



PUBLIC ASSISTANCE: CONTRACTING REQUIREMENTS CHECKLIST

The Federal Emergency Management Agency (FEMA) Public Assistance (PA) Program provides supplemental assistance to states, tribes, and local governmental entities, as well as certain private non-profit organizations (hereinafter referred to as applicants). FEMA’s *Public Assistance Program and Policy Guide* (<http://www.fema.gov/public-assistance-policy-and-guidance>) provides comprehensive information regarding assistance that FEMA can provide and the requirements that applicants must follow in order to receive the assistance. The purpose of this Fact Sheet is to provide key information that applicants need to consider when utilizing contracted resources.

Avoid the Risk of Not Being Reimbursed for Contract Costs in a Time of Need

Failure to follow federal contracting requirements when procuring and selecting contractors puts applicants at risk of not receiving full reimbursement for associated disaster costs. Both FEMA and the U.S. Department of Homeland Security’s Office of Inspector General (OIG) closely review applicant procurement actions and contract selections to evaluate whether Federal requirements were met. Where requirements were not met, funding can be disallowed and, in some cases, taken back even years after the event. Due to the frequency of applicants not following contracting requirements and the millions of dollars subsequently put at risk, FEMA and the OIG are increasing their efforts to ensure applicants understand Federal requirements for contracting resources. In addition to this Fact Sheet, FEMA has extensive procurement and contracting resources for applicants, including the *Procurement Under Grants Field Manual Supplement*, which are available at www.fema.gov/procurement-disaster-assistance-team. Additionally, the OIG in July 2016 issued its *Audit Tips for Managing Disaster-Related Project Costs* (OIG-16-109-D-Jul16).

FEMA reimburses costs incurred using fixed-price or cost-reimbursement contracts. FEMA advises against the use of Time and Materials (T&M) contracts and 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 because T&M contracts do not adequately incentivize contractors to control costs or maximize labor efficiency.

AVOIDANCE CHECKLIST

DO NOT:

- “Piggyback” on other jurisdiction’s contracts.
- Award cost-plus-a-percentage-of-cost contracts or contracts with a percentage-of construction-cost method.
- Include local preference.

AVOID:

- Time & Material (T&M) Contracts (FEMA may reimburse costs incurred under a T&M contract **only if all** of the following apply:
 - No other contract was suitable;
 - The contract has a ceiling price that the contractor exceeds at its own risk; and
 - The Applicant provides a high degree of oversight to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.
- Sole-Source Contracts unless you can support their use under the procurement rules.
- Pre-disaster/stand-by contracts with price proposals that increase when awarded post-disaster.

“FEMA’s mission is to support our citizens and first responders to ensure that as a nation we work together to build, sustain, and improve our capability to prepare for, protect against, respond to, recover from, and mitigate all hazards.”

REQUIREMENTS CHECKLIST

- Provide full and open competition;
- Place qualified small and minority businesses and women's business enterprises on solicitation lists;
- Assure that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
- 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;
- Establish delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;
- 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;
- Maintain oversight to ensure contractors perform according to the terms, conditions, and specifications of their contracts or purchase orders;
- Maintain written standards of conduct covering conflicts of interest and governing the performance of employees who engage in the selection, award, and administration of contracts;
- Negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed;
- Perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold, including contract modifications. The Federal threshold is currently \$150,000, if state or local procurement law is more restrictive, then the state or local law must be followed;
- Include required provisions in all contracts awarded; and
- Maintain records sufficient to detail the history of the procurement. These records will include, but are not limited to the rationale for the method of procurement, selection of contract type; contractor selection or rejection; and basis for the contract price.

Noncompetitive procurement may be used under certain circumstances, one of which is when the public exigency or emergency will not permit a delay resulting from competitive solicitation.

Examples Illustrating the Meaning of Exigency and Emergency

Emergency: A tornado impacts the City and causes widespread and catastrophic damage, including loss of life, loss of power, damage to public and private structures, and millions of cubic yards of debris across the City, leaving almost the entire jurisdiction inaccessible. The City needs to begin debris clearance activities immediately to restore access to the community and support search and rescue operations and power restoration.

Exigency: A tornado impacts the City in June and causes widespread and catastrophic damage, including damage to a City school. The City wants to repair the school and have it ready for the beginning of the following school year in September. The City estimates, based on past experience, that the sealed bidding process will take at least 90 days, and the City's engineer estimates that the repair work would take another 60 days. This would bring the project completion to well after the beginning of the school year. Rather than going through sealed bidding, the City—in compliance with State and local law—wants to solicit bids from five contractors that have previously constructed schools in the State and award the contract to the lowest bidder among those five. This would be an example of an "exigency", such that sealed bidding would cause a delay under the circumstances and the use of some other procurement method was necessary based on the particular situation.

Applicants should ensure their attorneys review all procurement actions and contracts. FEMA has a Procurement Disaster Assistance Team that is available to review contracts to ensure they include required provisions. Applicants may contact the State or Territory to request FEMA assist with review.