FEMA

Fact Sheet

Procurement Under Grants Conducted Under Exigent or Emergency Circumstances

The Federal Emergency Management Agency (FEMA) provides financial assistance to states, territories, tribes, local governments, nonprofits, institutions of higher education, and other non-Federal entities. All FEMA grant programs are subject to the Federal procurement standards found at 2 C.F.R. §§ 200.317 – 200.326. Recognizing that FEMA's recipients and subrecipients may face exigencies or emergencies when carrying out a FEMA award, this Fact Sheet provides key information to consider when utilizing contracted resources under exigent or emergency circumstances.

What Rules Apply to State Entities?
States are required to follow their own procurement procedures as well as the Federal requirements for procurement of recovered materials and inclusion of required contract provisions per 2 C.F.R. §§ 200.317, 200.322, and 200.326.

For purposes of the Federal procurement requirements, states are defined as the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Commonwealth of Northern Mariana Islands, and any agency or instrumentality thereof except for local governments. Tribal governments are not considered to be states when applying Federal procurement standards required by 2 C.F.R. Part 200.

What Rules Apply to Non-State Entities?
For all other types of entities, referred to as "non-state entities" in this Fact Sheet, Federal regulations (2 C.F.R. Part 200 – Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards) establish requirements for the exigency or emergency exception that permits the use of noncompetitive procurements, frequently referred to as "sole-source contracting." This exception and associated procurement requirements are discussed further below. In general, it will be fact-specific and entity-specific as to when exigent or emergency circumstances necessitate the use of noncompetitive procurements. The answers to the frequently asked questions below provide additional guidance on the acceptable use of noncompetitive proposals under exigent or emergency circumstances, which is described in regulation at 2 C.F.R. § 200.320(f)(2).

It is essential that all non-state entities understand that both FEMA and the U.S. Department of Homeland Security's Office of Inspector General (OIG) closely review procurement actions and contract selections, with a particular emphasis on noncompetitive procurement actions, to evaluate compliance with Federal requirements. ***Failure to follow Federal contracting and procurement requirements puts non-state entities at risk of not receiving reimbursement or not being able to use FEMA grant funds for otherwise eligible costs.***

What is the exigency or emergency exception?
Non-state entities must follow the procurement requirements found at 2 C.F.R. §§ 200.317 – 200.326. However, Federal regulations allow for noncompetitive procurements under certain circumstances, including when a non-state entity determines that immediate actions required to address the public exigency or emergency cannot be delayed by a competitive solicitation. This represents an exception to requirements for full and open competition. FEMA approval is not required for use of noncompetitive

procurements under the emergency or exigency exception; however, the non-state entity must document its justification for using noncompetitive procurements and must still comply with other procurement requirements and ensure that costs are reasonable.

When referring to procurement activity, FEMA defines both exigency and emergency as situations that demand immediate aid or action. The difference between the two is that:

- In the case of an ***exigency***, there is a need to avoid, prevent, or alleviate serious harm or injury, financial or otherwise, to the non-state entity, and use of competitive procurement proposals would prevent the urgent action required to address the situation. Thus, a noncompetitive procurement may be appropriate.
- In the case of an ***emergency***, a threat to life, public health or safety, or improved property requires immediate action to alleviate the threat.

While emergency conditions generally are short-lived, exigent circumstances can exist for a period of weeks or months.

Exigency Example: A tornado impacts a 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 use by the beginning of the school year in September. The city estimates, based on past experience, that awarding a contract using a sealed bidding process would require at least 90 days, and the city's engineer estimates that the repair work would last another 60 days. This would extend the project beyond the beginning of the school year. Rather than conducting a sealed bidding process, the city—in compliance with state and local law—wants to sole source with a contractor it has contracted with previously. The city can demonstrate that this constitutes an "exigent circumstance" because use of a sealed bidding process would cause an unacceptable delay and thus procurement by noncompetitive methods was necessary based on the particular situation.

Emergency Example #1 (Disaster Grants): Severe weather impacts a city and causes widespread and catastrophic damage, including loss of life, widespread flooding, 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 removal activities immediately to restore access to the community, support search and rescue operations, power restoration, and address health and safety concerns. Under these circumstances, the city may find it necessary to award noncompetitive contracts to address threats to life, property, and public health.

Emergency Example #2 (Non-Disaster Grants): The weather in a city has been below freezing for the past 2 weeks, causing a pipe in the city's emergency operations center to burst and flood the first floor. This flood destroyed half of the city's radios that its emergency workers use to communicate with police and fire personnel. The city documented and demonstrated that it needed to replace these radios right away to avert an immediate threat to life, safety, or property as the city needed a full supply of radios in order to respond to emergencies. Under these circumstances, the city may find it necessary to award noncompetitive contracts to address threats to life, property, and public health.

When does the exigency or emergency exception apply and for how long?

Use of the public exigency or emergency exception *is only permissible during the actual exigent or emergency circumstances*. Exigency or emergency circumstances will vary for each incident, making it difficult to determine in advance or assign a particular time frame when noncompetitive procurements may be warranted. Exigent or emergency circumstances may exist for two days, two weeks, two months, or even longer in some cases. Non-state entities must ensure that work performed under the noncompetitively procured contracts is specifically related to the exigent or emergency circumstance in

effect at the time of procurement. Importantly, because the exception to competitive procurement is available only while the exigent or emergency circumstances exist, non-state entities should, upon awarding a noncompetitive contract, immediately begin the process of competitively procuring similar goods and services in order to transition to the competitively procured contracts as soon as the exigent or emergency circumstances cease to exist.

FEMA may review a non-state entity's justification that exigent or emergency circumstances warrant an exception to competitive procurement. If the agency determines that exigent or emergency circumstances did not exist or did not preclude a non-state entity from adhering to competitive procurement requirements, FEMA may disallow all or part of the non-state entity's cost related to the contract or take other actions permitted by statute and regulation. (*See* 2 C.F.R. § 200.338).

What documentation is required to support the use of the exigency or emergency exception?
While FEMA approval is not required for a non-state entity to use noncompetitive procurement proposals under the emergency or exigency exception, non-state entities must document and provide justification for the use of the exigent or emergency exception. A list of elements that non-state entities may wish to include as part of their written justifications can be found at the end of this Fact Sheet. The justification must be included in the non-state entity's records for each FEMA award, subaward, or project.

Do any Federal procurement requirements apply if a non-state entity is sole-sourcing a contract under exigent or emergency circumstances?
Yes, non-state entities must comply with the following requirements even when exigent or emergency circumstances exist:

- Contracts must include the required contract clauses (2 C.F.R. § 200.326 & Appendix II) (also applicable to states).
- Contracts exceeding the Federal simplified acquisition threshold must include the Federal bonding requirements if the contract is for construction or facility improvement (2 C.F.R. § 200.325).
- Contracts must be awarded to a responsible contractor (2 C.F.R. § 200.318(h)).
- The non-state entity must complete a cost or price analysis to determine that the cost or price of the contract is fair and reasonable if the contract exceeds or is expected to exceed the Federal simplified acquisition threshold (2 C.F.R. § 200.323(a) and (b)).
- The use of cost-plus-percentage-of-cost contracting is prohibited (2 C.F.R. § 200.323(c)).
- Use of time and materials contracts must comply with 2 C.F.R. § 200.318(j).
- The non-state entity must follow documentation, oversight, and conflict of interest requirements among other general procurement requirements in 2 C.F.R. § 200.318. If a conflict of interest is unavoidable due to the exigent/emergency circumstances, the non-state entity must explain that in the procurement documentation.

What if the non-state entity wants to use a pre-awarded or pre-existing contract in an exigency or emergency and that contract does not comply with the Federal procurement requirements?
If a pre-awarded or pre-existing contract is not in compliance with the Federal procurement requirements (e.g., the contract was not fully and openly competed (*see* 2 C.F.R. §§ 200.319, 200.320), the six affirmative socioeconomic contracting steps were not completed (2 C.F.R. § 200.321), there is a conflict of interest involved (2 C.F.R. § 200.318)), it may still be possible to use the contract for the duration of the exigency or emergency. FEMA recommends that non-state entities review the list of procurement requirements above and take actions to modify pre-awarded or pre-existing contracts where applicable. In addition, non-state entities must prepare the appropriate documentation to justify the use

of a noncompetitively procured contract.

Can non-state entities use time and materials (T&M) contracts in an exigency or emergency?
Yes, but only under certain circumstances. FEMA advises against the use of T&M contracts and generally limits the use of these contracts to a short time period where the scope or duration of the work is unclear. T&M contracts do not incentivize contractors to control costs or maximize labor efficiency. 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 non-state entity can demonstrate it provided a high degree of oversight to obtain reasonable assurance that the contractor used efficient methods and effective cost controls.

Can a non-state entity award cost-plus-a-percentage-of-cost contracts or contracts with a percentage-of construction-cost method in an exigency or emergency?
No. This prohibition applies to all work, regardless of the circumstances (2 C.F.R. § 200.323(d)).

Can non-state entities use *piggyback* contracts in an exigency or emergency?
Piggyback contracting occurs when one entity with an existing contract assigns some or all of its contractual rights to another entity that was not previously party to the contract. Generally, FEMA discourages piggyback contracts because the original contract pertains to the needs of the original entity with a specific scope of work for that entity. While there may be circumstances when piggybacking is permissible, in almost all instances, the scope of work would need to be changed to include the needs of a non-state entity, and changes to the scope of work are generally not permitted as there is not likely to be full and open competition for the expanded scope of work. However, during emergency and exigency circumstances, non-state entities may be able to piggyback another entity's contract and expand the scope of a contract for the period of the emergency or exigency circumstance.

Note that a non-state entity may choose to enter into a separate contract with the same contractor as another entity, using the same terms and conditions as in that other entity's contract, with only a change in the scope of work and the associated costs. However, this is sole-source contracting rather than piggyback contracting, and it must meet the requirements for noncompetitive procurement under exigency or emergency circumstances as described elsewhere in this Fact Sheet.

If a non-state entity is contemplating the use of piggyback contracting, it should contact its state or territory liaison, or the applicable FEMA Program Office to request FEMA assistance with contract review. For assistance with FEMA contact information, the entity should contact the Centralized Scheduling and Information Desk (CSID) help line at (800) 368-6498 or askcsid@fema.dhs.gov. CSID hours of operation are from 9 a.m. to 5 p.m. ET, Monday through Friday.

Can states use time and materials (T&M) or cost-plus-percentage-of-cost (CPPC) contracts in an exigency or emergency?
While the Federal procurement rules do not prohibit the use of T&M contracts and CPPC contracts by states, FEMA discourages states from using these contracts because they generally lack provisions that control costs and maximize efficiency in performing work. FEMA and the OIG closely scrutinize these types of contracts for cost reasonableness.

Although T&M contracts are discouraged, there may be instances where T&M contracts are appropriate in the short term for activities such as debris removal, emergency power restoration, or other immediate actions required to address emergency health and safety threats under a Public Assistance award. States

entering into T&M contracts are encouraged to include language in the contract that specifies a ceiling price and limits the duration of the contract to a short time period, thus providing the state time to develop a scope of work and transition to the more competitive procurement procedures.

As a reminder, 2 C.F.R. § 200.317 requires states to follow: (1) the same policies and procedures they use for procurements using non-Federal funds; (2) 2 C.F.R. § 200.322 (procurement of recovered materials); and (3) 2 C.F.R. § 200.326 (required contract provisions). These requirements apply regardless of whether exigency or emergency circumstances exist. States must ensure that they are also in compliance with the cost principles in 2 C.F.R. §§ 200.400 – 200.474, including ensuring that costs are reasonable, as defined in 2 C.F.R. § 200.404.

Additional Information and Resources

Non-state entities should consult as soon as possible with all appropriate parties, including their own legal counsel, to review their procurement policies, actions, and contracts and compare them to the Federal procurement requirements. Non-state entities also should contact their state or territory liaisons, or applicable FEMA Program Office to request assistance with any procurement activity concerns. For assistance with FEMA contact information, the entity should contact the Centralized Scheduling and Information Desk (CSID) help line at (800) 368-6498 or askcsid@fema.dhs.gov. CSID hours of operation are from 9 a.m. to 5 p.m. ET, Monday through Friday.

Detailed procurement and contracting information is available on the FEMA website at www.fema.gov/procurement-disaster-assistance-team. While the guidance available at that website is specifically applicable to FEMA's Public Assistance Program, it is a useful resource for FEMA's other grant programs as the procurement requirements in 2 C.F.R. Part 200 apply to all of FEMA's grant programs. The current Code of Federal Regulations referenced in this guidance can be accessed at www.eCFR.gov. The annual Code of Federal Regulations is available at https://www.govinfo.gov/app/collection/cfr, and the applicable regulations will be the ones in place at the time FEMA issued the declaration or made the award.

Suggested Elements for Noncompetitive Procurement Justification

1. Identify which of the four circumstances listed in 2 C.F.R. § 200.320(f) justify a noncompetitive procurement:
   (1) The item is available only from a single source;
   (2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
   (3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or
   (4) After solicitation of a number of sources, competition is determined inadequate.

2. Provide a brief description of the product or service being procured, including the expected amount of the procurement.

3. Explain why a noncompetitive procurement is necessary. If utilizing the exigency/emergency exception, the justification should explain the nature of the public exigency or emergency, including specific conditions and circumstances that clearly illustrate why procurement other than through noncompetitive proposals would cause unacceptable delay in addressing the public exigency or emergency. (Failure to plan for transition to competitive procurement cannot be the basis for continued use of noncompetitive procurement based on public exigency or emergency).

4. State how long the noncompetitively procured contract will be used for the defined scope of work and the impact on that scope of work should the noncompetitively procured contract not be available for that amount of time (e.g., how long do you anticipate the exigency or emergency circumstances will continue; how long will it take to identify your requirements and award a contract that complies with all procurement requirements; or how long would it take another contractor to reach the same level of competence).

5. Describe the specific steps taken to determine that full and open competition could not have been used, or was not used, for the scope of work (e.g., research conducted to determine that there were limited qualified resources available that could meet the contract provisions).

6. Describe any known conflicts of interest and any efforts that were made to identify possible conflicts of interest before the noncompetitive procurement occurred. If no efforts were made, explain why. If a conflict of interest is unavoidable, such as due to exigent/emergency circumstances, explain how it was unavoidable and any steps taken to address the impact of that conflict of interest.

7. Include any other information justifying the use of noncompetitive procurement in the specific instance.

NOTE: A separate justification is required for each instance of noncompetitive procurement.