. A subaward may be provided through any form of legal agreement, including an agreement that the pass-through entity considers a contract. 2 C.F.R. § 200.92.
37. \*Subrecipient (formerly “Subgrantee”) means a NFE that receives a subaward from a pass-through entity to carry out part of a Federal program; but does not include an individual that is a beneficiary of such program. A subrecipient may also be a recipient of other Federal awards directly from a Federal awarding agency. 2 C.F.R. § 200.93.
38. Third party contract means a “contract” as defined above.
39. Uniform Rules (also referred to as the Super Circular) means the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards codified at 2 C.F.R. Part 200, which DHS adopted on December 19, 2014.
40. \*Value engineering means the systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lowest cost. Normally associated with construction or production contracts. 2 C.F.R. § 200.318(g).

## APPENDIX C

### APPLICABLE FEDERAL LAWS, REGULATIONS, AND EXECUTIVE ORDERS

#### 1. Background.

- a. In addition to complying with the Uniform Rules and the enabling laws, implementing regulations, and FEMA policies for a grant or cooperative agreement program, each NFE must also comply with all other applicable Federal laws, regulations, and executive orders.
- b. Many of these laws, regulations, and executive orders will need to be included in third party contracts to the lowest tier necessary, and others, although not expressly referenced in a contract, will have a direct and indirect effect on a NFE's third party contracts.
- c. DHS issues, on an annual basis, Standard Terms and Conditions that apply to recipients of Federal awards from all DHS Components, including FEMA. In addition, a recipient executes a Standard Form ("SF") 424B or 424D with its grant or cooperative agreement application to FEMA that contains standard assurances. The DHS Standard Terms and Conditions and SF 424B and D contain references to many cross-cutting Federal laws and regulations that may apply to a FEMA award.
- d. The following provides a non-exhaustive list and description of some of the cross-cutting laws, regulations, and executive orders that may affect a NFE's procurement.

#### 2. Debarment and Suspension

- a. NFEs and contractors are subject to the debarment and suspension regulations implementing Executive Order 12549, *Debarment and Suspension* (1986) and Executive Order 12689, *Debarment and Suspension* (1989) at 2 C.F.R. Part 180 and the Department of Homeland Security's regulations at 2 C.F.R. Part 3000 (Nonprocurement Debarment and Suspension). These regulations restrict awards, subawards, and contracts with certain parties that are debarred, suspended, or otherwise excluded from or ineligible for participation in Federal assistance programs and activities.
- b. The regulations at 2 C.F.R. Part 180 and 2 C.F.R. Part 3000 specifically prohibit a NFE from entering into a "covered transaction" with a party listed on the System for Award Management Exclusions ("SAM Exclusions"). SAM Exclusions is the list maintained by the General Services Administration that contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549. SAM exclusions can be accessed at [www.sam.gov](http://www.sam.gov). See 2 C.F.R. §§ 180.530.
- c. The Department of Homeland Security regulations at 2 C.F.R. Part 3000 include, within the meaning of a "covered transaction," a third party contract at any tier of

\$25,000 or more; a third party contract at any tier for a Federally required audit (irrespective of the contract amount); and a third party contract at any tier that must be approved by an FEMA official irrespective of the contract amount. 2 C.F.R. § 3000.220; 2 C.F.R. § 180.220.

- d. The Uniform Rules require a NFE to include contract provisions that require compliance with debarment and suspension prohibitions. *See* Chapter IV, ¶¶ 6.d and 12.a.ix; 2 C.F.R. Part 200, Appendix II, ¶ I; DHS Standard Terms and Conditions, v 3.0, ¶ X (Dec. 4, 2013)
3. Acknowledgement of FEMA Funding. A NFE must acknowledge its use of Federal funding when issuing statements, press releases, requests for proposals, bid invitations, and other documents describing projects or programs funded in whole or in part with FEMA financial assistance. Specifically, the document shall indicate that FEMA is providing the funds, the Catalog of Federal Domestic Assistance Number, as applicable, and the amount provided. *See* Financial Services and General Government Appropriations Act, 2015, Pub. L. No. 113-83, Division E, § 724 (2015); DHS Standard Terms and Conditions, v 3.0, ¶ II (Dec. 4, 2013).
  4. Lobbying Certification and Disclosure.
    - a. A NFE must comply with 31 U.S.C. § 1352 and 44 C.F.R. Part 18, which provides that no FEMA financial assistance may be expended by a recipient, subrecipient, contractor, or subcontractor to pay any person to influence, or attempt to influence, an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any Federal action concerning the award or renewal.
    - b. If a third party contract will exceed \$100,000, before awarding the contract, the NFE must obtain a lobbying certification and, if applicable, a lobbying disclosure from a prospective third party contractor. 44 C.F.R. § 18.110.
    - c. The Uniform Rules require a contractor to include provisions in its contracts of \$100,000 or more for compliance with lobbying certification and disclosure requirements. *See* Chapter IV, ¶ 12.a.x; 2 C.F.R. Part 200, Appendix II, ¶ J; DHS Standard Terms and Conditions, v. 3.0, ¶ XVIII (Dec. 4, 2013).
  5. Civil Rights Requirements. A NFE is required to follow various civil rights requirements when carrying out activities under a FEMA award, and these requirements will flow down to a NFE's contractors at every tier.
    - a. Nondiscrimination.
      - i. Nondiscrimination on the Basis of Race, Color, and National Origin. Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*), FEMA's implementing regulations at 44 C.F.R. Part 7 (*Nondiscrimination in Federally Assisted Programs*), and the Department's implementing regulations at 6 C.F.R. Part 21 (*Nondiscrimination on the Basis of Race, Color, or National Origin in Programs*



*or Activities Receiving Federal Financial Assistance*) provide that no person in the United States will, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. See DHS Standard Terms and Conditions, v 3.0, ¶ VII (Dec. 4, 2013); Standard Form 424D, ¶ 10.

- ii. Nondiscrimination on the Basis of Sex. Title IX of the Education Amendments of 1972 (codified as amended at 20 U.S.C. § 1681 et seq.), FEMA's implementing regulations at 44 C.F.R. Part 19 (*Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*), and the Department's implementing regulations at 6 C.F.R. Part 15 (*Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*) prohibit discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. See DHS Standard Terms and Conditions, v 3.0, ¶ IX (Dec. 4, 2013); Standard Form 424D, ¶ 10.
- iii. Nondiscrimination on the Basis of Disability. The Americans with Disability Act of 1990 (codified as amended at 42 U.S.C. §§ 12101-12213) prohibits discrimination against qualified individuals with disabilities in programs, activities, and services, and imposes specific requirements on public and private public and private entities. Contractors must comply with the responsibilities under Titles I, II, III, IV, and V of the Americans with Disability Act of 1990 in employment, public services, public accommodations, telecommunications, and other provisions, many of which are subject to regulations issued by other Federal agencies. See DHS Standard Terms and Conditions, v 3.0, ¶ V (Dec. 4, 2013); Standard Form 424D, ¶ 10.
- iv. Nondiscrimination on the Basis of Handicap. Section 504 of the Rehabilitation Act of 1973 (codified as amended at 29 U.S.C. § 794) and FEMA's implementing regulations at 44 C.F.R. Part 16 (*Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Federal Emergency Management Agency*) provide that no otherwise qualified handicapped individual in the United States will, solely by reason of handicap, be excluded from participation in, be denied the benefits of, or be subjected to, discrimination under any program or activity receiving Federal financial assistance. See DHS Standard Terms and Conditions, v 3.0, ¶ XXIII (Dec. 4, 2013); Standard Form 424D, ¶ 10.
- v. Nondiscrimination on the Basis of Age. The Age Discrimination Act of 1975 (codified as amended at 42 U.S.C. § 6101 et seq.), and Department of Health and Human Services implementing regulations at 45 C.F.R. Part 90 (*Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance*) prohibit discrimination against individuals on the basis of age in any program or activity receiving Federal financial assistance. See DHS Standard Terms and Conditions, v 3.0, ¶ IV (Dec. 4, 2013); Standard Form 424D, ¶ 10.

- vi. Nondiscrimination on the Basis of Limited English Proficiency. Title VI of the Civil Rights Act of 1964 prohibition against discrimination on the basis of national origin requires that recipients and subrecipients of FEMA assistance take reasonable steps to provide meaningful access to persons with limited English proficiency. Executive Order 13166, *Improving Access to Services for Persons with Limited English Proficiency* (Aug. 11, 2000), requires Federal agencies to issue guidance to recipients, assisting such organizations and entities in understanding their language access obligations. The Department published the required guidance, which is entitled DHS Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 76 Fed. Reg. 21755-21768 (Apr. 18, 2011). See DHS Standard Terms and Conditions, v 3.0, ¶ XVII (Dec. 4, 2013).
  - vii. Consistent with the preceding nondiscrimination requirements, a NFE's contractors must comply with the following requirements.
    - (1) A contractor of a NFEs must not discriminate against any employee or applicant for employment because of race, color, creed, national origin, sex, age, English proficiency, or disability.
    - (2) A contractor of a NFE carrying a program or activity under a FEMA award must not, on the grounds of race, color, creed, national origin, sex, age, English proficiency, or disability, exclude a person from participation in, deny him/her benefits, or subject him/her to discrimination.
    - (3) Contractors must adhere to any Federal implementing regulations and other requirements that the Department and the FEMA have with respect to nondiscrimination.
- b. Equal Opportunity
- i. Race, Creed, National Origin, Sex. A contractor must, in accordance with Title VII of the Civil Rights Act of 1968, comply with all applicable equal employment opportunity requirements of U.S. Department of Labor regulations at 41 C.F.R Part 60 (Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor), which implement Executive Order No. 11246, *Equal Employment Opportunity*, as amended by Executive Order No. 11375, *Amending Executive Order 11246 Relating to Equal Employment Opportunity*, 42 U.S.C. § 2000e note. The Contractor must take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, creed, national origin, sex, or age. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. See DHS Standard Terms and Conditions, v 3.0, ¶ VII (Dec. 4, 2013); Standard Form 424D, ¶ 10.

- ii. Age. A contractor must refrain from discrimination against present and prospective employees for reason of age in accordance with section 4 of the Age Discrimination in Employment Act of 1967 (codified as amended at 29 U.S.C. § 623).
  - iii. Disabilities. A contractor must, in accordance with Section 102 of the Americans with Disabilities Act of 1990 (codified as amended at 42 U.S.C. § 12112) and the requirements of the U.S. Equal Employment Opportunity Commission at 29 C.F.R. Part 1630 (Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act) pertaining to employment of persons with disabilities.
  - iv. Except as otherwise provided under 41 C.F.R. Part 60, the Uniform Rules require that all contracts that meet the definition of “Federally assisted construction contract” in 41 C.F.R. § 60-1.3 must include the equal opportunity clause provided under 41 C.F.R. § 60-1.4(b), in accordance with Executive Order 11246, *Equal Employment Opportunity* (30 Fed. Reg. 12319, 12935, 3 C.F.R. Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, *Amending Executive Order 11246 Relating to Equal Employment Opportunity*, and implementing regulations at 41 C.F.R. Part 60 (Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor). See Chapter IV, ¶ 12.a.iii; 2 C.F.R. Part 200, Appendix II, ¶ C.
6. Environmental and Historic Preservation Protections. Federal laws, regulations, and executive orders and the terms and conditions of specific FEMA award require the NFE to comply with applicable environmental and historic preservation requirements, which will, in turn, necessitate the NFE’s implementation of these requirements as necessary in its third party contracts. See Standard Form 424D, ¶¶ 15, 16, and 17.
- a. General – Environmental and Historic Preservation Compliance. FEMA will identify various environmental and historic preservation mitigation measures with which a NFE must comply when performing the scope of work under a FEMA award. FEMA expects the NFE to include adequate third party provisions to facilitate compliance with such measures that the NFE has agreed to implement as a term and condition of the FEMA award. The following sections provide brief discussion of a few of the applicable environmental and historic preservation statutes.
  - b. National Environmental Policy Act
    - i. The National Environmental Policy Act (“NEPA”) requires FEMA to consider the environmental impact of proposed actions (such as awarding Federal grants and cooperative agreements), including adverse consequences and reasonable alternatives, before making decisions or taking actions that may significantly affect the quality of the human environment. See National Environmental Policy Act of 1969, Pub. L. No. 91-190 (1969) (codified as amended at 42 U.S.C. §§ 4321-4347); Standard Form 424D, ¶ 15.

- ii. A NFE should not have a contractor proceed with contract work until FEMA has completed any necessary NEPA review and awarded the grant, cooperative agreement, and individual project under such grant or cooperative agreement.
  - iii. Occasionally, a NFE will request funding for an action that has been initiated and/or completed before FEMA has completed environmental review and documentation as required by NEPA and FEMA's implementing regulations at 44 C.F.R. Part 10 (Environmental Considerations) and the Council for Environmental Quality implementing regulations at title 40 of the C.F.R.
  - iv. It is FEMA policy that actions initiated and/or completed without fulfilling the specific documentation and procedural requirements of NEPA may not be considered for funding. There are, notably, statutory exclusions to this requirement, and FEMA may provide additional exceptions in emergency situations. *See FEMA Environmental Planning and Historic Preservation Policy No. 108.024.4, Projects Initiated Without Environmental Review Required by the National Environmental Policy Act (NEPA) (Dec. 18, 2013).*
  - v. The statutory exclusions and exceptions do not relieve FEMA of the responsibility to comply with other legal requirements under the National Historic Preservation Act, Endangered Species Act, Clean Water Act, other laws, and various executive orders. Furthermore, FEMA may not consider for funding work commenced before FEMA has completed review under these other legal requirements, even where NEPA review is not required.
- c. Endangered Species Act
- i. The Endangered Species Act ("ESA") requires all Federal agencies to consider the effects of their actions (such as grants and cooperative agreement awards) on listed species and their critical habitats. *See Endangered Species Act of 1973, Pub. L. No. 93-205 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544); Standard Form 424D, ¶ 15.*
  - ii. FEMA must consult with the National Marine Fisheries Service or U.S. Fish and Wildlife Services to ensure that any proposed action funded under a grant or cooperative agreement is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of a habitat. This consultation, if necessary, must take place before the action is taken, although there are exceptions for emergency actions.
- d. Clean Air Act
- i. The Clean Air Act establishes the basic structure for regulating air pollutants, which requires the Environmental and Protection Agency ("EPA") to establish national air quality standards and states to adopt enforceable plans to achieve the standards. 42 U.S.C. §§ 7401-7671q.

- ii. Section 306 of the Clean Air Act (42 U.S.C. § 7606) and EPA’s implementing regulations at 2 C.F.R. Part 1523, subpart J, disqualify persons convicted of certain offenses from eligibility to receive any contract, subcontract, assistance, subassistance, loan, or other nonprocurement benefit or transaction that is prohibited by a Federal agency under the government debarment and suspension system if a person will perform any part of the transaction or award at the facility giving rise to the conviction and the person owns, leases, or supervises the facility.
  - iii. The Uniform Rules require a contractor to agree to comply with this and all other applicable standards, orders, or regulations issued pursuant to the Clean Air Act for contracts over \$150,000. *See* Chapter IV, ¶ 12.a.vii and 2 C.F.R. Part 200, Appendix II, ¶ G; Standard Form 424D, ¶ 15.
- e. Federal Water Pollution Control Act
- i. The Federal Water Pollution Control Act (“Clean Water Act”) establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating quality standards for surface waters. 33 U.S.C. §§ 1251-1387.
  - ii. Section 508 of the Clean Water Act (33 U.S.C. § 1368) and EPA’s implementing regulations at 2 C.F.R. Part 1523, subpart J, disqualify persons convicted of certain offenses from eligibility to receive any contract, subcontract, assistance, subassistance, loan, or other nonprocurement benefit or transaction that is prohibited by a Federal agency under the government debarment and suspension system if a person will perform any part of the transaction or award at the facility giving rise to the conviction and the person owns, leases, or supervises the facility.
  - iii. The Uniform Rules require a contractor to agree to comply with this and all other applicable standards, orders, or regulations issued pursuant to the Clean Water Act for contracts over \$150,000. *See* Chapter IV, ¶ 12.a.vii and 2 C.F.R. Part 200, Appendix II, ¶ G; Standard Form 424D, ¶ 15.
- f. Recycled Products
- i. A NFE that is a State agency or agency of a political subdivision of a State and its contractors must comply with section 6002 of the Resource Conservation and Recovery Act of 1976. 42 U.S.C. § 6962; 2 C.F.R. § 200.322.
  - ii. The requirements of Section 6002 include procuring only items designated in guidelines of the EPA at 40 C.F.R. Part 247 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 by the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

- iii. The Uniform Rules require a NFE to include provisions in its contracts for compliance with section 6002 of the Resource Conservation and Recovery Act of 1976. *See* Chapter IV, ¶ 12.a.xi and Chapter V, ¶ 7; 2 C.F.R. Part 200, Appendix II, ¶ K.

7. Davis-Bacon Act

- a. When required by FEMA grant or cooperative agreement program legislation, all prime construction contracts in excess of \$2,000 awarded by NFEs must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. §§ 3141-3144 and 3146-3148) as supplemented by Department of Labor regulations at 29 C.F.R. Part 5 (Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction). *See* Chapter IV, ¶ 12.a.iv; 2 C.F.R. Part 200, Appendix II, ¶ D.
- b. In accordance with the statute, a NFE's contractors must pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor.
- c. The Davis-Bacon Act only applies to the Emergency Management Preparedness Grant Program, Homeland Security Grant Program, Nonprofit Security Grant Program, Tribal Homeland Security Grant Program, Port Security Grant Program, and Transit Security Grant Program. It does not apply to other FEMA grant and cooperative agreement programs, such as the Public Assistance Grant Program.

8. Copeland "Anti-Kickback" Act

- a. The Copeland "Anti-Kickback" Act (40 U.S.C. § 3145), as supplemented by its implementing regulations at 29 C.F.R. Part 3 (Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States) apply to any NFE contract which is subject to Federal wage standards and which is for the construction, prosecution, completion, or repair of public buildings, public works or buildings or works financed in whole or in part by loans or grants from the United States. This law prohibits a contractor from inducing, by any means, any employee to give up any part of his or her compensation to which he or she is otherwise entitled.
- b. The Uniform Rules require a NFE to include a provision for compliance with the Copeland Anti-Kickback Act in all contracts *subject to* the Davis-Bacon Act. *See* Chapter IV, ¶ 12.a.iv; 2 C.F.R. Part 200, Appendix II, ¶ D.

9. Contract Work Hours and Safety Standards Act

- a. The Uniform Rules require, where applicable, all contracts awarded by the NFE in excess of \$100,000 that involve the employment of mechanics or laborers to include a provision for compliance with 40 U.S.C. §§ 3702 and 3704, as supplemented by Department of Labor regulations at 29 C.F.R. Part 5 and 29 C.F.R. Part 1926. *See* Chapter IV, ¶ 12.a.v; 2 C.F.R. Part 200, Appendix II, ¶ E.

- b. Under 40 U.S.C. § 3702, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week.
- c. The requirements of 40 U.S.C. § 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of property or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence

10. Seismic Safety

- a. All construction of new buildings for which FEMA award funding will be used must use appropriate seismic design and construction standards and practices pursuant to the Earthquake Hazard Reduction Act of 1977, Pub. L. No. 95-124 (1977) (codified as amended at 42 U.S.C. §§ 7701-7709) and Executive Order 12699, *Seismic Safety of Federal and Federally Assisted or Regulated New Building Construction* (1990).
- b. A NFE should include compliance with seismic safety provisions in its third party contracts for construction.

11. Hotel and Motel Fire Safety. The Hotel and Motel Fire Safety Act of 1990, Pub. L. No. 391 (1990) (codified at 15 U.S.C. § 2225a) prohibits, among other things, a NFE from using FEMA award funding to source contract costs to sponsor or fund in whole or in part a meeting, convention, conference, or training seminar that is conducted in, or that otherwise uses the rooms, facilities, or services of, a place of public accommodation that does not meet the requirements of the fire prevention and control guidelines described in section 29 of the Federal Fire Prevention and Control Act of 1974 (15 U.S.C. § 2225).

12. Buy American Act.

- a. General. The Buy American Act is a major domestic preference statute governing procurement by the Federal government. 41 U.S.C. §§ 8301-8305; 48 C.F.R. Part 25. In brief, the Federal government is required to buy domestic “articles, materials, and property” when they are acquired for public use unless a specific exception applies. The Buy American Act, however, only applies to direct procurements by the Federal government and does not apply to procurement by NFEs even when using FEMA assistance funding.
- b. “Little Buy American Acts.” In addition to the Buy American Act, Congress has passed numerous “Little Buy American Acts” to govern specific types of procurements that are not covered by the Buy American Act. There are currently no such Little Buy American Acts for FEMA grant and cooperative agreements subject to this circular.
- c. Stafford Act Grant Programs. The Disaster Mitigation Act of 2000 amended various provisions of the Stafford Act—this included Sections 404, 406, and 408 of the

Stafford Act, which are the enabling authorities for the Hazard Mitigation Grant Program, Public Assistance Grant Program, and Individual and Households Program. Notably, Section 306(a) of the Disaster Mitigation Act of 2000 also had a general provision that provided that “No funds *authorized to be appropriated* under...any amendment made by [the Disaster Mitigation Act of 2000] may be expended by an entity unless the entity, in expending the funds, complies with chapter 83 of title 41.” Disaster Mitigation Act of 2000, Pub. L. No. 106-390, § 306(a) (2000) (codified at 42 U.S.C. § 5206(a)) (emphasis added). There is, however, currently no authorization of appropriations for the Stafford Act, rendering Section 306(a) of the Disaster Mitigation Act of 2000 inapplicable to Stafford Act grant and cooperative agreements.

13. Federal Criminal Law. A NFE may not use funding under a FEMA award to violate any Federal criminal law either directly or through its contractors. Any such activity that FEMA administratively determines to violate a criminal law is ineligible for FEMA assistance, and FEMA may terminate an entire award based on the violation. The following provides a summary of several of those laws.
  - a. Representational Statutes. Sections 203 and 205 of title 18 of the United States Code impose restrictions on outside activities of Federal employees involving representation of others before the Federal government. The prohibitions under 18 U.S.C. §§ 203 and 205 apply to all FEMA employees, including Disaster Reservists. Disaster Reservists are personnel authorized by the special hiring authority in the Stafford Act that are not full-time employees, but rather work on an on-call, intermittent basis to perform disaster response and recovery activities. In some cases, a NFE may hire a contractor to perform work under a FEMA award, and the contractor may have employees who are also Disaster Reservists (not currently activated by FEMA) perform that work. These Disaster Reservists are prohibited from performing any representational activity on behalf of the contractor and NFE before any Federal agency, including FEMA.
  - b. False Statements Act. The False Statement Act sets forth liability for, among other things, any person who knowingly submits a false claim to the Federal government or causes another to submit a false claim to the government or knowingly makes a false record or statement to get a false claim paid by the government. 31 U.S.C. §§ 3729-3733. For example, a false claim could include false billing documentation submitted by a NFE from a third-party contractor under a FEMA award.