



# **Procurement 101 OIG Findings County Auditors Institute - 2016**

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Texas Department of Public Safety

**DIVISION OF EMERGENCY MANAGEMENT**

## **Procurement 101**

### **Topics for Discussion**

- Governing Regulations
- Methods of Procurement
- Procurement Requirements
- Contracts (Types)
- Required Written Procedures for Procurement



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## Getting and KEEPING your FEMA grant dollars!

Entity	Grant Awards Pre 12/26/2014		Grant Awards Post 12/26/2014	
	Regulation	Cost Principle	Regulation	Cost Principle
State/local governments	44 CFR 13.36	2 CFR 225	2 CFR 200.317-.342	2 CFR 200.400-.475
Tribal	44 CFR 13.36	2 CFR 225		
Private Nonprofits (PNP)	2 CFR 215.40-48	2 CFR 230		
Hospitals	2 CFR 215.40-48	2 CFR 230		
Educational Institutions	2 CFR 215.40-48	2 CFR 220		



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## Methods of Procurement

<b>Micro-purchases</b>	<p><b>Does not apply to Presidential Declarations (PDs) prior to 12/26/2014</b></p> <ul style="list-style-type: none"> <li>• Applies to purchases less than OR equal to \$3,000.</li> <li>• No solicitation required.</li> <li>• Subrecipient (Applicant) determines reasonableness.</li> </ul>
<b>Small purchases</b>	<p><b>Applies to purchases less than or equal to \$100,000/\$150,000.</b></p> <ul style="list-style-type: none"> <li>• State Law if more restrictive than the Simplified Acquisition Threshold (SAT).</li> <li>• Only quotes required - a minimum of three (3) written or telephone quotes from qualified sources.</li> <li>• Purchases of commercial products sold in substantial quantities to the general public.</li> <li>— Limited by State law to contracts for supplies and materials less than \$10,000.</li> <li>— Item must meet the definition of commercial product.</li> </ul>
<b>Sealed bids</b>	<ul style="list-style-type: none"> <li>• Preferred for construction.</li> <li>• Fixed price.</li> <li>• Publicly advertised and publicly opened.</li> <li>• Two (2) or more responsive bidders. (Rejected bidders are not considered responsive.)</li> <li>• Awarded to lowest, responsive, responsible bidder.</li> <li>• Any OR all bids may be rejected for a sound, documented reason.</li> </ul>



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## Methods of Procurement

<b>Competitive proposals</b>	<p><b>GENERAL</b></p> <ul style="list-style-type: none"> <li>“ Must have more than one (1) responsible bidder.</li> <li>“ Must be publicized to maximum extent practical.</li> <li>“ Must have written procedure for conducting evaluations and award</li> </ul>
<b>Request for Proposal (RFP)</b>	<p><b>Price a criteria for selection</b></p> <ul style="list-style-type: none"> <li>“ Contract awarded to firm offering best value.</li> </ul>
<b>Request for Qualification (RFQ)</b>	<ul style="list-style-type: none"> <li>“ Limited to Architectural and Engineering (A/E) services.</li> <li>“ Qualifications only criteria selection.</li> <li>“ Price negotiated after selection based on cost analysis.</li> </ul>
<b>Non-competitive proposals</b>	<ul style="list-style-type: none"> <li>“ Available only from a single source.</li> <li>“ Used when insufficient number of responses received.</li> <li>“ Used in emergency or exigent circumstances.</li> <li>“ Always requires a cost analysis.</li> </ul>



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## Methods of Procurement

Category of Purchase	Federal Regulations	Size of Contract	Requirements for State, Local, & Federally Recognized Tribal Government Entities
<b>Materials &amp; Supplies</b>	Quotes Required	Less than a \$1000 and \$1000-\$9,999	No competitive procedure or cost analysis for commercial items.
	Bids Required	\$10,000 - \$30,000	Three (3) telephone or FAX quotes.
<b>Public Works</b>	Quotes Required	Greater than \$30,000	Bids required.
	Bid required	Less than or equal to \$150,000	No bid requirement
<b>Services (Except for A/E)</b>	Quotes Required	Greater than \$150,000	Bid required No minimum number of responses
	Bid Required (RFP)	Less than or equal to \$150,000	No bid requirement
<b>A/E Services</b>	Request for Qualification (RFQ)	Any Size	No bid Requirement
<b>State Cooperative Purchase (SCP)</b>	Authorized under 44 CFR 13.36(b) & 2 CFR 200.318 (f)	Any Size	<ul style="list-style-type: none"> <li>“ ONLY Office of State Procurement (OSP) SCP contracts.</li> <li>“ Can be used for materials plus supplies plus equipment.</li> </ul>



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### Contracts to use

<b>Lump Sum</b>	Contract for work within a prescribed boundary with a clearly defined scope + a total price.
<b>Unit Price</b>	Work done on an item-by-item basis, with cost determined per unit (e.g., box, cubic yard, etc.).
<b>Cost + fixed fee</b>	Total cost with a defined fixed fee added to the price.
<b>Time + Materials</b>	<p>Must make determination that no other type of contract is suitable; must contain a not-to-exceed (ceiling) clause. Payment based on hourly rate schedule and cost of materials.</p> <ul style="list-style-type: none"> <li>• Maintain high degree of oversight.</li> <li>• Contracts used for emergency protective measures and debris operations cannot exceed 70 hours continuous of actual work</li> </ul>
<b>Inter - Governmental Agreements</b>	Subrecipients (Applicants) are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.



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### Contracts to Avoid

<b>Piggy Back Contracts</b>	Piggyback contracts are generally ineligible. However, work done using another Subrecipient's (Applicant's) pre-existing properly procured contract must meet strict criteria to be eligible. The existing contract must be viable, same item must be purchased, price and vendor must also be the same; include written mutual consent of the original contracting parties.
<b>Cost + Percentage of Costs</b>	Strictly prohibited.
<b>Percentage of construction cost</b>	Strictly prohibited.
<b>Cost Plus Contract</b>	Not allowed under State bid law (Title 38).



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## Regulations

The regulations require the Subrecipient (Applicant) have certain written procedures: (44 CFR 13.36, 2 CFR 215, 2 CFR 200) which are:

- Contract administration system to ensure contractor performance: 13.36(b)(2), 215.47
- Employee codes of standards and conflicts of interest: 13.36(b)(2), 215.47
- Protest procedures: 13.36(b)(12), 215.41, 200.318(k)
- Written selection procedures for procurement transactions: 13.36(c)(3), 215.44, 200.320(d)(3)
- Contracting with small and minority firms, women’s business enterprise and labor surplus area firms: 13.36(b), 215.44(b), 200.321
- Recovered materials: 200.322
- Acquisition of unnecessary or duplicative items: 13.36(b)(4), 215.44(a)(1), 200.318(d)



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## Procurement Checklist

Project Title:		
Project Number:		
Project Description:		
<b>DOCUMENT YOUR FILE OR BE PREPARED TO DEMONSTRATE THE FOLLOWING:</b>		
<b>SOLICITATION</b>	<b>PRE-12/1/2014</b>	<b>POST-12/1/2014</b>
Is the solicitation (Request for Proposals [RFP] or Request for Qualifications [RFQ]) included in your file?	2 CFR 215.44(e) 44 CFR 13.36(c)(3)(i)	2 CFR 200.319(c)(1)
Were prospective respondents allowed sufficient time to respond?	44 CFR 13.36(d)(2)	2 CFR 200.320(c)(2)
Does solicitation contain a clear and accurate description of the technical requirements for the material, product or services and scope of work (SOW)?	2 CFR 215.44(a)(3)(i) 44 CFR 3.3(c)(3)(i)	2 CFR 200.319(c)(1)
Specifications may not contain features that unduly restrict competition.	2 CFR 215.4B 44 CFR 13.36(c)(3)(i)	2 CFR 200.319(c)(1)
Are there unreasonable requirements or unnecessary experience or excessive bonding requirements?	44 CFR 13.36(c)(1)	2 CFR 200.319(a)
Are there any "brand name" products specified without also listing "or equivalent"?	44 CFR 13.36(c)(3)(i)	2 CFR 200.319(c)(1)



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## Procurement Checklist

<b>DOES THE SOLICITATION FILE EVIDENCE THE FOLLOWING:</b>		
Positive efforts in hiring small-business, minority-owned business or women-owned business enterprises to the extent practical?	2 CFR 215.44(b)(1) 44 CFR 13.36(e)	2 CFR 200.321
Positive efforts in the utilization of labor surplus firms?	44 CFR 13.36(e)	2 CFR 200.321
If your prime contractor has decided to use a subcontractor, did they take the above affirmative steps?		2 CFR 200.321(b)(6)
Is the publication (advertisement, invitation to bid, etc.) included in your file?	44 CFR 13.36(d)(2)	2 CFR 200.320(c)
Is a record of respondents that were rejected as not responsive or not responsive and rejection reasoning included in your file?	2 CFR 215.44(d) 44 CFR 13.36(b)(8)	2 CFR 200.318(i)
Are there an adequate number of responses documented in the file (2 or more for large purchases and 3 for small purchases)? <b>Keep records of proposals in your file.</b>	2 CFR 215.43 44 CFR 13.36(d)(2)(i) 44 CFR 13.36(d)(3)	2 CFR 200.320(c)(1) 2 CFR 200.300(d) 2 CFR 200.320(d)
Are copies of all proposals, to include methodology of evaluation and selection process (bid summary, tabulation sheet, scoring sheet) included in your file?	2 CFR 215.44 44 CFR 13.36(d)(3)	2 CFR 200.320(d)



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## Procurement Checklist

METHOD OF PROCUREMENT	PRE-12/1/2014	POST-12/1/2014
Procurement by micro purchase. (less than \$3,000)		2 CFR 200.320(a)
Procurement by small purchase. (less than or equal to \$100,000/\$150,000)	2 CFR 215.44(2) 44 CFR 13.36(d)(2)(ii)	2 CFR 200.320(b)
Procurement by sealed bids (preferred method for construction contracts). Contract awarded to the lowest responsive, responsible bidder with a firm-fixed price contract (lump sum or unit price).	44 CFR 3.36(d)(2)(ii)	2 CFR 200.320(c)(2)
Procurement by competitive proposals.	44 CFR 13.36(d)(3)	2 CFR 200.320(d)
If solicitation was for other than "Architectural and Engineering (A/E) professional services", was price included as a selection criteria?	44 CFR 13.36(d)(3)(v)	2 CFR 200.320(d) req only for A/E
If solicitation was for A/E services, is a cost analysis included in your file? (see Cost Analysis Required section)	44 CFR 13.36(d)(3)(v)	2 CFR 200.320(d)
Does the solicitation clearly outline the scoring criteria and associated weights used for selection?	2 CFR 215.44(a)(3)(ii) 44 CFR 13.36(d)(3)(j) 44 CFR 13.36(e)(3)(ii)	2 CFR 200.320(d)
Procurement by noncompetitive proposals.	44 CFR 13.36(d)(4)	2 CFR 200.320(f)
Is there a justification for the use of this method of procurement included in your file?	2 CFR 215.46(b) 44 CFR 13.36(d)(4)	2 CFR 200.318(i) 2 CFR 200.320(f)
Are intergovernmental agreements and Federal surplus property (if applicable) included in your file?	44 CFR 13.36(b)(5)	2 CFR 200.318(e)



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## Procurement Checklist

<b>BONDING REQUIREMENTS</b>		<b>PRE-12/1/2014</b>	<b>POST-12/1/2014</b>
Is this a construction or facilities improvement contract that exceeds small purchase threshold? If so:		2 CFR 215.48 44 CFR 13.36(h)	2 CFR 200.325
Did the bid response include a 5% bid bond?		2 CFR 215.48(e)(1) 44 CFR 13.36(h)1	2 CFR 200.325(a)
Did the winning contractor execute a performance bond for 100% of the contract?		2 CFR 215.48(e)(3) 44 CFR 13.36(h)3	2 CFR 00.23513.36
Did the winning contractor execute a payment bond for 100% of the contract?		2 CFR 215.48(e)(3) 44 CFR 13.36(h)3	2 CFR 200.325(c)
<b>COST ANALYSIS REQUIRED</b>		<b>PRE-12/1/2014</b>	<b>POST-12/1/2014</b>
Were A/E or other professional services procured?		2 CFR 215.45 44 CFR 13.36(f)	2 CFR 200.323(a)
Is the contract a non-competitive proposal?		2 CFR 215.45 CFR 13.36(d)(4)	2 CFR 200.323(a)
Did the contract statement of work change? Are there change orders?		2 CFR 215.45 CFR 13.36(f)	2 CFR 200.323(a)



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## Procurement Checklist

<b>REQUIRED CONTRACT PROVISIONS</b>		<b>PRE-12/1/2014</b>	<b>POST-12/1/2014</b>
Does the contract (greater than small purchase threshold) contain a provision for administrative and legal remedies for violation or breach of contract?		2 CFR 215.48(a) 44 CFR 13.36(j)(1)	2 CFR 200 A II (a)
Does the contract (greater than \$10,000) contain a provision for termination of contract for cause and for convenience?		2 CFR 215.48(b) 44 CFR 13.36(j)(2)	2 CFR 200 A II (b)
Does the contract contain a provision to comply with Executive Order (E.O) 11246, Equal Employment Opportunity (EEO)?		2 CFR 215 44 CFR 13.36(j)(3)	2 CFR 200 A II (c)
Does the contract (applies to all construction or repair contracts greater than \$10,000) contain a provision to comply with the Copeland Anti-Kickback Act?		2 CFR 215 A(2) 44 CFR 13.36(j)(4)	2 CFR 200 A II (d)
Compliance with the Davis-Bacon Act: There is <b>NO REQUIREMENT</b> for such compliance with the FEMA Public Assistance (PA) or Hazard Mitigation (HM) programs.		Public Assistance Guide FEMA 322/June 2007 page 44	2 CFR 200 A II (d)
Is the contract required to comply with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act?		2 CFR 215 A(4) 44 CFR 13.36(j)(6)	2 CFR 200 A II (e)



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## Procurement Checklist

Does the contract include a provision stating the Subrecipient (Applicant) has a responsibility to include required reports (i.e. program performance, financial and progress reports)?	2 CFR 215.50 CFR 13.36(i)(7)	44	2 CFR 200.327-329
Does the contract (applies to contracts, subcontracts and grants greater than small purchase threshold) contain a provision to comply with Section 306 of the Clean Air Act, Section 508 of the Clean Water Act, Executive Order 11738 and Environmental Protection Act (EPA) regulations, 40 CFR 15?	2 CFR 215 A(6) 44 CFR 13.36(i)(12)		2 CFR 200 A II (g)
Does the contract certify that the contractor has complied with the Byrd Anti Lobbying Amendment?	2 CFR 215 A(7)		2 CFR 200 A II (j)
Does the contract contain a provision stating record retention and access requirements to all records?	2 CFR 215.53 CFR 13.36(i) (11)	44	2 CFR 200.333
Does the contract contain a provision that the contractor agrees to comply with mandatory energy efficiency standards and policies contained within the State Energy Conservation Plan?	44 CFR 13.36(i)(13)		2 CFR 200 A II (h)



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## Frequent Audit Findings

### **A. Poor Contracting Practices**

**Criteria:** According to Federal regulations (2 CFR 200.318 to .326), all non Federal entities (other than states) must comply with the following procurement standards: 1

- Conduct all procurement transactions in a manner providing full and open competition consistent with the standards of this section (2 CFR 200.319(a)). 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 (2 CFR 200.320(f)).
- Take all necessary affirmative steps to assure the use of minority businesses, women's business enterprises, and labor surplus area firms when possible (2 CFR 200.321)).
- Maintain oversight to ensure contractors perform according to the terms, conditions, and specifications of their contracts or purchase orders (2 CFR 200.318(b)).
- Maintain written standards of conduct covering conflicts of interest and governing the performance of its employees who engage in the selection, award, and administration of contracts (2 CFR 200.318(c)(1)).



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## Frequent Audit Findings

- **Poor Contracting Practices (cont'd)**
- Maintain records sufficient to detail the history of the procurement. These records will include, but are not limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price (2 CFR 200.318(i)).
- Use time-and-material-type (T&M) contracts only after determining that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and material type contract means a contract whose cost to a non-Federal entity is the sum of (1) the actual cost of materials; and (2) direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit (2 CFR 200.218(j)(1)).
- Perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications (2 CFR 200.323(a)).
- 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 (2 CFR 200.323(b)).
- Do not use cost-plus-a-percentage-of-cost and percentage-of-construction-cost methods of contracting (2 CFR 200.323(d)).
- Include required provisions in all contracts awarded (2 CFR 200.326).



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## Frequent Audit Findings

### **B. Unsupported Costs**

**Criteria:** Federal cost principles (2 CFR 200.403(g)) require recipients and sub-recipients to adequately document costs they claim under Federal programs.

### **C. Poor Project Accounting**

**Criteria:** Federal regulations (2 CFR 200.302 and 44 CFR 206.205) require recipients and subrecipients to maintain a system that accounts for FEMA funds on a project-by-project basis. The system must disclose the financial results for all FEMA-funded activities accurately, currently, and completely. It must identify funds received and disbursed, and reference source documentation (i.e., canceled checks, invoices, payroll, time and attendance records, contracts, etc.).



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## Frequent Audit Findings

### D. Duplication of Benefits

**Criterion:** Section 312 of the *Stafford Act* prohibits duplication of benefits. In other words, a sub-recipient cannot receive disaster funding for activities covered by insurance benefits, other Federal programs, or any other source.

### E. Excessive Equipment Charges (applicability may vary with hazard mitigation projects)

**Criterion:** Federal regulations (44 CFR 206.228) require that sub-recipients use the FEMA schedule of equipment rates or their local rates, whichever are lower. Sub-recipients that do not have local established rates must use the FEMA equipment rates when claiming costs under a FEMA project.



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## Frequent Audit Findings

### F. Excessive Labor and Fringe Benefit Charges

**Criteria:** According to Federal cost principles (2 CFR 200.403(c)), allowable costs must be consistent with policies and procedures that apply uniformly to both Federal awards and other activities of the non-Federal entity. Additionally, according to 44 CFR 206.228, straight or regular-time salaries and benefits of permanent employees engaged in emergency work (emergency protective measures and debris removal) are not eligible for FEMA Public Assistance funding.

### G. Unrelated Project Charges

**Criteria:** According to Federal cost principles (2 CFR 200.403(a)), charges to Federal grants must be necessary and reasonable for the performance of the Federal award. In addition, to be eligible for FEMA funds, an item of work must be required because of the major disaster event (44 CFR 206.223). Therefore, the sub-recipient must substantiate that its claimed costs directly relate to the disaster. The sub-recipient must also establish a clear relationship between claimed costs and the scope of work recorded on a project worksheet.



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## Frequent Audit Findings

### H. Unapplied Credits

**Criterion:** According to Federal cost principles (2 CFR 200.406), credits accruing to or received by a non-Federal entity that relate to allowable costs must be credited to the Federal award either as a cost reduction or cash refund, as appropriate.



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## Frequent Audit Findings

### I. Direct Administrative Costs

**Criteria:** 44 CFR 207 and FEMA Disaster Policy 9525.9, *Management Costs and Direct Administrative Costs* (Policy), identify "section 324 management costs," and other grant management and administrative costs that are eligible under the Public Assistance Program. The Policy also clarifies the process through which grantees and subgrantees (recipients and sub-recipients) can request reimbursement for these costs. Section VILA of the Policy provides the following definitions:

*Direct Administrative Costs* are costs the grantee or sub-grantee (recipient and sub-recipient) incurs that can be identified separately and assigned to a specific project (44 CFR 207.6(c)).

*Indirect Costs* are costs a grantee (recipient) incurs for a common or joint purpose benefiting more than one cost objective that are not readily assignable to the cost objectives specifically benefited (44 CFR 207.2).

*Management Costs* are any indirect costs, administrative expenses, and any other expenses that a grantee or sub-grantee (recipient or sub-recipient) reasonably incurs in administering and managing the Public Assistance grant that are not directly chargeable to a specific project (44 CFR 207.2).

*Pass-through funds* are the percentage or amount of management costs that the grantee (recipient) determines it will make available to sub-grantees (sub-recipients) (44 CFR 206.207(b)(1)(iii)(K)).

According to section VI.D.1 of the Policy, "Direct administrative costs include costs that can be tracked, charged, and accounted for directly to a specific project, such as staff time to complete field inspection and preparation of a project



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## Key Points to Remember When Administering FEMA Grants

- Designate a person to coordinate the accumulation of records.
- Establish a separate and distinct account for recording revenue and expenditures, and a separate identifier for each distinct FEMA project.
- Ensure that the final claim for each project is supported by amounts recorded in the accounting system.
- Ensure that each expenditure is recorded in the accounting books and is referenced to supporting source documentation (checks, invoices, etc.) that can be readily retrieved.
- Research insurance coverage and seek reimbursement for the maximum amount. Credit the appropriate FEMA project with that amount.
- Check with your Federal Grant Program Coordinator about the availability of funding under other Federal programs (Federal Highway, Housing and Urban Development, etc.) and ensure that the final project claim does not include costs that another Federal agency funded or should have funded .
- Ensure that materials taken from existing inventories for use under FEMA projects are documented by inventory withdrawal and usage records.
- Ensure that expenditures claimed under the FEMA project are reasonable and necessary, are authorized under the scope of work, and directly benefit the project.



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### TDEM Recovery - as of March 2016

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## Questions?

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